

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: Bank Windhoek Limited v Michael Ndapandula Colly Iyambo Oshikoto Fresh Fruit and Vegetables (Pty) Ltd	Plaintiff 1 st Defendant 2 nd Defendant	Case No: HC-MD-CIV-ACT-CON-2021/03685 Division of Court: High Court (Main Division) Heard on: 28 February 2023
Heard before: Honourable Lady Justice Rakow, J	Delivered on: 14 March 2023	
Neutral citation: <i>Bank Windhoek Limited v Iyambo</i> (HC-MD-CIV-ACT-CON- 2021/03685) [2023] NAHCMD 112 (14 March 2023)		
Order: <ol style="list-style-type: none">1. The amendment as prayed for, is hereby granted with costs, the costs of one instructed and one instructing counsel but capped in terms of rule 32(11).2. The matter is postponed to 28 March 2023 for further case planning. The parties are to file a draft case plan on or before 23 March 2023.		
Reasons for order:		
RAKOW, J: <u>Introduction</u> [1] The Plaintiff is Bank Windhoek Limited, a commercial bank, and company duly registered and incorporated in accordance with the applicable laws in Namibia. The first defendant is Michael Ndapandula Colly Iyambo, a self-employed adult and the second defendant is Oshikoto Fresh Fruit and Vegetables (Pty) Ltd, a private company with limited liabilities duly registered and		

incorporated in accordance with the provisions of the laws of Namibia.

[2] It is the case of the plaintiff that the plaintiff represented by Ms L E Boois and the first defendant entered into a written agreement in terms of which the plaintiff undertook to lend and advance monies in the amount of N\$1 065 000 to the first defendant in terms of an Overdraft Facility. They entered into this agreement on 25 March 2021 and the facility was to expire on 1 April 2021. In terms of Clause 8.10 of the agreement, a certificate signed by any manager, assistant manager, or branch administrator of the plaintiff as to the indebtedness of the first defendant shall be prima facie evidence of the fact mentioned in such a certificate. It is further alleged that despite demand, the first defendant defaulted on the repayment of the full overdraft facility on the date as agreed upon.

[3] On 6 August 2018, the second defendant bound itself in writing as a surety and co-principal debtor for the due fulfillment of the obligations of the first defendant in respect of monies owed by the first defendant to the plaintiff for an unlimited amount. It was again a term of the agreement that any certificate signed by any director, manager, assistant manager, or branch administrator of the plaintiff as to the amount of indebtedness of the second defendant to the plaintiff, which amount is so guaranteed under the suretyship, shall be prima facie evidence of the amount of the indebtedness.

[4] The plaintiff claims that the first and second defendants are indebted to the Plaintiff in the amount of N\$1 105 281,24 together with interest, calculated daily at 9 per cent per annum up to and including 15 September 2021.

The application

[5] The application to amend contains several amendments to the particulars of the claim.

'1. By deleting the current paragraph 6 and substituting it with the following:

6. On or about 25 March 2021 and at Windhoek, the plaintiff, duly represented by its Manager: Credit, Lydia E Boois, duly authorized thereto and the first defendant, acting in person entered into a partly written and partly oral agreement in terms of which the plaintiff extends the defendants overdraft facility ("the facility") in respect of his cheque account number CHK-8003033085 (a temporary overdraft facility was already in place since 18 October 2021) with the amount of N\$1 065 500,00 (One Million Sixty-Five Thousand Namibian Dollar.) A copy of the written part of the agreement is attached hereto as annexure "A", being the overdraft facility letter.

