

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION
HELD AT WINDHOEK**

RULING

Case no: HC-MD-CIV-ACT-MAT-2019/04742

In the matter between:

LOUIS PETRUS VAN DER WESTHUIZEN

PLAINTIFF

and

ANNA MARGARETHA VAN DER WESTHUIZEN (BORN KOTZE)

DEFENDANT

Neutral citation: *Van der Westhuizen v Van der Westhuizen* (HC-MD-CIV-MAT-2019/04742) [2023] NAHCMD 181 (11 April 2023)

Coram: UEITELE, J

Heard: 23 March 2023

Delivered: 11 April 2023

Flynote: Practice – Amendment of pleadings – May be brought at any stage of the proceedings – Where the amendment involves a change of front, a reasonable

explanation for the amendment must be given under oath – Such reason must be bona fide – Where no explanation for the change of front tendered, the amendment must be disallowed.

Summary: This is an application for an amendment of particulars of claim brought by the plaintiff after the closing of the parties' cases.

Held that, where an amendment is substantial, an explanation of why the amendment is sought must be given under oath. Substantial amendments will require a more compelling explanation under oath and in certain instances, a reasonably satisfactory explanation for a proposed amendment is strongest where it is brought late in proceedings where it involves a change of front.

Held that, an amendment is allowed in order to obtain a proper ventilation of the dispute between the parties so that justice may be done, but subject to the principle that the defendant must not be prejudiced by the amendment if that prejudice cannot be cured by an appropriate costs order and where necessary, a postponement.

Held that, although the amendments are sought at a very late stage, the plaintiff has explained the reason why it is only at this stage that he is seeking the amendment. He explained that the allegations that he is seeking to introduce were not in his knowledge and he could therefore not have pleaded them. Those allegations only became clear after the defendant testified and was cross-examined on the evidence which emerged during the trial. The court is therefore satisfied that the plaintiff has provided an acceptable explanation.

ORDER

1. The plaintiff is granted leave to amend his particulars of claim in accordance with the notices given by him on 11 August 2022 and 31 August 2022.
2. The plaintiff must pay the costs of the application for leave to amend.
3. The court order of 27 March 2023 postponing the matter to 9 May 2023 is rescinded.
4. The plaintiff must file his amended particulars of claim by no later than 21 April 2023.
5. The defendant must, if so advised, file a consequentially amended plea by no later than 11 May 2023.
6. The plaintiff must, if necessary and so advised, replicate to the defendant's consequentially amended plea by no later than 18 May 2023.
7. The parties must file a joint case management report by no later than 22 May 2023 at 12 noon.
8. The matter is postponed to 23 May 2023 for a case management conference to determine the way forward.

RULING

UEITELE J:

Introduction

[1] On 25 October 2019 the plaintiff caused summons to be issued out of this Court against the defendant who is his estranged wife. In the particulars of claim, the plaintiff alleges that the defendant has and continues to maliciously desert him in that she has informed him that she no longer desires to be his wife, whereafter she left the common home during February 2018 and she has since failed to show any interest in continuing with the marriage. He, accordingly, claimed that he is entitled to a decree of divorce and for an order that the defendant forfeits all the benefits arising from the marriage.

[2] The defendant, so to speak, returned fire and entered notice to defendant the plaintiff's claim. She, in addition, counterclaimed and sought an order dissolving the marriage and other ancillary matters. The parties agree that the marriage is at an end and blame each other for the breakdown of the marriage. Between 25 October 2019 and 27 October 2021 the parties exchanged pleadings and even engaged in some interlocutory applications.

[3] On 24 November 2021 this Court, at a pre-trial conference, postponed the matter for trial on the action floating roll for the week of 16 – 20 May 2022. The trial commenced on 17 May 2021 and proceeded until 19 May 2022, and on that day (19 May 2022) the court postponed the case for continuation of trial on the floating roll for the weeks of 1 August 2022 to 12 August 2022.

