

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
RULING

Case No: HC-MD-CIV-ACT-DEL-2021/03830

In the matter between:

**APULONIA TJILENGA MBAMBI**

**PLAINTIFF**

and

**THE MINISTER OF HOME AFFAIRS, IMMIGRATION,  
SAFETY AND SECURITY**

**DEFENDANT**

**Neutral Citation:** *Mbambi v Minister of Home Affairs, Safety and Immigration* (HC-MD-ACT-DEL-2021/03830) [2022] NAHCMD 226 (6 May 2022).

**CORAM:** MASUKU J

**Heard:** 27 April 2022

**Delivered:** 06 May 2022

**Flynote:** Civil Procedure - exceptions - rule 57(1) – particulars of claim not disclosing cause of action – requirements therefor – guardianship and assistance in litigation involving minor - Legislation - section 101 of the Child Care and Protection Act No. 3 of 2015.

**Summary:** The plaintiff is a minor child, duly assisted in the proceedings by Ms. Apolonia Tjilenga Kaluli, whose further particulars are not disclosed. The plaintiff instituted action proceedings against the defendant. The plaintiff in her particulars of claim, alleged that on or about 26 July 2021, she was assaulted with open hands by a member of the Namibian police, while in the presence of by Ms. Apolonia Tjilenga Kaluli.

It is averred that as a result of the assault, the plaintiff was injured in her self-esteem; subjected to pain and suffering; her bodily integrity, was injured; she was unable to sleep for a period of 7 days and that she was subjected to loss of amenities of life. It was further averred that the plaintiff was subjected to cruel and inhuman treatment by the police in contravention of Art 8 of the Constitution, alternatively that her common law right to dignity was violated. She accordingly claimed damages in the amount of N\$ 200 000, interest thereon and costs.

It is the defendant's case that the plaintiff did not make allegations in the particulars of claim as to the nature of the guardianship exercised over the minor, thus rendering the particulars of claim excipiable for not disclosing a cause of action.

*Held:* That the particulars of claim were not excipiable for not disclosing a cause of action, rather they were excipiable for not stating the nature of the guardianship exercised by the alleged guardian over the minor. As such, the particulars of claim were vague and embarrassing.

*Held that:* That in legal proceedings, according to LTC Harms, a minor may sue or be sued (a) in the name of the guardian representing the minor, in which case the fact of the representative capacity must be alleged; (b) in the minor's own name, assisted by the guardian and (c) in the absence of a guardian, in the name of a duly appointed *curator ad litem*, in which case the representative capacity must be stated.

*Held further that:* although the learned author Harms does not state the need for the representative capacity to mentioned, it is necessary, in a case as the present, that the person who is named as the one who assists the minor, states the capacity in which he or she assists the minor. This is so because it is not any person who can fit the position of guardian. It should therefor be plain whether the person assisting the minor is a parent or has been awarded guardianship by the court or serves in some other capacity.

*Held:* That we live in very perilous times where there are cases of human and child trafficking. It would therefor be necessary, to know of the nature of the relationship between the alleged guardian, who assists the minor, and the minor plaintiff or defendant, as the case may be. It cannot just be any person who is allowed to assist a minor on no other grounds other than the allegation that they are guardians, without stating the capacity in which they allege they qualify to be regarded as guardians.

*Held that:* In terms of s 101 of the Child Care and Protection Act, 2015, there are a number of persons who qualify to become the guardian of a minor child, including either parent, a person other than the mother or father of the child, or a person authorised by the Minister in writing, to act on behalf of the child. It is therefor necessary to state the capacity of the guardianship alleged.

*Held further that:* The relationship with the minor or the nature of the guardianship the alleged guardian has in relation to the plaintiff, is not disclosed. This renders the particulars of claim excipiable on the grounds that it is vague and embarrassing. The allegation of the nature of the guardianship should, appear *ex facie* the particulars of claim.

Held further that: The defendant's exception is upheld with costs.

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**ORDER**

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1. The Defendant's exception is upheld.
2. The Plaintiff is granted leave to amend her particulars of claim within 15 days of this order, if so advised.
3. The Plaintiff is to pay the costs of the exception, subject to the provisions of Rule 32(11).
4. The matter is postponed to 2 June 2022 for a case planning conference.
5. The parties are to file a joint case plan, together with a draft case planning order on or before 30 May 2022.

