

“ANNEXURE 11”

Practice Direction 61

IN THE HIGH COURT OF NAMIBIA

Case Title: <i>Power-Oyeno Construction (Pty) Ltd v National Housing Enterprise</i>	Case No.: HC-MD-CIV-ACT-CON-2018/01993
	Division of Court: High Court (Main Division)
Heard/tried before: Honourable Mr Justice B Usiku J	Date of hearing: 16 May 2019
	Delivered on: 16 May 2019
	Reasons released on: 21 May 2019
Neutral citation: <i>Power-Oyeno Construction (Pty) Ltd v National Housing Enterprises</i> (HC-MD-CIV-ACT- CON-2018/01993) [2019] NAHCMD 159 (21 May 2019)	
The Order: Having heard counsel for both parties and having read documents filed of record: IT IS ORDERED THAT: <ol style="list-style-type: none">1. The second defendant’s exceptions to the plaintiff’s particulars of claim, are dismissed.2. The second defendant is ordered to pay the plaintiff’s costs occasioned by the exceptions, and such costs include costs of one instructing and two instructed legal practitioners. It is hereby directed the costs referred to herein shall not be limited in terms of rule 32(11).	

3. The matter is postponed to 27 July 2019 at 15:15 for a Case Planning Conference.
4. The parties are directed to file a joint case plan on or before 18 July 2019.

Reasons: Practice Direction 61(9)

[1] This matter concerns an exception launched by the second defendant to the plaintiff's particulars of claim on the basis that the particulars of claim do not disclose a cause of action, alternatively are vague and embarrassing.

[2] The second defendant raises two grounds of exception.

[3] In its first ground of exception the second defendant contends that the plaintiff relies for its cause of action on payment certificates. The second defendant argues that a document reflecting an amount payable does not constitute a cause of action unless it is a liquid document or unless the parties to the agreement agreed that a payment certificate meeting certain requirements shall be payable. The second defendant also points out that payment certificates relied upon are unsigned. The second defendant argues that the plaintiff has not attached to its particulars of claim an agreement authorizing the payment certificates relied on. Therefore, the second defendant argues, among other things, the particulars of claim do not disclose a cause of action, alternatively are vague and embarrassing in that it is not clear on what basis the plaintiff relies for elevating payment certificates to a cause of action.

[4] As regards its second ground of exception the second defendant argues that the plaintiff has annexed to its particulars of claim two settlement agreements marked "D" and "E". The second defendant contends that the plaintiff's claim against both defendants "is clearly" precluded by those agreements, alternatively the agreements demonstrate that no claim lies against the second defendant. In the further alternative the settlement agreement render paragraph 12 of the particulars of claim vague and embarrassing.

[5] In response to the second defendant's first ground of exception, the plaintiff argues that the particulars of claim indicate that the plaintiff delivered services for the first defendant

during the period of 25 May 2015 to 3 June 2015. As a result thereof the amount claimed became due, owing and payable by the first defendant to the plaintiff for the services rendered. The payment certificates indicate that the amount claimed is due, owing and payable by the first defendant to the plaintiff and the first defendant promised on various occasions to pay the amount.

[6] In respect of the second ground of exception, the plaintiff contends that the particulars of claim expressly indicate the amount currently being claimed, as reflected in the payment certificates, were not part of the claim settled in annexures “D” and “E”.

[7] The plaintiff further submits that the particulars of claim expressly set out that the amount being claimed is claimed from the first defendant and is claimed from the second defendant only in the alternative, insofar as the first defendant alleged, and the second defendant accepts, that the obligations of the first defendant were taken over by the second defendant.

[8] The legal principles regarding exceptions were succinctly spelt out in *Van Straten and Another v Namibia Financial Institutions Supervising Authority and Another 2016 NR 747* in the following terms:

“[18] 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 emphasized. 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.

[19] Whether an exception on the ground of being vague and embarrassing is established would depend upon whether it complies with rule 45(5) of the High Court Rules. This rule requires that every pleading must contain a clear and concise statement of the material facts on which the pleader relies for his or her claim with sufficient particularity to enable the opposite party to identify the case that the pleading requires him or her to meet. Assessing whether a pleading is vague and

embarrassing is now to be undertaken in the context of rule 45 and the overriding objective of judicial case management. Those objectives include the facilitation of the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable by saving costs by, among others, limiting interlocutory proceedings to what is strictly necessary in order to achieve a fair and timely disposal of a cause or matter.

