

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON APPLICATION FOR AMENDMENT

CASE NO: I 1216/2015

In the matter between:

TEICHMANN PLANT HIRE (PTY) LIMITED

PLAINTIFF

and

RCC MCC JOINT VENTURE

DEFENDANT

Neutral citation: *Teichmann Plant Hire (Pty) Ltd v RCC MCC Joint Venture* (I 1216/2015)
[2018] NAHCMD 2 (17 January 2018)

Coram: MASUKU, J

Heard on: 9 November 2017

Delivered on: 17 January 2018

Flynote: Civil procedure – Application for leave to amend – Rule 52(9) of the rules of court – considerations to be taken into account in granting or refusing such applications – Result - application granted.

Summary: This is an opposed application for leave to amend the plaintiff's particulars of claim. The plaintiff instituted an action against the defendant in respect of a works contract and a hire contract. However, the plaintiff applied for leave to amend its particulars of claim just before the pre-trial hearing. The defendant objected thereto. In terms of this amendment, the plaintiff wishes to introduce new agreements into the pleadings, which agreements are based on the same claim. The defendant's bases for objection were manifold, including that the explanation for the lodging of the application is weak and that the wasted costs incurred by it thus far as well as the prejudice that it will suffer, if leave to amend was granted. Further, that the reasons given in support of the application for leave to amend, were not reasonable enough to warrant the grant of leave to amend.

Held; the court has discretion to grant or refuse an application for leave to amend.

Held; in our adversarial system a party may not be compelled to hold on to a version, which no longer represents his or her true case or interests.

Held; in the instant case, the interests of justice and the overall objectives of judicial case management require that the application for amendment should be granted.

ORDER

- a) The Plaintiff's application for leave to amend its particulars of claim is hereby granted.
- b) The plaintiff is to pay the costs occasioned by the amendment, as tendered.

- (c) The plaintiff is to pay the costs of the application for leave to amend, consequent upon the employment of one instructing and one instructed counsel on the ordinary scale.
- d) The amended particulars of claim must be filed on or before 31 January 2018.
- e) The defendant must plead to the amended particulars of claim on or before 15 February 2018.
- f) The matter is postponed to 7 March 2018 at 15:15 for a status conference hearing.

JUDGMENT

MASUKU, J:

Introduction

[1] This is an application by the plaintiff for leave to amend its particulars of claim in terms of the provisions of rule 52. Needless to say, the application is vigorously opposed by the defendant.

The parties

[2] The plaintiff is Teichmann Plant Hire (Pty) Ltd, a company duly registered and incorporated in terms of the Company laws of Namibia.

[3] The defendant is RCC MCC Joint Venture, a joint venture, the partners of which are a) the Roads Construction Company Limited, a company incorporated in terms of the Roads Construction Company Limited Act 14 of 1999 of Namibia and b) MCC Communication Engineering Technology Co Ltd, a company duly registered in China with its registered office at Building No. 2, No. 1 Kanding street, Economical Development District, Beijing, China.

Background

[4] The plaintiff instituted an action in this court dated 16 April 2015 against the defendant, wherein the plaintiff sued the defendant for the payment of N\$ 55 024 553.55. This amount is alleged to be in respect of management fees due to the plaintiff in terms of a works contract and an associated hire contract between the two protagonists. The defendant defended the action, where after the plaintiff filed an application for summary judgment. This application was subsequently refused by this court in November 2015.

[5] In consequence, the defendant accordingly filed its plea and claim in reconvention in August 2016. In early October 2016, the plaintiff filed its replication and its plea to the claim in reconvention. In August 2017, the plaintiff filed its notice of intention to amend its particulars of claim. The defendant objected thereto on grounds that will be traversed in the course of this ruling. The plaintiff thereafter filed an application for leave to amend and eventually had the matter set down for hearing of the intended amendment. The plaintiff made discovery and filed witness statements of J. C. Pretorius and N. J Putter on 23 March 2017.

Appearances

[6] Mr. J. Marais SC appeared on behalf of the plaintiff, with Ms. De Jager, assisting him. On the other hand, Mr. G. Coleman appeared on behalf of the defendant, with Mr. R. Maasdorp, assisting him. The court records its indebtedness to both counsel for the lucid and compelling argument they delivered. They performed their duty to this court with admirable assiduity.

