

Practice Directive 61

“ANNEXURE 11”

IN THE HIGH COURT OF NAMIBIA

Case Title: CHARLES RICHARD SMITH v TRUSTCO INSURANCE LIMITED	Case No: HC-MD-CIV-ACT-CON-2018/04079
	Division of Court: HIGH COURT(MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	Date of hearing: 11 JUNE 2020
	Date of order: 15 JUNE 2020
Neutral citation: <i>Smith v Trustco Insurance Limited</i> (HC-MD-CIV-ACT-CON-2018/04079) [2020] NAHCMD 228 (15 June 2020)	
Results on merits: Ruling on exception. Merits not considered.	
IT IS HEREBY ORDERED THAT: <ol style="list-style-type: none"> 1. The First to Fifth exceptions are upheld. 2. Plaintiff’s particulars of claim is hereby struck. 3. Plaintiff is ordered to pay the cost of the action. 4. The matter is removed from the roll and regarded as finalised. 	
Reasons for orders:	
<p><u>Introduction and brief background</u></p> <p>[1] The respondent (the plaintiff in the main action) filed his amended particulars of claim following the excipient’s (defendant in the main action) success with its exception that was previously raised in the matter in casu. This Court delivered its exception ruling on 9 September 2019¹ wherein it upheld all the exceptions raised by the defendant and ordered the plaintiff to amend its particulars of claim, if he so wished, within 20 days after the order. However after the ruling was delivered, the plaintiff filed a notice to appeal the ruling to the Supreme Court without leave of this court as the order granted was not final in nature. Subsequently and after several appearances, the said notice was withdrawn and the plaintiff filed its amended particulars of claim. Since the plaintiff was out of time in filing its amended particulars of claim he had to file a condonation</p>	

¹ *Smith v Trustco Insurance* (HC-MD-CIV-ACT-CON-2016/04079) [2019] NAHCMD 337 (09 September 2019).

application, to which the defendant indicated that it will not oppose, as the amended particulars of claim had already been filed in any event without the plaintiff first filing his condonation. The matter was then set down for hearing of this exception.

[2] For purposes of this ruling I will refer to the parties as they in the exception application.

Parties submissions

[3] Mr Theron, counsel for the applicant, submitted in his heads of argument that the first exception application (ruling delivered on 9 September 2019) has unswerving bearing to the second application. Respondent was granted an opportunity to remove the previous complaints in his particulars of claim and was guided by the ruling as to what the nature of the shortcomings of the particulars were.

[4] Counsel raised five grounds of exception and in respect of the first and fourth ground of exception he submitted that the amendment does not cure the first exception that was upheld in the 9th September 2019 ruling. Counsel argued that the respondent once again failed to attach to the particulars of claim the insurance contract he relies upon for his claim as well as the Trustco tariffs. Counsel argued that the respondent relies on documents that were filed by the applicant in opposing the summary judgment application, which falls outside the four corners of his particulars of claim. Counsel further argued that what respondent merely did was to refer to the agreement by inserting the following wording in the amended particulars of claim at the end of para 3: 'ANNEXURE DH1 TO OPPOSING AFFIDAVIT TO SUMMARY JUDGMENT OF THE DEFENDANT' and inserting the following sentence with reference to the tariffs at the end of para 7.3: 'ANNEXURE "DH2" TO THE OPPOSING AFFIDAVIT TO SUMMARY JUDGMENT'. Counsel referred the Court to para 30 and 31 of its 9th September 2019 ruling in this regard.

[5] Mr Grobler, counsel for the respondent, on the other hand submitted that when this court made the ruling of 9 September 2019 the court only considered the particulars of claim to which the insurance contract was not attached. The court did not consider the opposing affidavit to the summary judgment application to which the contract was attached to and incorporated in the pleadings. Mr Grobler submitted that what the respondent simply had to do was to refer to the contract (Annexure DH1) in his amended particulars of claim, which is in compliance with Rule 1 (3) of the Rules of Court to facilitate the resolution of the real issues in a dispute speedily and effectively. The respondent did not need to attach the contract because to require the respondent to file a further copy when it already forms part of the pleadings cannot be regarded as compliance with the Rules of Court

[6] In terms of the second exception, counsel submitted that the amendment does not cure the second exception that was upheld in the ruling as the respondent failed to once again plead the 'terms, conditions and exclusion' and the policy contract relied upon is also not attached. The applicant is therefore unable to ascertain those terms, conditions and exclusions relied upon, which results in the particulars of claim remaining vague and embarrassing. Counsel referred the Court to para 32 of the ruling.

[7] On this issue Mr Grobler submits that the same argument raised in reply to the first and fourth exception should similarly be applied to the second exception.

[8] In respect of the third ground of exception, counsel for the applicant submits that the amendments fail to cure the previously raised exception in that it fails to clarify why the cancellation of the agreement between the respondent and appellant amounted to a breach and whether the alleged breach and/or repudiation is accepted by the plaintiff. Counsel further argues that it is not clear from the amended particulars as to what the respondent is seeking. Counsel referred the Court to para 35 of the ruling whereby the Court held that it was unclear from the particulars of claim whether the respondent is claiming specific performance or whether he accepted the alleged breach and now claims damages.

[9] Mr Grobler is however of the view that the amended particulars clearly sets out the facts on which he relies for his claim, in that the applicant is liable to indemnify the respondent for his legal expenses that he himself paid to his then counsel. Counsel admits that he does not claim damages nor specific performance, but submits that his claim is based on indemnification.

