



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: I 4021/2015

In the matter between:

SURICATE TOWN LODGE CC

1ST PLAINTIFF

MYLENE SIDONIE YERSIN

2ND PLAINTIFF

LAURENT YERSIN

3RD PLAINTIFF

and

BRUNA PROPERTIES & CONSULTING SERVICES CC

1ST DEFENDANT

ALUNZIA BRUNA

2ND DEFENDANT

VINCENT BRUNA

3RD DEFENDANT

Neutral citation: *Suricate Town Lodge CC & 2 Others v Bruna Properties & Consulting Services CC & 2 Others* (I 4021/2015) [2017] NAHCMD 8 (20 January 2017)

Coram: **OOSTHUIZEN J**

Heard: 18 November 2016

Order & Ruling released: 20 January 2017

Flynote: Exception Hearing.

Summary: Plaintiffs filed an amended particulars of claim on 30 August 2016 containing a principal claim (claim 1) claiming the rendering of an account and the

debatement thereof, together with ancillary relief. In the alternative to the principal claim the plaintiffs claim repayment of N\$ 2,027,231.92, which they allege was made in the bona fide and reasonable but mistaken belief that it was owing. The payment, they say, was sine causa alternatively in reasonable error. Claim 2 claims repayment of N\$ 242,500.00 on the same basis as their alternative claim. Claim 3 claims (in the alternative to claim 1 and 2) repayment of N\$2,269,731.92 on the basis thereof that defendants induced payment by intentional or wrongful negligent misrepresentation. Defendants took exception to all of the claims on the basis that it discloses no cause of action, alternatively is vague and embarrassing.

ORDER

Having heard **Mr Mouton** for the excipients, and **Ms De Jager** for the plaintiffs, and having perused the documents filed of record and having considered the submissions of counsel –

IT IS ORDERED THAT:

1. The exceptions are dismissed.
2. The defendants shall pay the costs occasioned by the exceptions on the basis of one instructing and one instructed counsel subject to Rule 32(11) of the Rules of the High Court.
3. The defendants shall file their plea and counterclaim to the amended particulars of claim on or before 24 March 2017.
4. The plaintiffs shall replicate to the plea of the defendants and plea to the defendants counterclaim on or before 7 April 2017.
5. The defendants shall replicate to the plaintiffs' plea to the counterclaim, if any, on or before 13 April 2017.

6. Discovery shall be done in terms of Rule 28 on or before **31 March 2017**.
7. The parties shall file their case management report on or before 20 April 2017.
8. The matter is postponed to Monday, 24 April 2017 at 14h00 for a case management conference.

RULING

OOSTHUIZEN J:

[1] On 12 August 2016 and in chambers a court order was issued subsequent to a meeting with Mr Visser for the plaintiffs and Mr Mouton for the defendants.¹

[2] In that order the plaintiffs were directed to file their amended particulars of claim on or before 31 August 2016 and the defendants were ordered to, if they so intend, take exception to the amended particulars of claim by the 9th of September 2016.

[3] Plaintiffs' filed their amended particulars of claim on 30 August 2016.²

[4] The amended particulars of claim constitutes a document requiring thorough and attentive reading and consideration.

[5] Defendants (excipients) filed a considered exception to the claims made by the plaintiffs on the basis that none of the claims and alternative claims discloses causes of action, alternatively all of it is vague and embarrassing.³

¹ Record, Bundle B, pp 67 and 68.

² Record, Bundle A, pp 7 to 18 and Bundle C, pp 83 and 84.

³ Record, Bundle A, pp 19 to 31.

[6] In *Van Straten NO and Another v Namibia Financial Institutions Supervising Authority and Another*⁴ Smuts JA (with whom Shivute CJ and Hoff AJA concurred) set out the principles governing determination of exceptions thus:

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

[19] Whether an exception on the ground of being vague and embarrassing is established would depend upon whether it complies with rule 45(5) of the High Court Rules. This rule requires that every pleading must contain a 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 identify the case that the pleading requires him or her to meet. Assessing whether a pleading is vague and embarrassing is now to be undertaken in the context of rule 45 and the overriding objective of judicial case management. Those objectives include the facilitation of the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable by saving costs by, among others, limiting interlocutory proceedings to what is strictly necessary in order to achieve a fair and timely disposal of a cause or matter.

[20] The two-fold exercise in considering whether a pleading is vague and embarrassing entails firstly determining whether the pleading lacks particularity to the extent that it is vague. The second is determining whether the vagueness causes prejudice. The nature of the prejudice would relate to an ability to plead to and properly prepare and meet an opponent's case. This consideration is also powerfully underpinned by the overriding objects of judicial case management in order to ensure that the real issues in dispute are resolved and that parties are sufficiently apprised as to the case that they are to meet."

⁴ 2016 (3) NR 747 SC.

[7] The excipients have complied with a court order to file their exception on the 9th of September 2016 and the plaintiffs' contention concerning Rule 57(2) of this Court's Rules in respect of the alleged vague and embarrassing nature of the claims which should be dismissed on the basis that plaintiffs were not accorded 10 days by notice to remove the complaints, will therefore not be considered.

[8] In the principal claim for the rendering of an account and the debatement thereof the plaintiffs have pleaded all the necessary averments constituting their cause of action, and in the alternative have underpinned their damages claim for N\$ 264,421.56 based on their inability to reclaim the VAT charged.

[9] This court is not persuaded that upon every interpretation which the principal claim can reasonably bear, no cause of action is disclosed.

[10] The alternative claim to the principal claim based on payments made sine causa, alternatively upon reasonable error, contains all the necessary averments to disclose a cause of action and the court is likewise not persuaded that upon every interpretation which the alternative claim can reasonably bear, no cause of action is disclosed.

[11] Both the principal claim and the alternative claim is pleaded with such sufficiency that the defendants are not prejudiced in their ability to plead thereto and are thus not vague and embarrassing.

[12] Criticism against alleged lack of particularity which might make a pleading vague is not enough if the excipient is not prejudiced in its ability to plead to the averments made. The excipients bear the onus to show this prejudice, which they did not do.

[13] Claim two likewise contains all the necessary averments to constitute the cause of action. Defendants did not show prejudice in their ability to plead thereto, and it is not vague and embarrassing.

[14] Claim 3 is in the alternative to claims 1 (principal claim) and 2. It is based on negligent misrepresentation. It contains all the necessary averments to constitute the cause of action. Defendants did not show prejudice in their ability to plead thereon, and it is thus not vague and embarrassing.

[15] In coming to the conclusion that none of the defendants complaints concerning the alleged vague and embarrassing nature of the plaintiff's pleadings is good in law, I have also taken cognisance thereof that the case management procedures provide for discovery, witness statements, trial particulars and notices requiring the admissions of facts, all of which aid the parties to prepare properly for trial.

GH Oosthuizen
Judge

APPEARANCES

EXCIPIENTS: Mr Mouton
Instructed by Koep & Partners, Windhoek

PLAINTIFFS: Mrs De Jager
Instructed by ENS AFRICA NAMIBIA (Incorporated as
LorentzAngula Inc.), Windhoek