REPUBLIC OF NAMIBIA **REPORTABLE**

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between: Case no: I 341/2008

ADVOCATE FREDERICK ALLAN LANGE N.O.

(in his capacity as the appointed curator *ad litem* for

DIRK JACOBUS LOUBSER **APPLICANT/PLAINTIFF**

and

DE BEERS MARINE NAMIBIA (PTY) LTD **RESPONDENT/DEFENDANT**

Neutral citation: *Loubser v De Beers Marine Namibia (Pty) Ltd* (I 341/2008) [2013] NAHCMD 382 (26 September 2013)

Coram: GEIER J
Heard: **26 September 2013**
Delivered: **26 September 2013**

Flynote: Practice - Amendment of pleadings and consequent variation of pre-trial order - Applications for amendment and variation of pre-trial order – Objection to amendment on the grounds of res judicata – inter-relationship between pre-trial order

settling the issues for trial and the subsequent variation thereof due to an amendment – when such orders will be granted

Practice - Amendment of pleadings - Rule 37(17)(c) of Rules of High Court now incorporating the most important principles regarding amendments to pleadings in general - in order to expedite the determination of the real issues between the parties a managing Judge may, on good cause, at any stage, at any status hearing, case management hearing or at trial allow or order amendments to the pleadings to be filed so that the real issues between the parties and not mere technicalities would be determined at the trial -

Practice - Amendment of pleadings - Rule 37(17)(c) of Rules of High Court - should a party make out a case in accordance with the generally applicable principles pertaining to amendments, for having its pleadings amended - whether on an opposed basis or not – that - on its own – will - or should go a long way to persuade a court that *good cause* - as required by Rule 37(17) - has been shown, even if this may necessitate the simultaneous variation of a pre-trial order, which may, in the interim, have been made by the court on the strength of the parties' pre-trial proposal.

Practice – variation of interlocutory pre-trial order - a legitimate quest for the re-formulation of the issues for trial between the parties with greater precision - through amendment - thereby causing the real issues to be placed on record - also constitutes good and sufficient cause for the variation of a pre-trial order, which clearly is interlocutory in nature and made for purposes of regulating a particular aspect of the procedure.

As the plaintiff quest for an amendment in this case was considered to be legitimate and *bona fide* the court did not consider the issue of *res judicata* to constitute a bar to the amendment sought by the plaintiff, particularly, as the plaintiff, had simultaneously/additionally applied for the consequent variation of the standing pre-trial order, should the plaintiff's application for leave to amend be granted – accordingly leave to amend and consequent variation of pre-trial order allowed

Summary: The facts and grounds of opposition underlying this opposed application for leave to amend and the variation of the pre-trial order made in this case appear from the judgment.

ORDER

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1. The application for leave to amend succeeds.

2. The order sought in paragraph one (1) of the notice of motion to the application for leave to amend dated 13 June 2013 is hereby granted.

3. In so far as it may be necessary, paragraph one (1) of the pre-trial order of 19 March 2013 is hereby varied consequentially to allow for the incorporation of the issues flowing from the amendment granted in terms of this order.

4. The plaintiff is directed to deliver his amended particulars of claim, within three (3) days of this order.

5. The defendant is to amend its plea consequently, if it so chooses, within five (5) days of the delivery of the amended particulars of claim.

6. The parties are hereby granted leave to amend their witness statements filled of record, if they deem this necessary, and if they are able to achieve this, on or before the close of business of 11 October 2013.

7. The plaintiff is to pay the defendant's costs occasioned by the amendments, unless he can satisfy the taxing master that he has obtained leave to sue *in forma pauperis*, such costs to include costs of two instructed counsel and one instructing counsel.

8. The defendant is ordered pay the costs occasioned by the application for leave to amend, such costs to include costs of two instructed counsel and one instructing counsel.

JUDGMENT

GEIER J:

[1] The plaintiff in this instance was seriously injured due to having fallen through a hoisting hole in the deck of the vessel *Ya Toivo*, which at that time was lying off-shore from Oranjemund, in Namibian waters.

[2] He is now suing to recover special damages consisting of past hospital- and medical expenses, future medical expenses, loss of income, as well as general damages.

