



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: I 56/2016

JONA HAMBATA

PLAINTIFF

and

CHARLENE SCHWARTZ

1st DEFENDANT

2nd DEFENDANT

Neutral citation: *Hambata v Schwartz* (I 56/2016) [2017] NAHCMD 223 (7 August 2017)

Coram: PRINSLOO J

Heard: 07 August 2017

Delivered: 07 August 2017

Reasons Given: 08 August 2017

ORDER

1. Application for leave to amend pleadings is refused;
2. Application for leave to file expert report/summary is refused.
3. Cost to follow the result.

JUDGMENT

Prinsloo J:

[1] This court refused the plaintiff leave to amend his pleadings and file expert report/summary and herewith are my reasons in summary form. For purposes of this ruling I will refer to the parties as they are in the main action:

Application for amendment of pleadings:

[2] At the commencement of the trial, Mr. Enkali, legal representative for the plaintiff, moved an application from the bar to amend the value of the damages as set out in the particulars of claim. During his oral submissions Mr. Enkali indicated that it came to his attention on Friday after roll call that there was a difference between the figures in the discovered document and that of the particulars of claim.

[3] Mr. Diedericks, legal representative for the first defendant, opposed the application and argued that the proposed amendment will be prejudicial to the first defendant in this matter as it is not clear if the proposed amendment relates to consequential damages or direct damages.

[4] Mr. Diedericks further argued that as the defendant does not have the benefit of the application being brought on application and it is difficult to determine the nature of the amendment sought. He further submitted that as the plaintiff chose to move the application from the bar, he will have to accept the consequences following.

[5] Mr. Enkali stated that he only recently received the file and had to consult with the plaintiff telephonically as the plaintiff is not residing in Windhoek and only managed to have a face to face consultation this morning, which is apparently sought to explain the application from the bar. In this regard the court was referred to the matter of *Loubser v De Beers Marine Namibia (Pty) Ltd*¹.

[6] I am fully in agreement with Mr. Enkali that an application for amendment can be moved from the bar, especially if it is a minor amendment. It is also common cause that Rule 52(9) provide for that the court may during the hearing but prior to judgment grant leave to amend pleadings of documents on such terms on cost or otherwise as the court find to be proper and suitable.

[7] I am further alive to the fact that there may be incidences; where due to unforeseen circumstances an application to amend pleadings may become necessary at a late stage of the proceedings. Should that be the case, the applicant will have to give a full and acceptable explanation of the circumstances which gave rise to the late application.

[8] The court would almost invariably allow an amendment unless the party applying for it has acted "*male fide*" or the "injustice" to the other side "cannot be compensated by costs" or words to similar effect.

[9] This liberal approach by the courts towards amendments should not be regarded as creating an impression that leave to amend can be obtained merely for the asking. A litigant seeking to make an amendment is in fact craving an indulgence from the court and must offer some explanation for why the amendment is required and more especially when the application for amendment is not timeously made then a reasonably satisfactory account must be provided².

¹ (I 341/2008) [2013] NAHCMD 382 (26 September 2013).

² Herbstein & van Winsen 5th Edition page 680.

[10] This was clearly set out in the leading case dealing with amendment of pleadings, i.e. *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC*³. I can do no better than to concur with the Honorable Damaseb JP when he discussed amendment of pleadings since inception of judicial case management and stated:

[48] The common thread that runs through the judgments of this court is that a late amendment and change of font calls for an explanation. ...In my view, the explanation offered for the amendment and its timing by the party seeking the amendment is no less important and could well be decisive.'

And further:

[55] . . . A litigant seeking the amendment is craving an indulgence and therefore must offer some explanation for why the amendment is sought. Amendments take different forms and vary from the simple and obvious typographical or arithmetic, to the more substantial such as change of front or withdrawal of an admission. Given the latter reality, one cannot apply the same test to proposed amendments. The case for an explanation why the amendment is sought and the form it will take will also be determined by the nature of the amendment. The less significant the amendment, the less the formality for the explanation. For example, why should a typographical error be explained on oath? The more substantial an amendment, the more compelling the case for an explanation under oath. 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. If the proposed amendment is justified on the ground that it arose from a mistake, the mistake relied on must be bona fide and will only be allowed if good grounds exist for allowing the amendment. Although a litigant does not itself have to explain on oath the basis of an alleged mistake necessitating an amendment, its failure to do so may in an appropriate case be held against it if the explanation by the legal practitioner does not disclose good grounds for the alleged mistake or the necessity for the amendment. . . '

³ (I 601-2013 & I 4084-2010) [2014] NAHCMD 306 (17 October 2014).

[11] The plaintiff seeking the amendment ought reasonably to have known, a long time ago, what his case was all about and effect the proposed amendments timeously and in accordance with the rules, on application. Court must also point out that although Mr. Enkali provided some explanation as to why the amendment was sought at such a very late stage of the proceedings it is not a satisfactory reason to say that the necessity to amend only came to the attention of plaintiff's legal practitioner on Friday, apparently after roll call.

