REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1084/2011

In the matter between:

ETIENNE ERASMUS **PLAINTIFF**

and

GARY ERHARD WIECHMANN **FIRST DEFENDANT**

FUEL INJECTION REPAIRS & SPARES CC **SECOND DEFENDANT**

Neutral citation: *Erasmus v Wiechmann* (I 1084/2011) [2013] NAHCMD 214 (24 July 2013)

Coram: PARKER AJ

Heard: **8 – 11 July 2013**

Delivered: **12 July 2013**

Reasons: **24 July 2013**

Flynote: Contract – *Pactum contrahendo* (agreement to agree) – Whether enforceable contract – In instant case the court found that Exh 'A' (the agreement) which formed the basis of the plaintiff's main claim is the type of *pactum contrahendo* that is not an enforceable contract – The main basis of the claim is therefore non-existent.

Summary: Contract – *Pactum contrahendo* (agreement to agree) – Whether an enforceable contract – The court held that since there is no agreement on such essential or material matters as the cash flow needed to run the second defendant and the additional purchases that would be done after 2004 'year end', there was no

contract within the meaning of rule 18(6) of the rules of court – The court held that an agreement to enter into an agreement on essential or material matters at some future date is not an enforceable contract known to the law, the only exception being an agreement to break a deadlock in negotiations through, for example, arbitration and where the decision of the arbitrator would be final and binding on the parties – Court concluding that Exh 'A' which is an agreement to agree does not exhibit the exception and so Exh 'A' is not a contract.

Flynote: Practice – Judgments and orders – Absolution from the instance – In order to survive absolution plaintiff to make a prima facie case in the sense that there was evidence relating to all elements of the claim, without which no court can find for the plaintiff.

Summary: Judgments and orders – Absolution from the instance – In order to survive absolution plaintiff to make a *prima facie* case in the sense that there was some evidence relating to all elements of the claim, without which no court can find for the plaintiff – The principle in *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA) applied – In the instant case the plaintiff relies on an agreement to agree (Exh 'A') but the court has found that such agreement, with the exception of deadlock-breaking agreements is not a contract – The court found further that Exh 'A' which forms the basis of the plaintiff's claim is not a contract – Consequently, the court concluded that the basis of the plaintiff's main claim is non-existent and the plaintiff has not made a *prima facie* case to survive absolution – Absolution from the instance granted with costs in the interest of justice.

JUDGMENT

PARKER AJ:

[1] The plaintiff, represented by Mr De Beer institutes a claim against the first defendant as set out in para 11.1 of the 'particulars of complaint' ('claim 11.1'), and in the alternative to claim 11.1 the claim set out in para 11.2 of the 'particulars of

complaint' ('claim 11.2'). Mr Tötemeyer SC, assisted by Ms Van Der Westhuizen, represents the first defendant and the second defendant.

[2] For good reason, I set out here verbatim claim 11.1 and claim 11.2:

> 'Claim 11.1
> In the aforesaid Plaintiff claims payment in the amount of N$1 200 000,00 (One Million Two Hundred Thousand Namibian Dollars) from First Defendant as performance in that First Defendant failed to transfer 50% of the membership interest in Second Defendant.
>
> Claim 11.2
> Alternative to paragraph 11.1, Plaintiff claims from Second Defendant the amount of N$1 200 000,00 (One Million Two Hundred Thousand Namibian Dollars) being the 3% of the annual financial turnover of Second Defendant for each of the years 2004, 2005, 2006, 2007, 2008, 2009 and *pro rata* for 2010.'

[3] The plea of the defendants is essentially as follows:

> '2.1 Annexure "A" amounts to an agreement to agree, which is, as a result, void, alternatively unenforceable.
>
> 2.2 In the alternative to 2.1 above, and only in so far as it may be held that annexure "A" is a valid and enforceable agreement, the plaintiff has breached the terms of annexure "A" as a result of which the first defendant, as he was entitled to do, cancelled annexure "A" on the grounds enumerated. The plaintiff is, as a result of his breach, therefore not entitled to any relief based upon the terms of annexure "A".'

