

REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF  
WINDHOEK



NAMIBIA MAIN DIVISION,

RULING

PRACTICE DIRECTIVE 61

<b>Case Title:</b>  ROMAN CATHOLIC HOSPITAL                      PLAINTIFF  and  BERNARD SHIDUTE HAUFIKU                      DEFENDANT	<b>Case No:</b> HC-MD-CIV-ACT-CON-2022/04594
	<b>Division of Court:</b> HIGH COURT (MAIN DIVISION)
<b>Heard before:</b> HONOURABLE LADY JUSTICE PRINSLOO	<b>Date of hearing:</b> 13 March 2024
	<b>Delivered on:</b> 05 April 2024
<b>Neutral citation:</b> <i>Roman Catholic Hospital v Haufiku</i> (HC-MD-CIV-ACT-CON-2022/04594) [2024] NAHCMD 151 (5 April 2024)	
<b>Results on merits:</b>  Merits not considered.	
<b>The order:</b>  1.        The defendant is granted leave to amend his counterclaim.  2.        The defendant must pay the costs of the application for leave to amend.  3.        The defendant must file his amended counterclaim on or before 12 April 2024.  4.        The plaintiff must file its plea to the amended counterclaim on or before 19 April 2024.  5.        The defendant must file his replication to the plaintiff's plea to the counterclaim on or before	

26 April 2024.

5. The matter is postponed to **2 May 2024** at **15h00** for case management conference hearing.

**Reasons for orders:**

Prinsloo J:

Introduction

[1] The plaintiff is Roman Catholic Hospital, a non-profit association registered in terms of s 21 of the Companies Act 28 of 2004. The defendant is Bernard Shidute Haufiku, a major male residing in Windhoek. I intend to refer to the parties as they are in the main action.

[2] This is an application for leave to amend the defendant's counterclaim in terms of rule 52 of the rules of court.

The founding affidavit

[3] The founding affidavit was deposed to by the defendant's legal practitioner of record. It appears that the current application flows from the proceedings of the court-connected mediation. Although the matter was 'settled', it did not result in the production of a settlement agreement, and as a result, the defendant gave notice of the intended amendment. Ms Angula states that the defendant held off on amending the counterclaim in the hope that the matter would be amicably settled between the parties.

[4] She stated that the amendments are sought as a result of an error while drafting the counterclaim. She apparently overlooked a claim for damages and advanced the following reasons for pursuing the amendment:

- a) The amendment sought does not involve a major change of front or a withdrawal of an admission.
- b) The amendment seeks to rectify a bona fide mistake.
- c) It is important that the real issues are fully canvassed and must be determined by the court.

- d) It is in the interest of both parties and in the administration of justice that the amendment be allowed.
- e) There will be no prejudice to the plaintiff should the court grant the intended amendment.

*Amendment sought*

[5] The gist of the original counterclaim was that the plaintiff and the defendant entered into a lease agreement in terms of which the defendant would rent consulting rooms on the plaintiff's premises for a period of three years on a renewable basis. In 2015, the defendant entered into an agreement with Family Wise Medical Practice to serve as manager of the defendant's practice for a period of five years by rendering the necessary medical services required by the defendant's patients. Payments were made to the plaintiff for the defendant's account.

[6] In 2019, the plaintiff, via correspondence, directed the defendant to remove his vehicle from the premises as it was assigned to another doctor. In 2022, the plaintiff's board of trustees denied the defendant access to the premises.

[7] The plaintiff entered into a rental agreement with Family Wise Medical Practice from 2018 to date. Family Wise Medical Practice occupies the defendant's consultation room without it cancelling the defendant's agreement or giving notice thereof. The defendant prayed that the plaintiff's claim be dismissed and for the reinstatement of the defendant's access to the Roman Catholic Hospital.

[8] In terms of the intended amendment, the defendant wishes to introduce three claims. The first claim appears to elaborate on the original claim.

