

REPORTABLE

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case number: HC-MD-CIV-ACT-OTH-2023/03639

In the matter between:

STEVIE AUDREY ONGOLOMBIA OTSANA

PLAINTIFF

and

DONALD ELIE NGOLO

1st DEFENDANT

HEWA BORA TOURS & SAFARIS CC

2nd DEFENDANT

Neutral citation: *Ongolombia Otsana v Ngolo and another* (HC-MD-CIV-ACT-OTH 2023/03639 [2024] NAHCMD 83 (06 March 2024))

Coram: Ndauendapo J

Heard: 26 January 2024

Delivered: 06 March 2024

Flynote: Civil Procedure – Exceptions-Amended Particulars of Claim – Vague and Embarrassing – No cause of action disclosed-Exceptions upheld – Amended Particulars Excipiable.

Summary: The plaintiff instituted action against the defendants claiming an amount of N\$121 249, 30 (One Hundred and Twenty-One Thousand Two Hundred and Forty-Nine Namibian Dollars and Thirty Cents) for damages caused to his motor vehicle as a result of the conduct of the defendants. The plaintiff avers that he entered into an oral agreement (In his personal capacity) with the first defendant whereby, he lent out his motor vehicle to the first defendant for use in Windhoek. The plaintiff further avers that, instead of using the motor vehicle in Windhoek, he hired out the vehicle to a tourist who travelled with the motor vehicle outside Windhoek. The motor vehicle, whilst driven by the tourist got involved in an accident and got damaged. The plaintiff is claiming the retail value of the motor vehicle from the defendants. The defendants raised exceptions to the particulars of claim on the basis that they are vague, embarrassing and do not disclose a cause of action.

Held: that the particulars of claim are vague and embarrassing as it is not clear from the averments whether the action is based on contract or whether it is a delictual claim.

Held: further that the particulars of claim do not disclose a cause of action against the second defendant (a juristic person) as it was not party to the oral agreement.

Held: further that the grounds of exception are upheld.

ORDER

1. All the grounds of exception in respect of the defendants are upheld.
 2. The plaintiff is ordered, if so advised, to amend his particulars of claim within twenty (20) court days from today's date.
 3. The plaintiff is ordered to pay the defendants costs, such costs to be capped in terms of r 32 (11).
 4. The matter is postponed to 17 April 2024 at 15h30 for status hearing. The parties must file a joint status report 3 days before the hearing date.
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JUDGMENT

NDAUENDAPO J

Introduction

[1] Before me, are two exceptions raised by the defendants against the amended particulars of claim of the plaintiff. The plaintiff instituted an action against the defendants claiming an amount of N\$121 249,30 (One Hundred and Twenty-One Thousand Two Hundred and Forty-Nine Namibian Dollars and Thirty Cents) for damages caused to his motor vehicle as a result of the conduct of the defendants.

The exceptions

[2] The first defendant's exception is couched as follows:

'TAKE NOTICE THAT the 1st Defendant intends to raise an exception that the particulars of claim are extremely vague and embarrassing and therefore expiable for the following reasons:

Ground 1

1.1 The Plaintiffs cause of action is vague and embarrassing as the defendant is unable to decipher from the particulars of claim on whether the claim against the defendants is premised on contract/agreement, or fraudulent misrepresentation or delict.

1.2 Even if the defendant would accept that the claim of the plaintiff is premised on any one of the three, being contract/ fraudulent misrepresentation or delict, the plaintiff has failed to make necessary averments that can sustain any action premised on any of the three. Even if the defendant was to accept that the plaintiff's particulars are premised on all three, it is embarrassing for one to combine an action based on both delict and breach of contract without alleging the basis of each cause of action separately or in the alternative.

1.3 In light of the uncertainty as stated above, the 1st Defendant is unable to meaningfully plead thereto and in these circumstances the 1st defendant is embarrassed by the vagueness of the pleading in this regard.

Ground 2

2.1 The Plaintiff in his particulars of claim, has failed to set out the nature of the action; as the nature of the action will not be set out, if there is a failure to disclose whether the action is contractual or delictual and the lack of averments to show that a special or implied duty is created is a failure to set out the grounds of the action.

2.2 Even if one was to try to assist the plaintiff and state that the claim that the plaintiff meant to bring may be based on the *lex aquilia* or even negligent misrepresentation giving rise to a contract; the pleading is drafted in such a confusing manner, so as to deny the defendant an opportunity to meaningfully plead, the defendant is left to scramble and try and decipher amongst the plethora of possible causes of action in order to meet the case brought by the plaintiff against him.

2.3 The defendant therefore seeks clarity from the plaintiff as to which cause of action he is to plea to; alternatively pleads that if there is more than one cause of action, that the plaintiff clearly demarcates the different claims in order for the defendant to do so.

Ground 3

3.1 The plaintiff alleges that the Plaintiff and the 1st defendant agreed to enter into an oral agreement but fails to state when and where this took place. Rule 45(7) is not adhered to.

Ground 4

4.1 In terms of Rule 45(9) of the High Court, a plaintiff suing for damages must set out the damages in such a manner as will enable the defendant reasonably to assess the quantum thereof.