[4] At the close of the plaintiff's case, Mr Tötemeyer applied for an order granting absolution from the instance. After hearing arguments of Mr Totemeyer and Mr De Beer, I granted the order with costs, including costs of one instructing counsel and one instructed counsel, and I added that reasons for my decision would follow in due course. These are my reasons.

[5] Mr Tötemeyer's main ground in para 3.1 of counsel's written submission ('the main ground') is basically that considering the very words of the contents of Exh 'A' (entitled 'Partnership Agreement') and the plaintiff's evidence, Exh 'A' is 'indeed an agreement to agree which is void, alternatively unenforceable by the plaintiff vis-à-vis (ie against) the defendants'. Mr Tötemeyer puts forth also two alternative grounds. The first alternative ground in para 3.2 of counsel's written submission ('ground 3.2') is an alternative ground to the main ground, and he relies on it only if the court were to decide that Exh 'A' 'is not an agreement to agree' but an enforceable contract; then in that event, owing to the plaintiff's breach of terms that goes to the root of Exh 'A', the plaintiff is not entitled to any relief based on Exh 'A'. The other alternative ground in para 3.3 of Mr Tötemeyer's written submission ('ground 3.3') is an alternative ground to ground 3.2; and counsel relies on it only if ground 3.2 fails. Ground 3.3 is basically that 'the relief sought by the plaintiff is unsustainable in law'. And counsel sets out in his written submission the basis for his contention.

[6] What this means is that if I accept the main ground there would be no need to consider any other alternative ground. That would be dispositive of the application for absolution. But if I reject the main ground, then I should consider ground 3.2. And I shall only consider ground 3.3 if I rejected ground 3.2.

[7] The plaintiff moved to reject the application for an order granting absolution from the instance. Mr De Beer has also made written submissions. In para 1.1 of his written submissions, Mr De Beer mentions that 'the Defendant's submissions on pages 5 and 6 thereof contains (contain) an incorrect quotation of the authority, explaining the test for absolution'. Mr De Beer then says in para 1.3 of the submission, 'This oversight is a concern, and in the limited time available, it is an impossible task to verify the content and relevance of all the authorities referred to in the submission'. I do not share the 'concern' of Mr De Beer. In our practice counsel who refers authorities to the court has not the last word as far as 'the content and relevance' of the authorities are concerned. It is the court which has the last word, particularly about the relevance of an authority, after the judge has read that authority.

[8] Be that as it may, apart from praying for the dismissal of the application for absolution from the instance and for costs to be in the cause, Mr De Beer prayed

that the matter be postponed to enable the plaintiff to amend its particulars of claim, and tendered costs that may be occasioned by any postponement.

[9] Mr Tötemeyer did not object to the amendment with any persistent vigour; the reason, as I understood counsel, being that the amendment would affect only one of the grounds – not the main ground. The proposed amendment is to what the plaintiff characterizes as 'Particulars of Complaint'. I take it to mean Particulars of Claim; otherwise, it is meaningless. Anyhow; the amendment sought by the plaintiff is the deletion of the word 'performance' and its replacement with 'restitution'. In virtue of Mr Tötemeyer's response I allowed the amendment, but not the postponement.

[10] I now proceed to consider the main ground for an order granting absolution. In words of one syllable, as respects the main ground, Mr Tötemeyer's submission is that Annexure 'A', which is annexed to the plaintiff's pleadings in terms of rule 18(6) of the rules of court and which forms the basis of the plaintiff's main claim (claim 11.1), is 'an agreement to agree which is void, alternatively unenforceable by the plaintiff against the defendants'.

