

LEVY, AJ
(P) 989/98

SUMMARY: CIVIL MATTER

SOUTH AFRICAN SUGAR ASSOCIATION Vs NAMIBIA SUGAR
DISTRIBUTORS (PTY) LTD

Application for condonation to oppose an Application to
Amend of Plea.

The bad faith of Defendant's Attorney obstructed the timeous
notice to object to the proposed amendment.

Condonation granted. No person can take advantage of their
own bad faith or mistake.

IN THE HIGH COURT OF NAMIBIA

In the matter between:

SOUTH AFRICAN SUGAR ASSOCIATION

PLAINTIFF/APPLICANT

and

NAMIBIA SUGAR DISTRIBUTORS (PTY) LTD

DEFENDANT/RESPONDENT

CORAM: LEVY, AJ

Heard on: 2000-03-24

Delivered on: 2000-04-07

JUDGMENT

LEVY, AJ: This is an application brought by Applicant (Plaintiff) asking the Court to condone its failure to object timeously to a notice of an intended amendment to Defendant's Plea which Respondent (Defendant) purports to have given Applicant. Unlike the usual application where the failure to act timeously is due to the Applicants own fault, the failure in this instance was brought about by Respondent.

Advocate D F Smuts appears for the applicant and Advocate R Heathcote appears for the

The Applicant herein, is the Plaintiff in an action instituted against Defendant for damages in excess of NS6 million. That action was due to be heard in November 1999, but, when it was called, by agreement it was postponed *sine die*, Defendant to pay the costs of the postponement. Before the matter was called, Defendant sought to amend its plea with a pleading dated 19th November 1999 without invoking Rule 28. This provoked a notice dated 13th December 1999, in terms of Rule of Court 30 on the grounds that the proposed amendment was an irregular proceeding. The notice set out in detail the alleged irregularities including an allegation that one of the intended amendments constituted the withdrawal of an admission.

This notice in terms of Rule 30, was duly served at the offices of Respondent's/Defendant's Attorney.

This notice resulted in Respondent, purporting to act in terms of Rule 28, "serving" a notice to amend on 17th December 1999, not on the offices of Applicant's Attorney but at the offices of the Law Society, where most of the Attorneys practising in Windhoek, have agreed that for convenience of other practitioners service may be effected there, as well at their offices.

It is the "serving" of this notice to amend that has led to this application. It is alleged by Applicant that by reason of the grounds set out in Rule 30 proceedings, Respondent was aware that Applicant would have objected to the proposed amendment and that Respondent's legal representative acting in bad faith, then devised a scheme to prevent Applicant from objecting timeously within the Rules to the proposed amendment which would then *ipso facto* become an amendment of its Plea.

Applicant's objection filed on 21st January 2000, was out of time, and Applicant now applies for condonation in order to object to the said proposed amendment.

It is necessary to quote *in extensa* two paragraphs in the affidavit of Attorney Angula made in support of the application for condonation:

"6. As is apparent from Annexure "B", this notice to amend was not served at the offices of my firm but at the office of the Law Society where most firms of legal practitioners have agreed to accept service. As is apparent from the notice itself, this service was performed in the afternoon of 17 December 1999 (at 14h00). This was after my firm had closed for the year (at 13h00 on 17 December 1999) for the customary Christmas and New Year recess. The fact that our office closed between 17 December and 5 January was well known to all other firms of legal practitioners in Windhoek and to the Respondent's legal practitioners of record in particular. Indeed, the respondent's legal practitioner, Ms Katja Klein herself subsequently informed me that her firm also closed for the recess on that date.