[3] The relevant part of the cause of action was pleaded in the Particulars of Claim as follows:

> "3. At all material times the Defendant was the owner and/or operator of the ship YA TOIVA, on which the accident referred to hereinafter occurred.
>
> 4. At all material times the Plaintiff was in the employ of the Defendant, at the time working as a YT Plant Fitter.
>
> 5. On 12 February 2005, between 18h00 and 24h00, the Plaintiff was seriously injured when he fell through a hoisting hole (used to move equipment from one deck to another) in the deck floor of the ship YA TOIVA, at the time lying offshore from Oranjemund in Namibian waters.
>
> 6. The Plaintiff was injured as a result of the negligence of the Defendant, alternatively the employees of the Defendant, at all material times acting in their capacities as employees of the Defendant, who was/were negligent in one or more or all of the following respects:
>
> 6.1. The hoisting hole was left open in circumstances where it constituted a threat to the safety of the crew, with specific reference to the Plaintiff;

6.2. They failed to fit railings and/or handles and/or any other safety features or equipment in the immediate proximity of the hole.

6.3. They failed to place warning signs in the proximity of the hole. Indicating to the crew that it constituted a safety hazard;

6.4 They failed to warn the crew, with specific reference to the Plaintiff, sufficiently or at all of the dangers constituted by the hole;

6.5. They failed to avoid the incident in circumstances in which they could and should have done so.

6.6. They failed to ensure the safety of their crew, specifically the Plaintiff, in circumstances in which they were under a legal duty to do so.

7. As a result of the aforesaid accident the Plaintiff sustained the following injuries:

7.1. A severe traumatic brain injury;
7.2. An injury to his left shoulder.

8. The sequelae of the Plaintiff's injuries were, amongst others, the following:

8.1. He was hospitalised, was operated upon and, during his stay in hospital, suffered multiple organ failure;

8.2. He suffered from shock, pain, suffering and discomfort;

8.3. He has suffered cognitive impairment and, also resulting from the brain injury, overactive bladder function;

8.4. He received medical and hospital treatment in respect of which costs were incurred;

8.5. He will receive medical treatment in future, for which further medical costs will be incurred;

8.6. He suffered a loss of amenities of life and will in future suffer further such loss;

8.7. He has suffered a permanent complete loss of income earning capacity;

8.8. He is unable to conduct his previous normal activities of daily living."

[4] In terms of a request for trial particulars, the Defendant requested full particulars regarding the circumstances referred to in regard to the allegation that :

'Defendant and/or its employees failed to avoid the incident in circumstances in which they could and should have done so.'

[5] I pause to add that this was one of the grounds of negligence relied upon. In this regard the allegation was particularly made that:

'the Plaintiff was injured as a result of the negligence of the Defendant alternatively the employees of Defendant, at all material times acting in the capacity of employees of the Defendant, who was/were negligent in one or more or all of the following respects: …'.

[6] The plaintiff, in response to the request, then provided the following further particulars:

1.1 'At all relevant times before and at the time of the incident, Defendant foresaw (or ought reasonably to have foreseen) –

1.1.1 harm to workers who had to work in close proximity to the level 2 cargo hatch where the incident occurred ("the hatch");

1.1.2 harm to workers who had to be involved in the opening of the hatch or the lifting of the hatch cover;

1.1.3 harm to workers who had to enter the barricade which Defendant erected around the hatch, and while the hatch was in the process of being opened or the hatch cover being lifted.

1.2 At all relevant times before and at the time of the incident, and as a result of the poor design; and/or erection of the mechanism used to open the hatch or to lift the hatch cover. Defendant knew (or ought to have known):

1.2.1 that workers had to be involved with the opening of the hatch or the lifting of the hatch cover; and/or

1.2.2 had to enter the barricade erected by Defendant around the hatch while it was in the process of being opened or the hatch cover being lifted and/or;

1.2.3 workers had to work in close proximity to the hatch.

1.3 At all relevant times before and at the time of the incident, Defendant knew (or ought to have known) that the harm referred to above could include serious bodily injuries to the said workers, and that Defendant could easily afford proper precautions against the said foreseeable harm.

1.4 In the circumstances as set out above. Defendant had a duty to protect workers referred to above and to take appropriate precautions and/or avoiding action.'

[7] In the parties' pre-trial proposal in which the parties subsequently defined the issues to be resolved during trial the defendant already contended that the particulars so provided impermissibly widened the plaintiff's cause of action and that the defendant, as a result, was prejudiced in its preparation.

