

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: Katima Mulilo Town Council and Zambezi Arts And Cultural Association	Case No: HC-MD-CIV-ACT-OTH-2019/03110 Division of Court: Main Division Heard on: 11 May 2021
Plaintiff	Defendant
Heard before: Honourable Mr. Justice Usiku, J	Delivered on: 11 May 2021
Neutral citation: <i>Katima Mulilo Town Council v Zambezi Arts And Cultural Association</i> (HC-MD-CIV-ACT-OTH-2019/03110) [2021] NAHCMD 224 (11 May 2021)	
Order: <ol style="list-style-type: none">1. The plaintiff's first, second and fourth grounds of exception, are upheld.2. The defendant is granted leave to amend its counterclaim, if so advised, within 15 days of this order.3. The defendant is ordered to pay the costs of the exception.4. The matter is postponed to 30 June 2021 for additional case planning conference.5. The parties shall file a joint case plan on or before 23 June 2021	
Reasons for order:	
USIKU, J:	

Introduction

[1] This is an exception raised by the plaintiff to the defendant's counterclaim, on the basis that the counterclaim discloses no cause of action or alternatively, is vague and embarrassing, alternatively excipiable.

Background

[2] In July 2019, the plaintiff instituted an action for the eviction of the defendant from certain premises described as Erf No. 338, Katima Mulilo. The defendant defends the action, filed plea and launched a counterclaim. It is to this counterclaim that the plaintiff raises the present exception.

[3] In the exception the plaintiff prays for an order that the exception be upheld with costs and that the defendant's counterclaim be dismissed, alternatively the defendant be afforded an opportunity to amend its counterclaim. The plaintiff further prays that the costs order should not be subject to the limitation imposed by rule 32(11).

[4] The plaintiff has raised four grounds of exception.

Legal principles relating to exceptions

[5] Where an exception is taken on the ground that no cause of action is disclosed, two aspects are considered for the purposes of determining the exception, namely:

- (a) the facts alleged in the pleading in question are taken as correct; and
- (b) the excipient bears the onus to persuade the court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed.¹

[6] An exception taken against a pleading on the grounds that it is vague and embarrassing, strikes at the formulation of the cause of action and not its legal validity.² Vagueness amounting to embarrassment and embarrassment resulting in prejudice must be shown.

[7] Rule 45(4) requires every pleading to contain a clear and concise statement of the

¹ *Van Straten NO and Another v Namibia Financial Institutions Supervisory Authority and Another* 2016 (3) NR 747 SC.

² *Trope v South African Reserve Bank* 1993 (3) SA 264 at 269.

material facts on which the pleader relies for his/her claim or defence, with sufficient particularity, to enable the opposite party to reply thereto. The requirement for 'a statement of material facts' requires the pleading to disclose a cause of action.³ The term 'cause of action' is defined as 'every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his/her right to the judgment of the court.'⁴

[8] Where a party makes more than one claim in the same particulars of claim, it implies that the plaintiff is relying on more than one cause of action. The material facts in respect of each cause of action should be pleaded separately and in such manner as to enable the other party to reply thereto.⁵

[9] When considering exceptions a court is inclined to look benevolently at pleadings, so that substantial justice need not yield to technicalities.⁶

The defendant's counterclaim

[10] In the counterclaim, the defendant sets out a main claim and two alternative claims.

[11] In respect of the main claim, the defendant pleads that in or about June 1988 the Mafwe Traditional Authority allocated some customary land rights in respect of the property (the subject of the dispute) to the then Caprivi Arts and Cultural association, then an unincorporated voluntary association. At the time of the allocation, the property had improvements effected by one Gert Visagie, who donated the improvements to the defendants. In or about May 2014 the Association changed its name to Zambezi Arts and Cultural Association. In or about 2016 the Association was incorporated in terms of Section 21 of the Companies Act 28 of 2004. In or about 1990 the property became the property of the Government of Namibia. During 1995 the property ceased to be communal land, when Katima Mulilo was declared a town in terms of the Local Authorities Act, 23 of 1992. The plaintiff is the registered owner of the property. In terms of Schedule 5(3) of the Namibian Constitution, the rights of the defendant in the property survived the change of ownership in the property from the Government to Katima Mulilo Town Council.

