REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No. I 268/2014

In the matter between:

ZAMNAM EXCLUSIVE FURNITURE CC **PLAINTIFF**

and

JOSEF STEPHANUS LEWIS AND CORNELIA CATHARINA LEWIES THE TRUSTEES OF THE CC LEWIES FAMILY TRUST **DEFENDANT**

Neutral citation: *Zamnam Exclusive Furniture CC v Lewis (I 268-2014) [2015] NAHCMD 274 (13 November 2015)*

CORAM: MASUKU A.J.

Heard: 28 July 2015

Delivered: 13 November 2015

Flynote: RULES OF COURT – Compliance with Rule 32 (9) and (10); Amendment of pleadings; offer to settle and costs order in relation applications for amendment.

Summary: The plaintiff sued the defendant for a sum arising out of a contract for performance of certain works. Defendant claimed that the work had not been carried out in a workmanlike manner but tendered the amount claimed upon performance. The defendant applied for an amendment of its plea which was objected to by the plaintiff on a number of grounds. *Held* Parties should comply with the provisions of rule 32 (9) and (10) or they run the risk of their cases being struck from the roll for non-compliance. Court nevertheless condoned the non-compliance. *Held* that a party must be confined to the grounds of objection to amendments raised in the notice of opposition and may not be allowed to augment or supplement or add thereto in the heads of argument. *Held further* that a party may make a conditional 'tender' to settle the amount claimed against performance of certain conditions but this is not governed by the provisions of Rule 64. Policy of the courts regarding amendment of pleadings revisited. *Held further* that a party seeking an amendment craves an indulgence and must ordinarily pay the costs occasioned by the amendment. Amendment allowed and the party seeking amendment ordered to pay the costs.

ORDER

In the premises, the application for amendment is allowed in its entirety. The applicant is to pay the costs incurred as a result of the amendment.

ISSUES – Order for filing of further papers and return to case management roll
Costs of opposing the amendment.

RULING ON APPLICATION FOR AMENDMENT

MASUKU AJ.,

[1] The issue confronting the court in this ruling relates to the sustainability of an opposed application for the amendment of pleadings.

[2] It is important, however, to place the historical chronicle of the relevant events in perspective in order to conduce to an understanding of how the question for determination arises. It is important to mention that the parties seem to be at each other's throat in this matter, and testimony to this fact is a number of other applications, including one for security for costs and applications and counter-applications for striking out certain matter. All these appear to have been bitterly opposed, the present one being no exception.

[3] The matter commenced by a simple summons in which the plaintiff sued the defendant for payment of an amount of N$ 264 588, 12. It is alleged that indebtedness arose as a result of wood work performed by the plaintiff for the defendant at the latter's special instance and request, but which notwithstanding demand, the defendant failed to pay. An application for summary judgment was issued but by consent, the defendant was granted leave to defend the action.

[4] By notice dated 16 September 2014, the defendant indicated its intention to amend its plea. As is apparent from the preceding paragraphs, this application is vigorously opposed by the plaintiff and on grounds that I need not, at the present moment traverse. The plaintiff, by notice dated 25 September 2014, delivered its grounds of objection to the proposed amendment. It is on the two documents mentioned in this paragraph that this matter oscillates, namely, the proposed amendment and the grounds for opposition thereto.

Nature of the amendment sought

[5] By notice in terms of rule 52 (1), dated 19 September 2014, the applicant sought amendment of its plea in the following respects:

'1. By deleting the defendant's special plea;

2. By substituting the introduction to the defendant's amended plea with the following introduction:

"THE DEFENDANT REFERS TO THE PLAINTIFF'S AMENDED DECLARATION DATED 29 JULY 2014 AND PLEADS THERETO AS FOLLOWS:"

3. by substituting paragraphs 2.1 and 2.2 with the following:

"2 save to plead that the principal place of business of the Trust referred to therein is situated at 18 Schönlein Street, Windhoek-west, Windhoek, Republic of Namibia, the contents thereof are admitted."

