

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING IN TERMS OF PRACTICE DIRECTION 61

Case Title: Marmorwerke Karibib (Proprietary) Limited Plaintiff and Transnamib Holdings Limited Defendant	Case No: HC-MD-CIV-ACT-CON-2017/01542 Division of Court: Main Division Heard on: 12 March 2024
Heard before: Honourable Mr Justice Usiku	Delivered on: 5 April 2024
Neutral citation: <i>Marmorwerke Karibib (Proprietary) Limited v Transnamib Holdings Limited</i> (HC-MD-CIV-ACT-CON-2017/01542) [2024] NAHCMD 156 (5 April 2024)	
Order: 1. The defendant's application for leave to amend is dismissed. 2. The defendant is ordered to pay the plaintiff's costs occasioned by the application for leave to amend. Such costs are to include costs of one instructing and two instructed counsel. It is further directed that such costs shall not be limited by the provisions of rule 32(11). 3. The defendant is further ordered to pay the plaintiff's wasted costs occasioned by the vacation of trial dates on 29 August 2023. 4. The matter is postponed to 8 May 2024 at 15h15 for status hearing. 5. The parties shall file a joint status report on or before 24 April 2024.	
Reasons for order:	
USIKU J: <u>Introduction</u>	

[1] This is an application by the defendant for leave to amend its plea. For the sake of convenience, I shall refer the parties as they are cited in the action.

[2] On 10 May 2017, the plaintiff instituted the present action against the defendant. In its summons, the plaintiff pleads that the parties had entered into a written agreement during 1992 or 1993, in terms of which the defendant sold to the plaintiff certain immovable property for the purchase price of N\$3000, payable on registration of the transfer. The plaintiff further pleads that it complied with its obligations and tenders to perform its further obligations as may become due. According to the plaintiff, the defendant failed to transfer the property into the plaintiff's name. The plaintiff, therefore, among other things, prays for an order directing the defendant to take necessary steps to ensure that it complies with its obligations in terms of the agreement.

[3] In its plea, the defendant raised three special pleas, namely:

- (a) special plea of prescription,
- (b) special plea of non-compliance with s 1(1) of the Formalities in Respect of Sale of Land Act No. 71 of 1969, and,
- (c) special plea of lack of ministerial approval.

[4] On 7 August 2023, the defendant filed a notice signalling its intention to amend its special plea. The plaintiff filed a notice of objection. Subsequently, the defendant filed the present application for leave to amend.

Defendant's notice of intention to amend

[5] In summary, the proposed amendments seek to introduce into the plea allegations that:

- (a) at the time when the deed of sale was concluded, the defendant was not the registered owner of the immovable property;
- (b) the defendant was not authorised by the owner of the immovable property to conclude the deed of sale;
- (c) the deed of sale is invalid and unenforceable as it was concluded in 1992 and/or 1993, prior to the coming into effect of National Transport Service Holding Company Act 28 of 1998; and that;
- (d) in the premises the deed of sale is invalid and is of no force and effect as the defendant had no right or authority or basis in law and/or in fact to conclude the deed of

sale.

Plaintiff's notice of objection

[6] In summary, the plaintiff objects to the proposed amendments on account that:

(a) the notice of intention to amend seeks to make dramatic amendments to the defendant's special plea by adding new paragraphs 14 to 30.5, constituting inter alia a material, belated and unexplained change of front, mid-trial and seeking to raise substantial new issues;

(b) the notice and its timing are fundamentally inimical to the ethos of judicial case management and overriding objective provided for in rule 1(3);

(c) the stance now sought to be adopted by way of the proposed amendments contradicts agreed common cause facts under order 3 of the Pre-Trial Order dated 28 October 2019.

(d) the proposed amendments will render the defendant's pleadings excipiable for not disclosing a defence or lacking averments necessary to sustain a defence and/or for being vague and embarrassing to the prejudice of the plaintiff;

(e) the proposed amendments are inconsistent with and materially contradict the stance adopted in the third point *in limine* (third special plea) and the agreed common cause facts;

(f) the proposed amendments seem to be premised on the erroneous belief that, for the sale agreement to constitute a valid sale, the seller has to be the owner or have been authorised by the owner to sell the property; and;

(g) the proposed amendments contain no allegation or basis as to why, in law, the deed of sale is 'invalid and is of no force of law and/or effect'.

The application for leave to amend

[7] The defendant states that, in the initial plea which the defendant seeks to amend, the issue regarding the ownership and title to the land at the time the deed of sale was concluded, had not been raised. That issue was not brought to the attention of the defendant by its erstwhile legal practitioners. The defendant submits that the intended amendment will not prejudice the plaintiff to the extent that it cannot be compensated by a costs order on a party and party scale, limited to the costs set out under rule 32(11).