[11] And why does Mr Tötemeyer so argue? It is as follows. It is clear from Exh 'A' that the plaintiff and the first defendant were required to conclude agreements respecting (a) the determination of the cash flow needed to run the business of the second defendant after the expiration of six years from 1 September 2004, and the plaintiff and the first defendant each contributing 50 per cent of the amount so determined (see clause 3 of Exh 'A'); and (b) the plaintiff and the first defendant each contributing 50 per cent of all purchases done by the business of the second defendant after the end of the 2004 financial year of the second defendant, upon which the plaintiff would make payment to the first defendant in an amount equivalent to 50 per cent of his contribution after the expiration of the aforesaid six-year period (clauses 4 and 5 of Exh 'A').

[12] I find that it is clear, upon the true construction of Exh 'A' and the plaintiff's own evidence, that these are substantial or material aspects. The cash flow required to operate the business of the second defendant after the expiration of the six-year period would have to be discussed, negotiated and agreed by the plaintiff and the first defendant. It is not a foregone conclusion. It is not going to be a situation where

the plaintiff would just be confronted with a figure and asked to pay 50 per cent of it. It is also indisputable that the amount of which the plaintiff and the first defendant would each contribute 50 per cent towards was never discussed; neither does Exh 'A' state any such amount. Doubtless, for the business to run, the cash flow required is not an unsubstantial or immaterial matter. Furthermore, syntactically, the word 'This', introducing clause 3 and following immediately after clause 2, refers to the term that the plaintiff's waiver of his yearly 3 per cent turnover share in terms of the existing agreement as consideration for acquiring 50 per cent membership of the second defendant does not cover the cash flow needed to run the business of the second defendant which amount would be determined and ascertained at a future date, that is, at the end of the six-year period, as aforesaid. And when determined and ascertained the plaintiff and the first defendant would each contribute 50 per cent towards the defrayment of any such amount.

[13] Thus, the matters in clauses 3, 4 and 5, which I have found previously to be substantial or material matters, would, after they have been discussed, negotiated and agreed at a future date, enable the respective rights and duties of the parties to be ascertained and enforced in law. For the avoidance of doubt, I should say that the present case is not the case where the parties enter into a binding contract while they expressly or impliedly agree to discuss additional further terms perhaps after the commencement of implementation of their contract. In that event, if the further terms are not agreed the agreed contract stands. In the instant case, Exh 'A' cannot acquire contractual force because it is incapable of standing on its own. (R H Christie, *The Law of Contract in South Africa*, 5ed (2006): p 37) In a business sense, the second defendant cannot operate without the realization and inputs of clauses 3, 4 and 5. This makes, as the construction of those clauses and the evidence of the plaintiff converge on, those aspects substantial or material matters on which the parties would only agree after the cash flow needed to run the second defendant has been determined and ascertained and thereafter discussed, negotiated and agreed; and, furthermore, after additional purchases made after 2004 'year end' have also been discussed, negotiated and agreed between the first defendant and the plaintiff before the additional purchases could 'be dealt with on a 50/50 basis' at the expiration of the six-year period. Whether the plaintiff and the first defendant will agree on those essential or material matters depends upon the absolute discretion of the plaintiff and the first defendant (see *Southernport Development (Pty) Ltd v*

Transnet Ltd 2005 (2) SA 202 (A)), which each one of them may exercise when their eyes are open to all the material or substantial matters represented in clauses 3, 4 and 5 of Exh 'A'. Thus, if and when agreement is reached on those matters, it will be embodied in a contract at that future date; and so Exh 'A', as it stands, could not be said to be conclusive of the terms of the transaction. Exh 'A' cannot acquire contractual force as it is incapable of standing on its own.

[14] For all these reasons, I firmly hold that Exh 'A' is undoubtedly an unenforceable *pactum de contrahendo*, that is, an unenforceable agreement to agree or an '[A]greement concerning a possible future agreement'. (A J Kerr, *The Principles of Law of Contract*, 6th ed (2002): p 81, and the cases there cited) Exh 'A' is not an enforceable contract. (See *OK Bazaars v Bloch* 1929 WLD 37; *Pitout v North Cape Livestock Cooperative Ltd* 1977 (4) SA 842 (A).) The only exception to the principle is where deadlock-breaking mechanism, eg in the form of an arbitration clause, is worked into such agreement. (*Southernport Development (Pty) Ltd v Transnet Ltd* 2005). In sum, an agreement to enter into an agreement at some future date is not an enforceable contract known to the law. (*Courtney & Fairbaivn Ltd v Totalaini Brothers (Hotels) Ltd and Another* [1975] 1 WLR CA) The only exception, as I have said previously, is where such agreement is, for instance, to break a deadlock in negotiations through, for example, arbitration and where the decision of the arbitrator would be final and binding on the parties. Exh 'A' does not fall into that group of agreements covered by the exception.

