

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

RULING

<b>Case Title:</b> NDAPANDULA UHAKANA SHIKONGO // MUKENDI CHOUCOU MUJINGA	<b>Case No:</b> HC-MD-CIV-ACT-CON-2022/00924
	<b>Division of Court:</b> HIGH COURT (MAIN DIVISION)
<b>Heard before:</b> HONOURABLE LADY JUSTICE CLAASEN, J	<b>Date of hearing:</b> 20 September 2023
	<b>Delivered on:</b> 10 October 2023
<b>Neutral citation:</b> <i>Shikongo v Mujinga</i> (HC-MD-CIV-ACT-CON-2022/00924) [2023] NAHCMD 639 (10 October 2023)	
<b>The order:</b>  <ol style="list-style-type: none"><li>1. The application for an amendment to the particulars of claim is granted.</li><li>2. There is no order as to costs.</li><li>3. The plaintiff must file the amended particulars of claim on or before 17 October 2023.</li><li>4. The defendant must, if so advised, file its consequential plea to the amended particulars of claim on or before 25 October 2023.</li><li>5. The plaintiff must file her replication, if any, on or before 1 November 2023.</li><li>6. The parties must file a case management conference report on or before 3 November 2023.</li><li>7. The matter is postponed to 8 November 2023 at 8h30 for case management conference hearing.</li></ol>	
<b>Following below are the reasons for the above order:</b>	
CLAASEN J:	

## Background

[1] The plaintiff instituted an application for leave to amend her particulars of claim. The application was opposed by the defendant. The parties appear to be business women in the informal sector.

[2] The plaintiff instituted action against the defendant in which she claims cancellation of the agreement, defendant to pay N\$38 000, plus interest at the rate of 20 percent per annum, *temporae morae* and costs if the matter is opposed. The particulars of claim avers that on or about April 2019, the parties entered into an oral agreement in Windhoek that they will go into retail business together; and the retail business was to be run and managed by the defendant. The particulars amplified that the plaintiff paid certain amounts to the defendant for certain purposes, namely N\$15 000 to rent a space for the shop, N\$10 000 for a consignment of stock at the Namibian-Zambian border, N\$6400 to buy further stock requested by the defendant and N\$6600 for the defendant to buy food and pay outstanding rent as defendant was about to be evicted.

[3] Furthermore, that the plaintiff did not fulfil her part of these obligations by failing to secure a shop to rent, failing to produce the stock that was ostensibly held up at the border and failing to produce the further stock for which she got money from the plaintiff. Furthermore, that the plaintiff signed an acknowledgment of debt on 18 October 2019 to repay N\$38 000 to the plaintiff, which she failed to do.

## Nature of amendment sought

[4] The plaintiff seeks to amend her particulars of claim in the following terms. By deleting the entire para 4 and substituting same with the following:

‘On or about April 2019, the Plaintiff and the Defendant entered into various oral agreements on different occasions in Windhoek. The oral agreements consisted of the following:

1. The Defendant borrowed money in the amount of N\$10,000.00 from the Plaintiff to have her consignment held up at the Namibian-Zambian border released and the Defendant were to repay the money.
2. The Defendant borrowed money in the amount of N\$6,600.00 from the Plaintiff to

pay for her rent and food and were to repay the Plaintiff.

3. The Defendant would get the Plaintiff a place to rent in order to start up her business and Plaintiff gave N\$15,000.00 to ensure the place and 2 immediately move in as soon as she comes back from Angola.
4. The Defendant took some of the Plaintiff's stock to the value of the estimation of N\$20,000.00 and were to sell it on her behalf, providing the Plaintiff with the profits while securing a place to rent.'

[5] By deleting the entire para 5.3.

[6] By deleting paragraph 6 and substituting it was a paragraph same with the following:

'The Defendant breach the oral agreement between the parties as she acted fraudulently and had no intention to honour the agreements concluded with the Plaintiff as she acted in the following manner:

- 3.1 She never looked for the rental space on behalf of the Plaintiff.
- 3.2 She never provided the Plaintiff with any profits from the consignment she took from the Plaintiff to sell on her behalf.
- 3.3 She never paid back the Plaintiff the monies borrowed.'