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### **RULING ON EXCEPTION**

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**MASUKU, J:**

Introduction

[1] Serving before court for determination is an exception to the plaintiff's particulars of claim. It is alleged by the defendant that the plaintiff's particulars of claim do not disclose a cause of action. The plaintiff opposes the exception.

The parties and their representation

[2] The plaintiff is Apolonia Tjilenga Mbambi, a minor child aged 16 years. She is a pupil at Kehemu Primary School and resides in Rundu, Namibia. She is duly assisted in the proceedings by Ms. Apolonia Tjilenga Kaluli, whose further particulars are not disclosed.

[3] The defendant is the Minister of Home Affairs, Safety and Immigration, appointed as such in terms of the Constitution. He is represented by the

Office of the Government Attorney, 2<sup>nd</sup> Floor, Sanlam Building, Independence Avenue, Windhoek.

[4] The parties will henceforth be referred to as 'the plaintiff' and 'the defendant', respectively.

[5] Mr. Mukonda represented the plaintiff, whereas Mr. Ncube represented the defendant. The court records its indebtedness to both counsel for the assistance rendered in the determination of the legal issue identified above.

### Background

[6] The facts giving rise to the question submitted for determination is pretty straightforward and is not subject to much contestation. They acuminate to this: the plaintiff instituted action proceedings against the defendant. In the particulars of claim, the plaintiff alleged that on or about 26 July 2021 at or near Tuhingireni Supermarket at Tuhingireni Location in Rundu, she was assaulted with open hands by a member of the Namibian police, namely Kenya Shigwedha.

[7] It is further averred that the assault took place in the presence of Ms. Apolonia Tjilenga Kaluli. This assault, it was alleged, was meant to demean, threaten and scare the plaintiff and to instil fear in her. It is alleged further that at the material time, the plaintiff was in the care and custody of a social worker and the Namibian police. As such, both the social worker and the Namibian police owed her a duty of care, as she was a child in need of care.

[8] It is averred that as a result of the assault, the plaintiff was injured in her self-esteem; subjected to pain and suffering; her bodily integrity, was injured; she was unable to sleep for a period of 7 days and that she was subjected to loss of amenities of life. It was further averred that the plaintiff was subjected to cruel and inhuman treatment by the police in contravention of Art 8 of the Constitution, alternatively that her common law right to dignity

was violated. She accordingly claimed damages in the amount of N\$ 200 000, interest thereon and costs.

[9] The defendant, as he was entitled to, defended the proceedings. The defendant later indicated that he was desirous of taking an exception to the plaintiff's particulars of claim. As has now become the mandatory procedure, the provisions of rule 32(9) and (10) were followed regarding the exception but the parties were unable to amicably resolve the issue of the exception. The defendant thus filed its exception.

#### The exception

[10] As foreshadowed above, the basis of the defendant's exception is that the particulars of claim do not contain allegations necessary to sustain a cause of action. In support of this allegation, the defendant points out that the person who is allegedly assisting the minor child has not demonstrated what capacity she is acting in so allegedly assisting the minor child.

[11] It is the defendant's case that the plaintiff did not demonstrate whether she is a *curator ad litem*, the biological parent, guardian or has been granted custody of the minor child by the court. It is accordingly contended by the defendant that the particulars of claim do not contain a clear and concise statement of the material facts on which the plaintiff relies for her claim and what authority she has to assist the plaintiff to launch the claim.

[12] As indicated above, the plaintiff contends that there is no substance at all to the exception and that it should, for that reason, be dismissed and the matter proceeds to case planning. The question to determine is whether there is any merit to the exception. Should the court hold that there is, the exception will be upheld and the plaintiff will be afforded an opportunity to amend her particulars of claim. On the other hand, if the court comes to the view that the exception has not merit, the matter will proceed to case planning and the defendant will be ordered to file his plea and the ensuing processes will follow in earnest.

[13] Exceptions are governed by the provisions of rule 57(1), which read as follows:

‘Where a pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or a defence, the opposing party may deliver an exception thereto within the period allowed for the purpose in the case plan order or in the absence of a provision for such period, within such time as directed by the managing judge or the court for such purpose on the directions in terms of rule 32(4) being sought by the party wishing to except.’

[14] The legal principles applicable to exceptions have crystallised in this jurisdiction. A treatise in that regard, is accordingly not necessary. Perhaps the most illuminating exposition of the law applicable to exceptions is to be found in *Van Straten v Namibia Financial Institutions Supervisory Authority* 2016 (3) 747.

