

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING

Case Title: Kleophas Natangwe Ashilungu and Terrence Veripamwe Adam Kukuri	Case No: HC-MD-CIV-ACT-DEL-2019/03859
	Division of Court: Main Division
	Heard on: 21 May 2021
Heard before: Honourable Mr. Justice Usiku, J	Delivered on: 21 May 2021
Neutral citation: <i>Ashilungu v Kukuri</i> (HC-MD-CIV-ACT-DEL-2019/03859) [2021] NAHCMD 247 (21 May 2021)	
Order: Having heard Mr Coetzee , on behalf of the Plaintiff and Mr Nanhapo , on behalf of the Defendant and having read the pleadings and other documents filed of record: 1. The defendant's exception is dismissed. 2. The defendant is ordered to pay the plaintiff's costs occasioned by the exception. 3. The matter is postponed to 23 June 2021 at 15:15 for a further case planning conference. 4. The parties must file a joint case plan report on or before 16 June 2021.	
Reasons:	
USIKU, J <u>Introduction</u> [1] This is an exception taken by the defendant against the plaintiff's amended particulars of claim, on the basis that it is vague and embarrassing.	

[2] The plaintiff issued summons against the defendant for the recovery of damages sustained to his vehicle arising from a collision between the vehicle and a cow allegedly owned by the defendant. The alleged collision occurred on 15 March 2019 at approximately 21h05 on the B1 national road at or near Osona Village, Okahandja. The plaintiff alleges that the aforesaid cow was at the material time roaming on the national road.

[3] The plaintiff further alleges that after the collision, the police officers contacted the defendant, who confirmed his ownership of the cow in question, and who subsequently took possession of the carcass of the cow and loaded it onto his vehicle and drove away.

[4] The defendant delivered a notice of exception in terms of rule 57(1). The defendant complained that the particulars of claim were vague and embarrassing.

[5] The plaintiff later amended the particulars of claim. That notwithstanding, the defendant maintained that the amended particulars of claim did not remove the cause of complaint. The plaintiff opposes the exception on the basis that there is nothing amiss with the amended particulars of claim.

Legal principles

[6] It is trite that a party is required to plead the material facts upon which he relies and on which evidence will be led with sufficient clarity and particularity to enable the opposite party to plead thereto.¹

[7] The allegations in the pleading that forms the subject of the exception are accepted to be correct for the purposes of adjudicating the exception.

[8] An exception on the basis that a pleading is vague and embarrassing strikes at the formulation of the claim, not the validity of the cause of action. The exception must, however, relate to the whole cause of action, not a specific or particular paragraph within the cause of action.²

[9] Furthermore, where an exception is taken on the ground that a pleading is vague and

¹ Rule 45(5)

² *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 at 899G.

embarrassing, the enquiry involves a two-fold consideration, namely:

- a) whether the pleading lacks particularity to the extent that it is vague and, if so,
- b) whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced.

[10] The exception itself is a pleading and as such, is also subject to the requirements of rule 45 (5) and is susceptible to an exception if it lacks particularity and is vague and embarrassing.

[11] The notice in terms of rule 57 (2), affording the opposite party the opportunity of removing the cause of complaint, should be formulated with care, to advise the opposite party of the nature and the grounds of complaint he or she is called upon to remedy. Failure to properly advise the other party in terms of rule 57 (2) notice of the cause of complaint, defeats the purpose that rule 57 (2) seeks to achieve.³

The exception

[12] The defendant raised six grounds of exception to the particulars of claim.

First ground of exception

[13] In the first ground of exception, the defendant states that in para 5 of the amended particulars of claim, the plaintiff alleges that the defendant is the owner of the cow and in control of the cow, but the plaintiff did not identify the cow allegedly owned by the defendant or provide any description of the cow, to place the defendant in a position to ascertain the type of the cow the plaintiff is referring to. The defendant, therefore argues that, without establishing ownership of the cow, the defendant will not be able to ascertain which cow was in his control. Therefore, the defendant is unable to plead to the particulars of claim as it is vague and embarrassing.

[14] In response, the plaintiff submits that all material facts were pleaded in the amended particulars of claim

[15] I am of the opinion that the pleadings must be read as a whole and not as individual paragraphs, in isolation. The plaintiff has alleged that:

³ *Absa Bank Limited v Mocke* (1324/201) [2017] ZAFSHC 97 (15 June 2017) para 5.

- a) the defendant was the owner and was in control of, the cow that was involved in a collision with the plaintiff's vehicle on or about the 15th of March 2019, at about 21h05 at or near Osona Village in Okahandja;
- b) the defendant confirmed to police officers that he was the owner of the cow in question; and
- c) the defendant took the carcass of the cow with him.

[16] There is nothing that precludes the defendant from denying or admitting, in his plea, that he is the owner of the cow as described above. I am of the opinion that there is nothing vague or embarrassing about para 5 of the amended particulars of claim, and the defendant is able to plead thereto. Therefore, the first ground of exception is without merit and stands to be dismissed.