Submissions on behalf of the plaintiff

[7] Mr. Marais opened his address by pointing out that despite the radical amendment of the Rules of court, this court still retains its inherent jurisdiction to regulate its own procedures in the interest of justice. He pointed out that courts should, in this regard, be generally loath to refuse applications for amendment, save where the intended

amendment is *mala fide* or would cause injustice to the opposing party, which injustice cannot be cured by an appropriate order as to costs.

[8] He further argued that the learned author Erasmus¹ explains that there is no objection in principle to a new cause of action or defence being added by amendment, even if it might change the character of the proceedings, in particular where it is *bona fide* and where, if refused, it would result in the same parties coming before court on basically the same issues in due course. Further, he highlighted that according to Erasmus, a delay in bringing an application for an amendment in and of itself, without more, is no ground for refusing an amendment. However, the existence of prejudice occasioned by the intended amendment could be a ground for refusing an amendment, he further contended.

[9] It was his further contention that where the amendment will aid in the proper ventilation of the dispute between the parties and the achievement of justice, the court should allow same. He contended very strongly that this is such a case. In this regard, he further pointed out that to date, no pre-trial order has been issued; no witness statements have been filed and that trial dates have not been allocated to the parties. The application to amend is thus brought, he further argued, at a relatively early stage in the proceedings and there is no cogent reason, for same to be refused. It was his position that the amendment sought is straight-forward and was necessitated by the 'belated discovery of the additional agreements', which agreements form the basis of the existing claim.

[10] Mr. Marais further argued that the costs incurred by the defendant thus far, were in respect of causes of action which continue to exist and thus nothing was wasted. However, the amendment may require the defendant to reconstitute consultations and to amend its plea, insofar as the new causes of action (although, not entirely new) are

¹ H J Erasmus, A M Breitenbach and D E Van Loggerenberg. *Superior Court Practice* (1997) at B1-126A.

concerned and thereby incur costs. These extra costs, he further stated, create prejudice, but same can be remedied by an appropriate costs order.

[11] A further argument advanced on behalf of the plaintiff was that the defendant instituted a claim in re-convention. In this regard, if due to the new causes of action, the plaintiff were to withdraw its action as is suggested by the defendant, the claim in reconvention would continue. It would thus be improper and inconvenient to follow that course. What should not be lost sight of is that the claims by both parties are 'tied at the hip', as it were and considerations of convenience and proper use of the available court time and resources dictate that the matters be dealt with simultaneously. Finally, in this regard, he argued that the withdrawal of the plaintiff's action, as suggested by the defendant, could result in the court giving conflicting judgments in respect of the same issues and parties, should the plaintiff institute fresh proceedings to be heard at a later stage.

[12] In relation to the reasons for the application for leave to amend, it was Mr. Marais' argument that the plaintiff's South African counsel, Mr. Hay, in his founding affidavit, filed in support of the application for leave to amend, explained that during the preparation of the trial and towards the end of 2016, the total debt sued for arose from more than just two contracts, that is, that some of the invoices attached to the existing particulars of claim related to other agreements, which the plaintiff now wishes to add to the particulars of claim.

[13] It was also at this stage, it was argued for the plaintiff, that it dawned upon Mr. Hay that the amount claimed in respect of the works contract was overstated by an amount of N\$ 2.5 million. These revelations, so it was argued, necessitated an amendment to the existing particulars of claim, by the introduction of the additional contracts and the reduction of the amount claimed in respect of the works contract. The effect of this, it was

argued, is that the amended particulars of claim are not entirely new, but merely serve to connect the already attached invoices to the correct contracts. The claim, in essence, still remains the claim for the same debt.

[14] It was also explained in the plaintiff's affidavit in support of the application that due to the December holidays in the year 2016 and the voluminous documents which had to be scrutinised to pair the correct invoices to the correct contracts, it took months to complete that laborious exercise. This prolonged period was also due to the unavailability or an insufficient number of the plaintiff's personnel to undertake the necessary tasks. This delay, Mr. Marais argued, should not result in the plaintiff being denied the relief it seeks.