[15] Smuts JA, writing for the majority of the court stated the following at para [18]:

‘Where an exception is taken on the ground 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 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.’

[16] It will be recalled that the defendant, which is the excipient in this matter cries foul that the particulars of claim do not disclose a cause of action. Accordingly, the approach set out in the *Van Straten* matter above, is clearly apposite and applicable.

[17] In argument, Mr. Ncube argued that a minor, who is a child below the age of 18, cannot bring a case to court but needs to be assisted by a parent, guardian or some other recognised official, including a *curator ad litem* duly appointed by the court. In this connection, Mr. Ncube laid store in the judgment of Geier J in *Lotteryman v Lotteryman* (Case No. I 2293/2009) delivered on 6 July 2012. In that case, the learned judge found that a minor, generally speaking, has no *locus standi in judicio*. As such, the minor must be assisted by a major person in instituting proceedings.

[18] Mr. Ncube, in his usual thoroughness in referring to international law instruments, referred to the African Charter in Article 2, where it states that a child is a person below the age of 18 years. He further referred to the United Nations' Convention on the Rights of a Child, which similarly places the age at below 18 years. There is accordingly no issue about the fact that the plaintiff in this case, averred to be 16 years old, is a minor, even in terms of our domestic legislation.

[19] Mr. Mukonda, for his part agreed that the plaintiff is a minor in this case and must be assisted. He however argued that the approach that a minor does not have *locus standi* is no longer good law. He argued that in this case, the child's rights were infringed and as such, she has a right to seek redress in terms of the Constitution. He went on to allege that the plaintiff in this matter is 'an aggrieved person' in terms of the Constitution and the argument that she therefor does not have *locus standi* is bad law.

[20] Mr. Mukonda further referred to certain provisions of the Child Care and Protection Act<sup>1</sup> (the Act), which recognise the right of a child who is affected by or involved in a matter to be adjudicated. Once the child's rights are implicated, so he argued, that child automatically becomes a party to the proceedings. He further contended that the court should, in dealing with matters involving minors, embrace the best interests of the children, such that any person may approach the court and assist a child without more. I will return to this statement later.

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<sup>1</sup> Child Care and Protection Act No. 3 of 2015



[21] I find it unnecessary to deal with all the issues raised by the parties in argument. I will confine myself to the legal basis of the exception and necessarily deal with issues falling within the contours of the question submitted for determination.

#### Determination

[22] The first issue that I am in duty compelled to deal with, is whether it is correct, as alleged by the excipient that this is a matter that falls under the rubric of cases that do not disclose a cause of action. As will be clear from rule 57(1), quoted in part above, the other category is those pleadings, which are alleged to be vague and embarrassing.

[23] In *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at 210-211, McReath J dealt with the concept of vague and embarrassing pleadings in the following manner:

‘An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced. . . As to whether there is prejudice, the ability of the excipient to produce an exception-free plea is not the only, nor indeed, the most important test - . . . If that were the only test, the object of pleadings to enable parties to come to trial prepared to meet each other’s case would and not be taken by surprise may well be defeated. Thus it may be possible to plead to particulars of claim, which can be read in any one of a number of ways by simply denying the allegations made; likewise to a pleading which leaves one guessing as to its actual meaning. Yet there can be no doubt that such a pleading is excipiable as being vague and embarrassing . . . It follows that averments in the pleading which are contradictory and which are not pleaded in the alternative are patently vague and embarrassing; one can but be left guessing as to the actual meaning (if any) conveyed by the pleading.’

[24] It would therefor appear that a pleading may be regarded as vague and embarrassing if it lacks particularity which leads to prejudice to the other party in that it does not know what case it has to meet. This may also apply where there is a possibility that it may be taken by surprise at the trial, when the vagueness that is apparent at pleading stage, becomes only clarified by evidence that will later be adduced at the trial.

[25] Regarding the issue of minors instituting proceedings, the learned author Harms<sup>2</sup> states that, 'a minor (someone below the age of 18) may sue or be sued:

- (a) in the name of the guardian representing the minor, in which case the fact of the representative capacity must be alleged;
- (b) in the minor's own name, assisted by the guardian;
- (c) in the absence of a guardian, in the name of a duly appointed *curator ad litem*, in which event the representative capacity must be stated.'

