

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case No: HC-MD-CIV-ACT-CON-2019/03916

In the matter between:

**ARTHUR GEORGE PICKERING**

**PLAINTIFF**

and

**MINISTER OF VETERANS AFFAIRS  
CHAIRPERSON OF VETERANS BOARD**

**FIRSR DEFENDANT  
SECOND DEFENDANT**

Neutral citation: *Pickering v Minister of Veterans Affairs* (HC-CIV- ACT-CON-2019-03916) [2020] NAHCMD 276 (8 July 2020)

**CORAM:** NDAUENDAPO

**Heard:** 2 June 2020

**Delivered:** 8 July 2020

**Flynote:** Practice-Exceptions-Particulars of claim not disclosing cause of action-  
Material facts not disclosed-Exception upheld.

**Summary:** The respondent (Plaintiff) issued summons against the excipients (Defendants) claiming an amount of N\$ 144 400 for damages he allegedly suffered as a result of the failure of the excipients to register him as a veteran in terms of the Veterans Act 2 of 2008 within 60 days of him submitting his application. He submitted the application in January 2013. He was only registered in 2017 and received his payment from July 2017 up to date. The excipients raised four exceptions against the particulars of claim. The only exception is the one stating that the particulars of claim lack averments which are necessary to sustain an action. The other 'exceptions' that the respondents failed to exhaust internal remedy (failure to appeal to the board); limitation of liability of the members of the board; that the claim is overridden are all defenses that can be raised to the particulars of claim and are not exceptions as per the rules.

*Held* that it is not clear from the averments as to when the cause of action, if any, of the respondent arose.

*Held* further that the exception that the particulars of claim lack the necessary averments to sustain a cause of action is upheld and the particulars of claim are set aside.

*Held* further that the respondent is given leave, if so advised, to amend his particulars of claim within fifteen (15) court days, from the date of this judgment.

*Held* further that the second, third and fourth grounds of exceptions are refused.

*Held* further that there shall be no order as to costs.

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### **ORDER**

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1. The first ground of exception is upheld.
2. The plaintiff's particulars of claim are set aside and plaintiff is given leave, if so advised, to file amended particulars of claim within fifteen (15) court days from the 8<sup>th</sup> of July 2020.
3. The second, third and fourth grounds of exceptions are refused.

4. There shall be no order as to costs.

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## JUDGMENT

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NDAUENDAPO, J

### Introduction and background facts

[1] The plaintiff sued the defendants for an amount of N\$144 400 being N\$2 200 per month for 51 months for loss of income as a result of the failure of the defendants to register him as a veteran within a period of 60 days after he submitted his application for registration.

[2] In his particulars of claim, the plaintiff alleges that on or about 15 January 2013, he applied to be registered as a veteran in terms of the Veterans Act 2 of 2008.

The second defendant failed to consider his application within 60 days as per the regulation.

[3] The plaintiff further alleges that after pressure from his lawyers, he was eventually registered as a veteran and received a once off payment of N\$50 000 and thereafter the amount of N\$2 200 per month since July 2017 to date.

[4] The plaintiff further alleges that 'when the second defendant considered the plaintiff's application, the plaintiff's veteran status was confirmed and registered as a result of the application submitted in January 2015.

[5] Plaintiff further states that 'if the application had been processed during 2015, and within 60 days of submitting same, the plaintiff would have been entitled to and would have received the amount of N\$2 200.00 as from March 2015 and not July 2017. The plaintiff in the result has suffered a loss of income in the amount of N\$

144 400 being N\$ 2 200.00 per month for 51 months that the application as (sic) pending and as a direct result of the second defendant's unlawful conduct.'

The excipients (defendants) raised four grounds of exceptions to the particulars of claim.

First Exception: No cause of action is established against the Defendants

[6] 'It is the defendants' case that on proper construction of the Plaintiff's Particulars of Claim, the plaintiff did not suffer any damage or financial loss as a result of the defendants act.

[7] The legal relationship between the plaintiff and the defendants only came into existence from the date of registration and confirmation of plaintiff's status as a veteran. The plaintiff has unambiguously confirmed that soon after registration and confirmation of his status as a veteran he received a once-off payment in the amount of N\$50,000 and has been receiving N\$2, 200 monthly since then to date.

[8] The plaintiff has not established any legal basis for his claim to sustain a cause of action.

[9] The plaintiff vaguely and broadly alleges violation of his constitutional rights and freedom without establishing any basis to justify the allegations of unlawfulness of the defendants. There is simply no material allegations established to show how the defendants unlawfully violated the plaintiff's constitutional rights and freedoms.

[10] Therefore, no basis is established and the particulars of claim do not contain the necessary averments to sustain a cause of action.'

