



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

Practice Directive 61

**IN THE HIGH COURT OF NAMIBIA**

<b>Case Title:</b> JOHANNA KAHATJIPARA v FIRST NATIONAL BANK OF NAMIBIA LIMITED	<b>Case No:</b> HC-MD-CIV-ACT-CON-2019/05422
	<b>Division of Court:</b> HIGH COURT(MAIN DIVISION)
<b>Heard before:</b> HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	<b>Date of hearing:</b> 22 November 2021
	<b>Date of order:</b> 08 December 2021
<b>Neutral citation:</b> <i>Kahatjipara v First National Bank of Namibia</i> (HC-MD-CIV-ACT-CON-2019/05422) [2021] NAHCMD 578 (08 December 2021)	
<b>Results on merits:</b> Merits not considered.	
<b>The order:</b> Having heard <b>WANA CHIMSEMBU</b> , on behalf of the Applicant(s)/Plaintiff(s) and <b>JENNY VERMELEUN</b> , on behalf of the Respondent (s)/ Defendant (s) and having read the papers for <b>HC-MD-CIV-ACT-CON-2019/05422</b> and other documents filed of record:  <b>Ruling:</b> <ol style="list-style-type: none"><li>1. Para 20 of proposed particulars of claim is struck out.</li><li>2. The plaintiff is granted leave to amend her particulars of claim.</li></ol>	

3. No order as to costs.

**Further conduct of the matter:**

4. Plaintiff must file amended particulars of claim on or before 17 December 2021.
5. Defendant must plead to the amended particulars of claim on or before 19 January 2022.
6. Plaintiff must file replication, if any, to the Defendant's plea on or before 26 January 2022.
7. The matter is postponed to **3 February 2022 at 15h00** for a Case Management Conference.
8. Joint case management conference report must be filed on or before 31 January 2022.

**Reasons for orders:**

Introduction

[1] This is an application by the plaintiff for leave to amend its particulars of claim in terms of the provisions of rule 52, which is opposed by the defendant.

The parties

[2] The plaintiff is Johanna Kahatjipara, an adult female residing in Windhoek and the defendant is First National Bank Limited, a public company with limited liability, incorporated in terms of the laws of Namibia.

Brief background

[3] The chronological context of the application is as follows:

3.1 The plaintiff instituted action on 13 December 2019.

3.2 The first notice to amend was filed on 11 June 2020 and the objection thereto was filed on 24 June 2020.

3.3 On 14 September 2020 the plaintiff filed a notice of withdrawal of the intended amendment.

3.4 The plaintiff filed a second notice to amend on 18 September 2020 and the objection thereto was filed on 29 September 2020.

3.5 On 5 November 2020 the plaintiff filed a notice of withdrawal of the intended amendment.

3.6 A third notice to amend was filed on 6 November 2020. This intended amendment was not opposed and the plaintiff filed her amended particulars of claim on 27 November 2020.

3.7 The defendant filed its plea to the amended particulars of claim on 22 February 2021.

3.8 In terms of the court order dated 24 February 2021 the matter was postponed for a case management conference on 15 April 2021. The parties were directed to file their discovery affidavits and exchange their respective bundles on or before 8 April 2021.

3.9 The defendant complied with the court order dated 24 February 2021 and filed its discovery affidavit on 8 April 2021.

3.10 The plaintiff failed to file her discovery affidavit and instead gave notice of a fourth amendment to her particulars of claim on 3 May 2021.

3.11 The defendant objected to the proposed amendment on 11 May 2021.

3.12 The plaintiff then proceeded to file an application for leave to amend in terms of rule 52 on 20 May 2021 but withdrew the application on 18 June 2021.

3.13 The plaintiff launched the current application on 13 August 2021 wherein the applicant seeks to amend her particulars of claim in terms of a notice of amendment dated 3 May 2021.

#### The application for amendment

[4] The current application is the fourth attempt by the plaintiff at amending her particulars of claim. The explanation advanced by the plaintiff in her founding affidavit is that she was dissatisfied with the particulars of claim that her erstwhile legal practitioners filed as it did not include her claims related to the unauthorised actions by the employees of the defendant in respect of the opening and duplicating of a cheque and credit card account and increasing credit limits<sup>1</sup>.

[5] According to the plaintiff she instructed her erstwhile legal practitioners to include an alternative delictual claim and a claim for her pain to be added and this was not done<sup>2</sup>.

[6] The plaintiff further complains that although she furnished her erstwhile legal practitioners with various supporting documents to substantiate the additional claim, the erstwhile legal practitioners however failed to add the said claims<sup>3</sup>.

[7] During the lifetime of this matter the attempts by the plaintiff to amend her particulars of claim can be summarised as follows:

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<sup>1</sup> Founding affidavit para 7.

<sup>2</sup> Founding affidavit para 8.

<sup>3</sup> Founding affidavit para 9.

