

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

CASE NO.: HC-MD-CIV-ACT-OTH-2017/03060

In the matter between:

EDCON CONSTRUCTION CC

PLAINTIFF

and

RED INVESTMENT HOLDING COMPANY (PTY) LTD

DEFENDANT

Neutral Citation: *Edcon Construction CC v Red Investment Holding (PTY) Ltd* (HC-MD-CIV-ACT-OTH-2017/03060 [2018] NAHCMD 93 (03 April 2018))

Coram: USIKU J

Heard: 06 March 2018

Delivered: 03 April 2018

ORDER

1. The exception is dismissed.

2. The Defendant is ordered to pay the costs occasioned by the exception.
3. The Defendant must file its plea and counterclaim, if any, to Plaintiff's amended particulars of claim on or before the 25 April 2018.
4. The Plaintiff shall file its replication, if any, to the plea and plea to the Defendant's counterclaim, if any, on or before the 16 May 2018.
5. The Defendant shall file its replication, if any to Plaintiff's plea to counterclaim, on or before the 30 May 2018.
6. The parties shall file their discovery affidavits on or before the 12 June 2018.
7. The parties shall file a joint case management report on or before the 21 June 2018.
8. The matter is postponed to 27 June 2018 at 15:15 for Case Management Conference.

RULING IN TERMS OF PD 61 OF THE PRACTICE DIRECTIVES

USIKU J:

[1] The Defendant excepts to the Plaintiff's particulars of claim on the ground that same do not contain sufficient particulars to sustain a cause of action. The Plaintiff alleged in its particulars of claim that an "Acceptance of Proposal" annexed to its particulars of claim, signifies a written agreement between the Plaintiff and the Defendant.

[2] The Defendant contends that, it is evident *ex facie* the said "Acceptance of Proposal" that there are certain conditions precedent relating to the acceptance, and that the law provides that a conditional offer or acceptance is invalid or void and cannot constitute a valid agreement. The Defendant further argues that no contract

can be concluded upon a conditional offer or acceptance, therefore, the Plaintiff's amended particulars of claim lack averments necessary to sustain a cause of action.

[3] The Plaintiff on the other hand, contends that the issue whether the two parties reached an agreement is to be determined by the court using an objective test. The issue of conditional acceptance of an offer occurs only if the acceptance raises additional terms which are subject to further negotiations. The Plaintiff further argues that, where the acceptance of the offer does not raise further material terms for negotiations, a valid and binding legal agreement comes into being. The Plaintiff, therefore, argues that the particulars of claim are not excipiable.

[4] It is common ground that an excipient must persuade the court that on every interpretation which the pleading can reasonably bear, no cause of action is disclosed by such pleading. If possible evidence can be led on the pleading, which can disclose a cause of action, then such pleading is not excipiable. A pleading is only excipiable on that basis if no possible evidence can be led on the pleading to disclose a cause of action. The issue of whether or not there was a valid and binding agreement between the parties is one on which possible evidence can be led on the pleadings to disclose a cause of action. In the present matter, I am not persuaded that upon every interpretation which the pleading in question bear, no cause of action is disclosed.

[5] I am of the opinion that the Plaintiff has pleaded the necessary averments constituting its cause of action. And for the foregoing reasons the exception by the Defendant falls to be dismissed, and is hereby dismissed with costs.

B Usiku
Judge

APPEARANCES:

FOR THE PLAINTIFF:

T Ipumbu
of Titus Ipumbu Legal Practitioners, Windhoek

FOR THE DEFENDANT:

A Kamanja
of Amupanda Kamanja Inc., Windhoek