

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON EXCEPTION

Case no: HC-MD-CIV-ACT-OTH-2018/00470

In the matter between:

BELINDA GAROES

PLAINTIFF

and

DANA BEUKES

FIRST DEFENDANT

DANGOLOSIA KAFUTA KONJENI

SECOND DEFENDANT

MAXTON KAPULE SHITILIFA

THIRD DEFENDANT

SETH WILLIAMS

FOURTH DEFENDANT

NATIONAL HOUSING ENTERPRISE

FIFTH DEFENDANT

Neutral Citation: *Garoes v Beukes* (HC-MD-CIV-ACT-OTH-2018/00470) [2018]
NAHCMD 324 (15 October 2018)

CORAM: PRINSLOO J

Heard: 01 October 2018

Delivered: 15 October 2018

Flynote: Practice — Pleadings — Exception — Exception as disclosing no cause of action — Allegations in pleading must be taken as correct — Pleading only excipiable if no possible evidence led on pleadings could disclose a cause of action.

ORDER

1. Ruling on the exception raised:

- a) Exception is upheld.
- b) The plaintiff's particulars of claim, is set aside and she is given leave, if so advised, to file amended particulars of claim by 15 November 2018.
- c) No order as to costs.

2. Further conduct of the matter:

- a) The case is postponed to **22/11/2018** at **15:00** for Status hearing (Reason: Amendment of Pleadings).
- b) The plaintiff is cautioned to attend the court either in person or represented by duly appointed legal practitioner.

RULING IN TERMS PRACTICE DIRECTION 61

Prinsloo, J:

[1] The plaintiff is Belinda Garoes, a lay litigant who issued summons against the five defendants herein. Mr. Dana Beukes is sued in his personal capacity, however the

plaintiff's claim is apparently directed to the Registrar of Deeds. The first defendant is the only defendant that was served with the summons herein. No service was effected on the remainder of the defendants.

[2] The matter before me is an exception raised against the plaintiff's particulars of claim. The plaintiff's claim is a rather peculiar one in that, amongst others, she claims for land almost equivalent to half the country and for Erf 1595, 1596, 1597 and 1598 located in the Okahandja municipal area extension 8. Further, if the plaintiff's particulars of claim are to be understood correctly, she further demands payment of N\$ 500 million from the Registrar of Deeds office.

[3] There are several issues with the particulars of claim of the plaintiff and for the sake of completeness I will replicate the particulars of claim exactly as it appears on E-Justice:

.....
PARTICULARS OF CLAIM

1 THE PLAINTIFF IS BELINDA //GAROES AT ERF 124, ZEDEKIAS OGAMB STREET, GEMEENTE, KATUTURA

2 I AM THE OWNER OF ERWEN 1595; 1596; 1597; AND 1598.

3 THE [5] VYFE DEFENDANTS ARE

-MRDANA BEUKUS WORK AT REGISTRAR OF DEED. PRIVATE BAG 13343 WINDHEOK
 TEL. 061-296 5000 fax 061-243439

-DONGOLOSIA KAFUTA KONDJENI BORN 16 JUNE 1974

-MAXTON KAPULE SHILILIFA ID.NUMBER 72041110045 AND MARIA SHILILIFA MARIET IN
 COM UNITY OF PROPERTY EACH OTHER.is I ON ERF 1596-NOU-AIB-EXT 8

-SETH WILLIAMS, INDENITY NUMBER; 74031900031 AND FRANSISKA HANNA WILLIAM
 ID.68110100082 STY AT ERF-1597

NATIONAL HOUSING EOUSING ENTERPRISE [ESTABLISHED IN TERMS OF ACT NO 5 of
 1993]

4. OKAHANDJA MUNISIPALITY DEED OF SALE MAD AND SELLER IS THE OWNER OF ERF 1595; 1596; 1597; 1598 HEREINAFTER REFERRED TO AS THE 'PROPERTY' DEED OF SALE IS CHINE 9 march 2010

5. THE PLAINTIFF IS THEREFORE THE OWNER OF ERF 1595; 1596; 1597; 1598 IN EXTENTION 8

6. THE FIRST DEFENDANT UNLAWFULLY PUT SECOND; THIRD, FOURTH; AND VYFE DEFENDANT ON ERF 1595; 1596; 1597; AND 1598 IN EXTENTION 8 NOU-AIB'

