REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 3905/2009

In the matter between:

GUNCHAB FARMING CC	**FIRST PLAINTIFF**
HENDRIK CHRISTOFFEL BARNARD	**SECOND PLAINTIFF**

And

HENDRIK CHRISTOFFEL BARNARD	**FIRST DEFENDANT**

ELSIE RACHEL OOSTHUIZEN BARNARD **SECOND DEFENDANT**

Neutral citation: *Gunchab Farming CC v Barnard* (I 3905-09) [2014] NAHCMD 345 (14 November 2014)

Coram: VAN NIEKERK J

Heard: 5 April 2012

Delivered: 14 November 2014

Flynote: **Practice** – Pleadings – Exception to plea and counterclaim – Point *in limine* that exception to plea delivered while plaintiff under automatic bar to be struck out upheld – Argument rejected that counterclaim not excipiable because parties put differing interpretations on statutory provisions on which counterclaim is based - Transaction whereby farm, being agricultural land, is donated to close corporation to be incorporated and whereby donor's 100% member's interest in close corporation is sold to another is not in contravention of Agricultural (Commercial) Land Reform Act, 1995 (Act 6 of 1995,) prior to its amendment by Agricultural (Commercial) Land Reform Amendment Act, 2002 (Act 13 of 1995) – Exception upheld to principal counterclaim based thereon that such transaction illegal and therefore void and unenforceable.

ORDER

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1. The plaintiffs' exception to the defendants' plea is struck out with costs, such costs to include the costs of one instructing and one instructed counsel.

2. The plaintiffs' exception to the defendants' principal counterclaim is upheld with costs, such costs to include the costs of one instructing and one instructed counsel.

3. The defendants are given leave to amend their counterclaim, should they be so advised, within 21 days of this order.

JUDGMENT

VAN NIEKERK J:

[1] The first plaintiff is a close corporation of which the second plaintiff is the sole member. The first plaintiff is the owner of the farm Gunchab No. 125 ('the farm') in the Mariental district. It is evident from the deed of transfer attached to the particulars of claim as annexure "A" that the defendants donated the farm to the first plaintiff on 2 May 2000.

The particulars of claim

[2] The plaintiffs instituted action against the defendants based on an oral agreement dating from the year 2000. The following are alleged to be terms of the agreement: (i) that the parties would enter into a joint venture in terms of which they would conduct

farming operations on the farm; (ii) for such purposes the second plaintiff in his capacity as sole member of the first plaintiff, granted the defendants the right of *habitatio* on the farm for the duration of the joint venture; (iii) the second plaintiff would provide all the cattle and half the sheep as a contribution to the joint venture; (iv) the defendants would provide half the sheep as a contribution to the joint venture; (v) the defendants would be responsible for the day to day management and running of the farming operations for the duration of the joint venture; (vi) the defendants were responsible to report to the second plaintiff on a regular basis regarding the business operations of the joint venture; (vii) the second plaintiff and the defendants would share the profits derived from the joint venture equally, i.e. on a 50/50 basis; (viii) the defendants were responsible for the full costs of the joint venture.

[3] The plaintiffs allege that the second plaintiff complied with all his obligations in terms of the agreement, but that the defendants breached their obligations in terms of the agreement by failing to conduct proper farming operations which resulted in 'substantial losses of the livestock as well as the joint venture in general' (paragraph 10 of the particulars of claim). The further allegations are that the second plaintiff has called upon the defendants to agree to the dissolution of the joint venture by 31 January 2009, but that they refuse to do so; that the defendants are in possession of the farm, alternatively that they occupy the farm; and that the defendants, notwithstanding demand, refuse and/or neglect and/or fail to vacate the farm.

[4] The plaintiffs claim (i) confirmation of the dissolution of the joint venture; (ii) the rendering and debatement of an account of all joint venture transactions; (iii) payment of any amounts found owing; (iv) the return of certain livestock; (v) ejectment of the defendants from the farm; (vi) payment of N$15 000 per month in damages for unlawful occupation of the farm from 1 February 2009 until date of vacation of the farm; and (vii) costs of suit.

The defendants' plea

[5] The defendants filed a plea and provided further particulars in which they admit (i) the identity of the parties and their standing; (ii) that they donated the farm to the first

plaintiff; (iii) that they concluded an oral agreement with the second plaintiff in terms of which they embarked upon a joint venture relating to farming operations on the farm, although they rely on certain different terms than those pleaded by the plaintiffs; and (iv) their occupation of the farm and their refusal to vacate same.

