

“ANNEXURE 11”

IN THE HIGH COURT OF NAMIBIA

Case Title: Rossmund Golf Estate Home Owners Association vs M Hartmann Investments Eighty Two CC	Case No: HC-MD-CIV-ACT-CON-2017/03671
	Division of Court: High Court
Heard before: Honourable Justice Herman Oosthuizen	Date of hearing: 11 April 2018
	Delivered on: 21 June 2018
Neutral citation: <i>Rossmund Golf Estate Home Owners Association v M Hartmann Investments Eighty Two CC</i> (HC-MD-CIV-ACT-CON-2017/03671) [2018] NAMCMD 184 (21 June 2018).	
Result on merits: Exception Dismissed	
The order: Having heard Mr Wolfgang Pfeiffer , counsel for the plaintiff, and Mr Louis Karstern , counsel for the 1 st defendant, and having read the documents filed of record: IT IS ORDERED THAT: 1. First defendant's exception is dismissed with costs.	
Reasons for orders: 1 In the joint case plan filed during December 2017, first defendant discloses 11 points why it intends to raise an exception. It failed to identify whether it intends an exception on the basis that plaintiff's particulars of claim is vague and embarrassing or whether it fails to disclose a cause of action. 2. First defendant thereafter failed to provide plaintiff with a notice in terms of Rule 57(2) and therefore represented that its exception is not premised on the ground that the particulars of claim is vague and embarrassing.	

3. When the Notice of Exception was delivered to plaintiff on 2 February 2018, it said in the introduction that plaintiff's particulars of claim "are vague, embarrassing and fail to disclose a cause of action on the following grounds:"

4. What then follows is an attack on the *locus standi in iudicio* of the plaintiff to institute action against first defendant and therefore, it is alleged, no cause of action is made out by the plaintiff. The alleged ground concerning vagueness and embarrassment was not addressed, nor pursued.

5. Apart from filing a purported Rule 32(10) report on 2 February 2018 referring to the joint case plan, there is no indication that first defendant engaged plaintiff in meaningful discussions to amicably resolve the intended exception. The foregoing remark in this paragraph did not play a determinative role in the decision of the court as the first defendant has laboured under the impression that it gave the plaintiff ample time to rectify/amend its particulars of claim so to remove the cause of complaint.

6. First defendant referred to paragraphs in the particulars of claim which according to first defendant show that plaintiff has no *locus standi* and therefore no cause of action.

7. First defendant quoted authority stating that "The *locus standi in iudicio* of a plaintiff must exist from the time the action was instituted until final judgment is delivered. In the absence of *locus standi*, a plaintiff is not entitled to judgment, either on liability or on quantum"ⁱ.

8. Despite the aforesaid authority and the fact that plaintiff only instituted action in 2017, first defendant's complaints are directed to 2004/5.

9. In *Van Straten v Namibia Financial Institutions Supervisory Authority and Another*, 2016(3) NR 747 SC, paragraph (18) on pp 755 over on 756, the Namibian Supreme Court authoritatively said:

"Where an exception is taken on the grounds that no cause of action is disclosed or is sustainable on the particulars of claim, two aspects are to be emphasised. Firstly, for the purpose of deciding the exception, the facts as alleged in the plaintiff's pleadings are taken as correct. In the second place, it is incumbent upon an excipient to persuade this court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed. Stated otherwise, only if no possible evidence led on the pleadings can disclose a cause of action, will the particulars of claim be found to be excipiable".

10. It is therefore common cause that the facts alleged in plaintiff's particulars of claim are taken as correct for purposes of the exception. That being so the first defendant must show the court that upon every interpretation which the particulars of claim can reasonably bear, no cause of action is disclosed. The first defendant must convince the court that no possible evidence on the pleadings can disclose a cause of action.

11. The first defendant has failed to convince the court as envisaged.

12. First defendant introduced matter in its notice to except and heads of argument which was/were not pleaded and it fell foul of its own cited authority on *locus standi in iudicio*.

13. First defendant ought to plead its concerns, defences, and facts not apparent from the particulars of claim, in order for them to be properly ventilated by evidence during the trial.

Judge's signature:	Note to the parties:
Counsel:	
Plaintiff(s)	Defendant (s)
W Pfeiffer Behrens & Plaintiff, Windhoek	L Karsten Louis Karsten Legal Practitioners, Windhoek
	M Meyer Office of the Government Attorney, Windhoek
	Rossmund Golf Course CC

ⁱ *Siyepu and Others v Premier of the Eastern Cape* 2013(2) SA 425 (ECB), para 9.