

“ANNEXURE 11”

Practice Direction 61

IN THE HIGH COURT OF NAMIBIA

Case Title: <i>Charles Jose Pritzel v Planet Africa Investment and Another</i>	Case No.: HC-MD-CIV-ACT-DEL-2019/05372
	Division of Court: High Court (Main Division)
Heard/trie d before: Honourable Mr Justice B Usiku J	Last heads of argument filed on: 17 July 2020
	Agreement by the parties that the matter be determined on the papers filed on: 22 July 2020
	Delivered on: 06 August 2020
Neutral citation: <i>Pritzel v Planet Africa Investment</i> (HC-MD-CIV-ACT-DEL-2019/05372) [2020] NAHCMD 338 (6 August 2020)	
The Order: Having read the pleadings and documents filed of record and having considered the heads of argument filed by the parties: IT IS ORDERED THAT: 1. The defendants’ exception is upheld. 2. The plaintiff is ordered to pay the defendants’ costs occasioned by the exception, such costs include costs of one instructing and one instructed legal practitioner.	

3. The plaintiff is granted leave to amend his particulars of claim, if so advised, within 20 days from 06 August 2020.
4. The matter is postponed to 30 September 2020 at 15:15 for case planning conference.
5. The parties must file a joint case plan on or before 23 September 2020.

Reasons: Practice Direction 61(9)

Introduction

[1] This is an exception taken by the defendants against the plaintiff's particulars of claim, on the basis that it lacks averments necessary to sustain a cause of action, alternatively is vague and embarrassing.

[2] In their notice of exception, the defendants invited the plaintiff to remove the cause of complaint. The plaintiff did not remove the cause of the complaint. The defendants therefore raised the present exception.

[3] The plaintiff opposes the exception.

[4] The exception was set down for hearing for the 31 July 2020. However, on 22 July 2020 the parties filed a joint status report and a written agreement in which the parties waived their right to oral argument and requested that the exception be determined on the papers filed. On the 30 July 2020 the matter was postponed to 06 August 2020 for ruling.

Background

[5] During December 2019, the plaintiff instituted an action against the first and the second defendants for damages for personal injuries sustained in the course of his

employment by the first defendant.

[6] According to the particulars of claim, the plaintiff sustained such injuries as a result of a breach of a statutory duty, alternatively, negligence, on the part of the defendants. The plaintiff further avers that he was in the employment of the first defendant at the material time, and that the second defendant has membership interest in the first defendant.

[7] As a result of the injuries, the plaintiff sues for payment in the amount of N\$ 1,300,000, made up as follows:

- (a) pain and suffering : N\$ 200,000;
- (b) loss of amenities of life: N\$ 300,000;
- (c) past, current and future medical costs: N\$ 200,000;
- (d) loss of earnings and earning capacity: N\$ 400,000;
- (e) emotional shock: N\$ 100,000;
- (f) disfigurement: N\$ 100,000.

[8] The defendants raised four grounds of exception against the plaintiff's particulars of claim.

[9] The legal principles governing exceptions were succinctly set out in *Van Straten and Another v Namibia Financial Institution Supervisory Authority and Another 2016(3) NR 747 (SC)*, and I am not going to repeat them here.

The defendants' grounds of exception

First ground of exception

[10] In their first ground of exception, the defendants state that the plaintiff's main cause of action is based on a statutory duty allegedly obliging the defendants to ensure that the plaintiff works in a safe work environment. Under paragraph 9 of the particulars of claim, the plaintiff alleges that the defendants have breached that statutory duty and as a result of that breach the plaintiff suffered damages.

[11] The defendants contend that the plaintiff does not plead the particulars of the statute and the provisions thereof, on which he relies for his action. In the absence of such particulars, the defendants argue, the defendants are unable to interpret the statute relied upon and its relevance to the plaintiff's allegations.

