

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGEMENT

INT-HC-EXP-2021/00125

Case No: HC-MD-CIV-ACT-CON-2019/02861

In the matter between:

LAZARUS TEOFILUS

PLAINTIFF/APPLICANT

and

**KING PRICE INSURANCE COMPANY
OF NAMIBIA LIMITED**

DEFENDANT/RESPONDENT

Neutral citation: *Teofilus v King Price Insurance Company of Namibia Limited*
(HC-MD-CIV-ACT-CON-2019/02861) [2021] NAHCMD 320
(5 July 2021)

Coram: Oosthuizen J

Heard: 10 June 2021

Delivered: 5 July 2021

Flynote: Civil procedure — Interlocutory — Exception filed to defendant's amended plea — exception not based on the amendments sought and consented to — exception filed after plaintiff had already replicated to defendant's un-amended plea containing the very paragraphs the plaintiff now seek to impugn — exceptions dismissed with costs.

Summary: Plaintiff instituted a claim against the defendant based on a short term insurance agreement. Defendant defended the action, filed an exception which plaintiff initially opposed, then conceded and filing an amended particulars of claim. Defendant pleaded. Plaintiff replicated. Defendant sought an amendment to certain paragraphs of its plea. Plaintiff objected, raising vagueness and non-disclosure of required particularity. Defendant agreed to enclose more specificity. Plaintiff agreed to subsequent amended plea and that he (plaintiff) will file his amended replication and additional witness statement on a specified date. Court endorse the parties' agreement with a Court order. Plaintiff breach the agreement by seeking further directions from the Court on intended exception. Plaintiff eventually filed an exception raising vagueness and embarrassment in respect of unamended paragraphs in defendant's plea to which he had already replicated.

Held, that plaintiff's exception and the grounds therefore are dismissed;

Held, that plaintiff violated agreements with the defendants contained in joint status reports dated 10 and 26 February 2021; and

Held, that plaintiff is censured with an appropriate costs order.

ORDER

Having heard **Mr Beukes**, counsel for the plaintiff/excipient and **Mrs van der Westhuizen**, counsel for defendant/respondent -

IT IS ORDERED THAT:

[1] The exception raised by the plaintiff is dismissed.

[2] Plaintiff shall pay the costs of the defendant, uncapped by Rule 32(11) of the Rules of Court, which costs shall include the costs of one instructing and one instructed counsel from and including 10 March 2021 until 5 July 2021.

- [3] Plaintiff shall file his replication to the defendant's amended plea dated 16 February 2021 on or before 6 August 2021.
- [4] Plaintiff shall file his supplementary witness statement, signed by himself, on or before 6 August 2021.
- [5] Plaintiff shall file additional discovery, if need be, on or before 6 August 2021.
- [6] The parties shall file their joint pre-trial report on or before 18 August 2021.
- [7] A pre-trial conference shall be conducted in the presence of the parties and/or their legal practitioners seized with the matter at 11h00 on 23 August 2021 at SADC.

JUDGMENT

OOSTHUIZEN J:

Introduction

[1] The plaintiff instituted a claim for indemnification against the defendant on an insurance agreement concluded between the parties. The specific relief sought was: "1. Payment in the amount of N\$250 000.00; 2. Specific performance of accrued rights: (a) Indemnification of reasonable costs incurred for towing and storing the insured motor vehicle; (b) Providing the Plaintiff with hired car within 14 days from date of judgement. 3. Cost of suit." Thereafter the defendant had defended the action and filed an exception, resulting in the plaintiff delivering an amended particulars of claim.

[2] The cause of the complaint arose when the defendant subsequently filed a Notice of Intention to amend paragraphs 8, 9 and 13 of its Plea. The plaintiff was given time to object to the Notice tendered by the defendant, and do so. The

objection was settled. Defendant delivered its Amended Plea; the plaintiff decides to raise an exception. The exception raised on the amended plea was based on paragraphs that were not amended, identified by the plaintiff as "paragraphs that have been in the plea since it was first filed and thereafter replicated to by the plaintiff".

Background

[3] On 7 December 2020 the defendant gave notice of its intended amendments of *inter alia* paragraph 8 of its plea of 7 April 2020.

[4] On 21 January 2021 the plaintiff objected to sub paragraph 8.2 of the intended amendment on the grounds that it would render the plea vague and embarrassing by not disclosing with sufficient particularity to what previous incidents of non-disclosure defendant refers to.

[5] On 27 January 2021 the parties met and defendant consented to reveal the non-disclosure in his intended amendment. The objection was withdrawn and defendant filed an amended plea on 16 February 2021.

[6] On 10 and 26 February 2021 the parties agreed in joint status reports, signed by the representatives of both parties, that the plaintiff shall file an amended replication and witness statement on or before 10 March 2021.

[7] On 1 March 2021 the court ordered the case be postponed for a Pre-trial conference on 29 March 2021; for a joint pre-trial report to be filed by 25 March 2021; for plaintiff to file his amended replication and additional witness statement on or before 16 March 2021.