[8] The plaintiff then gave notice of his intention to amend the afore- quoted ground of negligence. The notice read as follows:

'TAKE NOTICE that Plaintiff intends to amend the Particulars of Claim in the following manner:

By the substitution of sub-paragraphs 6.5 and 6.6 with the following paragraph:

"6.5 Defendant, or its employees entrusted by Defendant with the management or control of the mining vessel YA TOIVO, on behalf of Defendant and acting in the course of their employment ("the management"), unlawfully and negligently breached Defendant's common law duty to take reasonable care for Plaintiff's safety. In amplification of this alleged breach, Plaintiff pleads as follows:

6.5.1 Defendant Imposed on Plaintiff the task to remove (from time to time) the hatch cover of the hatch in the tween deck at level 2 In the plant section of the vessel (“the hatch”), in order to hoist spare parts through the hatch (“the task”).

6.5.2 The task exposed Plaintiff to the risk of sustaining serious injuries by falling through the hatch, a risk which Defendant (or its management) was aware of, or ought to have been aware of.

6.6.3 In the aforesaid circumstances it was Defendant’s (or its management’s) duty –

6.5.3.1 to provide a proper and safe design and system for the removal of the hatch cover; and/or

6.5.3.2 to take adequate steps to ensure that proper safety measures, safety precautions and standing instructions regarding the removal of the hatch cover, were implemented and compiled with by its employees.

6.5.4 Defendant (or its management) breached or failed to comply with its aforesaid duties, in that Defendant (or its management):

6.5.4.1 failed to provide a proper and safe design for the hatch and a proper and safe system for the removal of the hatch cover; and/or

6.5.4.2 failed to devise adequate safely measures to prevent the dangers attendant upon the removal of the hatch cover; and/or

6.5.4.3 failed to implement safety precautions and standing instructions relating to the removal of the hatch cover; and/or

6.5.4.4 failed to take adequate steps to ensure that such measures and/or precautions and/or instructions were complied with by Its employees.”

[9] To this notice a lengthy notice of objection was filed as a result of which the application for leave to amend, which now falls to be determined, was brought.

[10] In the written heads of argument the defendant persists essentially with three of the grounds of objection. 1. Prescription, 2. the contingency fee arrangement, and 3. the issue of *res judicata*.

AD PRESCRIPTION

[11] Counsel are agreed that when it comes to the determination of opposed amendments, one of the grounds, on which an amendment can be refused, is that such amendment would introduce a new claim which has prescribed.[1]

[12] Tied to this objection is the contention that the plaintiff's claim has transformed itself from a contractual one into a delictual one. In this regard it was submitted by Mr Heathcote, who appeared with Mr Dicks, on behalf of the defendant, that it emerged from the original particulars of claim that the plaintiff had made no allegations of unlawfulness and that this was an indication that claim was based in contract - that it had to be taken into account that the incident occurred under the 1992 labour legislation regime, which incorporated, by operation of statute, certain residual terms into the standard employment contractual terms concluded between an employer and an employee – and - as the High Court retained jurisdiction - a claim for damages arising from a breach of contract fell squarely within the High Court's jurisdiction. In addition, and if I understand Mr Heathcote's argument correctly - he also contended, particularly in view of the time- bar contained in the said Labour Act, that the claim was in this instance not timeously instituted in the District Labour Court but in the High Court utilizing the aforesaid jurisdiction.

[13] The first time, so Mr Heathcote's argument goes further, that the plaintiff makes any allegations in regard to 'unlawfulness' - thereby switching from a claim in contract to a claim in delict - was in the proposed new paragraph 6.5 to be introduced onto the record - where the plaintiff now alleges, or rather seeks to allege

[1] See for instance : *South Bakels (Pty) Ltd and Another v Quality Products and Another* 2008 (2) NR 419 (HC) at [16] to [19], *Finch Opportunities Fund SPC v van Rooyen* (I 3663/2009) [2012] (28 June 2012) at [8], see also: *Sentrachem Ltd v Prinsloo*1997 (2) SA 1 (A) at 15A-C etc

that the defendant breached its common law duty to take all reasonable steps to ensure the plaintiff's safety.

[14] As the amendment thus sought to introduce a new claim this should not be allowed as this would resuscitate a prescribed claim.