4.2 The damages claimed by the plaintiff are not set out in such a manner as will enable the defendant to assess the quantum. The motor vehicle valuation report annexed to the plaintiffs "proposed amended particulars of claim" is not for the plaintiff's motor vehicle. It further states that the valuation was done on the 3rd of October 2023 that is 6 months after

the accident took place and 4 months after the current summons were already issued by the above Honourable court. The valuation of the damaged motor vehicle further states that it is in overall good condition, and yet the amount for repairs is not stipulated in the particulars of claim. Hence it is not even vague but not explained at all why then the plaintiff seeks damages in the amount of N\$121 249.30. The value denoted in the assessment is the retail value, the motor vehicle supposedly had in the year 2000(a whole 23 years prior to the accident) and not the actual value it would have had in April 2023, prior to the accident.

4.3 Damage to property is determined by comparing the market value of the property prior to the damage causing event with the market value thereafter. Damages are determined at the time the damage is inflicted with reference to the diminution in value of the damaged property directly after the damage causing event.

4.4 The owner is legally entitled to have the property reinstated to its pre-damaged condition and not necessarily to the value of the thing. At the very least the plaintiff must prove sufficient facts showing the respective values (before and after the damage causing event) which will enable the court to assess an equitable amount in damages.

4.5 A plaintiff is entitled to recover from the wrongdoer the amount by which the plaintiff's patrimony was diminished as a result of the wrongdoer's conduct. In order to prove that amount, the plaintiff may, in respect of damage to the article prove the reasonable cost of repairs to that article in order to restore it to its original state or the difference between the pre-delict value and the post -delict value. The plaintiff is entitled to the lesser of the two amounts and has to show that the measure chosen is the correct one under the circumstances. In respect of the complete loss (which is not alleged by the plaintiff), the plaintiff must then establish its market or replacement value at the date of the delict.

Ground 5

5.1 Even if the defendant could assume that the basis of the claim against it is premised on the 1st defendant's alleged misrepresentation, it is not clear, how such alleged misrepresentation led to the plaintiff's patrimonial loss, as there is no nexus between the misrepresentation and loss suffered by the plaintiff (the damage causing event as per the pleading, was the accident), the plaintiff has not pleaded how the loss occasioned by the accident is as a direct result of the "alleged misrepresentation".

5.2 It is for the plaintiff to allege and prove that damages suffered are as a result of the defendant's wrongful act". How did the misrepresentation cause the accident; plaintiff should plead the causation in order for the particulars to be cured of their vagueness, and the defendant not be prejudiced or embarrassed to plead to them.'

Second defendant's exception

'TAKE NOTICE THAT the 2nd Defendant raises an exception against the Plaintiff's Part The plaintiff's pleadings lack averments which are necessary to sustain an action against the 2nd defendant; furthermore, the pleadings are extremely vague and embarrassing and therefore expiable for the following reasons:

Ground 1

1.1 In paragraph 6 and 7 of the amended particulars of claim, the plaintiff avers that the first defendant in his personal capacity borrowed the plaintiff's motor vehicle. It is not alleged that the 1st defendant was acting in the scope or course of his employment with the 2nd defendant, or that he was representing the 2nd defendant.

1.2 In Paragraph 7 of the particulars of claim, the plaintiff also avers that it was only the Plaintiff and 1st defendant in his personal capacity that entered into the oral agreement.

1.3 It is therefore abundantly clear from the plaintiff's own version of facts that the 2nd defendant was not a party to the request/arrangement/ oral agreement allegedly entered into between the plaintiff and 1st defendant, as evidenced in the particulars of claim, and therefore the premise upon which the 2nd defendant is liable (presuming that the action of the plaintiff is based on breach of contract) is not established.

1.4 In paragraph 10 of the "proposed amended particulars of claim", the plaintiff further avers the following:

"The First Defendant subsequently obtained control and possession of the Plaintiff's motor vehicle and assumed responsibility for any potential loss or damage to the vehicle until it was to be returned to Plaintiff without incident in order to place the Plaintiff in the position that he had been before."

- 1.5 It is again abundantly clear from the plaintiff's particulars of claim, reference being made to the above paragraph, that in terms of the plaintiff's own version of events, only the 1st defendant carried the alleged responsibility for any potential loss and damage to Plaintiffs motor vehicle.
- 1.6 Therefore, no cause of action exists against the 2nd defendant; as the particulars of claim should contain the necessary averments that are necessary to establish the cause of action and support the legal relief sought against each and every defendant. In addition, the essential facts which support the cause of action, and the prayers should be stated, which are clearly not stated in the plaintiff's pleadings.
- 1.7 The basis upon which the defendant is added as a party to the particulars of claim is, therefore, extremely confusing, vague and embarrassing as there exists no causal link between the loss suffered by the plaintiff and the defendant.
- 1.8 The above vagueness also causes uncertainty as to the causation of the 2nd defendant's actions vis-a vis the damages allegedly caused to the plaintiff's property.
- 1.9 In light of the uncertainty as stated supra, the 2nd defendant is accordingly prejudiced by being unnecessarily joined as a party to these proceedings and should be removed as a defendant.

In the event the plaintiff unreasonably insists that despite the afore-stated the 2nd defendant should remain as a party to these proceedings, the 2nd defendant will seek punitive costs against the plaintiff; the defendant further submits that although it is mis joined in these proceedings, the plaintiff's pleading is vague and embarrassing for the further grounds stipulated herein after:

Ground 2

2.1 The Plaintiffs cause of action is vague and embarrassing as the defendant is unable to decipher from the particulars of claim on whether the claim against the defendants is premised on contract/agreement, or fraudulent misrepresentation or delict; or all three and if premised on all three, why they have not been pleaded in the alternative, as addressed by the defendant's legal practitioner during the parties Rule 32(9) meeting.

