REPORTABLE

CASE NO: SA 55/2014

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

HALLIE INVESTMENT 142 CC t/a WIMPY MAERUA **First Appellant**

CHRISTIAAN J J VAN DER MERWE **Second Appellant**

and

CATERPLUS NAMIBIA (PTY) LTD t/a

BLUE MARINE INTERFISH **Respondent**

Coram: DAMASEB DCJ, SMUTS JA and CHOMBA AJA

Neutral Citation: Hallie Investment 142 CC v Caterplus Namibia (Pty) Ltd (SA 55-2014) [2015] NASC (7 December 2015)

Heard: **22 October 2015**

Delivered: **7 December 2015**

APPEAL JUDGMENT

DAMASEB DCJ (SMUTS JA and CHOMBA AJA concurring):

The parties

[1] Caterplus Namibia (Pty) Ltd (the respondent in this appeal and whom I shall hereafter refer to simply as ‘Caterplus’ or ‘the plaintiff’) is the franchisor of Wimpy products. The first appellant (Hallie Investment 142 CC) trades as Wimpy Maerua and is the franchisee of the plaintiff’s Wimpy products. I hereafter refer to the first appellant as ‘Wimpy Maerua’. The second appellant, Mr van der Merwe, is the owner and operator of Wimpy Maerua and I refer to him hereafter as ‘Mr van der Merwe’. The first and second appellant will, where circumstances justify, be referred to collectively as ‘the defendants’.

[2] The present appeal is concerned with three issues:

(a) whether the court *a quo* was correct in dismissing a plea to a claim based on goods sold and delivered under a credit agreement although no exception was taken to the plea;

(b) whether the court *a quo* correctly applied the test for excipiability in dealing with a counterclaim based on and arising from allegations that a cession executed between contracting parties was *contra bonos mores* in that the debtor had ceded its right of action to the creditor and would thus not be able to institute legal proceedings against the creditor or third parties; and

(c) whether the court *a quo* was correct in not allowing the party, whose counterclaim it found as not disclosing any cause of action, to amend its counterclaim, if so advised.

The agreements

[3] Caterplus extended a credit facility to Wimpy Maerua on the latter's application. Mr van der Merwe signed a deed of suretyship binding himself as surety and co-principal debtor in *solidium* with Wimpy Maerua for all debts due by the latter to Caterplus.

[4] In addition, the agreement contained a clause 7.1 (the cession). Under the cession:

> Wimpy Maerua irrevocably and in *rem suam* ceded, pledged, assigned, transferred and made over unto and in favour of Caterplus Namibia, all its rights, title, interest, claim and demand in all and to all claims/debts/book debts of whatsoever nature and description and howsoever arising which Wimpy Maerua as applicant for credit may now or at any time hereafter have against all and any persons, companies, corporations, firms, partnerships, associations, syndicates and other legal personae whomsoever without exception, as a continuing covering security for the due payment of every sum of money which may now or at any time hereafter be or become owing by Wimpy Maerua from whatsoever cause or obligation howsoever arising which Wimpy Maerua may be or become bound to perform in favour of Caterplus.

[5] In order to facilitate Wimpy Maerua selling Caterplus' Wimpy products, the former applied for and was granted credit facilities by the latter under a credit agreement. The credit agreement contained the following important terms:

(a) that payment of Caterplus' account by Wimpy Maerua shall be effected within thirty days of the statement date;

(b) that in the event of Wimpy Maerua defaulting in making payment of any amount that becomes due and owing to Caterplus, the full amount of the former's indebtedness shall immediately become due, owing and payable to the latter; and

(c) a certificate signed by the manager or director of Caterplus reflecting the amount owing by Wimpy Maerua to the former shall be *prima facie* proof of the effects therein stated for the purposes of any action instituted by Caterplus against Wimpy Maerua.

[6] As owner and operator of Wimpy Maerua, Mr van der Merwe executed a suretyship as security and co-principal debtor for Wimpy Maerua's debts in favour of Caterplus.

