



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1772/2013

In the matter between:

MASILO JOSHUA HOCHOBEB

PLAINTIFF

And

MAUREEN DUNN

DEFENDANT

Neutral citation: *Hochobeb v Dunn* (I 1772/2013) NAHCMD 20 (12 February 2016)

Coram: MILLER AJ

Heard: 14 August 2015

Delivered: 12 February 2016

Flynote: Practice – Pleading – Exception to defendant's plea – Failure to disclose a defence, alternatively vague and embarrassing – Exception upheld with costs – Defendant granted leave to amend her plea.

ORDER

1. The exception is upheld with costs.
2. The defendant is granted leave to file an amended plea, should she so wish.
3. Any amendment must be filed not later 21 days from the date of this order.
4. The matter is postponed to 30 March 2016 at 15h30 for a status hearing.

JUDGMENT

MILLER AJ:

[1] The plaintiff instituted action against the defendant on 26 June 2013 in which the former claims for the eviction of the latter from the property she presently occupies. At the heart of the dispute is the property described as Erf 117, Rocky Crest, Windhoek, comprising of 510 (five hundred and Ten) square metres.

[2] The plaintiff states that he is the owner of the property described above and the defendant has no right to remain in occupation of it. The plaintiff claims that the said property was purchased at a sale in execution, pursuant to a default judgment, which had been granted by this court and that the property is presently registered in his name. The plaintiff further claims that the defendant refuses to vacate the property despite demand by the plaintiff to do so. In these premises, the defendant's persistent occupation of property is without any lawful justification and ought to be evicted from same.

[3] In response to the above allegations, the defendant filed plea on 19 August 2013 and which was later amended on 11 June 2015. The defendant's upshot defence is that her rights as the rightful owner to the property in question were fraudulently terminated by the plaintiff and that being the case, her refusal to vacate the premises is justified. The defendant accordingly prayed that the plaintiff's claim be dismissed with costs.

[4] On 26 June 2015 the plaintiff delivered an exception to the amended plea of the defendant, which alleged that the allegations contained therein does not disclose a defence, alternatively are vague and embarrassing and should be dismissed therefor with costs. It is therefore fitting at this stage to refer to the material paragraphs of both the defendant's amended plea and the exception respectively.

[5] The defendant's amended plea, against the allegations in the plaintiff's particulars of claim, responds in the following fashion:

AD PARAGRAPH3:

2.1 Defendant pleads that Plaintiff did not acquire ownership of Erf 117, Rocky Crest, Windhoek by lawful means, and that in fact the Plaintiff *mala fide* procured and acquired ownership of the said property to the prejudice and detriment of the Defendant.

2.2 Defendant wish to point out to this Honorable Court that the Deed of Transfer was signed on the 15th April 2013 and yet the auction only took place on 3rd October 2013.

2.3 Subsequent to a default judgment obtained against Defendant under case number I 1524/2008 the Plaintiff misrepresented to Defendant that she could continue to service the area account on the registered mortgage bond in respect of the property, which Defendant did.

2.4 Plaintiff knew, in his capacity as credit manager and person dealing with Defendant's loan account, at the relevant time with the financing bank, that Defendant was

servicing the mortgage, nonetheless and *mala fide* proceeded to facilitate the sale in execution of the property and acquire ownership of the property in 2013 at a judicial sale, alternatively,

2.5 Plaintiff fraudulently caused Defendant's property from which she is being sought to be evicted to be attached and sold in execution, and snatched up at the judicial sale for well below the actual market valuation of the property.

AD PARAGRAPH 4 THEREOF:

Plaintiff obtained ownership through unlawful and/or corrupt means, Defendant submits that the Plaintiff approached this Honorable court with dirty hands in issuing a combined summons in June 2013, claiming to this Court he is the "lawful owner", yet the property in question was only sold on auction the 3rd October 2013, which Defendant insist should never have taken place.

