REPORTABLE

CASE NO.: I 672/2004
I 673/2004

IN THE HIGH COURT OF NAMIBIA

In the matter between:

COASTAL FISH TRADERS (PTY) LTD	**APPLICANT/PLAINTIFF**
and	
CAMERON WILSON	**FIRST RESPONDENT/ DEFENDANT**
TREVOR FOSTER	**SECOND RESPONDENT/ DEFENDANT**

CORAM: DAMASEB, JP

Heard on: 2006.02.21

Released: 2006.03.01

REASONS

[1] **DAMASEB, JP:** On 21st February 2006 I made an order in the following terms as far as it is relevant:

> **IT IS FURTHER ORDERED AS FOLLOWS:**
>
> 1. The matter is postponed to a date to be arranged with the Registrar for trial.
>
> 2. Each Defendant is afforded the opportunity to plead to the Plaintiff's Particulars of Claim dated 13th February 2006, within 20 days from date of this order so as to comply with Rule 18(4) of the Rules of Court, i.e. by giving a clear and concise statement of the material facts upon which the Defendant relies for his defence to the Plaintiff's claim.
>
> 3. The reasons for this order and the appropriate order as to costs, are reserved."

I now give those reasons and deal with the issue of costs.

[2] These two matters were, by agreement, consolidated into one. The facts and issues arising in them are identical. In each the same Plaintiff claims the amount of N$150 000 from the defendant on the basis that the defendant, acting in the capacity of employee/director *"and without any authorization thereto ... unlawfully and/or wrongfully allocated and/or appropriated funds from the plaintiff company to himself in the total amount of N$150 000."* [1] This allegation surfaced for the first time in August 2004 when the plaintiff gave notice of its intention to amend its original particulars of claim (dated 17th February 2004) which started the proceedings and, in relevant part, reads as follows:

> "3. Defendant is indebted to Plaintiff in a total amount of N$150 000,00, being in respect of loans granted by Plaintiff to Defendant.
>
> 4. Such amount has not been repaid by the Defendant to Plaintiff, despite demand, and is due, owing and payable."

[2] The confusion which it has now become the Court's duty to resolve was created when, on 18th February 2005, the Plaintiff's *"Amended Particulars of Claim"* were filed.[2] Paragraph 5 of these amended particulars of claim reads:

> "5. Such amount **has been** repaid by Defendant to Plaintiff, despite demand, and is due, owing and payable."

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[1] Counsel for the defendants, in argument and rightly in my view, suggested that this is, in reality, an allegation of theft.

[2] Notice to amend was given together with the reply to a request for further particulars filed at Court on 25th August 2004.

The word “not” was, obviously erroneously, removed from the original paragraph 5 in respect of which no notice was ever given to amend in the notice to amend given on 25th August 2004.

[3] The Plaintiff filed a “Corrected Amended Particulars of Claim” only on 15 February 2006 to correct the error in excluding the “not” from paragraph 5 of the particulars. This was well after the plea was filed and, it is common cause, after it was so agreed at the Rule 37 Conference. The point though is that it was filed so close to the date of trial.

[4] Right at the outset, when the notice to defend the action was filed, the Plaintiff applied for summary judgment. That application was opposed and the defendant, in the opposing affidavit filed on 15th March 2004, stated that the amount claimed was an interest-free directors loan granted to the defendant by the plaintiff with no agreement as to date of payment and to be repaid from dividends earned by the defendant through shareholding in the plaintiff, if and when such dividends are declared. Since no such dividends were ever declared, the amount is not due and payable. As is obvious, at this stage already, the defendant admitted to receiving the disputed amount from the plaintiff, albeit as a loan, which had not yet become due and payable.

[5] The defendant filed a plea to the amended particulars of claim. In respect of paragraph 5 of the particulars which stated: *“Such amount **has been** repaid by Defendant to Plaintiff, despite demand, and is due, owing and payable.”*

The plea to that was as follows:

> "5.1 It is pleaded that the amount has been repaid. Defendant presumes that plaintiff intended pleading that the amount has not been repaid.
>
> 5.2 Defendant denies that plaintiff has demanded repayment of the amount of N$150,00.00 from him.
>
> 5.3 Defendant denies that the amount of N$150,000.00 is due, owing and payable as alleged and puts plaintiff to the proof thereof."

[6] The plaintiff argues that the above paragraph 5.1 means the defendant says that it repaid the money, and therefore bore the onus to prove that he did; and therefore prepared its case on that basis. The defendant, referring to the **history** of the matter, argues that such an interpretation is untenable and that what he did was only point out the error in the plaintiff's paragraph 5 and that he never pleaded that he repaid the money.

[7] When this matter was called, the Court was called upon to decide which interpretation of paragraph 5.1 of the plea is correct. The plaintiff says that since the defendant now says that he never pleaded that he repaid the money, a postponement must be granted as the basis on which it prepared is no longer valid, and that it be awarded costs. The defendant takes the opposite view.