2. By inserting the following after paragraph 10 of the particulars of the claim:
- 11 in terms of clause 6.2 of annexure "A" it is a condition that all collaterals serve as continuing covering security for all direct and indirect liabilities of the first defendant and must be in possession of the plaintiff and in legal order before the facility may be utilized. Collaterals were already in place at the time that the extension of the overdraft was granted by the plaintiff to the first defendant.
12. In terms of clause 7.3 of annexure "A" it was agreed that
- 12.1 this offer is valid for 30 calendar days from the date of issuing and must be accepted, failing which the facility shall lapse. The facility will be deemed to be accepted as follows:
- (a) In writing by signing the acceptance clause below and returning same to the bank before expiry; or
 - (b) Should the facility letter be sent by e-mail, post or registered mail, and the facility is utilized before expiry; or
 - (c) The facility is utilized before expiry.
3. By renumbering paragraph 11 to paragraph 13.
4. By renumbering paragraph 12 to paragraph 14.
5. By inserting the following paragraph before paragraph 13:
15. Plaintiff complied with its obligations in terms of the partly written partly oral agreement between the parties in that on the 25th of March 2021 it extended the first defendant's overdraft facility with the amount of N\$1 065 500.00 as is evident from annexure "A2" attached hereto.
16. The first defendant used the facility on 1 April 2021 and thereafter as a result whereof the facility was accepted.
6. By deleting the current paragraph 13 and substituting it with the following:
17. First defendant is in breach of the agreement between the parties in that despite demand and despite the fact that the facility agreement has lapsed, the first defendant defaulted with the re-payment of the full overdraft facility on the due date as agreed and the account is, therefore, due, owing and payable and, which breach, the defendant despite further demand failed and/or neglected to rectify.
7. By deleting the words CLAIM SECURED BY MORTGAGE BONDS REGISTERED IN FAVOUR OF THE PLAINTIFF; and substituting same with the following:
OVERDRAFT FACILITY IS SECURED BY THE MORTGAGE BONDS REFERRED TO HEREUNDER REGISTERED IN FAVOUR OF THE PLAINTIFF
8. By renumbering paragraph 14 to paragraph 18 and thereafter renumbering all consecutive numerical order.'

[6] Annexure "A2" referred to in the amendment is a full bank statement of the bank account held by the first defendant as of 10 November 2011.

The first and second defendant's notice in terms of rule 66(1)(c)

[7] The notice in terms of rule 66(1)(c) reads as follows:

'Take notice that the first and second defendants oppose the grant of the orders sought by the plaintiff in their application for amendment of its counterclaim and that, at this stage, the first and second defendants intend to do so by raising certain questions of law, and that, to this end, the first and third defendants hereby deliver notice of their intention to do so as envisaged in rule 66(1)(c) read with court order dated 22 June 2022, setting out such questions as follows:

1. Whether in the circumstances of this matter:

1.1 Whether the Plaintiff's intended amendment, basing its entire cause of action on an extension of an existing overdraft facility allegedly being in existence since 11 October 2005, is properly pleaded with necessary particularity as is required in terms of Rule 45(5) and (7), as to the exact terms of the alleged existing (main) agreement.

1.2 Whether the intended amendment which records clause 6.2 with reference to existing collaterals serving as continuing covering security for all direct and indirect liabilities of the first defendant to be in the possession of the plaintiff and in legal order" (own emphasis), further necessitates the pleading of the requisite terms of the main agreement, with full compliance with Rule 45(5) and (7).

TAKE NOTICE FURTHER that the first and second defendants rely on the following grounds:

2. Plaintiff instituted action on 27 September 2021, based on a written agreement concluded between it and First Defendant on 25 March 2021.
3. This was pleaded as "the Facility" with no mention made of it being an extension of an existing facility.
4. The surety relied on as furnished by the second defendant was ostensibly linked to "the Facility" with no mention made of an existing facility concluded allegedly during 2005.
5. Second defendant is linked to the action merely as surety for the obligations of the first Defendant.
6. An extension of an agreement implies that the terms of the main agreement are incorporated into the further agreement, which is further supported by the allegations made by the Plaintiff relating to the existing collateral and security continuing to serve in that capacity.
7. The defendants should be afforded the opportunity to scrutinize and potentially attack the validity of the main agreement and the security allegedly so furnished, which it is effectively obstructed from doing'.

The arguments

[8] The plaintiff argued that this is one of five cases that principally have the same facts. Bank Windhoek is the plaintiff in all five matters, but the defendants differ from case to case. The amendment was necessitated by an affidavit of a certain Thomas Christian Karijapua Ihujua's affidavit which was filed in opposition to summary judgement in one of these matters. The counsel for the plaintiff referred the court to the matter of *IA Bell Equipment Company Namibia (Pty) Ltd v Roadstone Quarries CC*¹ where it was held that an amendment will always be allowed unless the applicant to the amendment is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs. Adv Garbes-Kirsten submitted that the plaintiff is bona fide in seeking the amendment and it will not cause the defendants any injustice.

[9] It was further argued that the intended amendment reflects that the cause of action is not based on an extension of an existing overdraft facility but on a new agreement entered into between the parties on 25 March 2021 for the extension of an overdraft facility of which the temporary overdraft facility was already in place since 18 October 2012. The new agreement was for a temporary overdraft facility in the amount of N\$1 065 500 and the agreement was to expire on 1 April 2021. It was further submitted that the intended amendment of the plaintiff is in full compliance with rule 45(5). It is divided into paragraphs, including sub-paragraphs, it contains a clear and concise statement of the material facts on which the plaintiff relies and that the amendment makes it clear that the plaintiff relies on a new agreement. It is further also the case that collaterals were already in place at the time that the extension of the overdraft was granted by the plaintiff to the first defendant. The plaintiff further fully complied with rule 45(7) in that it avers that the agreement was partly in writing and partly oral as well as the fact that it was entered into at Windhoek on 25 March 2021. It further identifies the parties to the agreement as well as the representatives of the parties.