[12] The defendants further argue that the plaintiff ought to have pleaded:

- (a) the statute giving the right of action,
- (b) that the plaintiff is a person for whose benefit the statutory duty was imposed,
- (c) the conduct constituting breach of the statutory duty,
- (d) causal link between the breach and the resultant damages.

[13] The defendants, therefore, submit that the particulars of claim fail to disclose a cause of action, alternatively, are vague and embarrassing.

[14] In response, the plaintiff does not give a coherent answer to the defendants' criticism of the particulars of claim on this aspect.

[15] I am of the opinion that the existence of a cause of action for damages based on breach of a statutory duty, is to be inferred from the interpretation of the provisions of the relevant statute. Therefore, a party who wishes to rely on breach of a statutory duty, as a cause of action, must state the relevant statute and its provisions, in his pleadings.

[16] In the particulars of claim, the plaintiff alleges that the defendants have a statutory duty to ensure that the plaintiff works in a safe environment and that they breached that duty. However, the particulars of claim do not set out:

- (a) the statute imposing such duty, and its provisions,
- (b) the conduct of the defendants that constituted breach of the duty, and,
- (c) the causal link between the conduct and consequent damages.

[17] For the foregoing reasons, I am of the opinion that the particulars of claim fail to

disclose a cause of action. The defendants first ground of exception stands to be upheld.

Second ground of exception

[18] Under the second ground of exception, the defendants state that in paragraph 5 of the particulars of claim, the plaintiff alleges that the incident that gave rise to the plaintiff's claim, occurred at first defendant's workplace while the plaintiff was in the employ of the first defendant and performing work connected to the business of the first defendant. The plaintiff does not alleged any legal relationship that existed between himself and the second defendant, from which the second defendant attracted the alleged statutory duty. Therefore, the defendants contend, the particulars of claim fail to disclose a cause of action against the second defendant, alternatively are vague and embarrassing.

[19] In response, the plaintiff contends that the second defendant holds member interest in the first defendant, acts on behalf of the first defendant and manages the affairs of the first defendant. The plaintiff further alludes that the plaintiff was at the material time acting on the instructions of the second defendant. The plaintiff, therefore submits that there are sufficient facts to establish a link between the plaintiff and the second defendant.

[20] I am in agreement with the contentions of the defendants on this aspect. The plaintiff fails to make factual allegations of the relationship between the plaintiff and the second defendants from which the second defendant attracts the alleged statutory duty. The fact that the second defendants holds member interest, is irrelevant for the present purposes. Indeed, a member of a corporation is not merely by reason of his/her membership liable for the liabilities or obligations of a corporation.¹

[21] I am of the view that the particulars of claim fail to disclose a cause of action against the second defendant. The second ground of exception, therefore, stands to be upheld.

Third ground of exception

¹ Section 2(3) of the Close Corporations Act 26 of 1988.

[22] In regard to the third ground of exception, the defendants aver that, in paragraph 10 of the particulars of claim, the plaintiff appears to make an alternative cause of action based on delict. The particulars of claim allege that, in the alternative, the defendants' negligence caused the plaintiff to suffer bodily harm. Save for the aforesaid, the plaintiff fails to plead any fact required to establish delictual liability on the part of the defendants. The defendants therefore submit that the particulars of claim do not disclose a cause of action against the defendants based on delict, alternatively are vague and embarrassing.

[23] I agree. There is nowhere in the particulars of claim, where the plaintiff sets out material facts on which he relies for his alternative claim based on negligence. It is not sufficient to allege negligence without detailing material facts upon which the pleader relies for negligence. I am, therefore, of the opinion that the particulars of claim fail to disclose a cause of action based on negligence. The defendants' third ground of exception stands to be upheld.

Fourth ground of exception

[24] In the fourth ground of exception, the defendants indicate that the plaintiff claims compensation in the total amount of N\$ 1,300,000, for damages occasioned by the personal injuries suffered by the plaintiff. Save for pleading that the "*irreparable harm*" the plaintiff suffered "*rendered him unable to perform the work as he usually does prior to the injury*", the plaintiff fails to specify the nature, effects and duration of the disability alleged to have given rise to the damages claimed, as required by the rule 45(10).

