



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1764/2011

In the matter between:

ANTHONY ABRAHAMS AND 121 OTHERS

PLAINTIFFS

and

STANDARD BANK NAMIBIA RETIREMENT FUND

AND 9 OTHERS

DEFENDANTS

Neutral citation: *Abrahams v Standard Bank Namibia Retirement Fund*
(I 1764/2011 [2012] NAHCMD 51 (05 November 2012))

Coram: DAMASEB, JP

Heard: 2 October 2012

Delivered: 06 November 2012

Flynote: Opposed application for amendment in terms of rule 28 — Court finding proposed amendment - even if allowed - still excipiable as claims on which predicated bad in law. Application for amendment refused.

ORDER

I make the following order:

1. The application for amendment is refused.
2. The costs of the opposed application for amendment stands over for determination on a future date.
3. The parties are directed to convene a parties' conference and to agree a joint report for submission to the managing judge on the future conduct of the case, including whether or not the exception must be adjudicated, and the proposed dates for doing so.

JUDGMENT

Damaseb, JP:

[1] The 122 plaintiffs are either present or former employees of the 2nd defendant (Standard Bank Namibia Limited). Their claims relate to, and have their genesis in, the fact that, in 2000 their pension arrangements changed in that the pension scheme created for their benefit by the 2nd defendant, and run by the 1st defendant (Standard Bank Namibia Retirement Fund) – a body corporate and a registered Pension Fund in terms of the Pension Fund Act, 24 of 1956 – changed from a defined benefit Fund to a defined contribution Fund. Their claims arise from that event. Their principal claim relates to what they allege were erroneous calculations made in the wake of that conversion. They allege that they suffered damages which are set out in respect of each plaintiff. It is common cause that if they are successful in their principal claim, liability attaches to the 1st defendant whose affairs are run by the 4th – 10th defendants as trustees of the 1st defendant. The second head of claim relates to expenses the plaintiffs allegedly incurred in engaging a third party, ISG Risk Services XCC to -

- a) conduct an investigation on behalf of plaintiffs
- b) to assess the quantum of the loss attributable to 1st defendant's alleged wrongful conduct; and

c) provide general assistance to plaintiffs in pursuing the matter.

[2] Crucially, the plaintiffs allege that the 1st defendant, and the 4 – 10 defendants, have persistently refused to provide information relating to the manner in which the calculations were done – giving me the impression that engagement of ISG Risk Services CC was, or at least partly, justified by such refusal.

[3] The defendants, in answer to these claims, filed a notice of exception and application to strike on the following bases:

'All the defendants herewith except to the claim as set out in paragraph 156.6 of the Particulars of Claim read with the relief claimed in respect thereof in prayer 4 of the relief.

1.1 *The particulars of claim read with the further particulars thereto lack averments which are necessary to seek the aforementioned relief in that:*

1.1.1 *No basis is laid in law or fact for this claim:*

1.1.2 *Costs incurred by plaintiffs – if successful – will be allowed by the Taxing Master insofar as it was necessary and proper for the plaintiff's case. However, special fees, charges and unusual expenses are not allowed.*

1.1.3 *No basis in law exists for the claim insofar as it cannot be covered by a costs order. As it is recognised by plaintiffs that this claim is separate and distinct from the order for costs which is incidental to being successful in respect of the main relief, there is no basis in law for this claim.*

Second to tenth defendants herewith except to the Particulars of Claim as amplified by the further particulars thereto in that it lacks averments that are

necessary to join the said defendants as parties to the action and hence that the joining of the said defendants amounts to a misjoinder.

- 3.1 *No relief is sought against any of the defendants.*
- 3.2 *In respect of the second defendant it is conceded that it is joined on a speculative basis and no averments are made that it would or could be called on to make good the amount of the claim.*
- 3.3 *As first defendant is a legal person there is no need to cite its trustees in any capacity in respect of the relief sought against it.*
- 3.4 *No basis are laid in the averments contained in the particulars of claim to make the trustees personally liable for the amount of the claim nor is such relief claimed against the trustees.*
- 3.5 *Third defendant as principal officer of first defendant is cited without any link to any of the allegations made and apart from being cited as a party is not referred to further at all.*

In the alternative to paragraphs 1 to 4 above (the exception) the defendants apply for the striking out of the following paragraphs of the particulars of claim as being scandalous and/or vexatious and/or irrelevant.

