

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA
RULING
PRACTICE DIRECTION 61



MAIN DIVISION, WINDHOEK

Case Title: CHRISTINA ELIZABETH GROENEWALD PLAINTIFF and JOHANNES CHRISTIAN KOTZE FIRST DEFENDANT THE STANDARD BANK OF NAMIBIA LIMITED SECOND DEFENDANT THE DEPUTY SHERIFF OF THE HIGH COURT (OUTJO) THIRD DEFENDANT DR WEDER, KAUTA & HOVEKA INC FOURTH DEFENDANT MASTER OF THE HIGH COURT NAMIBIA FIFTH DEFENDANT THE REGISTRAR OF DEEDS DEFENDANT SIXTH	Case No: HC-MD-CIV-ACT-CON- 2023/04629 Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE PARKER, ACTING	Date of hearing: 16 MAY 2024 Delivered on:

5 June 2024

Neutral citation: *Groenewald v Kotze* (HC-MD-CIV-ACT-CON-2023/04629) [2024] NAHCMD 283 (5 June 2024)

IT IS ORDERED THAT:

1. The application is dismissed with costs, including costs of one instructing counsel and one instructed counsel, and the costs are capped in terms of rule 32(11) of the rules of court.
2. Counsel or the parties (if unrepresented) are called upon to attend a status hearing at 08h30 on 26 June 2024 for the court to determine the further conduct of the matter.

Following below are the reasons for the above order:

PARKER AJ:

[1] The first, second and fourth defendants have taken an exception to the particulars of claim and are founded on three grounds. It is noted that there are six defendants in all. The first to the fourth defendant are private persons. The fifth and the sixth defendants are administrative officials, within the meaning of article 18 of the Namibian Constitution. This observation is necessary as it is related to the first ground upon which the exception is founded.

[2] I shall refer to the excipients collectively as the defendants, and they are represented by Mr Kauta. The plaintiff, represented by Mr Jacobs, has opposed the exception. The exception is taken on the basis that the pleading 'lacks averments which are necessary to sustain an action', to use the language of rule 57(1) of the rules of court. In other words, the plaintiff has failed to disclose any right or cause of action.¹

[3] In *Auas Diamond (Pty) Ltd v Minister of Mines and Energy*,² the Supreme Court approved the description of 'cause of action' propounded by the Appellate Division of the Supreme Court of South Africa in *Evins v Shield Insurance*.³ that 'cause of action' is ordinarily used to describe the actual basis, the set of material facts that beget the plaintiff's legal right of action. The words

¹ *Anas Diamond (Pty) Ltd v Minister of Mines and Energy* 2017 (2) NR 418 (SC).

² Loc cit.

³ *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 825G.

'cause of action' bear no esoteric meaning. It means simply 'a group of operative facts, giving rise to one or more rights of action'.⁴ In that vein, in the English case of *Letang v Cooper*, Lord Diplock stated that the words 'cause of action' meant 'simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person'.⁵

[4] From the authorities the following crucial principles emerge: The words 'cause of action' refer to a group of material facts that give the plaintiff the right of action, entitling him or her to approach the court to vindicate that right. Therefore, whether or not the plaintiff can prove all the allegations he or she has pleaded is not a matter that should engage the attention of the judge determining an exception on the basis that the pleadings disclose no cause of action.⁶ Damaseb DCJ calls such exception 'the law-point exception'.⁷ Furthermore, the 'law-point exception is rarely allowed and *must* be disallowed if evidence can be introduced at trial which discloses a defence or cause of action.⁸ (Italics in the original text). That is the manner in which I determine the exception.

[5] Keeping the foregoing principles and approaches in my mind's eye, I proceed to consider the grounds upon which the law-point exception is founded.

[6] The first ground is briefly and primarily this: The plaintiff's claim against the defendants is contractual, yet a public law remedy is sought. The first ground has not a tincture of merit. It is trite that exception could not be taken against the relief claimed, for the relief does not form part of the cause of action.⁹ The first ground is rejected for this reason alone.

[7] In any case, it would be unwise to conclude that private law has no place in rule 76 applications, particularly where private rights and public law issues are linked,¹⁰ as is in the instant matter. Can it seriously be argued, as Mr Kauta appeared to do, that in such instances a party is obliged to select a public over a private remedy, or vice versa? Would it not be somewhat artificial to seek to impose the status of private law on a complex set of facts merely because the party may have a common law cause of action, as the plaintiff does in the instant case? In that regard,

⁴ *Swankowski v Diethelm* 129 N.E. 2d 182 at 184 (Ohio App 1953), quoted in Bryan A Garner *A Dictionary of Modern Legal Usage* 2ed (1995).

⁵ *Letang v Cooper* [1965] 1QB 232.

⁶ *McKelvey v Cowan* N.O 1980 (4) SA 100 (W) at 527.

⁷ Petrus T Damaseb *Court-Managed Civil Procedure of the High Court of Namibia* 1ed (2020) at 226.

⁸ Loc cit.

⁹ *Naanda and Another v Edward and Others* 2015 (4) NR 1188 (HC).

