

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: UNIVERSITY OF NAMIBIA Plaintiff/Respondent	Case No: HC-MD-CIV-ACT-CON-2019/00375
ERWIN NAMWIRA MPASI KATEWA Defendant/Applicant	Division of Court: High Court (Main Division)
	Heard on: 30 March 2023
Heard before: Honourable Lady Justice Claasen, J	Delivered on: 24 April 2023
Neutral citation: <i>University of Namibia v Katewa</i> (HC-MD-CIV-ACT-CON-2019/00375) [2023] NAHCMD 216 (24 April 2023)	
Order: <ol style="list-style-type: none">1. The application for an amendment to the particulars of claim is granted with costs, the costs of one instructed and one instructing counsel, capped in terms of rule 32(11).2. The defendant is to file its amended plea within fifteen (15) days from the date of this order.3. The plaintiff is to file its replication, if any, within ten (10) days of receipt of the amended plea.4. The matter is postponed to 21 June 2023 at 8h30 for a status hearing5. The parties are to file a draft case plan on or before 15 June 2023.	
Reasons for order:	
CLAASEN J:	

Background

[1] The applicant is before court, at the proverbial 11th hour, for an amendment of pleadings. The plaintiff is the University of Namibia, (UNAM) an institution in terms of s 2 of the University of Namibia Act 18 of 1992. The respondent is Erwin Namwira Mpasi Katewa, who is a former employee of the plaintiff.

[2] This is claim for damages in the amount of N\$ 2 338 430.89 as a result breach of contract. That amount represents the financial loss suffered by the plaintiff for monies paid for salary, other benefits and tuition for the defendant, whilst he was pursuing specified further studies. The claim avers that the defendant repudiated the agreement, thereby making him liable to repay the monies and that he failed to effect payment.

[3] The plaintiff gave notice of its intention to amend its particular of claim. The defendant opposed, paving the way for a formal application to amend. The founding affidavit is deposed by one Frednard Gideon who was the Acting Vice Chancellor of UNAM as from 12 January 2023 to 31 January 2023. He set out the claim and the nature of the proposed amendment and the reason why an amendment is necessary. The explanation was given that there was an omission in the drafting of the particulars of claim and that the person who drafted the pleading is no longer at the firm. It was stated that there is a need to clarify the existing claim to include that the defendant sought permission from the plaintiff to change institutions from Stellenbosch University to North-West University, which was granted by the plaintiff.

Nature of amendment sought

[4] The particulars of claim states inter alia at para 7 that on or about 19 March 2020, UNAM represented by Osmund Mwandemele, the PVC: Academic Affairs, as Acting Chairperson: Staff Development Committee and Mr Katwewa acting in his personal capacity, entered into a written agreement, which was signed by Arend Joubert on behalf of the PVC: Academic Affairs and IAL Research. The material terms of the agreement are that:

‘7.1 The defendant would pursue further studies to obtain a higher qualification of PHD at the University of Stellenbosch for a period of 4 years as from 19 March 2012 to 31 December 2015, on a full time basis.

7.2 Plaintiff would retain the employment position of the defendant as a lecturer until the defendant

completes his studies.

7.3 Plaintiff would remunerate 100% salary to the defendant during the first year (2012), 75% during the second year (2013) and 50% salary for the third year (2014) and onwards until the completion of the defendant's study programme.

7.4 Plaintiff undertook not to alter other fringe benefits of the defendant during the study period.

7.5 In return, and upon successful completion of the Defendant's studies, the defendant would work for the plaintiff for a period equivalent to the duration of the study leave granted to him.

7.6 In case of failure to return and work for the Plaintiff after the successful completion of his fellowship, the Defendant would be liable to repay all the financial support, inclusive of salary with benefits received from plaintiff during the period of fellowship. Alternatively, a status holder who resign before serving the employer for a period equal to that of his or her fellowship shall also be liable for repayment to the plaintiff under the agreement.'

[5] The plaintiff avers that it complied with the terms of the agreement, but that the defendant committed breach of contract. The alleged breach is set out as follows:

'9. On or about 31 March 2016, and before the successful completion of his PHD qualification the Defendant resigned from the Plaintiff's employment thereby repudiating the agreement between the parties. In furtherance of his contractual breach, the defendant failed and /or neglected to repay the plaintiff the financial assistance provided to him during his period of studies at Stellenbosch University.'

[6] The plaintiff seeks to amend two paragraphs in the particulars in the following terms:
By adding the following paragraphs after sub-paragraph 7.6 thereof:

'7.6 Should the Defendant, without written permission of the Plaintiff changes his program and or the institution to which he was sent to, may have his fellowship terminate and may be required to repay/compensate the Plaintiff all financial support received up to cancellation or change of his program of study.'

[7] By renumbering the existing sub-paragraph 7.6 to the Particulars of Claim to sub-paragraph 7.7.

[8] By deleting the entire paragraph 9 and by adding the following new paragraphs to the particulars of claim:

'9. During 2012 the defendant sought permission from the Plaintiff to change institutions, from the University of Stellenbosch to North-West University, which permission was granted by the Plaintiff to the Defendant. As a result, at the beginning of 2013, the Defendant moved from the University of

Stellenbosch to North-West University to continue pursuing is PHD qualification.