[9] Claim one relates to the cancellation of the lease agreement by the plaintiff in 2022, which the defendant rejects as being unlawful. The defendant demands that his access to use and enjoyment of the premises, as well as one parking bay, be restored. Alternatively, the plaintiff must provide the defendant with an alternative consulting room of similar size and space and one parking bay.

[10] The second claim relates to the damages that the defendant suffered as a result of the plaintiff's refusal for him to use the premises. The defendant claims that as a result of the plaintiff's wrongful actions and breach of the lease agreement, he suffered loss of income for the period 2021 to 2023.

[11] The third claim is one of defamation. The defendant alleges that in a publication of the Namibian Newspaper of 4 April 2020, the plaintiff made a number of defamatory statements, innuendos, insinuations and suggestions which damaged the defendant's reputation and injured his dignitas, resulting in him suffering damages.

#### Opposition to the intended amendment

[12] The plaintiff opposed the intended amendment on the following basis:

- a) Given the extraordinary and extensive amendments sought, the plaintiff would be prejudiced, and it would unreasonably delay the finalisation of the matter.
- b) The amendments do not constitute an amendment but rather a complete substitution of the defendant's counterclaim. The purported amendment is, however, vague and embarrassing, and the defendant does not make the necessary averments to sustain the respective counterclaims.
- c) The claim of defamation to be included in the counterclaim does not make out the essential averments to sustain a defamation claim. In this regard, the plaintiff avers that although the intended amendment refers to an article in the Namibian Newspaper, such an article is not attached to the pleadings.
- d) The belated amendments are incompatible with the ethos of judicial case management.
- e) The counterclaim of defamation that the defendant wishes to introduce has prescribed.

#### Arguments advanced

##### *On behalf of the defendant*

[13] Ms Angula submitted that contrary to the plaintiff's view, the amendments are not substantive or prejudicial but clarify the dispute between the parties. She further contended that an appropriate cost order can mitigate any prejudice that the plaintiff may suffer.

[14] Ms Angula argued that the third counterclaim did not prescribe. Counsel submitted although prescription started running when the newspaper article was published on 24 April 2020, the prescription was interrupted as a result of the COVID-19 Regulation under Proclamation 16 of 2020, Suspension of Operation of Provisions of Certain Laws and Ancillary Matters Regulations'. As a result of the aforementioned proclamation, the prescription period was extended to 5 May 2023, which was also the date on which the plaintiff filed his

counterclaim and the same has, therefore, not prescribed.

*On behalf of the plaintiff*

[15] Mr Namandje submitted that the defendant's intended amendment would not involve the mere removal or correcting of certain paragraphs. In the current instance, the notice of amendment constitutes the counterclaim, as it is a complete substitution.

[16] Mr Namandje argued that the amendment would not take the case any further for the following reasons:

- a) With respect to claim one, the defendant pleads that the plaintiff repudiated the agreement. Although the defendant does not plead that he rejected the repudiation, he demands specific performance.
- b) However, immediately thereafter, the defendant seeks future damages in claim two as if he accepted the termination of the agreement in claim one. The two claims cannot coexist. According to Mr Namandje, claim two can at most be conditional to claim one, and if not, then the defendant must choose which one of these claims to prosecute.
- c) In respect of the third claim, Mr Namandje submitted that the defendant refers to an article published in a newspaper in which the plaintiff purportedly made some allegations and innuendos that defamed the defendant. However, the article is not attached to the intended amendment. This, according to Mr Namandje, is a brand new claim as there was no reference to the alleged defamation in the original counterclaim. The alleged cause of action arose in 2020 already and has potentially prescribed. (The article was subsequently filed)

[17] In conclusion, Mr Namandje submitted that the amendment is bad in law and potentially excipiable and has prescribed.

Applicable legal principles and the application thereof

[18] Amendment of pleadings is regulated by rule 52 of the Rules of Court. Rule 52(9) provides that:

'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.' (Emphasis

added).

[19] The *locus classicus* judgment of the Full Bench of this court in *IA Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC*.<sup>1</sup> In the *IA Bell* matter, the court set out the main principles governing amendments. However, in the recent judgment of the Supreme Court in *Windhoek Municipal Council v Pioneerspark Dam Investment CC*,<sup>2</sup> the court held as follows:

[33] Rule 52 of the Rules of the High Court governs the amendment of pleadings.

