

AC 15/2001

IMP ALA SHIPPING (PTY) LTD v H & H CIVILS CC

Levy, AJ

2001/9/28

1. Application that a matter brought to Court in terms of the Vice-Admiralty Rules should proceed in terms of the Rules of the High Court of Namibia considered and granted.
2. The Rule that new matter introduced in a replying affidavit is to be struck out is not an absolute rule. Application to strike out refused.
3. Words written on a printed or typed agreement are entitled to greater effect than the printed or typed words.
4. The words "and/or" must be read conjunctively as well as disjunctively and neither word can be ignored. They are "an elliptical and embarrassing expression which endangers accuracy for the sake of brevity".

2. Directing that the filing of pleadings and the further prosecution of this action be conducted in accordance with the provisions and time limits contained in

the Namibian Uniform Rules of Court ('the Uniform Rules').
3. Alternatively to paragraph 2, directing that the time period set out in Rule 56 be enlarged, in accordance with Rule 185, to provide:
 - 3.1 respondent file its particulars of claim within THIRTY (30) days from date of the order granted herein; and
 - 3.2 That Applicant file its plea within THIRTY (30) days from the date of receipt of the respondent's particulars of claim; and
 - 3.3 That applicant file its reply within THIRTY (30) days from the date of the receipt of the applicant's plea.
4. Alternative relief.
5. Directing that the costs of this application be costs in the cause under case no. AC 15/2001, alternatively that such costs be paid by respondent in the event of it opposing the relief sought herein."

Respondent (hereafter plaintiff) on 4th July 2001, served a notice on defendant which purported to "oppose applicant's Notice of Motion dated 9th day of July 2001". There was and is no notice of motion dated 9th July 2001, and I have assumed that plaintiff intended to oppose the foregoing notice of motion dated 22nd June 2001.

The hearing of this notice of motion was set down for 14th September 2001.

On 6th September 2001, defendant brought further notice of motion proceedings. The relevant portions of this notice of motion read as follows:

"TAKE NOTICE THAT at the hearing of the application for pleadings on 14 September 2001, applicant further intends to apply to this Honourable Court for the following relief:

1. That the allocation by the Assistant Registrar of the 16 October 2001 as the trial date of the action herein be declared an irregular step and be set aside.
2. Alternatively to paragraph 1 above, that the trial of the action which has been set down for hearing on 16 October 2001 be postponed to a date to be determined by the Registrar in the ordinary course once the pleadings have closed in accordance with the Rules of Court applicable to the action.
3. Alternatively to paragraph 2 above, and only in the event of Applicant's application for pleadings and the application to the action of the Uniform Rules being dismissed, that the trial of the action which has been set down for hearing on 16 October 2001 be postponed to a date to be determined by the Registrar in accordance with Rule 110 of the Rules of the Vice Admiralty Courts in her Majesty's Possessions Abroad.
4. That such further and/or alternative relief be granted to the Applicant as to this Honourable Court may deem meet in the circumstances.
5. That Respondent pay the costs of this application."

This application was also opposed by plaintiff.

On 10 September 2001, plaintiff gave notice that "on 14 September 2001, the Respondent will make application to strike out the following portions of the Applicant's replying affidavit on the grounds that the averments constitute new matter which should properly have been included in the Applicant's founding affidavits:

1. The last sentence of paragraph 7.
2. Paragraphs 8 to 10.
3. Paragraphs 12 and 13.
4. Paragraph 15."

It must be observed that at the stage that this application to strike out was served, there were two applications duly issued and brought by defendant. Although plaintiff did not identify which notice

of motion proceedings it was referring to it is obvious that plaintiff was referring to the first one.

On 12th September 2001, defendant gave plaintiff notice that it would oppose this application.

Plaintiff who is the respondent in all the matters except the application to strike out, was represented by Mr M Wragge while defendant who is applicant in all the matters except in the application to strike out is represented by Ms M de Swardt SC.

Logically it is necessary to consider an application to strike out new matter from a replying affidavit before dealing with any other issue because if the application to strike out is successful, the question which arises is whether or not, the applicant in the notice of motion proceedings has nevertheless made out a case for the relief claimed. If the success of the application to strike out has no effect or influence on the success of the notice of motion proceedings itself, the application to strike out even if successful is nothing more than a harassment and may therefore attract an appropriate order as to costs. The aforesaid notwithstanding in order to deal effectively with an application to strike out new matter, it is necessary to know and understand what the notice of motion and supporting affidavits deal with and what the object of the notice of motion is.

