

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: Julia Paulus and Risto Natangwe Hafeni Ndaumbwa	Case No: HC-MD-CIV-ACT-OTH-2020/02023 Division of Court: Main Division Heard on: 08 April 2021
Plaintiff	Defendant
Heard before: Honourable Mr. Justice Usiku, J	Delivered on: 29 April 2021
Neutral citation: <i>Paulus v Ndaumbwa</i> (HC-MD-CIV-ACT-OTH-2020/02023) [2021] NAHCMD 194 (29 April 2021)	
Order: <ol style="list-style-type: none">1. The plaintiff's application for leave to amend is dismissed;2. The plaintiff is ordered to pay the defendant's costs occasioned by this application;3. The matter is postponed to 19 May 2021 at 15h15 for a further case planning conference;4. The parties are directed to file a joint case plan (or joint status report) on or before 12 May 2021.	
Reasons for order:	
USIKU, J:	

Introduction

[1] This is an application by the plaintiff for leave to amend her particulars of claim, in the terms as more fully set out in her notice of amendment filed on 04 November 2020.

[2] The defendant objects to the plaintiff's notice of amendment, by way of notice of objection filed on 17 November 2020.

Background

[3] On 23 April 2014 the parties entered into a written sale agreement in terms of which the plaintiff sold certain Erf No 3498, Ongwediva, to the defendant for N\$450 000. In terms of clause 23 of the deed of sale, the full amount has already been paid by the purchaser. Clause 14 states that the deed of sale constitutes the entire agreement between the parties and no modification, variation or alteration thereto, shall be valid unless in writing and signed by both parties. Transfer of the aforesaid erf was registered in the name of the defendant on 20 November 2014.

[4] On 03 June 2020, the plaintiff initiated action against the defendant claiming payment in the amount N\$790 000, allegedly being the outstanding amount in respect of the foregoing transaction. The plaintiff alleges that the foregoing amount includes occupational money payable by the defendant.

[5] On 24 September 2020, the defendant filed a notice of exception in terms of rule 57(2) against the particulars of claim. In his notice of exception, the defendant took issue with the particulars of claim, among other things, on account that:

- (a) the particulars of claim do not specify when the breach in respect of payment of the purchase price (which is alleged to include rent) occurred;
- (b) the particulars of claim do not specify which portion of the consideration constitutes the purchase price and which constitutes rent and that;
- (c) there is no copy of the written contract annexed to the particulars of claim.

[6] On or about 21 October 2020 the plaintiff filed amended particulars of claim without having first delivered a notice to amend. This amended particulars of claim was struck out by the court on account of it having been filed unprocedurally. The plaintiff, thereafter, indicated

willingness to remove the cause of complaint raised in the defendant's notice to except, and on 04 November 2020 the plaintiff filed a notice to amend. The notice to amend reads as follows:

'KINDLY TAKE NOTICE THAT the Plaintiff intends to amend her Particulars of Claim dated 28th May 2020 in this matter in terms of Rule 52 as follow:

1. PARAGRAPH 6 THEREOF: By deleting the entire paragraph replacing it with a new paragraph 6 as follow:

"6. The agreement was partly oral, partly written, and as part of the oral agreement between the parties, the material express, implied and /or tacit terms of the agreement were as follows:

6.1 That the defendant will take immediate occupation of the property, being Erf No 3498 measuring 3650m², Ongwediva, Republic of Namibia hereinafter "the Property".

6.2 The defendant shall pay the price consideration of N\$ 2, 600,00.00 (Two Million and Six Hundred Thousand Namibia Dollars) inclusive of both occupational and subsequent purchase price.

6.3 There was no stipulated period within which payment should be made.

6.4 That the price consideration shall be paid in several unscheduled instalments, until the full balance is paid in full.

6.5 Transfer of the property may take place prior to payment of full consideration price, but the defendant shall remain liable for the full amount outstanding at the time of transfer should transfer take place prior to the payment of the full consideration price.

6.6 The written portion of the agreement is attached hereto as annexure JP1, which is a deed of sale signed between the parties during April 2014, and annexure JP2, the title deed."

2. Deleting the entire paragraph 7 and replacing it with a new paragraph 7 as follow:

"7. The Plaintiff at the relevant and material times, fulfilled her obligation in terms of the agreement, in that plaintiff:

7.1 Authorised the Defendant to take possession of the Property from 2013 until to date.

7.2 In accordance with the agreement, on or about May 2014 the property was transferred into the name of the Defendant pursuant to annexure **JP1**.

7.3 At the time of transfer, the Defendant has not paid the full consideration price, and has only paid an amount of N\$ 1, 350,000.00.