AD PARAGRAPH 6 THEREOF:

It is denied, for the reasons advanced hereinabove, that Defendant is in unlawful occupation of the property. Defendant reiterates that Plaintiff's unlawful and fraudulent conduct resulted in the unlawful transfer of the property into the name of the Plaintiff. But for the fraudulent conduct of the Plaintiff, the Defendant's property would not have been sold at the auction that should have not taken place since.'

[6] On the other hand, the exception has been couched in the following manner:

'Paragraph 6:

Rule 46(2)(c) of the rules of this court stipulates:

'Every plea must clearly and concisely state all material facts on which the defendant relies in defence or answer to the plaintiff's claim.

Paragraph 7:

It follows that the Defendant admits the Plaintiff is the owner of the property but pleads that Plaintiff acquired the property *mala fides* in that he:-

7.1 He misrepresented to Defendant that she could service the account with Agribank; and

7.2 He nevertheless facilitated the sale in execution of the property and acquired ownership of the property unlawfully below the actual market valuation.

Paragraph 8:

The material facts for the representation made by Defendant being *mala fide* is not stated at all.

Paragraph 9:

Also the material facts for alleging that Defendant facilitated the sale in execution of the property and purchased same below the market valuation are not stated anywhere in her plea.'

[7] It is worth noting that, it is not a disputed fact that the property is registered in the name of the plaintiff. It is further not disputed that the defendant remains in occupation of the property. In the circumstances, the plaintiff prays that the defendant's plea be dismissed with costs and the prayers in the summons be confirmed. It is therefore proper at this juncture to refer to the relevant rules applicable to the matter before this Court.

[8] The rules relating to pleadings are set out in rule 45 and 46 of the Rules of the High Court and the parts of those relevant to this exception are the following:

'45(5) Every pleading must be divided into paragraphs, including subparagraphs, which must be consecutively numerically numbered and must contain a clear and concise statement of the material facts on which the pleader relies for his or her claim, defence or answer to any pleading, with sufficient particularity to enable the opposite party to reply and in particular set out -

- (a) the nature of the claim, including the cause of action; or
- (b) the nature of the defence; and
- (c) such particulars of any claim, defence or other matter pleaded by the party as are necessary to enable the opposite party to identify the case that the pleading requires him or her to meet.

45(6) Every allegation in the particulars of claim or counterclaim must be dealt with specifically and not evasively or vaguely.

46(2) Every plea must-

- (a) deal with each and every allegation made by the plaintiff in his or her particulars of claim;
- (b) clearly state which allegations by the plaintiff are admitted;
- (c) clearly and concisely state all material facts on which the defendant relies in defence or answer to the plaintiff's claim (Italicised and underlined for emphasis).

46(3) Every allegation of fact in the particulars of claim which is not stated in the plea as denied or admitted is regarded as having been admitted and, if an explanation or qualification of an admission or a denial is necessary, it must be stated in the plea.'

[9] It must be noted that where there is a breach of the rules relating to pleadings, it does not follow that an exception based upon such breach will necessarily be upheld. The breach itself must be of such a nature as to justify a sustainable exception.

[10] Ms Nambinga, who appeared for the plaintiff, relies on rule 46(2)(c) of the High Court Rules, in that, the defendant's plea fails to disclose any defence, alternatively is inherently defective. The gravamen of Ms Nambinga's complaint is that this failure of the defendant to particularize the alleged fraud or misrepresentation by the plaintiff constitutes a failure to raise a sustainable defence and is also vague and embarrassing. On behalf of the plaintiff, it was submitted that where fraud is alleged it is essential that the pleadings contain particulars of the fraud on which the claim is based. In order to found a cause of action premised on fraud it is essential that certain and specific allegations of the fraud be pleaded. When, as in the present case, the plea is based on

fraud, it is incumbent upon the defendant to prove the essential allegations for a claim based on fraud.