The general rule is that supporting affidavits in notice of motion proceedings must set out the cause of action justifying the relief claimed.

In *The Civil Practice of the Supreme Court of South Africa* by Herbstein & van Winsen, 4th Ed., p. **365**, the learned authors say;

"The necessary allegations must appear in the supporting affidavits, for the court will not, save in exceptional circumstances, allow the applicant to make or supplement his case in his replying affidavit, and will order any

matter appearing in it that should have been in the supporting affidavits to be struck out. If, however, the new matter in the replying affidavits is in answer to a defence raised by the respondent and is not such that it should have been included in the supporting affidavits in order to set out a cause of action, the court will refuse an application to strike out. It is well established that there exists a general rule that new matter may not be introduced by an applicant in his replying affidavit, but this is not an absolute rule and the court may in an appropriate case allow an applicant to do so."

In *Shcphard v Tuckers Land and Development Corporation (Pty) Ltdd* 1978(1) SA 173 at 177 H, Nestadt, J referring to the general rule that new matter should not be introduced in replying affidavits, said;

"This is not however an absolute rule. It is not a law of the Medes and Persians."

In the present case Ms de Swardt has argued that except for paragraph 15, all the paragraphs and the sentence in paragraph 7 which plaintiff applies to strike out, are "conclusionary", that is, they sum up and conclude a particular issue originating in the supporting affidavit. In such circumstances she says they cannot be struck out.

To decide this, reference must be made to the notice of motion itself and to the supporting and opposing affidavits. If the opposing affidavits raise matters not in the supporting affidavits and if the alleged offensive facts in the replying affidavits are consistent with the opposing affidavits, they should also not be struck out.

The High Court Act, 16 of 1990, of the Republic of Namibia made provision for the creation of a set of rules of practice in the High Court of Namibia and the Rules formulated and gazetted pursuant thereto have since 10th October 1990, subject to certain amendments, been in force and of application in Namibia. For convenience these rules hereafter are referred to as the "Ordinary

Rules of Court" or simply the Rules of Court. They are the product of many years of experience both historical and practical and they make provision for almost every contingency arising in litigation. They constitute the procedural machinery of the courts of law and are intended to expedite the business of the courts.

SOS Kinderdorf International v Effic Lentin Architects 1993(2) SA 481 (Nm) at 491 D-E

The Ordinary Rules of Court are interpreted and applied in a spirit that will facilitate the work of the courts and enable litigants to resolve their differences in a speedy and inexpensive manner.

The superior courts of Namibia, like the superior courts of the Republic of South Africa, possess inherent jurisdiction to grant relief when insistence upon exact compliance with the ordinary rules of court would result in injustice to one of the parties or where the rules fail to make provision for a particular situation.

(See Herbstein & van Winsen *The Civil Practice of the Supreme Court of South Africa* 4th Ed. p. 33)

The provisions of the Colonial Courts of Admiralty Act 1890, were part of the statute law of the Cape of Good Hope, when by Section 1(1) of Proclamation 21 of 1919, the law as existing at that time in the Cape of Good Hope became the law of the then Mandated Territory of South West Africa.

S v Redondo 1993(2) SA 528 (NmSC)

Freiremar SA v Prosecutor-General of Namibia and Another 1996 NR 18 (HC)

Krueger v Hoge 1954(4) SA 248 (SWA)

Admiralty Law as applied by the Colonial Courts of Admiralty Act 1890, was therefore extended to South West Africa and perpetuated in Namibia when the Republic of Namibia was established.

The parliament of the Republic of South Africa has amended and adapted the Admiralty jurisdiction to South African Courts (The South African Admiralty Jurisdiction Regulation Act No. 105 of 1983) but this Act was not extended to Namibia.