[15] Accordingly, I respectfully reject Mr De Beer's submission that Exh 'A' does not contain any provision which says that the agreement in Exh 'A' is subject to an agreement on the cash flow or the additional purchases. It is a basic rule of construction of legal instruments that all provisions of the instrument in question must be read contextually in order to ascertain the true meaning of individual provisions of the instrument. In the present case a proper construction of Exh 'A', as I have undertaken previously, debunks Mr De Beer's argument; I should say. I have no doubt in my mind that Exh 'A' may be an agreement, but it is an agreement to agree; it is not an enforceable contract, considering the particular acts or conduct of the parties that may have to be agreed which is, as I have found previously, within the absolute discretion of the first defendant and the plaintiff and which each one of them will exercise in any way at a future date. Thus, since there is no agreement on

such essential or material matters as the cash flow needed to run the second defendant and the additional purchases that would be done after 2004 'year end', there was no contract.

[16] It follows that what the plaintiff has annexed to his pleadings, ie Exh 'A', as a contract on which he relies in terms of rule 18(6) of the rules of court is not a contract.

[17] Having so found, I proceed to consider the issue of absolution from the instance. In considering the issue, I keep in my mind's eye the fact that the plaintiff's entire cause of action, as I have found previously, is based on Exh 'A' which the plaintiff says is a contract – an enforceable contract – but which I have found to be not.

[18] The test for absolution from the instance has been settled by the authorities in a line of cases. I refer particularly to the approach laid down by Harms JA in *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (A) at 92E-F; and it is this:

'[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H in these terms:

"… (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T))" '

And Harms JA adds, 'This implies that a plaintiff has to make out a prima facie case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff.' Thus, the test to apply is not whether the evidence established what would finally be required to be established but whether there is evidence upon which a

court, applying its mind reasonably to such evidence, could or might (not should, or ought to) find for the plaintiff. (HJ Erasmus, et al, *Superior Court Practice* (1994): p B1-292, and the cases there cited)

[19] In the instant case, the plaintiff's main claim consists of the production of Exh 'A', and Exh 'A' is the entire basis upon which the main claim has been brought and pleaded. In short, the plaintiff sues on Exh 'A', which he alleges is a contract and on which he relies on it to prove his main claim. But I have held that Exh 'A' is not a contract. The upshot of this holding is that, as Mr Tötemeyer submitted, the entire basis upon which the claim has been brought and pleaded is non-existent. And it must be remembered that at this stage it is inferred that the court has heard all the evidence available against the defendant. (Erasmus, *Superior Court Practice* ibid, p B1-293) For all the aforegoing reasoning and conclusions at the close of the plaintiff case, I found that the plaintiff has not made a *prima facie* case against the defendants.

[20] I am alive to the principled judicial counsel that a court ought to be chary in granting an order of absolution from the instance at the close of the plaintiff case unless the occasion arises. In that event the court should order it in the interest of justice. In the instant case, taking into account all the aforegoing reasoning and conclusions, I think it was in the interest of justice that I granted the order. That being the case I exercised my discretion in favour of granting the order referred to in para 4.

[21] Having accepted the main ground for granting the order, it serves no purpose to consider any of the alternative grounds.

C Parker

Acting Judge

APPEARANCES

PLAINTIFF:	P J De Beer Of De Beer Law Chambers, Windhoek
FIRST AND SECOND DEFENDANTS:	R Tötemeyer SC C E Van Der Westhuizen Instructed by Mueller Legal Practitioners, Windhoek