

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
RULING

Case No.: HC-MD-CIV-ACT-CON-2021/00463

In the matter between:

NATIVE BRICKS NAMIBIA (PTY) LTD
DR PATRICE URAYENEZA1st PLAINTIFF
2nd PLAINTIFF

and

ARCHIE MBAKILE
ZIBO MBAKILE
KHAYALAMI PROPERTIES CC1st DEFENDANT
2nd DEFENDANT
3rd DEFENDANT**Neutral citation:** *Native Bricks Namibia (Pty) Ltd v Mbakile* (HC-MD-CIV-ACT-CON-2021/00463) [2023] NAHCMD 186 (13 April 2023)**Coram:** SIBEYA J
Heard: 29 March 2023
Delivered: 13 April 2023

Flynote: Civil Procedure – Rule 52 of the High Court Rules – Amendment of pleadings before judgment – granting *audi* to legal practitioners who were on record for a matter when blame is laid on them.

Summary: The plaintiffs instituted proceedings against the defendants. The action was defended and the action progressed until pre-trial stage. The defendants changed legal practitioners and their new legal representatives of record brought an application for the amendment of their plea filed on 10 May 2022. The plaintiffs opposed the application citing prejudice and the judicial case management principles.

Held: that what may be summed up from rule 52(9) is that there is no time limit within which an application for an amendment must be brought, but that such amendment at least be sought before judgment.

Held that: amendments may be allowed at any time before judgment. The catch is however, that such amendment must be able to be cured by an appropriate order for costs. It is for that reason that this court cannot hold the defendant's to a case that no longer represents the true picture of their position in this matter.

ORDER

1. The defendants' application is granted.
2. The defendants shall pay the plaintiff's costs for the application, such costs are not capped in terms of rule 32(11).
3. The parties must file a joint status report on or before 8 May 2023.
4. The matter is postponed to 11 May 2023 for a status hearing to determine the further conduct of the matter.

RULING

SIBEYA J:

Introduction

[1] The court is seized with this application launched in accordance with the provisions of rule 52 of the Rules of the High Court, in terms of which the applicants, who are the defendants in the main proceedings, seek an amendment of their plea to include a special plea to raise lack of authority.

The parties and their representation

[2] The applicants who are the defendants in the main action will be referred to as the defendants for ease of reference. Similarly the respondents, who are the plaintiffs in the main action will be referred to as the plaintiffs.

[3] The first plaintiff is Native Bricks Namibia (Pty) Ltd, a company with limited liability, duly registered in terms of the relevant laws of Namibia with its registered address situated at Rem Swakop River Plots, Five Rand Camp, Okahandja, Republic of Namibia.

[4] The second plaintiff is Dr Patrice Urayeneza, a major male Engineer with full legal capacity, practicing as such at no. 39 Daan Bekker Street, Windhoek, Republic of Namibia and the major shareholder in the first plaintiff, with 55 percent shares.

[5] The first defendant is Mr Archie Mbakile, a major male person with full legal capacity, residing at Camelthorn Estate, Riverthorn Village, Unit 3, Okahandja, Republic of Namibia who is employed by third defendant and a shareholder in the first plaintiff with 22.5 percent shares and married to second defendant.

[6] The second defendant is Ms Zibo Mbakile a major female person with full legal capacity, residing at Camelthorn Estate, Riverthorn Village, Unit 3, Okahandja, Republic of Namibia and a shareholder in the first plaintiff with 22.5 percent shares and married to first defendant.

[7] The third defendant is Khayalami Properties CC, a close corporation, duly registered in accordance with the relevant laws of the Republic of Namibia, with its registered address situated at Unit 59, Osona Village, Okahandja, Republic of Namibia.

[8] The first and second defendants are both members of the third defendant jointly holding 70 percent membership interest in the third defendant.

[9] The plaintiffs are represented by Mr Mhata while the defendants are represented by Ms Cloete. The court records its indebtedness to both counsel for their assistance herein.

Background

[10] The plaintiffs instituted legal action against the defendants in this court on 11 February 2021 with the combined summons being successfully served on the defendants.

[11] The defendants filed their notices to defend on 01 March 2021. The defendants then filed their plea to the plaintiffs' particulars of claim on 10 May 2022 of which they had specifically pleaded to the allegations contained therein.