4. By adding paragraph 6 to the paragraphs listed in paragraph 5.1 (b).

5. By adding the following at the end of paragraph 5.2 (b) (xiii)/

"In the premises, the first agreement was a reciprocal agreement whereby final payment by the defendant only became payable upon completion of the project as pleade in paragraph 5.2 (b) (i), (ii) and (iii) above."

6. By adding paragraph 6 to the paragraphs listed in paragraph 7.2.

7. By adding the following at the end of paragraph 7.3 (a) (x).

"In the premises, the second agreement was a reciprocal agreement whereby final payment by the defendant only became payable upon completion of the project as pleaded in paragraph 7.3 (a) (i), (ii) and (iii) above."

8. By adding the following at the end of paragraph 10.2 (a) (x).

"In the premises, the third agreement was a reciprocal agreement whereby final payment by the defendant only became payable upon completion of the project as pleaded in paragraph 10.2 (a) (i), (ii) and (iii) above."

9. By adding the following at the end of paragraph 12.1.

", in particular, provided the work was completed as pleaded above. In the premises, the first, second and third agreements were reciprocal agreements whereby final payment by the defendant only became payable upon completion of the work as pleaded above. The plaintiff is, in respect of the first, second and third agreement, obliged to complete the work as pleaded above before the defendant is obliged to make final payment to the plaintiff. The plaintiff has not completed the work as pleaded above, nor has it tendered to do so."

10. By adding the following after paragraph 12.2.

"12.3 Despite the defendant having invited the plaintiff to complete the work as pleaded above, the plaintiff failed to do so nor has the plaintiff tendered to do so.

12.4 Throughout the project and especially towards the end of it, the plaintiff's Mr Scholtz was warned that the quality of its work is not in line with the agreed set specifications and that same was defective. During December 2010 the plaintiff's Mr Scholtz was informed that the money for the balance outstanding will be paid into the defendant's legal practitioner's trust account pending the plaintiff remedying the defects whereupon the money will be paid over to the plaintiff. This payment the defendant did some time ago. The defendant herewith reiterates its tender for payment in the amount of N$ 242 185. 93 upon the defendant remedying the defects in accordance with the agreement as pleaded above and, insofar as it may be necessary, the defendant herewith tenders payment in the amount of N$ 242 185 .93 upon the defendant remedying the defects in accordance with the agreement as pleaded above.

12.5 To date hereof, the plaintiff failed to complete the work as pleaded above nor did the plaintiff tender to do so.

12.6 The nature of the defects concerned are material.

12.7 In the premises, final payment in respect of the work has not become due, owing and payable by the defendant to the plaintiff."

11. By substituting paragraphs 16.1, 16.2 and 16.3 with the following:

"16.1 Save for admitting that the defendant is utilizing some of the items subject to what is pleaded below in this regard, each and every allegation contained

therein is denied as if specifically traversed and denied and the plaintiff is put to the proof thereof.

16.2 Without derogating from the aforesaid denial, the defendant pleads that:

(a) The defendant is utilizing some to the items in accordance with its duty to mitigate its losses.

(b) The plaintiff failed to materially fulfil its obligations.

(c) The plaintiff is aware of its non-fulfilment of its obligations.

(d) The defendant informed the plaintiff that it did not fulfil its obligations and invited the plaintiff to rectify same. The plaintiff failed to do so.

(e) The work concerned was not constructed in accordance with the samples provided by the plaintiff to the defendant and accepted by the defendant as more fully set out in the defendant's "buddle of photographs" delivered on 29 May 2012, read with the plaintiff's "list of work done" delivered on 4 April 2012, the entire contents of which are referred to and incorporated herein as if specifically so traversed and pleaded.

(f) The work concerned was not constructed in accordance with such standard and nature and did not fulfil such purpose as to fit in and accord with the superior class and general aesthetics of the Lodge and, as a result, the work concerned was not executed in accordance with the required standard, as more fully set out in the defendant's "buddle of photographs" delivered on 29 May 2012, read with the plaintiff's list of work done" delivered on 4 April 2012, the entire contents of which are referred to and incorporated herein as if specifically so traversed and pleaded.

