

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between:

Case no: HC-MD-CIV-ACT-CON-2022/00854

KATRINA SHIMBULU

PLAINTIFF/APPLICANT

and

STANDARD BANK NAMIBIA LIMITED

1ST DEFENDANT/RESPONDENT

WILLEM JOHANNES GROENEWALD

2ND DEFENDANT/RESPONDENT

WILLEM JOHANNES GROENEWALD

3RD DEFENDANT/RESPONDENT

ELIZABETH GROENEWALD

4TH DEFENDANT/RESPONDENT

MAROELA FARMING

5TH DEFENDANT/RESPONDENT

THE REGISTRAR OF DEEDS

6TH DEFENDANT/RESPONDENT

DEPUTY SHERIFF OF OUTJO

7TH DEFENDANT/RESPONDENT

Neutral citation: *Shimbulu v Standard Bank Namibia Limited* (HC-MD-CIV-ACT-CON-2022/00854) [2022] NAHCMD 561 (18 October 2022)

Coram: PARKER AJ

Heard: 28 September 2022

Delivered: 18 October 2022

Flynote: Practice – Pleadings – Particulars of claim – Amendment of – When to be granted – Amendment raising no cause of action and therefore excipiable – Based on excipiability of the amendment and attendant irreparable prejudice to the defendant, court refused to allow the proposed amendment.

Summary: Practice – Pleadings – Particulars of claim – Amendment of – When to be granted – The plaintiff had entered into an agreement of sale of land with the first defendant, a Bank – Court found that the agreement the plaintiff sues on contained resolute conditions and the plaintiff's self-admitted breach of the resolute conditions rendered the contract liable to cancellation – It was clear the conditions set for the plaintiff (purchaser) to take possession of the farm (the subject matter of the agreement) were not satisfied – Accordingly court concluded that no possible evidence led on the pleadings can disclose a cause of action alleged in the pleadings – That rendered the proposed amendment excipiable – Consequently, application to amend the pleading refused with costs.

Held, a pleading is excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action.

Held, further, 'cause of action' means the fact or combination of facts which give rise to a right of action.

Held, further, a consideration of whether the amendment, if allowed, would occasion prejudice to the other party is a relevant consideration in determining an application to amend pleadings.

ORDER

1. The application to amend is dismissed with costs provided in rule 32 (11) of the rules of court.

2. The application to amend is finalized and removed from the roll.

JUDGMENT

PARKER AJ:

[1] It is important at the outset to recall the judicial mill that the instant matter has gone through to get a sense of the instant proceeding. On 3 March 2020 the plaintiff instituted an action wherein, among other relief, she prays the court to declare the agreement entered into between her and the first and seventh defendant on 19 June 2019 valid and enforceable.

[2] On 19 April 2020 the first and seventh defendants delivered an exception to the plaintiff's particulars of claim. The grounds of the exception were that the particulars of claim do not (a) disclose a cause of action and also do not make the necessary allegations to sustain a cause of action or (b) do not make the necessary allegations to sustain a cause of action.

[3] The exception was heard on 5 July 2022. The court delivered an *ex-tempore* judgment wherein it dismissed the defendant's exception. Nevertheless, the court ruled that the plaintiff's particulars of claim were excipiable on the ground that the agreement upon which the plaintiff sues is a resolutive agreement, containing resolutive conditions. And the plaintiff's self-admitted breach of the resolutive conditions rendered the contract liable to cancellation as it was clear that the conditions set for the purchaser to take possession of the farm (the subject matter of the agreement) were not satisfied.

[4] The court held that the plaintiff should have alleged and pleaded her compliance with the resolutive conditions provided in clause 6(a) (of the conditions of sale) to establish a valid cause of action, and the plaintiff had failed to make these

material and necessary allegations. For the court, these material and necessary allegations ought to have been made to sustain the declaratory relief sought.

