

“ANNEXURE 11”

Practice Direction 61

IN THE HIGH COURT OF NAMIBIA

Case Title: <i>ADIDAS (South Africa) (Pty) Ltd v Roland Donovan Jacobs T/A Streethouse Namibia</i>	Case No.: HC-MD-CIV-ACT-CON-2019/02339
	Division of Court: High Court (Main Division)
Heard/tried before: Honourable Mr Justice B Usiku J	Date of hearing: 13 February 2020
	Delivered on: 06 March 2020
Neutral citation: <i>ADIDAS (South Africa)(Pty) Ltd v Roland Donovan Jacobs T/A Streethouse Namibia</i> (HC-MD-CIV-ACT-CON-2019/0239) [2020] NAHCMD 81(06 March 2020)	
The Order: Having heard Mr Haraseb , on behalf of the Plaintiff and Mr Naude , on behalf of the Defendant and having read documents filed of record: IT IS ORDERED THAT: 1. The defendant’s application for security for costs is struck from the roll for non-compliance with the provisions of rule 32(9) and (10). 2. The defendant is ordered to pay the plaintiff’s costs occasioned by plaintiff’s opposition to the application for security for costs.	

3. The defendant's first, third and fourth grounds of exception are dismissed. The defendant is ordered to pay the plaintiff's costs occasioned by opposition to the first, third and fourth grounds of exception.
4. The defendant's second and fifth grounds of exception are upheld on the basis that the plaintiff's particulars of claim are vague and embarrassing. The plaintiff is ordered to pay the defendant's costs occasioned by the second and fifth grounds of exception.
5. The applicant is granted leave to amend its particulars of claim, if so advised, within 15 days of this order.
6. The matter is postponed to 22 April 2020 at 15:15 for case planning conference.
7. The parties must file a joint case plan or on before 15 April 2020.

Reasons: Practice Direction 61(9)

Introduction

[1] Presently before court are two interlocutory matters launched by the defendant. The first one is an exception delivered by the defendant on the ground that the particulars of claim disclose no cause of action, 'alternatively vague, embarrassing, alternatively and is excipiable'. The second one is an application for security for costs on the ground that the plaintiff is a peregrinus of this court and has no attachable immovable property in Namibia.

[2] The aforesaid exception and application for security for costs are opposed by the plaintiff. The plaintiff has raised two points in limine, namely: that the defendant has not complied with the provisions of rule 32(9) and (10) before launching the application for security for costs, and that the defendant has filed a rule 32(10) late in respect of both the exception and the application for security for costs.

[3] The defendant contends that it has complied with the provisions of rule 32 (9) in

respect of the application for security for costs, but only filed the rule 32(10) report on 12 November 2019 instead of the 8 November 2019 deadline. And that the defendant seeks condonation for the one court day late filing of the rule 32(10) report.

[4] In regard to the exception, the defendant acknowledges that his rule 32(10) was filed on 12 September 2019 instead of the 30 August 2019 (directed in the court order) and that the defendant requests condonation

Whether there was compliance with rule 32(9) and (10) before the defendant launched the application for security for costs

[5] It is common cause that the court order dated 17 October 2019 directed the defendant to comply with rule 32(9) and (10) regarding the application for security for costs, on or before 8 November 2019.

[6] It is also common ground that on Thursday 07 November 2019, the defendant, purportedly in an attempt to comply with the aforesaid court order, addressed a letter to the plaintiff's attorneys, in the following terms, in part:

'Dear Sir/Madam,

RE: ADIDAS (SOUTH AFRICA) (PTY) LTD // R.D. JACOBS T/A STREETHOUSE NAMIBIA CASE NO. HC-MD-CIV-ACT CON-2019/02339

We refer to the above matter and the to the court order dated 17 October 2019 and hereby engage you again to inform you for purposes in terms of Rules 32(9) and (10), that the Defendant intends to bring an Application for an order that such Security of N\$ 150,000.00 be given on a date to be determined by the court, alternatively that the plaintiff's claim be dismissed with costs, due to the non-compliance with the defendant's Notice for Security for Costs in terms of Rule 59(1) dated 29 August 2019.

We are also refer you to and regard our engagement with yourselves in paragraph 3 of the joint status report dated 10 October 2019 as a proper and further demand by our client for your client to comply with the Notice of Security for costs dated 29 August 2019, and to which you did not respond nor did you furnish the requested Security for Costs of N\$ 150,000.00.

Should your client not undertake irrevocably to furnish the Bond of Security in the amount of N\$ 150,000.00 by tomorrow, 08 November 2019 at 16h00, we hold instructions to proceed with the aforesaid application on or before 15 November 2019.

Yours faithfully'

[7] The defendant responded to the abovestated letter the following date, remonstrating that such letter does not amount to a genuine attempt to resolve the matter amicably, as contemplated under rule 32(9). In addition the defendant denied liability to pay security for costs.

