



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2845/2012

In the matter between:

IMBERT NGAJOZIKWE TJIHERO
JACQUELINE GETRUD TJIHERO

FIRST PLAINTIFF/APPLICANT
SECOND PLAINTIFF/APPLICANT

and

UAZUVA BEN KAUARI
LYDIA NINGIREE KAUARI

FIRST DEFENDANT/RESPONDENT
SECOND DEFENDANT/RESPONDENT

Neutral citation: *Tjihero v Kauari* (I 2845/2012) [2014] NAHCMD 27 (30 January 2014)

Coram: PARKER AJ
Heard: 14 November 2013
Delivered: 30 January 2014

Flynote: Pleadings – Replication – Plaintiff entitled to deliver replication in terms of rule 25(1) of rules of court – But such entitlement is qualified by the requirement of compliance with the time limit prescribed by rule 25(1) – Court held that plaintiffs cannot raise what would amount to a new or an alternative cause of action, that is, there should not be a departure.

Summary: Pleadings – Replication – Plaintiffs entitled to deliver replication in terms of rule 25(1) of the rules of court – But such entitlement is qualified by the requirement that plaintiffs must comply with the time limit prescribed by rule 25(1) for

delivery of replication – In instant case, plaintiffs sought in terms of rule 27(1) extension of the time limit prescribed by rule 25(1) of the rules – Court found that the plaintiffs have on affidavit furnished a sufficiently full explanation for the default and no prejudice will be occasioned to the defendant if the time limit for delivery of the replication was extended – Court found further that the replication did not raise what amounts to a new or an alternative cause of action and further that the replication was necessary for the adjudication of the dispute between the parties – Consequently, the court granted the application for extension of time for the delivery of the plaintiffs' replication.

Flynote: Pleadings – In terms of rule 18(4) of the rules of court – Interpretation and application of the rule – Court held that whether a party can prove what he or she alleges is neither the concern nor requirement of rule 18(4) – On the authorities the court held further that the plaintiffs pleading contains indubitably sufficient averments to sustain a cause of action.

Summary: Pleadings – In terms of rule 18(4) of the rules of court – Interpretation and application of the rule – Court found that a party complies with the requirements of rule 18(4) of the rules if the party puts forth a definite or clear expression of the facts the party relies on for his or her claim with sufficient particularity to enable the opposing party to reply to it – It is not the concern or requirement of rule 18(4) whether the party can prove what he or she alleges – Upon the authorities the court found that the plaintiffs' pleading contains indubitably sufficient averments to sustain a cause of action.

ORDER

- (a) The plaintiffs are granted extension of time within which to deliver their replication, and they should deliver the replication on or before 7 February 2014.

- (b) The parties' legal representatives must attend a status hearing in open court at 08h30 on 13 February 2014 for the determination of the further conduct of the matter.

JUDGMENT

PARKER AJ:

[1] The plaintiffs (as applicants) have brought an application by notice of motion in the course of an action instituted by the plaintiffs under Case No. I 2845/2012. In the application the plaintiffs seek the relief set out in the notice of motion in the following terms:

- (a) Granting an order in terms of rule 27(1) of the rules of court, extending the time prescribed by rule 25(1) of the rules and granting leave to the plaintiffs to deliver a replication with five days from date of the order.
- (b) Costs of this application, only in the event of it being opposed by the defendants (respondents).
- (c) Further and/or alternative relief.

[2] In the action proceeding the plaintiffs set out in their particulars of claim that –

- (a) at all relevant times the plaintiffs are the joint owner of the farm Dankbaar No. 44, registration division 'D', held by Deed of Transfer No. T6474/2003, Otjozondjupa Region.
- (b) the defendants are in unlawful occupation of the farm, *with no legitimate entitlement to occupy* that farm. (Italicized for emphasis)

And the relief claimed is that 'the defendants are liable, to be ejected from the farm'.

