**REPUBLIC OF NAMIBIA**

**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: I 2270/2012

In the matter between:

1.1.1.1. **MARIE-LOUISE HOLZE**

**PLAINTIFF**

and

**R E A STROWITZKI** **1ST DEFENDANT**

**H A HEYN** **2ND DEFENDANT**

*Holze v Strowitzki (I 2270/2010) [2013] NAHCMD 373 (9 December 2013)*

**Coram:** SMUTS, J

**Heard**: 26 November 2013

**Delivered**: 11 December 2013

**Flynote:** Exception – plaintiff seeking dismissal of the defendants' counterclaim without affording them the opportunity to amend. The court declining to deviate from the established practice of first affording such an opportunity. Exception thus upheld but defendants afforded the opportunity to amend.

**ORDER**

a) The exception is upheld;
b) The defendants' counter claim is set aside and the defendants are given leave, if so advised, to file a notice to amend their counter claim within 30 days from service of this judgment upon them;
c) The defendants are to pay the costs of this exception, including the costs occasioned by the employment of one instructed and one instructing counsel.

**JUDGMENT**

SMUTS, J

[2] The plaintiff's cause of action against the defendants is based upon a written lease agreement. The plaintiff claims arrear rental in the sum of N$19 359, 89, confirmation of the cancellation of the lease agreement and ejectment of the defendant's from the leased premises. The written lease agreement is attached to the particulars of claim.

[3]

[4] In addition to filing a plea, the defendants instituted a counterclaim for N$27 500 'for renovations and/or improvements to the leased premises. These renovations and improvements are listed as 'tiling, installing water and electricity wiring to premises, replacing the defendant's wiring, new front door, walls, shelves, wall fixed cupboards, installing a sink, installing a water pipe extension to the premises, and closing the opening leading to the neighbouring unit.' (sic)

[5]

[6] The plaintiff excepted to the counterclaim on the grounds that it did not contain the necessary averments to sustain a cause of action against the plaintiff and/or failed to disclose a cause of action against the plaintiff.

[7]

[8] In support of the exception, the plaintiff referred to clauses 7 and 7.1, 7.2, 7.3, 15.7 and 22 of the written lease agreement. These clauses provides:

> '7.1 The tenant shall not make any alterations or additions to the premises without the Landlord's prior written consent.
>
> 7.2 Should such consent be given, upon vacating the premises the Tenant is liable for the cost of cleaning, clearing and restoring the premises to the condition in which they were originally, fair wear and tear only expected, unless the Landlord exempt the Tenant in writing or chooses to retain such alterations or additions, which become the property of the Landlord without reimbursement or compensation.
>
> 7.3 Should he Landlord consent to alterations and additions, the Landlord shall be entitled to approve contractors, plans and specifications without incurring any liability whatsoever. Local Authority approval shall be submitted by the Tenant before commencement of the work. . .'
>
> 15.7 The Tenant shall not install any floor covering, lighting, plumbing, fixtures or shades or make any change to the shop front, install any window covering, awning, blinds, air-conditioner or light device or adjacent to the shop front or any window or the premises without the prior written consent of the Landlord. . .'
>
> 22. This Lease constitutes the whole agreement between the parties and no Warranties or representations whether express or implied shall be binding on the parties other than as recorded herein. Any agreement to vary this agreement shall be in writing and signed by the parties. No relaxation or indulgence which the Landlord may show to the Tenant shall in any way prejudice its right hereunder. An acceptance of payment of rental & costs or any other payment shall not prejudice the Landlord's rights or operate as a waiver or abandonment thereof. . .'

[9] The plaintiff further stated in the exception that the defendant failed to

make any allegation that any of the oral agreements relied upon for the improvements and expenses were concluded with the prior written consent of the plaintiff alternatively that such agreements were reduced to writing and signed by the parties. In the absence of allegations to this effect, the plaintiff contended that the counterclaim did not disclose a cause of action alternatively did not contain averments necessary to sustain a cause of action against the plaintiff.

[10] The exception was set down for hearing on 9 July 2013. Shortly beforehand (and on 25 June 2013) the defendants gave notice to amend their counterclaim. Before the period during which an objection could be made against the proposed amendment, the defendants sought to file a counter claim, as amended. This was subsequently withdrawn.

[11] At the date of hearing, the exception was removed from the roll and the defendants required to pay the costs. The plaintiff subsequently timeously filed a notice of objection against the proposed amendment. No application to amend, as contemplated by rule 28, was subsequently brought by the defendants. The notice to amend has accordingly lapsed.