[26] It would appear, from the foregoing that in terms of (a) and (c) above, the guardian must state the representative capacity in which he or she represents the minor. The same applies in respect of (c), in that the where there is no guardian, the name of the person who represents the minor must sue in his or her name, but state the representative capacity in which he or she represents the minor.

[27] In the instant case, as is apparent from what is stated earlier in the ruling, the minor sues in her name but she is assisted by a named person. This fact assigns the current matter under (b) referred to by the learned author Harms. There is, however, when one has regard to what the learned author states, no requirement that the capacity in which the person assists the ward be stated. Is that not necessary?

[28] I am of the considered view that although the learned author does not state the need for the representative capacity to mentioned, it is necessary, in a case as the present, that the person who is named as the one who assists

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<sup>2</sup> LTC Harms, *Amler's Precedents of Pleadings*, 7<sup>th</sup> ed, LexisNexis, Durban, 2009, p272.

the minor, states the capacity in which he or she assists the minor. This is because it is not any person who can fit the position of guardian. It should therefor be plain whether the person assisting the minor is a parent or has been awarded guardianship by the court or some other capacity.

[29] In the instant case, the particulars of claim state that the plaintiff is 'Apolonia Tjilenga Mbambi, 16 years of age, s (*sic*) pupil at Kehemu Primary School and residing at Tuhingireni Location, Rundu. Hereto assisted by her guardian Apolonia Tjilenga Kaluli.' The relationship with the minor or the nature of the guardianship she has over the plaintiff, is not disclosed. This renders the particulars of claim excipiable on the grounds that it is vague and embarrassing.

[30] The failure to state the nature of the relationship, in my considered view, is not just an idle requirement. It is necessary to be stated for the purpose of establishing whether the minor has *locus standi*, by virtue of being duly assisted person competent to be a guardian. It is now established that the minor cannot represent him or herself unassisted or when not represented by a guardian or duly appointed *curator*.

[31] In the present scenario, it is not a case of the plaintiff not having pleaded the issue of guardianship at all, in which case that would go to the issue of *locus standi in judicio*. The name of the alleged guardian is disclosed but there is no information of how she is to be considered a guardian to the minor. To that extent, the particulars of claim are vague and embarrassing.

[32] The capacity in which the guardian alleges entitles him or her to assist the minor must be disclosed. We live in very perilous times where there are cases of human and child trafficking. It would therefor be necessary, before the court lends it processes to the summons, to know of the nature of the relationship between the alleged guardian who assists the minor and the minor plaintiff or defendant, as the case may be. It cannot just be any person who is allowed to assist a minor on no other grounds other than the allegation

that they are guardians, without stating the capacity in which they allege they qualify to be regarded as guardians.

[33] When one has regard to s 101 of the Act, it becomes clear that there are a number of persons who may qualify to become the guardian of a child. This includes either parent, a person other than the mother or father of the child or a person authorised by the Minister in writing, to act on behalf of the child.

[34] That allegation of the nature of the guardianship should, in my considered view, appear *ex facie* the particulars of claim. To the extent that nature of the guardianship alleged between the ward and the alleged guardian is not disclosed, it, in my considered view, amounts to the particulars of claim being excipiable on the grounds that they are vague and embarrassing by not specifying the nature of the nature of the guardianship.

### Conclusion

[35] Having regard to the above considerations and conclusions, it seems to me that the defendant's exception does hold water. I am of the considered view that the exception ought to be upheld as it has merit on the facts.

### Costs

[36] The law applicable to costs bears no in-depth scrutiny. It has, like the majestic Baobab tree, taken root and it is this – costs ordinarily follow the event. There is no reason submitted or apparent from the papers why that position should not be followed in the instant case. What should, however be pointed out, is that the costs will be subject the cap imposed by rule 31(11).

### Order

[37] In the premises, the following order commends itself as being appropriate:

1. The Defendant's exception is upheld.
2. The Plaintiff is granted leave to amend the particulars of claim within 15 days from the date of this order, if so advised.
3. The Plaintiff is to pay the costs of the exception, subject to the provisions of Rule 32(11).
4. The matter is postponed to 2 June 2022 for a case planning conference.
5. The parties are to file a joint case plan, together with a draft case planning order on or before 30 May 2022.

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T. S. Masuku  
Judge

## APPEARANCES:

APPLICANT: J. Ncube  
Of the Office of the Government Attorney

RESPONDENT: R. Mukonda  
Of Mukonda & Co Inc, Rundu