

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

RULING (INTERLOCUTORY)

Case Title: HARRY STEPHANUS // LIZ LILIANA NDEUMONA KUUTONDOKWA & 3 OTHERS	Case No: HC-MD-CIV-ACT-OTH-2020/00364
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE MILLER, ACTING	Date of hearing: 1 SEPTEMBER 2020
	Delivered on: 12 OCTOBER 2020
Neutral citation: <i>Stephanus v Kuutondokwa</i> (HC-MD-CIV-ACT-OTH-2020/00364) [2020] NAHCMD 468 (12 October 2020)	
The order: <i>In absentia</i> of the parties and/or their legal practitioners and having read other documents filed of record: IT IS ORDERED THAT: 1. The grounds of exception to the plaintiff's particulars of claim are dismissed with costs, limited to N\$20 000. 2. The matter is postponed back to the Judicial Case Management Roll before Judge Oosthuizen on 23 November 2020 at 14h15 .	
Following below are the reasons for the above order:	
[1] The matter before me concerns an exception raised by the first defendant against the plaintiff's amended particulars of claim, as read with the annexure attached thereto.	
[2] The grounds of the exception are contained in the notice of exception dated 10	

August 2020, which also incorporated a notice in terms of rule 57(2).

[3] In terms of that notice, the first defendant excepts against the plaintiff's amended particulars of claim dated 25 June 2020 on the first ground that the particulars of claim do not contain the necessary averments to sustain a cause of action against the first defendant; and/or vague and embarrassing, and the second ground is that the particulars of claim fail to disclose a cause of action against the first defendant.

[4] According to the notice of exception, the allegations or averments that the last will and testament of the testatrix executed on 24 August 2018 is not a valid will are vague and embarrassing averments because the plaintiff failed to set out material facts in respect of the following:

- (a) Details on who admitted the testatrix, the time that the testatrix was admitted, and failed to attach a death certificate.
- (b) The reason why the testatrix was admitted to the hospital, who was present when the testatrix was admitted to the hospital, who took her to the hospital, who prescribed and administered the morphine before and during her admission to the hospital, doctors who treated the testatrix were not attached to the amended particulars of claim, and there is no indication as to who diagnosed the testatrix with aspiration pneumonia, anaemia, and hypoxia, and the date of such diagnosis.
- (c) No medical report was attached to the amended particulars of claim indicating when and where the testatrix suffered severe respiratory distress, and who treated the testatrix.

[5] According to the notice of exception, the plaintiff's amended particulars of claim failed to set out a cause of action in that the plaintiff failed to do the following:

- (a) Failed to lay a basis on how the testatrix condition became worse and/or deteriorated, plaintiff failed to attach a medical report to support the allegation made.
- (b) Failed to set out the basis upon which he claims that the testatrix was

mentally unfit.

- (c) Failed to set out what the mental illness is the date of diagnosis and treatment, if any.
- (d) Failed to allege how the alleged mental illness affected the testatrix's ability to execute a valid will.

[6] In his particulars of claim, the plaintiff stated that on 24 August 2018 the late Magdalena Stephanus ('the testatrix') purported to execute a will, a copy of which is attached to the particulars of claim, and marked as Annexure "A".

[7] The plaintiff further stated that that the testatrix was admitted into Katutura State Hospital on 24 August 2018 and she passed away on 29 August 2020. He states that during that period the testatrix was terminally ill and pleaded more in particular in that regard under paragraph nine of his particulars of claim. He added that the testatrix condition was so severe that it deteriorated to such an extent that she used a finger print as the form of signature in the purported will. The plaintiff stated that the testatrix was not in a mental state fit to execute a valid will and was unable to appreciate the nature and contents of her act. He claims an order declaring the will of the testatrix dated 24 August 2018 to be null and void, and an order declaring that the testatrix died intestate.

[8] The plaintiff states in his particulars of claim that the first defendant is cited in her capacity as the executrix and heir in the estate of the late Magdalena Stephanus ('the testatrix'), and that the first defendant was appointed by letters of executorship issued in her favour by the third defendant, the Master of the High Court on 9 May 2019.

[9] In his answering affidavit in exception, the plaintiff stated that he has discovered the doctor's and nursing records of the deceased before and during her admission into the hospital, and her last will and testament, and further added that those documents will be used during trial and further supplemented by the expert testimonies of the authors thereof. He further answered that those documents speak to the issues raised by the excipient in relation to the identity of the medical professional who consulted the testatrix, a description of her medical condition and the medication administered from the date of her admission into the hospital to the date of her death. The plaintiff also answered that he is yet to be afforded an opportunity to file expert summaries which speak toward the

plaintiff's mental health as at the date of signature of the will, and added that it follows that the pleader is not required to plead evidence necessary to establish the elements cause of action.

[10] In *Namibia Breweries Ltd v Seelenbinder Henning & Partners*¹ it was held that when judging the merits of an exception, the court is to assume that the pleaded facts are true and capable of proof, and that the excipient has the duty to satisfy the court that on all reasonable constructions to be given to the pleadings and on all possible evidence that may be led thereon, no cause of action is or can be disclosed. It was held as follows:

[The excipient] must satisfy the Court that, on all reasonable constructions of the plaintiff's particulars of claim as amplified and amended (cf. *Kennedy v Steenkamp*, 1936 CPD 113 at 115; *Amalgamated Footwear & Leather Industries v Jordan & Co Ltd*, 1948 (2) SA 891 (C) at 893; *Callender-Easby and Another v Grahamstown Municipality and Others*, 1981 (2) SA 810 (E) at 812H-813A); *Theunissen en Andere v Transvaalse Lewendehawe Koöp Bpk*, 1988 (2) SA 493 (A) at 500E; *Lewis v Oneanate (Pty) Ltd And Another*, 1992 (4) SA 811 (A) at 817F-G and *Michael v Caroline's Frozen Yoghurt Parlour (Pty) Ltd*, supra at 632D) and on all possible evidence that may be led on the pleadings (see: *McKelvey v Cowan NO*, 1980 (4) SA 525 (Z) at 526D-G), no cause of action is or can be disclosed.'

[11] In *Van Straten and Another v Namibia Financial Institutions Supervising Authority and Another* 2016 NR 747 SC, the legal principles regarding exceptions were succinctly set out 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

¹ *Namibia Breweries Ltd v Seelenbinder Henning & Partners* (PI 1606/99) [2002] NAHC 2 (12 February 2002).

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.'

[12] After having perused the content of the plaintiff's particulars of claim, the notice of exception incorporating a notice in terms of rule 57(2), and the plaintiff's answering affidavit in exception, as I have discussed before, I am not satisfied that on all reasonable constructions of the plaintiff's particulars of claim and on all possible evidence that may be led on the pleadings, no cause of action is or can be disclosed. I am also not persuaded that the plaintiff's particulars of claim are vague and embarrassing in so far as they relate to the first defendant. Consequently, the grounds of exception to the plaintiff's particulars of claim are dismissed with costs, limited to N\$20 000.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff	First defendant
M Siyomunji <i>of</i> Siyomunji Law Chambers, Windhoek	F Gaes <i>of</i> Uanivi Gaes Incorporated, Windhoek

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