Claim based on credit agreement and suretyship

[7] In October 2013 Caterplus (as plaintiff) issued summons against Wimpy Maerua (as first defendant) alleging that:

> 'During or about the period between January 2010 until December 2011 the plaintiff sold and delivered goods to the first defendant at the latter's special instance and request. Currently an amount of N$663 103,69 is due, owing and payable by the first defendant to the plaintiff in respect of goods sold and delivered by the plaintiff to the first defendant. A copy of the certificate of indebtedness signed by the manager of the plaintiff is annexed hereto and marked annexure "POC 2".'

[8] Caterplus further alleged that Wimpy Maerua failed to pay the amount due within the 30 day credit period as provided for in the credit agreement. It is alleged that Caterplus cancelled the credit agreement and claims the amount which allegedly became due and payable in respect of goods sold and delivered.

[9] Based on the suretyship, Caterplus also claims against Mr van der Merwe the debt allegedly due and payable by Wimpy Maerua.

The Plea

[10] The defendants delivered a plea to Caterplus' particulars of claim after successfully resisting the latter's application for summary judgment.

[11] The defendants deny in their plea that the credit agreement is enforceable based on allegations they make in their counterclaim alleging that the cession of the right of action is *contra bonos mores*. In addition, any indebtedness and breach of obligations under the credit agreement which would justify its cancellation is denied. The denial is a bare one and probably does not comply with High Court rule 46(2)[1] which states that:

[1] Old rule 22(2).

‘Every plea must-

(a) deal with each and every allegation made by the plaintiff in his or her particulars of claim;

(b) clearly state which allegations by the plaintiff are admitted;

(c) clearly and concisely state all material facts on which the defendant relies in defence or answer to the plaintiff’s claim.’ (Emphasis supplied.)

[12] Caterplus’ allegations concerning goods sold and delivered and the outstanding amount and the defendant’s failure to pay were also met with a bare denial.

[13] Based on the plea, the defendants sought an order that Caterplus’ claim be dismissed or that in the alternative (in view of the counterclaim discussed below) the claim by Caterplus be stayed pending the determination of the counterclaim.

[14] As I will presently demonstrate, no exception was taken to this plea either on the ground that it is vague and embarrassing or as not disclosing a defence. The plea was clearly excipiable for being bare. It is trite that a plea must be clear and unequivocal and answer the point of substance made in the plaintiff’s claim. It must not leave a plaintiff unclear as to what he needs to prove at the trial.[2]

[2] *Lampert–Zakiewicz v Marine & Trade Insurance Co Ltd* 1975 (4) (C) SA 597, cited with approval in

Hangula v Motor Vehicle Accident Fund 2013 (2) NR at 358 (HC) para 17 and

Denker v Cosack and others 2006 (1) NR 370 (HC) at p 375.

The counterclaim

[15] The defendants delivered a counterclaim together with their plea. It is alleged in the counterclaim that Caterplus has a monopoly on selling franchises of the Wimpy Restaurant brand in Namibia and that a franchisee such as Wimpy Maerua is required by Caterplus to sign a credit agreement and the cession in order to obtain supplies of Wimpy products. It is further alleged that the cession operates to deprive Wimpy Maerua of its right to make any claim against Caterplus because any claim the former may have is ceded and transferred to the latter. Similarly, it is alleged that the cession has the effect that Wimpy Maerua cannot sue any third party such as a supplier of Caterplus' franchise products in Namibia. It is alleged that the cession automatically vests in Caterplus any claims for monies due by Caterplus to Wimpy Maerua and that any legal action instituted by it against Caterplus will be met with the defence that Wimpy Maerua has no *locus standi* to sue Caterplus.

[16] The counterclaim also alleges that given the effect that it is alleged to have, the cession is unconstitutional, unenforceable and void because it deprives a party to a contract of the right to claim performance under that contract. It is alleged that the cession offends public morals as it infringes Wimpy Maerua's constitutional right of access to court as all rights to its claims vest in Caterplus which is thereby placed in a position to prevent Wimpy Maerua from exercising any rights against Caterplus or the former's third party debtors.

[17] The defendants then seek an order that the entire agreement, which includes the credit facilities, the suretyship and the cession, be declared invalid, illegal and unconstitutional as being contrary to the public morals of the people of Namibia.

[18] The defendants seek an order for the repayment of all moneys paid by Wimpy Maerua to Caterplus under the allegedly unconstitutional agreement.

