REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: I 132/2013

In the matter between:

ANTONIO MARTINS **PLAINTIFF**

and

JOSUA MEDUSALEM **1ST DEFENDANT**

THE TOWN COUNCIL OF OSHAKATI **2ND DEFENDANT**

Neutral citation: *Martins* v *Medusalem* (I 132-2013) [2015] NAHCNLD 28 (16 July 2015)

Coram: CHEDA J

Heard: **22 June 2015**

Delivered: **08 July 2015**

Flynote: Application to amend particulars of claim is a substantive application which should be by notice of motion and filing of Heads of Argument before a hearing in terms of the Rules of Court.

… costs should not be awarded willy-nilly as they might scare litigants from seeking legal recourse through the courts.

Summary: Applicant sought to amend his particulars of claim, but, chose not to make a formal application in terms of Rules 52 and 32 of the Rules of this court. Respondent argued that the application should have been by a substantial application as it sought to alter material terms of the contract. Respondent further argued that if a substantial application is not made, defendant will be prejudiced as the application seeks to materially alter the course of action. Application is dismissed.

ORDER

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1. The application is dismissed with costs.

JUDGMENT

CHEDA J:

[1] Applicant (Plaintiff) [hereinafter referred to as “Applicant” issued summons out of this court on the 22 July 2013 which were subsequently defended.

[2] On the 5 December 2013 defendant [hereinafter referred to as “Respondent” filed an exception to the particulars of claim. On the 31 October 2014 applicant applied to amend his particulars of claim which were opposed by respondent on 14 November 2014.

[3] On the 17 November 2014 the matter was set down for hearing, but, was not heard as applicant applied for leave to amend his particular of claim which leave was granted on condition that applicant's legal practitioner, should file her substantive application on or before 13 February 2015 and respondent's legal practitioner to file his replying affidavit or some such other response by the 27 February 2015 and Heads of Argument to be filed in terms of the High Court Rules.

[4] Upon commencement of the hearing Mr. Greyling for respondent raised a point in *limine.* His point was that Ms. Mainga for applicant failed to file a substantive application for amendment of the particulars of claim in terms of court order of the 17 November 2014. I, allowed this main application as I wanted to deal with these issues together. Ms. Mainga argued that her application for amendment is in terms of Rule 52. Rule 52 (1) – (6) which reads, thus;

> "(1) A party desiring to amend a pleading or document, other than an affidavit, filed in connection with a proceeding must give notice to all other parties to the proceeding and the managing judge of his or her intention so to amend.
> (2) A notice referred to in subrule (1) must state that unless objection in writing to the proposed amendment is made within 10 days the party giving the notice will amend the pleading or document in question accordingly.
> (3) If no objection in writing is made the party receiving the notice is considered as having agreed to the amendment.
> (4) A party giving notice of amendment is, unless the court otherwise orders, liable to pay the costs thereby occasioned to any other party.
> (5) The managing judge must set the matter down for hearing and thereafter the managing judge may make such order thereon as he or she considers suitable or proper and that order must be made within 15 days from the date of the hearing.
> (6) Whenever the court has ordered an amendment or no objection has been made within the time specified in subrule (2), the party amending must deliver the amendment within the time specified in the court's order or within five days after the expiry of the time specified in subrule (2)."

In her submissions she argued that there is no requirement for applicant in these circumstances to file Heads of Argument. It is for that reason that she felt that she was not legally obliged to do so.

[5] On the other hand, Mr. Greyling argued that this is a matter where a substantive application should be filed. He further argued that the said application was not *bona fide,* but, was designed to circumvent the application for exception filed in this matter and is therefore pending before this court.

[6] Ms. Mainga for applicant submitted that there was no need to file a substantive application in this matter. She referred the court to Rule 52 (supra). She further submitted that her argument is based on the advice of counsel.

[7] The general rule is that amendments can be made with the consent or deemed consent of the other parties, at any stage of the proceedings before judgement. The issue before court is whether or not applicant should have made a substantive application for amendment of his particulars of claim. It is now an accepted principle under the Roman Dutch law that there are two types of amendments. Some can be of a formal nature while others are of a substantial nature. I am attracted by the remarks of in Swartz v Van Der Walt T/A Sentraten 1998 (1) SA 53 at 57 where Claassen J stated:

> "Amendments to pleadings can be of a wide variety. Some are simple and purely formal in nature, ie to amend arithmetical and clerical errors in pleadings. Other amendments may be more substantial, for example amendments seeking to withdraw an admission made on the pleadings. It is trite law that amendments constituting the withdrawal of an admission have to be done on affidavit. However, it would, in my view, be absurd to interpret the new Rule 28(4) as prescribing the use of the Rule 6 procedure in all cases of applications for leave to amend pleadings. In cases where a mere word or figure requires amendment, it would be totally absurd to file a notice of motion supported by an affidavit to secure such amendments.