- a) the first attempt to amend her particulars of claim on 11 June 2020, the plaintiff sought to introduce claims for unauthorised actions by the defendant's employees including the duplicating of the cheque and credit card accounts and the increasing of plaintiff's credit limits as well as the delictual claim for pain and suffering and the fraudulent opening of credit card facilities. In addition thereto the plaintiff introduced elements of embezzlement and fraud on the part of the defendant.
- b) In the second attempt to an amendment on 18 September 2020 the plaintiff relied on a delictual claim for damages brought about by her having to sell her vehicle below market value and a delictual claim for general damages and medical expenses. The objection in this regard was also premised on issues of prescription and excipiability.
- c) The third attempt to amend, the plaintiff sought to introduce a component of special damages in the pre-existing (and originally pleaded) contractual claim. There was no opposition to the proposed amendment and the plaintiff amended her particulars of claim accordingly.
- d) In respect of the current application, which is in essence a fourth attempt to amend, the plaintiff seeks to reintroduce the delictual claim based on fraud and theft. In this instance the plaintiff plead that the fraud and theft was perpetrated by unknown employee(s) of the defendant by acting within course and scope of his/her duties. In addition thereto the plaintiff wishes to introduce in the alternative a claim of enrichment.

[8] It is noticeable that it is only in respect of the current application that the plaintiff seeks to introduce an alternative claim for enrichment. The original particulars of claim was founded in contract and subsequently with the amendment during February 2021 also on delict which was introduced by the said amendment.

#### The defendant's objection to the amendment

[9] The defendant filed comprehensive notes on law in terms of rule 66(1) (c), in support of its objection to the proposed amendment. These objections can essentially be said to come down to two grounds of objection, i.e.:

- a) In the proposed amendment at paragraph 7 of the notice to amend the plaintiff refers to a "written agreement" and pleads the terms, however a copy of this written agreement is not attached, and
- b) That it is unclear, due to a lack of specific allegations, as to what *condictio* the plaintiff relies on for her cause of action in claim 1A notwithstanding a failure to allege who was purportedly enriched.

[10] The defendant maintains that the proposed amendments will render the particulars of claim vague and

embarrassing and fail to properly and sufficiently set out and allege the plaintiff's cause of action in claim 1A and as a result will cause the proposed claim to be excipiable.

#### Submissions

##### *On behalf of the plaintiff*

[11] Counsel for the plaintiff argued that the plaintiff was represented by a number of other legal practitioners, who did not follow the plaintiff's instructions in respect of the intended amendments. Counsel contend that the plaintiff has provided the court with a comprehensive explanation for the delay.

[12] Counsel argued that if claim 1A is left out of the plaintiff's particulars of claim she would be unable to prosecute the said claim because of the issue of prescription.

[13] Counsel points out that the compliant raised by the defendants regarding the written agreement which was not previously filed (in the May 2021 application) has be rectified and the agreement was accordingly filed, thereby removing the complaint of the defendant.

[14] Counsel conceded that the alternative claim of enrichment is bad in law and sought paragraph 20 of the proposed amendment to be struck.

##### *On the behalf of the defendant*

[15] Counsel for the defendant argued that in the event that the court allows the proposed amendment it would render the plaintiff's particulars of claim excipiable for the following reasons:

- a) In paragraph 19 of the proposed amendment the plaintiff relies on a breach of the credit card agreement and alleged that she suffered damages and in the very next paragraph alleges that the 'defendant or its employees or both were enriched at the expense of the plaintiff in the amounts of N\$ 18 613.50 and the aforementioned enrichment was without just cause.
- b) The plaintiff's allegation that the defendant's employees were enriched, there is no sustainable cause of action alleged against the defendant.
- c) To successfully rely on enrichment is that the unjust enrichment must have been without cause. (Bearing in mind the cause of action is a breach of an alleged agreement and/or a delict.
- d) Therefore to successfully rely on an enrichment claim, which in turn would not be excipiable, no contract in respect of the

credit card should be in existence or enforceable, i.e. a claim based on contract and unjustified enrichment in respect of the same claim cannot exist.

[16] Counsel argued that an amendment should not be allowed where its introduction in the pleading would render such pleadings excipiable.

[17] Counsel further maintained that the plaintiff's overall claim is incompetent and bad in law to rely on an 'enrichment claim in the alternative to a contractual or delictual claim.

The rule applicable and discussion:

[18] The primary objection of allowing amendments is to facilitate 'a proper ventilation of disputes between parties, to determine the real issues between them, so that justice may be done'.<sup>4</sup> 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.<sup>5</sup>

[19] 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.<sup>6</sup>

[20] It is the defendant's case that that the proposed amendments would render the particulars of claim excipiable.

[21] The counsel for the plaintiff conceded that the alternative claim for enrichment in the context of the contractual and delictual claim is bad in law and quite correctly abandoned the alternative claim.

[22] Counsel for the defendant argued that abandoning the alternative claim of enrichment does not mean the end of the difficulties of the plaintiff in respect of the proposed amendments.

[23] The next issue is the plaintiff's reliance on vicarious liability between an unknown employee and the defendant and if the acts performed by the employee was indeed authorized.