[7] By deleting the entire paragraph 7,8 and 9 and replacing same with the following:

'In the premises the Defendant breached the oral agreements as set out in paragraph 3 above. The Defendant was therefore liable towards the Plaintiff for payment in the amount of N\$51 600.00 however only admitted liability of N\$38 000.00. The Plaintiff subsequently claims the N\$38 000.00.'

[8] By deleting the entire claim and substituting same with the following:

'WHEREFORE the Plaintiff claims from the Defendant the following:

1. Payment in the amount of N\$38 000.00.
2. Interest on the aforesaid amount at the rate of 20% per annum a tempore mora from the date of judgment until the date of final payment.
3. Cost of suit only if defended.
4. Further and/or alternative relief.'

[9] The reason for the proposed amendment is given as a misunderstanding between her and her legal practitioner due to language barriers and that the correct and true facts only came about after communication with the legal practitioner's candidate legal practitioner. Both the legal practitioner and the candidate legal practitioner gave confirmatory affidavits.

[10] Counsel for the plaintiff reiterated the reason for the need to amend and submits that the amendment does not seek to change the version of the plaintiff but merely seeks to give a chronological sense of what transpired between the parties. It is the plaintiff's case that the admission of debt relied on by the plaintiff remains valid and thus the amount of the claim remains the same.

[11] The defendant in opposition of the application deposed that the proposed changes constitute a new version, that they are 'worrisome and undermine the possibility of fair adjudication between the parties which cannot be cured by a cost order or a postponement'. She also points out that it is done at a belated stage of pre-trial and if the amendment is granted it will cause 'unconscionable delay.'

[12] Counsel for the defendant held the view that the amendment brings about a change of versions at a late stage of the proceedings. She argued that the defendant stands to suffer prejudice because the parties will be sent back to case planning stage. As a result, she avers, the proceedings will be prolonged. She argued that what the plaintiff seeks to do is to tailor her version and that would not allow for a fair adjudication of the matter.

#### The law and application thereof

[13] 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.'

[14] The subrule does not impose a time limit within in 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 defendant contends that the plaintiff 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.

[15] In one of the leading cases on amendment of pleadings in our jurisdiction, *DB Thermal (Pty) Ltd & Another v Council of the City of Windhoek*,<sup>1</sup> 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 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.'

### Conclusion

[16] It is evident that amendments may be allowed at any time before judgment as long as no substantial prejudice is caused which cannot be cured by an appropriate costs order or a postponement. In order to ensure the fair adjudication of a matter, courts should endeavour to resolve the real issues in dispute between the parties and this includes the true issues raised by the parties.

[17] Having considered the proposed amendment, I am satisfied that an acceptable explanation was put before me as to why the amendment is sought at this stage of the proceedings. I disagree with the submissions by counsel for the defendant that the amendment sought amounts to a change of versions by the plaintiff or a total new front. The defendant will be allowed to plead to the introduction of the averment that the defendant also received stock to the value of N\$20 000. In any event, the amount of the claim remains the same amount, which is the amount in the purported acknowledgement of debt.

### Costs

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<sup>1</sup> *DB Thermal (Pty) Ltd & Another v Council of the City of Windhoek* (SA 33-2010) [2013] NASC 11 (19 August 2013) para 38.

[18] In light of the fact that both parties are legally aided, I do not see it fit to grant costs in favour of any one of the parties and I make the following order:

1. The application for an amendment to the particulars of claim is granted.
2. There is no order as to costs.
3. The plaintiff must file her amended particulars of claim on or before 17 October 2023.
4. The defendant must, if so advised, file its consequential plea to the amended particulars of claim on or before 25 October 2023.
5. The plaintiff must file her replication, if any, on or before 1 November 2023.
6. The parties must file a case management conference report on or before 3 November 2023.
7. The matter is postponed to 8 November 2023 at 08h30 for case management conference hearing.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
C Claasen Judge	Not applicable.
<b>Counsel:</b>	
<b>Plaintiff</b>	<b>Defendant</b>
D Garises Of The Directorate of Legal Aid, Windhoek	W Chinsembu Of Henry Shimutwikeni Legal Practitioners, Windhoek