

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: Nedbank Namibia Limited and Franciskus Fabianus Kruger Walburga Kelebemang Kruger	Case No: HC-MD-CIV-ACT-CON-2018/04954
	Division of Court: Main Division
	Heard on: 12 August 2021
1 st Defendant 2 nd Defendant	
Heard before: Honourable Mr. Justice Usiku, J	Delivered on: 02 September 2021
Neutral citation: <i>Nedbank Namibia Limited v Kruger & Another</i> (HC-MD-CIV-ACT-CON-2018/04954) [2021] NAHCMD 390 (02 September 2021)	
Order: <ol style="list-style-type: none">1. The defendants' exception is dismissed.2. The defendants' application to strike out is dismissed.3. The defendants are ordered to pay, jointly and severally, the one paying the other to be absolved, the costs of the plaintiff occasioned by the exception and the application to strike out. Such costs include costs of one instructing and one instructed legal practitioner.4. The matter is postponed to 29 September 2021 at 15h15 for a further case planning conference.5. The parties shall file a joint case plan on or before 22 September 2021.	
Reasons for order:	
USIKU, J:	

Introduction

[1] Presently before court for determination are two interlocutory matters. The first one is an exception delivered by the defendants. The second one is an application by the defendants to strike out certain averments contained in the particulars of claim.

[2] The exception and the application to strike out, are opposed by the plaintiff.

Background

[3] The plaintiff instituted action against the defendants. The action is founded on a written instalment sale agreement concluded by the parties. According to the particulars of claim:

- (a) the plaintiff sold and delivered to the defendant(s) a Nissan motor vehicle for N\$403 620.69;
- (b) the purchase price was payable in 54 equal monthly instalments of N\$5737.46, commencing from 25 November 2012. The final instalment was due on 25 March 2017;
- (c) ownership of the vehicle remained vested with the plaintiff until the defendants(s) paid all amounts due in terms of the agreement;
- (d) should the defendant(s) be in default with any instalment on due date, the plaintiff would be entitled to cancel the agreement, claim money that would have been paid by the defendants(s) in terms of the agreement, retain payments already made in terms of the agreement and take possession of the vehicle;
- (e) the defendant(s) breached the agreement by failing to pay instalments due and were in arrears as at 3 November 2018, in the amount of N\$39 665.16. The full outstanding balance as at 3 November 2018 was N\$47 413.11;
- (f) the agreement is not governed by the provisions of the Credit Agreements Act 1980 (Act No. 75 of 1980);
- (g) on 12 November 2018 the plaintiff called upon the defendant(s), in terms of s11 of the Credit Agreements Act, to make payment of the outstanding amount of N\$47 413.11. The defendant(s) failed to do so;
- (h) the plaintiff cancelled the agreement, alternatively hereby cancels the agreement;
- (i) the vehicle is the only security that the plaintiff holds for its claim.

[4] The plaintiff, therefore, claims for an order:

- (a) confirming the cancellation of the agreement;
 - (b) directing the defendant(s) to immediately restore the vehicle to the plaintiff and in the event of the defendant(s) failing to do so, authorizing the deputy sheriff to attach it and hand it over to the plaintiff,
 - (c) declaring the amounts paid by the defendant(s) to be forfeited in favour of the plaintiff, and
- other ancillary relief.

[5] The defendant(s) delivered a notice of exception and application to strike out. In the main, the defendants complain that the particulars of claim are vague and embarrassing, and fail to disclose a cause of action. The plaintiff persists in its particulars of claim and opposes the exception on the basis that its pleading is in order.