7. DESPITE DEMANT.THEFOUR DEFENTENDS FEFUS TO VACATE THE PROPERTY.

8. AN ORDER AVICTING THE DEFENDANTS ALL FROM ERWEN.

WHEREFOR THE PLAINTIFF CLAIMS;

1. THE FIRST DEFENDANT MUS GIVE TO PLAINTIFF THE HALF OF THE COUNTRY [MAENS FROM CAPRIVI, KATIMA MULILO ONG OHANGENA DOWN TO GOBABIS; WINDHOEK; SWAKOPMUND'
2. THE DEFENDANT MUST GIVE THE PALINTIFF THE DEED OF TRANSFEE OF THE FOLLOING ERWEN 1595;1596;1597 and 1598
3. THE REGISTR OF DEED OFFICE MUST PAY THE PLAINTIFF 500 MILJOEN
4. COST OF SUIT
5. FURTHER AND/OR ALTERNATIEVE RELIEF.'

[4] Unfortunately in spite of this court's guidance in respect of assistance to her from various Directorates and Institutions, the plaintiff insisted in conducting this matter herself, which ultimately brought me to this ruling.

[5] The first defendant opposed the claim and indicated in his one sided case plan that he intend to file an exception against the plaintiff's particulars of claim. The basis for the exception was already set out in the case plan filed on 03 August 2018.

[6] On 12 August the court issued the following order:

'Having heard BELINDA GAROES, IN PERSON and MR. KANDOVAZU, on behalf of the First Defendant and having held case planning conference pursuant to rule 23 of the Rules of High Court of Namibia on 12th day of August 2018 at 17:27 PM and Having considered the case plan and submissions by the parties or their legal practitioners during the case planning conference.

IT IS ORDERED THAT:

1. The parties shall comply with the following procedural steps on / before the following court days / due dates :

| Procedural Steps | Due Date |
|--|--|
| Parties must comply with Rule 32(9) and (10) | 22 nd day of August 2018 |
| Application for Exception | 24 th day of August 2018 |
| Status Hearing on Exception | 06 th day of September 2018 |

3. The case is postponed to 06/09/2018 at 15:00 for Status hearing (Reason: Interlocutory (To Bring)).
4. Plaintiff is cautioned to attend court on the next date of hearing, either in person or represented by duly appointed legal practitioner.'

[7] The first defendant's exception against the plaintiff's particulars of claim is primarily on the basis that the particulars of claim do not disclose a cause of action and further lack the necessary averments to sustain the cause of action sought by the plaintiff. The exceptions raised against the particulars of claim of the plaintiff is extensive and I will not repeat all the grounds raised for sake of brevity.

[8] The plaintiff was given the opportunity to remove the causes of complaints of the first defendant, however the plaintiff would have none of it and insisted that the court grants judgment against the first defendant.

[9] Hereafter the matter was set down for hearing of the argument on **the** 1st of October 2018. It is rather unfortunate that the plaintiff is in person and the heads of argument filed in regard to the exception raised by the first defendant did not fully address the exception raised by the defendant and as a result could not assist this court in arriving at a balanced decision.

The law applicable

[10] It is trite that pleadings must conform with Rule 45 in order for the opposing party and the trial court to identify the case that pleadings require to meet. When not in compliance, the trier of fact would not be able to determine what case needs to be met.

[11] I however reminded myself of the fact that the plaintiff is a lay litigant and of what was said in the matter of *Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others*¹ where Maritz JA (as he then was) remarked as follows:

'[8] The applicant is a lay litigant and, as MT Steyn J (as he then was) remarked in *Van Rooyen v Commercial Union Assurance Company of SA Ltd*² 'it would certainly be manifestly unjust to treat lay litigants as though they were legally trained . . .'. They are unlikely to 'fully appreciate the finer nuances of litigation'³ and, I should add, to completely appreciate the principles bearing on the court's jurisdiction. Bearing in mind that lay litigants face significant hurdles due to their lack of knowledge and experience in matters of law and procedure and, more often than not, financial and other constraints in their quests to address real or perceived injustices, the interests of justice and fairness demand that courts should consider the substance of their pleadings and submissions rather than the form in which they have been presented.⁴

¹ 2008 (2) NR 753 (SC) also referred to in the matter of *Boois v State* (CA 76-2014) [2015] NAHCMD 131 (8 June 2015) at paragraph [2].