[12] Mr. Enkali indicated that he only recently received the file to proceed to trial with. He however did not explain why he, or his predecessors, were not able to deal with the application for amendment timeously and why the application is only moved on the morning of the trial.

[13] This court is not satisfied that the plaintiff has disclosed good grounds for the necessity for the amendment.

Filing of Expert summaries:

[14] This brings us to the second leg of Mr. Enkali's application, namely, leave to file the expert report/summary during course of the trial. The plaintiff would have become aware of the factual position relating to quantum if the expert summary was filed in terms of the case management order.

[15] The non-compliance with the court's judicial case management order is common cause. According to the case management order dated 08/08/2016 the expert summaries/reports were due to be filed on or before 16/10/2016.

[16] On 21/11/2016 the matter was set down for trial for period 07-11 August 2017. A period of some 8 months has passed since date of that order.

[17] As the expert report is not considered a pleading, the plaintiff would not be barred for filing the said report⁴. However, the plaintiff remains in non-compliance with a court order as per Part 6 of the Rules of Court and as Mr. Diedericks quite correctly pointed out that the plaintiff had to seek condonation for said non-compliance.

[18] The plaintiff has been in non-compliance with the relevant court order, dated 08/08/2016 for the better part of a year already. This is not a matter where the plaintiff can merely request leave to file the expert report and then assume all is well.

[19] The court got the distinct impression that the legal representative for plaintiff is of the opinion that he is entitled to proceed and file the expert report and call the witnesses as a matter of fact.

[20] That is indeed not the case. In the instances where a party has been ordered by the court or in terms of the rules, to do a certain act by a specified time but fails to do so, that defaulting party should approach the court and apply for condonation of its non-compliance.

[21] Once condonation is applied for, the insightful remarks of O'Regan AJA made in the matter of *Petrus v Roman Catholic Archdiocese*,⁵ becomes very relevant:

'It is trite that a litigant seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the grant of condonation. Moreover, it is also clear that a litigant should launch a condonation application without delay. In a recent judgment of this court, *Beukes and Another v SWABOU and Others [2010] NASC 14 (5 November 2010)*, the principles governing condonation were once again set out. Langa AJA noted that "an application for condonation is not a mere formality" (at para 12). The affidavit accompanying the condonation application must set out a "full, detailed and accurate" (at para 13) explanation for the failure to comply with the rules. In determining whether to grant condonation, a court will consider whether the explanation is sufficient to warrant the grant of condonation, and will also consider the litigant's

⁴ Rule 54(3).

⁵ 2011 (20 NR 637 (SC)).

prospects of success on the merits, save in cases of “flagrant” non-compliance with the rules which demonstrate a “glaring and inexplicable” disregard for the processes of the court (*Beukes*, at para 20).’

[22] From reading rule 55 (1)⁶ it is clear that it allows the court “on good cause shown” to invoke its powers to uplift the bar, extend the time, relax the conditions or condone non-compliance. The plaintiff thus had to apply for condonation, showing good cause as to why the court should condone the failure to comply with the case management order dated 08/08/2016.

[23] The application for condonation is however glaringly absent.

[24] Expert witnesses in general are dealt with in rule 29 which states:

‘(2) A party to any proceedings is entitled to call an expert witness at the trial if-

(a) the name of the expert, his or her field of expertise and qualifications are included in the case management report required in terms of rule 24;

(b) a summary of such expert’s opinion and reason therefor are include in report required in terms of rule 24; and.....

(3) The parties must propose in the report to be submitted to the managing judge in terms of rule 24, the date on which the particulars referred to in subrule (2) will be delivered.’

[25] To date the particulars of the expert witnesses plaintiff intend to call are not on record as required by Rule 29, only a date for delivery of the said report is referred to in the case management report.

⁶ 55. (1) The court or the managing judge may, on application on notice to every party and on good cause shown, make an order extending or shortening a time prescribed by these rules or by an order of court for doing an act or taking a step in connection with proceedings of any nature whatsoever, on such terms as the court or managing judge considers suitable or appropriate.

[26] It is also important to keep Rule 93(5) in mind regarding the proposed witness affidavits plaintiff wish to file in respect of the experts. Rule 93(5) provides that if a witness statement for use at the trial is not served within the time period prescribed by the court, the witness may not be called to give oral evidence, unless the court on good cause shown permits such a witness to give evidence.

[27] Since the matter was set down for trial, three more status hearings were held to determine pre-trial status of this matter and legal representatives for the plaintiff did not pick up that their expert witness summary has not been filed in accordance with the case management order.

[28] To date the statements have still not been obtained. The plaintiff thus remains in non-compliance with the case management order.

[29] The plaintiff can therefore not be allowed file the expert report contrary to the case management order unless he complies with the rules as discussed *supra*.

[30] My order is therefore the following:

1. Application for leave to amend pleadings is refused;
2. Application for leave to file expert report/summary is refused.
3. Cost to follow the result.

JS PRINSLOO
JUDGE

APPEARANCES:

For the Plaintiff:

Mr. S. Enkali

Of:

Kadhila Amoomo Legal Practitioners, Windhoek

For the Defendant:

Mr. Diedericks

Of:

Diedericks Incorporated, Windhoek