Approach to exceptions

[6] Where an exception is taken on the ground that no cause of action is disclosed in the particulars of claim, for the purposes of deciding the exception, all the facts alleged in the particulars of claim are accepted as correct, unless they are manifestly incorrect or improbable. Furthermore, for the exception to succeed, the particulars of claim must be excipiable on every reasonable interpretation of the pleading in question.¹

[7] Where an exception is taken on the grounds that a pleading is vague and embarrassing, the applicable principles include the following, namely:

- (a) the pleading must be read as a whole and no paragraph should be read in isolation;
- (b) the exception must be directed at the whole cause of action and not at a specific paragraph within a cause of action;
- (c) the excipient is required to show vagueness amounting to embarrassment and embarrassment, in turn, resulting in prejudice;
- (d) an exception may not be allowed even if a pleading is vague and embarrassing, unless the excipient shows that he/she will be prejudiced if compelled to plead to the pleading in question.²

¹ *Van Stratten v Namibia Financial Institutions Supervisory Authority* 2016(3) NR 747 para 18; also see *Voget and Others v Kleyhans* 2003(2) SA 148 para 9.

² *Trope v South Africa Reserve Bank* 1992(3) SA 208 at 221 A-E.

Approach to striking out

[8] An applicant for the striking out of any matter from a pleading has to satisfy two requirements, namely that:

- (a) the matter to be struck out is scandalous, vexatious or irrelevant, and
- (b) the applicant must satisfy the court that he/she will be prejudiced in the conduct of his/her claim or defence, if the matter is not struck out.³

The exception

[9] The defendants raised five grounds of exception to the particulars of claim.

First and second grounds of exception

[10] In the first ground of exception, the defendants state that the agreement ended on 25 March 2017 and the plaintiff caused summons to be issued on 3 December 2018. According to the defendants, the plaintiff does not have valid cause of action as there is no longer a contract subsisting between the parties. As the plaintiff has not pleaded that the agreement still exists at the time of claim, the defendants argue that the particulars of claim do not disclose a cause of action.

[11] In the second ground of exception, the defendants state that para 10 of the particulars of claim alleges that the plaintiff cancelled the agreement. The defendants argue that the plaintiff has not pleaded that the agreement was in existence at the time when the plaintiff initiated its action. The defendants, therefore, contend that the particulars of claim do not disclose a cause of action on that basis.

[12] In response, the plaintiff submits that the agreement has not ended by operation of law as alleged by the defendants. According to the plaintiff, the agreement did not end on 25 March 2017. The agreement merely recorded that the last instalment was projected to be due on 25 March 2017.

³ Rule 58(1): Rules of the High Court of Namibia.

[13] I agree with the contention advanced by the plaintiff. There is nowhere, in the particulars of claim, where it is alleged that the agreement ended on 25 March 2017. Therefore, there is no merit in the first and second grounds of exception and these grounds stand to be dismissed.

Third ground of exception

[14] Under the third ground of exception, the defendants state that para 8 of the particulars of claim alleges that the defendant(s) are in arrears with the instalments, in the amount of N\$39 665.16 as at 3 November 2018, and that the full outstanding balance as at 3 November 2018 is N\$47 413.11. The defendants contend that there is no explanation as to the difference between the 'arrears amount' and the 'full outstanding balance' in para 8. The defendants argue that they do not know which amount is the subject of the claim and, therefore, they would not be able to plead to the particulars of claim.

[15] In reply, the plaintiff contends that an exception is generally, not the appropriate procedure to pursue to settle disputes in respect of the interpretation of words and terms used in a pleading which is a subject of the action proceedings.

[16] In my opinion, the reference to 'arrears amount' and to the 'full outstanding balance' in para 8 of the particulars of claim, does not render the particulars of claim vague and embarrassing. I am of the view that there is no merit in the third ground of exception. There is nothing that precludes the defendants from admitting or denying, in their plea, that they are in arrears with the instalment payments or that there is an outstanding balance on the purchase price of the motor vehicle in question, should this be the defendants' case. Therefore, this ground is also without merit and stands to be dismissed.

Fourth ground of exception

[17] In regard to the fourth ground of exception the defendants argue that the plaintiff has failed to allege, in the particulars of claim, that ownership has not passed to the defendant(s) and therefore, the prayer that the vehicle be restored to the plaintiff, renders the particular of claims vague and embarrassing. In addition, the defendants argue that in para 12 of the particulars of claim, the plaintiff pleads that the vehicle is the only security it has. The defendants contend that the vehicle cannot be security in favour of the plaintiff as the agreement has ended. The

defendants submit that they are unable to plead as the particular of claim are vague and embarrassing on that score.