(g) Alternatively to the aforesaid the defendant pleads that, the work concerned was not constructed in accordance with such standard and nature as to be proper, workmanlike, professional and acceptable by the building industry in the circumstances pleaded above and, as a result, the

work concerned was not executed in accordance with the required standard, as more fully set out in the defendant's "buddle of photographs" delivered on 29 May 2012, read with the plaintiff's list of work done" delivered on 4 April 2012, the entire contents of which are referred to and incorporated herein as if specifically so traversed and pleaded.

(h) The plaintiff is not excused from completing the work as pleaded above.

(i) The plaintiff failed to set up circumstances that would make it equitable to award the plaintiff some remuneration even though it failed to fulfil its obligations in terms of the agreement.

(j) The plaintiff failed to set up circumstances justifying the exercise by the above honourable court of its discretion to award the plaintiff a reduced contract price.

(k) The costs of remedying the defects still found to be present in the work of the plaintiff will exceed the sum of N$ 2 830.

(l) The plaintiff is not entitled to payment of the amount of N$ 239 355. 93, together with interest as alleged.

16.3 In any event, to date hereof, the plaintiff, notwithstanding being invited by the defendant to do so, so refuses and/or fails to remedy its defective work."

12. By substituting the defendant's prayer with the following:

"WHEREFORE THE DEFENDANT, WHILST REPEATING ITS TENDER, PRAYS THAT THE PLAINTIFF'S CLAIM BE DISMISSED WITH COSTS."'

Opposition and basis thereof

[6] The respondent opposed the amendments sought as captured in the preceding paragraph and the main bases for the opposition may be gleaned from it's notice of

opposition dated 25 September 2014. I intend to capture the essence of the grounds of opposition and they acuminate to this:

(a) the applicant filed its notice of amendment late without tendering any explanation for the delay and non-compliance with an order of court dated 19 August 2014;

(b) the applicant has by the amendment in paras 5-10 of its proposed amendment to introduce a new cause of action and which renders all the previous pleadings, case management meetings and photographing sessions of none effect and wasted. The respondent took the position that if this amendment is allowed, then an order should be issued for the applicant to bear the costs incurred in the activities mentioned above;

(c) in paras 10-12, the defendant alleges that an amount of N$242 185, 93 was paid into the its attorneys' trust account as a tender upon the defendant remedying the defects alleged. The respondent alleges that the amount in question was paid as security in terms of the old Rule 32 (3) to avoid the granting of summary judgment. It is claimed that the allegation of a tender having been made are untrue and dishonest; and

(d) in paragraph 16.3 the defendant makes an allegation to the effect that that the plaintiff notwithstanding being invited to do so, refuses and/or neglects and/or fails to remedy its defective work. It is contended that this allegation is untrue. It is therefore contended on the plaintiff's behalf that an amendment introducing allegations that are to the defendant's knowledge untrue should not be allowed.

[7] Before embarking on an analysis and determination of the grounds for the amendment and the opposition thereto, I find it imperative to first deal with the court's general policy towards amendments as this will lay a basis for the approach that may eventually be taken. In this regard, there is no better place to begin and end at the present moment, than to refer to the *locus classicus* judgment of a Full Bench of this

court in *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC*[1]. The main conclusions which were reached, and which may have a bearing on the instant matter, include the following:

(a) amendments may be sought at any stage of the proceedings;

(b) the court exercises a judicial discretion in allowing or disallowing amendments, and which discretion must be exercised judicially;

(c) a litigant seeking an amendment craves the court's indulgence and must therefore proffer some explanation for the amendment sought;

(d) the explanation required will be determined by the nature of the amendment sought. The more substantial the amendment, the more compelling a case for an explanation;

(e) if a party proffers an explanation that is not reasonably satisfactory or one lacking in *bona fides* the court may disallow the amendment, especially where the amendment is opposed and has the potential to compromise a firm trial date;

(f) an amendment that is not opposed or one that is minor will invariably be granted;