[5] In the instant proceeding, the proposed amendment cannot cure the excipiability complained of by the defendants. The proposed amendment cannot grant to the plaintiff a right which she asks the court to protect by a *declarator*. The plaintiff has not alleged and pleaded that she has complied with the said resolute conditions. Therefore no evidence led in due course would disclose a cause of action alleged in the pleading, thus rendering the proposed amendment excipiable.¹

[6] For these reasons, I accept the submission of Ms Kuzeeko, counsel for the first and seventh defendants, that if the plaintiff's proposed amendment was allowed it would not disclose a cause of action. In *Read v Brown*,² Lord Esher defined 'cause of action' to be every fact which would be necessary for the plaintiff to prove, if traversed, to support his or her right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but each fact which is necessary to be proved. Put simply, a cause of action is 'the fact or combination of facts which give rise to a right of action'.³

[7] In the instant matter, on the facts which I have found to exist, I hold that if the amendment was allowed, the allegations contained therein would not generate a 'fact or combination of facts which give rise to a right of action'. Consequently, in virtue of the authorities, I accept Ms Kuzeeko's submission that the proposed amendment does not disclose a cause of action, and therefore, excipiable. It is trite that a pleading is excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action.⁴

[8] But the matter does not end there. A consideration of whether the amendment, if allowed, would occasion prejudice to the other party is a relevant consideration in determining an application to amend pleadings. Ms Chinsembu

¹ See *July v Motor Vehicle Accident Fund* 2010 (1) NR 368 (HC) para 8 where the authorities are gathered.

² *Read v Brown* 22 QBD 128 at 131.

³ Roger Bird *Concise Law Dictionary* 7th ed (1983).

⁴ *McKelvey v Cowan* NO 1980 (3) SA 525 (Z) at 526C-F; applied in *July v Motor Vehicle Accident Fund* 2010 (1) NR 368 (HC) para 8.

contends that the proposed amendment, if allowed, would not occasion any prejudice to the defendants. Counsel added that the proposed amendment would 'not cause a substantial disruption as the matter is still in its infant stage' as the defendants 'are yet to file their plea in these pleadings'. Ms Kuzeeko contends contrariwise. She submitted that if the amendment was allowed, it would prejudice the defendants because the amendment does not disclose a cause of action. I agree. Ms Chinsembu misses the point. The proposed amendment does not raise a cause of action, that is, the amendment simply does not generate a fact or combination of facts which give rise to a right of action which the court can adjudicate upon. Put in another way, the amendment simply does not generate a fact or combination of facts which it would be necessary for the plaintiff to prove, if traversed, to support her right to judgment of the court.⁵

[9] 'Prejudice' here should be understood to mean that the amendment would cause an injustice to the defendant which cannot be compensated by an order of costs or a postponement.⁶ On the facts and in the circumstances, I find that the defendant would be irreparably prejudiced by the amendment sought, if granted.

[10] It has been said that a court is generally inclined to allow an amendment intended to give a proper airing of the disputes between the parties to determine the real issues between them so that justice may be done, as Ms Chinsembu appeared to submit.⁷ But it has also been held that an amendment ought not to be allowed where its introduction into the pleading would render such pleading excipiable on the basis that the pleading as amended would not disclose a cause of action, as is in the instant matter, or a defence.⁸

[11] Based on these reasons, I conclude that the plaintiff has not made out a case for the relief sought. Consequently, the application fails; whereupon I order as follows:

⁵ *Read and Brown* 22 QBD 128 at 131.

⁶ See *Moolman v Estate Moolman and Another* 1927 CPD 27 at 29.

⁷ *Dowles Manor Properties Ltd v Bank of Namibia* 2005 NR 59 at 64H-I.

⁸ *Euroshipping Corp of Monrovia v Minister of Agriculture and Others* 1979 (2) SA 1072 (C).

1. The application to amend is dismissed with costs provided in rule 32 (11) of the rules of court.
2. The application to amend is finalized and removed from the roll.

C PARKER
Acting Judge

APPEARANCES

PLAINTIFF/APPLICANT:

W Cinsembu

Henry Shimutwikeneni & Co Inc, Windhoek

DEFENDANTS/RESPONDENTS:

M Kuzeeko

Dr Weder, Kauta & Hoveka Inc., Windhoek