Freireinar SA v The Prosecutor-General of Namibia and Another 1996 NR 18 (HC)

Bourgwells Ltd (Owners of the MFV "Ofelia ") v Vladimir JShepalov and 43 Others
1998 NR 307 (HC)

As can be expected the Vice Admiralty Rules emanating from the Admiralty Act of 1890, and applicable in Namibia, have in certain respects, not kept pace with the development and exigencies of modern commerce and shipping and do not make provision for every contingency. In terms of Rule 207 of the Admiralty Rules in cases not provided for in the Admiralty Rules, the practice of the Admiralty Division of the High Court of Justice of England, is to be applied. However, the practice of the High Court of Justice of England may itself be silent in respect of a practice which is peculiar to the circumstances of a particular case in Namibia or maybe out of step with our practice and procedure.

It is clear that under these circumstances where this occurs in order to do justice the ordinary Rules of the High Court of Namibia may have to be invoked. The net result is that in these circumstances two sets of rules are applicable.

In the instant case, on 28th April 2001 before action was instituted in this matter the parties came to an agreement concerning the jurisdiction of this Court. On 6th June 2001, plaintiff caused a writ of summons *in personam* to be issued out of the High Court of Namibia (exercising its Admiralty jurisdiction.) together with an endorsement of claim wherein plaintiff after alleging that it is a closed corporation registered in the Republic of South Africa and that defendant is registered in

Singapore and carrying on business as a charter and ships operator, says that defendant has submitted to the jurisdiction of this Court in respect of the claim reflected in its summons.

It was after service of this summons and after defendant entered an appearance to defend that defendant launched these notice of motion proceedings on 22nd June 2001.

Before tiling its opposing affidavit, the plaintiff caused to be issued and served a document described as "Particulars of Claim". In the particulars of claim, plaintiff repeats its allegation that defendant has submitted to the jurisdiction of this court in respect of the action it had instituted by writ of summons. Plaintiff says defendant did this by way of an "undertaking" accepted by plaintiff dated 28th April 2001, and in proof hereof annexes to the particulars of claim the alleged submission to jurisdiction.

The relevant portion of the clause of the annexed agreement which plaintiff says gives it jurisdiction, provides briefly that defendant agrees to be liable to plaintiff in respect of any order;

".for which Defendant and/or Impala Shipping is found liable by a final judgment of the Namibian High Court exercising its Admiralty and/or ordinary jurisdiction."

The underlined portion was added in script to the typed document.

The rule of interpretation of contracts is that where a printed or typed form has been altered by written words specially inserted, such words are entitled to have greater effect attributed to them than the printed words, inasmuch as the written words are the immediate language and words selected by the parties themselves for the expression of their meaning.

Hayne & Co Ltd v Central Agency for Co-Operative Societies 1938 A.D. at pp 365/366.

The words "and/or" which are frequently found in legal documents and which are prominent in the aforesaid added provision have been interpreted from time to time by the Courts.

In the instant case, Mr Wragge argues that to give the word "and" its ordinary meaning would render the submission to jurisdiction absurd and that "and" must be ignored. *In Bennan v Teiman* 1975(1) SA 756 (WLD) the Court considered these words as discussed in other judgments, including an Australian judgment, where that court referred to "and/or" as "an elliptical and embarrassing expression which endangers accuracy for the sake of brevity". *In Bennan's* case (at p 757 G to II) the learned judge added;

"The words must, however, be given a meaning and they must be read disjunctively as well as conjunctively - see *Aird v Hockly's Estate* 1937 EDL 34 at 42."

Similarly the words "and/or" must, for the reasons already traversed, be given a meaning, in the instant case and they must be read conjunctively as well disjunctively. When this is done it is apparent that the effect of the word "and" is that exclusive Admiralty jurisdiction is specifically excluded and the effect of the word "or" is that the Ordinary Rules of the Court exclusively, can be applicable instead of Admiralty and the Ordinary Rules.

Accordingly plaintiff when it issued summons claimed to be acting according to and in terms of Vice Admiralty Rules. Thereafter, however, it has followed and acted in terms of the Ordinary Rules of the High Court of Namibia.

In terms of the Admiralty Rules, every action is to be heard without pleadings, unless the Court otherwise orders (Admiralty Rule 55). There was at the time of the service of the particulars of claim no application to this Court for an order that this Court direct that this action should be heard with pleadings. Nevertheless on 29th June 2001 plaintiff *mero motu* issued and caused to be served "Particulars of Claim" a form of pleading not known in Admiralty Rules but common in the Ordinary Rules of Court.