[15] Mr Botha, who appeared with Ms Viljoen, on behalf of plaintiff, submitted that when it comes to the consideration of prescription in this context it would be misleading to refer to a 'cause of action'- and - that in such a situation, it would be more correct to refer to a 'right of action'. He made this submission with reference to *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) were Trollip JA stated:

> ''I prefer to use the term 'right of action' to 'cause of action' because, I think, the former is strictly and technically more legally correct in the present context. (cf *Mazibuko v Singer* 1979 (3) SA 258 (W) at 265D – G). 'Cause of action' is ordinarily used to prescribe the factual basis, the set of material facts that begets the plaintiff's legal right of action and, complementarily, the defendant's 'debt', the word used in the Prescription Act. The term 'cause of action' is commonly used in relation to pleadings or in statutes relating to jurisdiction or requiring prior notification of a claim before action thereon is commenced. … I am not sure that it necessarily follows that, because one factual basis differs from another in some respect or respects, separate or different rights of action arise; on the contrary, both cases may nevertheless beget only one right of action or debt, eg one for the plaintiff's entire patrimonial loss.'[2]

[16] In order to thus decide the present objection i.e. whether the debt claimed in the here proposed amendment has become prescribed it would be necessary to identify the debt - or as Harmse JA put it in *Drennan Maud & Partners v Pennington Town Board*[3]

> ' … what the 'claim' was in the broad sense of the word.'

[17] Here, so Mr Botha contended, the plaintiff's claim for damages was sustained when he fell through the hatch of the mining vessel as a result of the defendant's negligence.

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[2] at 825 F - H
[3] 1998 (3) SA 200 (SCA) at 212 F-G

[18] Essentially he submitted that no new cause of action was introduced as the right, which plaintiff was seeking to enforce, was still the same, the facts on which the claim was based were the same and the cause of action remained the same.

[19] It should be remembered that the plaintiff had been requested to specify the grounds of negligence, widely formulated in the particulars of claim, and, when requested to do so, did so, and that the plaintiff was now faced with an objection because the 'specified grounds' were now considered to be 'new grounds' and 'factual grounds' which had become prescribed.

[20] Just because the word 'unlawful' was used for the first time in the amendment the defendant alleges that this has changed the nature of the relied upon cause of action.

[21] In addition it was submitted that it is not customary to allege unlawfulness (which is to be implied from the allegations that the defendant negligently caused the plaintiff's damage), but a plaintiff will however be required to allege facts from which wrongfulness can be inferred.[4]

[22] It is clear from the principles pertaining to amendments that the court will allow an amendment where the main issue between the parties remains the same and were the real issue in the case has been imperfectly or imprecisely pleaded - the aim is here to achieve - through the amendment - that the true issues are formulated onto the record.[5]

[23] While considering the cause of action, as pleaded originally on behalf of the plaintiff for purposes of determining this matter, I could not avoid forming the distinct impression that the author thereof - and for purposes of formulating his client's case in this instance - utilized and adopted a precedent dealing with a claim for damages arising out of a motor vehicle collision.

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[4] See for instance : *Coronation Brick Pty Ltd v Strachan Construction Co Pty Ltd* 1982 (4) SA 371 (D) at 379C, *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A), *Osborne Panama SA v Shell & BP South African petroleum Refineries (Pty) Ltd & Others*1982 (4) SA 890 (A) at 900

[5] See for instance *Trans-African Ins Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 279C See also for instance : *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 640G - 641C

[24] It is also clear that the amendment now attempts to clarify the further particulars, already forming part of the record, as elicited by the defendant's request for trial particulars, in respect of one of the grounds of negligence relied upon and pleaded. It also seeks to formalize the status of those allegations, now, through the notice of amendment and the subsequent application for leave to amend.

[25] No reliance whatsoever was placed - nor is any reference made to the plaintiff's contract of employment with the defendant in such particulars of claim or that any of its terms have been breached.

[26] What is pleaded in no uncertain terms is that, on account of the negligent acts pleaded, the plaintiff suffered special and general damages for which he seeks compensation.