2.2 Even if the defendant would accept that the claim of the plaintiff is premised on any one of the three, being contract/ fraudulent misrepresentation or delict, the plaintiff has failed to make necessary averments that can sustain any action premised on any of the three. Even if the defendant was to accept that the plaintiff's particulars are premised on all three, it is embarrassing for one to combine an action based on both delict and breach of contract without alleging the basis of each cause of action separately or in the alternative.

2.3 In terms of rule 45 (5) of the High Court rules:

“Every pleading ...must contain a clear and concise statement of material facts on which the pleader relies for his or her claim, with sufficient particularity to enable the opposite party to reply and in particular set out –

(a) the nature of the claim, including the cause of action; or

(b).....; and

(c) such particulars of any claim, defence or other matter pleaded by the party as are necessary to enable the opposite party to identify the case that the pleading requires him or her to meet.”

2.4 Inconsistent claims may be pleaded in the alternative, provided that an alternative claim must be pleaded with the same clarity as if it stood alone.

2.5 In light of the uncertainty as stated above, the 2nd defendant is unable to meaningfully plead thereto and in these circumstances the 2nd defendant is embarrassed by the vagueness of the pleading in this regard. Further, if these issues are not addressed by the plaintiff, this leads to the 2nd defendant filing an excipiable plea, full of bare denials.

Ground 3

3.1 The Plaintiff in his particulars of claim, has failed to set out the nature of the action; as the nature of the action will not be set out, if there is a failure to disclose whether the action is contractual or delictual and the lack of averments to show that a special or implied duty is created is a failure to set out the grounds of the action.

3.2 Even if one was to try to assist the plaintiff and state that the claim that the plaintiff meant to bring may be based on the lex Aquilia or even negligent misrepresentation giving rise to a contract; the pleading is drafted in such a confusing manner, so as to deny the defendant an opportunity to meaningfully plead, the defendant is left to scramble and try and decipher

amongst the plethora of possible causes of action in order to meet the case brought by the plaintiff against it.

3.3 The defendant therefore seeks clarity from the plaintiff as to which cause of action he is to plea to; alternatively pleads that if there is more than one cause of action, that the plaintiff clearly demarcates the different claims in order for the defendant to adequately plea.

Ground 4

4.1 In terms of Rule 45(9) of the High Court, a plaintiff suing for damages must set out the damages in such a manner as will enable the defendant reasonably to assess the quantum thereof.

4.2 The damages claimed by the plaintiff are not set out in such a manner as will enable the defendant to assess the quantum. The motor vehicle valuation report annexed to the plaintiffs "proposed amended particulars of claim" is not for the plaintiff's motor vehicle. It further states that the valuation was done on the 3rd of October 2023, that is 6 months after the accident took place and 4 months after the current summons were already issued by the above Honourable court. The valuation of the damaged motor vehicle further states that it is in overall good condition, and yet the amount for repairs is not stipulated in the particulars of claim. Hence it is not even vague but not explained at all why then the plaintiff seeks damages in the amount of N\$121 249.30. The value denoted in the assessment is the retail value, the motor vehicle supposedly had in the year 2000(a whole 23 years prior to the accident) and not the actual value it would have had in April 2023, prior to the accident.

4.4 Damage to property is determined by comparing the market value of the property prior to the damage causing event with the market value thereafter. Damages are determined at the time the damage is inflicted with reference to the diminution in value of the damaged property directly after the damage causing event. The plaintiff does not in his pleading explain why he is entitled to the market value the motor vehicle supposedly had in 2000 less the salvage value? in order for the defendants to adequately plea.

4.5 Furthermore, the owner is only legally entitled to have the property reinstated to its pre-damaged condition and not necessarily to the value of the thing. At the very least the plaintiff must prove sufficient facts showing the respective values (before and after the damage causing event) which will enable the court to assess an equitable amount in damages or alternatively the repair costs.

4.6 A plaintiff is entitled to recover from the wrongdoer the amount by which the plaintiff's patrimony was diminished as a result of the wrongdoer's conduct. In order to prove that amount, the plaintiff may, in respect of damage to the article prove the reasonable cost of repairs to that article in order to restore it to its original state or the difference between the pre-delict value and the post -delict value. The plaintiff is entitled to the lesser of the two amounts and has to show that the measure chosen is the correct one under the circumstances. In respect of the complete loss (which is not alleged by the plaintiff), the plaintiff must then establish its market or replacement value at the date of the delict. It has not been established by the Plaintiff why he is entitled to the value the motor vehicle may have had in the year 2000. This is not pleaded by the Plaintiff and the 2nd defendant cannot establish the quantum of damages.

Ground 5

7.1 Even if the defendant could assume that the basis of the claim against it is premised on the 1st defendant's alleged misrepresentation, it is not clear, how such alleged misrepresentation led to the plaintiff's patrimonial loss, as there is no nexus between the misrepresentation and loss suffered by the plaintiff (the damage causing event as per the pleading, was the accident), the plaintiff has not pleaded how the loss occasioned by the accident is as a direct result of the "alleged misrepresentation".

7.2 It is for the plaintiff to allege and prove that damages suffered are as a result of the defendant's wrongful act". How did the misrepresentation cause the accident; plaintiff should plead the causation in order for the particulars to be cured of their vagueness, and the defendant not be prejudiced or embarrassed to plead to them.