[10] For the first and second defendants it was submitted that from the onset it is necessary to address the issue of whether an opposition to the amendment should not rather be introduced as a formal exception after the amendment is allowed but that the applicant seemingly concedes to it being brought at this juncture. It would, however, be against the overriding objectives of the case management system to bring further interlocutories. It is argued on their behalf further that

¹ *IA Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC* (I 601-2013 & I 4084-2010) [2014] NAHCMD 306 (17 October 2014).

the defendants will not be in a position to plea, should the amendment be allowed as the amendment does not contain enough information to allow them to plea upon and will therefore still be excipiable.

Legal considerations

[11] Rule 52 of the High Court rules deals with the amendment of pleadings. It reads as follows:

(1) A party desiring to amend a pleading or document, other than an affidavit, filed in connection with a proceeding must give notice to all other parties to the proceeding and the managing judge of his or her intention so to amend.

(2) A notice referred to in subrule (1) must state that unless objection in writing to the proposed amendment is made within 10 days the party giving the notice will amend the pleading or document in question accordingly.

(3) If no objection in writing is made the party receiving the notice is considered as having agreed to the amendment.

(4) If objection is made within the period referred to in subrule (2), which objection must clearly and concisely state the grounds on which it is founded, the party desiring to pursue the amendment must within 10 days after receipt of the objection apply to the managing judge for leave to amend.

(5) The managing judge must set the matter down for hearing and thereafter the managing judge may make such order thereon as he or she considers suitable or proper and that order must be made within 15 days from the date of the hearing.

(6) Whenever the court has ordered an amendment or no objection has been made within the time specified in subrule (2), the party amending must deliver the amendment within the time specified in the court's order or within five days after the expiry of the time specified in subrule (2).

(7) When an amendment to a pleading has been delivered in terms of this rule, the other party is, within 15 days of receipt of the amended pleading, entitled to plead to the amendment or to amend consequentially any pleading already filed by him or her.

(8) A party giving notice of amendment is, unless the court otherwise orders, liable to pay the costs thereby occasioned to any other party.

(9) The court may during the hearing at any stage before judgment, grant leave to amend a pleading or document on such terms as to costs or otherwise as the court considers suitable or proper.

(10) If the amendment of a pleading affects any deadline set in a case plan order, the managing judge or the court must give appropriate directions as to new dates for the taking of such steps as remain unfinished in terms of the case plan order.'

[12] The principles regulating the granting of a proposed amendment of a pleading are very

clear and were summarized in a Supreme Court judgment of *DB Thermal (Pty) Ltd and Another v Council of the Municipality of City of Windhoek*² as follows:

'[38]. . . The established principle that relates to amendments of pleadings is that they should be "allowed to obtain a proper ventilation of the dispute between the parties ... so that justice may be done", subject of course to the principle that the opposing party should not be prejudiced by the amendment if that prejudice cannot be cured by an appropriate costs order, and where necessary, a postponement'

[13] A further elaboration on these principles can be found in the matter of *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC*³ wherein it was held that:

'[55] Regardless of the stage of the proceedings where it is brought, the following general principles must guide the amendment of pleadings: Although the court has a discretion to allow or refuse an amendment, the discretion must be exercised judiciallyThe overriding consideration is that the parties, in an adversarial system of justice, decide what their case is; and that includes changing a pleading previously filed to correct what it feels is a mistake made in its pleadings A litigant seeking the amendment is craving an indulgence and therefore must offer some explanation for why the amendment is sought A court cannot compel a party to stick to a version either of fact or law that it says no longer represents its stance. That is so because a litigant must be allowed in our adversarial system to ventilate what they believe to be the real issue(s) between them and the other side.'

[14] Regarding the general principles applicable to amendments, the following is clear from our case law:

- Amendments should create triable issues.⁴
- Amendments that introduce excipiable matter, i.e. defences that, in law, are unsustainable, should be refused.⁵

[15] In the matter of *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty)*⁶ a triable issue was explained to be:

"(a) 'n geskilpunt wat, indien dit aan die hand van die getuienis wat die applikant in sy aansoek in

² *DB Thermal (Pty) Ltd and Another v Council of the Municipality of City of Windhoek* (SA 33-2010) [2013] NASC 11 (19 August 2013).