[11] Counsel submitted that the defendant despite slackly alleging fraud, in her plea, fails to set out such material facts to substantiate her allegations of the plaintiff's fraud or misrepresentation. In this respect the defendant failed to set out any facts for the allegation that the plaintiff attached and sold the property below market value, in essence to himself. The defendant further failed to set out material facts to the effect that the plaintiff influenced the bank to proceed with a default judgment against her. In fact what caused the transfer of the property to the plaintiff, was the sale in execution, pursuant to a default judgment granted against the defendant.

[12] Counsel further submitted that undisputed facts are that the defendant secured a bond over the property with Agribank and as a result of the defendant's failure to service the loan granted to her by the bank, the property was attached and ultimately sold to the plaintiff at the auction. At no stage, was there any foul play on the part of the plaintiff and therefore, the defendant's allegations do not disclose a defence in law, alternatively vague and embarrassing.

[13] Ms Dunn, who represented herself in defence, however contended in the negative and maintained her defence to the claim as pleaded in the plea. In her heads of argument and during oral argument, the defendant submitted that she had comply with the requisite of the rules of court relating to pleadings, in that, she clearly and concisely stated all material facts on which she relies in her defence to the plaintiff's claim. Therefore the argument advanced by the plaintiff that the plea is vague and embarrassing is misplaced, as all material facts to the plaintiff's fraudulent conduct and fraudulent termination of her rights as the rightful owner of the property is clearly set out in paragraph 3 of her plea.

[14] Ms Dunn further submitted that the plaintiff mislead to the court by stating that he was never involved with the loan account of the defendant, at the time when her

property was placed and sold at the auction. In fact, the plaintiff admitted that by the time when he was the bank's corporate manager he influenced the bank to proceed with the judgment against her despite the fact that she was busy servicing the loan account, so the defendant claims.

[15] The test for determining whether a pleading is vague and embarrassing was succinctly set out in *Jacobs v The Minister of Safety and Security*¹ where Parker, AJ stated at para 12 that:

[1]

[2] 'Where a statement is vague it is either meaningless or capable of more than one meaning. (*Wilson v South African Railways and Harbours* 1981 (3) SA 1016 (C) at 1018H) And exception involves a two-fold consideration, that is: (a) whether the pleading complained of lacks particularity to the extent that it is vague, and (b) whether the vagueness is of such nature that the excipient is prejudiced. (*Trope v SA Reserve Bank and Two Other Cases*). Where the court finds that the pleading is not vague, the second consideration does not arise.'

[3] [16] It is trite therefore that a pleading is vague and embarrassing if it is capable of more than one meaning or if it is not reasonably clear what the pleading means. The necessity to plead was emphasised and it was stated that particulars of claim should be phrased so that a defendant may reasonably be required to plead thereto.

[17] The court has recently restated the legal principles relating to exceptions to pleadings on the grounds that they are vague and embarrassing in the *Trustco Capital (Pty) Ltd v Atlanta Cinema CC and Others*² case, where the court stated that;

[4] '[16] A pleading may disclose a cause of action or defence but may be worded in such a way that the opposite party is prevented from clearly understanding the case he or she is called upon to meet. In such a case the pleading may be attacked on the ground that it is vague

¹ (I 3772/2013) [2015] NAHCMD 27 (19 February 2015) at para 12, p 7.

² ((P) I 3268-2010) [2012] NAHC 190 (12 July 2012), p 8.

and embarrassing. A man who has an excipiable cause of action is in the same position as one who has no cause of action at all.

[5]

[6] In any case an exception on the ground that the pleading is vague and embarrassing will not normally be upheld unless it is clear that the opposite party would be prejudiced in his defence or action as the case might be.

[7]

[8] In the first place when a question of insufficient particularity is raised on exception the excipient undertakes the burden of satisfying the court that the declaration, as it stands, does not state the nature, extent and the grounds of the cause of action. In other words he must make out a case of embarrassment by reference to the pleadings alone ... If an exception on the ground that certain allegations are vague and embarrassing is to succeed, then it must be shown that the defendant, at any rate for the purposes of his plea, is substantially embarrassed by the vagueness or lack of particularity.'