7. I was in office on 17 December until our firm closed at 13h00 that day. The Respondent's legal practitioners of record did not alert me to the fact that service of this notice would be given. I am aware that the notice was drafted by the Respondent's counsel on 15 December already. This is also the original date given on the notice itself, which was subsequently changed by hand to 17 December 1999. In the absence of an explanation, which has not to date been forthcoming, I am constrained to infer in the circumstances that service of this notice was held back until the afternoon of the 17th and then served on the Law Society office with the knowledge that it would not come to my attention until after the resumption of legal business in January 2000. I also point out that a Rule 35(3) notice dated 16 December was served by the respondent's legal practitioners at the Law Society on the morning of 17 December 1999 at 09h43 but that the notice to amend, prepared on 15 December was curiously subsequently served at 14h00 on 17 December. I annex the Rule 35(3) notice, marked 'C'."

These paragraphs contain serious allegations from which it could be inferred that there was a scheme calculated to avoid an objection being lodged timeously to the notice of amendment

which Respondent should have known, Applicant would have made as it had been raised in the Rule 30 application.

Mr Smuts argued that in the absence of a denial by Respondent the facts alleged by Mr Angula are taken to be admitted as well as the inference which Mr Angula has drawn from the facts. Mr Smuts relies on the well-known cases of: *Stellenbosch Farmers' Winery Limited v Stellenvale Winery (Pty) Ltd* 1957(4) SA 234 (C) at 235 E-G; *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623 (A).

Respondent has not only not denied these allegations but has conceded in its affidavit, as did its counsel in argument, that the reason advanced by Applicant as to why the objection was filed late is reasonable. However, Respondent says that notwithstanding the foregoing, Applicant is not entitled to an order condoning the late filing of its objection because Applicant must show;

".....that its opposition to the Respondent's proposed amendment is *bona fide* and that the Respondent does not have reasonable prospects to succeed with an application to amend its pleadings in the manner as indicated in its Rule 28 notice, even if the Notice of Objection has been filed in time by the Applicant."

Had Applicant objected timeously in terms of Rule 28, Respondent would have had to apply by way of notice of motion supported by affidavits for leave to amend.

The desired amendments relate firstly to amend an amendment of its pleadings dated 19 November 1999 and secondly to amend the pleading as it was when filed on 12 December 1997. The affidavits which Respondent would have had to file in order to obtain the amendment would

have had to explain:

1. Why the most recent amendment of 19 November 1999 was not in order at the time it was filed;
2. Why the pleading of 12 December 1999 was not in order when it was filed and why it has taken two years before an amendment was applied for;
3. Why both amendments are material;
4. Why Applicant has not been prejudiced particularly by the delay in the making of the application after two years. This prejudice includes satisfying the Court that evidence necessary and available to Applicant in December 1997 is still available today.

Respondent contends that in order to get condonation, the onus is on Applicant to prove that Respondent will not succeed in its application for amendment. Respondent is therefore trying to benefit from its own irregular and prejudicial conduct. Having obstructed Applicant from objecting to its proposed amendment, it is trying to take advantage thereof by throwing the onus on Applicant. The principle is clear that no-one can benefit from its own bad faith or mistakes. Whether the inference of bad faith which Mr Angula says can be drawn, is or is not, drawn, Respondent cannot gain any advantage therefrom.

Furthermore there is in law of contract, the doctrine of fictional fulfilment. Where a party to a contract deliberately and in bad faith prevents the fulfilment of a condition in order to escape the consequences of a contract, the law considers the unfulfilled condition fulfilled as against the party guilty of bad faith.

Koenig v Johnsen & Co Ltd 1935 A.D. 262.

The present inquiry is certainly not of a contractual nature but on a parity of reasoning, it is clear that if the conduct of Respondent's legal representative was in bad faith and it obstructed the timeous objection by Applicant, this application should be granted forthwith.

In its opposing affidavit Respondent has emphasised that to grant the application would be a waste of time because the opposition to the amendment will not succeed. Nevertheless, Respondent wasted more time by not bringing a counter application for the amendment. Nevertheless, Respondent insists on the Court dealing with the proposed amendments. Should condonation be granted the Court will not confine Applicant to the grounds of opposition mentioned in its Notice of 21 January 2000.