Affidavits would only be necessary in more substantial amendments, such as the withdrawal of admissions." (SA Rules)

[8] It should be noted by the legal practitioners that this type of application is an interlocutory application and is therefore governed by Rule 32 of the Rules of the High Court. It should be borne in mind that there are certain steps to be followed by applicant before the matter is placed before court for argument, in the event that it is opposed. In terms of Rule 32 (9) and (10) no application should be brought to court without a report seeking the directions from the managing Judge as to the way forward. This procedure was not in the old rules. Its introduction was designed to expedite a speedy resolution of the disputes where possible.

[9] In my respectful view, therefore, I find that it will be an absurdity indeed to file a notice of motion to amend a word or figure, but, where the intended amendments are likely to change the particulars of claim in a material way thereby necessitating a response from the defendant it is essential for applicant to make a substantial application supported by substantive affidavit(s).

[10] In *casu* the said verbal application falls far short of the requirements as laid down by the Rules and case authorities. Applicant has not ventilated the disputes in this matter. It has failed to take the court in its confidence which is necessary in order to enable the court to objectively arrive at an appropriate decision. Such ventilation and support, thereof, would have been achieved through a substantive application.

[11] Mr. Greyling has asked the court to grant a special order of costs in this application. His reasons are that:

"1. The proposed amendment will still render the particulars of claim expiable on the grounds that it is bad in law and does not sustain any cause of action in respect of Second Defendant in that;

1.1 No offer was made by Plaintiff to Second Defendant as alleged. Plaintiff sought "authority" from Second Defendant in its capacity at a local authority as per AM 2, to transfer his rights to First Defendant. It was therefore impossible in fact and in law for the Second Respondent to "accept" the alleged offer;

1.2 Plaintiff did not disclose any alleged representation allegedly made by First Respondent to him nor the terms of the agreement between himself and First Defendant to Second Defendant. Accordingly, there is no basis in law on which it can be argued that Second Defendant acted "wrongfully" and the amended particulars of claim does therefor not sustain any cause of action against Second Defendant.

2. The proposed amendments do not ventilate any dispute or real dispute between Plaintiff and Second Defendant. There can only be a dispute of any nature between Plaintiff and Second Defendant once the purported cancellation of the agreement between plaintiff and First Defendant has been adjudicated upon and Second Defendant unlawfully refuses to give effect to such cancellation and not before.
3. The proposed amendment does not contain any tender for the payment of the admitted arrears of N$850,000-00 due to Second Defendant."

The general rule is that the question of costs is the discretion of the court, which discretion is to be exercised judicially, see *Kruger Bros & Wasserman v Ruskin 1918 AD 63 at 69,* where *Innes CJ* stated:

> "the rule of our law is that all costs – unless expressly otherwise enacted – are in the discretion of the Judge. His discretion must be judicially exercised, but it cannot be challenged, taken alone and apart from the main order, without his permission."

[12] I have fully examined this argument. While I agree that the amendment will indeed change and/or alter the cause of action thereby, necessitating other measures by defend it is, however, not a case where punitive costs should be awarded. The courts should be slow in granting punitive costs as this may unnecessary discourage litigants from seeking justice in the courts, see *De Villiers v Daggafontein Minies Ltd 1960 (2) SA 507 (W) 516; Nkume v Transunion Credit Bareau (Pty) Ltd and another 2014 (1) SA 134 (ECM); Moosa v Lalloo 1957 (4) SA 207 (D) 225 and Mallinson v Tanner 1947 (4) SA 681 (T) 6861.* However, the courts

have a discretion when it comes to the question of costs. I am of the view that this is not a case where punitive costs should be awared.

[13] The following order is made:

1. The application is dismissed with costs.

M Cheda

Judge

APPEARANCES

PLAINTIFF:	I. Mainga Of Inonge Mainga Attorneys
1ST DEFENDANT:	S. Aingura Instructed by Lorentz Angula Inc., Windhoek
2ND DEFENDANT:	J. Greyling (Junior) Of Jan Greyling & Associates, Oshakati