[20] The two-fold exercise in considering whether a pleading is vague and embarrassing entails firstly determining whether the pleading lacks particularity to the extent that it is vague. The second is determining whether the vagueness causes prejudice. The nature of the prejudice would relate to an ability to plead to and properly prepare and meet an opponent's case. This consideration is also powerfully underpinned by the overriding objects of judicial case management in order to ensure that the real issues in dispute are resolved and that parties are sufficiently apprised as to the case that they are to meet."

[9] I am in agreement with the above legal principles and those principles find application in the present case.

[10] Insofar as the second defendant's first ground of exception is concerned, I fail to see the second defendant's reasons for claiming that the particulars of claim do not disclose a cause of action. On this issue, the second defendant argues that in terms of the relevant settlement agreement, the plaintiff has no claim against the first defendant (or second defendant) as the parties had agreed that the settlement agreement extinguished any claim the plaintiff may have against the first defendant in terms of the written agreement between the plaintiff and the first defendant. The particulars of claim reflect that the plaintiff's claim is based, among other things, on the payment certificates furnished by the first defendant to the plaintiff. In addition the first defendant had, according to the particulars of claim, promised on numerous occasions to settle the amounts outstanding as set out in the payment certificates. Furthermore, the particular of claim indicate that the written agreement entered into about January 2014 is not being relied upon and is merely referred to for background purposes. On the strength of the *Van Straten's* case (supra) this court must proceed, at this stage, on the assumption that each and every averment in the particulars of claim is true. With this approach, as more fully set out in the *Van Straten's* case in mind, I

am not persuaded that upon every interpretation that the particulars of claim can reasonably bear, no cause of action is disclosed. I am further not satisfied that the particulars of claim run foul of rule 45. The second defendant's first ground of exception, therefore, falls to be dismissed.

[11] In regard to the second ground of exception, it appears from the particulars of claim that the amounts being claimed by the by the plaintiff as set out in the payment certificates are not part of the claims settled in annexures "D" and "E". Under the second ground, the second defendant also contends, in the alternative, that the particulars of claim do not establish a claim against the second defendant. In the particulars of claim (para 13 thereof) it is stated that the claim against the second defendant is raised in the alternative, insofar as the first defendant alleges, and the second defendant accepts, that the obligations of the first defendant was taken over by the second defendant. I fail to see the basis of the second defendant for claiming that the particulars of claim do not "clearly demonstrate" a claim against it. Furthermore, the second defendant has not spelt-out averments that the plaintiff should have made in its particulars of claim to cure the alleged defect complained of. I am not persuaded that no possible evidence can be led on the particulars of claim on this aspect to disclose a cause of action. In any event, on this score, I am satisfied that the particulars of claim disclose a cause of action. Furthermore, the particulars of claim, in my opinion are not vague and embarrassing. The second defendant's second ground of exception also falls to be dismissed.

[12] As regards the issue of costs, the general principle that the successful party is entitled to costs, must apply. I am of the opinion that the complexity of the case justifies the costs of one instructing and two instructed legal practitioners. In this matter, counsel on both sides submitted that the costs to be awarded in this matter should not be limited in terms of rule 32(11). I am in agreement with that submission. More so because I am of the view that the second defendant's exceptions are clearly uncalled for, especially when measured against the approach to exceptions as set out in the *Van Straten's* case. I shall therefore order that costs in this matter not be limited in terms of rule 32(11).

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

1. The second defendant's exceptions to the plaintiff's particulars of claim, are dismissed.
2. The second defendant is ordered to pay the plaintiff's costs occasioned by the exceptions, and such costs include costs of one instructing and two instructed legal practitioners. It is hereby directed the costs referred to herein shall not be limited in terms of rule 32(11).
3. The matter is postponed to 27 July 2019 at 15:15 for Case Planning Conference.
4. The parties are directed to file a joint case plan on or before 18 July 2019.

Judge's signature	Note to the parties:
	Not applicable
Counsel:	
Plaintiff	Second Defendant
R Heathcote SC (with him SJ Jacobs) Instructed by Louis Karsten legal practitioners, Windhoek	G Coleman (with him MS Kashindi) Instructed by Government Attorneys, Windhoek