The actual procedure to be followed in doing so does not substantially depart from that previously provided for in rule 28 of the erstwhile rules. A party desiring to amend a pleading must give notice of the intention to do so. The other parties to the litigation are afforded the opportunity to object within ten days. In that event the party seeking an amendment is required to bring an application to amend within ten days (or such period as is directed by a managing judge in judicial case management (JCM)).

[34] A court may grant an amendment at any stage of the proceedings<sup>3</sup> on terms considered suitable or proper by the court.

[35] What has however changed since the advent of JCM is that the previously liberal attitude to granting amendments has been found by a Full Bench of the High Court in *IA Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC*<sup>4</sup> to no longer apply because it is inimical to the ethos of JCM, with the emphasis shifting from 'doing substantial justice between parties' to the 'interests of the administration of justice overall' – of which doing justice between the parties is but one consideration. We endorse this approach except to add that 'doing substantial justice between the parties', although no longer being the primary consideration, remains of considerable importance but is now to be considered within the context of the objectives of JCM, with late amendments being subjected to greater scrutiny than before because of their deleterious effect upon the administration of justice.'

[36] The Judge President, writing for the Full Court in *IA Bell*, reached this conclusion after considering recent decisions of the High Court on the issue since the introduction of JCM in Namibia in 2011 and after an exhaustive survey of the approach followed in Australia after that jurisdiction introduced JCM. The Full Bench stressed that a new approach to amendments under JCM was underpinned by the following overriding objectives of JCM:

<sup>1</sup> *IA Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC* (I 601-2013 & I 4084-2010) [2014] NAHCMD 306 (17 October 2014) at paras 33 - 36.

<sup>2</sup> *Windhoek Municipal Council v Pioneerspark Dam Investment CC* (SA 70/2019) NASC (23 June 2021).

<sup>3</sup> Rule 52 (9).

<sup>4</sup> *Supra* at footnote 1.

- (a) to ensure the speedy disposal of any action or application,
- (b) to promote the prompt and economic disposal of any action or application,
- (c) to use efficiently the available judicial, legal and administrative resources,
- (d) to identify issues in dispute at an early stage,
- (e) to curtail proceedings, and
- (f) to reduce the delay and expense of interlocutory processes. Rule 1B imposed an obligation on the parties 'to assist the managing judge in curtailing the proceedings.'<sup>5</sup>

## Discussion

### *Excipiability*

[20] Mr Namandje raised the issue of the potential excipiability of the second claim, which, in his view, should have been conditional to the first claim, at best.

[21] In *Frankly Enterprises CC v Ohiozebau*,<sup>6</sup> Ueitele J stated as follows on the issue of repudiation and damages:

'It is settled law that repudiation of a contract occurs where one party to a contract, without lawful grounds, indicates to the other party, whether by words or conduct, a deliberate and unequivocal intention to no longer be bound by the contract.<sup>7</sup> Then, the innocent party will be entitled to either: (i) reject the repudiation and claim specific performance; or (ii) elect to accept the repudiation, cancel the contract and claim damages. If he or she elects to accept the repudiation, the contract comes to an end upon the communication of the acceptance of the repudiation to the party who has repudiated. Only then does a claim for damages arise.'

[22] From the *Ohiozebau* matter above, it appears that there might be merits in the argument advanced by Mr Namandje. However, in opposition to the intended amendment the plaintiff, instead of setting out its objections in detail as required by the rule, merely glanced over the issue of possible excipiability by averring that 'the amendment does not actually amount to amendments of the existing counterclaim. They amount to the institution of new counterclaims, and they are vague and embarrassing and do not make out necessary averments to sustain the

<sup>5</sup> Para 50 as embodied in the erstwhile Rule 1A, now replaced and expanded in rule 1 (3) of the current rules of the High Court.