³ *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC* (I 601-2013 & I 4084-2010) [2014] NAHCMD 306 (17 October 2014).

⁴ *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 641. See also *Hartzenberg v Standard Bank Namibia Ltd* (supra) at para 54 and, generally and relating to amendment applications in this regard, *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 (2) SA 447 (SCA) at 462 – 464.

⁵ *Cross v Ferreira* 1950 (3) SA 443 (C) at 449; *Fischer Seelenbinder Associates v Steelforce* 2010 (2) NR 684 (HC) at 694 par [22].

⁶ *Supra*.

die vooruitsig stel, bewys word, lewensvatbaar of relevant sou wees; of

(b) 'n geskilpunt wat op die waarskynlikhede deur die getuienis wat aldus in die vooruitsig gestel word, bewys sou word.”

[16] Requiring the party who wishes to amend a pleading, to show that there is:

(a) a dispute which, if it is proved based on the evidence foreshadowed by the applicant in his application, will be viable or relevant, or

(b) a dispute which will probably be established by the evidence thus foreshadowed.

[17] In *Paulus v Ndaumbwa*⁷ Justice Usiku said the following regarding the amendment of pleadings:

‘ 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 explanations 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.⁸

[21] 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’⁹. 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.¹⁰

[22] In the present case, the defendant contends that the proposed amendments will result in the summons still being excipiable.

[23] The general rule applicable to pleadings, requires pleadings to be drafted in a lucid and intelligible manner. The cause of action (or defence) must appear clearly from the factual allegations made in the pleadings. An excipient bears an onus of persuading the court that upon every interpretation which a pleading can reasonably bear, no cause of action is disclosed.¹¹

[18] Regarding the raising of the possible exception at this time, the court considered the ethos

⁷ *Paulus v Ndaumbwa* (HC-MD-CIV-ACT-OTH-2020/02023) [2021] NAHCMD 194 (29 April 2021).

⁸ *Trans-Drakensberg Bank Ltd v Combined Engineering* 1967 (3) SA 632 at 641.

⁹ *Cross v Ferreira* 1950 (3) SA 443 at 447.

¹⁰ *Trans-Drakensberg Bank Ltd* supra.

¹¹ *Van Straten and Another v Namibia Financial Institutions Supervisory authority* 2016 NR 747 (SC).

An exception raised on the ground of vagueness and embarrassment is normally a curable defect, cured by amending same summons to which an exception is raised.

of the JCM system as set out in *Windhoek Municipal Council v Pionierspark Dam Investments CC*¹²:

[36] The Judge President, writing for the Full Court in *IA Bell*¹³, reached this conclusion after considering recent decisions of the High Court on the issue since the introduction of JCM in Namibia in 2011 and after an exhaustive survey of the approach followed in Australia after that jurisdiction introduced JCM. The Full Court stressed that a new approach to amendments under JCM was underpinned by the following overriding objectives of JCM:

- (a) to ensure the speedy disposal of any action or application,
- (b) to promote the prompt and economic disposal of any action or application, (c) to use efficiently the available judicial, legal and administrative resources,
- (d) to identify issues in dispute at an early stage,
- (e) to curtail proceedings, and
- (f) to reduce the delay and expense of interlocutory processes. Rule 1B imposed an obligation on the parties 'to assist the managing judge in curtailing the proceedings.'

[19] In the above matter it was also held that "although the position that 'doing substantial justice between the parties' is no longer the primary consideration, it remains of considerable importance but is now to be considered within the context of the objectives of Judicial Case Management, with late amendments being subjected to greater scrutiny than before because of their deleterious effect upon the administration of justice."

[20] Two typical exceptions can be raised by parties in litigation. One is that the pleadings are vague and embarrassing and two, that it lacks averments that are necessary to sustain an action or defence. In the current matter, the complaint against the proposed amendment is understood to be that it will render the particulars of the claim vague and embarrassing. In *Trustco Capital (Pty) Ltd v Atlanta Cinema CC and Others*¹⁴ Geier J discussed these according to the legal principles applicable:

'In Beck's Theory and Principles of Pleadings in Civil Actions' where the following is stated:
 'A pleading may disclose a cause of action or defence but may be worded in such a way that the opposite party is prevented from clearly understanding the case he or she is called upon to meet. In such a case the pleading may be attacked on the ground that it is vague and embarrassing. "A man who has an excipiable cause of action is in the same position as one who has no cause of action at all.'
 and further –

¹² *Windhoek Municipal Council v Pionierspark Dam Investments CC* SA 70/2019.