[12] In the meantime, the defendants' legal practitioner of record withdrew. The plaintiff thereafter proceeded to set down the exception for hearing on 26 November 2013. Although it was not necessary serve the notice of set down upon the defendants (as they had not provided a service address after the withdrawal of their erstwhile legal practitioner of record), the plaintiff nevertheless forwarded the notice of set down by registered mail to the postal addresses provided in the notice of withdrawal of the defendants' erstwhile legal practitioner. These registered items were however returned.

[13] When the matter was called at the hearing on 26 November 2013, the names of the defendants were called but they were absent.

[14] Mr A Van Vuuren, who had filed written heads of argument, appeared for the plaintiff. He submitted with reference to the authorities referred to in his

heads of argument that the exception was well founded. He further submitted that, in view of the history of the matter, instead of providing the opportunity for the defendants to amend their counterclaim, the court should rather dismiss the counterclaim. When asked for authority in support of adopting such a course, Mr Van Vuuren could not provide any. He however pointed out that the defendants had previously given notice to amend but had not brought an application to amend after the objection had been raised. He submitted that the defendants were engaged in delaying tactics and were thus not serious with their amendment and should not be afforded the opportunity to once again attempt to amend the counterclaim.

[15] I am satisfied that the exception is a good one. The terms of the written lease agreement provide that the items referred to as 'renovations and/or improvements' would require the prior written agreement of the leasor (the plaintiff). Clause 15.7 re-inforces the need for the written consent of the lessor for the items referred to in the counterclaim. Clause 22 of the agreement furthermore provides that the lease constitutes the whole agreement between the parties and any amendment or variation would need to be in writing and signed by the parties. It was thus a requisite for any entitlement to claim in respect of 'improvements and/or renovations' for the defendants to allege the written agreement of the plaintiff thereto as well as address the further provisions of clause 7 and 15.7 relating to such 'improvements and/or renovations'. In the absence of allegations to that effect, the defendants' counter claim is excipiable in failing to disclose averments necessary to sustain a case of action and the exception is to be upheld.

[16]

[17] The usual practice when upholding an exception is for leave to be granted for an amended pleading to be filed within a given period.[1] In the *Group Five* matter, Corbett CJ referred to the reluctance of the courts to deny a party the opportunity to amend a defective pleading[2] and expressed the view that to dismiss a claim for that reason (without affording that opportunity) would be in

[1]*Group Five Building Ltd v Government of the Republic of South Africa* 1993 (2) AS 593 (A) at 602.

[2]Supra at 603 B.

conflict with the general policy of the court to attach such a drastic consequence to a finding that a pleading discloses no cause of action. I respectfully agree with that approach. The *Group Five* matter has been subsequently followed.[3] The Supreme Court of Appeal furthermore subsequently disapprovingly referred to an instance where the court *a quo* had dismissed an excipiable claim instead of the usual order setting aside the particulars of claim with leave to that appellant to amend if so advised.[4] The court in that matter referred to the remarks of Corbett CJ in the *Group Five* matter and stated that 'it is doubtful whether this established practice brooks of any departure and that, in a rear cases in which a departure may perhaps be permissible, one expects to find the reasons in the court's judgment.' The court did not further elaborate on this issue in view of the fact that it upheld the appeal which resulted in the dismissal of the exception.

[18]

[19] The fact that there had been a single abortive attempt to amend – in the sense that defendants did not subsequently prosecute it following a notice of objection – would not in my view be a sufficient basis to depart from the established and well founded practice of affording a party the opportunity to first amend a defective pleading before dismissing a claim. I thus decline Mr Van Vuuren's invitation to dismiss the counterclaim without affording the defendants the opportunity to amend

[20]

[21] I accordingly make the following order:

a) The exception is upheld;
b) The defendants' counter claim is set aside and the defendants are given leave, if so advised, to file a notice to amend their counter claim within 30 days from service of this judgment upon them;
c) The defendants are to pay the costs of this exception, including the costs occasioned by the employment of one instructed and one instructing counsel.

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[3] *Elgin Brown and Haner v Industrial Machinery Supplies (Pty) Ltd* 1993 (3) SA 424 (A) at 431.

[4] Supra at 167

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D SMUTS

Judge

APPEARANCES

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|---|---|
| PLAINTFF: | A Van Vuuren<br>Instructed by Behrens & Pfeiffer |
| DEFENDANT: | Non-Appearance |