The Exception

[19] Caterplus purported to deliver two exceptions to the plea and counterclaim. Although in the *chapeau* it purports to be directed at both the plea and the counterclaim, the exception only relates to the counterclaim. That much was common cause during argument.

[20] The exception states that Wimpy Maerua's counterclaim and defence are 'unsustainable in law' in that public policy favours the utmost freedom of contract which is recognised by Art 16[3] of the Constitution.

[21] Caterplus specifically excepts that the construction placed by Wimpy Maerua on the cession is unsustainable because:

(a) the right to bring a counterclaim is 'at best a procedural right';

[3] '(1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatee; provided that parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibia citizens.'

(b) a general rule which would invalidate a cession or the whole agreement because a debtor alleges that it has a counterclaim ‘has no place in modern commercial law’;

(c) Wimpy Maerua’s ‘debtors’ as defined in the cession ‘do not and cannot’ include any claim which it may have or obtain against Caterplus; a construction buttressed by clause 10 of the agreement which expressly provides for a set off automatically and as a matter of law at the moment reciprocal debts arise between the parties; and

(d) The agreement (in clause 7.2) expressly retains Wimpy Maerua’s right to sue in its own name and collect on Caterplus Namibia’s behalf any debts ceded under the cession.

[22] Therefore, according to Caterplus, the plea and counterclaim lack the necessary averments to sustain the contention that the agreement is contrary to public policy, unconstitutional and therefore null and void.

[23] The relief which Wimpy Maerua seeks in the alternative for the stay of Caterplus’ claim pending adjudication of the counterclaim is also excepted to as being unsustainable on the grounds that the right to a refund and the prayer for stay are:

(a) alleged in extremely vague terms;

(b) can arise only upon a declaration of invalidity of the agreement;

(c) the refund is not founded on any set-off or *mala fide* conduct by Caterplus; and

(d) did not exist at any time of the cession which was incorporated into the agreement.

[24] The exception in relation to the prayer for the refund of the N$6 453 212,56 is that whilst Wimpy Maerua prays for a refund thereof, it fails to tender the return of the goods sold and delivered to it by Caterplus. For that reason, according to Caterplus, the counterclaim lacks the necessary averments to sustain a cause of action for a refund.

[25] The excipient asked for the following orders:

(a) That the exceptions be upheld;

(b) That the defendants' defence be dismissed with costs;

(c) That the defendants' counterclaim be dismissed with costs; and

(d) That judgment be granted against the defendants, jointly and severally, in the amount of N$663 103,69 with interest and costs.

[26] The relief in paragraphs (b) and (d) were plainly not competent if regard is had to the fact that the application for summary judgment was successfully resisted and the defendants were entitled to defend the action and there was no exception taken against the plea on any ground permissible under the rules[4].

[27] A procedure whereby a party seeks judgment in summary form without seeking summary judgment in terms of rule 60 is unknown to our practice. Be that as it may, after the exception to the counterclaim was taken, the matter was set down and argued. The High Court dismissed both the plea and the counterclaim and entered judgment as asked for by Caterplus. The defendants are aggrieved by the outcome and appealed to this court against the whole of the judgment and order of the High Court.

Proceedings in the High Court

[28] The High Court defined the exception before it as being against the plea and the counterclaim on the ground that it was bad in law and not disclosing any defence or cause of action. In so doing the High Court approached the matter as if there was a live issue between the parties as regards the signature on the certificate of indebtedness and the defendants' bare denial of Caterplus' alleged delivery of goods under the credit agreement. The exception challenged the counterclaim in so far as the latter impugned the cession on a constitutional basis. It also challenged the counterclaim to the extent that it sought recovery of the amounts paid under the credit agreement. The one thing the exception did not do

[4] Either on the ground of it being vague or embarrassing or not disclosing a defence, following the procedure set out in rule 57 of the High Court Rules.

was to squarely challenge the plea for its bare denial of liability and the bare denial of the authenticity of the signature appearing on the certificate of indebtedness.