10. On or about 31 March 2016, and before successful completion of his PHD qualification, the Defendant resigned from the Plaintiff's employment thereby repudiating the agreement between the parties. In furtherance of his contractual breach, the defendant failed and /or neglected to repay the plaintiff the financial assistance provided to him during his period of studies at Stellenbosch and North-West University.'

Summary of Arguments

[9] Mr Chibwana argued for the applicant and Mr Mhata for the respondent. Mr Chibwana submitted that the amendment does not seek to alter the existing debt as the purpose of the contract remains the same namely that it was entered into for the purpose of the respondent to further his studies during certain years and that he did not abide by his terms of the agreement. He stated that all the plaintiff seek is to add an additional term insofar as the defendant sought and obtained leave from the plaintiff to continue his studies at another institution, which was granted. He also submitted that the claim for repayment of studies provided to the defendant is for the period 19 March 2012 to 31 March 2015, as such the debt has not prescribed. It is his view that the proposed amendment will not cause any prejudice, other than in respect of costs.

[10] Mr Mhata referred to the history of the matter, in particular that the matter had gone as far as witness statements and that a trial date had been allocated for July 2022. That was when the applicant woke up and indicated that it wants to file an application for an amendment. He argued that there is prejudice for the defendant, that it causes a return on a path already taken and that it will render everything done up to now, useless. He argued that what the applicant seeks to do essentially amounts to a new claim namely monies that are also paid to the other university and that it will introduce a substantial change of stance on the part of the applicant. He argued that the respondent will be required to deal with a claim relating to North-West University, which he opined, has become prescribed. He argued that the plaintiff must lie on the bed that they made, i.e. to seek relief for monies paid to the University of Stellenbosch only.

Legal Considerations

[11] The *locus classicus* judgment of this court is *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC*¹, which provide valuable guidelines. These include the following:

- (a) amendments may be sought at any stage of the proceedings;
- (b) the court exercises a judicial discretion in allowing or disallowing amendments, and which discretion must be exercised judicially;
- (c) a litigant seeking an amendment craves the court's indulgence and must therefore proffer some explanation for the amendment sought;
- (d) the explanation required will be determined by the nature of the amendment sought. The more substantial the amendment, the more compelling a case for an explanation;
- (e) if a party proffers an explanation that is not reasonably satisfactory or one lacking in *bona fides* the court may disallow the amendment, especially where the amendment is opposed and has the potential to compromise a firm trial date;
- (f) an amendment that is not opposed or one that is minor will invariably be granted;
- (g) the more substantial an amendment, the more compelling the case for an explanation under oath
- (h) a court will not compel a party to stick to a version of fact or law that it says no longer represents its stance and this is because litigants must be allowed in the adversarial system to ventilate what they believe are the real issues between them.'

Conclusion

[12] Having considered the proposed amendment, I disagree with the contention by counsel for the respondent that if the amendment is permitted it will constitute a new cause of action and a new claim, which give rise to prescription. In my view the claim will still turn on the same material facts, with the additional facts that the respondent had been studying at a different university for a part of the period and that the parties had agreed to that stipulation. The cause of action, the period of the study program, the amount claimed for the salary and benefits as well as tuition remain the same.

[13] Whilst it is not desirable that an amendment be brought this late in the proceedings, I am satisfied that it was not done with *mala fides*. The applicant provided an explanation, namely that the omission to have included the averment in the particulars of claim was caused by the erstwhile legal practitioner. That legal practitioner was no longer at the firm and the omission was

¹ *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC* (Case No. I 602/2013 and I 4084/2010) [2014] NAHCMD 306 (17 October 2014).

discovered, belatedly, after the filing of witness statements.

[14] I am of the view that the amendments are in order as they seek to properly capture the complete terms and true account of the contract. Having had regard to the plea, the defendant did not dispute the contract and will certainly be afforded the opportunity to plead again to an amended particulars of claim. There is no prejudice that can be said to be likely to be suffered by the applicant if the court grants the proposed amendment which cannot be cured an appropriate order as to costs.

[15] As a result, I make the following order:

1. The application for an amendment to the particulars of claim is granted with costs, the costs of one instructed and one instructing counsel, capped in terms of rule 32(11).
2. The defendant is to file its amended plea within fifteen (15) days from the date of this order.
3. The plaintiff is to file its replication, if any, within ten (10) days of receipt of the amended plea.
4. The matter is postponed to 21 June 2023 at 8h30 for a status hearing
5. The parties are to file a draft case plan on or before 15 June 2023.

Note to the parties:

C CLAASEN
Judge

Not applicable

Counsel:

Plaintiff/Applicant:

T Chibwana
Instructed by Samuel and Co Legal
Practitioners
12 Mose Tjitendero street
Olympia
Windhoek

Defendant/Respondent:

N Mhata
Nambili Mhata Legal Practitioners
23(A) Pasteur Street
Windhoek