¹⁰ RFJ Gordon *Judicial Review: Law and Procedure* (1985) at 5.

it has observed: 'It would be a strange definition of public law which excluded the vindication of private law rights from its ambit.'¹¹

[8] Therefore, I respectfully find Mr Kauta's reliance for support in *Minister of Agriculture, Water and Forestry and Another v Serve Investments 84 (Pty) Ltd and Others*¹² to be misplaced. It is neither aleatory nor insignificant that the learned Moseneke DCJ (the primary source of the quoted passage) used the adverb 'ordinarily' in the passage attributed to him. The adverb means 'usually'. It does not mean on all occasions, ie always.¹³ Counsel has editorialized the Honourable Deputy Chief Justice's passage. Such editorialization does violence to the real meaning of the passage and is self-serving. The passage cannot assist the defendants. As I have found, this ground has no merit, and is rejected. I proceed to consider the second and third grounds.

[9] Under the second ground, the reason for taking the exception is grounded on the allegations of fact contained in paras 18, 19, 29 and 33 of the particulars of claim. Under the present head, for our present purposes, the relevant material facts or allegations set out in the particulars of claim, which the court must accept as correct,¹⁴ are laid out briefly in the succeeding paras [10] – [12].

[10] The plaintiff alleges that at the relevant time no specific leave had been granted in terms of s 30 of the Administration of Estates Act 66 of 1965 to sell and transfer the immoveable property in question. On 9 May 2023 the first and third defendants (the responsible deputy sheriff) (*qua* seller) concluded a Cancellation Agreement to cancel an earlier agreement to sell.

[11] The deputy sheriff undertook to instruct the fourth defendant, the conveyancers ('WKH'), to return the already paid purchase price to the first defendant. Thereafter, the matter took a curious turn. On 10 August 2023 the fourth defendant, in a status report filed of record, placed before the court the following, namely, that on 18 July 2023 the first defendant and the deputy sheriff (the third defendant) had given the fourth defendant instructions to transfer the property to the first defendant.

¹¹ Loc cit; quotation from Cane [1984] PL 17.

¹² *Minister of Agriculture, Water and Forestry and Another v Serve Investments 84 (Pty) Ltd and Others* Case No SA 105/2021.

¹³ *Concise Oxford English Dictionary* 12ed.

¹⁴ *Van Staten N.O and Another v Namibia Financial Institutions Supervisory Authority and Another* 2016 (3) NR 747 (SC) para 18.

[12] The plaintiff alleged further that the fourth defendant acted, as it did, upon instructions and/or in common purpose with Standard Bank of Namibia Limited ('the Bank') (the second defendant). The plaintiff alleged further categorically that the deputy sheriff gave no such instructions to WKH and WKH was aware that no such instructions had been given to it by the deputy sheriff.

[13] For the foregoing reasons, the plaintiff contended that by implementing the said transfer, Kotze (the first defendant), the Bank (the third defendant) and/or WKH (the fourth defendant) acted wrongfully and intentionally, with knowledge of the foregoing defects in the transaction. In the result, the plaintiff prays the court to set aside the said transfer.

[14] I find that paras [10] – [12] contain a group of material facts, giving rise to the plaintiff's rights of action, that is, the cause of action.¹⁵ Whether or not the plaintiff can prove all the allegations she has pleaded should not concern this court in determining the exception taken by the defendants.¹⁶ Therefore, any legal impediments allegedly imposed by the authorities, referred to the court by Mr Kauta,¹⁷ that might prevent the plaintiff's claim from succeeding in the trial are irrelevant and are of no assistance on the point under consideration in the determination of the law-point exception.

[15] Accordingly, I find and hold that the second ground upon which the exception is founded is not sound and is rejected. I proceed to consider the third ground.

[16] On the authority of *Auas Diamond (Pty) Ltd v Minister of Mines and Energy*, I do not find para 32 of the particulars of claim to contain material facts. It contains a conclusion drawn by the plaintiff from certain facts based on the plaintiff's interpretation or 'misrepresentation' of rule 110 of the rules of court. The result is that the third ground on which the exception is founded is also not sound and is, accordingly rejected.

[17] Both counsel submitted that the unsuccessful party should be mulcted in costs, except that

¹⁵ See paras [3] – [4] above and the cases there cited.

¹⁶ *McKelvey v Cowan N.O.* footnote 7 loc cit.

¹⁷ Eg *New Era Investment (Pty) Ltd v Roads Authority* 2017 (4) NR 1160 (SC) on failure to 'seek interdict'; and *Oshakati Tower (Pty) Ltd v Executive Properties CC and Others*. (1) 2009 (1) NR 232 (HC) on Namibia's property transfer system.

Mr Jacobs submitted that costs should not be capped in terms of rule 32(11) of the rules of court, because the matter and the issues involved, are complex. I respectfully reject counsel's entreaty. It is still an exception taken on only one leg of the requisites, and the applicable principles are now well settled.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
PLAINTIFF	1ST , 2ND and 4TH DEFENDANTS
J Jacobs Instructed by Krüger, Van Vuuren & Co., Windhoek	P Kauta Of Dr Weder, Kauta & Hoveka Inc., Windhoek