[27] A helpful discussion is found in '*The Law of Delict*', 5th Ed, by the learned authors *Neethling, Potgieter and Visser* from which the close affinity between contractual- and delictual damages emerges:

'Breach of contract clearly constitutes another form of wrongful conduct in private law. As with a delict, breach of contract is normally an act by one person (contracting party) which in a wrongful and culpable way causes damage to another (contracting party).[6] Thus there is apparently no material difference between these two legal phenomena.'[7]

Nevertheless, breach of contract and a delict are fundamentally different. Breach of contract is only constituted by the non-fulfilment by a contractual party of a contractual personal right (claim) or an obligation to perform. Accordingly, the primary remedy for breach of contract is directed at enforcement, fulfilment[8] or execution of the contract; a claim for

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[6] Cf JC Van der Walt and Midgley JR *Principles of Delict* (2005) at 4; Stoop 1998 THRHR 10; *Marais v Groenewald* 2001 (1) SA 634 (T) 645, especially on causation. However, in *Administrator, Natal v Edouard* 1990 (3) SA 581 (A) at 597 the Appellate Division slated clearly that "fault is not a requirement for a claim for damages based upon a breach of contract". Cf also Van der Walt and Midgley Delict at 5 fn 6

[7] Cf *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) 495-496 and the authority cited there. For McKerron *'The Law of Delict*' 2 the distinction between a delict and breach of contract lies in the fact that a delict consists in the 'breach of a duty imposed by law " whereas breach of contract comprises the 'breach of a duty voluntarily assumed". Although this distinction has merits, it offers no substantial difference. The nature of the duly is not materially influenced by the voluntary or involuntary acceptance thereof (cf eg a duty to support which originates ex lege with a contractual duty to support); see further Burchell *'Principles of Delict'* (1993) 3 et seq.

[8] Note too that while in delict patrimonial as well as non-patrimonial damages may be claimed, the latter may not be recovered in contract (*Administrator, Natal v Edouard* op cit at 595-596; Van der Walt and Midgley *Delict* 5).

damages as a remedy only plays a secondary part. On the other hand, a delict is constituted by the infringement of any legally recognised interest of another party, excluding the non-fulfilment of a duty to perform by a contractual party. Conseqentially, the delictual remedies are primarily directed at damages (or satisfaction) and not at fulfilment. The fundamental differences between breach of contract and a delict are for historical, systematic and practical reasons also supported by the fact that breach of contract is not formally treated as part of the law of delict but is considered to be part of the law of contract. The law of contract, as indicated, therefore provides specific rules and remedies for breach of contract that are not applicable to a delict.[9] This distinction is clearly apparent from the fact that one and the same act may render the wrongdoer liable ex contractu as well as ex delicto.'

[28] It immediately emerges that the plaintiff here is not seeking - and has never sought - the enforcement, fulfilment or execution of his contract of employment. His action was always aimed at obtaining damages (satisfaction) for the injuries suffered due to negligent conduct.

[29] I agree therefore with Mr Botha's submissions that the right and claim based thereon, which the plaintiff is seeking to enforce, despite the amendment, remains the same[10] and that the relief sought ultimately also remains the same.[11]

[30] Importantly also is that, the cause of action, which, in my view, was always based in delict, remains the same and which was merely amplified in the respects set out in the notice of amendment.

[31] In such circumstances I cannot uphold Mr Heathcote's contention that the plaintiffs' original claim will be transformed from a contractual- to a delictual one through the sought amendment, which amendment would thus have been open to attack on the basis of the principles formulated in respect of the introduction of new causes of action by amendment which have become prescribed. Prescription simply does not come into play in such circumstances.

[32] The first ground of objection is therefore not upheld.

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[9] Van der Walt & Midgley Delict 6, cf any textbook on the law of contract in connection with the remedies for breach of contract.

[10] also in the 'broad sense of the word' … as per Harms JA in *Drennan Maud & Partners v Pennington Town Board op cit above*

[11] See also for instance : *Basfour 2482 (Pty) Ltd v Atlantic Meat Market (Pty) Ltd and Another* 2011 (1) NR 164 (HC) at 168H – 169B

RES JUDICATA

[33] Counsel for defendant also submitted that the amendment should not be allowed due to the compromise reached by the parties made in their pre-trial proposals, as encapsulated in the consequential pre-trial order. Reliance was placed in this regard on the decision of this court in *Jin Casings & Tyre Supplies v Mr E Hambabi t/a as Alpha Tyres* (I 1522/2008) [2013] NAHCMD 215 (25 July 2013).[12]

[34] On behalf of the plaintiff it was submitted that on a proper analysis of this ground of objection it was effectively contented on behalf of defendant that, by making a pre-trial order, this court would forfeit its inherent power to grant amendments.

[35] This understanding was subsequently ameliorated by the concession made by Mr Heathcote, during argument, and after the court had enquired from him whether it was not so that a pre-trial order was not an order cast in stone and whether it could not be varied in appropriate cases.