<sup>6</sup> *Frankly Enterprises CC v Ohiozebau* (HC-MD-CIV-ACT-CON-2017/04092) [2023] NAHCMD 368 (30 June 2023) at para 81.

<sup>7</sup> *Nash v Golden Dumps (Pty) Ltd* [1985] 2 All SA 161 (A); 1985 (3) SA 1 (A) at 22D-F.

respective counterclaims.' Mr Namandje developed this argument only during his oral submissions.

[23] This approach is unacceptable. The rule is clear, if an objection is raised against the intended amendment such objection must clearly and concisely state the grounds on which it is founded. To raise the exception objection in argument places the opposing counsel at a disadvantage to respond adequately thereto.

[24] In *Fischer Seelenbinder Associates CC v Steelforce CC*,<sup>8</sup> Van Niekerk J held that it is trite that a court will not allow an amendment which renders a pleading excipiable.<sup>9</sup>

[25] In my view, it is not prudent to allow an amendment that would make the pleadings worse than they already are. The purpose of pleadings is to clearly outline the issues for both parties and the court. If the pleadings are confusing, vague and embarrassing or do not disclose a cause of action, it hinders the pursuit of justice. Therefore, an amendment that could potentially create such confusion should be discouraged early on, before the other party is forced to raise an exception. In the current matter, the intended amended counterclaim might as well be excipiable. However, before an amendment is refused on the grounds of excipiability, it must be clear that the amendment will (not may) render the pleadings excipiable.<sup>10</sup>

[26] For the reasons set out above, I am not satisfied that a proper case has been made out for the refusal of the amendment on the basis of excipiability.

### *Prescription*

[27] In respect of the third claim the plaintiff is quite correct that it is a new claim that was not advanced in the original particulars of claim. The possible prescription of this claim was raised in passing and suffers from the same lack of particularity as the issue of excipiability.

[28] On the issue of prescription, I will refer to *Grindrod (Pty) Ltd v Seaman*,<sup>11</sup> wherein Foxcroft J held that prescription could be raised during an application for an amendment that

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<sup>8</sup> *Fischer Seelenbinder Associates CC v Steelforce CC* 2010 (2) NR 684 (HC) para 22.

<sup>9</sup> Also see *Cross v Ferreira* 1950 (3) SA 443 (C) at 449G-450 G.

<sup>10</sup> *Bowring Barclays & Genote (Edms) Bpk v De Kock* 1991 (1) SA 145 (SWA).

<sup>11</sup> *Grindrod (Pty) Ltd v Seaman* 1998 (2) SA 347 (C).



prescription either if it were the common cause or in situations where the claim or right to claim were 'known to have prescribed'. The court was of the view that no purpose would be served in allowing the amendment sought, only to have it dismissed after the success of a special plea. However, the issue of prescription was, in my view, not properly raised by the plaintiff and as a result, I do not deem it sufficient to refuse the plaintiff's application for leave to amend on the basis of possible prescription.

### Conclusion

[29] In conclusion, I must reiterate what has been said many times in this jurisdiction. Legal practitioners must desist from deposing to affidavits on behalf of their clients, save for exceptional and compelling reasons. Such reasons must be disclosed in the affidavit and must be exceptional.

[30] Although the plaintiff did not raise this issue, I cannot emphasise enough that even where the defendant's legal practitioner indicates that some of the claims were omitted due to her oversight as in the current matter, the client must depose to the founding affidavit.<sup>12</sup>

### Costs

[31] In terms of rule 52(8), the defendant is liable for the cost of this application, limited to rule 32(11).

### Order

[32] My order is set out above.

	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Plaintiff</b>	<b>Defendant</b>
S Namandje	K Angula

<sup>12</sup> See *Prosecutor-General v Paulo and Another* 2017 (1) NR 178 (HC), at p.184, para 16, *Shihepo v Project Hope Namibia* (HC-NLD-CIV-ACT-CON 218-2021) [2022] NAHCNLD 61 (13 June 2022).

Of Sisa Namandje & Co Inc. Windhoek	Of Angula Co. Windhoek
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