

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING IN TERMS OF PRACTICE DIRECTION 61

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| Case Title: Alfred Clayton and Bradian Williams | Plaintiff Defendant | Case No: HC-MD-CIV-ACT-DEL-2021/01779 |
| | | Division of Court: Main Division |
| | | Heard on: 28 July 2023 |
| Heard before: Honourable Mr Justice Usiku | | Delivered on: 18 August 2023 |
| Neutral citation: <i>Clayton v Williams</i> (HC-MD-CIV-ACT-DEL-2021/01779) [2023] NAHCMD 510 (18 August 2023) | | |
| Order: | | |
| <ol style="list-style-type: none">1. The plaintiff's point <i>in limine</i> regarding non-compliance with the provisions of rule 32(9) and (10) is dismissed.2. The defendant's application for leave to amend is dismissed.3. I make no order as to costs.4. The matter is postponed to 20 September 2023 at 15:15 for a status hearing.5. The parties shall file a joint status report on or before 13 September 2023. | | |
| Reasons for order: | | |
| USIKU J: | | |

Introduction

[1] This is an application by the defendant for leave to amend his plea, in the terms as more fully set out in his notice of intention to amend filed on 9 March 2023.

[2] In essence, the defendant wishes to amend his plea in order to incorporate a special plea asserting that:

- (a) the plaintiff has failed to plead in his particulars of claim that he has been fully indemnified by his insurer and that since he is indemnified he lacks capacity to sue; and that,
- (b) the insurer ought to have been joined in the present proceedings as an interested party, together with the insured.

Background

[3] The plaintiff has instituted an action against the defendant for payment of N\$457 968,35 as damages arising from a motor vehicle collision between the plaintiff's vehicle and defendant's vehicle. In his particulars of claim, the plaintiff alleges that the collision was caused by the negligence of the defendant and that as a result of the collision, his vehicle was damaged beyond economical repair and he suffered damages in the aforesaid amount.

[4] The defendant entered appearance to defend and filed a plea.

[5] It is common cause that the plaintiff's motor vehicle was insured by Hollard Insurance Company ('Hollard') and that the latter has reimbursed the plaintiff in respect of the damages suffered. It is also common cause that the plaintiff has not pleaded the fact that his motor vehicle was insured with Hollard and that the latter has reimbursed him.

[6] The defendant now seeks to amend his plea in order to incorporate therein a special plea that the plaintiff has failed to plead in his particulars of claim, that he has been fully indemnified and for that reason he lacks capacity to sue the defendant. The defendant also seeks to raise a special plea that the plaintiff has failed to join Hollard as an additional plaintiff to the present proceedings.

[7] The plaintiff objects to the intended amendments on the basis that the intended amendments will render the defendant's plea excipiable.

Defendant's position

[8] The defendant contends that the plaintiff ought to plead that he has been indemnified and that he is suing on behalf of Hollard. His failure to do so, argues the defendant, renders the plaintiff lacking *locus standi* to institute the present action against the defendant.

[9] The defendant further argues that Hollard should not litigate in the name of the plaintiff but should do so in its own name, to promote transparency. The fact that Hollard is not joined, argues the defendant, is fatal to the plaintiff's claim.

Plaintiff's position

[10] The plaintiff raised a point in *limine* that the defendant has not complied with rule 32(9) and (10) before launching his application for leave to amend and therefore, the defendant's application should be dismissed.

[11] On the aspect of the point *in limine*, the defendant contends that he has complied with rule 32(9), however, he only omitted to file the rule 32(10) report. The defendant also contends that the provisions of rule 32(9) and (10) are not applicable to amendment of pleadings. For that proposition, the defendant cites the case of *Marmowerke Karibib (Pty) Ltd v Transnamib Holding Ltd*¹ as authority.

[12] In regard to the merits of the application, the plaintiff argues that it is trite law that the fact that the plaintiff was reimbursed by Hollard is irrelevant to the proceedings. He further contends that subrogation concerns solely the parties to the insurance contract (namely the insurer and the insured) and that the arrangements between the insurer and the insured are irrelevant to the defendant. As authority for the foregoing propositions the plaintiff cites the case of *Sheehama v Nehunga*² and *Marco Fishing (Pty) Ltd v Government of the Republic of Namibia*.³

¹ *Marmowerke Karibib (Pty) Ltd v Transnamib Holding Ltd* Case No SA 92/2020 (29 May 2022).