- 5.1 *Paragraphs 124 to 132 of the particulars of claim;*
- 5.2 *Paragraphs 147 to 150 of the particulars of claim;*
- 5.3 *Paragraph 156.6 and prayer 4 of the particulars of claim.'*

[4] Confronted with the exception and strike out, the plaintiffs filed a notice to amend their pleadings extensively. The import of the proposed amendments is to add particulars which are intended to establish a nexus between 2nd to 10th defendants and the 1st defendant's alleged wrongful conduct. The defendants object to the proposed amendments claiming that they suffer the same legal defects raised in the exception in that, even in the proposed amended form, the plaintiffs rely on allegations to pursue which, in law, are *facta probantia* (as opposed to *facta*

probandum) which are not permissible in terms of rule 18 (4).¹ The objection to the amendment is materially the same as the exception but in relation to the raft of the proposed amendments it makes clear that they are either facta probantia or provide no 'nexus between the allegations and the relief sought'² or are 'irrelevant and or vexatious and or scandalous'. Specifically it repeats that: the proposed amendments are excipiable for not disclosing a cause of action; alternatively are vague and embarrassing on account of being contingent or speculative in respect of the 2nd defendant; and that the cost of engaging ISG Risk Services CC if found to be necessary will be included in the eventual costs order and is not part of the facta probandum in respect of the principal claim relating to erroneous calculation.

[5] If I understand them correctly, the defendants say that even if I should grant the amendment sought, in law, no liability can even ever attach to:

- a) The 2nd defendant in respect of the claim based on the alleged erroneous calculation of the benefits of the plaintiffs;
- b) The third defendant because, as a principal officer of the 2nd defendant and acting on the directions of the trustees, he cannot be personally liable – for he is cited in his personal capacity – for the actions of the trustees at whose behest he acts;
- c) 1st - 10th defendants cannot be liable for the expenses allegedly incurred by the plaintiffs because such costs (as I understand it) , not being claimed as damages arising from wrongful conduct under the actio legis Anquilia, can only be recovered consequent to a costs order following a successful claim and upon taxation by the Taxing Master. That the claim for the plaintiffs indebtedness to ISG Risk Services CC was justified as being costs (as opposed to a claim for damages) was conceded in argument by counsel for the plaintiffs – and correctly so. As is argued pertinently on behalf of the defendants in para 21 of their heads of argument:

¹ Which states in so far as it is relevant: 'Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his or her claim ...with sufficient particularity to enable the opposite party to reply thereto.'

² In the sense of not disclosing a cause of action.

'Whereas the Court grants cost orders, it only does so on the basis of general principles and orders. It is for the taxing master to determine the exact amounts which must relate to all costs reasonably incurred by the litigant. The decisions of the taxing master can be reviewed by the Court. We submit the plaintiffs cannot attempt to usurp the process by claiming such fees as part of its claims. This means the issues as to the reasonability or otherwise of the fees must be determined in a trial (and not in a taxation hearing), even though it may turn out to be academic (if plaintiffs are unsuccessful in their claims). Furthermore, it would be contrary to the whole manner in which taxation is done where the taxing master is to exercise a discretion and not the Court. There is simply no basis to claim the fees as a substantial separate claim other than as part of a costs order as none of the defendants were party to it.'

[6] I have no quarrel with the test I must apply in deciding whether or not to allow an amendment, as set forth by Mr Van Vuuren for the plaintiffs. He argued that the test I must apply is that an amendment will only be denied in circumstances which will cause the other party such prejudice as cannot be cured by an order for costs and where appropriate, a postponement; and that the power of the court to allow material amendments is limited only by considerations of prejudice or injustice to the opponent.