Second Exception: Failure to comply with section 40 of the Veterans Act 2008

[11] 'The plaintiff instituted this civil action against the Minister of Veterans Affairs and the Chairperson of the Veterans Board in terms of the provisions of the Veterans Act 2 of 2008.

[12] The plaintiff failed to exhaust the remedy availed to him under Part VI, Section 40 of the Veterans Act 2008, which provides for the right of appeal to the Veterans Appeal Board. In any event the Veterans Appeal Board is not a party to these proceedings.'

#### Third Exception – The claim is overridden

[13] 'By his own admission in paragraphs 13, 15, 16 of the particulars of claim, plaintiff has already been registered as a veteran, received payment of N\$50 000 at once and thereafter the amount of N\$2 200 per month since July 2017 to date.

[14] It is the defendants' case that the plaintiff is only entitled to receive assistance from the Fund upon having been registered as a veteran by the second defendant. Prior to his registration as a veteran, the plaintiff is not entitled to any assistance by the Fund. The mere submission of an application for veteran's status does not in any way guarantee the plaintiff that his application will be favorably considered and does not automatically entitle him to any payment from the Fund. The granting of veteran status is subject to inquiry and or investigations before the granting of such status can be done.'

#### Fourth exception-limitation of liability

[15] It is stated that in terms of section 26 of the Veterans Act 2 of 2008

'No liability attaches to the Fund, or, any member of the Board, any member of a committee of the Board, any staff member of the Ministry or any other person in respect of anything done or omitted to be done in the bona fide performance of any function or duty in terms of this Act.'

It is further stated that the delay (if any) in registering the plaintiff as a veteran was not intentional but as a result of the backlog of too many applications for veterans status as from 2008 which the second defendant needed to clear up, including the application by plaintiff. The defendants are by law required to conduct inquiry to investigate any matter relating to an application for veteran status. The delay was in the bona fide performance of the defendant's functions and duty in terms of the Veterans Act. They (defendants) can therefore not be held liable'.

#### Submissions by excipients (defendants)

[16] Counsel argued, in summary, that the legal relationship between the plaintiff and defendants came into existence from the date the plaintiff was registered as a veteran. Soon after registration and confirmation of his status as a veteran, plaintiff received a once off payment in the amount of N\$50 000 and has been receiving N\$ 2200 per month since that date.

[17] Counsel further argued that the plaintiff is only entitled to receive assistance from the fund upon having been registered as veteran by the second defendant. Prior to registration, the plaintiff is not entitled to any assistance from the fund. The mere submission of the application for veterans status does not in any way guarantee the plaintiff that his application will be favorably considered and does not automatically entitle him to any payment from the fund. The granting of the veteran status is subject to inquiry and or investigations before the granting such status can be done. Accordingly, plaintiff particulars of claim do not contain the necessary averments to sustain a cause of action.

[18] On the second exception, counsel argued that s 40 of the Veterans Act 2 of 2008, provides for internal remedy-the right to appeal.

S 40 (1) provides:

'Any person aggrieved by a decision or an act of the Board relating to-

(a) An application for registration as a veteran.

(b) Determination of amount of assistance, funding of a project or any other benefit granted to him. May within 90 days after notification in writing of the decision of the Board, appeal against such a decision.'

Counsel submitted that the plaintiff should first have appealed to the appeals Board, if he was unhappy with the decision of the Board.

[19] Counsel further argued that in terms of s26 of the Veterans Act, no liabilities attaches to the fund.

S 26 provides:

'No liability attaches though the Fund, or, any member of the Board, any member of the committee of the Board, any staff member of the Ministry or any other person in respect of anything done or omitted to be done in the bona fide performance of any function or duty in terms of this Act.'

[20] Counsel argued that the delay (if any) in registering the plaintiff was not intentional but was as a result of the backlog of too many applications for veterans status as far as from 2008 which the second defendant needed to clear up, including the application by the plaintiff. The defendants are by law entitled to conduct inquiry to investigate any matter relating to an application for veteran status. The delay was bona fide performance of the defendant's functions and duty in terms of the Veterans Act.

#### Submissions by the respondent (plaintiff)

[21] As far as the first ground of exception is concerned, counsel, in his written heads, argued that: 'the defendants mistakenly interpret the relationship between itself and the plaintiff. If taken on the construction of the plaintiff, the relationship in fact commenced the instant the plaintiff submitted an application for determination. And that the relationship is being governed by the rules of natural justice and the regulations.' The plaintiff had the expectation that the defendants would comply with the law and approve his application within 60 days. But that did not happen.