The law reports are studded with cases dealing with applications to amend pleadings from which it is clear that the granting of an amendment is not a formality. There are certain essential legal requirements which an applicant for an amendment must fulfil.

In *Krogman v Van Reenen* 1926 O.P.D. 191 at 194-5, De Villiers JP said:

".....even if the party applying for an amendment tenders to pay wasted costs and to consent to a postponement and to other conditions and terms which will avoid all direct prejudice to the other party as regards his prospects of succeeding in the action, that will not entitle him to claim an amendment as of right, but he will have to show reasonable grounds, he must show for instance, that the matter involved in the amendment is of sufficient importance to justify him in putting the Court and the other party to the manifold inconveniences of a postponement, and that the necessity for the amendment has arisen through some reasonable cause, even if it be only *bona fide* mistake, which would, I take it be the minimum reasonable cause admissible in this connection."

In *Euro-shipping Corporation Of Monrovia v The Minister of Agriculture and Others* 1979(2) S A 1072 (C), the Court considered the question as to whether it should grant the amendment of a Particulars of Claim where there was a delay of almost 5 years. It rejected the application. The Court held that the Plaintiff did not prove that there was no prejudice to the Defendant.

In dealing with the question of prejudice the Court said that "if there was real doubt whether or not prejudice or injustice will be caused.....if the amendment is allowed, it should be refused." Where there is a lengthy delay the likelihood of prejudice is greater than otherwise. The nature of the prejudice, is that because of the delay, the other party may not be able to get the evidence it would have been able to get had the pleadings been in proper form originally. Consequently in *Oblowitz Bros v Guardian Insurance Co. Ltd* 1924 CPD 64 where Defendant applied to amend its plea after the lapse of 18 months the Court refused to allow the amendment. In *Rosenberg v Bitcom* 1935 WLD 115, the Court held that delay was unreasonable and rejected the application.

(See also *Parkes v Parkes* 1920 WLD 1 at 4-5; *GMF Kontrakteurs (Edms) Bpk and Another v Pretoria City Council* 1978(2) SA 219 T; *Van Aswegen & Another v Fechter* 1939 OPD 78 at 88-89)

Respondent has filed, in response to this application, an affidavit dealing with certain issues which should have accompanied its application for an amendment. It has not counterclaimed for an amendment but in any event, even at this stage, its affidavit falls far short of what is required.

Applicant contends that Respondent is withdrawing an admission. Respondent says at most its

plea is ambiguous. If it is ambiguous, it is vague and embarrassing and capable of being excepted to. Failure to have excepted by the Applicant can result in a special order as to costs. If the pleading is capable of the meaning allocated to it by Applicant, Respondent has then by its own dereliction, allowed Applicant to labour under a false impression and once again, it may well be that Applicant has been prejudiced in not gathering the evidence timeously, which it would have gathered had the pleading been in order.

(C.f. *President-Versekeringsmaatskappy Bpk v Moodley* 1964(4) SA 109 (T) at 110H- 111A)

In its opposing affidavit even at this late stage, Respondent says:


".....I point out that Applicant does not advance a single reason as to why it will be prejudiced if the amendment will be allowed."

As already stated the onus is on Respondent to show there will be no prejudice and if there is doubt, the amendment will be refused.

For these reasons the order of the Court is:

1. Condonation is granted to Applicant for failing to object timeously in terms of Rule 28 to the proposed amendment of its plea by Respondent dated 17 December 1999;
2. Leave is granted to Applicant to amend and amplify its Notice of Objection if it so desires;

Defendant shall pay the costs of this application.

 LEVY, AJ /

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Counsel for the Plaintiff-Applicant: Advocate D F Smuts

Instructed by: Messrs Lorentz & Bone

Counsel for the Defendant/Respondent: Advocate R Heathcote

Instructed by: Messrs P F Koep & Co