² *Sheehama v Nehunga* Case No. SA 13/2019 [2021] NASC 1 (1April 2021) para 20.

³ *Marco Fishing (Pty) Ltd v Government of the Republic of Namibia* 2008 (2) NR 742 at 750 D-E.

[13] The plaintiff further argues that, in the exercise of its right of subrogation, Hollard cannot act in its name against the defendant but has to enforce the plaintiff's right against the defendant in the name of the plaintiff only. As authority for that proposition the plaintiff cites the case of *Dresselhouse Transport CC v The Government of the Republic of Namibia*⁴ and *Western National Insurance Company Ltd v Mweulinale*.⁵

[14] The plaintiff argues that should the amendments be allowed, they would render the defendant's plea excipiable and the plaintiff would suffer obvious prejudice.

[15] The plaintiff prays for a punitive costs order against the defendant's legal practitioner, *de bonis propriis*, on the basis , among other things that:

- (a) the plaintiff's legal practitioners, in an attempt to curtail incurrence of unnecessary costs, had before they filed the notice of objection, referred the defendant's legal practitioner to the Supreme Court and High Court authorities, in respect of the intended amendments and have advised him that the plaintiff shall seek a *de bonis propriis* costs order should the defendant persists with the application; and that,
- (b) despite the foregoing, the defendant's legal practitioner has elected not to consider the authorities referred to and proceeded to file the present application.

Analysis

[16] In regard to the point *in limine*, I am satisfied that, on the facts of the case, the defendant has substantially complied with the provisions of rule 32(9), even though the rule 32(10) report was not filed. In any event, I am inclined to agree with the defendant that on the authority of the *Marmorwerke* case, the provisions of rule 32(9) and (10) are not applicable to proceedings relating to amendment to pleadings. In the *Marmorwerke* case, the Supreme Court observed that the provisions of rule 52 prescribe a self-contained process and that the provisions of rule 32(9) and (10) are not applicable where the provisions of rule 52 are followed to the letter. In terms of rule 52(4), where an objection to the notice to amend is delivered, the party desiring to pursue the amendment must, within 10 days after receipt of the objection, deliver the application for leave to amend. In the present matter, the defendant appears to have followed the provisions of

⁴ *Dresselhouse Transport CC v The Government of the Republic of Namibia* 2005 NR 214 (SC).

⁵ *Western National Insurance Company Ltd v Mweulinale* Case No (HC-MD-CIV-ACT DEL-2019/02849) [2021] NAHCMD 82 (11 February 2021).

rule 52 to the letter, and therefore, the provisions of the rule 32(9) and (10) are not applicable.

[17] Insofar as the merits of the application are concerned, an applicant for leave to amend is required to persuade the court that the proposed amendment is worthy of consideration and introduces a triable issue.

[18] In considering whether to grant leave to amend or not, the court is required to weigh the reasons and explanation given by the applicant against objections raised by the respondent. Where a proposed amendment will prejudice the respondent or would be excipiable, the amendment should be refused.⁶

[19] The central issues raised by the proposed amendments are whether:

(a) the plaintiff lacks capacity to sue the defendant for damages by reason of the indemnity. Put differently, whether the indemnity absolves the defendant from liability, and whether;

(b) an insurer is a party with a direct and substantial interest in the proceedings and must therefore, be joined as an additional plaintiff.

[20] As was correctly submitted by the legal practitioner for the plaintiff⁷, subrogation means the substitution of one person for another so that the person subrogated succeeds to the rights of the person whose place he takes. Subrogation expresses the insurer's right to be placed in the insured's position so as to be entitled to the advantage of all the latter's rights and remedies against third parties. Under subrogation, no transfer or cession of rights takes place.