(g) the more substantial an amendment, the more compelling the case for an explanation under oath;

(h) a court will cannot compel a party to stick to a version of fact or law that it says no longer represents its stance and this is because litigants must be allowed in the adversarial system to ventilate what they believe are the real issues between them. See also *K L Construction (Pty) Ltd v The Minister of Works and Transport.*[2]

[8] It is fair to say that properly construed, the first basis for opposition of the amendment is really in the nature of a procedural point rather than a basis in law for opposing an amendment. It is in the proper light that the objection must be seen and decided. The first issue is that the applicant did not comply with the provisions of rule 32 (9) and (10) before lodging this application for determination. Is this point sustainable in the circumstances?

[1] Case No. I 602/2013 and I 4084/2010

[2] Case No. I 246/2013 [2015] NAHCMD 71 (25 March 2015).

[9] A fairly generous portion of judicial comment has been directed at the rule under scrutiny. The first case in this regard was *Irvine Mukata v Lukas Appolus*[3] where the learned judge held that the provisions of rule 32 (9) and (10) are peremptory and that failure to comply therewith should ordinarily lead to the court refusing to enroll a matter for hearing. In *Old Mutual Life Assurance Company of Namibia Ltd v Hasheela,*[4] the court held that on the peculiar facts of that case, a good case for substantial compliance with the provisions of the said rule had been made and the court accordingly condoned the non-compliance. Mr Vaatz contends that in the instant case there has been no compliance whatsoever and that doctrine of substantial compliance is not borne out by the facts.

[10] In the heads of argument, Mr. Vaatz contended that the letter purporting to be in compliance with the provisions of rule 32 (9) was addressed to his office on 27 February 2015 and about two hours later, the proposed amendment was also filed. This, he argued, cannot be in compliance with the rules as the parties hardly had any time within which to engage and regurgitate the proposed amendments and the effects thereof with a view to finding an amicable solution. According to Mr. Vaatz, there was no time between filing of the letter and of the proposed amendment.

[11] I agree with Mr. Vaatz that there was no compliance with the provisions of the said rule in the circumstances. Parties should ensure that they comply with the provisions of the rules, particularly those that bear directly on the overriding principles to be located in rule 1 (3). The one relating to the amicable resolution of disputes is one such rule.

[12] Having said this, I am of the view that in the peculiar circumstances of this matter, and in order to give effect to the other overriding principles, I shall condone the non-compliance considering the costly and time-consuming effect of having to strike the matter from the roll for non-compliance. The parties were otherwise ready to argue the issue of the amendment. I should not, by adopting this stance, be construed to be encouraging parties not to comply with peremptory provisions of the rules. I have

[3] Case No. I 3396/2014 (per Parker A.J.).
[4] Case No. I 2359/2014.

adopted a pragmatic and cost-effective approach to the issues and one which will serve to redeem the time rather than to waste same.

[13] I should perhaps end this issue on a cautionary note I stated in *Kondjeni Nkandi Architects and Another v Namibia Airports Company Ltd.*[5] At paragraph [19] I stated the following:

'Having said the above, and considering that all the parties were before court, with instructing and instructed counsel ready to fire on all cylinders, and amply prepared to argue the exception, I grudgingly condone the non-compliance but hasten to point out very sternly that this must not be taken as a precedent that parties who choose not to comply with this subrule can be allowed to gatecrash the court's portals and be allowed to access the fountains of justice with the freshness of non-compliance very evident. Far from it. Other overriding principles, including the saving of time and costs and the need to speedily dispatch the application have impelled me from strictly following the strictures of the said subrules and in the peculiar circumstances of this matter, subordinating the overriding principle of seeking amicable resolution of disputes to the others I have just mentioned'.

[15] The other procedural point raised by the respondent relates to the applicant not having sought condonation for the late filing of the proposed amendment. This is an issue that I shall not devote much time and attention to as I am of the view that there has been no prejudice suffered by the respondent as a result of the delay. In any event, I am of the view that time should rather be dedicated to dealing with the matter on its merits, namely whether or not the amendment ought to be allowed. I am of the view that the applicant has tendered a satisfactory explanation for the delay in filing its amendment and no prejudice, as I have said, has been suffered by the respondent as a result. More importantly, the delay has not in any was prejudiced and caused the abortion of a firm trial date in this matter.