[8] On 13 November 2019 the defendant filed a rule 32(10) report in the following terms, in part:

'Defendant's rule 32(10) report:

.....

Pursuant to the court order dated 17 October 2019, the defendant herewith reports as follows to the steps taken to find an amicable resolution before delivering his Application for security for costs for further adjudication to the Honourable court:

1. On 07 November 2019, the defendant's legal practitioners forwarded the attached letter dated 7 November 2019 to the plaintiffs attorneys of record, the contents whereof are reiterated herein and is marked "A"
2. On 08 November 2019, the plaintiff's attorneys of record sent the attached letter to the defendant's attorneys which is self-evident and wherein no undertaking or confirmation to pay the N\$ 150,000.00 Security for costs was made, as requested. Same is attached hereto marked "B".
3. ON 12 November 2019, the defendant's attorneys of record responded to the plaintiff's aforesaid letter of 08 November 2019, which letter is attached hereto as "C".
4. The Defendant reports, in so far as it is still necessary, that no amicable resolution could be reached on the intended Application for security for costs and therefore will proceed to file the formal Application in terms of Rule 59(5) on or before 15 November 2019 for adjudication by the Honourable court.'

[9] It is thus apparent that the search for amicable resolution made by the defendant before launching the application for security for costs, is through the letter which the

defendant addressed to the plaintiff on 7 November 2019. The defendant states that the plaintiff's letter dated 8 November 2019 disputing liability to pay security for costs, only reached the defendant on Monday 11 November 2019. And it appears that the defendant contends that the efforts to seek amicable solution to the dispute between the parties failed when the defendant received the letter from the plaintiff dated 8 November 2019.

[10] The question now is whether the steps taken by the defendant in this matter are sufficient to satisfy the requirements of rule 32(9).

[11] As it appears from the defendant's letter dated 7 November 2019 quoted above, its gist is that it demands that the plaintiff complies with the defendant's notice for security for costs and warned that should there be no compliance "by tomorrow" at 16h00 the defendant shall launch his application on or before 15 November 2019.

[12] In *Bank Windhoek Limited v Benlin Investment CC HC-MD-CIV-CON-2016/03020[2017] NAHCMD 78 (15 March 2017)*, Masuku J held that a letter written by the plaintiff in that case, prior to the launching an application for summary judgment, could not pass, as a genuine attempt to settle the matter amicably. The learned judge stated that the mere writing of the letter may be the precursor to a meeting between the parties, however the letter initiating the meeting cannot be an end in and of itself.

[13] I am in the agreement with the sentiments expressed above. I am of the opinion that a letter requesting a party to make an undertaking to pay security for costs "by tomorrow", is not sufficient initiative by itself, for the search of an amicable resolution of a dispute contemplated under rule 32(9). A letter with a content as the one we are concerned with, sounds more like an ultimatum and not as initiative for the search of an amicable resolution within the context of rule 32(9). What is sufficient initiative for the purpose of rule 32(9) will vary from one case to another, depending on the peculiar facts of each case. What is clear is that, there should be a clear intention on the part of the applicant to make serious effort to engage the respondent in the process of attempting to resolve the dispute amicably. In the present matter, the defendant has not demonstrated such serious intention.

I therefore find that there was no compliance with the provisions of rule 32(9) and (10).

[14] For the foregoing reasons, the application for security for costs stands to be struck from the roll with costs.

[15] In regard to the defendant's late filing of the rule 32(10) in respect to the exception, I find that there was compliance with rule 32(9). The rule 32(10) report was filed prior to the filing of the exception and the delay in the filing of the report was not inordinate in the circumstances. The late filing of the rule 32(10) in respect of the exception is therefore condoned.

The defendant's exception

[16] As stated earlier, the defendant excepts to the particulars of claim that they do not disclose a cause of action 'alternatively are vague, embarrassing alternatively and is excipiable.' The defendant has raised five grounds of exception.

The legal principles

[17] The legal principles regarding exceptions were succinctly spelt out in *Van Straten and Another v Namibia Financial Institutions Supervisory Authority and Another* 2016 NR 747 in the following terms:

'[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 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.

[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.'

[18] The foregoing principles apply with equal force to the present matter.

Application of the legal principles to the present matter

First ground of exception

[19] In his ground of exception the defendant argues that the plaintiff did not properly plead a written agreement or contract relied on, as the Credit Application Form attached as Annexure "A" was only signed by the defendant and was not approved by the plaintiff ex facie Annexure "A".

[20] The above ground of exception has no merit, as Annexure "A" bears two signatures: one signature by the defendant signed over the words 'customer signature', dated 18 May 2000 and another signature by or on behalf of the plaintiff signed over the words 'agent signature' dated 19 May 2000. The first ground of exception therefore stands

to be dismissed.