BE PLEASED TO TAKE FURTHER NOTICE that the Plaintiff is, in terms of Rule 57(2), herewith afforded an opportunity to remove and remedy the afore-mentioned causes of complaints within 10(ten) days from receipt of this notice, failing which this notice also serves as an exception, and in respect whereof the following relief is sought.'

The amended particulars

In order to fully comprehend why the exceptions were raised, the amended particulars are reproduced verbatim below:

1. 'The **PLAINTIFF** is **STEVIE AUDREY ONGOLAMBIA OTSANA**, an adult male residing at **Erf 4788 Meass Street, Khomasdal, Windhoek, Republic of Namibia**.
2. The **FIRST DEFENDANT** is **DONALD ELIE NGOLO**, an adult male and the sole member of the Second Defendant, residing at **Erf 01 Martin Neib Street, Okahandja, Republic of Namibia**.
3. The **SECOND DEFENDANT** is **HEWA BORA TOURS & SAFARIS CC**, with registration number CC/2019/01240 a close corporation, duly incorporated in terms of the laws of the Republic of Namibia with its principal place of business situated at **Erf 7259 Grimms Street, Windhoek, Republic of Namibia**.
4. The whole cause of action arose within the area of jurisdiction of this Honourable Court.

Background of the Cause of Action

5. At all relevant times thereto, the Plaintiff was the lawful owner of a 1998,mmmmm Toyota Land Cruiser with registration number N 163-063 W (herein after referred to 'the Plaintiff's motor vehicle). A certified copy of the Plaintiff's motor vehicle registration document is attached hereto and marked as Annexure '**SO – 1**'.
6. On the 14th of April 2022, the First Defendant, a friend and/or acquaintance of the Plaintiff, approached the Plaintiff and asked whether he could borrow the Plaintiff's motor vehicle for personal use, specifically for himself and his family. The First Defendant's requested the use of Plaintiff's motor vehicle because his own vehicle was in transit from Kasane, Botswana, and he lacked any means of transportation for the upcoming long weekend.
7. The Plaintiff and the First Defendant herein after agreed to enter into an oral agreement regarding the Plaintiff lending his motor vehicle to the First Defendant.
8. The Plaintiff, who had a personal relationship with the First Defendant, consented to lend his vehicle to First Defendant, who expressed a desire to chauffeur his

family during the extended weekend spanning from Friday, 14 April 2022 through to Sunday, 16 April 2022. On 14 April 2022, at approximately 12h30, the First Defendant collected the motor vehicle in question from Plaintiff.

9. The material, expressed and/or alternatively tacit terms of the oral agreement were as follows:
 - 9.1 The Plaintiff would lend his motor vehicle to wit: a **1998 Toyota Land Cruiser** bearing registration number **N 163-063 W**, to the First Defendant for personal use;
 - 9.2 The First Defendant would borrow the Plaintiff's motor vehicle from Friday the 14th of April 2022 to Sunday the 16th of April 2022;
 - 9.3 The First Defendant would collect the Plaintiff's motor vehicle from the Plaintiff on the 14th of April 2022 and return it to the Plaintiff in the same condition in which he collected it on the morning of the 16th of April 2022;
 - 9.4 A material term of the agreement was that the Plaintiff would only lend his motor vehicle to the First Defendant on the premise that the First Defendant would only operate the Plaintiff's motor Vehicle in the city of Windhoek to transport his family around for the long weekend;
 - 9.5 The First Defendant would furnish the Plaintiff a sum of **N\$ 4000.00 (Four Thousand Namibian Dollars)** as reimbursement for the fuel present in Plaintiff's vehicle at the time, which was at full capacity.
10. The First Defendant subsequently obtained control and possession of the Plaintiff's motor vehicle and assumed responsibility for any potential loss or damage to the vehicle until it was to be returned to Plaintiff without incident in order to place the Plaintiff in the position that he had been before.
11. At the time at which the Plaintiff's lent his vehicle to the First Defendant, the Plaintiff's motor vehicle was estimated at a market value of **N\$159 249.30 (One**

Hundred and Fifty-Nine Thousand Two Hundred and Forty-Nine Namibian Dollars and Thirty Cents). A copy of Tinus Venter Assessing Services (Motor Vehicle Valuation Report) is attached hereto and marked as **“SO - 2”**

12. At approximately 16h00 on Friday the 14th of April 2023, Plaintiff was contacted and informed via telephone that his motor vehicle had been involved in an accident in the vicinity of Sesriem, an area situated in close proximity to the southern end of the Naukluft Mountains which is approximately 305.7km in the south western direction from Windhoek. This indicated that the First Defendant had travelled with the Plaintiff's vehicle beyond the confines of the city of Windhoek and had thus breached a material term of the oral agreement between himself and the Plaintiff
13. At the time of the accident, the First Defendant, whilst acting in the interest and/or to the benefit of the Second Defendant, carried the responsibility of loss and damage to the Plaintiff's motor vehicle which he was due to return to the Plaintiff in the same condition.
14. The Plaintiff was informed that an individual named Frederic Boisseaux, who is a French citizen, was driving the motor vehicle when the incident occurred. This individual was not previously known to the Plaintiff. The First Defendant was also present in the vehicle at the time of the accident. The Plaintiff's vehicle being driven by a third party, unknown to the Plaintiff, had been done without the consent of the Plaintiff as the Plaintiff had only agreed to pass the responsibility of the operation of the Plaintiff's motor vehicle to the Defendant. A copy of the accident report completed on the 14th April 2023 is attached hereto and marked as Annexure **“SO – 3.”** Additionally, photographs of the Plaintiff's damaged motor vehicle after the motor accident are attached hereto and marked as Annexure **“SO – 4 - SO – 11”**.
15. Moreover, the Plaintiff discovered that the individual who was driving the vehicle during the incident was a client of the Second Defendant. The First Defendant, acting on behalf of the Second Defendant, had entered into a contract to offer a three-day tour to the third party (Mr. Frederic Boisseaux) from 14 April to 16 April 2022, at the Sossuvlei Lodge and Sesriem National Park. A copy of the original tour package (offered in French) that had been offered to and paid for by the third

