

“ANNEXURE 11”
Practice Directive 61

IN THE HIGH COURT OF NAMIBIA

Case Title: GABBY CISKA VAN NIEKERK VS SALMON VERMAAK	Case No: HC-MD-CIV-ACT-CON-2018/05020
	Division of Court: MAIN DIVISION
Heard before TOMMASI J	Date of hearing: 04 APRIL 2019
	Delivered on: 29 April 2019
Neutral citation: <i>van Niekerk v Vermaak</i> HC-MD-CIV-ACT-CON-2018/05020 [2019] NAHCMD 131 (2 May 2019)	
Results on merits: Not on the merits.	
The order: Having heard Mr Swanepoel on behalf of the Applicant, and Mr Muhongo on behalf of the Respondent, and having read the documents filed of record: IT IS ORDERED THAT: <ol style="list-style-type: none">1. The exception is dismissed.2. The Defendant is ordered to pay the cost in accordance with the provisions of Rule 32(11).	
Reasons for orders:	
<p>[1] Plaintiff claimed an amount of N\$401 720.90 which she advanced periodically to the Defendant as and when he requested it in terms of a verbal agreement entered into during March/April 2013. The Defendant lodged an exception to the Plaintiff's claim in convention on the ground that same is vague and embarrassing, and hence excipiable.</p> <p>[2] The parties filed a joint case plan in which the Defendant expressed his intention to except to the Plaintiff's claim. The court adopted the proposed dates and procedure to be followed by the parties. The following order was granted:</p> <p style="padding-left: 40px;">(a) The Defendant shall (if so advise), comply with Rule 32(9) and (10) and detail his grounds for</p>	

Exception by no later than 11 February 2019 in order for the Plaintiff to consider the exception and amend her particulars of claim (sic).

- (b) The Plaintiff shall (if so advise), reply to Defendants letter in terms of Rule 32(9) by no later than 15 February 2019.
- (c) The Defendant shall (if so advise), file its notice of exception by no later than 22 February 2019.
- (d) The Plaintiff shall (if so advise), file a notice to amend its particulars of claim by no later than 28 February 2019.
- (e) The case is postponed to 6 March 2019 at 14:00 for Status hearing'

This order omitted to include 1 provision which was included in the joint case plan i.e that the Defendant shall file his amended particulars of claim on or before 1 March 2019.

[3] The Defendant filed his notice of exception on 22 February 2019. Plaintiff filed a notice to amend his particulars of claim the same day affording the Defendant 10 days (i.e on or before 8 March 2019) to object to the amendment and advising that, if no objection is received, the Plaintiff shall proceed to amend her particulars of claim. No objection was filed. In light of the omission to incorporate the agreed date in the order, I must consider the notice of amendment as binding between the parties as same was given properly and in accordance with the rules of court.

[4] On 7 March 2019 the Defendant filed his exception and a Notice of Motion. The latter document was objected to by the Plaintiff in that this is an irregular document since an exception is brought on notice. Counsel for the Defendant explained that this document was automatically generated by the system. This is a poor excuse. The system would generate a document with the information provided for by the person who operates the system. In any event, if there is any document erroneously created by the system, it is the duty of the author of the document to alert parties to the fact that the document has been erroneously generated and should be ignored.

[5] A further point raised by the Plaintiff was that the exception was taken on a non-existing pleading. The first notice filed in terms of rule 57(2) was clearly directed at the original particulars of claim. The exception however was filed when Plaintiff already gave notice of her intention to amend the particulars of claim and was waiting for the *dies* to expire before filing the amended particulars of claim. The Defendant filed a report in terms of Rule 32 (10) and therein makes the averment that the amendment does not remove the cause of complaint. It is thus not clear whether the defendant is excepting to the original particulars of claim or the notice to amend. The exception, to my mind was brought prematurely. The Defendant ought to have brought same after the plaintiff had amended her particulars of claim.

[6] Both parties are well acquainted with the principles governing determination of exceptions set out in *Van*

Straten No and Another v Namibia Financial Institutions Supervisory Authority and Another 2016 (3) Nr 747 (Sc) as both counsel cited same. Counsel for the Plaintiff would do well to adhere to the requirements of Rule 45 and to properly consider the exceptions raised.

[7] The exception cannot be entertained in light of the fact that it was prematurely raised.

[8] Counsel for Plaintiff submitted that the court ought to order that costs be ordered *de bonis proprii*. I am not persuaded that the conduct of the counsel for the plaintiff in this matter warrants such an order. I am further of the view, given the nature of the issues raised, that there is no reason for this court to order it does not warrant an order.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Applicant	Respondent
Mr P. Swanepoel Philip Swanepoel Legal Practitioners	Mr T. Muhongo Instructed by Koep & Partners