



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1426/2011

In the matter between:

PAUL LOOTS

APPLICANT/PLAINTIFF

and

MARTIN SCHMIDT

RESPONDENT/DEFENDANT

Neutral citation: *Loots v Schmidt* (I 1426/2011) [2013] NAHCMD 28 (31 January 2013)

Coram: MILLER AJ

Heard: 28 November 2012

Delivered: 31 January 2013

ORDER

In the result I grant leave to the plaintiff to amend his particulars of claim only insofar as paragraph 3C is concerned. As far as costs are concerned, and for the reasons I mentioned this application is by and large a superfluous exercise. Plaintiff is ordered to pay the defendant's costs which will include the costs of one instructing and one instructed counsel.

JUDGMENT

MILLER AJ :

[1] This is an interlocutory matter in which the plaintiff seeks to amend his particulars of claim. The application is opposed by the defendant on several grounds.

[2] Mr. Strydom appeared for the plaintiff. The defendant is represented by Mr. Coleman.

[3] Before I consider this application it is necessary to deal with the history of the matter.

[4] On 4 June 2007 the plaintiff instituted action against the defendant by way of summons. The action was based on the allegation that the plaintiff was the owner of a certain Aqua Cruiser Raft ("the raft") which he claims was donated to him by the Namibia Development Corporation ("the NDC") in terms of a written Deed of Donation which was attached to the particulars of claim. The plaintiff went on to allege that the defendant was in possession of the raft. Consequently the plaintiff claimed delivery of the raft, and in the alternative he claims payment in the sum of N\$150 000.00 being the alleged value of the raft.

[5] Having entered an appearance to defend the defendant filed a plea and a conditional counterclaim in September 2007. In his plea the plaintiff's ownership was placed in issue on the following grounds:

- '2.1 Defendant denies that plaintiff was and still is the owner of the said raft;
- 2.2 In particular defendant denies that plaintiff obtained ownership of the raft by way of the alleged donation for the following reasons:
 - 2.2.1 The Namibia Development Corporation never owned the raft, alternatively, even if it owned it, it did not have the authority to donate it to plaintiff;
 - 2.2.2 Plaintiff never accepted the donation, which is a requirement for the donation;
 - 2.2.3 The donation was conditional upon plaintiff removing the raft within 90 days from the date of donation, which he had to do by 23 June 2006 and failed to do; and

2.2.4 Plaintiff never took possession of the raft, which is a requirement for obtaining ownership.'

The plea goes on to allege that the raft was *res derelicta* and that the defendant became the owner thereof when he took possession of it in 2006.

[6] The conditional counterclaim was premised on the fact that the defendant effected salvage and improvements to the raft to the store of N\$16 068.00. The defendant claimed payment of this amount, in the event of the court finding that the plaintiff was indeed the owner.

[7] To this the plaintiff filed a replication and a plea to the counterclaim on 29 October 2007. It is not necessary for present purposes to deal with the details thereof.

[8] Eventually this matter was enrolled for hearing for the period 8-10 July 2008.

[9] On 9 July 2008 the parties filed a Notice in terms of Rule 33 which reads as follows:

‘

1.

The parties agree that this court decides the question of law whether, or not, the plaintiff became owner of the raft in dispute in terms of the deed of donation attached, marked “A”, to plaintiff’s particulars of claim.

2.

The parties agree on the following facts for the purposes of this decision:

- 2.1 The deed of donation was signed on 23 March 2006’
- 2.2 In pursuance of this deed of donation plaintiff wrote two letters dated 9 May 2006 and 28 August 2006, respectively, annexed hereto, marked, 1 & 2 addressed to Namibia Wildlife Resorts;
- 2.3 The Ministry of Environment and Tourism responded on 22 August 2006, with the letter annexed, marked 3;
- 2.4 Apart from making telephonic calls to Namibia Wildlife Resorts to follow up on the letters referred to in sub-paragraph 2.2 supra, plaintiff did nothing else within the 90 day period calculated from 23 March 2006 stipulated in clause 1 of the deed of donation.

3.

The parties agree further that in the event this Court rules that the plaintiff did not acquire ownership of the raft and/or that the alleged ownership was terminated on account of the condition in Clause 1 of the Deed of Donation it is the end of the matter. Conversely, if the Court rules that the Deed did confer ownership, the parties agree that the matter be set down for trial on the existing pleadings as amended if necessary.

4.

The parties agree that costs will follow the outcome herein.

Dated at WINDHOEK on this 9th day of JULY 2008.'