Arguments on behalf of the defendant

[15] Returning the salvo, Mr. Coleman pointed out that this is not the first amendment sought by the plaintiff. The plaintiff filed a replication to the plea and a plea to the claim in reconvention in October 2016. He pointed out that an amendment may not be had merely for the asking and in this regard, a compelling and reasonably satisfactory explanation for the amendment sought must be proffered. In this regard, he continued, legal practitioners have a duty to take full instructions before committing a client to a pleading. He argued further that the later the amendment is sought in the proceedings, the greater the need for a full and reasonable explanation. It was also his contention that applications for leave to amend brought at an advanced stage of the proceedings, frustrate the overriding objectives of judicial case management and should therefore be discouraged by the courts refusing the entreaties of the applicant for amendment.

[16] At the inception of the matter, Mr. Coleman further submitted, the plaintiff pursued the action aggressively, placing the defendant under enormous pressure in the circumstances. This included the plaintiff filing an application for summary judgment, which caused the defendant to incur substantial costs, estimated at N\$ 600 000.00. Now

that it suits the plaintiff, it has mounted a horse that is no longer aggressive in pursuit of the claim. The costs incurred by the defendant before the plaintiff's present stance, Mr. Coleman argued, should be regarded as wasted costs, should the amendment be allowed.

[17] A further argument by Mr. Coleman was that the additional invoices added by way of annexure "G" to the new particulars of claim, read with annexure "C" of the original particulars of claim, which pre-date 30 May 2014, will have prescribed. The amendment, if allowed, would require the defendant to read through 'reams of documents to address prescription and potential exceptions, this after it had already pleaded'. This, he submitted was prejudicial to the defendant, and that a favourable costs order would grant very little succour, if any, in the circumstances.

[18] Mr. Coleman further argued that the new particulars of claim constitute a new cause of action. In this regard, he contended, it adds five agreements and 'shifts the goal posts into an earlier period'. With these consequences in mind, he submitted, the plaintiff should either withdraw the action, tender costs or then institute the action *de novo*. If not, the only other course open to the plaintiff, is to pursue the current matter in its present form.

[19] In his spirited address, Mr. Coleman further submitted that the fact that the additional agreements only came to the attention of the South African legal practitioner at the end of 2016 during preparation for trial, is neither a compelling nor persuasive reason for granting the amendment in the circumstances. In essence, he argued that the plaintiff had made its bed and must accordingly lie on it, whatever the repercussions.

[20] Finally, Mr. Coleman argued that the defendant will not only be financially prejudiced if the amendments were to be allowed, but will be prejudiced in its defence. In this regard, it will be compelled to address prescribed and vague and embarrassing claims in the new particulars of claim, which the court should not allow at this very stage. It was his closing submission that the application to amend should thus be dismissed with costs on the normal scale. However, if the court is persuaded that the amendment should be allowed, the plaintiff should be ordered to pay the costs incurred by the defendant thus far.

Applicable legal principles and application thereof

[21] Rule 52(9) of the rules of the High Court provides that:

‘The court may during the hearing at any stage before judgment, grant leave to amend a pleading or document on such terms as to costs or otherwise as the court considers suitable or proper.’ (Emphasis added).

This reinforces the argument advanced by the Mr. Marais that the question whether an application for leave to amend should be granted or not, lies within the court’s discretion, hence the permissive tone employed by the rule-maker above.

[22] This court, in the case of *Billy v Mendonca*,² referred to by Mr. Coleman, made reference to the principles as set out in the *locus classicus* judgment of a Full Bench of this court in *I A Bell Equipement Namibia (Pty) Ltd v Roadstone Quarries CC*³, with regards to amendments. In *Billy v Mendonca*,⁴ this court summarised the applicable principles. These are:

‘(a) amendments may be sought at any stage of the proceedings;

² *Billy v Mendonca* (I 3945-2013) [2016] NAHCMD 391 (16 December 2016).

³ *IA Bell Equipement Namibia (Pty) Ltd v Roadstone Quarries CC*, Case No. I 602/2013 and I 4084/2010

⁴ *Billy v Mendonca* (I 3945-2013) [2016] NAHCMD 391 (16 December 2016).