[29] The court *a quo* therefore misdirected itself in adjudicating upon and determining a matter which was not a live issue on the pleadings. The defendants are therefore justified in impugning in this appeal the order of the High Court upholding an exception against the plea which was not raised and proceeding to enter judgment against the defendants for the amount claimed in the combined summons.

[30] What remains for me to consider is the exception which is directed at the defendants' challenge of the cession. Although two exceptions were taken, the court *a quo* recorded that the second exception was not argued and therefore not addressed in the judgment. The second exception is therefore not a live issue in this appeal.

[31] It is necessary to repeat the essence of the challenge to the cession and the answer thereto. The foundational premise is that the effect of the cession is to deprive Wimpy Maerua as cedent of the right to pursue illiquid claims against third party debtors or against Caterplus as cessionary. The argument is that the transfer to the cessionary of the cedent's right of action which has the effect that the latter can prevent the former from approaching court to seek the recovery of debts that are owing to the cedent by the cessionary. It is alleged that by so doing the cession denies Wimpy Maerua the right of access to court guaranteed by Art 12 of the Constitution. Art 12 states:

‘(a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law . . .

. . . .

(e) All persons shall be afforded adequate time and facilities for preparation and presentation of their defense, before the commencement and during their trial, and shall be entitled to be defended by a legal practitioner of their choice.’

[32] The challenge was met in the following way by Caterplus. Freedom of contract militates against interference with an agreement consensually concluded. Caterplus also stated that the issue did not arise because the claim contained in its particulars of claim was for goods sold and delivered under the credit agreement and not on the cession. It also stated that Wimpy Maerua’s ‘debtors’ as defined in the cession ‘do not and cannot’ include any claim which it may have or obtain against Caterplus.

[33] The High Court dealt with the claim that the cession is *contra bonos mores* and in some detail set out the salient features of the present case which the court considered distinguished the present case from the facts of *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A). *Sasfin* was relied on for the proposition that the cession was unconscionable and therefore liable to be invalidated. The High Court was at pains to stress that unlike the present case, it was the cumulative effect of the several onerous and oppressive provisions in *Sasfin* which operated to the prejudice of the debtor which necessitated the agreement in that case being characterised as unconscionable and therefore unenforceable.

[34] The High Court proceeded to consider the question raised in the counterclaim whether the cession was *contra bonos mores* seen against the allegation that the ceding of a right of action by Wimpy Maerua to Caterplus denied the former the constitutional right of access to court. The court considered if the cession amounted to a *pactum commissorium* such as was found to be the case with the offending clause in *Sasfin*. The court considered *Sasfin* to be distinguishable because in that case the creditors were, amongst other vices, entitled without first obtaining any order of court to sell by public auction or private treaty all or any of the claims ceded for such price and on such terms and to such purchasers as the creditors in their sole and absolute discretion deemed fit. The court in *Sasfin* concluded that the impugned clause was open to abuse and left the debtor without recourse against the creditors and could not in the public interest be enforced.

[35] The High Court highlighted the following factors that it considered saved the cession in the present case from unconstitutionality:

(a) the agreement provided for set-off of reciprocal debts;

(b) the certificate of indebtedness operates only as *prima facie* proof of indebtedness; and

(c) generally, the cession was not afflicted by the vices which prevailed in *Sasfin.*

[36] In regard to the first exception, the court *a quo* stated that the purpose of an exception alleging non-disclosure of a cause of action is to avoid the leading of unnecessary evidence at trial. The court reminded itself that at the exception stage it had to assume the correctness of the averments made in the pleading excepted to, unless they are palpably untrue or so improbable that they can be rejected out of hand. The court also accepted that even if the averments of the defendant were accepted as true, the exception would hold if the averments in the counterclaim do not disclose a defence or a cause of action.

[37] The High Court concluded that the present was a case of a defenseless debtor seeking to pursue a counterclaim which did not disclose any cause of action. The court also concluded that there was nothing that could conceivably be amended even if the opportunity was afforded to the defendants to amend. The court therefore chose not to follow the 'invariable practice' of affording a disappointed exceptee the opportunity to amend. In the words of the learned judge:

> '48. An order of this court setting aside the defendants' plea and granting leave to amend, presupposes that there is something which can be amended. In the particular circumstances of this matter there is nothing that can be amended. The counterclaim of the defendants is premised on the very same contention as in the defendants' plea namely that the agreement relied on by the plaintiff is contrary to public policy, void, illegal and unenforceable. Since I have found that the defendants' plea discloses no defence it follows for the same reason that the counterclaim discloses no cause of action.'