party on the 14th of April at approximately 10h33 (inclusive of the payment confirmations of **N\$23 000.00 (Twenty-three Thousand Namibian Dollars)** and **N\$7 360.00 (Seven Thousand Three Hundred and Sixty Namibian Dollars)** is attached hereto and marked as Annexure “**SO – 11**”. A translated copy of the abovementioned tour package, sufficiently translated by the Embassy of the Republic of Congo, from French to English for the Court’s ease of reference, is additionally attached hereto and marked as Annexure “**SO – 12**”.

16. As per paragraph 15 above, the First Defendant when entering into the oral agreement with the Plaintiff, had made a false representation to the Plaintiff that he had intended to make use of the Plaintiff’s vehicle in the district of Windhoek. This representation by the First Defendant was material and had thus influenced the Plaintiff to enter into the agreement. The First Defendant at all relevant times thereto had been acting in the interest and/or to the benefit of the Second Defendant as he had the intention to make use of the Plaintiff’s motor vehicle for the intended tour which the First Defendant had arranged prior to approaching the Plaintiff for the borrowing of his motor vehicle. The First Defendant had thus passed the responsibility and/or custody of the Plaintiff’s motor vehicle to the Second Defendant without the expressed, implied and or tacit consent of the Plaintiff and had done so having already been in breach of the agreement with Plaintiff. The First Defendant had a legal duty not to make such misrepresentation to the Plaintiff which had resulted in inducing the Plaintiff to enter into the oral agreement.
17. The Second Defendant had thus been unjustly enriched through and by the First Defendant’s misrepresentation to the Plaintiff which similarly resulted in the breach of agreement with the Plaintiff.
18. The tour package offered to the third party *inter alia* included being taken care of by a tour guide and driver as well as the provision of a vehicle type Ford Ranger or similar and the First Defendant happened to be the designated tour guide and driver for this tour which costs estimated a total amount of **N\$ 24 650.00 (Twenty-Four Thousand Six Hundred and Fifty Namibian Dollars)** or **1 450.00 Euros (One Thousand Four Hundred and Fifty Euros)** to the Second Defendant. The Plaintiff had no knowledge of this agreement nor the tour. A copy of a correspondence letter from the third party’s legal representatives, Nixon

Marcus Public Law Office, in amplification of the abovementioned agreement is attached hereto and marked as Annexure "**SO – 13**".

19. At the time of lending the Plaintiff's motor vehicle, the First Defendant was only in possession of a Code C1 licence that did not include the necessary Professional Authorization to transport passengers for reward. In order to qualify and be authorized to do this, requires a Good and/or Passengers (G, P) to indicated on the licence itself and this essential clearance was not indicated on the First Defendant's driver's licence. Professional Authorization is required by anyone transporting passengers or goods for reward and thus, the First Defendant required this if he was to be the designated driver for the third party's designated trip. A copy of the First Defendant's Driver's licence is attached here to and marked as Annexure "**SO – 14**".

20. The Plaintiff had provided the motor vehicle to the First Defendant in good faith to their agreement on the basis that the First Defendant would only operate the motor vehicle for personal use for his family in Windhoek. The Plaintiff had no knowledge of the First Defendant's agreement, whilst indirectly acting on behalf of the Second Defendant, with the third party and had thus not been aware that the First Defendant intended to make use of the Plaintiff's motor vehicle for alternative purposes as the First Defendant had had made a false misrepresentation to the Plaintiff in the interest and/or for the benefit of the Second Defendant.

21. As per paragraph 9 above, the First Defendant was the designated driver in terms of the agreement between himself and the third party, however, the First Defendant, through the Second Defendant and without the consent of the Plaintiff, permitted the third party to operate the Plaintiff's motor vehicle with the knowledge that the third party had no authority to do so and similar was not in possession of a driver's licence which permitted the third party to operate a motor vehicle to transport persons on a guided tour in Namibia as he did not have the required Professional Authorization on his licence to operate a motor vehicle on a tour in Namibia. A copy of Mr. Frederic Boisseaux's French driver's licence is attached hereto and marked as Annexure "**SO – 15**".