During the course of the argument, it was pointed out to Mr Wragge that in terms of Ordinary Rule of Court 7, a power of attorney had to be filed before summons could be issued. A debate ensued as to whether or not a power of attorney was necessary in the instant case. Whether or not such power of attorney was or was not necessary, Mr Wragge tendered such power and asked for condonation in terms of Ordinary Rule of Court 27. Ms de Swardt agreed that condonation should be granted. Accordingly, in so far as it may be necessary invoking the Ordinary Rules of Court, this Court grants condonation in this respect.

It is now necessary to refer briefly to the claim made by plaintiff as reflected in its particulars of claim. It will be observed that plaintiff relies on the bill of lading and throughout emphasizes this document.

Plaintiff alleged that it was the owner of, and at all material times had the risk, in and to the cargo which it described as 53 bundles containing 265 pieces of ductile cast iron spun pipes, shipped on board the "MV Impala" in Calcutta, India, for carriage to and discharge at Luderitz, Namibia, under bill of lading CALOO dated 27th March 2001.

Plaintiff then pleads that it attaches to the particulars of claim, the front and reverse sides of the bill of lading which it has marked "RCW1". The aforesaid notwithstanding the said portions of the bill

of lading were not annexed. Plaintiff says the said bill of lading evidenced the contract in terms whereof defendant was to carry on the vessel from Calcutta, the cargo aforesaid and in terms of the contract, defendant was obliged (I quote verbatim):

- " 1. to deliver the pipes at Luderitz to the holder of the bill of lading, in the same good order and condition in which they were shipped on board the vessel at Calcutta, and
- 2. before and at the beginning of the voyage to:
 - 2.1 make the vessel seaworthy;
 - 2.2 properly man, equip and supply the vessel;
 - 2.3 make the holds and all other parts of the vessel in which the pipes were to be carried fit and safe for the reception, carriage and preservation of the pipes.
- 3. to properly and carefully handle, stow, carry, keep, care for and discharge the pipes;
- 4. to provide a vessel suitable to safely load, carry and discharge the pipes."

Plaintiff says that on 27th March 2001, defendant discharged the pipes at Luderitz but the cargo was in a "damaged and discrepant condition". In particular the outer coating of the entire consignment of pipes was damaged and structural damage was sustained to 380 of the 500 nominal bore pipes (constituting 1091.6 m), 27 of the 400 nominal bore pipes (constituting 165 m) and 18 of the 250 nominal pipes (constituting 110m). Plaintiff then says that the damage to the pipes was caused by the defendant's breach of contract, as set out above. It will be noticed that plaintiff pleaded, (apparently quoting from the bill of lading), several obligations which rested on the defendant in terms of the alleged contract but it did not specify the breach of the particular obligation which resulted in any particular damage.

Plaintiff did allege that as a result of the damage to the pipes, the plaintiff suffered damages in the amount of N\$6,968,473.54 broken down as follows (once again verbatim):

"replacement pipes N\$881,280-00
repairs to pipes N\$6,087,193-54."

Other than the foregoing there are no details of the nature of the damages and which pipes had to be replaced and which had to be repaired and how the damages are quantified.

According to plaintiffs particulars of claim, these damages were a "direct, natural and foreseeable consequence of the breach of contract by the defendant" and accordingly plaintiff claims damages in the sum of N\$6,968,473-54 interest and costs.

I have pointed out that there is no provision in the Admiralty Rules for the filing of particulars of claim and unless it is so ordered by the court there can be no pleadings. In this case there had been no such order. Furthermore in terms of Admiralty Rule 56, if pleadings are ordered, the plaintiff is obliged to file a "petition (not particulars of claim) within a period of one week from the date of the order and the defendant is obliged to file an Answer within one week from the filing of the petition whereafter a Reply, if any, is also filed within one week. No pleadings are allowed beyond the aforesaid Reply, unless the Court so orders.

This cumbersome procedure far from expediting a decision of this Court could delay it, and furthermore it militates against accuracy. There is no provision in Admiralty Rules for a Request for Further Particulars to be made as of right. Should the plaintiff in this case be ordered to plead and should it file a "petition" embracing the provisions in the language and form which it has pleaded in the particulars of claim, such "petition" would lack the degree of precision required by the Ordinary Rules of Court in a particulars of claim (See Ordinary Rule of Court 18(4)). A defendant faced with a petition of this nature could not know what the case is which it has to meet and furthermore could not request essential particulars such as asking for the bill of lading which was not annexed by plaintiff and asking for those necessary details referred to above, which would

help to define the issues between the parties and which would place defendant in a position to plead.