<u>New allegations that render previous case management orders and incidental processes redundant</u>

[5] Case No. I 3622/2014.

[16] I now turn to the bases of opposition to the amendment proper. The first contention is that the applicant has introduced a new allegation in paragraphs 5 to 10 by alleging that respondent failed to finish the work and also averring that payment became payable upon completion. It is the respondent's case that there were 120 items of furniture to be completed and with the proposed amendment, it is unclear what case it has to meet as the identity of those items of work which were not completed has not been disclosed. Nor is it clear which ones were satisfactorily done, the respondent further contends.

[17] For its part, the applicant denies that it has introduced a new allegation as alleged. It is the applicant's contention that the amendment proposed does nothing more than include a legal conclusion from various averrals already contained in its plea. It further contends that the respondent has, in its heads of argument not only augmented its bases for opposition but has significantly introduced new grounds of opposition which were not included in the grounds of objection before court.

[18] A reading of the applicant's plea at para 5.2 (b) vi shows that the defendant pleaded as follows in that paragraph:

'The balance of the quoted amount was to be payable at the completion of the project, such completion to have been as pleaded in paragraph 5.2 (b) (i), (ii) and (iii) above.'

Other paragraphs which have a bearing on this complaint are paragraphs 5.2 (b) xiii, where it is alleged that the defendant was to remunerate the plaintiff for the construction of the teak deck on condition that and only once the plaintiff had complied with all its aforesaid obligations. The refrain, also evident in paragraphs 7.3 (a) vi, 7.3 (a) x, 10.2 (a) vi; 10.2 (a) x and 12.1 appears to be that the defendant would make payment for the work on condition that the plaintiff had complied with its obligations or it had delivered the furniture to the defendant and the latter accepted and approved the work done.

[19] In the premises, I am of the considered opinion that the respondent's complaint that the applicant sought to introduce new allegations regarding payment being made upon completion is not borne out by the plea even in the unamended state. I find that this complaint is totally unjustified and I reject it outright. I also agree with the applicant

that the amendment regarding the allegation that the work was not completed as undertaken and in terms of the agreement *inter partes* is nothing more than a legal conclusion that can reasonably be drawn from the allegations already included in the plea in its current state.

[20] A reading of the defendant's plea as a whole would have led to an ineluctable conclusion that the defendant has at all material times contended that the work done by the plaintiff was defective in a number of respects and further that some of the work had not been completed. It would not be fair to then say that the legal conclusions that the defendant wishes to include in the amendment have introduced new allegations altogether and which amount to a change of front. To this extent, I am unable to agree with the plaintiff. It is also my view that the mere crystallization of the legal conclusions in the amendment on a defence already pleaded does not *per se* render the previous pleadings, case management meetings and photographing sessions with Mr. Mostert redundant and therefore a wastage.

[21] It must be pertinently mentioned that the plaintiff, in its heads of argument, belatedly appears to raise a new complaint which is not included in its notice of objection. This is to be found in paragraphs 7.2 where the plaintiff alleges that the proposed amendment is prejudicial to it for the reason that there were 120 items of work to be done and the plaintiff is in the dark as to which of the 120 items were not completed, thus placing the plaintiff in a difficult position as it does not know what case it has to meet. To meet this accusation, the applicant has submitted that the photographs filed as exhibits itemize all the defects alleged and that the respondent knows which items it is alleged are defective and in what respects. To this extent, I am with the applicant.

