

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING

Case Title: LUKAS HISHEKWA vs AKA AUTO JUNCTION CC AND OTHER	Case No: HC-MD-CIV-ACT-CON-2021/04564
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE PARKER, ACTING	Date of hearing: 16 FEBRUARY 2023
	Delivered on: 7 MARCH 2023
Neutral citation: <i>Hishekwa v AKA Auto Junction CC</i> (HC-MD-CIV-ACT-CON-2021/04564) [2023] NAHCMD 95 (7 MARCH 2023)	
IT IS ORDERED THAT: 1. The exception is allowed, and the plaintiff shall pay the costs of suit, capped in terms of rule 32(11) of the rules of court. 2. The case is postponed to 22 March 2023 at 08:30 for a Status hearing (Reason: Court to determine the further conduct of the matter).	
Reasons for the Order:	
[1] As to the background of this matter, it is not necessary to garnish this judgment with copious rendition of the background. As Mr Ausiku, counsel for the plaintiff, submitted, the background was set out in the heads of argument of both counsel when the court heard an earlier application to amend the plaintiff's pleadings. The pleadings	

were subsequently amended.

[2] The present interlocutory application is that the defendant, represented by Mr Silungwe, has sought to except the amended particulars of claim. The basis of the exception is that it is vague and embarrassing. As to this ground of exception of pleadings, the beacon on the lighthouse that should guide this court in determining the application is *Alwyn Petrus van Stratten N.O. and Another v Namibia Financial Institutions Supervisory Authority and Another*¹, where Smuts JA (with whom Shivute CJ and Hoff JA concurred) stated:

[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.'

[3] It is clear from the passage by Smuts JA that the duty of a pleader to satisfy the requirements under rule 45 is accentuated and made onerous by the overriding objectives clearly set out in rule 1(3) of the rules of court, coupled with the case management prescriptions. The foundational requirement enunciated by the Supreme Court in *Alwyn Petrus van Straten N.O. and Another* ('the *Alwyn Petrus van Straten N.O.* requirements') is that parties must 'ensure that the real issues in dispute are resolved and that the parties are sufficiently apprised as to the case that they are to meet'.² The burden of the court in the instant proceeding is, therefore, to determine whether the pleadings complained of are formulated in such a way that the real issues are laid bare and that the defendants are sufficiently apprised as to the case the defendants have to meet.

[4] In his written submission, Mr Silungwe raised six grounds of exception. In my view, the first ground which relates to the plaintiff's non-compliance with the Stamp Duties Act 15 of 1993 is not well taken as it bears no relationship with whether or not the pleadings are vague and embarrassing.

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

² *Alwyn Petrus van Straten N.O. and Another* footnote 1 loc cit.

[5] If I find that the pleadings offend the *Alwyn Petrus van Straten N.O.* requirements, the exception must be upheld. The reason is that that requirements lie at the root of the vague and embarrassing ground of exception of pleadings, as aforesaid. Indeed, the *Alwyn van Straten N.O and Another* requirements form the basis of the defendant's complaint under the remainder of the grounds of exception. It is to those grounds that I now direct the enquiry.

[6] Mr Ausiku submitted that the agreement on which the plaintiff sues is partly written and partly oral. He stated further that the written part of the agreement is LH2 (annexed to the pleadings) as required by rule 45(7) of the rules of court; and the oral part of the agreement is adverted to in para 10 of the Particulars of Claim.

[7] There are several obstacles in Mr Ausiku's way. First, LH2 cannot on any pan of legal scales be an agreement. LH2 is dated 12 July 2021. It is on the headed paper of the defendant with its date-stamp embossed on it. All the signatures belong to individuals acting for or on behalf of the defendant.

[8] 'In order to decide whether a contract exists', wrote Christie, 'one looks first for the agreement by consent of two or more parties. A person cannot contract with himself alone'.³ Looking at Annexure LH2, I feel no difficulty in holding that the defendant was contracting with itself; and so, no contract existed.

[9] Second, as Mr Silungwe showed in his submission, while LH2 is dated 12 July 2021 (even if it was taken as representing a written agreement), the oral part of the agreement is pleaded as having been entered into on 19 August 2021. Besides, the parties are different. It is, therefore, not clear if the plaintiff relies on one or two agreements or on only one oral agreement, since LH2, as I have held, cannot be accepted as a valid contract.

[10] The upshot is that the plaintiff's pleading is vague in the sense that it is meaningless and is capable of more than one meaning. And it is embarrassing also because the defendant is denied the right to know what are the grounds upon which the claim is based to enable it to meet it.⁴

³ R H Christie *The Law of Contract in South Africa* 3ed (1996) at 21.

[11] It has been said that, if it is shown that for the purpose of his or her plea the defendant is embarrassed by vagueness or lack of particularity, the exception that the pleading is vague and embarrassing should be allowed.⁵ Thus, since in the instant proceeding, the *Alwyn Petrus van Straten N.O.* requirements have not been satisfied, the defendant's exception ought to be allowed.

[12] Based on these reasons, I find that the defendant has made out a case for the relief sought. In the result, the exception is allowed, whereupon, I make the following order:

1. The exception is allowed, and the plaintiff shall pay the costs of suit, capped in terms of rule 32(11) of the rules of court.
2. The case is postponed to 22 March 2023 at 08:30 for a Status hearing (Reason: Court to determine the further conduct of the matter).

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff	Defendant/Excipients
T AUSIKU <i>of</i> Kishi Shakumu & Co. Inc., Windhoek	R SILUNGWE <i>of</i> Silungwe Legal Practitioners, Windhoek

⁴ See I Isaacs Beck's *Theory and Principles of Pleading in Civil Actions* 5ed (1982) at 131, and the *Alwyn Petrus van Straten N.O* requirements in paras 2 and 3 above.

⁵ Ibid at 130-131.