22. At all relevant times, the Plaintiff was the owner of the motor vehicle and the First Defendant was the possessor thereof subject to their agreement that the motor vehicle was to be driven within the domain of the district of Windhoek.
23. The First Defendant intentionally and thus fraudulently misrepresented to the Plaintiff that the former would be lending the Plaintiff's vehicle for his personal use however had lent it in furtherance of his business and fulfilment of an agreement which the First Defendant entered into with the third party and thus acted *contra bonos mores* when borrowing the Plaintiff's motor vehicle. The First Defendant's false misrepresentation rendered his subsequent possession thereof in breach and the Plaintiff, in restitution, may claim any damages suffered to the motor vehicle as a result of the First Defendant's possession thereof.
24. The Plaintiff would not have agreed to lending his motor vehicle to the First Defendant had he known that the First Defendant's intention was to pass it on to the third party, Mr. Frederic Boisseaux *in casu* and furthermore for his motor vehicle to be used for the financial gain of the Second Defendant.
25. As a result of the motor vehicle accident, the Plaintiff had to hire the service of a tow-in company namely A&A Recovery and Tow-in in order to tow his vehicle from the accident scene and paid a sum of **N\$ 7000.00 (Seven Thousand Namibian Dollars)** for the service of the tow-in. A copy of the proof of payment to A&A Recovery and Tow-in is attached hereto and marked as Annexure "**SO – 16**".
26. The total salvage value of the Plaintiff's motor vehicle is estimated at an amount of **N\$45 000.00 (Forty-Five Thousand Namibian Dollars)**. Refer to 'SO-2' as abovementioned in paragraph 11.
27. As a result of the First Defendant's misrepresentation and subsequent breach of agreement with the Plaintiff, has caused the Plaintiff to suffer patrimonial damages in the amount of **N\$121 249.30 (One Hundred and Twenty-One Thousand Two Hundred and Forty-Nine Namibian Dollars and Thirty Cents)**.
28. Despite constant demand, the Defendants have failed and/or refused to make payment to the Plaintiff in restitution.

29. The First Defendant is thus indebted to the Plaintiff in the amount of **N\$121 249.30 (One Hundred and Twenty-One Thousand Two Hundred and Forty-Nine Namibian Dollars and Thirty Cents)** for damages suffered to his motor vehicle in the amount of **N\$114 249.30 (One Hundred and Fourteen Thousand Two Hundred and Forty-Nine Namibian Dollars and Thirty Cents)** in restitution of the First Defendant's misrepresentation and breach of contract and **N\$7000.00 (Seven Thousand Namibian Dollars)** for the tow-in services, respectively.

WHEREFORE THE PLAINTIFF CLAIMS AGAINST THE FIRST AND SECOND DEFENDANTS, JOINTLY AND SEVERALLY, THE ONE PAYING THE OTHER TO BE ABSOLVED:

1. Payment in the amount of **N\$ 121 249.30 (One Hundred and Twenty-One Thousand Two Hundred and Forty-Nine Namibian Dollars and Thirty Cents);**
2. 20% interest on the principal amount from the date of demand to the date of final payment;
3. Cost of suit on attorney client's scale;
4. Further and/or alternative relief;

Submissions on behalf of the defendants

[3] Ms Chihenya submitted that the plaintiff avers that the first defendant in his personal capacity and the plaintiff as the alleged owner of the motor vehicle entered into an oral agreement.¹The afore-mentioned parties allegedly agreed to the material and/or alternatively tacit terms of the oral agreement.²It is, therefore, abundantly clear from the plaintiff's own version of facts that the 2nd defendant was not a party to the oral agreement allegedly entered into between the plaintiff and 1st defendant and therefore cannot be held liable for damages caused to the motor vehicle of the plaintiff. No cause of action exists against the second defendant.

¹ In paragraph 6 and 7 of the amended particulars of claim

² Reference is made to paragraphs 8, 9 and 10 of the amended particulars of claim.

[4] Ms Chihenya contends that what makes it more baffling for the defendants is that one cannot tell whether the claim for damages is based on breach of contract or whether it's an enforcement of the contract that the plaintiff seeks; to add insult to injury, the defendants also don't know if it is a cancellation that the plaintiff seeks due to the alleged misrepresentation by the 1st defendant; and if so, how the link between the damages and the misrepresentation is established.³

[5] It is blatantly clear that the pleading contains irrelevant matters which wholly add to the confusion that the defendants' face in responding to same⁴, the 1st defendant is desirous to plead but it's abundantly clear that significant averments have not been stated by the plaintiff to allow him to adequately plea⁵.

[6] Ms Chihenya argued that it is not stated in the particulars of claim, the basis upon which the plaintiff claims for damages against the defendants. What one can decipher from the particulars of claim, is that the plaintiff seems to seek damages premised on an agreement that was exclusively entered into between himself, as the "alleged owner" of the motor vehicle and (Mr Elie Donald Ngolo) (the 1st defendant in the matter, and hereinafter ,interchangeably referred to as Mr. Ngolo).

[7] She submitted that the plaintiff, further without pleading the alternative or pleading all the relevant allegations, also seems to seek the damages premised on misrepresentation that apparently was done by 1st defendant to him. The 2nd defendant is not the one who allegedly misrepresented to the plaintiff, therefore, creating more confusion as to the claim against the 2nd defendant.

[8] Ms Chihenya contends that the damages caused to the plaintiff's vehicle, where neither caused by the negligent representation, as nothing is pleaded to that effect, however same was caused by an accident that occurred whilst the plaintiff's "alleged vehicle" was being driven by a third party who is conveniently not added as a party in the current proceedings. No allegations of negligence are pleaded in any

³ Reference is made to paragraphs 8, read in conjuncture with paragraphs 16 and paragraph 19.

⁴ Reference is made to paragraphs 19 and 21 of the amended particulars of claim.

⁵ Reference is made to paragraph 8 and Rule 45(7).

form shape or manner, and hence the premise upon which damages are sought against the defendants is baffling, if not bizarre.

[9] Ms Chinyehya argued that the defendants cannot assess the damages claimed by the plaintiff because he claims the retail value of the vehicle, whereas, damages are determined by comparing the market value of the vehicle and the post-accident value of the motor vehicle.