² 1983 (2) SA 465 (O) at 480G - H.

³ Per Rabie J in *Absa Bank Ltd v Dlamini* 2008 (2) SA 262 (T) ([2008] 2 All SA 405) at 268B.

⁴ See: *Xinwa and Others v Volkswagen of South Africa (Pty) Ltd* 2003 (4) SA 390 (CC) (2003 (6) BCLR 575; 2003 (5) BLLR 409) at 395B - D.

[12] Although the format of the plaintiff's the particulars of claim does not conform to the Rules of Court, it does not pose the biggest obstacle for me in this matter. What does pose a substantial problem is the substance of the particulars of claim.

[13] In *Hangula v Motor Vehicle Accident Fund* 2013 (2) NR 358 (HC), Damaseb JP made the following observations with respect to exceptions as follows:

[16] In adjudicating an exception the court must accept the correctness of the facts as alleged by the plaintiff. The test that I must apply is this: notwithstanding the truth of the facts alleged, do those facts in law establish any sufficient case? If they don't, the exception is good and must be allowed.

[17] It was held in *Denker v Cosack and Others* that the remedy of exception is only available where an exception goes to the root of a claim or defence and that the main purpose of an exception that a claim does not disclose a cause of action is to avoid leading unnecessary evidence at the trial. In that case Hoff J held that an excipient has a duty to persuade the court that, upon every interpretation that the particulars of claim can reasonably bear, no cause of action is disclosed and further that the court, for the purposes of an exception, takes the facts as alleged in the pleadings as correct.'

Application of the law to the facts:

[14] If one goes to the root of the action then the following is evident, and I will only mention a few issues:

14.1 When reading the plaintiff's particulars of claim, she only states that she is the owner of Erf 1595, 1596, 1597 and 1598 located in the Okahandja municipal area extension 8, but how she came about to be the owner thereof and if she is the owner thereof at all, is not stated. Plaintiff filed a deed of sale reached between the Municipality of Okahandja and Huitere Project. Neither of these parties are parties to the proceedings before me and it does not take the matter any further.

14.2 The plaintiff further does not lay a basis on which she claims that the first defendant must give the plaintiff half the country to the plaintiff. Further the plaintiff does not lay a basis on which she claims the amount of N\$ 500 million from the first defendant as well.

14.3 There is no legal basis upon which the first defendant allegedly unlawfully put the second to the fifth defendants on erven in question.

14.4 There is no legal basis upon which the plaintiff is requesting the deed of transfer of the erven in question.

14.5 The particulars of claim do not contain averments necessary to sustain a cause of action.

14.6 The plaintiff claim the amount from the Registrar of Deeds but issues summons against the first defendant in his personal capacity.

[15] In my opinion the exception against the particulars of claim was well taken. The manner in which the particulars of claim is formulated does not disclose a cause of action and must be set aside.

[16] The draftsman of the particulars of claim was clearly lacked learning or training in the area of drafting of pleadings. When considering the plaintiff's particulars of claim, the first thing that springs to mind is that the particular of claim is incurably bad and that the claim should be dismissed. However the following passage from Erasmus *Superior Court Practice*⁵ is instructive:

'where the exception is successful, the proper course is for the court to uphold it. When an exception is upheld, it is the pleading to which exception is taken which is destroyed. The

⁵ At page BI- 159.

remainder of the edifice does not crumble The upholding of an exception to a declaration or a combined summons does not, therefore, carry with it the dismissal of the action. The unsuccessful party may then apply for leave to amend his pleading. It is in fact the invariable practice of the courts in cases where an exception has been taken to an initial pleading that it discloses no cause of action, to order that the pleading be set aside and the plaintiff be given leave, if so advised, to file an amended pleading within a certain period of time. It has been held that it is doubtful whether this practice brooks of any departure; in the rare case in which a departure may be permissible, the court should give reasons for the departure. This practice *a fortiori* applies where an exception is granted on the ground that the pleading is vague and embarrassing, a ground which strikes at the formulation of the cause of action and not its legal validity.'

