

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA
DIVISION, OSHAKATI



NORTHERN LOCAL

JUDGMENT

Case Title: MARCIA MARIA AMUPOLO // KEUMBO LETU INVESTMENT CC T/A KEUMBO LOGISTICS & ANOTHER	Case No: HC-NLD-CIV-ACT-CON-2020/00085
	Division of Court: HIGH COURT (NORTHERN LOCAL DIVISION)
Heard before: HONOURABLE MR JUSTICE ANGULA, DEPUTY JUDGE-PRESIDENT	Date of hearing: 22 FEBRUARY 2021
	Delivered on: 15 MARCH 2021
Neutral citation: <i>Amupolo v Keumbo Letu Investment CC t/a Keumbo Logistics</i> (HC-NLD-CIV-ACT-CON-2020/00085) [2021] NAHCNLD 28 (15 March 2021)	
It is recorded that: After counsel filed their respective heads of argument they requested the court to decide the matter on papers in chambers and waived their rights to appear and make oral submissions. Having read and considered the pleadings, notices and counsel heads of argument in chambers, now therefore: IT IS ORDERED THAT: 1. The defendants' exception to the plaintiff's particulars of claim, that it is vague and embarrassing is dismissed with costs limited to half of the costs stipulated by rule 32(11). 2. The plaintiff is afforded an opportunity to amend para 12 of her particulars of claim.	

That amendment is to be effected on or before 26 March 2021.

3. The plaintiff is to pay the defendants' costs equal to half of that stipulated by rule 32(11).
4. The defendants are to file their plea and counterclaim, if any, on or before 9 April 2021.
5. The parties are to file a joint case management report on or before 31 March 2021.
6. The matter is postponed to **12 April 2021 at 14h15** for case management conference.

Following below are the reasons for the above order:

[1] The defendant gave notice to the plaintiff in terms of rule 57(1), (2) and (3) alleging that the plaintiff's particulars of claim are vague and embarrassing. The notice afforded the plaintiff 10 days within which to remove the cause complained. The notice further informed the plaintiff that failing to remedy the cause complained, the notice 'also serves as an Exception in terms of Rule 57(3)' in which event defendant prays that the exception be upheld and that the plaintiff be granted leave to amend her particulars of claim within 10 days.

[2] In the same notice the defendant took an exception that the particulars of claim do not disclose a cause of action. The defendant alleged that the plaintiff pleaded her cause of action relying interchangeably on ss 64 and 65 of the Close Corporation Act, 26 of 1988 instead of pleading in the alternative. The defendant points out that in order to rely on s 64 there must be declarator made by a competent court that the defendants acted recklessly, negligently and/or fraudulently. The defendants point out further that the plaintiff does not allege in her particulars of claim that such a declarator has been made by a competent court.

[3] The aims or object of the two types of exceptions are mutually exclusive. So are the procedures. Therefore, the two types of exceptions should not be conflated as it happened in the present matter.

[4] The exception that the particulars of claim do not disclose a cause of action goes to the root of the plaintiff's claim. It is a point of law type of exception. Its purpose is to dispose

of the case without incurring unnecessary costs. For that reason, it must be taken first. In the case of the exception that the particulars of claim do not disclose a cause of action, there is no obligation on the party giving his opponent an opportunity to remedy the defect. The exception is taken there and then without notice.

[5] As P T Damaseb¹ says in his works the procedure for adjudication of this type of exception, that is the particulars of claim are vague and embarrassing, if not already stipulated in the case plan order, is for the party raising the exception to seek directions from the managing judge when the exception may be heard.

[6] The exception that the particulars of claim are vague and embarrassing by implication admits that it discloses a cause of action but the excipient feels that the cause of action is not sufficiently and precisely pleaded. The excipient entertains some apprehension that if he or she were to try to plead thereto he or she will be embarrassed by the vagueness and lack of particularity. In *Gauseb v Minister of Home Affairs*², this Court per Mtambanengwe, J held that:

‘The proviso to rule 23(1) [the predecessor to rule 57(1)] is couched in peremptory terms, and the effect is clear; it is a condition precedent to the taking of an exception on the ground that a pleading is vague and embarrassing, that the would-be excipient shall by notice afford his opponent an opportunity of removing the cause of the complaint within 14 days. Where no such opportunity was afforded no such exception can be taken.’

[7] Therefore, unlike with the law point exception with this type of exception there is an obligation on the excipient, as a condition precedent, to afford the other party an opportunity to remove the defect by giving notice to his or her opponent to remove such defect within ten days from the date of notice. It is only after the expiry of such period that the excipient may take an exception should the opponent fail to remedy the defect. An exception is a pleading and cannot substituted by the notice giving notice of exception as the excipient attempted to do in the present proceedings. Rule 57(3) requires the excipient to ‘deliver’ his or her exception after the expiry of 10 days calculated from the date of reply to or 10 days after the due to reply to notice of intention to except.

¹ Petrus T Damaseb *Court - Managed Civil Procedure of the High Court: Law, Procedure and Practice*, p 226.

² 1996 NR 90 (HC).

[8] In the present matter the excipient conflated the two distinct exceptions. This is not permissible for the reasons stated above. In respect of the exception alleging that the particulars of claim are vague and embarrassing, the excipients having given notice of their intention to except failed after the expiry of the notice period to file the exception. Rule 57(3) does not make provision for the notice to substitute the filing of the actual exception. Just like the notice of intention to amend does to substitute the filing of the real amended pleading, be it particulars of claim of plea or counter-claim, likewise the notice of intention to except does not obviate the requirement to file the exception.

[9] For those reasons, the failure by the defendants to file an exception is fatal to their attempt to except to the plaintiff's particulars of claim. I found the procedure adopted to be irregular and for that reason the exception that the particulars of claim are vague and embarrassing is dismissed.

[10] As regards the exception that the particulars of claim do not disclose a cause of action I agree with the defendants that the plaintiff conflated ss 64 and 65 of the Close Corporation Act, 1988 by failing to plead the alleged contravention of the two sections separately or in the alternative. In my view, each section creates its own separate and independent cause of action. Therefore, any cause of action founded on either of the said sections must be pleaded separately or in the alternative. It is correct that in the absence of a declarator the particulars of claim insofar as it relates to s 64 does not disclose a cause of action. However, if the plaintiff were to lead evidence at the trial to prove a cause of action based on s 65 she might succeed.

[11] Having regard to the foregoing, in my view it is not a matter that the particulars of claim do not disclose a cause of action but rather that the failure to plead the cause of action in relation to s 65, independently and separately had the effect of making the cause of action based on s 65 to be vague and embarrassing. This is because the cause of action founded on s 65 is not dependant on the existence of a declarator.

[12] My finding is therefore that the particulars of claim are rather vague and embarrassing as opposed to not disclosing a cause of action, particularly the cause of action founded on s 65 for the reason that it has not pleaded separately and/or in the alternative from the cause of action founded on s 64.

[13] Accordingly, the plaintiff is afforded an opportunity to correct the defect pointed out within the time period stipulated in the order.

Costs

[14] The defendants have partially failed with one part of the exception and partially succeed with the other part of exception. On the other hand the plaintiff succeeds with her opposition to part of the exception but have to amend part of her particulars of claim. Under the circumstances and in the exercise of my discretion I am prepared to award each side half of the costs prescribed by rule 32(11).

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff	Defendants
I Mainga <i>of</i> Inonge Mainga Attorneys, Ongwediva	S Kahengombe <i>of</i> Samuel & Company Legal Practitioners, Ongwediva