[22] It is well to observe that this complaint is now raised for the first time in the heads of argument and was not raised in the notice as part of the reason for opposing the amendment. Should a party in the place of the plaintiff be allowed to improve the case it set out in the heads by introducing new bases of opposition in the heads of argument? I

think not. In *Squid Packers (Pty) Ltd v Robberg Trawlers (Pty) Ltd*[6] 1999 (1) SA 1153, the following was stated in regard to this issue:

'Prior to the amendment of Rule 28 during 1987 it was not a requirement that a notice of objection should set out the grounds upon which the objection was based. However, this is now a requirement, and it is my view that the amendment to the Rule was introduced in order to enable a party who wishes to amend a pleading to know the basis of upon which the objection to the proposed amendment is made, and to avoid the situation which previously frequently arose, namely that the party seeking to amend did not know what the basis of the objection was and therefore, when applying for an amendment, had to endeavor to deal with every conceivable complaint that the other party might have'.

[23] In dealing with a party being limited to the grounds of objection raised in its notice, the Court expressed itself thus at p 1158 A:

'Quite clearly this was done because the objection now raised by Mr. *Eksteen* was not referred to in the notice of objection. If the defendant could now prevent the plaintiff from amending its pleadings merely because there has been no motivation for the change in stance, when the defendant itself did not indicate that it required such motivation by raising an appropriate ground of objection in its notice of objection, this would be grossly unfair, and is something which cannot be allowed to happen.'

[24 I am of the view that the above quotations accurately reflect what should also be the practice in this jurisdiction. A party objecting to a proposed amendment is afforded an opportunity to state the grounds of objection which serve as notice to the opposite party as to the case it has to meet. The party proposing the amendment is not entitled, ordinarily to look elsewhere beyond the four corners of the objection raised. It is therefore irregular and unfair for the objecting party, in its heads of argument, which appears to have happened in this case, to introduce new grounds of objection which were not properly raised in the notice. The court should in my view have no regard to such new grounds. To do otherwise would be to sanction litigation by ambush and would allow the objecting party to change its goalposts as it were, with the other party

[6] 1999 (1) SA 1153 (SECLD) at 1157 E-G.

being left at the mercy of its opponent. I shall, for that reason, not have any regard to new grounds of objection raised in the heads of argument which were not raised in the notice of objection.

Opposition related to the tender of the amount of N$ 242 185. 93

[25] The basis of the complaint and opposition in regard to this ground is that the defendant never made a tender as alleged but the said amount was paid in as security in terms of the old Rule 32 relating to summary judgment. It is alleged by the respondent that the allegations of a tender are dishonest and untrue. It is further stated that for a tender to be what it purports to be, it must be unconditional and should not have attached to it several conditions to be met. It is further alleged that the defendant's plea is contradictory in that on the one hand in paragraph 12.4 it is stated that the defendant tenders payment, yet in 16.2 the defendant alleges that the plaintiff is not entitled to the payment of the amount stated above.

[26] It would appear to me that the allegation by the respondent that the money paid into trust was in respect of security furnished in terms of the provisions for summary judgment is not borne out by the evidence. I say so for the reason that the allegation was made in previous proceedings and was denied with positive evidence being tendered to show that by the time the summary judgment was moved, the amount in question had already been placed in the trust account of the applicant's legal practitioners. In this regard, it would appear that the said amount was paid on 13 January 2011. The summary judgment, it appears, was only lodged on 28 January 2011.

[27] In the premises, the strong language of dishonesty levelled should not have been made, particularly where the evidence shows that the position is otherwise. It is therefore inconceivable, in the circumstances that the applicant could have put up security in respect of a summary judgment application even before an application for summary judgment had been launched. The probabilities in this matter favour the applicant's version and I find for the applicant in this regard.

[28] The respondent further alleges that the applicant should not have disclosed the tender in the pleadings as a form of proposed settlement and further states that if the applicant wished to make the tender as a form of settlement, then the amount tendered should have been quantified in order to enable the plaintiff to know what case it has to meet. No authority is cited in support of either position.

[29] I am of the view that if the approach of the respondent in this regard is informed by the non-disclosure of settlement negotiations, then that does not, in my view apply to a matter such as the current one. In this case, the defendant is not entering into settlement negotiations but what it did was to 'tender' the amount claimed against the plaintiff performing in terms of the agreement alleged. To show its genuineness in this regard, it proceeded to place the amount tendered in its practitioner's trust account. In any event, it does not appear that the tender is on a 'without prejudice basis' and which in terms of rule 64 (10) must not be disclosed or appear in any file in the office of the registrar.