[4] On 10 August 2022, after the cross-examination of the defendant, the plaintiff's legal practitioner indicated that he intends to amend the plaintiff's particulars of claim. On 11 August 2022 the plaintiff filed his notice of intention to amend his particulars of claim and on 31 August 2022 again filed a further notice of intention to amend. In the notice to amend the plaintiff seek to introduce into the particulars of claim defendant's adultery with a certain Mr Everhardus Petrus Fackulyn Gous and that 1,600 sheep, which were exchanged for 180 cows, form part of the plaintiffs inheritance which he seeks to excluded from the community of property by the last will and testament of the plaintiff's late father.

[5] On 31 August 2022, the defendant indicated that she will oppose the plaintiff's intended amendments. As a result of that indication, the plaintiff filed his application for leave to amend his particulars of claim. As I said, the application for leave to amend is opposed by the defendant and it is that opposed application that is the subject matter of this ruling.

The law relating to amendment of pleadings

[6] I do not find it necessary to deal in much detail with the law applicable to applications for amendment of pleadings, for the reason that the position of the law in this regard is well settled. To the extent necessary, the amendment of pleadings is provided for in rule 52 of the Rules of the High Court with specific reference to rule 52(9), which provides that:

‘52(9) The court may during the hearing at any stage before judgment, grant leave to amend a pleading or document on such terms as to costs or otherwise as the court considers suitable or proper.’

[7] From the decisions of this court and the Supreme Court, the following principles can be discerned.

(a) The court has a discretion to allow or refuse an amendment, and the discretion must be exercised judicially. The overriding consideration is that the parties, in an adversarial system of justice, decide what their case is; and that includes changing a pleading previously filed to correct what it feels is a mistake made in its pleadings.¹

(b) A court cannot compel a party to stick to a version either of fact or law that it says no longer represents its stance.²

(c) Amendments must be ‘allowed in order to obtain a proper ventilation of the dispute between the parties so that justice may be done’, subject of course to the principle that the opposing party must not be prejudiced by the amendment if that prejudice cannot be cured by an appropriate costs order, and where necessary, a postponement.³

¹ *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC* (I 601-2013 & I 4084-2010) [2014] NAHCMD 306 (17 October 2014) para 55.

² *Ibid.*

³ *DB Thermal (Pty) Ltd and Another v Council of the Municipality of City of Windhoek* (SA 33-2010) [2013] NASC 11 (19 August 2013).

(d) A litigant seeking the amendment is craving an indulgence and therefore, must offer some explanation of why the amendment is sought.⁴

[8] In *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC*⁵ Damaseb cautions the court to be on the lookout for and to avoid conduct which may lead to an interpretation that litigation is a game. He said:

‘The practices adopted by the courts (when considering applications for the amendment of pleadings) should avoid creating the impression that litigation is some sort of a game and that parties can, without good reason, change their positions as they go along and as circumstances suit them.’

[9] In his work, *Court-Managed Civil Procedure of the High Court of Namibia*,⁶ Damaseb DCJ, relying on *I A Bell Equipment Company (Namibia) (Pty) Ltd* writes:

‘...the court has the following avenues open to it when an amendment is sought:

- if a party has failed to provide an explanation on oath or otherwise in circumstances where one is called for, the proposed amendment must be refused ;....’

[10] It is with those principles in mind that I now proceed to consider whether or not to grant the amendment sought by the plaintiff.

The explanation advanced by the plaintiff for the need to amend and the objections raised

[11] The plaintiff supports or justifies his application for leave to amend his particulars of claim in the following terms:

⁴ *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC* (I 601-2013 & I 4084-2010) [2014] NAHCMD 306 (17 October 2014) para 55

⁵ Supra 31.

⁶ P T Damaseb: *Court-Managed Civil Procedure of the High Court of Namibia: Law, Procedure and Practice* at 145.