[8] On 10 March 2021 the plaintiff however made a *volte face* and filed a notice for directions from the Court in terms of Rule 32(4) to bring an exception application against the very amended plea to which he consented.

[9] On 28 March 2021 and without hearing the parties the court gave directions and overlooked the agreement between the parties on 10 and 26 February 2021.

[10] The plaintiff eventually brought an exception which he based on un-amended paragraphs in defendants plea to which he has already replicated.

[11] To date the plaintiff has not filed an amended replication and amended witness statement as he has agreed and the Court has ordered.

[12] The plaintiff's exception on the following six grounds, summarised by the defendants, are:¹

‘6.1 Paragraphs 6, 7 and 11 violate Rule 46(2)(c) and 46(3) because it does not contain all material facts on which the defendant relies in defence, alternatively it requires an explanation or qualification that must be stated in the plea.

6.2 Paragraphs 6, 7 and 11 violate Rule 45(5) in that they:

6.2.1 do not contain a clear and concise statement of material facts on which the pleader relies for its defence;

6.2.2 do not have specific particularity to enable the plaintiff to reply thereto;

6.2.3 does not set out the nature of the defence; and

6.2.4 do not contain such particulars as are necessary to enable the plaintiff to identify the case that the pleading requires him to meet.

6.3 Paragraphs 6, 7 and 11 amount to bare denials that leave the plaintiff with two distinct interpretations thereof, namely:

6.3.1 either the defendant does not bear knowledge of the allegations pleaded to and cannot admit or deny same; or

¹ Defendant's Heads of Argument in the Exception, pp 3 and 4.

6.3.2 the defendant possesses knowledge and can accurately answer to the allegations, but chooses deliberately to be vague and evasive by resting its case on bare or ambiguous denials.

6.4 The plaintiff is prejudiced because he cannot meaningfully replicate to the allegations in paragraphs 6, 7 and 11 of the defendant's plea.

6.5 More clarity on paragraphs 6, 7 and 11 "will go a long way to narrow down the issues to be proven by the parties at the trial".

6.6 Paragraphs 6, 7 and 11 "go to the root of the claim because same affects the liability of the Defendant if the court is to hold the Defendant liable.'

The Law

[13] The rules on amendment of Pleadings are trite law i.e. any Amendment sought must be brought in terms of Rule 52. Pleadings are further regulated by Rule 45 and 46 of the Rules of the High Court.

'45(5) Every pleading must be divided into paragraphs, including subparagraphs, which must be consecutively numerically numbered and must contain a clear and concise statement of the material facts on which the pleader relies for his or her claim, defence or answer to any pleading, with sufficient particularity to enable the opposite party to reply and in particular set out -

- (a) the nature of the claim, including the cause of action; or
- (b) the nature of the defence; and
- (c) such particulars of any claim, defence or other matter pleaded by the party as are necessary to enable the opposite party to identify the case that the pleading requires him or her to meet.

45(6) Every allegation in the particulars of claim or counterclaim must be dealt with specifically and not evasively or vaguely.

46(2) Every plea must-

- (a) deal with each and every allegation made by the plaintiff in his or her particulars of claim;
- (b) clearly state which allegations by the plaintiff are admitted;
- (c) clearly and concisely state all material facts on which the defendant relies in defence or answer to the plaintiff's claim.

46(3) Every allegation of fact in the particulars of claim which is not stated in the plea as denied or admitted is regarded as having been admitted and, if an explanation or qualification of an admission or a denial is necessary, it must be stated in the plea.'

Application of the Law to the facts

[14] The plaintiff argued that the allegations which the plaintiff raises the exception to "violates rule 46(2) (c) and 46(3)" which provides that every plea must clearly and concisely state all material facts on which the defendant relies its defence on.

[15] The plaintiff argued that the pleas now complained of are bare denials to the plaintiff's allegations and leaves the plaintiff with two distinct interpretations of the allegations by the defendant, which he identified as "the defendant can neither deny or admit the allegations of the plaintiff because they have no knowledge of the facts; or they possess knowledge of the facts and can accurately answer the allegations of the plaintiff but choose to be deliberately vague and evasive by resting their case on bare or ambiguous denials."²

[16] The plaintiff argues that the prejudice he suffers is that he cannot meaningfully replicate to the allegations.

[17] Where a denial of an allegation is pleaded, the onus remains on the plaintiff to proof this allegation. For the plaintiff to argue that he cannot meaningfully replicate, (after he has already done so), holds no water.

² Plaintiff's heads of argument, page 3, paragraph 8.3.

[18] The defendant made the following submissions in its heads of argument –

‘19. At the outset, however, it is respectfully submitted that the plaintiff’s approach is, with respect, fatally flawed in a number of respects. These include the following:

19.1 Firstly, the plaintiff focusses on only three paragraphs of the defendant’s plea and entirely disregards the remainder of the plea. However, the defendant’s plea for purposes of exception, must be considered as a whole. The plaintiff cannot object to parts thereof only.

