REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA

JUDGMENT

PRACTICE DIRECTION 61

MAIN DIVISION, WINDHOEK

Case Title:	**Case No:**
OLLINS MABUKU MULATEHI APPLICANT/PLAINTIFF and ENKEHAUS PRIVATE HOSPITAL CLOSE CORPORATION 1ST RESPONDENT/1ST DEFENDANT DR. KOMBO BAKASHALA 2ND RESPONDENT/2ND DEFENDANT MINISTER OF HEALTH AND SOCIAL SERVICES 3RD DEFENDANT	INT-HC-OTH-2024/00530 / HC-MD-CIV-ACT-DEL-2022/02873 **Division of Court:** HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE PARKER, ACTING	**Date of hearing:** 24 SEPTEMBER 2024 **Delivered on:** 15 OCTOBER 2024
Neutral citation: *Mulatehi v Enkehaus Private Hospital Close Corporation* (HC-MD-CIV-ACT-DEL-2022/02873) [2024] NAHCMD 600 (15 October 2024)	

IT IS ORDERED THAT:

1. The application to amend the particulars of claim is dismissed with costs and the costs are

capped in terms of rule 32(11) of the rules of court.

2. The matter shall proceed as a partly heard proceeding and remains postponed to 2 December 2024 to 6 December 2024 at 10h00 for Civil Part-Heard hearing.

Following below are the reasons for the above order:

PARKER AJ:

[1] This application is brought by way of notice of motion by the applicant (the plaintiff in the action) to amend specified parts of the plaintiff's particulars of claim. The defendants (the first and second defendants) *qua* respondents have moved to reject the application. The third defendant has not participated in these proceedings. Mr Muluti represents the plaintiff and Dr Diedericks represents the defendants. I shall refer to the parties interchangeably, as the context allows, as plaintiff or applicant and defendants or respondents.

[2] *IA Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC*[1] has settled the principles and approaches that ought to be applied by the court in the determination of applications to amend pleadings. I shall apply those principles and approaches in the determination of the instant application.

[3] First and foremost, it is stressed that to succeed, the applicant must satisfy the court that good grounds existed to grant the indulgence sought, and the good grounds must be found in the founding papers and not in the sanitized submissions by counsel, because submissions by counsel do not constitute evidence.[2]

[4] Furthermore, it has been said that:

'A court cannot compel a party to stick to a version either of fact or law that it says no longer represents its stance. That is so because litigants must be allowed in our adversarial system to ventilate,

[1] *IA Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC* [2014] NAHCMD 306 (17 October 2014).
[2] *Herle v Van Ryhn* [2024] NAHCMD 137 (27 March 2024) para 2.

what they believe to be the real issue(s) between themselves and the other side.'[3]

[5] It is important to note that the principle enunciated in the foregoing quotation is a general principle of law. Like all general principles, this principle, too, is subject to qualifications.[4] The qualifications are set out in paras [6] and [7] below.

[6] It is an idle boast to suggest that judicial case management ('JCM') has not had an impact on the parties' aforesaid right to amend pleadings. Naturally, the basis upon which the courts in the past decided the principles relating to amendment did not take into account the ethics of JCM in terms of the rules of court. The common thread that runs through the judgments since the introduction of JCM is that a late amendment and change of front, like in the instant case, call for an explanation, that is, sound and sufficient explanation.

[7] The unchanged position under the rules is that an amendment of pleadings may be granted at any stage of the proceedings and that the court has discretion in the matter, to be exercised judicially. The common-law position that a party may amend pleadings at any stage of proceedings, as long as the amendment does not operate to the prejudice of the opponent, remains; except that, like every other procedural right, it is also subject to the ethos of JCM. That includes the imperative of just, speedy and inexpensive disposal of cases.[5]

[8] The aforesaid qualifications resolve themselves into the following requirements, all of which the applicant must satisfy to succeed. The requirements are as follows:

1. A party seeking an amendment is craving an indulgence and, therefore, he or she must give sound and sufficient explanation for the amendment sought. (First requirement)

2. The proposed amendment, if allowed, should not defeat the overriding objectives of the rules of court, being the imperative of just, speedy, inexpensive disposal of cases. (Second requirement).

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[3] Petrus T Damaseb *Court-Managed Civil Procedure of the High Court of Namibia: Law, Procedure and Practice 1 ed (2020) at 145.*
[4] *Herle v Van Ryhn* Footnote 2 para 10.
[5] Petrus T Damaseb *Court-Managed Civil Procedure of the High Court of Namibia: Law, Procedure and Practice* footnote 3 at 144.

3. The proposed amendment should not operate to the prejudice of the opposite party. (Third requirement).

[9] It is to the founding affidavit as to the facts on which the applicant relies for relief in accordance with rule 65(1) that I now direct the enquiry. I have carefully pored over the founding affidavit, which runs into 24 full-scalp pages, to determine whether the applicant has satisfied the requirements laid out in para [8] above. Having done that, I come to these findings. The single and naked explanation given by the applicant in his 24-page affidavit is only this: 'The amendment is essential as it aligns closely with the testimonies provided by the (plaintiff's) four expert witnesses and the joint expert report.' The plaintiff continued: 'It (ie the amendment) seeks to introduce evidence that has already been accepted by the court through expert testimonies.'

