

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA

Practice Directive 61

“ANNEXURE 11”

<b>Case Title:</b> SOPHIA PUYE IPAWA SHAAPOPI v ANNA SHAAPOPI	<b>Case No:</b> HC-MD-CIV-ACT-OTH-2022/02242
	<b>Division of Court:</b> (MAIN DIVISION)
<b>Heard before:</b> CLAASEN J	<b>Date of hearing:</b> 25 OCTOBER 2023
	<b>Date of order:</b> 16 NOVEMBER 2023
<b>Neutral citation:</b> <i>Shaapopi v Shaapopi</i> (HC-MD-CIV-ACT-OTH-2022/02242) [2023] NAHCMD 737 (16 November 2023)	
<b>ORDER</b>	
<b>IT IS HEREBY ORDERED THAT:</b>  <ol style="list-style-type: none"><li>1. The defendants’ exception brought against the plaintiff’s particulars of claim is dismissed.</li><li>2. The defendants must pay the plaintiff’s costs of opposing the exception jointly and severally, the one paying the other to be absolved, subject to rule 32(11).</li><li>3. The matter is postponed to 06 December 2023 at 08h30 for case planning conference.</li><li>4. The parties must file a joint case plan report on or before 01 December 2023.</li></ol>	
<b>Reasons:</b>	
CLAASEN J:	

### Introduction

[1] This is an exception taken by the defendants against the plaintiff's amended particulars of claim. The defendants excepted on the basis that the particulars of claim discloses no cause of action and that some of the paragraphs are vague and embarrassing.

[2] In their notice of exception, the defendants invited the plaintiff to remove the cause of complaint. The plaintiff did not remove the cause of the complaint. The defendants therefore raised the present exception and it was opposed by the plaintiff.

### Background

[3] The plaintiff instituted an action against the first and second defendants for breach of contract in respect of improvements the plaintiff made to a certain property, which property the defendants inherited from their late father, Mr Simpson Shaapopi. The plaintiff is the deceased's sister.

[4] According to the particulars of claim, the late Mr Shaapopi suffered an aortic aneurism in 2005 and was unable to pay the monthly instalments on his house. Thus, the plaintiff and her sister sporadically assisted with that and in 2006 Mr Shaapopi donated the premises to the plaintiff. Mr Shaapopi passed away in 2007. The plaintiff settled the arrears on the house and effected structural improvements to the property during the years 2009 until 2020.

[5] When Mr Shaapopi passed away, he left no will and testament and the house had not been transferred to the plaintiff in terms of the purported donation. The estate of the late Mr Shaapopi devolved in terms of the intestate succession law and the first and second defendant were the only heirs.

[6] During February 2019, when the estate was being distributed, the plaintiff and the two defendants concluded an oral agreement relating to the improvements she made on the property and the value thereof. In terms of the agreement, the plaintiff would obtain a

valuation of the property and the renovations effected thereon. The plaintiff would not lodge a complaint against the deceased estate when it was published in order to enable the speedy finalization of the estate. It was further agreed that the defendants, once the property is inherited by them and registered in their name, would proceed to sell the property and the proceeds from the sale of the property would be divided equally with 50 percent of the proceeds accruing to the plaintiff and the other 50 percent accruing to the defendants jointly.

[7] The plaintiff alleges that she complied with her obligations in respect of the agreement and that the defendants breached and/or repudiated the agreement in that the property was transferred to the defendants and they have to date failed to comply with the agreement between the parties to sell the property and/or pay the plaintiff her 50 percent of the value of the premises and/or the full improvement value of the premises.

#### The legal principles in the adjudication of exceptions

[8] In *Van Straten v Namibia Financial Institutions Supervisory Authority and Another*,<sup>1</sup> the Namibian Supreme Court authoritatively fully set out the principles applicable to the adjudication of exceptions as follows:

"[18] Where an exception is taken on the grounds that no cause of action is disclosed or is sustainable on the particulars of claim, two aspects are to be emphasised. Firstly, for the purpose of deciding the exception, the facts as alleged in the plaintiff's pleadings are taken as correct. In the second place, it is incumbent upon an excipient to persuade this court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed. Stated otherwise, only if no possible evidence led on the pleadings can disclose a cause of action, will the particulars of claim be found to be excipiable.

.....

[20] The two-fold exercise in considering whether a pleading is vague and embarrassing entails firstly determining whether the pleading lacks particularity to the extent that it is vague. The second is determining whether the vagueness causes prejudice. The nature of the prejudice would relate to an ability to plead to and properly prepare and meet an opponent's case. This consideration is also powerfully underpinned by the overriding objects of judicial case

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<sup>1</sup> *Van Straten v Namibia Financial Institutions Supervisory Authority and Another*, 2016 (3) NR 747 SC, para 18.

management in order to ensure that the real issues in dispute are resolved and that parties are sufficiently apprised as to the case that they are to meet”.