As regards the practice of allowing an amendment where an exception is upheld, the learned judge had the following to say:

> '49. I do not at all doubt that the practice of the courts as stated by Corbett CJ . . . is correct, however in this particular case where I have found that the defendants' plea discloses no defence and in view of the fact that the defendants do not dispute the terms of the agreement, do not dispute that the second defendant in writing bound himself as surety and co-principal debtor in *solidium* with the first defendant, and do not dispute that, demand notwithstanding, the defendants have failed to pay the amount claimed by the plaintiff, there is certainly no room for the defendants to amend their plea.'

Grounds of appeal

[38] On appeal, the defendants complain that the High Court never really considered whether the cession deprived Wimpy Maerua of the right of access to court. In so far as the court *a quo* relied on the set-off provision as an ameliorative factor, they complain that the High Court missed the point because the deprivation related to seeking redress for illiquid claims.

[39] The other complaint raised on appeal is that the court *a quo* dismissed a plea which raised a clearly triable issue. The argument goes that the denial of liability, the denial that goods were sold and delivered and the denial that the signature on the certificate of indebtedness was that of Caterplus' manager, cast the *onus* on the latter to prove its case. By granting judgment in the way it did, the complaint goes, the High Court denied the appellants their Art 12 right to a fair trial by not requiring a plaintiff in a civil trial to prove its case.

[40] The further ground of appeal is that the High Court misdirected itself in not following the invariable practice of affording the defendants the opportunity to amend their counterclaim. It is suggested in the appeal grounds that the court *a quo* was 'bound' by the South African decisions of *Group Five Building Ltd v Government of the RSA (Minister of Works and Land Affairs*) 1993 (2) SA 593 (A) at 602D-E and *Rowe v Rowe* 1997 (4) SA 160 (SCA) at 167H.

Is there an extant counterclaim?

[41] Before I can consider if the agreement of cession is *contra bonos mores*, it is necessary to first address Caterplus' rebuttal on appeal that the reliance on a non- existing counterclaim makes the matter academic. If indeed that is so it will be unnecessary for this court to consider the *contra bonos mores* defence.

[42] Courts exist for the ventilation of actual disputes and not to offer advisory opinions on moot questions[5]. Access to court must be seen in that context. The court is not available if a party does not have a justiciable dispute. As was famously put by Innes CJ in *Geldenhuys and Neethling v Benthin* 1918 AD 426 at 441:

> 'After all, the Courts of law exist for the settlement of concrete controversies and actual infringement of rights, not to pronounce upon abstract questions or to advise upon differing contentions, however important.'

[5] *Mushwena & others v Government of the Republic of Namibia & another* (2) 2004 NR 94 (HC) at 102-103.

[43] As counsel for Caterplus pertinently pointed out in their written heads of argument, the counterclaim seeking repayment of the N$653 212,56 is premised solely on the declaration of invalidity of the cession. The counterclaim in relevant part reads as follows:

> '8. [C]lause [7.1] infringes the first defendant's constitutional rights in that it prevents the first defendant from exercising its rights of access to court as all its claims vest in the plaintiff which is thus in a position to prevent the first defendant from exercising any rights, including its claims against any third party/ies and indeed against the plaintiff itself.
>
> 9. The contract relied on by the plaintiff is accordingly contrary to the public policy morals of the people of Namibia and of their Constitution and accordingly the contract should be found to be unenforceable.
>
> 10. The agreement being found to be unenforceable at law same is void.
>
> 11. Since the inception of the agreement . . . the plaintiff has received payments from the first defendant in the sum of N$ 6453 212.56.
>
> 12. The first defendant is, in consequence of the aforegoing, entitled to a refund of all amounts paid to the plaintiff to date.'

Wherefore the defendants pray:

> 1. That [the agreement] be declared to be invalid, illegal and unconstitutional as being contrary to the public morals of the people of Namibia;

2. That the plaintiff be directed to refund to the first defendant all sums received by the plaintiff pursuant to the said invalid, illegal and unconstitutional agreement;

3. . . . .