[10] In respect of the fifth ground of exception, counsel for the applicant submits that the phases now being introduced by the amendment ('phase 5' and 'phase 6') does not sustain the respondent's claim because 'Annexure A' (written mandate) that is attached to the particulars of claim is limited to 'phase 2'. Counsel referred the Court to para 38 of the ruling and further submitted that in light of the amendment, the particulars of claim still remain vague and embarrassing as it contradicts 'Annexure A' as the basis for claiming what the plaintiff alleges is entitled to is not pleaded. The Court was referred to para 39 of the ruling in this regard.

[11] With respect to the fifth ground of exception Mr Grobler argues that the respondent had to incur legal costs which he had to pay himself although the applicant undertook to indemnify the respondent for his legal expenses. Whether there is any inconsistency in Annexure A, it refers to the mandate of Grobler & Co

and not to whether the applicant must indemnify the respondent for legal costs actually incurred. Counsel argues that the averments in 'Annexure A' which this Court found to be contradictory cannot nullify the fact that the respondent incurred legal costs that the applicant undertook to indemnify him for such costs.

[12] In conclusion Mr Theron argued that the respondent is required to plead all the material facts and terms on which he relies to sustain his cause of action. Respondent is further required to attach all documents he relies upon for his claim. He cannot expect the defendant to assume and anticipate in preparation for its defence for eventualities either foreseeable or unforeseeable. Counsel further submitted that the defendant will not be in a position to plead to the amended particulars of claim as the defendant is still confused by the discrepancy created between what the respondent claims is covered by the written mandate and what is claimed in the action. The excipient therefore submits that all the exceptions raised should be upheld with costs as the respondent has failed to remedy the shortcomings that were raised in the ruling.

[13] Mr Grobler on the other hand submits that the applicant failed to allege that it is prejudiced or seriously prejudiced by the content of the amended particulars and prays that the objections be dismissed with costs.

Discussion

[14] The principles on exceptions are clear and I do not intend repeating them in the matter in casu as these principles were properly discussed in the ruling of 9 September 2019.

[15] The respondent was granted an opportunity to amend his particulars of claim and the order of 9 September 2019 was unequivocally clear. However it appears that the respondent failed to remedy the shortcomings of the respondent's particulars of claim as indicated in the ruling. This resulted in the applicant bringing another exception application on similar grounds with those that were raised in the first application. If one has a closer look at the amended particulars of claim one would notice that the shortcomings previously raised were not dealt with, apart from a few words and sentences that were added.

[16] The Court is cognisant of the fact that a party must at least be granted an opportunity to set out his/her/its cause of action more clearly once an exception is upheld in order to remove the source of complain where an exception is taken on the ground that the particulars of claim is vague and embarrassing. A party must be made aware of the shortcomings so that those shortcomings can be addressed in the subsequent amended pleading. Having said that the Court is of the view that the respondent's amended

particulars of claim are still not sufficiently detailed and lack lucidity and thus embarrassing.

[17] I disagree with Mr Grobler's position that the insurance contract and the Trustco tariffs attached to the affidavit opposing summary judgment is sufficient and that it was not necessary to attach the said documents to the respondent's particulars of claim as they formed part of the court file. The Court's position is quite clear that parties stand and fall by their papers and are bound by the four corners of that particular pleading. The particulars of claim must be capable of being read independently and separate from the pleading relating to the summary judgment. In this regard I agree with the position of Damaseb DJP in the case of *Coastal Fish Traders (Pty) Ltd v Wilson and Another*² wherein he cited Van Blerk *Legal Drafting Proceedings* and held as follows:

'... The purpose of pleadings is to clarify, not obfuscate issues'. I agree with and adopt the following statement by Peter Van Blerk in his work "*Legal Drafting: Civil Proceedings*" (1998), Juta at p.4:

"It is said that there are three reasons why pleadings are required: firstly, for the parties to be informed of the issues in dispute between them so that they may prepare for trial; secondly, for the court to be informed of the issues so that it may know of the limits of the dispute before it; and, thirdly, so that the issues may be on record lest one or the other parties seek to reopen the same disputes after they have already become determined.

...

To achieve these objectives, the pleadings must be prepared with as much precision as possible. There may be cases where the parties know precisely what is in dispute between them, but the judicial officer who is to hear the dispute will not know unless he or she is informed of it. Pleadings present the opportunity to do just this. The disputes must be recorded in the pleadings with sufficient precision to enable someone other than the combatants to ascertain what it is that is in dispute between them." (My underlining)

[18] Although the respondent argues that the applicant failed to show serious prejudice if the issues complaint of were not expunged, the court in *In Trope v South African Reserve Bank*³ held that:

'As to whether there is prejudice, the ability of the excipient to produce an exception-proof plea is not the only, nor indeed the most important, test - see the remarks of Conradie J in *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298G-H. If that were the only test, the object of pleadings to enable parties to come to trial prepared to meet each other's case and not be taken by surprise may well be defeated.'

[19] This Court therefore holds that a pleading may be vague if it fails to provide the degree of detail

² (1672/04) [2006] NAHC 6 (01 March 2006).

³ 1993 [3] SA 208.

necessary in a particular case properly to inform the other party of the case being advanced⁴. The prejudice which will justify an exception is if the allegations in the particulars of claim are such that the defendant is unable to plead properly, and that is the main basis on which the applicant has raised the exceptions. The Court reiterates that the respondent would not know what to plead to and would be left to guess what material facts the plaintiff is relying on as the amended particulars of claim remains vague and embarrassing.

[20] As a result the exception must be upheld with costs.

[21] My order is as set out above.

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
Applicant	Respondent
Ms P Theron Of PD Theron & Associates	Mr Z Grobler Of Grobler & Co.

⁴ *Lockhat v Minister of Interior* 1960 (3) SA 765 (D) at 777D.