[12] The matter then progressed to the pre-trial stage and the parties were to file their joint pre-trial report. It should be mentioned here that the defendants' erstwhile legal practitioners of record filed their notice of intention to withdraw as legal practitioners of record after the parties were ordered to file their joint pre-trial report. The defendants'

current legal practitioners consequently filed notices of intention to defend and came on board for the defendants.

[13] The defendants are thus, seeking leave to amend their plea filed on 10 May 2022, to include a special plea as per their notice in terms of rule 52 (1) of this court, dated 23 November 2022.

[14] The plaintiffs objected to the intended amendment as per their notice of objection dated 7 December 2022.

[15] The plaintiffs' authority to institute the main action was at the stage of filing the defendants' plea not challenged.

[16] The defendants, in this application, apply for leave to amend their plea in order to introduce a special plea to the effect that the plaintiffs failed to comply with s 274 of the Companies Act 28 of 2004.

[17] With leave of this court, the defendants filed their application for amendment on 30 January 2023 and plaintiffs were ordered to file their opposing papers on or before 23 February 2023, pursuant to the court order dated 17 January 2023.

The defendants' case

[18] The application to amend was brought in terms of s 274 of the Companies Act¹.

[19] The defendants' case is that the first plaintiff did not resolve to institute the main proceedings. It is further their case that the second plaintiff instituted the proceedings in his personal capacity as he did not have any authority to act on behalf of the first plaintiff.

¹ Act 28 of 2004.

[20] It is further the defendants' case that the plaintiffs will not suffer prejudice that cannot be cured by an award of costs. When the court posed the question whether or not the costs, if so awarded, must be capped in terms of rule 32(11), Ms Cloete responded that she leaves the entire determination of costs in the hands of the court.

The plaintiffs' case

[21] The plaintiffs aver that the main action was not brought by the second plaintiff in his personal capacity, however, that the action was brought by the first plaintiff through the second plaintiff.

[22] The plaintiffs' main bone of contention is that they stand to suffer prejudice because the matter is at its concluding rites and if the amendment sought is granted, the parties will be sent back to case management stage. The plaintiffs state that the aim of judicial case management was to curb the unnecessary prolonging of cases and that the amendment sought would defy such objective.

[23] The plaintiffs further contended that the defendants are shifting goal posts by first stating that the amendment was sought in respect of s 274 of the Companies Act, thereafter that the amendment was sought because the authority to institute proceedings was to be challenged.

[24] What Mr Mhata emphasised is that the defence put up by the defendants at the eleventh hour is bad in law and highly prejudicial towards his clients.

[25] The court posed a question to Mr Mhata that if the court had to grant the application and award costs to the plaintiffs, should such costs be capped in terms of rule 32(11) or not. Mr Mhata, in response, placed a very interesting proposition before court. He suggested that if the court awarded costs, then such costs should not be costs for the application, but must be costs for the work done in this matter from the pleading stage to the pre-trial stage. The court disagrees with Mr Mhata's overzealous' proposition. Part of the reasons why such proposition should not be upheld is that the defendants do not intend to have an overhaul of their plea. To the contrary, they intend

to have their plea stand subject to an addition of the special plea sought to be introduced. It follows, therefore, that the defendants' plea and other documents filed as a matter of consequence thereafter stand unscratched.

[26] Mr Mhata also submitted that if the case of the defendants is that the previous legal practitioners of the defendants were negligent in their duties towards their clients, then such legal practitioners should have been given *audi* to place their side of the story before court. Failure to have accorded the said *audi* to the defendants' erstwhile legal practitioners should result in the dismissal of the application.

Analysis of the law

[27] Rule 52 of the rules of this court regulates the procedure to be followed when a party seeks to amend a pleading. More specifically, rule 52(9) states the following:

'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.'

[28] What may be summed up from this subrule is that there is no time limit within which an application for an amendment must be brought, but that such amendment must at least be sought before judgment. It follows that even if the plaintiffs contend that the defendants brought this application at a late stage, it still does not preclude this court in an appropriate case, to grant the application for an amendment.

[29] In one of the leading cases on amendment of pleadings in our jurisdiction, in *DB Thermal (Pty) Ltd & Another v Council of the City of Windhoek*,² the Supreme Court stated the following in respect of amendment of pleadings:

'The established principle that relates to the amendment of pleadings is that they should be "allowed in order to obtain a proper ventilation of the dispute between the parties... so that

² *DB Thermal (Pty) Ltd & Another v Council of the City of Windhoek* (SA 33-2010) [2013] NASC 11 (19 August 2013) para 38.

justice may be done, subject of course to the principle that the opposing party should not be prejudiced by the amendment if that prejudice cannot be cured by a costs order, and where necessary, a postponement.'

