

“ANNEXURE 11”
Practice Directive 61

IN THE HIGH COURT OF NAMIBIA

Case Title: WILLEM ABRAHAM FOURIE v MARRELI FOURIE (BORN COCKLIN); ETZOLD-DUVENAGE; AND HANELIE DUVENAGE	Case No: HC-MD-CIV-ACT-OTH-2019/03172
	Division of Court: MAIN DIVISION
Heard before TOMMASI J	Date of hearing: 04 June 2020
	Delivered on: 29 June 2020
Neutral citation: <i>Fourie v Fourie</i> (HC-MD-CIV-ACT-OTH-2019/03172) [2020] NAHCMD 261 (29 June 2020)	
Results on merits: Not on the merits.	
The order: Having heard Ms Van Der Westhuizen on behalf of the Applicant, and Mr Strydom 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 first and third grounds of the 2nd and 3rd defendants' exception are upheld;2. The plaintiff is granted leave to amend his particulars of claim within 15 days of this order;3. The 2nd and 3rd defendants are granted costs, the cost to include the costs of one instructing and one instructed counsel and limited in terms of the provisions of Rule 32(11).4. The matter is postponed to 29 July 2020 at 14h15 for further conduct of the matter.	
Reasons for orders:	
<p>[1] This is an exception raised by the defendant in respect of the plaintiff's particulars of claim. The plaintiff opposes the exception raised. I shall refer to the parties as in the main action.</p> <p><u>Background</u></p>	

[2] The plaintiff and the first defendant were married to each other out of community of property. The plaintiff instituted divorce action and same was finalised incorporating a settlement agreement which was signed on 12 July 2016 and made an order of court. In terms of the agreement (clause 5 thereof), the plaintiff recorded that he will give transfer of his immovable property situated at Riethaan Street within 36 months of the final divorce order so that 1st defendant may become the beneficial owner. Three years after the final order of divorce the plaintiff transferred the property to the 1st Defendant. The plaintiff at all material times was represented by 3rd defendant who is a legal practitioner and partner/director of 2nd Defendant.

[3] The plaintiff now institutes an action for relief in the following terms in respect of the principal claim:

- The setting aside of the settlement agreement signed on 12 July 2016; alternatively
- setting aside clause 5 of the agreement;
- the restoration of possession of the immovable property; and
- cost of suit.

In respect to the alternative claim, the plaintiff is claiming the following from 2nd and 3rd defendant jointly and severally the one paying, the other to be absolved:

- the amount of N\$4 000 000.
- interest at the rate of 20% from date of judgment to date of payment; and
- cost of suit.

[4] The plaintiff's principal claims that the 1st defendant and 3rd defendant (and by necessary implication the 2nd defendant) unduly influenced him to enter into the settlement agreement. The alternative claim is for damages arising from the 3rd and by implication 2nd defendant's breach of contract by providing incorrect and negligent advice i.e professional negligence.

The exception

[5] The 2nd and 3rd defendants initially raised 3 grounds of exception but abandoned the 2nd ground. The remaining 2 grounds are as follow:

(a) The plaintiff's principle claim does not disclose a cause of action against the 2nd and 3rd Defendant alternatively is vague and embarrassing for the following reasons:

- The allegations made in support of the claim of undue influence in paragraph 11, 12 and

13 of the plaintiff's particulars of claim relies on advice given (which is not specified) and a special relationship. These allegations do not establish a claim based on undue influence.

- No allegation is made that the undue influence was contra bonos mores; and
- The plaintiff does not allege that he did not enter into the agreement out of his own free will.

(b) The last ground relates to the alternative claim. The 2nd and 3rd defendants maintain that the alternative claim does not contain the necessary averments to disclose a cause of action alternatively are vague and embarrassing in that:

- the plaintiff does not show how the amount of the N\$4 000 000.00 is calculated and arrived at;
- and that the plaintiff fails to aver that the damages were within the contemplation of the parties when they entered the agreement.

Exception not rule-compliant

[6] Mr Strydom, counsel for the Plaintiff during argument raised the point that no notice of exception was filed and the procedure adopted by the defendants are thus flawed. Ms Van Der Westhuizen referred the court to a Joint Status report dated 16 October 2019 wherein the parties indicated that counsel met in terms of Rule 32 (9) in order to determine whether the exception cannot be amicably resolved. The status report reflects that the grounds for the intended exception were disclosed to plaintiff and the parties agreed that plaintiff would file amended particulars of claim on or before 1 November 2020. No notice of amendment was filed and the defendant proceeded to file the Exception. She submitted that this afforded the plaintiff the opportunity to remove the cause of complaint and the Plaintiff in any event did not object to the irregular step and in fact took a further step in the proceedings.