[22] Relying on the *Vumazonke*<sup>1</sup> matter, counsel argued that ‘there is a prima facie relationship, cause, and liability for which the defendants have to account. The defendants argue as if its actions have been condoned or found to be bona fide by a competent court, when it clearly amounts to assertions and attempts at explanations to excuse the prima facie mala fides. The plaintiff in depth dealt with the retrospectivity alleged by the defendant which principles amounts to conflation and misrepresentation.’

[23] ‘The reference by the defendants to article 21, is an issue that raises eyebrows, as it says, in a democratic society. The defendants fail to mention or chooses to omit the qualifying provision for the limitations it alludes to, which is,

“the fundamental freedoms referred to in Sub-Article (1) hereof shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said sub-article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.” (Own emphasis added)

[24] Counsel argued that:

‘The defendants negligently misrepresent the Article in its entirety and fail to recognize how the defendants failure to act was in line with the Act and Regulations, nor that its omission to act was, in the interest of the sovereignty and integrity of Namibia, the national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. This in itself is cause for concern in a democratic society. The plaintiff has shown in these heads the remedies alluded to by the defendants, and available in terms of the Act, and which cannot address the specific evil which occurred in this case. Notwithstanding, the defendants cannot reasonably argue that the act supersedes the Constitution, when the violation in terms of the act amounts to the breach of a right found in constitutional and common law administrative justice. The trial court is empowered to grant the remedy it deems necessary, should it find for the plaintiff, alternatively, fashion the same, should it find that there is no applicable remedy, but that the violation had in fact occurred.’

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<sup>1</sup> *Vumazonke v MEC for social Development*, Eastern Cape 2005(6) SA 229 (SE).



[25] On the issue as to when the cause of action arose, counsel submitted that plaintiff in his particulars 'details the crux of his being (sic) the delayed determination of his application and his subsequent actions. The defendants in turn acknowledge the same. The decision was made unreasonably late. What is the crux is not the decision but that the decision was made later than reasonably expected and as such made the plaintiff to suffer damages.'

[26] Counsel argued that, if the particulars of claim do not disclose a cause of action, the plaintiff be allowed an opportunity to amend same. He relied on *Sammys Group (Pty) Ltd*<sup>2</sup> where the court refers to the following passage from Erasmus Superior Court Practice, as instructive:-

'Where the exception is successful, the proper course is for the court to uphold it. When an exception is upheld, it is the pleading to which exception is taken which is destroyed. The remainder of the edifice does not crumble. The upholding of an exception to a declaration or a combined summons does not, therefore, carry with it the dismissal of the action. The unsuccessful party may then apply for leave to amend his pleading. It is in fact the invariable practice of the courts in cases where an exception has been taken to an initial pleading that it discloses no cause of action, to order that the pleading be set aside and the plaintiff be given leave, if so advised, to file an amended pleading within a certain period of time. It has been held that it is doubtful whether this practice brooks of any departure; in the rare case in which a departure may be permissible, the court should give reasons for the departure.'

### Discussion

[27] In terms of Rule 57 of the Rules of the High Court, an exception may be raised where a pleading is; (a) vague and embarrassing (b) the pleading lacks averments which are necessary to sustain an action or defense.

[28] The excipients (defendants) raised four grounds of exceptions to the particulars of claim of the plaintiff. In my considered views, only the first ground of exception, that the pleadings lack the necessary averments to sustain a cause of

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<sup>2</sup> *Sammys Group (PTY) LTD v Meyburgh(NO) & Others* (SC 194/13) [2015]ZWSC 45[22 July 2015].

action, is a ground of exception in terms of Rule 57 of the Rules of the High Court. The other three grounds of 'exceptions' are not exceptions, but defenses that can be raised against the plaintiff's case.

[29] In terms of Rule 45 (5) every pleading 'must contain a clear and concise statement of the material facts on which the pleader relies for his or her claim.' It is generally accepted that the plaintiff's particulars of claim must disclose a cause of action. In *McKenzie*<sup>3</sup> the court defined a cause of action as follows:

'Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'

[30] In *Van Straten NO*<sup>4</sup> the Supreme Court said:

'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 emphasized. 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.'

[31] I will now deal with the first ground of exception (no cause of action is disclosed), herein below. In the particulars of claim, the plaintiff states that he applied on 15 January 2013 to be registered as a veteran in terms of the Veterans Act 2 of 2008. The second defendant failed to consider the application within 60 days as per the regulations under the Act. The plaintiff made several enquiries, but received no response. Again on 1 July 2015 he addressed a letter to the second defendant to enquire about the status of his application, but no response was forthcoming. Following the intervention of the Legal Assistance Centre on behalf of the plaintiff, the plaintiff was registered as a veteran and received a once off payment of N\$50 000 and thereafter the amount of N\$2 200 per month since July 2017 to date.