[44] In other words, Wimpy Maerua seeks to claw back moneys paid to Caterplus for goods received as franchisee under the credit agreement. The basis for that is that the cession is allegedly *contra bonos mores* as it denies it access to court. Wimpy Maerua does not rely on any other basis than the alleged unconstitutionality of the cession which would make it inequitable for Caterplus to have received the payments. Therefore, in the form that the claim is presently formulated, it matters not that the defendant in fact received the goods and profited therefrom. On Wimpy Maerua's pleaded version, the agreement denies it access to court and it matters not that it may or may not have any extant claim cognisable in law against Caterplus or indeed any other third party debtor. That is an extraordinary proposition. If indeed there is any other basis than the alleged unconstitutionality of the cession it was not pleaded and it cannot be inferred in Wimpy Maerua's favour, more so as it is on its strength that a stay of proceedings is sought.

[45] I agree with Caterplus' submission that the relief in the form it is presently framed is academic, absent a live controversy arising from an injustice that would follow from Caterplus having the advantage of the N$6 453 212,56 allegedly paid to it by Wimpy Maerua. In other words, there is no suggestion that but for the

cession the defendant is not indebted to the plaintiff or that it is impoverished by Caterplus' retention of the money paid under the credit agreement. That's what places the counterclaim in the realm of mootness.

[46] What fortifies me in this view is another consideration which was not canvassed by Caterplus. Until such time that Caterplus, upon being sued, seeks to invoke the cession, can it truly be said that the issue of the unconstitutionality of the cession is ripe for determination? What if Caterplus, when sued upon an illiquid claim by Wimpy Maerua, does not rely on the cession to frustrate the former's *locus standi*? I say this against the backdrop of the submission by Caterplus' counsel that the cession does not have the effect of denying Wimpy Maerua *locus* in respect of illiquid claims against itself or third party debtors. Put another way, is the proper time for invoking the *contra bonos mores* defence not when Caterplus purports to prevent Wimpy Maerua access to court by relying on the cession? In that case the court will be able to evaluate the matter against the backdrop of the claim sought to be enforced and the inequity of Caterplus seeking to frustrate enforcement of any illiquid claim Wimpy Maerua may have against it.

[47] I come to the conclusion that Wimpy Maerua has not set out any basis for a counterclaim that is being frustrated by the cession of its claims to Caterplus. At this stage, it is an academic question whether Wimpy Maerua has an extant legally cognisable illiquid claim against either Caterplus or any third party debtor. The notion that one can obtain credit voluntarily and then seek to avoid it by relying merely on an alleged unconstitutionality of an agreement regrettably smacks of

what in some of the cases has been described as a Charter for defenseless recalcitrant debtors.

Citation of authority in the Supreme Court

[48] In the defendants' grounds of appeal it is stated that the High Court was bound to follow the decision in the *Group Five* matter. I hope it does not come as a surprise to counsel for Wimpy Maerua that the courts of Namibia, including the High Court, are not bound by decisions of a foreign court, including the highest courts of South Africa. As this court has made clear in the past, in this jurisdiction we draw inspiration from other jurisdictions with similar legal history as our own if the circumstances justify and not because they bind our courts.[6]

[49] Regrettably, the kind of sentiment expressed by counsel for Wimpy Maerua is responsible for the indiscriminate citation of especially South African decisions in our courts. In the present appeal, counsel cited a staggering 37 decisions of South African courts. Of those 10 (ten) are decisions of the High Courts of South Africa, post Namibia's independence. The High Courts of South Africa are equivalent in status to our High Court. Not much thought had hitherto gone into this indiscriminate citation of especially South African decisions in our courts. The time has come for this court to give guidance on citation of decisions of foreign courts in this court as the apex court.

