

IN THE HIGH COURT OF NAMIBIA

Case Title: Transnamib Holdings Limited v Scorpion Credit Management CC	Case No: HC-MD-CIV-ACT-CON-2018/02713
Heard before: Honourable Mrs Justice Rakow, AJ	Division of Court: HIGH COURT (MAIN DIVISION) Date of hearing: 3 February 2020 Date of order: 25 February 2020
Neutral citation: <i>TransNamib Holdings Limited v Scorpion Credit Management CC</i> (HC-MD-CIV-ACT-CON-2018/02713) [2020] NAHCMD 71 (25 February 2020) Having read the record of proceedings as well as submissions made by counsels for the Applicants and the Respondent: IT IS HEREBY ORDERED THAT: a) The exceptions are dismissed. b) Costs of the application is awarded to the Defendant.	
Reasons for orders:	
<u>Background</u> [1] The Applicant/Plaintiff is TransNamib Holdings Ltd, a limited company duly registered and incorporated as such in terms of the company laws of the Republic of Namibia. The Respondent/Defendant is Scorpion Credit Management and Mediatorship CC, a close corporation duly registered and incorporated as such in terms of the Close Corporations Act. The Plaintiff instituted action against the Defendant claiming for arrear rental in terms of a written agreement entered into between the Plaintiff and the Defendant for Office number 49 in a building belonging to the Plaintiff in the amount of N\$193 328.31. They further seek an order ejecting the Defendant and interdicting the Defendant from removing any property from the said office. The Plaintiff incorporated the terms of a written lease agreement for the office premises at number 53 into the Particulars of Claim and attached the said agreement to the Particulars of claim as annexure "A". They further allege	

that all relevant times the Plaintiff was duly represented by Mr. Happy Tjivikua and the Defendant by Mr. Issy Nakamwe.

[2] After a Summary Judgement application that seemed not to have proceeded, the Defendant pleaded to these allegations on 12 June 2019, and together with its plea filed a counterclaim alleging that the Defendant leased various office spaces during the period 2014 – 2018, office number 53, 51 and 49 and that it was part of an agreement between Mr. Hippy Tjivikua on behalf of the Plaintiff and Mr. Issy Nakamwe on behalf of the Defendant. The agreement was initially a written agreement, but later agreements were oral. During 2017, the Defendant was again to move to a new office, office number 49, but before it could move into the new premises, certain renovations had to be made. The parties then entered into an oral agreement in which the Defendant was to renovate and make improvements to the office by using its own resources and that the Defendant would be exempted from paying the monthly rental fee, equivalent to the value of the renovations. Renovations to the value of N\$30 000 was made but shortly after the Defendant moved into these new offices, it was locked out by the Plaintiff and demands were made for the outstanding rental. As a result of the unlawful deprivation of access to office number 49, the Defendant suffered considerable losses and its counterclaim is therefore for the N\$30 000 spent on the renovation of office number 49 and N\$60 000 damages occasioned by the unlawful actions of the Plaintiff.

[3] It is then against this pleading that the Plaintiff excepts and raised the following exceptions:

a) Allegations contained in the Counterclaim are contradictory: The counterclaim states that the parties entered into a written agreement which is attached to the Particulars of Claim of the Plaintiff. The Defendant further avers that the Plaintiff leased various office premises to it. These two averments is inconsistent and contradictory to each other, if regard is had to the lease agreement referred to in the counterclaim and therefore vague and embarrassing and the plaintiff is unable to plea thereto.

b) The allegations made by the Defendant are vague and embarrassing and the Plaintiff is unable to plead thereto: The Defendant alleged that they parties entered into an oral agreement in terms of which the Defendant occupied office number 53 for the period from 2014-2016 and again in terms of the said oral agreement occupied office number 51. The Defendant however failed to mention with whom the oral agreement/s were concluded on behalf of the Plaintiff. The date on or period for which these oral agreements were concluded are also unspecific and therefore vague and embarrassing when read with the other averments of the counterclaim. The Defendant further attached a proof of payment to the counterclaim which is neither a proof of payment, a statement of account from a banking institution nor does it indicate the

alleged amount of rental paid by the Defendant.

c) The necessary allegations are lacking and as such no cause of action is sustained against our client: The Defendant stated that he has lost business totalling N\$ 60 000 but no averments were made to disclose the nature of the Defendant's business and furthermore none was made in respect of the Defendant's actual income during the occupation of the office. The Defendant's quantification of the damages is further bad in law as there is also no attempt to list the actual renovations and improvements allegedly made to office number 49 which are in total N\$30 000. Therefore no cause of action is sustained in the counterclaim.