[7] In *Hayley Fay t/a Hayley Fay Properties v Uptown Property Investment CC and others* 2016 (3) NR 893 (HC) Masuku J held that where a pleading was alleged to be vague and embarrassing, there were two different documents that had to be issued by the excipient. The first was a notice, which served to alert the other party of the fact and basis for claiming that the pleading in question was vague and embarrassing. If that notice was not heeded within the period of ten days afforded then the excipient was at liberty to deliver the exception proper which would then serve before court for determination.

[8] The court indeed afforded the plaintiff on 28 October 2019 the opportunity to file an

amended plea. I hold the view that the plaintiff was aware of the grounds of exception and was given opportunity to amend and to remove the cause of complaint which the plaintiff declined to do. There has not been strict compliance with the rules but there has been an informal procedure adopted that served the same purpose as a notice in terms of 57(2) and there has thus been no prejudice to the plaintiff. I am of the view that an over fastidious approach in this would unduly delay the matter defeating the overriding objectives of case management. This by no means sets a precedent for non-compliance with the provisions of rule 57. (See paragraph 13-16 of the Haley Fay case, supra). It is further debatable whether rule 57 (2) requires such notice if the exception is raised on the ground that the pleading lacks the averments which are necessary to sustain a cause of action.

The law

Exceptions

[9] Both parties are ad idem in respect of the law applicable to exceptions (See the provisions of Rule 45; *Van Straten NO and Another v Namibia Financial Institutions Supervisory Authority and Another* 2016 (3) NR 747 (SC) *July v Motor Vehicle Accident Fund* 2010 (1) NR 368 (HC) *Trope v South African Reserve Bank and Another and Two Other Cases* 1992 (3) SA 208 (T); *Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing* 2001 (2) SA 790 (T)).

Requirements for claim of undue influence

[10] Both parties are further ad idem in respect of the legal requirements for a claim which is premised on undue influence i.e

- That the other party had an influence over the plaintiff;
- That the other party's influence weakened the plaintiff's resistance and made his will pliable;
- That the other party used this influence unscrupulously or unconscionably to prevail upon the plaintiff to agree to the transaction;
- That the transaction is prejudicial;
- That in the exercise of a normal free will the plaintiff would not have concluded the transaction.

Case for the 2nd and 3rd Defendants

[11] Ms Van Westhuizen submitted that the court held in *MB De Klerk & Associates v*

Eggerschweiler and Another 2014 (3) NR 609 (HC) at p 624, 52 that the relationship of client and legal practitioner does not constitute a special relationship from which undue pressure can be presumed and the plaintiff must thus make the averments as stated above to sustain a cause of action of undue influence. The submits that the averments made are that:

- Ms Duvenage's advice aggravated the undue influence exerted by his wife;
- Ms Duvenage was assisted in negotiating and drafting of the agreement in question;
- Ms Duvenage advised him to transfer the property after 3 years after the final decree of divorce whilst the parties were married out of community of property;
- The plaintiff had a special relationship with Ms Duvenage;
- Ms Duvenage exerted pressure through her advice to the plaintiff;
- The plaintiff was dependent on the advice of Ms Duvenage.

[12] Ms Van Der Westhuizen argued that even if the above is proven it will not sustain a cause of action against the defendant. No allegation is made as to the influence Ms Duvenage exerted over the defendant, the effect thereof and lastly that it was unlawful or contra bonos mores in a situation where 2nd and 3rd defendant derived no benefits from the agreement entered into. She further submitted that the advice given by Ms Duvenage cannot be relied on as there is no law prohibiting parties who are married out of community of property to enter into an agreement along the lines of the settlement agreement to settle their proprietary claims and as such the advice was not unlawful or contra bonos mores.

Plaintiff's position

[13] Mr Strydom, counsel for the plaintiff submitted that plaintiff's cause of action, with clarity, deals with the issue of a special relationship which existed between him and the 1st defendant as well as between him and the 3rd defendant and how this relationship was used in order to exert undue influence upon the plaintiff to eventually agree to the transaction that he now wishes to set aside. He refers to examples where the courts have found that where a special relationship for instance an attorney and client exists a party would be susceptible for the exercise of undue influence.

Application of the law to the facts

First ground – Principle claim

[14] *Christie, The Law of Contract in South Africa*, 5th edition at 310, states that: "a

confidential relationship between persons such as might give rise to a *metus reverentialis*, though relevant, does not create a presumption of undue influence” (See *MB De Klerk & Associates v Eggerschweiler and Another, supra*). The allegation of a special relationship between the plaintiff and the third defendant having given the plaintiff advice is not sufficient to establish undue influence as a cause of action. The plaintiff concludes that the influence is undue and unlawful but no averment is made to support such a conclusion. No averment is made to indicate in what manner the assistance rendered in drafting and negotiating the settlement agreement amounted to influence which was exercised in an unscrupulous manner or contra bonos mores.

