HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: I 920/2012

In the matter between:

SIEGFRIED ECKLEBEN **APPLICANT/PLAINTIFF**

and

MOBILE TELECOMMUNICATIONS LIMITED **RESPONDENT/DEFENDANT**

Neutral citation: *Eckleben v Mobile Telecommunications Limited* (I 920/2012) [2013] NAHCMD 277 (9 October 2013)

Coram: UEITELE,J

Heard on: **22 August 2013**

Delivered on: **09 October 2013**

Flynote: Practice - Pleadings - Amendment - Court will normally lean in favour of granting amendments - Court will refuse amendment where other party would suffer injustice or prejudice - Amendment would also be declined where it would render pleading excipiable.

Summary: On 5 July 2007 the plaintiff being the successor in title and the defendant concluded an agreement in writing, in terms of which the former let to the defendant a small room and tower for the purposes of erecting and installing equipment and an MTC antenna. In terms of the lease agreement the agreement would expire on 31 July 2016.

On 25 January 2011 the defendant gave the plaintiff two months written notice of its intention to terminate the lease agreement. On 17 April 2012 the plaintiff issued summons claiming payment in the sum of N$326 644,73 from the defendant as damages for alleged breach of contract.

The defendants filed a plea and the plaintiff responded by filling an application for summary judgment. The defendant opposed the application for summary judgment on the basis that the lease agreement was invalid and unenforceable because so the affidavit read, the leased premises were not identified or identifiable from the lease agreement. In the light of the defence disclosed by the defendant the plaintiff gave notice in terms of Rule 28(1) of his intention to amend his particulars of claim. The defendant objected to the proposed amendments, necessitating a formal application in terms of Rule 28 (4).

The question that needs to be asked here is whether the plaintiff will be prejudice by the intended amended to the extent that the prejudice cannot be cured by an order for costs or a postponement.

Held that the Parole evidence role does not find application this matter and that the intended amended does raise a triable issue. Held further that that the defendant has not demonstrated any prejudice which it will suffer if the amendment were to be allowed. The court therefore exercise its discretion in favour of allowing the amendment

Held that the amendment is granted without departing from the general rule created by rule 28(7) of this Court. The plaintiff is granted leave to amend his declaration in respects as set out in the notice to amend being Annexure “A” to his affidavit in support of his application to amend.

Held that that plaintiff is to pay the wasted costs and that such costs are to include the taxed costs of the present application.

ORDER

(a) The plaintiff is granted leave to amend his declaration in respects as set out in the notice to amend being Annexure “A” to his affidavit in support of his application to amend.

(b) That plaintiff is ordered to pay the wasted costs which are to include the taxed costs of this application.

JUDGMENT

UEITELE, J

INTRODUCTION

[1] This is an application for amendment of the particulars of claim in terms of rule 28 of the Rules of the High Court. I shall refer to the applicants as plaintiff and to the respondent as the defendant. Mr Vaatz represents the plaintiff and Mr Barnard represents the defendant.

[2] The facts are as follows. On 5 July 2007 the late Mr Thilo Neumann (the plaintiff being the successor in title of the said Neumann) and the defendant concluded an agreement in writing, in terms of which the former let to the defendant a small room and tower for the purposes of erecting and installing equipment and an MTC antenna. The lease agreement was annexed to the particulars of claim as Annexure ‘A’. In terms of the lease agreement the agreement would expire on 31 July 2016.

[3] On 25 January 2011 the defendant gave the plaintiff two months written notice of its intention to terminate the lease agreement. On 17 April 2012 the plaintiff issued summons out of this Court claiming payment in the sum of N$326 644,73 from the defendant as damages for alleged breach of contract.

[4] The defendants filed a plea and the plaintiff responded by filling an application for summary judgment. The defendant opposed the application for summary judgment. In the affidavit opposing the application for summary judgment the defendant disclosed its defence and its defence was that the lease agreement was invalid and unenforceable because so the affidavit read, the leased premises were not identified or identifiable from the lease agreement.

[5] In the light of the defence disclosed by the defendant the plaintiff gave notice in terms of Rule 28(1) of his intention to amend his particulars of claim. The defendant objected to the proposed amendments, necessitating a formal application in terms of Rule 28 (4).