[12] The defendant further pleads in the counterclaim that the plaintiff will not suffer prejudice,

³ *Makgae v Sentraoer (Koöpertief) Bpk* 1981 (4) SA 239 at 244.

⁴ *McKenzie v Farmers' Cooperative Meat Industries Ltd* 1922 AD 16 at 23.

⁵ *Roberts Construction Co Ltd v Dominion Earthworks (Pty) Ltd* 1968 (3) 255 at 263.

⁶ *Alphedie Investments (Pty) Ltd v Greentops Ltd*. 1975 [1] SA 161 at 162.

injustice or loss, if the plaintiff is ordered to enter into an irrevocable 99 year lease for a nominal rental of N\$1.00 per annum with the defendant, which lease is to be registered by the Registrar of Deeds in terms of the Deeds Registries Act, 47 of 1937.

[13] The defendant pleads in respect of the first alternative claim that the plaintiff will suffer no prejudice, injustice or loss if the Registrar of Deeds is ordered to register the “rights” of the defendant in terms of any provisions of s 3 of the Deeds Registries Act, whichever provision the court deems appropriate.

[14] In respect of the second alternative claim the defendant pleads that during or about 1995, when the plaintiff became owner of the property, the defendant's rights to the property and the improvements on the property were expropriated without compensation contrary to article 16(1) and Schedule 5(3) of the Namibian Constitution. The improvements on the property are valued at N\$41 359 500. In support of the value of the improvements, the defendant attached to the counterclaim a Valuation Certificate under the hand of the Chief Executive Officer of the Katima Mulilo Town Council

[15] The defendant therefore prays for an order in the following terms:

‘1. That the Plaintiff is ordered to enter into an irrevocable 99 year lease for a nominal rental amount of N\$1.00 (One Namibian Dollar) per annum with the Defendant, which is to be registered by the Registrar of Deeds in terms of the Deeds Registries Act 47 of 1937.

Alternatively

2. That the Registrar of Deeds is ordered to register the rights of the Defendant in terms of any of the provisions of Section 3 of the Deeds Registries Act 47 of 1937, whichever provision the court deems appropriate.

3. Costs of Suit

Alternative claim

1. That the Plaintiff ordered to compensate the Defendant in the amount of N\$41 359 500 (Forty-One Million Three Hundred and Fifty-Nine Thousand Five Hundred Namibia Dollars).

2. Further and/or alternative relief

3. Cost of Suit.’

Plaintiff's objection against the main claim

[16] In its first ground of objection, the plaintiff contends that the defendant's claim as alleged in paras 6 and 7 of the counterclaim is based on *rei vindicatio*. The relief based on *rei vindicatio* is not capable in respect of the alleged customary land rights. The plaintiff therefore submits that the counterclaim does not disclose a cause of action against the plaintiff or alternatively the counterclaim does not contain averments necessary to sustain a cause of action against the plaintiff.

[17] In my opinion, the defendant does not purport to be an owner vindicating its property based on ownership. Nor does the defendant purport to protect its right through the use of a vindicatory action as a possessor of the property, for the eviction of the plaintiff from the property. The plaintiff's ground of objection based on *rei vindicatio* therefore has no merit and stands to be rejected.

[18] However, insofar the plaintiff contends generally in its first ground of objection that the defendant has failed to make the necessary allegations entitling it to the relief it seeks, the plaintiff has a point. The defendant seeks an order directing the Registrar of Deeds to register a 99 year lease for a nominal rental amount of N\$1.00 per annum.

[19] A lease is normally created pursuant to an agreement between a lessor and a lessee. In its counterclaim, the defendant has not set out material facts giving rise to a relationship of (or akin to) lessor and lessee between the parties in terms of which the defendant is entitled to the relief it seeks. I am of the opinion that the counterclaim does not contain necessary allegations entitling the defendant to the relief set out in the main claim. The plaintiff's complaint that the counterclaim does not disclose a cause of action therefore stands to be upheld.