[17] The issue of invariable practice was discussed by Damaseb DCJ (Smuts JA and Chomba AJA concurring) in the matter of *Hallie Investment 142 cc t/a Wimpy Maerua and another v Caterplus Namibia (Pty) Ltd t/a Blue Marine Interfish*.⁶

'[53] In a long line of cases predating Namibia's independence the practice of the courts of South Africa (of which the South West Africa Division was part) was to allow the disappointed party to amend where its pleading was successfully excepted to. (See for example, *Furman v Cardew: In re Cardew v Cardew and Furman* 1955 (3) SA 24 (D) at 27A – 28A and *Santam Insurance Co Ltd v Manqele* 1975 (1) SA 607 (D) at 609.) Group Five only followed in that tradition. The practice has been followed by our courts since independence in a number of cases: *Total Namibia (Pty) Ltd v Van der Merwe t/a Ampies Motors* 1998 NR 176 (HC) at 180B/C wherein Strydom JP held that 'in exceptions on the basis that the pleadings do not disclose a cause of action the Court should set aside the pleadings and not dismiss the action'; *Beukes and Another v Botha and Others* NAHC case No (P) I 111/2004 (17 July 2008); *China Jiangsu International Namibia Ltd v J Schneiders Builders CC and Another* NAHC I 1425/2009 (5 October 2010); *Nedbank Namibia Ltd v Louw* NAHCMD I 2780/2011 (8 August 2012); and *Holze v Strowitzki and Another* [2013] NAHCMD 373 (case No I 2270/2012, 11 December 2013).

[54] The invariable practice was therefore binding on the High Court in the present case, not because of *Group Five* or *Rowe*, but because of its adoption by our own courts. The statement

⁶ 2016 (1) NR 291 (SC) at p304-305.

of the rule and its rationale as enunciated by Corbett CJ is eminently sound and should be applied by our courts. Corbett CJ, writing for the Appellate Division (at 602) stated as follows:

“As far as I am aware, in cases where an exception has successfully been taken to a plaintiff's initial pleading, whether it be a declaration or the further particulars of a combined summons, on the ground that it discloses no cause of action, the invariable practice of our Courts has been to order that the pleading be set aside and that the plaintiff be given leave, if so advised, to file an amended pleading within a certain period of time. Such leave has been granted, in my experience, in cases where judgment has been reserved, irrespective of whether at the hearing of the argument on exception the plaintiff applied for such leave or not. No doubt this was done in anticipation of the possibility that the plaintiff would wish to have leave to amend and in order to obviate the need for a specific application. The important point to be stressed, however, is that until the order setting aside the pleading has been granted, there is no need for the plaintiff to seek leave to amend.”

[55] As to the rationale of that approach, Corbett CJ said the following (at 602 – 603):

“An order dismissing an action puts an end to the proceedings and means that if the plaintiff wishes to pursue his claim on a different pleading he must start de novo. This may have drastic consequences for the plaintiff, particularly where it results in the prescription of the claim. In my opinion, it would be contrary to the general policy of the law to attach such drastic consequences to a finding that the plaintiff's pleading discloses no cause of action.”

[56] Corbett CJ's approach in Group Five was applied more recently by the Constitutional Court of South Africa *in H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) (2015 (2) BCLR 127; [2014] ZACC 34) para 79 which held as follows:

“In upholding the exception, the High Court also ordered the dismissal of the claim. This was unwarranted. The upholding of an exception does not inevitably carry with it the dismissal of the action. Leave to amend the particulars of claim should have been granted.”

[18] In keeping with the invariable practice as adopted by our courts, under the guidance of the Supreme Court of Namibia, the plaintiff must be afforded the opportunity to amend her particulars of claim, should she elect to do so.

[19] In the result, I then make the following order:

1. Ruling on the exception raised:

- a) Exception is upheld.
- b) The plaintiff's particulars of claim, is set aside and she is given leave, if so advised, to file amended particulars of claim by 15 November 2018.
- c) No order as to costs.

2. Further conduct of the matter:

- a) The case is postponed to **22/11/2018 at 15:00** for Status hearing (Reason: Amendment of Pleadings).
- b) The plaintiff is cautioned to attend the court either in person or represented by duly appointed legal practitioner.

J S Prinsloo
Judge

APPEARANCES:

FOR THE PLAINTIFF: In-person

FOR THE FIRST DEFENDANT: J van der Byl
of the Office of the Government Attorney