7.4 After the transfer of the property, the Defendant made further payments as follow:

7.4.1 N\$ 50,000.00 paid on 08th July 2014

7.4.2 N\$ 100,000.00 paid on 21 July 2014

7.4.3 N\$ 100,000.00 paid on 18 December 2014

7.4.4 N\$ 200,000.00 paid during 2015

7.4.5 N\$ 10,000.00 paid during 2015

7.5 In total the defendant has only paid a total amount of N\$ 1, 810, 000.00 (One Million, Eight Hundred and Ten Thousand Namibia Dollars), which amount was paid between the year 2013 and 2015."

3. PARAGRAPH 9 THEREOF: By deleting the entire paragraph 9 and replacing it with a new

paragraph as follow:

“9. Despite several promises, the defendant failed to make any further payments. On the 06th of April 2019, the Plaintiff demanded payment of the remaining balance consideration. Proof of demand is attached hereto as annexure **JP3**.”

[7] In summary, the proposed amendments seek to:

- (a) introduce an allegation that the agreement entered into by the parties was partly written and partly oral and that the purchase consideration of N\$ 2 600 000 was part of the terms of the oral agreement; and,
- (b) include JP1 (deed of sale) and JP2 (deed of transfer) as annexures to the particulars of claims.

[8] On 17 November 2020, the defendant filed a notice of objection to the proposed amendments.

[9] On 12 February 2021, the plaintiff filed the present application for leave to amend. The defendant opposes the application for leave to amend.

The notice of objection

[10] In his notice to object, the defendant submits that the Deed of Sale and Deed of Transfer on the one hand, and the proposed amended para 6, on the other hand, contradict each other insofar as the purchase price of the property is concerned. Such contradiction renders the particulars of claim vague and embarrassing and therefore excipiable.

[11] The defendant further submits that the proposed amendments prejudice the defendant, in that if allowed, the amendments would unnecessarily prolong an already flawed suit and expose the defendant to incurring further legal costs which the defendant might not be able to recover in full from the plaintiff.

[12] The defendant contends that the Formalities in respect of Contracts of Sale of Land Act 71 of 1968 provides that a contract for the sale of land shall not be valid unless it is first reduced to writing and signed by the seller and purchaser. The oral part of the alleged agreement in respect of the purchase price violates the peremptory provisions of the Act.

[13] It is also the contention of the defendant that the proposed amendments would extinguish

the whole of the plaintiff's cause of action and are incompatible with the particulars of claim as they stand.

[14] The defendant submits that the proposed amendments pursued by the plaintiff are bad in law and that application for leave to amend be dismissed with cost on a punitive scale.

The application for leave to amend

[15] The plaintiff states that the purpose of the proposed amendments is to clarify and make averments necessary to sustain a cause of action and thereby cure the defects specified by the defendant in his notice to except.

[16] The plaintiff asserts further that the Deed of Sale only reflects the written part of the agreement. The purchase price of N\$ 2 600 000, including occupational rent, is contained in the oral part of the agreement.

[17] The plaintiff further contends that the oral agreement in regard to the N\$ 2 600 000 does not violate the provisions of the Act since the aforesaid amount includes occupational rental and the purchase price.

[18] The plaintiff submits that the defendant is not prejudiced by the proposed amendments and can plead thereto.

Analysis

[19] The issue falling for determination is whether or not the plaintiff should be granted leave to amend her particulars of claim in the terms as set out in her notice to amend.

[20] In order to persuade the court to exercise its discretion in its favour, an applicant for leave to amend must show that the proposed amendment is worthy of consideration and introduces a triable issue. The court shall then weigh the reasons and explanation given by the applicant for the amendment, against the objections raised by the opponent. Where the proposed amendment will prejudice the opponent or would be excipiable, the amendment should be refused.¹

[21] The primary objection of allowing amendments is to facilitate 'a proper ventilation of

¹ *Trans-Drankensberg Bank Ltd v Combined Engineering* 1967 (3) SA 632 at 641.

disputes between parties, to determine the real issues between them, so that justice may be done'.² The court would normally disallow a proposed amendment if same is not made in good faith or would prejudice the opposing party or would be excipiable.³

[22] In the present case, the defendant contends that the proposed amendments will result in the summons still being excipiable.

[23] The general rule applicable to pleadings, requires pleadings to be drafted in a lucid and intelligible manner. The cause of action (or defence) must appear clearly from the factual allegations made in the pleadings. An excipient bears an *onus* of persuading the court that upon every interpretation which a pleading can reasonably bear, no cause of action is disclosed.⁴

[24] It is common cause that the central issue raised in the proposed amendment is the introduction of an oral agreement having the effect of amending the written portion of the agreement. The written agreement relates to the sale of land. In addition, the written agreement contains an express non-variation provision and a provision to the effect that the full purchase price has been paid as at the date of the signing thereof.