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<sup>3</sup> *McKenzie v Farmer's Co-operative Meat Industries Ltd* (1922) AD 16 at 22.

<sup>4</sup> *Van Straten NO and Another v Namibia Financial Institutions and Another* (2016) (3) NR 747(SC).

[32] The plaintiff further states that if the application had been processed **during 2015**, and within 60 days of submitting same, the plaintiff would have been entitled to and would have received the amount of N\$2 200 as from **March 2015** and not **July 2017**. The plaintiff further states that he suffered a loss of income in the amount of N\$114 400 being N\$2 200, per month for 51 months that the application was pending and as a result of the second defendant's unlawful conduct.

[33] From the particulars of claim, it is not clear how the claim amount of N\$114 400 is calculated and arrived at. It is stated that he would have received the amount of N\$2 200 from **March 2015** and not July 2017. The period between **March 2015** and **July 2017** is not **51 months** and the amount N\$2 200 per month for that period does not equate to N\$114 400. In the letter of demand (annexure "AGP 5"), it is stated that the amount of N\$114 400 is the total amount of N\$2 200 per month from **March 2013** until **July 2017**, which is **51 months**. The claim period in the particulars of claim therefor, differ from the claim period in the letter of demand.

[34] There is also contradictory averments as to when the cause of action, if any, arose. Counsel for the respondent (plaintiff) submitted in his written heads, that plaintiff admits that he submitted his application in 2015. The **January 2013** reference was '**a typographical error.**' That submission is patently wrong. The application for registration was submitted by the plaintiff on 15 January 2013 (Annexure AGP1). On 1 July 2015 the plaintiff wrote a letter to the PS of veteran affairs, styled: *status of application*. In that letter applicant states: 'In **January 2013** I submitted my application in terms of the Veterans Act...' The letter is annexure 'AGP2.' So, it is evident that the application was submitted on 15 January 2013. It is also clear that the application was not dealt with within 60 days as required by the regulations of the Veterans Act. The application was only considered in 2017 when the applicant was registered as a veteran and received his payment in July 2017.

[35] Counsel further submitted in the written heads that the cause of action arose in 2017. That averment is not made in the particulars of claim. Again, if it is correct

that the cause of action arose in 2017, how is the amount of N\$114 400 and the 51 months calculated and arrived at?

[36] The particulars of claim do not disclose the date (a material fact) when the cause of action arose and how the claim amount of N\$ 144, 400 is calculated and arrived at. If the application was submitted in January 2013 and it was not finalized within 60 days as per the regulation, is it not that the cause of action arose in March 2013 as per the letter of demand (AGP5). If so, has the claim not prescribed?

[37] In addition, the respondent (Plaintiff) admits that after he was registered as a veteran, he received his payment and continues to do so to date. Given that, is there a legal basis for a claim for damages? Accordingly, the particulars of claim lack the necessary averments to sustain a cause of action. The first exception must accordingly succeed.

[38] The other three grounds of 'exceptions' are defenses or can be raised as special pleas to the particulars of claim. I say so for the following reasons: The second 'exception' is stated as a failure to exhaust appeal proceedings by the plaintiff. That has nothing to do with the particulars being vague or embarrassing or not disclosing a cause of action. It is a defense or a special plea. The third 'exception' is stated as 'the claim is overridden.

'Again, that is not what the Rule 57 requires in order to raise an exception. That can be raised as a defense. The fourth 'exception' is stated as limitation of liability. Defendants state that in terms of s 26 of veterans Act 2 of 2008 'No liability attaches to the Fund, or any member of the Board, any of a committee of the Board, any staff member of the Ministry or any other person in respect of anything done or omitted to be done in the bona fide performance of any function or duty in terms of this Act.' That is clearly a defense to the claim of the plaintiff.

[39] In *Group Five Building Ltd*<sup>5</sup> the court held that:

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<sup>5</sup> *Group Five Building Ltd v Government of RSA* 1993(2) SA at 593 at p 602C.

'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 does not disclose a 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.'

I agree with the *dictum* expressed above, as the correct approach to be followed.

[40] For all those above mentioned reasons, I make the following order:

Order:

1. The first ground of exception is upheld.
2. The plaintiff's particulars of claim are set aside and plaintiff is given leave, if so advised, to file amended particulars of claim within fifteen (15) court days from the 8<sup>th</sup> of July 2020.
3. The second, third and fourth grounds of exceptions are refused.
4. There shall be no order as to costs.

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**G N NDAUENDAPO**  
**Judge**

**APPEARANCES:**

**FOR THE PLAINTIFF**

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**FOR THE DEFENDANT**

Mr M Kashindi  
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