[36] Mr Botha also referred the court to the provisions of Rule 37(17)(c)[13] and placed reliance thereon as that rule, according to him, incorporated the most important principles regarding amendments to pleadings in general. It tellingly provides, so the argument went further, that in order to expedite the determination of the real issues between the parties a managing Judge may, on good cause, at any stage, at any status hearing, case management hearing or at trial allow or order amendments to the pleadings to be filed so that the real issues between the parties and not mere technicalities would be determined at the trial.

[37] Mr Botha must be correct in this proposition. Part of the case management process is the expeditious determination of any interlocutory issues between the parties which in the past have been the cause of many a delay. Quite clearly the case management rules were designed to achieve also this object as stated

[12] Reported at: http://www.saflii.org/na/cases/NAHCMD/2013/215.html

[13] 'In order to expedite the determination of the real issues between the parties, the judge may, for good cause, at any status hearing, case management conference or at the trial … allow or order amendments to the pleadings to be filed so that only the real issues between the parties and not mere technicalities are determined at the trial.'

expressly in rule A1. Clearly they were not formulated to prevent the parties from ventilating the real issues to be determined at the trial.

[38] Should a party make out a case in accordance with the applicable principles pertaining to amendments, for having its pleadings amended, whether on an opposed basis or not, that, on its own, will- or should go a long way to persuade a court that *good cause*, as it required by Rule 37(17), has been shown, even if this necessitates the variation of a pre-trial order, which may, in the interim, have been made by the court on the strength of the parties' pre-trial proposal.

[39] This would also be in line with the common law principles applicable to the variation of simple interlocutory orders, designed to regulate procedural aspects, as referred to and analysed in *Government of Namibia and Others v Africa Personnel Services (Pty) Ltd*.[14]

[40] I have thus no hesitation to find further that a legitimate quest for the re-formulation of the issues for trial between the parties with greater precision, through amendment, thereby causing the real issues to be placed on record, in accordance with the accepted principles pertaining to amendments, will also go a long way to constitute good and sufficient cause for a consequent variation of a pre-trial order, which clearly is interlocutory in nature and made for purposes of regulating a particular aspect of the procedure.

[41] Such finding, in my view, would then also accord with the principles summarised by Heathcote AJ in the *APS* case referred to above.[15]

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[14] 2010 (2) NR 537 (HC) at [27] to [37]

[15] where the learned judge after an analysis of the applicable case law concluded at [37] : 'Given the authorities referred to, I am of the view that the following situation prevails in Namibia: provided that the order sought to be varied is a simple interlocutory order, the High Court has an inherent jurisdiction to discharge, or vary an order given by the same court, albeit by another judge. It would be impossible to list the circumstances when such jurisdiction will be employed, but it may be done: (1) in respect of purely procedural or incidental matters; (2) where the very substratum or reason why the order was granted disappears as a result of new facts arising since the granting of the order. New facts are, however, not a prerequisite for the inherent jurisdiction to be exercised; but it must be said that cases (where no new facts are available) would seldom arise. This inherent jurisdiction would be employed on good cause shown or when justice so demands, but sparingly and only in exceptional circumstances. Whether or not the circumstances should move the judge to exercise the inherent jurisdiction, and how the existing order should be affected (ie reviewed, discharged or altered) falls within the discretion of the judge.'

[42] As the plaintiff quest for an amendment here is legitimate and *bona fide* I do not consider the issue of *res judicata* to constitute a bar to the relief sought by the plaintiff herein particularly as Mr Botha has simultaneously/additionally applied for the consequent variation of the standing pre-trial order should the plaintiff's application for leave to amend be granted.

[43] I therefore conclude that also this ground of objection can also not be upheld in the circumstances of this matter.

THE CONTINGENCY FEE POINT

[44] It was pointed out on behalf of the defendant that plaintiff's legal practitioners were acting on a contingency fee basis. This was denied.

[45] However and during oral argument Mr Heathcote elaborated on this point. He submitted to the court that should there be a private fee arrangement, which would amount to a contingency fee arrangement, or one that was based on the successful outcome of the plaintiff's case that this would amount to an unlawful arrangement in the Namibian jurisdiction, which unlawfulness the court should not countenance.

[46] I have however on the facts before me - and also as a result of the assurances from plaintiff's counsel - no ground to assume that the plaintiff's legal practitioners are acting herein unlawfully on a contingency fee basis. I am entitled to- and will accept, for present purposes, the assurances of counsel in this regard.