THE PROPOSED AMENDMENT AND THE OBJECTIONS TO THE PROPOSED AMENDMENT

[6] In order to appreciate the nature of the intended amendment and the objection to the intended amendment I find it appropriate to in detail quote the proposed ament and the objection to the proposed in full. The plaintiff intends to substitute paragraph 3 of its particulars of claim with the following new paragraph 3:

> "3 (a) The late Mr Thilo Neumann was the owner of a property known as Plot 91 Nonidas, Swakopmund, a property on which he had erected various houses and structures.
>
> 3 (b) In *(sic)* or about the 1st of August 2006 and at Swakopmund, defendant entered into an oral agreement with Mr Thilo Neumann in terms of which defendant would be permitted to erect a MTC antenna and install all equipment and electrical connections required for the erection of such an antenna, which antenna was to be erected in a small room and a tower on top of such room on one of the buildings existing on the premises, the site being agreed upon between the parties. The agreement provided that the defendant would pay Neumann monthly payment of N$3000, 00 per month for the right of erecting and using the indentified tower and room for its antenna.

3 (c) On or about the 5th of July 2007 the said Thilo Neumann and defendant agreed to reduce the terms of their agreement relating to the use of the said room and tower for the purposes of a MTC antenna into a written document described as "Memorandum of lease agreement" a copy of which is annexed hereto and marked annexure "A". The said document was signed by the said Thilo Neumann in Swakopmund on the 5th of July 2007 and by an authorized representative of the defendant on the 19th July 2007 in Windhoek.

3 (d) The said written agreement, Annexure "A" hereto, was drawn by an employee or representative of the document.'

[7] The defendant's objection is based on the grounds that:

'2 The alleged terms of the oral agreement are contradictory in that the oral agreement would allegedly make provision for two distinct possibilities:

2.1 That the late Neumann would afford the defendant the right to erect a MTC antenna in an existing building and to install equipment and electric connections in the room and the tower on top of the room;

2.2 That the late Neumann would transfer the right to defendant to erect and use the identified tower and room for its antenna.

3 The two possibilities are contradictory and mutually destructive. It is not clear what right it is that was to be transferred. This will render the pleadings excipiable.

4 In terms of the written lease agreement attached to the particulars of claim as annexure 'A' the premises to be let are described as follows:

4.1 In clause 1.1.3 as follows:

'the premises' means the portion of the property selected by the lessee for purposes of this Agreement;"

4.2 In the schedule to the agreement clause as follows;

‘1.1 **SPECIAL CONDITIONS**

Initial installment done in temporary. MTC to relocate equipment and antennas to permanent allocated room as it becomes available at no cost to lessor.

5 The terms of the oral agreement as alleged do not appear in the written agreement “A”. The premises as described in the alleged oral agreement are not the same as the premises as described in the written agreement. It is not clear whether plaintiff relies on the terms of the agreement as orally concluded or relies on the terms of the written agreement annexure “A”. Plaintiff is prejudiced in that it does not know what case to meet and how to plead.

6 The allegation in the new paragraph 39(c) is that there was an agreement that the terms of the oral agreement would be reduced to writing, which written agreement is attached as Annexure ‘A’. However, this statement is contradictory due to the fact that the terms of the alleged oral agreement are not the same as the terms of the written agreement annexure ‘A’. These allegations by the plaintiff are inconsistent and will render the particulars of claim vague and embarrassing. The defendant will be prejudiced in pleading and meeting the case.

7 Clause 27 of the written agreement annexure ‘A’ provides as follows:

’27 **WHOLE AGREEMENT**

This agreement constitutes the whole agreement between the parties as to the subject matter and no agreements, representations or warranties between the parties regarding the subject matter hereof other than those set out herein are binding upon the parties.’

8 The plaintiff now attempts to introduce a prior oral agreement in order to rely on such agreement. This is not permitted. The particulars of claim will thus not disclose a cause of action alternatively will be vague and embarrassing.’

[8] I will before I consider the validity or otherwise of the objection briefly set out the principles governing amendments.

THE PRINCIPLES GOVERNING AMENDMENTS

[9] This Court and South African courts have in a line of cases set out the general legal principles relating to amendments of pleadings. I will below briefly outline the principles so set out by the courts. In the matter of *Stolz v Pretoria North Town Council*[1] Ramsbottom, J said:

> 'I think that the way to approach the question of how the discretion ought to be exercised is this. The general rule, as I understand it, is that an amendment to pleadings ought to be allowed if that can be done without prejudice to the other side or without any prejudice which cannot be remedied by an appropriate order as to costs.'