- (b) in granting or refusing an amendment, the court exercises a judicial discretion, which discretion must be exercised judicially;
- (c) a litigant seeking leave to amend craves the indulgence from the court and must, therefore, proffer some explanation for the amendment sought;
- (d) the explanation proffered will be determined by the nature of the amendment sought. The more substantial the amendment, the more a compelling case for an explanation under oath;
- (e) if a party proffers an explanation that is not reasonably satisfactory of one lacking in *bona fides*, the court may disallow the amendment, especially where the amendment is opposed and has the potential to compromise a firm trial date;
- (h) a court cannot compel a party to stick to a version of fact or law that it says no longer represents its stance and this is because litigants must be allowed in the adversarial system, to ventilate what they believe are the real issues between them.⁵ See *Zamnam Exclusive Furnitures CC v Josef Stephanus Lewies and Cornelia Catherina Lewies, The Trustees of the Lewis Family Trust*.⁶

[23] It is correctly submitted that an application for leave to amend may be brought at any time of the proceedings before the judgment and that the court has a discretion to grant or refuse the application, provided the discretion is exercised judicially. It is also true, that the stage at which proceedings for leave to amend are brought and the nature and extent of the amendment, as well as the explanation proffered by the applicant for amendment, are pivotal considerations in the court's decision-making process.

[24] In this matter, the plaintiff wishes to introduce new contracts, in addition to the works and hire contracts relied upon in the initial particulars of claim. These new contracts, however still pertain to the same invoices referred to and attached to the initial particulars of claim. The claim in substance thus remains the same.

⁶ *Ibid* para. 18.

[25] The plaintiff, in support of the amendment, argued that witness statements had not been filed in the instant case, but as seen in para [5] above, this is not entirely the case. The plaintiff had already filed two witness' statement in March 2017. It is true, however, that the defendant had not, at the stage the application was brought, filed its witness' statements.

[26] The explanation advanced by Mr. Hay in his affidavit, in support of this application leaves much to be desired. How Mr. Hay, who was or should have been well acquainted with his client's case due to proper consultations with the plaintiff, could only learn of these new agreements at such a late stage, is dumbfounding, to say the least. The court would expect more from its officers.

[27] Having said this however, the possibility of this happening to even the most astute and diligent of attorneys, is not entirely impossible or unthinkable and cannot be ruled out, particularly in matters with a morass of paper, running into hundreds, if not thousands of documents. It is often said that to err is human and this is what the explanation, entirely unconvincing, as it is, in essence, amounts to. In this regard, I can do no better than to cite with approval the timeless words that fell from the lips of the learned Judge in *Whittaker v Roos*,⁷ where he said the following regarding mistakes in amendment applications:

'This Court has the greatest latitude in granting amendments and it is necessary that it should have. The object of the Court is to do justice between the parties. It is not a game we are playing in which if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be the wrong facts. But we all know that mistakes are made in pleadings and it would be a very grave injustice, if for a slip of the pen, or an error in judgment, or

⁷ *Whittaker v Roos & Another; Morant v Roos & Another* 1911 TPD 1092.

the misreading of a paragraph in the pleadings by counsel, litigants were to be mulcted in heavy costs. This would be a gross scandal. Therefore, the court will look not look at the technicalities, but will see what the real position between the parties is.⁸ (Emphasis added).

[28] I am of the considered view that in the circumstances, the mistake was genuine and the parties must be allowed to ventilate the real issues with the fullness of relevant documents availed. In this case, I am of the considered opinion that it cannot be said that the application is *mala fide* and furthermore, it appears to me that whatever manifold inconveniences and prejudice that the defendant may suffer as a result of the granting of the amendment, is very capable of being adequately balmed by an appropriate order as to costs.

[29] In this regard, I take on board the remarks of the court in *Tidesley v Harper*,⁹ where the court reasoned as follows:

‘My practice has always been to give leave to amend, unless I have been satisfied that the party was acting *mala faide*, or that by his blunder, he has done some injury to his opponent which cannot be compensated for in costs or otherwise.’

As indicated above, the injury suffered by the defendant as result of allowing the amendment cannot be said to be of paraplegic proportions, so as to justify this court to deny the amendment sought. An appropriate costs order will effectively assuage the defendant’s ‘injuries’ and the prejudice suffered, and at the same time ensure that both parties return to court with all the relevant documents at hand and have the court adjudicate on what are the real issues *inter partes*.

[30] These new contracts even if admitted, would not deprive the defendant of an opportunity to challenge same, well before the commencement of the trial. Whether this

⁸ *Ibid* at 1102.

⁹ *Tidesley v Harper* 10 Ch.D 393, per Lord Bramwell at p396.

will be a challenge based on prescription of the claim or an exception, is entirely up to the defendant. 'If a party provides an explanation that is not reasonably satisfactory or is lacking in bona fides, the court may disallow the amendment especially if it is opposed and has the potential to compromise a firm trial date'.¹⁰ (Emphasis added).