'When in evidence it became clear that the defendant had committed adultery with Mr. Gous, I then and there became entitled to amend the pleadings and the pre-trial order to rely on the defendant's adultery in seeking the divorce and general forfeiture order.'

[12] The defendant objected to the plaintiff's intended amendments on several grounds, but the essence of the objection is that the pre-trial order which was made an order of court is a compromise between the parties and the parties thus excluded reliance on other grounds of divorce. The defendant further relies on the fact that the allegations or conclusions or both allegations and conclusion which are contained in the notice to amend (and sought to be included in the particulars of claim) were not included in the pre-trial report or order. In her affidavit resisting the amendment, the defendant states that she not only prepared for, but also participated in the trial on the basis of the pleadings and ultimately the pre-trial order.

Discussion

[13] Damaseb⁷ argued that amendments take different forms and vary from the simple and obvious typographical or arithmetical errors, to the more substantial ones involving a change of front or withdrawal of material admissions. Owing to this, the same test cannot be applied for all types of amendments. Where the amendment is substantial, an explanation of why the amendment is sought must be given under oath. The more substantial amendments will require a more compelling explanation under oath and in certain instances, a reasonably satisfactory explanation for a proposed amendment is strongest where it is brought late in proceedings and where it involves a change of front.⁸

[14] In my view, the determining question is whether the circumstances of this case call for an explanation as to why the amendment is sought and whether the party seeking to amend its pleadings has provided the explanation called for.

⁷ P T Damaseb *Court-Managed Civil Procedure of the High Court of Namibia: Law, Procedure and Practice* at 145.

⁸ Ibid.

[15] The circumstances of this matter are as follows: the plaintiff caused summons to be issued out of this court some thirty nine months ago (that is around October 2019). The matter proceeded to trial and the parties have closed their cases. What can therefore not be disputed is that the matter has reached an advanced stage and that the amendment which the defendant seeks comes at a very late stage. It thus follows that the party seeking to amend its pleadings must provide an explanation for the indulgence it is seeking.

[16] Although the amendments are sought at a very late stage, the plaintiff has explained the reason why it is only at this late stage that he is seeking the amendment. He explained that the allegations that he is seeking to introduce were not in his knowledge and he could therefore not have pleaded them. Those allegations only became clear after the defendant testified and was cross-examined on the evidence which emerged during the trial. I am therefore, satisfied that the plaintiff has provided an acceptable explanation.

[17] On the facts and in the circumstances of this matter, the court must not compel the plaintiff to stick to a version of fact that he says no longer represents his stance. The circumstances of this case call for the amendments to be allowed in order to obtain a proper ventilation of the dispute between the parties so that justice may be done, but as it has been stated, subject of course to the principle that the defendant must not be prejudiced by the amendment if that prejudice cannot be cured by an appropriate costs order, and where necessary, a postponement.

Costs

[18] Rule 52(8) of this Court's rules provide as follows:

'(8) A party giving notice of amendment is, unless the court otherwise orders, liable to pay the costs thereby occasioned to any other party.'

[19] No reasons were advanced for me to depart from the provision of rule 52(8). It therefore appears to me that the plaintiff must pay the costs of the application for leave to amend.

[20] For the reasons set out in this ruling I make the following order:

1. The plaintiff is granted leave to amend his particulars of claim in accordance with the notices given by him on 11 August 2022 and 31 August 2022.
2. The plaintiff must pay the costs of the application for leave to amend.
3. The court order of 27 March 2023 postponing the matter to 9 May 2023 is rescinded.
4. The plaintiff must file his amended particulars of claim by no later than 21 April 2023.
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7. The parties must file a joint case management report by no later than 22 May 2023 at 12 noon.
8. The matter is postponed to 23 May 2023 for a case management conference to determine the way forward.

SF Ueitele
Judge

APPEARANCES:

APPLICANT:

J Jacobs

Instructed by Van der Merwe-Greeff Andima Inc.,
Windhoek

RESPONDENT:

J-PR Jones

Instructed by Koep & Partner, Windhoek