[25] In addition, the defendants contend that the particulars of claim in regard to claims for:

- (a) past and future medical costs,
- (b) loss of earnings and earning capacity,
- (c) loss of amenities of life,
- (d) emotional shock,

(e) disfigurement,

lack particularity required under rule 45(9). The defendants argue that, for that reason they are not able to reasonably assess the amounts of those claims and plead thereto. The defendants, therefore, submit that the particulars of claim are vague and embarrassing in that the defendants are unable to reasonably assess the quantum of the damages claimed by the plaintiff and plead thereto.

[26] In response, the plaintiff argue that the particulars of claim meet the requirements of rule 45(9) and (10).

[27] Rule 45(9), (10) and (11) provides as follows:

‘(9) A plaintiff suing for damages must set them out in such a manner as will enable the defendant reasonably to assess the quantum thereof.

(10) A plaintiff suing for damages for personal injury must specify the nature and extent of the injuries and the nature, effects and duration of the disability alleged to give rise to such damages.

(11) In a claim for damages for personal injuries the plaintiff must, as far as practicable, state separately what amount, if any, is claimed for –

(a) medical costs and hospital and other similar expenses;

(b) pain and suffering;

(c) disability in respect of –

loss; (i) the earning of income stating the earnings lost to date and the estimated future

(ii) the enjoyment of amenities of life and giving particulars.’

[28] Rule 45 (10), read with subrule (9), requires a party claiming damages for personal injuries to provide sufficient material facts about the injuries and the damages claimed, to enable the opposing party to know why a particulars amount is being claimed as damages. Such material facts are to be set out in such a way as to enable the opposing party to assess the quantum thereof. Insofar as claims for damages for personal injuries are concerned, it is apparent that the abovementioned sub-rules require greater particularity over and above the particularity required under rule 45(5). From the provisions of rule 45(9), (10) and (11), it appears to me that if a pleading does not comply with the requirements set out in the aforesaid subrules, the prejudice required for vagueness and embarrassment is established.²

[29] In the present case, I am of the view that the particulars of claim fall short of the

² See *Hangula v Motor Vehicle Accident Fund* 2013 (2) NR 358 HC.

prerequisites laid down by rule 45(9), (10) and (11) in that they do not, among other things, set out:

- (a) the particulars specifying the nature and extent of the injuries and the nature, effects and duration of the disability alleged to give rise to the damages claimed;
- (b) the earning that the plaintiff used to make and the earnings lost to date and the estimated future loss of earnings and how such amounts are made up;
- (c) when and towards whom, past and future medical care is owed or will likely to be incurred;
- (d) the nature of the loss of amenities of life involved in this matter.

[30] In my view, the way that the plaintiff has pleaded will not enable the defendants to reasonably assess the quantum of the damages claimed. For the foregoing reasons, I am of the opinion that the fourth ground of exception must be upheld.

Conclusions

[31] The exception raised by the defendants stands to be upheld. As regards costs, I am of the view that the general rule that costs follow the event must find application.

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

1. The defendants' exception is upheld.
2. The plaintiff is ordered to pay the defendants' costs occasioned by the exception, such costs include costs of one instructing and one instructed legal practitioner.
3. The plaintiff is granted leave to amend his particulars of claim, if so advised, within 20 days from 06 August 2020.
4. The matter is postponed to 30 September 2020 at 15:15 for case planning conference.

5. The parties must file a joint case plan on or before 23 September 2020.	
Judge's signature	Note to the parties:
	Not applicable
Counsel:	
Plaintiff	Defendants
P.Nanhapo Of Brockerhoff & Associates Windhoek	LL Beets Of Engling, Stritter & Partners Windhoek