[10] On 10 July 2008, the matter was heard by Frank AJ.

[11] On 28 July 2008 Frank AJ delivered a written judgment. During the course of the judgment Frank AJ stated that what was required of him was to determine the question of ownership as a separate issue.

[12] Having dealt with the facts placed before him Frank AJ concluded the judgment with the following findings:

'[27] For the above reasons I am of the view that the plaintiff did have sufficient possession of the raft for the purposes of delivery *brevi manu* and he thus became the owner of the raft upon entering into the agreement with the NDC.

[28] The result is that I find that plaintiff did establish that he is the owner of the raft and in accordance with the parties' agreement in dealing separately with this issue I order that the costs occasioned by adjudicating this issue separately to be paid by the defendant.'

[13] There cannot be the slightest doubt that the issue of ownership was finally resolved in favour of the plaintiff. All that remained in issue were the disputes remaining on the pleadings, mainly the issues raised in the conditional counterclaim.

[14] Nonetheless on 27 February 2009 the defendant requested further particulars for trial purposes. It sought *inter alia* particulars from the plaintiff regarding the manner in which the plaintiff acquired ownership, which particulars the plaintiff by and large furnished.

[15] On 9 June 2009 the defendant amended his plea in which plaintiff's ownership of the raft was once more placed in issue. This was followed by yet another request in November 2011 in which the defendant ostensibly sought to lay the basis for challenging the plaintiff's ownership on the basis that the donation was not valid because of non-compliance on the part of the NDC with the provisions of section 4(m) of the Namibia Development Corporation Act No. 18 of 1993 which provided inter alia that the NDC may only make donations with the consent of the Minister of Trade and Industry. In response thereto the plaintiff replied that the issue of compliance or otherwise with section 4(m) had become moot in the view of the judgment delivered by Frank AJ.

[16] In my view the stance adopted by the plaintiff in that regard is correct. The judgment delivered by Frank AJ was a final and definite determination of the issue of ownership. As such it is not open to any party to now re-visit that issue. Amler's Precedents of Pleading p. 302 and the authorities cited there.

[17] This brings me to the present application which, as I have indicated is to amend the plaintiff's particulars of claim in the following manner:

'3A. Alternatively to paragraph 3 above and in the event of the honourable Court finding that such donation did not comply with the provisions of Act 18 1993, the plaintiff avers the following:

- (a) Plaintiff has no knowledge as to whether there has been compliance with section 4(m) of Act 18 of 1993.
- (b) In any event avers that at all relevant times hereto he acted in the belief and on the assumption that the acting managing director/CEO of the NDC, Wessel !Namuseb, had the necessary authority to execute Annexure "A" and the necessary internal requirements and procedures incidental to the aforesaid Act had been complied with.

3B. Alternatively to paragraph 3A above and in the event of the Court finding that there has been proper compliance with the provisions of Act 18 of 1993 and/or that the plaintiff could in essence not rely on the *Turquand* rule as aforesaid, then the plaintiff avers that the donation is not strictly a donation in the technical sense and legal meaning of the word in that the transaction involved a counter performance on the plaintiff's part by virtue of the following:

- (a) The plaintiff had to re-win and remove the raft at his own costs;
- (b) All risks attendant to the raft will passed on to the plaintiff upon signature of the agreement – annexure "A".

- (c) Plaintiff was contractually bound to indemnify the NDC from any loss, liability, damage or expenses which may be suffered or incurred as a result of taking ownership of the raft, having same removed same from the Von Bach Dam and operating same.

In the premises the plaintiff avers that the provisions of section 4(m) of Act 18 of 1993 does not apply to the current arrangement/agreement concluded between him and the NDC.

3C. In any event the plaintiff avers that by reason of a judgment of this honourable court delivered on the 28th of July 2008, the issue of ownership has already been determined.'

[18] With the possible exception of paragraph 3C, the proposed amendments seek to introduce into the pleadings issues that are no longer live or relevant issues.

[19] In the result I grant leave to the plaintiff to amend his particulars of claim only insofar as paragraph 3C is concerned.

[20] As far as costs are concerned, and for the reasons I mentioned this application is by and large a superfluous exercise. The plaintiff is ordered to pay the defendant's costs which will include the costs of one instructing and one instructed counsel.

P J MILLER
Judge

APPEARANCES

APPLICANTS/PLAINTIFF: J A N STRYDOM

Instructed by Engling, Stritter & Partners,
Windhoek

DEFENDANT:

G COLEMAN

Instructed by FRANCOIS ERASMUS &
PARTNERS, Windhoek.