[6] The defendants deny that the first plaintiff is the lawful owner of the farm. In this regard they plead *inter alia* as follows:

> '6.2 The defendants plead that the sole purpose for the donation was to dispose of the farm in selling the membership interest still to be acquired by the first and second defendants in the first plaintiff to second plaintiff as is evident from the sale of membership interest agreement concluded between the second plaintiff and the first defendant, annexed hereto marked annexure "B".
>
> 6.3 The transaction as constructed was and was intended by the parties to be an alienation of agricultural land as described in the Agricultural (Commercial) Land Reform Act, 1995, as the farm being agricultural land was dispose (*sic*) of against valuable consideration received.
>
> 6.4 No certificate of waiver has been obtained for the alienation of the farm to first plaintiff.
>
> 6.5 As such, the defendants plead that the donation of the farm by the first and second defendants to first plaintiff, as well as the sale of membership interest *ultra virus* (*sic*), the provisions of the Agricultural (Commercial) Land Reform Act, Act No. 6 of 1995, and therefore void, alternatively voidable and stands to be set aside. In this regard the Honourable Court is respectfully referred to defendants (*sic*) counterclaim, filed evenly herewith.'

(I pause to note here that the use of the expression '*ultra vires'* as is done here and repeated in various parts of the pleadings to indicate that the parties acted in contravention of a statute is not appropriate in the context where the illegality does not concern the illegal exercise or non-exercise of powers in an administrative law context.)

[7] The defendants also deny that the second plaintiff is the lawful sole member of the first plaintiff. In this regard they state in the relevant part of paragraph 1 of their further particulars:

> '**AD PARAGRAPH 1 THEREOF**
>
> The defendants allege that the second plaintiff is not the lawful sole member of the first plaintiff as the transfer of membership interest agreement is invalid and void as same, together with the donation of the farm into the name of the first plaintiff are *ultra virus* (*sic*) the provisions of the Agricultural (Commercial) Land Reform Act, 1995. ……..'

[8] The defendants plead further that, while being under the *bona fide*, but mistaken, belief that the aforesaid donation of the farm and the sale of the membership were valid and enforceable, the parties during 2000 entered into an oral agreement, the material terms of which, for purposes of this judgment were (i) that the first defendant acquired the right to repurchase the second plaintiff's membership interest in the first plaintiff when the first defendant is in a financial position and elects to do so; (ii) that the defendants have the right of *habitatio* on the farm until their death; (iii) that the first defendant would have the right to repurchase the second plaintiff's membership interest in the first plaintiff for the same price as paid by the second plaintiff and on the same terms and conditions; (iv) that the defendants were responsible for the day-to-day management and running of the farming operations and for all the costs of the farming operations and for the upkeep of the farm; and (v) that the parties would enter into a joint venture with certain terms in relation to the farming operations.

<u>The defendants' counterclaim</u>

[9] The defendants also filed a counterclaim in which they make, *inter alia*, the following allegations in respect of their principal claim:

> '5.
>
> On or about the 2nd of May 2000 and at Windhoek, the first defendant sold his membership interest, still to be acquired in first plaintiff, to second plaintiff on the

terms and conditions contained in the written agreement of sale of membership interest, annexed to defendants' plea as annexure "B".

6.

To give effect to the sale of the membership interest and to receive a valuable consideration for the disposal of the farm Gunchab No 125 ……, the first and second defendants, as agreed, donated the farm to the first plaintiff as is evident from annexure "A", annexed to plaintiffs' claim in convention.

7.

The said farm, at all relevant times hereto, was and still is agricultural land, as defined in the Agricultural (Commercial) Land Reform Act, 1995.

8.

The farm was alienated (disposed of) against valuable consideration received.

9.

No certificate of waiver has been obtained for the alienation of the farm to first plaintiff as is required in terms of the relevant provisions of the Agricultural (Commercial) Land Reform Act, 1995.

10.

As such, the defendants plead that the donation of the farm by first and second defendants to first plaintiff, as well as the sale of membership interest an (*sic*) *ultra vires* the provisions of the Agricultural (Commercial) Land Reform Act, Act No. 6 of 1995 and therefore void, alternatively voidable and stands to be set aside.

11.

The defendants herewith tender the return to second plaintiff in the amount of N$620 000.00 being the purchase price paid by the second plaintiff to first defendant for and in respect of the disposal of the farm to first plaintiff and for the transfer of second defendant's membership interest in first plaintiff to second plaintiff.'

[10] In the alternative and in the event that the Court should find that the disposition of the farm is not in contravention of the Agricultural (Commercial) Land Reform Act, 1995 (Act 6 of 1995) ('the ACLR Act'), the relevant part of the defendants' counterclaim alleges as follows (the insertion in square brackets is mine):

> '12.
>
> At all times prior to and at the conclusion of the agreement of sale of membership interest, the second plaintiff, orally represented to the first and second defendants *inter alia* that first defendant will be entitled to repurchase the membership interest from second plaintiff on the same terms and conditions as contained in annexure "A" [it should be annexure "B"], as well as for the same purchase price when first defendant is in a financial position to do so and that first and second defendants will have the right of *habitatio* on the farm, until their death.
>
> 13.
>
> ……
>
> 14.
>
> The first defendant, to the second plaintiff's knowledge, is presently in a financial position to repurchase the second plaintiff's membership interest held in first plaintiff against payment in the amount of N$620,000.00, the payment of which is tendered herewith on the same terms and conditions as same was sold by first defendant to second defendant.'