[15] In *Namibia Broadcasting Corporation v Kruger and Others* 2009 (1) NR 196 (SC), page 209, para 21 Chomba AJA states as follows:

'In its contractual concept, duress is raised where the alleged is seeking to rescind a contract on the ground that there was no consensus ad idem as a prelude to the consummation of the contract, and that what is presented by his opponent as consent to contract was actually induced by some illicit threat. Implicit in the foregoing statement is that the perpetrator of the duress is the other party to the contract or his/her agent who was involved in the negotiations leading to the contract'. [my emphasis]

The other party's influence must have weakened the plaintiff's resistance and made his will pliable; thus no true consensus is reached. The defendant's averment in its exception that this allegation has not been made and as such the pleading is defective. The impact of the undue influence on the will of the innocent party is a necessary averment in light of the fact that it establishes the absence of voluntary consensus.

[16] The defendant's exception in respect of this ground must, in the circumstances, be upheld.

Third Ground - (Alternative claim)

[17] The damages claimed flows from the relationship between an attorney and client which in turn is contractual in nature. Ms Van Westhuizen argued that the relief claimed is contractual damages. The damages claimed are not general damages and it does not flow naturally from the agreement between the parties. She submitted that, given the special circumstances, such damages can only be claimed where, at the conclusion of the agreement, the parties presumptively contemplated that such damages would probably arise from the breach relied on by the plaintiff

[18] It is further her submission that no allegation is made of the remoteness of damages and causation upon which he would be entitled to claim should he succeed in his claim for breach he

relies on.

[19] She submits that the particulars of claim does not set the damages in such manner as to enable the defendants reasonably to assess the quantum thereof.

[20] In the result, she submitted, the plaintiff's alternative claim is vague and embarrassing.

[21] Mr Strydom submitted that it is evident that the plaintiff unequivocally stated in his particulars of claim that the amount of N\$4 000 000.00 represents the value of the loss sustained by the plaintiff in him losing his immovable property situated at 6 Riethaan Street, Hochlandpark, Windhoek.

[22] Rule 45 provides that a party suing for damages must set it out in such a manner that will enable the defendant reasonably to assess the quantum thereof. Plaintiff's particulars of claim states that: "the plaintiff suffered damages in the amount of N\$4 000 000.00 for the reason that plaintiff lost his immovable property..."

[23] The wording of this paragraph contains the allegation that plaintiff suffered damages and stipulates the factual cause of the damages suffered. No factual averments are made however to indicate what the amount of N\$4 000 000.00 represents. The plaintiff is required to specify the damages. In this instance there is no indication whether it represents the value of the property and if so how and when the value was determined. The defendants, under these circumstances would not be in a position to reasonably assess the quantum of damages. The plaintiff, as correctly pointed out by Ms Van Westhuizen, is also required to satisfy the second leg of causation to establish legal liability i.e. whether the wrongful act is linked sufficiently closely or directly to the loss. (See *FS v Minister Of Safety And Security* 2009 (2) NR 417 (SC) at page 424, para 28).

[24] In light of this conclusion this ground of exception must also be upheld.

[25] Both parties were ad idem that the court ought if the exception is upheld to allow the plaintiff the opportunity to amend its particulars of claim and the court will therefore make such an order. (See *Hallie Investment 142 CC t/a Wimpy Maerua and Another v Caterplus Namibia (Pty)*

Ltd T/A Blue Marine Interfish 2016 (1) NR 291 (SC).

[26] The defendants herein succeeded with two of the grounds raised in their exception and are therefore entitled to costs herein. I am however not persuaded that the cost hereof should exceed the limit provided for in Rule 132 (11).

[27] In the result the above order is made:

1. The first and third grounds of the 2nd and 3rd defendant's exception are upheld;
2. The plaintiff is granted leave to amend his particulars of claim within 15 days of this order;
3. The 2nd and 3rd defendants are granted costs, the cost to include the costs of one instructing and one instructed counsel and limited in terms of the provisions of Rule 32(11).
4. The matter is postponed to 29 July 2020 at 14h15 for further conduct of the matter.

	Note to the parties:
	Not applicable.
Counsel:	
Applicant	Respondent
Adv Van Der Westhuizen On behalf of 2 nd and 3 rd Defendants – Koep & Partners	Adv Strydom On behalf of Plaintiff - Dr Weder, Kauta & Hoveka Inc.