

REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF  
WINDHOEK



NAMIBIA MAIN DIVISION,

RULING

PRACTICE DIRECTIVE 61

<b>Case Title:</b>  WILLEM GERT EIMAN  and  MOBILE TELECOMMUNICATIONS COMPANY LTD  PLAINTIFF  DEFENDANT	<b>Case No:</b> HC-MD-CIV-ACT-OTH-2023/00329
	<b>Division of Court:</b> HIGH COURT (MAIN DIVISION)
<b>Heard before:</b> HONOURABLE LADY JUSTICE PRINSLOO	<b>Date of hearing:</b> 18 March 2024
	<b>Delivered on:</b> 10 April 2024
<b>Neutral citation:</b> <i>Eiman v Mobile Telecommunications Company Ltd</i> (HC-MD-CIV-ACT-OTH-2023/00329) [2024] NAHCMD 162 (10 April 2024)	
<b>Results on merits:</b>  Merits not considered.	
<b>The order:</b>  1. The application for leave to amend is refused.  2. The plaintiff must pay the costs of the sought amendment, such costs to include the costs of one instructing and one instructed counsel.  3. Costs are limited to rule 32(11).  4. The matter is postponed to <b>25 April 2024</b> at <b>15h00</b> for Status hearing.	

5. The parties must file a joint status report on or before 22 April 2024.

**Reasons for orders:**

Prinsloo J:

Introduction

[1] This is an application to amend the plaintiff's particulars of claim. The plaintiff, Willem Gert Eiman, issued summons against Mobile Telecommunications Company Limited (MTC) on 23 January 2023.

Current pleadings

[2] The plaintiff avers in his particulars of claim that during 2017, he came up with a 'Pre-Paid Multi-Period Telecommunication Concept'. He proposed to MTC that it should consider implementing multiple Aweh products and that it could acquire his idea and/or invention against compensation. Via correspondence to MTC dated 27 April 2017, he indicated that he would allow MTC to take over the intellectual property rights of this idea and/or invention at a rate to be agreed upon by him and MTC. However, MTC launched this product to the public on 26 May 2020 without giving the necessary credit and/or acknowledgement to the plaintiff, who coined the idea. The plaintiff then directed a letter of demand to MTC, wherein he demanded compensation from MTC for its use of his idea. However, MTC maintained that the product launched on 26 May 2020, which resulted from years of research, dates back to May 2015 and that the Aweh concept belongs to MTC. The plaintiff claims that MTC failed to compensate him for using his idea.

[3] In the alternative, the plaintiff avers that he reduced the idea to a protectable form and obtained a copyright on a literary work titled "Pre-paid Multi-period Telecommunications Concept" regarding this idea dated 27 April 2017. The defendant implemented this concept and is using it without acknowledging that it is the plaintiff's idea and without compensation to the plaintiff.

[4] According to the plaintiff, this conduct by MTC was not authorised by him and is an infringement of his copyright rights. The plaintiff further avers that the defendant is generating

substantial revenue from the plaintiff's idea and/or concept and is being unjustifiably and/or unduly enriched at the plaintiff's expense. As a result, he has suffered and continues to suffer damages.

[5] The relief sought by the plaintiff in the main and alternative claims is similar and is as follows:

- a) an order appointing a duly registered Chartered Accountant to prepare and submit to the parties a full account of all defendant's business from 26 May 2020 to the date of judgment to determine the revenue the defendant has generated on account of plaintiff's idea and or concept;
- b) debatement of such accounts;
- c) payment of 15% of the total income so generated by MTC on account of the plaintiff's idea and or concept;
- d) payment of an amount equal to 15% of all the future income that MTC will continue to generate from the use of the plaintiff's idea and or concept;
- e) interest on the aforesaid damages, a tempora morae at the rate of 20% per annum from the date of judgment to date of final payment, and
- f) costs of suit.

#### Amendment sought

[6] The plaintiff seeks to amend his particulars of claim by substituting the words 'idea' and 'concept' with the word 'product'.

[7] The plaintiff states that the reason for seeking the amendment is that the plaintiff was issued with a copyright on the 'Pre-Paid Multi-Period Telecommunication Product'.