Second and fifth grounds of exception

[21] Under his second ground of exception the defendant contends that the particulars of claim do not allege who, on behalf of the plaintiff, accepted or approved the alleged Credit Application and when it was approved.

[22] In the fifth ground of exception the defendant argues that paragraph 8 of the particulars of claim is vague and embarrassing as it does not allege or state during what period the products/goods were ordered and/or when same were delivered to the defendant.

[23] The relevant parts of rule 45(5) provides as follows:

'Every pleading mustcontain a clear and concise statement of the material facts on which the pleader relies for his or her claim, defence or answer to any pleading, with sufficient particularity to enable the opposite party to reply.....'

[24] Rule 45(7) provide that:

'A party who in his or her pleading relies on a contract must state whether the contract is written or oral and when, where and by whom it was concluded and if the contract is written a true copy thereof or of the part relied on in the pleading must be annexed to the pleading.'

[25] It is apparent that the particulars of claim state that the parties concluded the agreement on or about 19 May 2000, at Windhoek. The particulars of claim are silent on who represented the plaintiff when the aforesaid contract was concluded.

[26] The plaintiff claims against the defendant an amount of N\$ 2,002,039.08. The defendant contends he is not able to plead to the globular amount as the plaintiff fails to allege the period during which the goods were sold and delivered.

[27] It follows from the provisions of rule 45 that the plaintiff must plead facts with sufficient particularity to enable the defendant to reply thereto. I am of the opinion that the particulars of claim are indeed vague and embarrassing premised on the grounds advanced by the defendant under the second and fifth grounds of exception. The second and fifth grounds of exception stand to be upheld.

Third ground of exception

[28] In respect of the third ground of exception the defendant argues that paragraph 5 of the particulars of claim alleges that the General Conditions of Sale would become the written agreement between the parties upon the granting of the application (Annexure "A"). Annexure "A" was signed by the defendant on 19 May 2000. However, the second part of Annexure "B" (the Terms and Conditions of Sale) is dated 2016. The defendant contends that such document could not have existed if it was only dated in 2016. The defendant argues that the particulars of claim are vague and embarrassing on that account.

[29] It appears from the particulars of claim that the agreement including Annexure 'B' was concluded on 19 May 2000. An exception that a pleading is vague and embarrassing is not directed to a particular paragraph within a cause of action, it goes to the whole cause of action which must be demonstrated to be vague and embarrassing. In my view the mere fact that a date appearing from a document, which is different from a date alleged in a pleading, does not per se render the pleading vague and embarrassing. In any event, even if the particulars of claim were vague and embarrassing on that account, I am not persuaded that the defendant would be seriously prejudiced if the offending pleading were allowed to stand. For the foregoing reasons, the defendant's third ground of exception stands to be dismissed.

Fourth ground of exception

[30] In his fourth ground of exception, the defendant contends that Annexure "B" also purports to be a deed of suretyship and is not stamped in terms of the Stamp Duties Act (No

15 of 1993) and therefore may not be used or tendered in evidence or made available in any court.

[31] The plaintiff argues that the defendant's contention on this aspect has no merit, as an unstamped document may be stamped retrospectively.

[32] I agree with the submission made by the plaintiff above. At the hearing of the matter, before judgment is given, the plaintiff would have to show cause why the court should permit it, in terms of the proviso to section 12 of the Stamp Duties Act, to have the instrument stamped and be made available. At this early state of the pleadings, the agreement has not yet been placed in evidence and the admissibility thereof on the ground of it being unstamped cannot be adjudicated upon.¹ The exception based on Annexure "B" being not stamped is, therefore, without merit and stands to be dismissed with costs.

[33] In the result and for reasons set out above, I make the following order:

1. The defendant's application for security for costs is struck from the roll for non-compliance with the provisions of rule 32(9) and (10).
2. The defendant is ordered to pay the plaintiff's costs occasioned by plaintiff's opposition to the application for security for costs.
3. The defendant's first, third and fourth grounds of exception are dismissed. The defendant is ordered to pay the plaintiff's costs occasioned by opposition to the first, third and fourth grounds of exception.
4. The defendant's second and fifth grounds of exception are upheld on the basis that the plaintiff's particulars of claim are vague and embarrassing. The plaintiff is ordered to pay the defendant's costs occasioned by the second and fifth grounds of exception.

5 The applicant is granted leave to amend its particulars of claim, if so advised, within 15

¹ Miller v Prosperity Africa Holdings (pty) Ltd (I218/2010) [2013] NAHCMD 255 (17 September 2013).

days of this order.

6 The matter is postponed to 22 April 2020 at 15:15 for case planning conference.

7. The parties must file a joint case plan or on before 15 April 2020.

Judge's signature	Note to the parties:
	Not applicable
Counsel:	
Plaintiff	Defendant
Ms GK Losper Instructed by ENSafrica Namibia Windhoek	Mr A Naude Instructed by Dr Weder Kauta and Hoveka Inc. Windhoek