[3] The plaintiffs' pleading has drawn the displeasure of the defendants. And what is the reason for the defendants' displeasure with the plaintiffs' pleading? Mr Grobler, counsel for the defendants, says that 'The Plaintiffs did not provide in their particulars of claim a clear and concise statement of the facts on which they rely for their claim except for alleging that they are the owners of the farm'. With the greatest deference to Mr Grobler; that is palpably false; and it is tantamount to misleading the court. I have set out in para 2 (of this judgment) the plaintiffs' pleading in the particulars of claim. And it must be clear to any careful reader of the particulars of claim to see that the plaintiffs do not only allege that they are the joint-owner of the farm, as Mr Grobler submits, but they also allege that the defendants are in unlawful occupation of the farm; and, *a fortiori*, the plaintiffs go further to give a reason clearly for all to see why they aver that the defendants are in unlawful occupation. These are indubitably sufficient averments to sustain a cause of action.

[4] It must be remembered that what rule 18(4) expects a party to do is for the party to ensure that his or her pleading contains 'a clear and concise statement of the material facts' on which the party relies for his or her claim, with sufficient particularity to enable the opposing party to reply to them. Rule 18(4) does not expect the party to set out extensively the facts on which he or she relies for relief. Thus, what rule 18(4) prescribes is a clear and concise statement of the material facts; that is, a 'statement'. And 'statement' means a 'definite or clear expression of something in speech or writing' (*Concise Oxford Dictionary*, 11th ed). In the present proceeding, what the plaintiffs have set out in the particulars of claim (see para 2 of this judgment) is, in my opinion, a definite and clear expression of something (the fact) they rely on for their claim, within the meaning of rule 18(4) of the rules.

[5] In order to proceed to the next level of the enquiry I shall extrapolate these reasoning and conclusions to a consideration of the plaintiffs' claim, that is, what the plaintiffs must allege and prove. It has been said, 'An owner is entitled to reclaim possession of his property with the *rei vindicatio*'. In that case, in his or her claim the plaintiff must allege and prove that -

- (a) he or she is the owner of the thing (moveable or immovable), and
- (b) the defendant was in possession of his or her property at the time of the institution of the action. And the relief claimable by the plaintiffs is, among other relief, the return of the possession of his or her property. (See LTC Harms, *Amlers Precedents of Pleadings*, 4th ed (1993): p 322, and the authorities relied on.)

[6] It has been said also that –

‘In view of the fact that the possession of an owner’s property by another is prima facie wrongful, it is not necessary for the plaintiff to allege or prove that the defendant’s possession is wrongful or against the wishes of the plaintiff. These allegations may be made without drawing any additional onus.’

(*Amler’s Precedents of Pleadings*, loc. cit.)

This principle has even deeper and greater relevance in Namibia where a person’s basic right to his or her property is guaranteed by art 16 of the Namibian Constitution. Thus, as I see it, in the instant case the plaintiffs have come to court to ask the court to protect their art 16 basic right against the defendants who are in possession – unlawfully – of their property.

[7] Based upon the foregoing analysis, I am satisfied that the plaintiffs’ pleading is rule 18(4) compliant; that is to say: the statements of facts in the particulars of claim are clear and concise; they are material; and they have been set out with sufficient particularity to enable the opposite party to reply thereto. And, indeed, the defendants have replied thereto. In this regard, it must be remembered that whether the plaintiffs can prove what they allege is not the concern or requirement of rule 18(4). I am also satisfied that the pleading does not lack averments to sustain a cause of action as far as the authorities I have put forth above are concerned.

[8] Having been so satisfied, I now proceed to consider the plaintiffs application in terms of rule 27(1) of the rules of court. In the application the plaintiffs (applicants), represented by Mr Narib, seek an extension of time to enable the plaintiffs to deliver

a replication. The defendants (respondents) oppose the application. I find that the defendants' opposition is based on two main grounds. The first ground is that the plaintiffs' particulars of claim do not comply with the requirements of rule 18(4) of the rules of court and they lack averments to sustain a cause of action. The second is that the defendants will be prejudiced by the filing of the replication in that the plaintiffs' should have set out their cause of action in the particulars of claim and should not seek to set it out in the replication and that because the plaintiffs failed to set out their cause of action in their particulars of claim there is no *lis* between the parties, as regards the validity of the agreements put up in the defendants plea.