[24] However, the fact that the identity of the employee is not known does not render the proposed particulars of claim

<sup>4</sup> *Cross v Ferreira* 1950 (3) SA 443 at 447.

<sup>5</sup> *Trans-Drankensberg Bank Ltd v Combined Engineering* 1967 (3) SA 632 at 641.

<sup>6</sup> *Trans-Drankensberg Bank Ltd v Combined Engineering* 1967 (3) SA 632 at 641.

excipiable.

[25] In *Kambuze v Shilimela Advanced Security Services CC*<sup>7</sup> Sibeya J held as follows:

[36] I hold without fear of contradiction that failure to name the employee does not render the particulars of claim excipiable. I am further of the respective view that the attempt by Mr. Brendell to limit the non-requirement to name the employee to public institutions only lacks reason, logic and is ultimately misplaced. I find that parties may institute claims against the employers based on vicarious liability without necessarily stating the names of the employees, provided that it is apparent from the pleadings that such persons are not employees of the defendants. Instances may occur where the name of the employee is unknown to the claimant but where the identity of the employer is clear as noon and day. It will defeat the ancient established principle of vicarious liability if employers are allowed to escape liability just because the names of a particular employee are not stated and will in my view amount to a travesty of justice.

[37] I am not satisfied upon a closer scrutiny that on every interpretation of the particulars of claim, no cause of action can be sustained. The failure to mention the names of the security guards in the employ of the defendant does not render the particulars of claim excipiable. This ground of exception on which an attack to the particulars of claim is premised falls to be dismissed.'

[26] The issue of the unknown employee thus falls away. The issue regarding the issue of authority of the said employee however raises an issue. The question is: were the acts in the case under consideration in fact authorized; were they in fact performed in the course and scope of the employee's employment? This was the question asked in *Ess Kay Electronics Pte Ltd and Another v First National Bank of Southern Africa Ltd*<sup>8</sup> when the court considered the liability of the defendant in respect of an employee's actions. The defendant's counsel pertinently drew my attention to this question raised by the court and it was argued that the plaintiff did not plead that the defendant's employee had authority. I however do not understand the court to say that it is a necessity that the plaintiff had to plead authority in addition to pleading that the employee acted within course and scope of his or her duties.

[27] In *Ambler's Precedent of Pleadings*<sup>9</sup> the learned author stated in the context of State liability that:

'Although there is a distinction between a servant acting within the scope of her or his authority and a servant acting within the scope of her or his employment, both phrases have come to be treated as being synonymous for the purposes of determining the liability of the State. (my underlining)

[28] I cannot see how the proposition in *Ambler's* that acting within scope of an employee's authority and within course and scope

<sup>7</sup> (HC-MD-CIV-ACT-DEL-2020/03938) [2021] NAHCMD 90 (02 March 2021).

<sup>8</sup> (581/98) [2000] ZASCA 67; 2001 (1) SA 1214 (SCA); [2001] 1 All SA 315 (A) (28 November 2000).

<sup>9</sup> 7<sup>th</sup> Ed at 359.

of his or her duty would not apply to the defendant's employee as well.

[29] Having carefully considered the opposition to the proposed amendments and in light of the concession made by the plaintiff's legal practitioner in respect of the enrichment claim, I am not convinced that the proposed amendments would render the particulars of claim excipiable and as a result I am of the view that the proposed amendment raises a triable issue and the amendment should be granted.

#### Cost

[30] The plaintiff is an elderly person and is represented on the instructions of the Directorate of Legal Aid. Counsel for the defendant strongly argued for a cost order as a result of the plaintiff's continuous attempt to amend her particulars of claim and disregarding the advice of competent and experienced legal practitioners. The plaintiff provided the court with a comprehensive explanation for the delay, and I am of the view that the plaintiff's explanation is satisfactory under the circumstances. What I should add though is that if one has regard to the chronology of this matter the delays on the part of the plaintiff borders on an abuse of the court process.

[31] What should be understood is any further attempts to amend her particulars of claim will become more and more difficult and her attention is pertinently drawn to the discussion of the court in *Windhoek Municipal Council v Pioneerspark Dam Investment CC*<sup>10</sup> wherein the court held the view that in addition to the guiding principles enumerated by the court in *IA Bell*<sup>11</sup> the applicant in an amendment application must establish that it did not unduly file its notice to amend.

[32] Given the fact that the plaintiff is represented on the instructions of the Director of Legal Aid I will not make a cost order against the plaintiff.

[33] My order is as set out above.

**Judge's signature**

**Note to the parties:**

<sup>10</sup> (SA 70-2019) [2021] NASC (23 June 2021) at para 40.

<sup>11</sup> *IA Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC* I 601-2013 & I 4084-2010) [2014] NAHCMD 306 (17 October 2014).



	Not applicable.
<b>Counsel:</b>	
<b>Plaintiffs</b>	<b>Defendants</b>
V Hifindaka Of Henry Shimutukweni Inc.	JP Jones Instructed by Ellis Shilungudwa Inc.