[21] In *Sheehama v Nehunga*⁸, the Supreme Court underlined that subrogation concerns solely the parties to the insurance contract, namely the insurer and the insured. It confers no rights or liabilities on third parties who are strangers to the insurance contract. There is no need for a third party to be interested in the subrogation. This is because the insured remains vested with the rights against the third party and the latter retains all the rights and obligations he has against the insured.⁹ By virtue of the doctrine of subrogation, the insurer enforces the rights of the insured on his or her behalf and has no claim independent of the insured.¹⁰ As third parties'

⁶ *Tras-Draknsberg Bank Ltd v Combined Engineering* 1967(3) SA 632 at 641.

⁷ Submissions made in the notice to amend.

⁸ *Supra* para 20.

⁹ *Ibid.* para 21.

rights and obligations as against the insured are not affected at all by subrogation, the insurance contract and the rights and obligations created therein, have nothing to do with third parties and are thus, *res inter alios acta* and normally irrelevant to the proceedings between the insured and third parties.¹¹

[22] The Supreme Court in *Sheehama v Nehunga* further underscores that there is no duty on an insurer when it sues in the name of the insured, by virtue of the doctrine of subrogation, to allege or prove subrogation. It is the claim of the insured who is vested with the rights and the fact that it is the insurer who is in charge of the proceedings is irrelevant to the cause of action.¹²

[23] From the foregoing statement of the law by the Supreme Court, it appears to me that the questions posed in para 19 hereof are to be answered as follows:

- (a) an indemnity does not affect the plaintiff's capacity to sue the defendant; and,
- (b) an insurer is not a person with a direct and substantial interest in the proceedings and need not be joined as an additional plaintiff.

[24] It is therefore, apparent that the defendant's application for leave to amend has no merit and stands to be dismissed.

[25] The plaintiff prays for a costs order *de bonis propriis*, against the defendant's legal practitioner.

[26] The principle of awarding costs *de bonis propriis* applies in instances where a person acting or litigating in a representative capacity is blameworthy for:

- (a) malfeasance in the form of negligence or dereliction of duty such as non-observance of court orders or rules of court;
- (b) serious and unacceptable conduct from an officer of the court; or
- (c) undue and unnecessary conduct leading to the increase of litigation costs.¹³

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid, para 22.

¹³ *De Sousa v Alexia Properties CC* (Case No SA 84/2019) (27 July 2021).

[27] An order that a legal practitioner pays the litigation costs out of his own pocket is granted only in exceptional cases where the malfeasance is of a serious nature, justifying a court to sanction such conduct, as a mark of its disapproval. The policy consideration underlying the court's reluctance to order costs against a legal practitioner personally is that practitioners are expected to pursue their client's rights and interest without undue regard for their personal convenience.¹⁴

[28] In the present matter, it is common cause that the defendant's legal practitioner received correspondence from the plaintiff's legal practitioner, on 10 March 2023, in which he was referred to judgments of the High Court and the Supreme Court on the subject. He appears not to have heeded the advice. He proceeded to file the present application.

[29] Having considered the facts of the present matter and arguments put forth by counsel on both sides, I am of the view that while the conduct of defendant's legal practitioner warrants criticism, I am not persuaded that such criticism justifies the granting of a costs order *de bonis propriis*. The prayer for the costs order *de bonis propriis* therefore, falls to be declined.

[30] It is common cause that the defendant's firm of legal practitioner(s) accepted a mandate from legal aid to represent the defendant. The legal position appears to be that a legally aided person is shielded from an adverse costs order.¹⁵ I shall therefore, not make any costs order.

[31] In the premises, I make the following order:

1. The plaintiff's point in *limine* regarding non-compliance with the provisions of rule 32(9) and (10), is dismissed.
2. The defendant's application for leave to amend is dismissed.
3. I make no order as to costs.
4. The matter is postponed to 20 September 2023 at 15:15 for a status hearing.
5. The parties shall file a joint status report on or before 13 September 2023.

¹⁴ *Multi Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* 2013(4) All SA at para 34.

¹⁵ *Mentoor v Usebiu* SA 24/2015 [2015] NASC 12 (19 April 2017) para 21.

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| Judge's signature: | Note to the parties: |
| | |
| B Usiku Judge | Not applicable |
| Counsel: | |
| Plaintiff: | Defendant: |
| H Awaseb Awaseb Law Chambers, Windhoek | F Pretorius Francois Erasmus & Partners, Windhoek |