[9] That being so, the defendants must show the court that upon every interpretation which the particulars of claim can reasonably bear, no cause of action is disclosed. The defendants must thus convince the court that no possible evidence on the pleadings can disclose a cause of action

#### The defendants' grounds of exception

[10] The defendants' exception is structured on six grounds. I proceed to the first ground that deals with no cause of action to sustain a valid claim. The crux of the complaint under this ground is that, at the time of the conclusion of the agreement, neither of the parties were the lawful owners of the property, nor did they have the requisite authority to conclude the agreement in respect of the property. As a result, the defendants' argued that no valid or enforceable agreement came into effect. They maintained that the fact that the agreement was concluded prior to the finalisation of the estate and prior to the transfer of the property into the defendants' names renders the agreement legally unenforceable, null and void.

[11] The plaintiff's argued that the defendants have interpreted the plaintiff's case incorrectly as the claim is not based on a sale of immovable property. The plaintiff further contends that, based on the facts as pleaded, it is clear that the agreement becomes enforceable once the property is transferred to the heirs, as only the heirs can attend to the sale of the property. It is the plaintiff's submission that she does not plead that the property was to be sold while the process of distribution of the estate was ongoing.

[12] It is common cause that at the time of entering into the agreement, neither of the parties were lawful owners of the immovable property which formed the subject matter of the agreement. Having a close look at the plaintiff's particulars of claim, it is pleaded that the sale of the property and the proceeds thereof would, in terms of the agreement, be performed once the property was transferred into the names of the defendants. It is further pleaded that the parties entered into the agreement in 2019 whilst the deceased estate was being distributed. It is indicative thereof that parties were privy that there was

no will and that the two defendants were the only heirs who would be able to make decisions regarding the property. It is the plaintiff's case that it is indeed what happened herein, that the parties contracted with the view that the terms will become enforceable upon the finalization of the estate once the property devolves upon the heirs. Thus it is not a case that upon every interpretation of the particulars no valid claim may arise.

[13] Furthermore the defendants appeared to have lost sight that there were alternative claims. One of the alternative claims is premised on undue enrichment in that the plaintiff effected and paid for the structural improvements to the property. At this stage, the defendants are unjustly enriched by the value of the improvements whereas the plaintiff is impoverished by that said amount. The defendant raised no attack against that claim. Having considered the above, there is no merit in the first ground of the exception and it stands to be dismissed.

[14] The remainder of the grounds exceptions are based on the allegation that the plaintiff's particulars of claim is vague and embarrassing and there is a degree of overlap between them. Grounds 2, 4, 5 and 6 relate to para 17 and 18 and essentially relate to what the defendant perceives to be inconsistencies in certain amounts, as pleaded, and the amounts for the said item in two of the annexures attached to the claim. Ground 3 also relates to para 17 and in this ground the excipients take issue with the value of the property, as pleaded, for the year 2015. The exception is phrased that the said annexure 'cannot be evidence or a true reflection of the value of the property in 2015 if the evaluation of the property was done more than five years after'.

[15] The plaintiff refuted the grounds relating to the computation of the claims. The plaintiff argues that the annexures provide the estimated valuation cost for the improvements to the said property. Furthermore that it was not clear whether the defendants simply elected to dispute the documents as representing a true and accurate reflection of the value of the said property before and after the improvements funded by the plaintiff. Counsel for the plaintiff also contended that these grounds relate to a dispute in relation to the value of the property and the value of the improvements, which is a matter for evidence.

[16] Where a statement is vague, it is either meaningless or capable of more than one

meaning. It is embarrassing in that it cannot be gathered therefrom what ground is relied on by the pleader.<sup>2</sup> As a general rule, a pleading is vague and embarrassing if it is unclear and ambiguous, to the extent that the opposing party is uncertain of the case he is required to meet.

[17] While an exception provides a useful mechanism for weeding out cases without legal merit, it should be dealt with in a sensible and pragmatic approach.

[18] Having said that and having considered the grounds, I agree with the plaintiff's view that the issues in these grounds relate to matters which appears to be a dispute in the quantum of the claim, which can be pleaded to and on which evidence can be lead. Therefore these grounds also stand to be rejected.

[19] Accordingly, I make the following order:

1. The defendants' exception brought against the plaintiff's particulars of claim is dismissed.
2. The defendants must pay the plaintiff's costs of opposing the exception jointly and severally, the one paying the other to be absolved, subject to rule 32(11).
3. The matter is postponed to 06 December 2023 at 08h30 for case planning conference.
4. The parties must file a joint case plan report on or before 01 December 2023.

<b>Judge's signature</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Applicant</b>	<b>Respondent</b>
Mr Knittle Of LorentzAngula Inc	Ms Shiwedha Of Dr Weder, Kauta & Hoveka Inc

<sup>2</sup> *Trustco Capital (Pty) Ltd v Atlanta Cinema CC* 2012 JDR 1148 (Nm) Page 1, para 16.