[8] When the plea was filed, the plaintiff never demanded further particulars in respect of paragraph 5 of the plea; nor did it require any particulars for purposes of trial in respect of what *it* assumed was the allegation that the money

had been repaid. Paragraph 5 of the amended particulars of claim was obviously nonsensical and was excipiable and clearly vague and embarrassing. No exception to it was taken by the defendant though. Had both parties acted in that way, the confusion would have been cleared well before trial. Litigants are required to take appropriate steps to limit issues and shorten litigation. In *Channel Life Namibia Ltd v Finance In Education* (Pty) Ltd[3], the following appears:

> "A party should at the earliest opportunity that presents itself take all such steps as would end the litigation or curtail the costs associated with it. A party would be denied of costs it would otherwise have been entitled to if its conduct has unnecessarily occasioned, encouraged or prolonged litigation. Compare: *Ottawa (Rhodesia) (Pvt) Ltd v Highams Rhodesia (1969) Ltd* 1975 (3) SA 77 at 80-D."

See also *Scheepers and Another v Pate* (1909 TS. 353), where Wessels J said, at 356:

> "It is the duty of a litigant to take the most expeditious course to bring the litigation to a conclusion. He should take such exceptions in limine as will dispose of the dispute or bring the proceedings instituted to a conclusion. If he does not adopt this course it does not necessarily under our rules preclude him from raising in the court of appeal an objection which was not raised in the court below; but in that case he increases the

[3] Unreported judgment of this Court delivered on 8/09/2004

> litigation and the costs, and should not, as a general rule, be entitled to get from his opponent the extra costs caused by his omission." (My underlining)

[9] In my view both parties share in equal measure the blame for the confusion. The confusion was exacerbated by the evasive nature of the defendant's plea which, contrary to Ms Vivier's suggestion, does not comply with Rule 18(4) of the Rules of Court. Had the full basis of the defendant's case as shown in the affidavit opposing summary judgment been set out in the plea, it would have been clear:

1) that the defendant admits receiving the disputed amount;

2) that the amount was received as a loan repayable from dividends; and

3) that the amount was not yet due and payable because no dividend had been declared.

[10] Rule 18(4) requires that a plea must contain a clear and concise statement of the material facts upon which the defendant relies.[4] As was said by Tindall J in *Wildner v Compressed Yeast Ltd* 1929 TPD 166 at 170-1.

> "A plea ought to state expressly the defences which the defendant relies on, but it may happen to be so drafted that it indicates impliedly that the defendant intends to rely upon a certain defence. And if the terms of the plea do indicate, by implication, that the defendant intends to rely upon a certain defence, then I think it is the duty of the defendant to state clearly and concisely the material facts on which that defence is based …" [My emphasis]

[4] See Herbstein & Van Winsen (4th edn.) pp 466.

[11] Based on what is stated in the affidavit resisting summary judgment, the defendant intended to rely on positive allegations explaining the circumstances under which that money was received. Those allegations ought to have been set

out in the plea clearly and concisely. The allegation that the money is not due, owing and payable is susceptible of several interpretations: either it was never received; or it was received but had already been paid back, or the time for payment is not yet due. The plea *in casu* is not clear which of these was intended. It would be wrong to say that the affidavit resisting summary judgment explains which it is. The plea must be capable of being read independently of the affidavit resisting summary judgment. The purpose of pleadings is to clarify, not obfuscate issues. I agree with and adopt the following statement by Peter Van Blerk in his work *"Legal Drafting: Civil Proceedings"* (1998), Juta at p.4:

> "It is said that there are three reasons why pleadings are required: firstly, for the parties to be informed of the issues in dispute between them so that they may prepare for trial; secondly, for the court to be informed of the issues so that it may know of the limits of the dispute before it; and, thirdly, so that the issues may be on record lest one or the other parties seek to reopen the same disputes after they have already become determined.
>
> ...

> To achieve these objectives, the pleadings must be prepared with as much precision as possible. There may be cases where the parties know precisely what is in dispute between them, but the judicial officer who is to hear the dispute will not know unless he or she is informed of it. Pleadings present the opportunity to do just this. The disputes must be recorded in the pleadings with sufficient precision to enable someone other than the combatants to ascertain what it is that is in dispute between them." (My underlining)

[12] The defendant's plea does not meet that standard. As I observed before, both parties must share the blame for the confusion in this matter. The most appropriate order as to costs is therefore not to place the blame on one party at this stage, but to make it dependent on the final outcome of the merits. It is for these reasons that I made the order I did after hearing argument. It only remains for me to add that the wasted costs for 21 – 23 February 2006, shall be costs in the cause.

DAMASEB, JP

ON BEHALF OF THE APPLICANT:	**Adv. Mouton**
Instructed By:	**P F Koep & Co**
ON BEHALF OF THE RESPONDENTS:	**Adv. Vivier**
Instructed By:	**Kirsten & Co**