¹³ *Supra*.

¹⁴ *Trustco Capital (Pty) Ltd v Atlanta Cinema CC and Others* (3268 of 2010) [2012] NAHC 190 (12 July 2012).

In any case, an exception on the ground that the pleading is vague and embarrassing will not normally be upheld unless it is clear that the opposite party would be prejudiced in his defence or action as the case might be.

In the first place when a question of insufficient particularity is raised on exception, the excipient undertakes the burden of satisfying the court that the declaration, as it stands, does not state the nature, extent, and the grounds of the cause of action. In other words, he must make out a case of embarrassment by reference to the pleadings alone . . . If an exception on the ground that certain allegations are vague and embarrassing is to succeed, then it must be shown that the defendant, at any rate for the purposes of his plea, is substantially embarrassed by the vagueness or lack of particularity.

The object of all pleadings is that a succinct statement of the grounds upon which a claim is made or resisted shall be set forth shortly and concisely, and where such statement is vague, it is either meaningless or capable of more than one meaning. It is embarrassing in that it cannot be gathered from it what ground is relied on by the pleader.

[W]here a statement is vague, it is either meaningless or capable of more than one meaning. It is embarrassing in that it cannot be gathered there from what ground is relied on, and therefore it is also insufficient in law to support in whole or in part the action or defence.'

[21] The court was also referred to 'Erasmus Superior Court Practice'¹⁵ from which the following relevant extracts were quoted:

'An exception that a pleading is vague and embarrassing is not directed to a particular paragraph within a cause of action: it goes to whole cause of action, which must be demonstrated to be vague and embarrassing. The exception is intended to cover the case where, although a cause of action appears in the summons there is some defect or incompleteness in the manner in which it is set out, which result in embarrassment to the defendant. An exception that a pleading is vague and embarrassing strikes at the formulation of the cause and action and not its legal validity.

An exception that a pleading is vague and embarrassing will not be allowed unless the excipient will be seriously prejudiced if the offending allegations will not be expunged... The test applicable in deciding an exception based on vagueness and embarrassment arising out of lack of particularity can be summed up as follows:

In each case the court is obliged first of all to consider whether the pleading does lack particularity to an extent amounting to vagueness. Where a statement is vague it is either meaningless or capable of more than one meaning. To put it at its simplest: the reader must be unable to distill from the statement a clear, single meaning.

If there is vagueness in this sense the court is then obliged to undertake a quantitative analysis of such embarrassment as the excipient can show is caused to him or her by the vagueness complained of.

In each case an ad hoc ruling must be made as to whether the embarrassment is so serious as to cause

¹⁵ Erasmus Superior Court Practice at pages B1-153 to B1-154 A.

prejudice to the excipient if he or she is compelled to plead to the pleading in the form to which he or she objects. A point may be of the utmost importance in one case, and the omission thereof may give rise to vagueness and embarrassment, but the same point may in another case be only a minor detail.

The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced.

The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice.

The excipient must make out his or her case for embarrassment by reference to the pleadings alone.

The court would not decide by way of exception the validity of an agreement relied upon or whether a purported contract may be void for vagueness.¹⁶

Conclusion

[22] Because of the general ethos of the JCM system, as set out above the court will consider at the same time the application for amendment and the possible exception that can be raised. The court is convinced that the amendment is indeed needed to clarify the cause of action to such an extent that it will allow the defendants to plead to the true complaint against them. If the amendment is allowed, it will further place a triable issue before the court and I am convinced that the information contained in the particulars of the claim as amended complies with the requirements as set out in rules 45(5) and 45(7) of the High Court rules.

[23] The onus to convince the court that the pleading will indeed be excipiable rests upon the excipient who must convince the court of their position, which they failed to do in this instance. The amendment will not render the pleading excipiable as it will not render the particulars of the claim vague and embarrassing and the excipient will not be prejudiced.

[24] As a result, I make the following order:

1. The amendment as prayed for, is hereby granted with costs, the costs of one instructed and one instructing counsel but capped in terms of rule 32(11).
2. The matter is postponed to 28 March 2023 for further case planning. The parties are to file a draft case plan on or before 23 March 2023.

Note to the parties:

¹⁶ Erasmus supra.

E RAKOW Judge	Not applicable
Counsel:	
Plaintiff:	Defendant:
Adv Garbes-Kirsten Instructed by Van der Merwe-Greeff Andima Inc, Windhoek	Mrs Delport Delport Legal Practitioners, Windhoek