Written Submissions on behalf of the plaintiff

[10] Mr Goroseb submitted that insofar as the defendant's legal practitioner avers that no cause of action exists against the second defendant as the amended particulars does not contain the averments that are necessary to establish the cause of action and support the legal relief sought against the second defendant,⁶ the plaintiff contends with reference to the *Van Straten v Namibia Financial Institutions Supervisory Authority and Another* matter⁷, if all the facts as alleged in the plaintiff's amended particulars of claim is taken as being correct, it is clearly evidenced that the necessary averments have been made against the second defendant in which the second defendant had unjustly been enriched due to the use of the plaintiff's motor vehicle, unlawfully, as consent had not been given to the first nor second defendant by the Plaintiff for the latter's motor vehicle to be operated in furtherance/benefit/interest of the Second Defendant which, if the facts are read to be correct, that is particularly the case of the Plaintiff against the Second Defendant.

[11] Mr Goroseb further argued that the defendant's in raising an exception in terms of r 57(1) concludes that the basis upon which the second defendant is jointly and severally liable to the plaintiff is confusing and that there exists no causal link between the loss suffered by the plaintiff and the defendant's actions.⁸

⁶ Reference is made to paragraph 16 of the Defendant's Heads of Argument.

⁷ *Van Straten N.O and Another v Namibia Financial Institutions and Another* (19 of 2014) [2016] NASC 10 (8 June 2016).

⁸ Reference is made to paragraph 16.1 of the Defendant's Heads of Argument.

[12] Mr Goroseb submitted that the plaintiff disputes such conclusion made by the defendant's as there is crucifying evidence to prove that the *mala fide* actions of the first defendant, whilst portraying to the plaintiff that his intention was for personal use had in actual fact been acting as an agent and in the interest of the second defendant and through the first defendant own malicious actions had roped the second defendant into these proceedings as everything which followed the agreement was done in the interest and/or to the benefit of the second defendant.

[13] Mr Goroseb submitted that the defendants' should bear in mind that 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.⁹ Evidently, a complete chain of relevant material and primary facts relied upon by a plaintiff in its action must be set out. Failure to link material facts will break the sequence and will render any conclusion and an exception will be sustained.⁸ The court in this matter held this and which is evidenced in law, however, where it can be established that the plaintiff has established that the material link exists and that there is a complete chain of relevant material and primary, then the particulars or pleadings cannot be said to be excipiable and therefore an exception should be dismissed and which in the present case, a complete chain of relevant material and primary facts have been established and can be relied upon.

[14] Mr Goroseb submitted that the main claim from which the present case is established emanates from the first defendants misrepresentation to the Plaintiff which leads onto the breach of contract and additionally the unjustified enrichment of the second defendant. Perhaps what may have caused the confusion for the defendants is the term "breach of contract" instead of "termination of the contract" due to the malicious intent of the first defendant to mislead the plaintiff into entering into the agreement and thus the agreement was invalid in law as the first defendant did not engage with the plaintiff in good faith thus rendering his possession and any subsequent action of the first and second defendant unlawful. However, the causal

⁹ *Rossmund Golf Estate v M Hartmann Investments* (2017) 82 CC para 9.

link between the claims and causes of action is clearly indicated and elaborated in the timeline of event which is illustrated in the plaintiff's particulars of claim.

[15] Mr Goroseb referred to *Venter and Others NNO v Barritt Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd*¹⁰, where the Court held:

[11] A statement is vague when it is either meaningless or cabalbe of more than one meaning or can be read in any one of a number of ways. To put it at its simplest: the reader must be unable to extract from the statement a clear, single meaning.

[12] In the context of pleadings such a statement in particulars of claim would be embarrassing 'in that it cannot be gathered from it what ground is relied on by the pleader.'

[13] This leads logically to the inference that the particulars of claim could hardly be vague and embarrassing if the Defendant is fairly able to plead thereto. In the Lockhat Case at 777E, Henochsberg J summarized this as follows:

As long as a declaration reasonably states the nature, extent and grounds of the cause of action, this Court will not as a rule strike out paragraphs as vague and embarrassing, provided the information given is reasonably sufficient and provided that it does not appear to the Court that the paragraphs cannot be pleaded to by the Defendant.

[14] Generally the information in a declaration or particulars of claim thus need only be sufficient for the defendant to plead thereto. The exception stage is not the time for the defendant to complain that he does not have enough information to prepare for trial or may be taken by surprise at the trial. That comes later in the journey to the doors of the court, after, *inter alia*, discovery of documents and request for trial particulars had been made.

[15] The basic requirement is that the defendant must have a clear enough exposition of the Plaintiff's case to enable it to take instructions from the client and file an adequate response to the claim in the form of a plea. The plea may consist of a denial seriatim of all the averments in the particulars if claim (a 'bare denial'), as long as there is no ambiguity in such denial.'

¹⁰ *Venter and Others NNO v Barritt Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) at para 6.

[16] Mr Goroseb submitted that, if the complaint of the exception is a lack of particularity, which relates to mere detail, the excipient's/defendants remedy lies elsewhere. The Plaintiff has indicated to the eruption of claims which have come from the first defendant's misrepresentation, which leads to the contract being in breach from the exception. The complaints of the defendants can be cured by mere addition to the already stated clear facts which would allow the defendants' to plead to the amended particulars of claim which they vehemently deny being able to plea to, due to apparent gross vagueness and embarrassment of the particulars of claim.