[31] The *I A Bell Equipment Namibia (Pty) Ltd*¹¹ case, clearly did not set a peremptory rule but respected the retention of the court's discretion. The court may disallow the amendment, in circumstances where an explanation might seem unreasonable. However, each case has to be decided on its merits and the court's discretion remains intact at all times and should be exercised in full appreciation of the attendant facts together with the interests of justice.

[32] I must interpose at this juncture and advert to the court's decision in *Billy*. What seems to have turned the scales against the applicant for amendment in that case was the lateness of the application. The application for leave was brought after the close of the plaintiff's case and the nature and extent of the amendment (which entailed amending both the plea and the counterclaim), was held by the court to be extensive. Furthermore, the time allocated to the matter for finalisation had to be extended to allow the amendment to take its course, thus affecting the early finalisation of the case.

[33] The defendant's counsel, has vigorously argued, with all the powers of persuasion at his command, that the plaintiff, has two options at its disposal. Firstly, it could withdraw the entire action and institute fresh proceedings based on the new particulars of claim or secondly, the plaintiff may simply proceed with the action as is. I take issue with both these supposed options. Firstly, the defendant has instituted a counterclaim against the plaintiff in respect of the current claim before this court. The counterclaim would, in all

¹⁰ *IA Bell Equipment Namibia (Pty) Ltd v Roadstone Quarries CC*, Case No. I 602/2013 and I 4084/2010 para. 55.

¹¹ *Ibid.*

probability, proceed even if the plaintiff withdraws its action. This would necessitate dealing with the same matters, probably involving the same evidence and witnesses at different times, much to the chagrin of the parties and their witnesses. The court would not be spared the agony as well.

[34] The effect of the plaintiff withdrawing these proceedings and instituting a fresh action, on the same issues, against the same defendant and on the same cause of action, may conceivably have detrimental effects. It would mean that the High Court could potentially give two conflicting judgments, in respect of the same parties, the same issues and the same cause of action. Such a situation would constitute a serious disservice to the administration of justice and certainly nugatory the overall objectives of the judicial case management. Furthermore, the court would be required to use its time and resources in a reckless manner, calling upon parties to appear in court on similar and related transactions at different times. I am of the considered view that the interests of justice in this matter require of this court to grant an application for leave to amend, as I hereby do.

[35] If the court was to consider applying the alternative option suggested on the defendant's behalf, it must be recalled that the Full Bench in *I A Bell* expressed itself as follows, 'the court cannot compel a party to stick to a version either of fact or law that it says no longer represent its stance. That is so because a litigant must be allowed in our adversarial system to ventilate what they believe to be the real issue(s) between them and the other side.'¹² The practicalities and realities of the matter, considered *in tandem* with the interests of justice, stand in unison and proclaim that the application deserves to be granted in this matter.

[36] It must be mentioned, in fairness, that in the grand scheme of things, the defendant's objections are understandable and cannot, in all the circumstances, be

¹² Ibid.

regarded as totally unreasonable. The principles applicable, considered in the light of the attendant circumstances, considered as a whole, appear to lean in favour of the plaintiff. There is, of course no doubt that the defendant will be prejudiced if the amendment were to be allowed. However, this prejudice is one which, as indicated earlier in the ruling, can be cured by an appropriate costs order.

Disposal

[37] Having regard to all the foregoing, I am of the considered view that the following order is condign and is therefor issued:

- a) The Plaintiff's application for leave to amend its particulars of claim is hereby granted.
- b) The plaintiff is to pay the costs occasioned by the amendment, as tendered.
- c) The plaintiff is to pay the costs of the application for leave to amend, consequent upon the employment of one instructing and one instructed counsel on the ordinary scale.
- d) The amended particulars of claim must be filed on or before 31 January 2018.
- e) The defendant must plead to the amended particulars of claim on or before 15 February 2018.
- f) The matter is postponed to 7 March 2018 at 15:15 for a status conference hearing.

T.S. Masuku
Judge

APPEARANCES

PLAINTIFF:

J Marais SC (with him B De Jager)

Instructed by Andreas Vaatz & Partners, Windhoek

DEFENDANT:

G Coleman (with him R Maasdorp)

Instructed by AngulaCo Inc., Windhoek