[9] The first ground has been considered and rejected as having no merit. The second ground partakes partly of the first ground and it is based on the defendants' averment that the defendants will be prejudiced by the filing of the replication. And why do the defendants so aver? Only this. The 'plaintiffs should have set out their cause of action in the particulars of claim and should not seek to set it out in the replication'. I have already stated more than once that the plaintiffs have set out their pleading in compliance with rule 18(4) so much so that the defendants were able to reply to. The defendants were not handicapped in their effort at all. It is, therefore, my firm view that the plaintiffs do not seek to 'set out their cause of action in the replication', as Mr Grobler submits. Furthermore, their pleading does not lack averments to sustain a cause of action.

[10] I have found already that the plaintiffs did set out in their pleading a clear and concise statement of the material facts upon which they rely for their claim and their pleading does not lack averments to sustain a cause of action. The defendants filed a plea thereto, as they are entitled to do in terms of the rules. The plaintiffs seek to reply to the defendants' plea; and they are entitled to do so in terms of the rules. The replication is the plaintiffs' answer to the defendants' plea. And the court or the opposite party is not entitled to deny the plaintiffs their right to reply to the defendants' plea. The only qualification to the right is compliance with the time limit prescribed by rule 25(1). And what is more; the defendants have not established, and I do not find, that by their replication the plaintiffs seek to increase the ambit of their claim or to set up a new or different cause of action (*Rodgers v SWE Power*

and Pumps (Pty) Ltd 1990 NR 230 (SC)). In sum, the replication the plaintiffs seek to deliver does not constitute a departure. (See H J Erasmus, *Superior Court Practice* (1994) at pp B1–167.)

[11] As I have said previously, the only requirement qualifying the plaintiffs' right to replicate is that in terms of rule 25(1) the plaintiffs must deliver their replication within 15 days after the service upon them of the defendants' plea. The plaintiffs did not deliver their replication within the rule time limit, hence their application to the court for an order extending the time limit for delivery of the replication.

[12] Based on the foregoing reasoning and conclusions, I hold that the defendants' grounds for opposing the application to extend the time limit within which to deliver their replication have, with respect, no merit; and so I respectfully reject them. But that is not the end of the matter. In order to succeed in such application the plaintiffs must satisfy two requirements for the favourable exercise of the court's discretion. The first is that the plaintiffs should file an affidavit satisfactorily explaining the default. (See *Solomon v De Klerk* 2009 (1) NR 77 (HC) at 79G.) The second is that the grant of the indulgence sought must not prejudice the defendants in any way that cannot be compensated for by a suitable order as to postponement and costs. (See H J Erasmus, *Superior Court Practice*, *ibid.* at p B1–172, and the authorities relied on.)

[13] I have pored over the plaintiffs' founding affidavit and I am satisfied that the plaintiffs have furnished a sufficiently full explanation for the default. Furthermore, I find that there has not been a reckless or an intentional disregard of the rules of court. I also find that the plaintiffs seriously intend to proceed with the case. Additionally, I find that the application is bona fide: it was not brought with the intention of delaying the trial of the matter. It must be remembered that the defendants' agreement to the delivery of the replication out of time was sought by the plaintiffs' timeously. And above all; I find that the replication is necessary for the proper adjudication of the issues dividing the parties, and the delivery of the replication will not occasion any prejudice to the defendants. The set down trial dates of the matter was 23 to 27 September 2013, and those dates have passed. The

matter was then removed from the roll due mainly to the inability of defence counsel to appear for trial, and the plaintiffs' counsel then gave the intimation that the plaintiffs proposed to bring the present application.

[14] For all these reasons it is my view that a case has been made out for the grant of the relief sought in para 1 of the notice of motion. And I think this is a proper case where costs should not follow the event. It meets the justice of this case, therefore, for each party to pay its own costs of the present application.

[15] In the result I make the following order:

- (a) The plaintiffs are granted extension of time within which to deliver their replication, and they should deliver the replication on or before 7 February 2014.
- (b) The parties' legal representatives must attend a status hearing in open court at 08h30 on 13 February 2014 for the determination of the further conduct of the matter.

C Parker
Acting Judge