Second and third grounds of exception

[17] In the second ground of exception the defendant states that in para 6 of the amended particulars of claim, the plaintiff alleges that the defendant has a legal duty of care towards road users to ensure that the fence surrounding the camp in which the cow is kept is well maintained. The defendant contends that he is unable to ascertain the name or description of the camp where the cow was allegedly kept and allegedly escaped because the fence was not well-maintained. The defendant therefore submits that the amended particulars of claim are vague and embarrassing.

[18] In the third ground of exception, the defendant states that in para 6 of the amended particulars of claim, the plaintiff alleges that the defendant has a legal duty to ensure that the fence surrounding the camp and the gate which enters the camp in which the cow is kept, is kept closed and maintained in good condition. The defendant argues that he is unable to ascertain which fence was not well maintained and how it was not well-maintained. Furthermore, the defendant contends that he is unable to ascertain which gate was not closed and how it was not maintained in good condition. The defendant therefore submits that the amended particulars of claim are vague and embarrassing.

[19] It must be pointed out that in para 7 of the amended particulars of claim, the plaintiff alleges that the defendant is statutorily obliged in terms of s 42(1) (a) (i) of the Roads Ordinance No. 17 of 1972 to maintain a fence within which his livestock is to be kept. Section 42(1) (a) (i)

requires an owner, lessee or occupier of a farm to erect and maintain a fence along or across a proclaimed road.

[20] In my opinion, when regard is had to the amended particulars of claim as a whole, the plaintiff has pleaded material facts upon which he relies for his claim. Nothing precludes the defendant from denying or admitting, in his plea, that the alleged statutory duty is applicable to him, whatever the defendant's case may be. I am therefore of the view that there is nothing vague or embarrassing about the absence of the particulars complained of and the defendant is able to plead thereto. The second and third grounds of exception, therefore stand to be dismissed.

Fourth, fifth and sixth grounds of exception

[21] Under the fourth ground of exception, the defendant states that in para 6 of the amended particulars of claim, the plaintiff alleges that the defendant has a legal duty to ensure that the cow would not roam on the road surface. The defendant argues that the plaintiff failed to show how and why that legal duty was imposed on the defendant. The defendant further contends that the plaintiff also failed to state where the cow moved from to enter on the national road, so as to enable the defendant to ascertain whether he has a legal duty attributed to him. Therefore, the defendant contends that the amended particulars of claim are vague and embarrassing.

[22] In regard to the fifth ground of exception the defendant states that in para 8.6 of the amended particulars of claim, the plaintiff alleges that the defendant failed to ensure that a person was accompanying the animals on the road reserve. The defendant argues that he is not sure whether the plaintiff is referring to the cow in question or other types of animals. The defendant thus submits that the particulars of claim are rendered vague and embarrassing thereby.

[23] Under the sixth ground of exception, the defendant states that in para 12 of the particulars of claim, the plaintiff alleges that his vehicle was damaged, which damage amounts to N\$ 35 502.77. The defendant contends that the plaintiff fails to state how such amount was arrived at. The defendant thus contends that the manner in which the plaintiff's damages or loss is pleaded does not comply with rule 45 (9) and is as such excipiable.

[24] I should mention that the fourth, fifth and sixth grounds of exception are not included with defendant's notice of exception delivered in terms of rule 57(2). The court would not entertain an exception on the ground of vague and embarrassing, unless the grounds thereof are also articulated in the notice in terms of rule 57(2) and in the exception itself. To do so would allow an excipient to except without affording his opponent the opportunity of removing the cause of complaint.

[25] In any event I am not persuaded that there is any merit in the defendant's fourth, fifth and sixth grounds of exception. In the first instance, a failure to show 'how' and 'why' the legal duty is imposed on the defendant would not preclude him from pleading to the particulars of claim. Secondly, a failure to state whether the 'animals not accompanied by a person on the road reserve' refer to the cow in question or other animals, does not render the amended particulars of claim vague and embarrassing in the circumstances. When regard is had to the amended particulars of claim as a whole, it is apparent from the context that the plaintiff refers to the cow which was involved in the collision with the plaintiff's vehicle. There are no other animals referred to in the particulars of claim, apart from the cow in question. Thirdly, it is not correct to contend that the plaintiff failed to state how his amount of damages was arrived at. Paragraph 12 of the amended particulars of claim provides such information. Therefore, there is no merit at all in the defendant's grounds of exception and the exception stands to be dismissed.

[26] As regards to the issue of costs, I am of the opinion that the general rule that costs follow the event should find application.

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

1. The defendant's exception is dismissed.
2. The defendant is ordered to pay the plaintiff's costs occasioned by the exception.
3. The matter is postponed to 23 June 2021 at 15:15 for a further case planning conference.
4. The parties must file a joint case plan report on or before 16 June 2021.

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

Counsel:**Plaintiff:**

P Coetzee
Of PD Theron & Associates
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Defendant:

T Nanhapo
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Practitioners
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