Discussion

[17] Rule 45(5) of the High court rules provides that:

'(5) Every pleading must be divided into paragraphs, including subparagraphs, which must be consecutively numerically numbered and must contain clear and concise statement of the material facts on which the pleader relies for his or her claim..., with sufficient particularity to enable the opposite party to reply and in particular set out-

(a) The nature of the claim, including cause of action...'

[18] In *Van Straten v Namibia Financial Institutions Supervisory Authority and Another*¹¹ paragraph (18) on pp 755 over on 756, the Supreme Court held that:

'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'.

In *Jowell v Bramwell-Jones and Others*, the Court held at 899F900A:

¹¹ *Van Straten v Namibia Financial Institutions Supervisory Authority and Another*, (2016) (3) NR 747 SC.

“An exception that a pleading is vague and embarrassing cannot be directed at a particular paragraph within a cause of action. The exception must go to the whole cause of action, which must be demonstrated to be vague and embarrassing. Thus *Carelsen v Fairbridge, Arderne and Lawton* 1918 TPD 306 at 309 the following was said:

“If we have regard to the nature of an exception, namely that it is a procedure which goes to the root of the action, I think we are entitled to say that, when legislature speaks of an exception, it does not refer to a case which can be fairly met by particulars, and that the two are mutually exclusive. The rule therefore that this Court ought to lay down is that, where a defendant can obtain the desired information by asking further particulars, he should do so. He can only employ the exception that the summons is vague and embarrassing when it goes to the root of the actions and when the cause of action is not clearly set forth in the declaration and he is therefore embarrassed in that way.”

[19] Rule 45(7) provides that if the plaintiff relies on a contract, he or she must state whether the contract (a) is written or oral; (b) when it was entered; and (c) where and by whom it was concluded.

Grounds 1 and 2

[20] First defendant's exception is premised on the basis that the averments are vague and embarrassing on the basis that it is not clear whether the action of the plaintiff is based on contract or delict. It is trite if a cause of action is based on contract, all the elements of the contract must be pleaded and if based on delict, the elements must be pleaded. From the way the particulars of claim are drafted, it is not clear whether the claim against the first defendant is a contractual claim or a delictual claim and for that reason the particulars of claim are vague and embarrassing and excipiable.

Ground 3

[21] The plaintiff relies on an oral agreement entered into between himself and the first defendant, but failed to state when and where the oral agreement was entered into. Rule 45(7) provides that, where a party relies on an oral agreement, it must be

clearly stated when and where it was entered into. This ground of exception is upheld.

Ground 4

[22] Rule 45(9) provides that, a plaintiff suing for damages must set out the damages in such a manner as will enable the defendant reasonably to assess the quantum thereof. The plaintiff is claiming damages for a motor vehicle that was damaged in an accident. The value denoted in the assessment is the retail value and not the market value of the vehicle as at April 2023. On what basis the plaintiff claims the retail value is unclear. The way to determine damages caused to a motor vehicle, is to compare the market value of the motor vehicle- prior to the accident and the market value thereafter. Ms Chinheya correctly submitted: "The owner is legally entitled to have the property reinstated to its pre-damaged condition and not necessarily to the value of the thing. At the very least the plaintiff must prove sufficient facts showing the respective values (before and after the damage causing event) which will enable the court to assess an equitable amount in damages. The plaintiff will not be able to assess the damages based on retail value and therefore the damages claimed are vague and embarrassing." This ground is upheld.

Ground 5

[23] The plaintiff alleges that the first defendant's misrepresentation led to the patrimonial losses that he suffered, however, no *nexus* has been pleaded and/or established between the accident which caused damages to the vehicle and the misrepresentation. Ms Chenhinya aptly put it: "How did the misrepresentation cause the accident; plaintiff should plead the causation in order for the particulars of claim to be cured of their vagueness, and the defendant not be prejudiced or embarrassed to plead to them." This ground is upheld.

[24] The second defendant grounds of exception are mainly premised on the basis that there is no cause of action pleaded. The plaintiff pleaded that the alleged oral agreement was between the plaintiff and the first defendant in his personal capacity,

how then the second defendant can be held jointly and severally liable for damages arising from an oral agreement it was not party to, is beyond comprehension. There are simply no averments pleaded to sustain a cause of action against the second defendant and therefore the pleadings are excipiable.

Conclusion

[25] In conclusion, my observation is that the way the amended particulars of claim were drafted leaves much to be desired. They do not contain clear and concise statement of material facts on which the plaintiff relies on his claim with sufficient particularity. The particulars of claim are replete with irrelevant and immaterial averments which are not necessary to sustain a cause of action. They are drafted in such a confusing manner that it makes it difficult for the defendants to meaningfully plead to the particulars of claim.

Order

1. All the grounds of exception in respect of the defendants are upheld.
2. The plaintiff is ordered to amend, if so advised, his particulars of claim within twenty (20) court days from today's date.
3. The plaintiff is ordered to pay the defendants costs, such costs to be capped in terms of r 32 (11).
4. The matter is postponed to 17 April 2024 at 15h30 for status hearing. The parties must file a joint status report 3 days before the hearing date.

NDAUENDAPO
JUDGE

APPEARENCES:

PLAINTIFF:

MR GORASEB
OF ILENI VELIKOSHI INCORPORATED

DEFENDANTS:

MS CHINHEYA
OF ISABEL CHINHEYA INCORPORATED