[7] What Mr Van Vuuren loses sight of in the circumstances of this case is the gravamen of the complaint that runs through both the exception and the objection to the proposed amendments - that under whatever guise, in law, the claims (relating to all defendants in respect of the ISG expenses and the alleged erroneous calculations in respect of 2nd to 10th defendants) are insupportable. The parties are ad idem that an amendment cannot be allowed if, even after amendment, it is excipiable.

[8] 2nd Defendant

I agree that for the reasons advanced on behalf of the 2nd defendant, the second defendant cannot be held liable for the damages allegedly suffered by the plaintiffs. It meets the standard for 'prejudice' to require the 2nd defendant to be obliged to meet a claim that in law can never be supported against it.

[9] *3rd Defendant*

The 3rd defendant is the principal officer of the 1st defendant. He acts on the directions of the trustees of the 1st defendant. He cannot be personally held responsible for so acting. I uphold the submission made on behalf of 3rd defendant that:

'In fact, as the third defendant is not involved in the principal relief sought, and the ISG costs cannot be sought other than as part of the costs, there is simply no basis to hold third defendant liable for anything. His actions, if any, is imputed to the Fund who must bear the consequences. The question of holding a party personally liable for costs in respect of a claim which is not by or against such person personally, arises where a person litigates in a representative capacity.'

[10] *All (1st – 10th) Defendants*

The plaintiffs' alleged indebtedness to ISG Risk Services CC is not predicated on a damages claim for patrimonial loss arising from a breach, by the trustees, of their fiduciary duty resulting in loss to the plaintiffs. On plaintiffs' own pleadings and concessions, it is costs recoverable only in the event of their being successful in their claim for erroneous calculation against the 1st defendant. As argued in plaintiffs heads of argument (at p. 12 para (e));

'the reference to ISG Risk Services CC is necessary to enable this Honourable Court to, at the end of the day, determine whether it was necessary to have engaged such services and if so determined, then the Plaintiffs will be entitled to the costs so incurred as a special cost order under exceptional circumstances.'

The defendants' counsel retort in their heads (at p. 16, para 40):

In respect of alleged breaches of a fiduciary duty this may conceivably support a damages claim, but this is not what is claimed. It can obviously not be pressed for plaintiffs will have to allege that the obtaining of the services of ISG was a result of a wrongful act by third defendant and that this caused them damages, which in turn can only eventuate if they are successful but do not get the relevant costs order.'

[11] *Result*

In the result, all the objections to the notice to amend are upheld and the application for amendment stands to be refused.

[12] *Costs*

An award of costs is in the discretion of the Court. Ordinarily, costs must follow the event unless there are circumstances which justify departure from the normal rule. In this suit, the defendants have not pleaded yet. Serious allegations are made in both the particulars of claim and the further particulars that the defendants have persistently refused to provide to the plaintiffs, and the Registrar of Pension Funds, information about the manner of calculation of the benefits of the plaintiffs. I express no view on that allegation as it remains unanswered, but I find it significant enough to justify an order (in exercise of my discretion) that the costs of the present application stand over for future determination until the defendant has had the opportunity to deal with those allegations and all the facts relative to that allegation have been properly ventilated. If the allegation is true, it makes the defendants guilty of conduct that calls for censure.

[13] *What of the exception?*

In plaintiffs' heads of argument, it is said that if the application to amend is refused, the exception must then be heard. My optimism relative to the prospect of the exception being successful must be obvious from what I have stated above. Setting it down for argument therefore appears to me to be academic. I remain open to persuasion though.

[14] I make the following order:

- (i) The application for amendment is refused.
- (ii) The costs of the opposed application for amendment stands over for determination on a future date.
- (iii) The parties are directed to convene a parties' conference and to agree a joint report for submission to the managing judge on the future conduct of the case, including whether or not the exception must be adjudicated, and the proposed dates for doing so.

P T Damaseb
Judge-President

APPEARANCES

PLAINTIFF: Mr Van Vuuren
Instructed by Du Plessis, Roux De Wet &
Partners, Windhoek.

DEFENDANTS: Mr Theo Frank, SC, Assisted by Mr Ramon
Maasdorp
Instructed by LorentzAngula Inc.