[10] On any pan of legal scales, there is no weight in the aforesaid statements to qualify as sound and sufficient explanation for the amendment sought. Accordingly, I conclude that the applicant has failed to satisfy the requirement in para [8](1), that is, the first requirement. I now pass to consider the requirement in para [8](2), that, is the second requirement.

[11] The applicant's complete silence on the second requirement is significant. The plaintiff instituted action on 6 July 2022. The matter has been subjected to the whole gamut of JCM procedures, as Dr Diedericks reminded the court, and the trial of the action commenced on **6 July 2022**. Evidence has been led from four plaintiff expert witnesses. If the amendment was allowed, it would indubitably defeat and set out naught the overriding objectives of the rules.

[12] If the amendment was allowed, the following *minima* procedures will surely have to be repeated:

1. The defendants shall amend their plea.

2. The plaintiff may wish to replicate.

3. The matter must go through all the JCM procedures all over again, including:
   (a) a new case management conference, after the filing of a new case management report;

(b) the filing of new witness statements of opinion witnesses and expert witnesses, occasioned by the change of front by the plaintiff brought on by the amendment;

(c) a new pre-trial conference must be held, after the filing of a new proposed pretrial order; and

(d) the holding of a series of status hearings, after the filing of status reports that has characterized the JCM procedures.

[13] That the aforesaid *minima* procedures will have to be proceeded with by hook or by crook, if the amendment was allowed, is – unfortunately and sadly – lost on Mr Muluti. That monumentally significant fact is not lost on Dr Diedericks. It need hardly emphasising that for the procedures mentioned in para [12] above, it will take a sound and cogent explanation to persuade the court to exercise its discretion in favour of allowing an amendment sought in the late hour of the proceedings.[6]

[14] The conclusion is therefore inescapable that the plaintiff has failed to tell the court why the imperative of just, speedy and inexpensive disposal of causes coming before the court should be sacrificed in the determination of the present application to amend. It follows irrefragably that the applicant has failed to satisfy the second requirement set out in para [8] (2) above, too. I proceed to consider the third requirement under para [8] (3) above.

[15] The third requirement under para [8] (3) above is that the amendment sought should not operate to prejudice the opposite party. In his founding affidavit, all that the applicant has done is to sing the tune that the respondent will not be prejudiced, but he has not given one iota of explanation to support his contention. It is not enough to state – without more – that the opposite party will not be prejudiced. The prejudice that will be occasioned to the defendants if the amendment was allowed looms large if one considers the plaintiff's failure to satisfy the requirements in para [8](1) and (2). Furthermore, if the amendment was allowed, the defendant's constitutional right to have the dispute adjudicated within a reasonable time will be violated. By a parity reasoning, the defendants' legal right under rule 1(3) of the rules of court, too, will be

[6] Petrus T Damaseb Court-managed *Civil Procedure of the High Court of Namibia: Law, Procedure and Practice* footnote 3 at 143.

violated. In sum, the amendment, if allowed, will cause the defendants such prejudice as cannot be cured by an order for costs.[7] It would cause grave injustice to the defendants.

[16] In any case, as I have found previously, the plaintiff has not discharged the onus cast on him to establish that the defendants will not be prejudiced, if the amendment was allowed.[8]

[17] In sum, from the founding affidavit, I find that the plaintiff has not brought the application to correct what he feels is a mistake made in the pleadings or to ventilate the real issues between the parties,[9] that is, 'to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done'.[10]

[18] Based on these reasons, in the exercise of my discretion, I hold that the application should be refused in the interest of due administration of justice. In the result, I order as follows:

1. The application to amend the particulars of claim is dismissed with costs and the costs are capped in terms of rule 32(11) of the rules of court.

2. The matter shall proceed as a partly heard proceeding and remains postponed to 2 December 2024 to 6 December 2024 at 10h00 for Civil Part-Heard hearing.

Judge's signature:	**Note to the parties:**
	Not applicable.
Counsel:	
APPLICANT/PLAINTIFF	**1ST & 2ND RESPONDENTS/DEFENDANTS**

[7] HJ Erasmus *Superior Court Practice* (1994) at B1-178 and the cases there cited.
[8] Ibid at B1-179 and the cases there cited.
[9] Petrus T Damaseb Court-managed *Civil Procedure of the High Court of Namibia: Law, Procedure and Practice* footnote 3 at 146.
[10] HJ Erasmus *Superior Court Practice* footnote 8 at B1-178 and the cases there cited.

P Muluti of Muluti & Partners, Windhoek	J Diedericks Instructed by Afrika Jantjies and Associates, Windhoek