[20] In its second ground of objection, the plaintiff contends that there is no support to the defendant's allegation that the property and/or improvements were donated to the defendant during or about 1988. The defendant did not exist in 1988 and could not have been vested with the land rights it claim to have. The plaintiff therefore contends that the main claim does not contain averments necessary to sustain a cause of action.

[21] The crucial allegation made by the defendant is that, the customary land rights it alleges to possess survived the transfer of the property from the Government to the Local Authority. Based on the benevolent reading of the pleading, the fact that the defendant was non-existent in

1988 is not material for the present purposes. Whether the rights in fact survived the incorporation of the defendant is a decision best left to the trial court and should not be decided on exception.

[22] However, insofar as the plaintiff contends that the main claim lacks necessary averments to disclose a cause of action, I am of the opinion that the plaintiff's contention has merit for reasons stated above, and stands to be upheld.

Plaintiff's objection against the first alternative

[23] In its fourth ground of objection, the plaintiff contends that in para 19 of the counterclaim the defendant alleges that the Registrar of Deeds be ordered to register the rights of the defendant in terms of s 3 of the Deeds Registries Act, whichever provision the court deems appropriate. The defendant does not specify which subsection and under which legal basis the Registrar of Deeds may be ordered to register the alleged rights. The plaintiff therefore submits that the counterclaim does not disclose a cause of action, alternatively the counterclaim does not contain necessary averments to sustain a cause of action.

[24] Section 3 of the Deeds Registries Act deals with the duties of the registrar of deeds. It states, among other things, that, the registrar shall:

- (a) take charge of and preserve all records of any deeds registry in respect of which he has been appointed;
- (b) examine all deeds or other documents submitted to him for execution or registration;
- (c) register grants or leases of land lawfully issued by the government or other competent authority;
- (d) attest or execute and register deeds of transfer of land;
- (e) attest and register mortgage bonds;
- (f) register any servitude and record the modification or extinction of any registered servitude etc.

[25] The defendant has not set out the nature of the right which it alleges is capable of registration under s 3 of the Deeds Registries Act. Furthermore, the defendant has not set out with sufficient clarity the factual averments entitling it to the registration of its rights in terms of s 3 of the Act. In addition, the defendant did not incorporate any of the allegations that were made in respect of the main claim as allegations in respect of which it seek the registration of its rights

in terms of s 3. For the foregoing reasons, I am of the view that the plaintiff's objection is well-founded and the plaintiff's fourth ground of objection that the first alternative claim does not disclose a cause of action stands to be upheld.

Plaintiff's objection against the second alternative claim

[26] In its third ground of objection, the plaintiff contends that the defendant alleges in paras 21 and 22 that the property was expropriated by the plaintiff without compensating the defendant, and that the improvements on the property is valued at N\$41 359 500. The plaintiff submits that the valuation certificate attached to the counterclaim does not demonstrate that the alleged improvements were made by the defendant. The plaintiff further contends that the valuation certificate is not rule 45(6) and (9) compliant.

[27] In my view, a valuation certificate in respect of improvements made on immovable property need not 'demonstrate' the identity of the person who made the improvements. The objection raised by the plaintiff in that respect has no merit and stands to be dismissed.

Conclusion

[28] In conclusion, I am of the opinion that the plaintiff's exception, in respect of the first, second and fourth grounds of exception, stands to be upheld.

[29] Insofar as costs are concerned, I am of the view that the general rule that costs follow the event must find application. I am not persuaded that the circumstances of the current matter justifies the making of an order excluding the application of rule 32(11). The limitation on costs imposed by rule 32(11) is therefore applicable.

[30] In the result, I make the following order:

1. The plaintiff's first, second and fourth grounds of exception, are upheld.
2. The defendant is granted leave to amend its counterclaim, if so advised, within 15 days of this order.
3. The defendant is ordered to pay the costs of the exception.
4. The matter is postponed to 30 June 2021 for additional case planning conference.

5. The parties shall file a joint case plan on or before 23 June 2021.

Judge's signature	Note to the parties:
B Usiku Judge	Not applicable
Counsel:	
Plaintiff:	Defendant:
Mr Karel Gaeb Of Sisa Namandje & Co. Inc. Windhoek	Mr Henry Shimutwikeni Henry Shimutwikeni & Co Inc. Windhoek