Opposition to the application for leave to amend

[8] In its opposition to the application, the plaintiff submits that application is unfortunate, unfounded and represent a further delay in the finalisation of the matter. The plaintiff submits further that the application be dismissed with costs not limited in terms of rule 32(11) and that such costs be on the scale of attorney and client and to include the costs of one instructing and two instructed counsel. The plaintiff further submits that the recent vacation of trial dates was occasioned by the defendant's notice of intention to amend and therefore the defendant should be ordered to pay wasted costs incurred by the recent vacation of the trial dates in this matter.

Analysis

[9] The principal issue for determination is whether the defendant should be granted leave to amend its plea in the terms as set out in the notice to amend.

[10] In order to persuade the court to exercise its discretion in its favour, an applicant for leave to amend must show that the proposed amendment is worthy of consideration and introduces a triable issue. The court shall then weigh the reasons and explanation given by the applicant for the amendment, against the objections raised by the opponents. Where the proposed amendment will prejudice the opponent or would be excipiable, the amendment should be refused.¹

[11] In the present case, one of the plaintiff's contentions is that the defendant seeks the introduction of amendments which, if allowed, will render the pleadings (as amended) excipiable and that the proposed amendments are premised on an erroneous belief that for the sale agreement to constitute a valid sale, the seller has to be the owner or have been authorised by the owner to sell the property.

[12] Having considered the proposed amendments, I am of the view that the proposed amendments are principally premised on a notion that for a sale agreement to be valid, the seller need to be the owner or have been authorised by the owner of the thing sold. This much is apparent from the provisions of paras 15 to 19 and paras 23 to 30 of the notice to amend. In addition to the foregoing, the substance of the defence raised in paras 20 to 22 read with para 23 of the notice to amend, is that the deed of sale is invalid and unenforceable because at the

¹ *Trans-Dankensberg Bank Ltd v Combined Engineering* 1967 (3) SA 632 at 641.

time it was concluded the immovable property was not the property of the defendant.

[13] It is trite that it is not a requirement for a valid contract of sale that the seller must be the owner of the thing sold.² Considering that the defendant's proposed amendments are principally premised on the notion that a seller need to be the owner of the thing sold for the contract to be valid, I am of the opinion that the amendments should not be allowed on the ground that they would render the plea excipiable on the basis that the proposed amendments fail to disclose a defence alternatively for being vague and embarrassing that the plaintiff would be unable to ascertain a basis for the defence.

[14] For the foregoing reason, the application for leave to amend stands to be dismissed.

[15] On the issue of costs, I am of the view that costs should follow the event in the present circumstances. The plaintiff requests that costs not be limited by rule 32(11). To determine this issue, I have had regard to the approach and the considerations set out in *SAPA v Minister of Trade and Industry* 2015 (1) NR 260 at p 282. I have considered that the parties are litigating more or less with equality of arms. I have also considered the complexity and the importance of the matter to the parties, the number of interlocutory motions in the life of the case (about three in this case), the merits (or lack thereof) and the stage at which the present application was launched. Having considered the foregoing issues, I am of the view that the costs should not be limited as contemplated in rule 32(11). Furthermore, the plaintiff prays for a costs order including costs of one instructing and two instructed counsel. Given the importance of the matter to the parties I am satisfied that those costs are justified. However, I am not persuaded by the plaintiff's arguments that the costs to be awarded should be on a punitive scale.

[16] I am also of a view that the plaintiff is entitled to an order in its favour for the wasted costs in respect of the vacation of trial dates on 29 August 2023.

[17] In the result, I make the following order:

1. The defendant's application for leave to amend is dismissed.
2. The defendant is ordered to pay the plaintiff's costs occasioned by the application for leave to amend. Such costs are to include costs of one instructing and two instructed counsel. It is further directed that such costs shall not be limited by the provisions of rule 32(11).

² *Koster v Norval* [2015] ZASCA 185 [2015] JOL 34890 (SCA) para 4.

3. The defendant is further ordered to pay the plaintiff's wasted costs occasioned by the vacation of trial dates on 29 August 2023.
4. The matter is postponed to 8 May 2024 at 15h15 for status hearing.
5. The parties shall file a joint status report on or before 24 April 2024.

Judge's signature	Note to the parties:
B Usiku Judge	Not applicable
Counsel:	
Plaintiff:	Defendant:
R Töttemeyer (with him D Obbes) Instructed by Fisher, Quarmby & Pfeifer, Windhoek	T Phatela (with him LH Murorua) Instructed by Murorua Kurtz Kasper Incorporated. Windhoek