[30] In the matter of *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC*,³ the full bench of this court held that:

'[44] Although as I point at later, I am in general agreement with the approach that late amendments and revision of pre-trial orders must be discouraged, I wish to caution that it should not be elevated to a rule of law and that each case must be considered on its facts. If a bona fide mistake has been made by a lawyer in correctly representing the client's version in the pleadings or a pre-trial order, it would be manifestly unjust to hold the party to a version which does not reflect the true dispute between the parties. But that is by no means the end of the matter as the very fact of the alleged mistake and the subsequent attempt to change front may well go to the merits of the matter overall in that a finding that it was not bona fide could well undermine a party's case and strengthen the probabilities in favour of the opponent...

[49] The unchanged position under the rules of court at the time the matter was argued and now is that an amendment may be granted at any stage of a proceeding and that the court has discretion in the matter, to be exercised judicially. The common law position that a party may amend at any stage of proceedings as long as prejudice does not operate to the prejudice of the opponent remains, save that, like every other procedural right, it is also subject to the objectives of the new judicial case management regime applicable in the High Court. That includes the imperative of speedy and inexpensive disposal of causes coming before the High Court.'

[31] What is evident from the cases cited, including the relevant rule of this court, is that amendments may be allowed at any time before judgment for as long as no substantial prejudice is caused to the opposing party which cannot be cured by an appropriate costs order. A word of caution should be sent out that the earlier in the proceedings the amendment is sought, the better the prospects that it may be granted. Where the amendment sought constitutes a change of front at the stage of the proceedings e.g. at pre-trial stage, such application for amendment may have severe

³ *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC* (I 601-2013 & I 4084-2010) [2014] NAHCMD 306 (17 October 2014) paras 44 and 49.

prejudicial effect on the other party not capable of being cured by a costs order and consequently, the prospects of such application to succeed, will be slim.

[32] In *casu*, the plea filed by the defendants, as alluded to earlier, remains intact save for the application to add the special plea raised. This court opines that to disallow the intended amendment is likely to cause extreme prejudice to the defendants. Courts should endeavour to resolve the real issues in dispute between the parties and this includes the true issues raised by the parties.

[33] On the issue of laying blame at the door of a legal practitioner who no longer represents a party without giving them an opportunity to be heard, this is an important aspect which parties and their legal practitioners should not overlook. Such erstwhile legal practitioner should be afforded *audi* whenever adverse allegations are made against him or her. In the matter at hand, however, the court will not labour into such subject as it was only raised by Mr Mhata as a statement in passing. That argument was never mentioned in any of the papers before court, neither can it be said to have been properly raised and ventilated to have an impact on the live matter. It, therefore, deserves no further mention.

Conclusion

[34] In view of the above authorities, as well as the aforesaid findings and conclusions reached, this court restates the well-beaten legal position that an amendment may be sought at any stage of the proceedings, before judgment is delivered. This court, in the exercise of its discretion, holds the view that the defendants should not have the door shut in their face for intending to amend their plea as an addition to their substantive plea already filed of record. That is because, although prejudice to be suffered by the plaintiffs is out in the open for all to see, such prejudice can be cured by an appropriate costs order.

Costs

[35] The general rule is that costs follow the event, this case is no different. A party who seeks an application for leave to amend essentially seeks an indulgence from the court and for that reason that party should ordinarily be the one to bear the costs. What the court however, needs to highlight is that the costs are not costs of suit, it is the costs of the application for amendment. The lateness of the application to amend and the great length at which the parties went to prepare and present the cases on the application, including the time and resources spent by the parties warrants that the costs should not be capped as provided for in rule 32(11).

Order

[36] In view of what has been stated above, I issue the following order:

1. The defendant's application is granted.
2. The defendant shall pay the plaintiff's costs for the application, such costs are not capped in terms of rule 32(11).
3. The parties must file a joint status report on or before 8 May 2023.
4. The matter is postponed to 11 May 2023 for a status hearing to determine the further conduct of the matter.

O S Sibeya

Judge

APPEARANCES

PLAINTIFFS:

N Mhata

Of Nambili Mhata Legal Practitioners,

Windhoek

DEFENDANTS:

L Cloete

Of FB Law Chambers,

Windhoek