[18] The court went on further to state that:

'The test applicable in deciding an exception based on vagueness and embarrassment arising out of lack of particularity can be summed up as follows:

1. In each case the court is obliged first of all to consider whether the pleading does lack particularity to an extent amounting to vagueness. Where a statement is vague it is either meaningless or capable of more than one meaning. To put it at its simplest: the reader must be unable to distil from the statement a clear, single meaning.

2. If there is vagueness in this sense the court is then obliged to undertake a quantitative analysis of such embarrassment as the excipient can show is caused to him or her by the vagueness complained of.

3. In each case an ad hoc ruling must be made as to whether the embarrassment is so serious as to cause prejudice to the excipient if he or she is compelled to plead to the pleading in the form to which he or she objects. A point may be of the utmost importance in one case, and the omission thereof may give rise to vagueness and embarrassment, but the same point may in another case be only a minor detail.

4. The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced.

5. The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice.

6. The excipient must make out his or her case for embarrassment by reference to the pleadings alone.

7. The court would not decide by way of exception the validity of an agreement relied upon or whether a purported contract may be void for vagueness.'

[19] It is clear from the above that the defendant's plea has failed to comply with rule 46(2)(c) of the Rules, which rules require particularity when defending a claim. In the premises, the defendant's plea amounts to a bare denial lacking particularity to demonstrate the alleged fraud or misrepresentation on the part of the plaintiff in facilitating attachment and ultimate sale of the property below market value.

[20] It is also noteworthy that the allegation of fraud, as sketchy as it is, is raised only now. It is apparent that the defendant took no steps to have the sale of the property and its subsequent transfer to the plaintiff be set aside.

[21] There is a further aspect. The exception in this case is only to the possible defences against an eviction claim. This aspect of the exception is founded on the allegation that the amended plea failed to set out a defence to an eviction claim. The plaintiff reinforces this point by enumerating possible defences and they are follows:³

(a) Denial of ownership, which creates no onus for the defendant since the plaintiff has to prove ownership.

³ Harmse, Amler's Precedents of Pleadings, 7th ed, page 393

- (b) Denial of possession, which likewise draws no onus.
- (c) The defendant may plead that the plaintiff's property was returned to the plaintiff. This defence must be specifically alleged and proved.
- (d) The *bona fide* disposal of possession is a complete defence.
- (e) Should the defendant wish to rely on a right to possession, the defendant must allege and prove the right.
- (f) A defendant wishing to rely on estoppel must allege and prove.

[22] Ms Nambinga, who appeared on behalf of the plaintiff, submitted that with reference to the defendant's plea and the allegations contained therein, none of the aforementioned defences are advanced by the defendant in response to the plaintiff's claim. In point of fact, the defendant admits the registration and transfer of ownership of the property to the plaintiff. Moreover, the defendant does not deny that she is in occupation of the property and refuses to vacate the property despite so requested by the plaintiff. There is no suggestion on the pleadings that the defendant has pleaded and proved estoppel, as a defence.

[23] On a careful examination of the pleadings filed of record, it becomes apparent that the defendant has failed to set out any of the defences as enumerating under paragraph 21 above. However, dismissing the defendant's plea on this point only, would not, in my opinion, cure the defects contained in the plea. The defendant's failure to set out with sufficient particularity the plaintiff's alleged fraud or misrepresentation should rather be visited with a cost order.

[24] In the result, I make the following order:

1. The exception is upheld with costs.
2. The defendant is granted leave to file an amended plea, should she so wish.
3. Any amendment must be filed not later 21 days from the date of this order.
4. The matter is postponed to 30 March 2016 at 15h30 for a status hearing.

Miller, AJ
Acting

APPEARANCES

PLAINTIFF:

S Nambinga

Instructed by AngulaCo. Inc, Windhoek

DEFENDANT:

Maureen Dunn

In Person