Admiralty Rules 62 and 63, permits a Court to order interrogatories to be answered either on affidavit or by oral evidence. This is a clumsy way to define the issues between the parties and in comparison to the Ordinary Rules of Court would delay a decision in the matter concerned and increase costs.

Furthermore, in terms of the Ordinary Rules of Court a party need not apply to Court for an order that the other party discover. Under Admiralty Rules discovery and inspection of documents takes place in terms of a court order.

According to Admiralty Rules before almost every step is taken, steps which are required for accuracy, application has to be made to Court for an order.

It is clear that before a dispute governed by Admiralty Rules is ripe for decision and reaches the trial court, there could be a large number of applications to Court. En route some applications if not all may even be opposed.

In the present case common experience tells us that it would most certainly be necessary to have expert evidence as to the nature of the damage to the pipes and how such damage was caused.

Summaries of the expert opinions according to the Ordinary Rules are filed to facilitate cross-examination. While a similar procedure may be possible in terms of the Admiralty Rules, the Court's direction will again be necessary.

I am satisfied that if the present dispute between the parties were governed by the Ordinary Rules of the High Court as opposed to the Admiralty Rules, the dispute would be resolved far more expeditiously and cost effectively.

In the meantime and in reply to defendant's notice of motion proceedings an affidavit signed by one Thomas Nicholas German du Toit, on behalf of the plaintiff, was served purporting to be the opposing affidavit in these notice of motion proceedings. It is necessary to quote verbatim from this affidavit.

Paragraph 19 thereof provides:

"On 30 July 2001 the Applicant served particulars of claim on the Respondent. The particulars of claim were served in order to deal with the Applicant's complaint that it was unable to ascertain the true nature of the action instituted against it without pleadings."
(This affidavit was signed on the 3rd July 2001 and 30 July is clearly incorrect.)

Du Toit concludes his affidavit as follows:

'80. The Applicant prays that this application be dismissed with costs, on the tariff contained in the uniform rules, and that the action proceeds on the basis set out in paragraphs 59 and 60 of this affidavit!'

Paragraphs 59, 60 and 61 of Du Toit's affidavit provide as follows:

"59. The cargo damaged by the Applicant was intended for the construction of an underground water system for the zinc mine at Rosh Pinah. This is an important project for the Namibian economy. It is in the interest of the various parties involved in the project that the Respondent recovers its damages as soon as possible. Any delays in the prosecution and hearing of the action will severely prejudice, *inter alia*, the Applicant.

60. The Respondent submits that this Honourable Court should direct the Registrar of the court to set down the action for the earliest date possible. The Respondent's Namibian correspondents, Fisher Quarmby & Pfeifer, have advised that according to the Registrar of this court trial dates are available in November.
61. In order to regulate the trial the Respondent is prepared to agree that the following provisions of the uniform rules apply to the action:
- 61.1 Uniform rule 21 (further particulars);
 - 61.2 Uniform rule 35 (discovery);
 - 61.3 Uniform rule 36 (inspections, examinations and expert testimony);
 - 61.4 Uniform rule 37 (pre-trial conference);
 - 61.5 Uniform rule 38 (procuring evidence for trial);
 - 61.6 Uniform rule 67 (tariff of court fees);

Provided the trial is set down immediately on a date in November 2001 agreed between the parties, the Applicant is directed to deliver its plea within ten court days of receipt of the particulars of claim already served on his Namibian attorneys, the Applicant responds to the notice to produce and the uniform rules referred to in this paragraph are applied within a time frame that allows the action to proceed on the agreed date in November 2001."

Despite the impression conveyed that the matter should be set down in November 2001, the plaintiff applied to the Registrar of this Court and was allotted the 16th October 2001 for the hearing of this action.