#### Opposition

[8] The defendant filed its opposition in terms of rule 52(4). Its opposition can be summarised as follows:

- a) Main claim: The particulars of claim contains no allegations on contract or any other basis in law upon which MTC would be liable to pay any compensation to the plaintiff.
- b) Alternative claim: The defendant contends that the plaintiff claims compensation for using

his product due to copyright. However, copyright law does not afford the right to compensation and does not protect an idea or product. In this regard, the defendant maintains that the plaintiff makes no allegations that he is entitled to copyright in terms of the Copyright and Neighbouring Rights Protection Act<sup>1</sup> (Copyright Act) or how the Act was contravened as BIPA (Business and Intellectual Property Authority) had no power to register such copyright.

c) The relief sought: The particulars of claim contains no allegations to establish a basis in law for the extraordinary relief claimed.

[9] The defendant, therefore, contended that if the court grants the amendment as sought, it will be excipiable.

[10] The defendant submitted that the amendment by replacing the word 'concept' with the word 'product' is of no consequence as the particulars of claims remain defective as before as the underlying allegations remain the same.

#### Legal principles applicable and discussion

[11] Rule 52 of the Rules of Court regulates the amendment of pleadings, and the court may entertain an application for amendment at any stage of the proceedings. I do not intend to replicate this rule for the purposes of the current ruling.

[12] In *Windhoek Municipal Council v Pioneerspark Dam Investment CC*,<sup>2</sup> the Supreme Court discussed the principles applicable to amendments with reference to *IA Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC*.<sup>3</sup> After discussing the approach that the court should have in considering amendments, the court proceeded to state as follows:

'37. The Full Court in *IA Bell* proceeded to provide detailed guiding principles applicable to amendment of pleadings under JCM, which are neatly summarised by the Judge-President in his recent work *Court Management Civil Procedure of the High Court of Namibia: Law, Procedure and Practice*.<sup>4</sup> Relevant for present purposes are the following:

<sup>1</sup> Copyright and Neighbouring Rights Protection Act 6 of 1994.

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

<sup>3</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>4</sup> P T Damaseb *Court Managed Civil Procedure of the High Court of Namibia: Law, Procedure and Practice* (2020) at p 102-103.

- Although the court has discretion to allow or refuse an amendment, the discretion must be exercised judicially.
- An amendment may be brought at any stage of a proceeding. The overriding consideration is that the parties, in an adversarial system of justice, decide what their case is; and that includes changing a pleading previously filed to correct what it feels is a mistake made in its pleadings.
- A litigant seeking an amendment is craving an indulgence and therefore must offer some explanation for why the amendment is sought.
- The case for an explanation of why the amendment is sought and the form it will take will also be determined by the nature of the amendment: whether or not an explanation under oath would be required will thus depend on the circumstances of each case; the more substantial an amendment, the more compelling the case for an explanation under oath. Correcting a typographical error would thus not require an explanation under oath.
- (The need for) a reasonably satisfactory explanation for a proposed amendment is strongest where it is brought late in proceedings and/or where it involves a change of front or withdrawal of a material admission. In the latter instance, tendering wasted costs or the possibility of a postponement to cure prejudice is not enough. The interests of the administration of justice require that trials proceed on dates assigned for the hearing of a matter.’

38. The Full Court in *IA Bell* further held that if a party has failed to provide an explanation on oath or otherwise in circumstances where one was called for, the proposed amendment should be disallowed.<sup>5</sup>

39. The Judge-President in *IA Bell* stressed that amendments should less readily arise following the introduction of JCM:<sup>6</sup>

“The system of judicial case management in which practitioners are by law required from an early stage in the life of a case to limit issues and identify the real issues for determination by the court has the undoubted merit, and therefore imposes the duty on the practitioner, to consult early, thoroughly and to obtain all relevant evidence from the client. That must, of necessity, limit the number of mistakes by counsel on account of not properly understanding a client’s version. It is that logic that informs the ratio in *Scania Finance Southern Africa (Pty) Ltd v Aggressive Transport CC* and *Jin Casings & Tyre Supplies CC v Hambabi*.”<sup>7</sup>

<sup>5</sup> Para 55 and Damaseb op cit p 145.

<sup>6</sup> Para 59.