[47] What however became clear is that plaintiff's counsel, after application to the Chief Justice of Namibia, were issued with a Section 85(2)[16] certificate, allowing counsel, who are foreign counsel, the right of audience and to act on behalf of plaintiff in the Namibian Courts on the basis of a certificate, which was issued to them, and which reflects that they would be acting on behalf of plaintiff on an in *forma pauperis* basis.

[48] At the hearing of this matter Mr Botha however conceded that no formal application in terms of Rule 41 of the Rules of High Court had ever been brought in

[16] Section 85(2) of the Legal Practitioner's Act No 15 of 1995, as amended,

this jurisdiction, in terms of which plaintiff's legal practitioners were formally authorized to act on an *in forma pauperis* basis for the plaintiff.

[49] As I understand it, this issue will have a bearing on any cost order that the court might make and which may accompany any amendment to cure any resultant prejudice to the defendant.

[50] It also emerged during the run- up to the hearing of this application, during which hearing also an application for security of costs would have had to be determined, that, in the meantime, this application for security for costs had been withdrawn by defendant. It is unclear on which basis such withdrawal was done and whether this withdrawal should thus have any bearing on the costs determination of this matter.

[51] What is however clear, is that the amendment sought - and should it be granted - will have practical repercussions. It does not take much to fathom why any resultant prejudice, occasioned to a party on the receiving end of an amendment, is normally cured by a costs order.

[52] Plaintiff has not shown that he enjoys the cover afforded by Rule 41 of the Rules of Court. Accordingly, and unless he brings himself within the ambit of the protection of that Rule, I am not inclined to not order him to pay any cost occasioned by the bringing of the amendment which he has sought, and which will be granted.

[53] Mr Heathcote has also argued that the amendment is prejudicial to the defendant. This argument is also based on the fact that the incidents, which the witnesses in this case, will have to narrate, has taken place some 8 years ago and that it already emerges from the witness statements that it is very difficult for the defendant to now produce documents and evidence, for instance in regard to the safety instructions that may, or may not have been issued, on the day in question.

[54] The prejudice contented for is one that may ultimately have an impact on the outcome of this matter. In this regard it has however been held that this is not the type of prejudice that should prevent the granting of leave to amend.[17]

[17]The fact that an amendment may cause the other party to lose his case against the party seeking

[56] In any event, and should this be the evidence at the trial, depending on the actual evidence and the circumstances in this case, the effluxion of time and its impact on the power of recollection, will surely be taken into account when the credibility of any witness in this matter is eventually considered.

[57] It will have become clear from what has been set out above that I consider the objections to the proposed amendment without merit and that I deem it proper, in order to allow for a full ventilation of the real issues, that leave to amend be granted in this instance.

[58] In the result I make the following orders:

a) The application for leave to amend succeeds.

b) The order sought in paragraph one (1) of the notice of motion to the application for leave to amend, dated 13 June 2013, is hereby granted.

c) In so far as it may be necessary, paragraph one (1) of the pre-trial order of 19 March 2013 is hereby varied consequentially to allow for the incorporation of the issues flowing from the amendment granted in terms of this order.

d) The plaintiff is directed to deliver his amended particulars of claim, within three (3) days of this order.

e) The defendant is to amend its plea consequently, if it so chooses, within five (5) days of the delivery of the amended particulars of claim.

f) The parties are hereby granted leave to amend their witness statements filled of record, if they deem this necessary, and if they are able to achieve this, on or before the close of business of 11 October 2013.

g) The plaintiff is to pay the defendant's costs occasioned by the amendments, unless, he can satisfy the taxing master that he has obtained leave to sue *in*

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the amendment is not of itself prejudice' of the sort which will dissuade the court from granting it.' *'Erasmus - Superior Court Practice'* at p B1-179 (Service 35,2012) and the authorities cited in footnote 3 - See also generally : *Andreas v La Cock* 2006 (2) NR 472 (HC)

forma pauperis, such costs to include costs of two instructed counsel and one instructing counsel.

h) The defendant is ordered pay the costs occasioned by the application for leave to amend, such costs to include costs of two instructed counsel and one instructing counsel.

H GEIER

Judge

APPEARANCES

APPLICANT/PLAINTIFF:	J J Botha SC (with him L Viljoen) Instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek
RESPONDENT/DEFENDANT:	R Heathcote SC (with him G Dicks) Instructed by GF Köpplinger Legal Practitioners, Windhoek