[10] In the matter of *Zarug v Parvathie*, NO[2] Henochsberg, J said:

> '…the following legal principles can be gathered from the decisions quoted to me:
>
> 1. That the Court will allow an amendment, even though it may be a drastic one, if it raises no new question that the other party should not be prepared to meet.
>
> 2. With its large powers of allowing amendments, the Court will always allow a defendant, even up to the last moment, to raise a defence, such as prescription, which might bar the action.
>
> 3. No matter how negligent or careless the mistake or omission may have been and no matter how late the application for amendment may be made, the application can be granted if the necessity for the amendment has arisen through some reasonable cause, even though it be only a bona fide mistake.
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> An amendment cannot, however, be had for the mere asking. Some explanation must be offered as to why the amendment is required and if the application for amendment is not timeously made some reasonably satisfactory account must be given for the delay. Of course if the application to amend is *mala fide* or if the amendment causes an injustice

1 1953 (3) SA 884 (T) at 887.
2 1962 (3) SA 872 (D) at 876.

to the other side which cannot be compensated by costs, or in other words, if the parties cannot be put back for the purposes of justice in the same position as they were in when the pleading it is sought to amend was filed, the application will not be granted.'

[11] In this Court Manyarara, AJ said[3]; with reference to Harms C[4] as follows:

'Approach towards amendments In deciding whether to grant or refuse an application for an amendment the court exercises a discretion and, in so doing, leans in favour of granting it in order to ensure that justice is done between the parties by deciding the real issue between them.

An amendment which would render the relevant pleading excipiable cannot lead to a decision of the real issues and should not be granted. On the other hand, it may be more sensible in a given case to grant the amendment and let the other party file an exception. Applications for amendments should not deteriorate into mini-trials since amendment proceedings are not intended or designed to determine factual issues such as whether the claim has become prescribed . . .

An amendment must raise a triable issue i.e., it may be of sufficient importance to justify any procedural disadvantages caused by the amendment proceedings in the sense that the issue is viable and relevant or will probably be covered by the available evidence. It will normally not be granted if there will be prejudice to the other party which cannot be cured by an order for costs or a postponement. Prejudice in this context is not limited to factors which affect the pending litigation but embraces prejudice to the rights of a party in regard to the subject-matter of the litigation. . . There will not be prejudice if the parties can be put back for the purpose of justice in the same position as they were when the pleading, which is sought to be amended, was originally filed. The onus rests upon the applicant seeking the amendment to show that the other party will not be prejudiced by the amendment.' {My Emphasis}

[3] South Bakels (Pty) Ltd and Another v Quality Products and Another 2008 (2) NR 419 (HC) at 421:D-H.

[4] Civil Procedure in the Superior Courts, service issue 33, para B28.18.

WILL THE PLAINTIFF BE PREJUDICED BY THE AMENDMENT SOUGHT TO BE INTRODUCED BY THE DEFENDANT?

[12] The question that needs to be asked here is whether the plaintiff will be prejudice by the intended amended to the extent that the prejudice cannot be cured by an order for costs or a postponement.

[13] Mr Barnard argued that if the amendment were to be allowed the particulars of claim as amended will not disclose a cause of action and the amendment would be an exercise in futility. He submitted that from the written agreement the exact premises leased is not indentified or identifiable, or ascertained or ascertainable as a consequence thereof no lease agreement exists. He referred me to case of *Stellmacher v Christians and Others*[5] where it was held that where immovable property which is the subject of a written lease agreement is not clearly identified or identifiable, there can be no valid agreement of lease.

[14] Mr Barnard furthermore argued that through the proposed amendment, the plaintiff wants to introduce an oral agreement to stand alongside the written agreement. This is precluded by the provisions of the agreement itself, clause 27 of the agreement. Mr Barnard went on stated that the oral part of the agreement that the plaintiff wishes to introduce any description of what the tower should be cannot be proven as evidence in respect thereof as is excluded by the Parole Evidence Rule. He submitted that the intended amendment should not be allowed as it will not introduce a triable issue and render the particulars of claim excipiable.