<sup>7</sup> *Scania Finance Southern Africa (Pty) Ltd v Aggressive Transport CC* 2014 (2) NR 489 (HC) and *Jin Casings*

40. In considering an explanation for an amendment, a court would in our view, in addition to the guiding principles enumerated by the court in *IA Bell*, require that an applicant establish that it did not unduly delay its notice to amend after becoming aware of the evidentiary material upon which it proposes to rely. The applicant would also need to show, as was stressed in *Scania* that the proposed amendment raises a triable issue, which is a dispute which, if established on evidence foreshadowed by the proposed amendment, will be viable or relevant. Following the advent of JCM, where an amendment is sought at a late stage of proceedings, an applicant should also be required to indicate how it proposes to establish its amended case and its prospects of succeeding with the new cause would properly be elements in the exercise of the court's discretion, as was expressed in *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd & another*<sup>8</sup> where the court concluded, (as is accurately translated in the headnote):<sup>9</sup>

'The greater the disruption caused by an amendment, the greater the indulgence sought and, accordingly, the burden upon the applicant to convince the Court to accommodate (it).'' (my underlining)

#### *Failure to advance an explanation*

[13] The application to amend was filed approximately ten months after the institution of the action. The pleadings in this matter closed in March 2023. Granted, other interlocutory applications followed after the close of pleadings, but there is no indication why there was such an extensive delay in the filing of the current application.

[14] I scrutinised the plaintiff's application, and nowhere does he advance any reasons for the intended amendment or why it was brought months after the close of pleadings.

[15] Leave to amend cannot be granted for the mere asking, and as a result, I found it prudent to specifically refer to the remarks of the Supreme Court supra paras 37 to 40. In his founding affidavit, the plaintiff only responded to the defendant's grounds of opposition but lost sight of his obligation to advance an explanation for the delay or that the proposed amendment raised a triable issue.

[16] In the founding affidavit the plaintiff referred to specific extractions from the Copyright Act, without applying it to the intended amendments. In my view, the founding affidavit filed in support of the application is wholly unhelpful in enabling the court to consider the application

---

& *Tyre Supplies CC v Hambabi* (I 3499-2011) [2014] NAHCMD 57 (19 February 2014).

<sup>8</sup> *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd & another* 2002 (2) SA 447 (SCA).

<sup>9</sup> At 450 C-D.

properly. The applicant must make out his case in his papers. Schimming-Chase J in *Hunibeb v The Commissioner General Raphael Hamunyela of the Namibian Correctional Service*, referred to *Nelumbo and Others v Hikumwah and Others*, where the Supreme Court had the following to say on this aspect:

[41] Since affidavits constitute both the pleadings and the evidence in motion proceedings, a party must make sure that all the evidence necessary to support its case is included in the affidavit: *Stipp and Another v Shade Centre and Others* 2007 (2) NR 627 (SC) at 634G-H. In other words, the affidavits must contain all the averments necessary to sustain a cause of action or a defence. As was stated in *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*:

“It is trite law that in motion proceedings the affidavits serve not only to place evidence before the Court but also to define the issues between the parties. In so doing the issues between the parties are identified. This is not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits.”

As the adage goes, in motion proceedings you stand or fall by your papers.’

[17] In my view, the plaintiff did not make out a case for granting the amendment sought.

#### *Alleged excipiability*

[18] In light of my findings above, I do not intend to dwell on the issue of excipiability. Still, I must remark that this was an interesting argument to advance, especially because the proposed amendment was limited, which would leave the particulars of the claim to a large extent intact. That would essentially mean that the particulars of claim were excipiable all along, yet the defendant only raises the issue now in response to the intended amendment.

[19] The issue of exception was not raised during the case planning stage, which was the appropriate time to raise an exception in terms of rule 23(3)(a). If the defendant had failed to raise the issue of exception at the case planning stage, it would have been precluded from raising it, unless the defendant approached the court in terms of rule 23(7) and the court determined otherwise, upon good cause shown.

[20] In its opposing papers, the defendant indicated that the amendment, by replacing the

word 'concept' with the word 'product', is of no consequence as the particulars of claim remains defective as before, and the underlying allegations remain the same.

[21] The defendant seeks a second bite at the 'exception' cherry. If the plaintiff's papers were in order, raising a possible exception in this way would not have allowed it to veer off the amendment.

#### Conclusion

[22] The application for leave to amend is refused for reasons set out above, with costs. Such costs to include the costs of one instructing and one instructed counsel.

#### Order

[23] My order is set out above.

	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Plaintiff</b>	<b>Defendant</b>
R Rukoro (assisted by J Tjizo) Of Jerhome Tjizo & Company Inc. Windhoek	P Barnard (assisted by S Nambinga) Of Palyeenime Inc. Windhoek