[25] It is a settled principle of law that a stipulation in a written agreement that 'variations of the agreement shall be in writing, otherwise the same shall be of no force and effect' cannot be altered verbally.⁵ In addition, the Law of Evidence, in respect of the Parol Evidence, forbids extrinsic evidence about the contents of a document insofar as it tends to contradict or change the document by introducing allegations of a verbal agreement to the contrary.⁶

[26] In addition to the above, s1 of the Formalities in Respect of Contracts of Sale of Land Act (supra), states that no contract of sale of land shall be of any force or effect unless it is reduced to writing and signed by both parties thereto. In my opinion, the purpose of the Act in requiring a contract of sale of land to be written, is so that all the express terms of the contract, as agreed by the parties, are in black and white.

² *Cross v Ferreira* 1950 (3) SA 443 at 447.

³ *Trans-Drankensberg Bank Ltd v Combined Engineering* 1967 (3) SA 632 at 641.

⁴ *Van Straten and Another v Namibia Financial Institutions Supervisory authority* 2016 NR 747 (SC).

An exception raised on the ground of vagueness and embarrassment is normally a curable defect, cured by amending same summons to which an exception is raised.

⁵ *Brisley v Drotsky* 2002 (4) SA 1.

⁶ *ABSA v Michael's Bid A House* 2013 (3) SA 426 (SCA).

[27] The court takes cognizance of the fact that the plaintiff did not only have to sign the Deed of Sale, but other various documents including the power of attorney to give effect to the transfer of the property, which, for obvious reasons, should have been in line with the Deed of Sale. It is apparent from the Deed of Transfer that the plaintiff was exempted from payment of transfer and stamp duties on the basis of the purchase price as recorded in the Deed of Sale. Based on the foregoing considerations, it cannot convincingly be contended that the proposed amendment based on an alleged oral agreement, is made in good faith.

[28] The plaintiff contends that the attempt to introduce an oral agreement in the pleadings does not violate the provisions of the Act since the 'price consideration' of N\$ 2 600 000 is both for 'occupational' and the purchase price. I do not agree with the plaintiff on this aspect. There are no averments in the proposed amendments to the effect that the parties had concluded an oral lease agreement and the terms thereof. In other words, on the pleadings as proposed to be amended, the court would not be faced with a claim by a landlord for recovery of rent from his/her tenant which is due and owing. The averments made in the particulars of claim as proposed to be amended, relate to the sale of land and an outstanding purchase price which is alleged to include occupational rent. The reference by the plaintiff to the purchase price as 'price consideration' does not change the status of the purchase price.

[29] Furthermore, the averments necessary to allege a contractual relationship flowing from a contract of lease are different from the averment necessary to establish a relationship flowing from a sales contract. The contractual relationship alleged in the summons and in the proposed amendments, is and remain one of seller and purchaser of immovable property and the debt claimed is and remains payment of the alleged outstanding amount of the purchase price, notwithstanding the allegation that the purchase price is inclusive of 'occupational' price. A 'purchase price' for the sale of land remains the 'purchase price' of land even if it is inclusive of cats or mice on the land.

[30] On the basis of the authorities I referred to above, including the provisions of the Act, I am of the opinion that, insofar as the plaintiff seeks to rely on an oral agreement, in relation to the sale of land, the plaintiff seeks, through the proposed amendments, to enforce a right which is non-existent.

[31] For the foregoing reasons, I am inclined to agree with the defendant that the proposed

amendment would still make the plaintiff's pleading excipiable.

[32] I have considered whether or not to allow some of the proposed amendments which do not necessarily relate to the alleged oral agreement. Such as the proposed clause 6.6 which introduces a copy of the deed of sale and the deed of transfer. However, due to the manner in which such provisions are couched, the same would still render the pleading excipiable due to the fact that the central part of the plaintiff's pleaded cause of action appears to rely on the alleged oral agreement.

[33] I am of the opinion that the court should not grant leave to amend where the proposed amendments have no possibility of advancing a litigant's cause and which may only, at best, serve as a basis for the need to hear evidence which would lead nowhere.

[34] For the reasons stated above, it follows that the objection raised by the defendant to the effect that the proposed amendments not be allowed as they would still render the particulars of claim excipiable, is valid and stands to be upheld.

[35] Insofar as costs are concerned, I am not persuaded that costs on a punitive scale is justified in the present matter. I would therefore grant costs on the ordinary scale.

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

1. The plaintiff's application for leave to amend is dismissed;
2. The plaintiff is ordered to pay the defendant's costs occasioned by this application;
3. The matter is postponed to 19 May 2021 at 15h15 for a further case planning conference;
4. The parties are directed to file a joint case plan (or joint status report) on or before 12 May 2021.

Judge's signature	Note to the parties:
B Usiku Judge	Not applicable

Counsel:**Plaintiff:**

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Defendant:

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