[15] The arguments of Mr Barnard appear attractive but that argument loses sight of what Professor Kerr[6] has stated when said:

> 'Parties to an oral contract (i.e. one which both parties originally intended to enter into orally, which they did so enter into and which has commenced to run its course) may

5 2008 (1) NR 285 (HC).

6 In his book The Principles of the Law of Contract LexisNexis Butterworths 6th ed 2002 at 143-144.

> desire to record the agreement in writing. If they sign a document or exchange signed documents recording its terms, is there a new contract or merely the old one in a new form? It is thought that there is only one contract the old one, now in new form.'

[16] In the present matter the opinion expressed by Professor Kerr is exactly at play here. The late Neumann and the defendant intended to conclude an oral agreement, they did so enter into the oral agreement and that agreement commenced to run its course during August 2006 and during July 2007 they decided to reduce the term of their agreement to writing. It thus follows that there is only one agreement the oral agreement which was reduced to writing. It was not Mr Barnard's argument that the property which is the subject was not identified or identifiable in terms of the oral agreement I therefore find no fault with the plaintiff intending to introduce the amendment which it seeks to introduce because Professor Kerr[7] argues that the *'mere fact that the terms of an already existing agreement oral contract are reduced to writing does not mean that one contract is "replaced" by another'.* Professor Kerr further states that if the terms recorded in the written agreement do not correctly reflect the provisions of the oral contract the writing can be rectified. Also see the case of *Tesven CC and Another v South African Bank of Athens*[8] where Farlam, AJA (as he then was) said:

> 'To allow the words the parties actually used in the documents to override their prior agreement or the common intention that they intended to record is to enforce what was not agreed and so overthrow the basis on which contracts rest in our law.'

[17] I am therefore of the view that the Parole evidence role does not find application this matter and that the intended amended does raise a triable issue. I am of the further view that the defendant has not demonstrated any prejudice which it will suffer if the amendment were to be allowed. I will therefore exercise my discretion in favour of allowing the amendment.

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7 *Supra 6.*
8 2000 (1) SA 268 (SCA) at in para [16]

COSTS:

[18] Rule 28(7) of this Court's rules provide as follows:

> '(7) A party giving notice of amendment shall, unless the court otherwise orders, be liable to pay the costs thereby occasioned to any other party.'

[19] The wording of Rule 28 (7) makes it clear that the granting of cost is in the discretion of the court. The principle on which the Court acts in exercising its discretion was laid down by Watermeyer, J in *Moolman v Estate Moolman and Another*[9], in which he stated:

> 'Amendments will always be allowed unless the application to amend is *mala fide* or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or, in other words, unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleadings which it is sought to amend were filed.'

[20] In the present case I am disposed to exercise my discretion on the lines laid down by Watermeyer, J, in that case, and, as I am unable to hold that this is a *mala fide* defence, and as I have held that the defendant has not demonstrated any prejudice it will suffer by the granting of the amendment, I am prepared to grant the amendment without departing from the general rule created by rule 28(7) of this Court.

[21] The defendant was perfectly entitled to place before the Court the arguments that it did and any other respondent in similar applications where the opposition is fair and reasonable, as it is here, ought not to be put into a position that they oppose the granting of an indulgence at their peril in the sense that if the amendment is granted they cannot recover their costs of opposition or they may even have to pay such costs as are occasioned by their opposition. In my view an applicant for indulgence should pay all wasted costs and the costs of a reasonable opposition are part of such wasted costs.

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9 1927 CPD at 29.

[22] I, however, fail to understand on which basis such costs should include the costs of one instructed and one instructing counsel? The nature of the subject matter of this application to amend is not complex, or one which requires the special forensic skills of a counsel. In my view any practising legal practitioner should have been able to argue this matter. Accordingly I decline to exercise my discretion in this regard. I therefore direct that plaintiff is to pay the wasted costs and that such costs are to include the taxed costs of the present application.

[23] As a result I make the following order:

(c) The plaintiff is granted leave to amend his declaration in respects as set out in the notice to amend being Annexure “A” to his affidavit in support of his application to amend.

(d) That plaintiff is ordered to pay the wasted costs which are to include the taxed costs of this application

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APPEARANCES

APPLICANT/PLAINTIFF:	A Vaatz of Andreas Vaatz & Partners
RESPONDENT/DEFENDANT:	P C I Barnard Instructed by Lorentz Angula Inc