[30] I am of the view that the 'tender' made by the defendant in the instant matter is not an offer to settle as contemplated by the provisions of rule 64 and does not fall in either rubric of a tender, properly construed, nor a without prejudice offer to settle. I say so because in the instant case, the defendant tied the payment to performance and remedying of the alleged defects by the plaintiff, which means that conditions are attached, an appendage not applicable to rule 64. It is in my view, a *sui generis* situation which is not prohibited by the rules but at the same time displays the *bona fides* and readiness of the litigant concerned to settle the matter once the demands or conditions made have been met. It would therefore appear to me that the use of the word 'tender' in the circumstances may well be a misnomer and is not to be construed in the strict legal and regimented manner contemplated by rule 64, but rather loosely.

[31] As I understand the applicant's case regarding the tender is that it contends that the work done by the respondent was defective in respects which are disclosed. The tender is made available to the respondent once it has remedied the defects complained of. I do not, for that reason agree that the applicant needs to quantify the amount tendered in relation to the individual defects that are alleged in order to place

the respondent in a position to know the case it has to meet as alleged. The parties would, in my view, be at large, once it is alleged that the work has been done and the defects have been remedied to assess the value of the work done against the amount tendered.

[32] An authority[7] was supplied to the court by the respondent's legal practitioners purportedly in support of their contention mentioned above. Regrettably, that authority is not in the language of the court and I was hamstrung in that regard and cannot get any guidance from the said authority. I have used the word purportedly above for the reason that I could not, in the circumstances independently confirm that the case is proposition indeed for what was contended for. I would in this regard appeal to practitioners to refer to authorities which are in the language of the court or to provide official translations thereof so as to give full assistance to judicial officers in the enormous task of determination of at times intricate matters of law.

Introduction of new allegations which are to the defendant's knowledge untrue

[33] In this ground of objection, the respondent alleges that the applicant has sought to introduce new allegations which are to the applicant's knowledge untrue. These allegations are to be found in paragraph 16.6 where the applicant states, 'to date hereof the Plaintiff, notwithstanding being invited to do so, refuses to do so and/or neglects and/or fails to remedy the defective work'. It is contended that this allegation is untrue and this the applicant knows full well. It is on those bases that it is claimed that the amendment in this regard should not be allowed for it is untrue.

[34] I am of the view that the reason advanced by the respondent of disallowing this aspect of the amendment is not sustainable. There is no prejudice that has been allegedly suffered by the respondent as a result of the proposed amendment in this regard. If anything, the respondent has every opportunity to respond to the new allegations and the veracity or the fallacy of these allegations can be tested in evidence as it should be clear what each of the parties position on this aspect is. The court should

[7] *B K Tooling v Scope Precision Engineering (Pty) Ltd* 1979 (1) SA 391 (AA).

not be placed in a position where it has to engage into a trial-within-a-trial as it were in order to decide on whose side the truth regarding the allegation rests at this nascent stage of the proceedings, well before trial.

[35] The applicant's position, from the pleadings appears to be and seems to have always been that the work done by the respondent was defective and the respondent was offered an opportunity to remedy the defects which it failed to do. The amendment sought does not appear on first principles, to detract from that position. The reasons advanced by the respondent do not, in my judgment, serve to provide sufficient reason to decline the amendment.

[36] It must be recalled that the instant matter has not at this stage progressed to the stage which had been reached for instance in the *K L Construction* case (*supra*). In that case, the matter was actually ready and due for trial on the morning when the amendment was sought to be effected. In this case, the factual and legal issues to be decided have not yet crystallised and the trial date is far from being appointed, with the pleadings being reopened as it were as a result of the respondent seeking an amendment of its pleadings in the first place.