[18] It is difficult to follow the logic of the abovementioned exception. However, the following is clear. The plaintiff has alleged in para 6.3 of the particulars of claim that ownership of the vehicle remains vested with the plaintiff until the defendant(s) has paid all amounts due in terms of the agreement. Paragraph 8 of the particulars of claim alleges that the defendant(s) has breached the agreement by failing to pay monthly instalments on due date and that the defendant(s) is/are in arrears with payment of such instalments. Paragraph 10 of the particulars of claim alleges that as a result of the aforesaid breach, the plaintiff cancelled the agreement.

[19] From the foregoing allegations, I find it difficult to follow the defendant(s)' argument that there is no allegation that ownership has not passed. As for the defendant(s)' denial that the vehicle is security held by the plaintiff, the exception is not the appropriate medium for denying factual allegations. In sum, there is no merit in this ground of exception, and it therefore falls to be dismissed.

Fifth ground of exception

[20] In the fifth ground of exception the defendants argue that plaintiff did not plead the specific months and years in respect of which payments were due but not paid. The defendants contend that absence of such specific information renders the particulars of claim vague and embarrassing.

[21] In my opinion, when regard is had to the particulars of claim as a whole, the plaintiff has pleaded material facts upon which it relies for its claim. There is nothing that precludes the defendants' from denying or admitting, in their plea, that they are in arrears with instalment payments, whatever the defendants' 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 defendants are able to plead thereto. The fifth ground of exception, therefore stands to be dismissed.

Application to strike out

[22] In their application to strike out the defendants state that the plaintiff pleaded in the

particulars of claim that the agreement between the parties is not governed by the provisions of the Credit Agreements Act, yet in para 9 of the particulars of claim, the plaintiff alleges that it dispatched notice to the defendant(s) in terms of s 11 of the Credit Agreements Act calling upon the defendant(s) to make payment of the outstanding balance.

[23] The defendants argue that since the agreement is not governed by the provisions of the aforesaid Act, reference to the Act is vexatious or irrelevant and must be struck out. The defendants therefore apply that every reference to the Credit Agreements Act in the particulars of claim be struck out as vexatious or irrelevant.

[24] It is apparent that para 5 of the particulars of claim alleges that the agreement concluded between the parties is not governed by the provisions of the Credit Agreements Act. That being the case, reference to the Act in para 9 is irrelevant. However, irrelevance of an averment is not the only requirement that the defendants are expected to meet. The defendants are also required to show how they would be prejudiced if reference to the Act is not struck out. The defendants have not shown such prejudice. In any event, I am not satisfied that the defendants will be prejudiced in the conduct of their defence if the relief sought in this application were not granted. In the circumstances, the application to strike out stands to be dismissed.

[25] As regards the issue of costs, I am of the opinion that the general rule that costs follow the event must find application. The plaintiff submitted that costs in this matter not be capped in terms of rule 32(11). I am not persuaded that the circumstances of this matter justify departure from the provisions of rule 32(11). I shall, therefore, not make an order to that effect.

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

1. The defendants' exception is dismissed.
2. The defendants' application to strike out is dismissed.
3. The defendants are ordered to pay, jointly and severally, the one paying the other to be absolved, the costs of the plaintiff occasioned by the exception and the application to strike out. Such costs include costs of one instructing and one instructed legal practitioner.
4. The matter is postponed to 29 September 2021 at 15h15 for a further case planning conference.
5. The parties shall file a joint case plan on or before 22 September 2021.

Judge's signature:	Note to the parties:
B Usiku Judge	Not applicable
Counsel:	
Plaintiff:	Defendant:
Ms M Kuzeeko Of Dr Weder, Kauta & Hoveka Inc. Windhoek	Mr FF Kruger (In person) Windhoek