Paragraph 61 of the opposing affidavit of Du Toit indicates that plaintiff is clearly of the view that the Vice Admiralty Rules are inadequate and should be augmented by the Rules of the High Court of Namibia

I am satisfied that the applicant in notice of motion dated 22nd June 2001 has made out a case justifying an order in terms of claims 1 and 2 of its notice of motion and I arrive at this decision without having to rely on any allegations in paragraphs 8 to 10, 12 and 13, and 15 and the last sentence in paragraph 7, of its replying affidavit. In any event I am satisfied that all those

facts and argument appearing in paragraph 15 was indeed not referred to in Tucker's supporting affidavit but Mr du Toit in paragraph 61.3 of his opposing affidavit specifically suggests that the Ordinary High Court Rule 36 which governs expert evidence should be ordered by this Court to apply to this trial.

In the circumstances there is no substance in the application to strike out and if there is some substance, such cannot effect the result of this case and exercising the discretion vesting in me, I reject the application.

Admiralty Rules 55 and 56 entitles this Court to Order that this matter proceed by way of pleadings and this Court is also given the power in terms of those rules to regulate time periods for filing such pleadings. It does not, however, refer to the right of either party to request further particulars, nor file exceptions or applications to strike out on the various grounds recognized in Namibian law relating to practice and procedure.

I am satisfied that it would be in the interest of justice and far more cost effective, if this matter proceed to trial and be prosecuted in terms of the Ordinary Rules of the High Court of Namibia.

I am fully aware that this Court has the inherent jurisdiction and power to regulate the procedure to be followed by litigating parties. By ordering this matter to proceed in terms of the Ordinary Rules of Court, I am not riding rough-shod over the wishes of plaintiff. The written agreement whereon plaintiff relies for jurisdiction specifically provided that the jurisdiction would be Admiralty and Ordinary jurisdiction or simply ordinary jurisdiction and as pointed out plaintiff itself has departed from the requirements of the Admiralty jurisdiction and invoked the Ordinary jurisdiction of the Court. It did so again on 10th September when it applied to strike out paragraphs in plaintiffs

replying affidavit. Furthermore in his opposing affidavit Du Toit on behalf of plaintiff recognized the inadequacy of the Vice Admiralty Rules.

This Court agrees with the views expressed by Ms de Swardt that the Admiralty Rules would not lead to an expeditious and cost effective result in this matter. It is clear from the opposing affidavit of Mr du Toit, that he too realizes that certain of the Ordinary Rules of the High Court should be invoked. Should only some of the Ordinary Rules of Court be invoked and not others, this could create uncertainty and lead to further confusion and a delay in finality.

It would appear from the affidavit of Mr du Toit quoted above that the date of hearing which plaintiff originally wanted, was not 16th October 2001. In any event both counsel agree that the parties are not in a position to proceed on that date.

A. In respect of the Notice of Motion instituted on 22nd June 2001, the orders of this Court are:

- (1) In terms of Rule 55 of the Rules of the Vice Admiralty Courts in Her Majesty's Possessions Abroad, the action instituted by H & H Civil CC against Impala Shipping (Pty) Ltd under case no. AC 15/2001, shall be heard with pleadings;
- (2) The filing of pleadings and the further prosecution of this action shall be conducted in accordance with the provisions and time limits contained in the Ordinary Rules of Court of the High Court of Namibia subject to (3) hereunder.
- (3) The Particulars of Claim dated 2nd July 2001 shall stand as Particulars of Claim in the action AC 15/2001 and the defendant in that action is authorized to request

further particulars if it so desires in respect of such Particulars of Claim provided such request is made within 10 (ten) court days of this Order.

- (4) The costs of this application dated 22nd June 2001, shall be costs in the cause under case no. AC 15/2001.

B. In respect of the Notice of Motion proceedings dated 6th September 2001, the Order of this Court is:

- (1) The trial of the action AC 15/2001 which has been set down for hearing on 16th October 2001 is postponed to a date to be determined by the Registrar in the ordinary course, once the pleadings in the said action have been closed in accordance with the Rules of the High Court of Namibia.

- (2) The costs shall stand over for decision by the Court when action AC 15/2001 is adjudicated.

C. In respect of the application dated 10th September 2001, brought by H & H Civils CC to strike out certain matter from the replying affidavit of Impala Shipping (Pty) Ltd, this Court orders:

- (1) The Application is dismissed.
- (2) There is no order as to costs.



LEVY, AJ

For the applicant:

Advocate M de Swardt SC

Instructed by:

Messrs Weder, Kruger & Hartman

For the respondent:

Advocate M Wragge

Instructed by:

Messrs Fisher, Quarmby & Pfeifer