[37] On this note, I should perhaps say a word or two, in closing about the principles derived from case law that have influenced me in granting the application sought, the respondent's protestations notwithstanding. Perhaps the starting point would be ideal to advert to *Whittaker v Roos,*[8] a case which notwithstanding its age, still reflects the principles that to this day largely guide the court in considering applications for amendment. There the court said the following:

'This court has the greatest latitude in granting amendment, and it is necessary that it should have. The object of the Court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts. . . But we all know, at the same time, that mistakes are made in pleadings, and it would be a very grave injustice, if for a slip of the pen, or

[8] 1911 TPD 1092 at p 1102.

error of judgment, or the misreading of a paragraph in pleadings by counsel, litigants were to be mulcted in heavy costs. This would be a gross scandal. Therefore, the Court will not look to technicalities, but will see what the real position between the parties.'

[38] In *Tidesley v Harper*[9] the following lapidary remarks were made:

'My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide,* or that, by his blunder, he has done some injury to his opponent which cannot be compensated for by costs or otherwise.'

[39] In *Macduff & Co (In Liquidation) v Johannesburg Consolidated Investment Co. Ltd,*[10] the court reasoned thus regarding the approach to applications for amendment of pleadings:

'It is a development which is to be welcomed with proper ventilation of the issues in a case is to be achieved and if justice is to be done. In line with this approach, courts should be therefore careful not to find prejudice where none really exists.' See also *Hinananye Nehoya v Teresia Shafooli and Another.*[11]'

[40] Having considered the proposed amendments and the notice of objection filed thereto, I am of the opinion that the amendments are in order as they seek to properly capture and express the real issues between the parties and having regard to the stage the case has reached, there is no prejudice that can be said to be likely to be suffered by the applicant as a result of the proposed amendment which cannot be cured by balm than an appropriate order as to costs offers.

[41] On the question of costs, it has been stated that a party which applies for an amendment seeks the court's indulgence. For that reason, that party should ordinarily be ordered to pay the costs occasioned by the amendment. See the *Nehoya* judgment (*supra*) and *Eckleben v MTC.*[12] In the *Nehoya* case, the learned Judge cautioned

[9] 10 Ch.D 393, per Lord Bramwell at p396.
[10] 1923 T.P.D. 309 at 3010.
[11] (I 09-2013) [2015] NAHCNLD 04 (27 January 2015) per Cheda J, at p9.
[12] (I 920/2013 per Ueitele J delivered on 9 October 2013.

against the practice of mulcting an unsuccessful respondent in such applications with an adverse order for costs, reasoning that such a practice would breed an 'unnecessary reluctance to approach the courts thereby shutting out genuine albeit mistaken litigants'.

[43] In *Siegfirend Eckleben v Mobile Telecommunications Limited*[13] my learned Brother Ueitele J held at para [21] and I agree with him, that the costs incurred as result of reasonable opposition to the application for amendment form part of the wasted costs. I am of the view that the opposition in this case was not wholly unreasonable as some of the matters raised serious issues of law that occupied the mind of the court for some time.

[44] It will be seen that the judgment has taken rather long to be delivered and this is owed largely to the fact that I inherited the matter on the morning of the hearing yet the matter had a long and protracted history and therefor has voluminous papers that I had to consider. The issues at play were not straight-forward either and I had, in between dealing with other matters, had to deeply consider the pertinent issues in this matter, some of which were far from easy.

[45] In the premises, the following order is hereby granted:

[45.1] The application for amendment is allowed in its entirety.

[45.2] The applicant is to pay the costs incurred as a result of the amendment, including the costs of opposition.

[45.3] The defendant is to file its amended plea within a period of fifteen (15) days from the date of this order.

[45.4] The plaintiff is to file its replication, if any, within a period of ten (10) days on receipt of the amended plea.

[45.5] The matter is postponed to 3 February 2016 for a status hearing

[13] Case No. (I 920/2012) [2013] NAHCMD 277 (9 October 2013).

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TS Masuku

Acting Judge

APPEARANCES:

DEFENDANT/APPLICANT:	B De Jager Instructed by
PLAINTIFF/RESPONDENT:	A Vaatz Instructed by Andreas Vaatz & Partners