[50] To start with, there is a palpable danger in citing to the apex court of this country judgments of courts other than its equivalent in a foreign jurisdiction. The

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[6] *Attorney-General v Minister of Justice and 14 others* 2013 (3) NR 806 (SC) at 815 para 8.

lower court may be reversed in due course and this court may then have to revisit the decision in the event that it followed the *ratio* of the foreign lower court. The correct approach is that unless and until a new approach becomes settled in another jurisdiction, decisions of courts inferior to our Supreme Court's counterpart in the foreign jurisdiction do not represent persuasive authority in this court. Secondly, it is a practice to be deprecated to cite in this court a judgment of a foreign inferior court while it is still on appeal. Thirdly, practitioners must take note that the trend internationally is to discourage excessive citation of authority as that only adds to costs and burdens the courts who, after counsel have cited countless number of cases, must wade through it, often without much profit, to come to a decision. If a proposition is trite it really adds nothing to cite excessive authority to support it. If one decision of the apex court can be cited to support a proposition, that must suffice.

[51] I can do no better than empathise with the following lament by Laddie J in *Michael's v Taylor Woodrow Developments* [2001] Ch 493:

> 'There are now significantly more judges, more cases and more databases than there were even two decades ago. Until comparatively recently, this was not a substantial problem. Large numbers of decisions, good and bad, reserved and unreserved, can be accessed. Lawyers frequently feel that they have an obligation to search this material. Anything which supports their client's case must be drawn to the attention of the court. This is so even when it is likely that the court which gave the judgment probably never intended it to be taken as creating a new legal principle. A number of consequences flow from this. First, . . . it is the client who eventually has to pay for all this searching. . . . Further, it is a fact of life that sometimes courts go wrong, or at least not conspicuously right. . . . A poor decision of, say, a court of first instance used to be buried silently by omission from the

report. Now it may be dug up and used to support a cause of action or defence which, without its encouragement, might have been allowed to die a quiet death. Thirdly, it is a common experience that the courts are presented with ever larger files of copied law reports, thereby extending the duration and costs of trials, to the disadvantage of the legal system as a whole. It seems to me that the common law system, which places such reliance on judicial authority, stands the risk of being swamped by a torrent of material, not just from this country but from other jurisdictions. . . .'

[52] And as was aptly observed by Millet LJ in *In Re Freudiana Holdings Ltd*:[7]

'The proper conduct of litigation does not require every point to be taken and every stone to be turned. The proper, efficient and effective conduct of litigation requires all involved to concentrate on the real issues in the case.'

The invariable practice

[53] In a long line of cases predating Namibia's independence the practice of the courts of South Africa (of which the South West Africa Division was part) was to allow the disappointed party to amend where its pleading was successfully excepted to. (See for example, *Furman v Cardew: In re Cardew v Cardew & Furman* 1955 (3) SA 24 (D) at 27A-28A and *Santam Insurance Co Ltd v Manqele* 1975 (1) SA 607 (D) at 609). *Group Five* only followed in that tradition. The practice has been followed by our courts since independence in a number of cases: *Total Namibia (Pty) Ltd v Ruben van der Merwe t/a Ampies Motors* (I 2154/97) [1998] NAHC 12 wherein Strydom JP held that 'in exceptions on the basis that the pleadings do not disclose a cause of action the court should set aside the pleadings and not dismiss the action'; *Erica Beukes & another v Daniël*

[7] The Times, 4 December 1995 para 30.

Petrus Botha & 3 others Case No (P) I 111/2004 2008/07/15; *China Jiangsu International Namibia Ltd v J. Schneiders Builders CC & another* (I 1425/2009) [2010] NAHC 134; *Nedbank Namibia Ltd v Louw* (I 2780/2011) [2012] NAHC 227 and *Holze v Strowitzki* (I 2270/2010) [2013] NAHCMD 373)**.**

[54] The invariable practice was therefore binding on the High Court in the present case, not because of *Group Five* or *Rowe*, but because of its adoption by our own courts. The statement of the rule and its rationale as enunciated by Corbett CJ is eminently sound and should be applied by our courts. Corbett CJ, writing for the Appellate Division (at 602) stated as follows:

> '. . . As far as I am aware, in cases where an exception has successfully been taken to a plaintiff's initial pleading, whether it be a declaration or the further particulars of a combined summons, on the ground that it discloses no cause of action, the invariable practice of our Courts has been to order that the pleading be set aside and that the plaintiff be given leave, if so advised, to file an amended pleading within a certain period of time. Such leave has been granted, in my experience, in cases where judgment has been reserved, irrespective of whether at the hearing of the argument on exception the plaintiff applied for such leave or not. No doubt this was done in anticipation of the possibility that the plaintiff would wish to have leave to amend and in order to obviate the need for a specific application. The important point to be stressed, however, is that until the order setting aside the pleading has been granted, there is no need for the plaintiff to seek leave to amend . . . .' (My emphasis.)