[4] The Excepiant/Plaintiff filed a report in terms of rule 32(10) indicating that it made attempts to resolve the interlocutory matter amicably as contemplated by rule 32(9) of the High Court rules by writing to the Defendant on 30 July 2019, but received no response from the Defendant on the said letter. The Plaintiff once again tried to engage the Defendant in a letter dated 4 September 2019, requesting it to amend it's Particulars of Claim before 11 September 2019. The Plaintiff further attempted to reach the Defendant telephonically but to no avail. They also wrote an email to the Defendant on 12 September 2019, to which the Defendant responded indicating that it would revert back to them soonest but no response was forthcoming.

The law

[5] An exception can only be taken when the exception appears *ex facie* the pleading as no facts should be presented to show that the pleading is excipiable.¹ When looking at an exception against any pleading, it is important to determine whether the exception is based on the fact that it is vague or embarrassing or both. In *Kahn v Stuart*,² Davis J with Sutton, J concurring said the following:

"In my view it is the duty of the court when an exception is taken to a pleading, first to see if there is a point of law to be decided which will dispose of the case in whole or in part. If there is not, then it must see if there is an embarrassment which is real and such cannot be met by the asking of particulars, as the result of the faults in pleadings to which exception is taken."

[6] The test for allowing an exception on any of these bases was set out in *Levitan v Newhaven Holiday Enterprises CC*³ as follows:

¹ *Edwards v Woodnutt NO* 1968 (4) SA 184 (R) at 186.

² 1942 CPD 386 at page 392.

³ 1991 (2) SA 297 (C) at 298A–C.

“(i)t has been stated, clearly and often, that an exception that a pleading is vague or embarrassing ought not to be allowed unless the excipient would be seriously prejudiced if the offending allegations were not expunged.”

[7] In Herbstein & Van Winsen’s Civil Practice of the High Courts of South Africa⁴ the authors list general principles relating to an exception taken on the ground that a pleading is vague and embarrassing. They refer to the judgement given by Heher J in *Jowell v Bramwell-Jones*⁵ and list a number of principles including the following:

‘An attach on a pleading as being vague and embarrassing cannot be found on the mere averment of lack of particularity, although a lack of particularity might allow an application in terms of rule 30, which is an entirely different proceedings’ and ‘an exception that a pleading is vague and embarrassing may only bew taken when the vagueness and embarrassment strikes at the root of the cause of action or the defence.’

Application

[8] As long as a declaration reasonably states the nature, extent and grounds of the cause of action, the court will not as a rule strike out paragraphs as vague and embarrassing, provided the information given is reasonably sufficient and provided it does not appear to the court that the paragraphs cannot be pleaded to by the defendant.⁶

[9] The rules of this court’s makes provision for a party to request further particulars to any pleadings and if the further particulars are not forthcoming a party can be compelled, by way of an application for further particulars, either to furnish sufficient particulars, or to declare unequivocally that he/she is unable to furnish such. The embarrassment in the present matter can easily be met by a request for further particulars.

[10] With regard to the first exception that the allegations contained in the counterclaim are contradictory: The Plaintiff itself refers to at least two different premises rented by the Defendant from the Plaintiff and the Defendant explains in its counterclaim how it came about the moves came about. This allegations is not vague or embarrassing and contains sufficient averments that will allow the Plaintiff to formulate a plea.

⁴ 5th edition by Cilliers, Loots and Nel, published by Juta 2009, volume 1 page 634 – 635.

⁵ 1998 (1) SA 836 (W) .

⁶ *Lockhat and Others v Minister of the Interior* 1960(3) SA 765 (D) at 777E.

[11] The second exception relates to who the persons were who represented the parties when the oral agreements were concluded between the parties. This can not be raised as an exception as the Defendant averred at all times the Plaintiff was represented by Mr. Hippy Tjivikua and the Defendant by Mr Issy Nakamwe. With regard to the allegation that the date on or period for which these oral agreements were concluded are also unspecific and therefore vague and embarrassing when read with the other averments of the counterclaim, can also not be supported as there is enough information available regarding the periods covered by these agreements to allow the Plaintiff to plea.

[12] Rule 45(9) however reads that '(a) plaintiff suing for damages must set them out in such a manner as will enable the defendant reasonably to assess the quantum thereof.' The allegation by the Defendant in his counterclaim in this instance only reads as follows:

'The total costs of the renovations amounted to N\$30 00' and 'The defendnat has lost business totaling N\$60 000.00. This is as a direct result of the unlawful actions of the plaintiff by locking out defendant. It is not clear how the above costs and damages are calculated but when deciding whether an exception against these averments should be upheld, the court concludes that these particularities can be cured and does not 'strike at the root of the cause'.

In the result, I make the following order

- a) The exceptions are dismissed.
- b) Costs of the application is awarded to the Defendant.

E Rakow

Acting Judge

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	

Applicants	Respondent
Mercy Mombeyarara Adv. S. S. Makando Chambers	<i>In person</i>