19.2 Secondly, the plaintiff proceeds from the premise that if a defendant does not, factually, support any denial in his or her plea, then that defendant is not permitted to deny an allegation. In this regard it is pointed out that a plea may consist of a “bare denial”, as long as there is no ambiguity in such denial.

19.3 Thirdly, the plaintiff, with respect, confuses a non-admission plea and a bare denial. 19.3 Fourthly, the plaintiff – no doubt as a result of his misunderstanding of a non-admission plea – misapplies the vagueness required to success with an exception such as that contended for by the plaintiff.

19.4 Lastly, on those aspect that paragraphs 6, 7 and 11 of the defendant’s plea relate to, the plaintiff bears the onus.

20. These, with respect, misconstructions appear from a proper reading of the plaintiff’s purported exception. However, these notions are not supported in law.’

[19] The parties are in agreement that the first, second and sixth grounds of exception³ relate to rules 46(2) (c), 46(3) and 45(5).

[20] The above Rules dictated that a pleader must state clearly and concisely all materials facts relied upon for its defence so as to set out the nature of the defence in order to enable the opposite party to identify the defence.

[21] Defendant argued that it had done so⁴ -

³ See paragraph [12] before.

⁴ Defendant’s heads of argument, page 13, paragraph 22.

'22. This the defendant has, with respect, done by, inter alia, what is set out in paragraphs 3, 4 and 8 of its plea. Incidentally, none of these paragraphs have been excepted to or are even referred to in the exception. In these paragraphs the defendant, clearly and concisely sets out its defence, which can be summarised as follows:

22.1 The plaintiff's risk profile and the elements thereof form an integral part of the agreement between the parties and any indemnification for which the defendant might be liable.

22.2 For purposes of this risk profile the plaintiff must explicitly inform the defendant of previous incidents, losses and insurance claims. Failure to provide accurate information with respect to such risk profile may have an adverse effect on the validity of a claim for indemnification.

22.3 The plaintiff failed to disclose to the defendant, alternatively misrepresented to the defendant, at the conclusion of the agreement between the parties, of a previous claim of N\$19,913.64 which the plaintiff registered with Outsurance on 17 June 2018 (only a matter of days before the conclusion of the agreement between the parties in *casu*). This failure or misrepresentation affected the plaintiff's risk profile.

22.4 As a result of the aforesaid failure or misrepresentation the defendant was entitled to refuse to indemnify the plaintiff in terms of the agreement between the parties, which the defendant did.'

[22] The third ground of exception i.e. that paragraphs 6, 7 and 11 of defendant's plea amount to bare denials and are therefore vague and embarrassing, is devoid of substance. There is no non-admission. They are expressly denied. Defendant's argument in [21] is sound and accepted.

[23] The Court is mindful of the fact that the plaintiff irregularly brought his exception contrary to the agreement he has entered into with defendant⁵ and in an attempt to reduce his onus by seeking admissions or qualifications which he is obliged to prove during the trial. The fourth and fifth grounds of his exception are indicative of his erroneous approach and is rejected.

⁵ *Vide* paragraph [6] above.

[24] Plaintiff (and his legal practitioner) labour under the misplaced conviction that they are entitled to violate the rules, their agreements with the defendants, the overriding objective of the rules to resolve disputes without unnecessary delay and cost effectively, the convenience of the court and the onus the plaintiff bears.

[25] For the reasons set out above the court shall show its displeasure by granting costs to the defendant against the plaintiff, which costs shall not be capped by the provisions of rule 32(11) and shall include the costs of one instructing and one instructed counsel from and including 10 March 2021 to 5 July 2021.

[26] Being mindful of the current Covid-19 restrictions, the court shall extend the periods for filing further process.

[27] In the premises the following orders are issued;

[27.1] The exception raised by the plaintiff is dismissed.

[27.2] Plaintiff shall pay the costs of the defendant, uncapped by Rule 32(11) of the Rules of Court, which costs shall include the costs of one instructing and one instructed counsel from and including 10 March 2021 until 5 July 2021.

[27.3] Plaintiff shall file his replication to the defendant's amended plea dated 16 February 2021 on or before 6 August 2021.

[27.4] Plaintiff shall file his supplementary witness statement, signed by himself, on or before 6 August 2021.

[27.5] Plaintiff shall file additional discovery, if need be, on or before 6 August 2021.

[27.6] The parties shall file their joint pre-trial report on or before 18 August 2021.

[27.7] A pre-trial conference shall be conducted in the presence of the parties and/or their legal practitioners seized with the matter at 11h00 on 23 August 2021 at SADC.

G H Oosthuizen
Judge

APPEARANCES:

PLAINTIFF/APPLICANT(S):

Mr R Beukes

Henry Shimutwikeneni & Co. Inc

DEFENDANT/RESPONDENT(S):

Mrs. C van der Westhuizen

Instructed by Koep & Partners