[55] As to the rationale of that approach, Corbett CJ said the following (at 602):

> 'An order dismissing an action puts an end to the proceedings and means that if the plaintiff wishes to pursue his claim on a different pleading he must start de novo. This may have drastic consequences for the plaintiff, particularly where it results in

> the prescription of the claim. In my opinion, it would be contrary to the general policy of the law to attach such drastic consequences to a finding that the plaintiff's pleading discloses no cause of action.'

[56] Corbett CJ's approach in *Group Five* was applied more recently by the Constitutional Court of South Africa in *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) which held as follows:

> 'In upholding the exception, the High Court also ordered the dismissal of the claim. This was unwarranted. The upholding of an exception does not inevitably carry with it the dismissal of the action. Leave to amend the particulars of claim should have been granted.'

[57] I come to the conclusion that the court *a quo* misdirected itself in not following the invariable practice of allowing the defendants the opportunity to amend the counterclaim, if so advised.

Conclusion

[58] In the absence of an exception squarely attacking the plea denying performance by Caterplus under the credit agreement, the matter was not ripe for adjudication. That makes it unnecessary for this court to make any specific order allowing the defendants the opportunity to amend the plea. If Caterplus is minded to exercise its procedural rights in respect of the plea, it remains open for it to do so in terms of the applicable court rule.

[59] The first exception against the counterclaim was well taken. The counterclaim as formulated does not disclose a cause of action and must be set

aside. In keeping with the invariable practice also adopted in this jurisdiction, the defendants must be afforded the opportunity to amend the counterclaim within 15 days of this order.

[60] I am not persuaded by Mr Tötemeyer's submission that the defendants must be condemned in costs on account of their failure to have properly pleaded the defence as contemplated by rule 46. That argument ignores the fact that it was plaintiff's duty to except to the bare denials on the ground that they were vague and embarrassing or did not disclose a defence.

[61] Costs unnecessarily incurred must be paid by the party who occasioned them and a party is required to take such exceptions *in limine* as will dispose of the dispute or to bring proceedings to a speedy conclusion. See *Channel Life Namibia Ltd v Finance in Education (Pty) Ltd* 2004 NR 125 (HC) at p 125E-J and 133A-B.

[62] As far as costs go, the defendants have achieved success in having the judgment entered against them set aside. It is common cause that the defendants had implored the court *a quo* to allow them the opportunity to amend if the exception were upheld. That supplication was not heeded. They are therefore entitled to their costs in that respect both in this court and in the court below.

[63] As regards the exception, we are satisfied that the court did not err in upholding it, albeit for different reasons. Therefore, the costs awarded *a quo* in favour of Caterplus on the exception should not be disturbed. The defendants

have, however, achieved substantial success on appeal in that they will be afforded the opportunity to amend their counterclaim, the very thing that they beseeched the High Court to do. The defendants are therefore entitled to their costs of the appeal.

Order

[64] Accordingly, the following orders are made:

1. The appeal succeeds in part.

2. The order of the High Court dismissing the defendant's defence and granting judgment against the defendants, jointly and severally, for the payment of the amount of N$663 103,69 with interest and costs is set aside.

3. The order of the High Court is substituted for the following order:

    '1. The plaintiff's first exception is upheld;

    2. The defendants' counterclaim is set aside, with costs, to include the costs of one instructing and one instructed counsel.

    3. The defendants are granted leave to amend their counterclaim within 15 (fifteen) days of this order, if so advised.'

4. The appellants are granted the costs of this appeal, to include the costs of one instructing and two instructed counsel.

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DAMASEB DCJ

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SMUTS JA

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CHOMBA AJA

APPEARANCES

APPELLANTS:	L J Morison SC (with him N Ntuli)
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