[11] Against tender of the amount of N$620,000.00 the defendants in their main claim seek an order declaring the disposition by way of donation of the farm to be '*ultra vires*' the provisions of the ACLR Act and therefore void *ab initio* and authorisation for the Deputy Sheriff to sign all documents necessary to give effect to the re-registration of the farm in the names of the defendants. In the alternative they pray *inter alia* for an order against the second plaintiff only that he transfers his 100% membership interest in the first plaintiff to the second defendant within fourteen days after all statutory

requirements, including the obtaining of a waiver insofar as it may be required for the transfer have been fulfilled.

The exceptions

(i) *The exception to the plea*

[12] Although the notice of exception and the grounds refer almost throughout to the plaintiff singular, I take it that it is the plaintiffs who except. The exception to the plea as amplified by the further particulars thereto is based on the assertion that it is bad in law in that it does not disclose a proper defence. The grounds are set out as follows:

> '1. The defendants admit that they donated the farm Gunchab No 125 to the first plaintiff.
>
> 2. In their plea, the defendants further aver that the donation was done with the sole purpose of disposing of the said farm through the sale of the membership interest of the first and second defendants to the second plaintiff and in that regard referred to a written sale of membership interest annexed to the defendants' plea marked "B".
>
> 3. The defendants then further aver that the aforesaid sale of member's interest constitutes an alienation of agricultural land as contemplated in the Agricultural (Commercial) Land Reform Act, 1995 ('the Act").
>
> 4. Further the defendants aver that no waiver as prescribed in the Act was obtained to sanction such alienation as contemplated in the Act.
>
> 5. In and as a result of the aforesaid the defendants aver that the donation as aforesaid as well as the sale of the member's interest is *ultra virus* (*sic*) the provisions of the Act and therefore void, alternatively voidable and therefore stands to be set aside.
>
> 6. It is submitted that the defendant's (*sic*) grounds of defence in this respect is premised on the aforesaid reliance of (*sic*) the provisions of the Act pertaining to the plaintiffs' cause of action with regard to the relief in order to have the defendants evicted from the farm Gunchab.

7. At the onset it is respectfully submitted that the provisions of section 17 of the Act does not carry with it a provision in terms of which the alienation of commercial land is void, alternatively voidable in the absence of a waiver as contemplated in the said section, where it expressly deals with the transfer of members' interest in respect of which the relevant close corporation is the owner of commercial land as contemplated in the Act.

8. It is further respectfully submitted that at the time of the conclusion of the agreement of donation by the first and second defendants to the first plaintiff and which occurred prior to 21st of June 2000, the provisions of section 17 of the Act did not at the time apply to donations conducted in this fashion.

9. Likewise it is submitted that the Act and specifically section 17 read with section 1 thereof, did not at the time apply to this scheme of transfer of membership interests in and to a close corporation that has as its asset commercial land and to that end did not prohibit the sale of membership interest (sic) as such.

10. It is further respectfully submitted that the legislator only introduced a restriction to such donations and sales by virtue of the provisions of the Agricultural (Commercial) Land Reform Amendment Act, 2002 Act 13 of 2002, which Amendment Act only took effect on 31 March 2003.

11. The defendants' (*sic*) further allege that they attained a lifelong right of *habitatio* in respect of the farm, Gunchab which right was purportedly given to them by the plaintiffs on the basis of an oral agreement.

12. In light of the aforesaid it is respectfully submitted that a right of *habitatio* in respect of an immovable property constitutes a disposal of a right attached to an immovable property as contemplated in the Alienation of Land Act which Act expressly provides that such right can only be obtained by way of a written agreement signed by all parties concerned.

13. In *casu* the defendants do not rely on any written agreement which accords to them the right of *habitation* they contend to have.

14. Further it is submitted that the first defendant's purported right to repurchase the second plaintiff's 100% membership in the first plaintiff is completely unrelated to the relief being sought and as such does not constitute any defence to same.

15. In the premises the defendants' plea lacks averments necessary which could sustain a defence against the plaintiff's particulars of claim.'

(ii) The exception to the principal counterclaim

[13] In respect of the counterclaim the plaintiffs' exception is based thereon that it is bad in law as it does not disclose a cause of action. The grounds as set out in paragraphs 1 – 11 of exception is identical as grounds 1 – 11 in respect of the exception to the plea.

(iii) *The exception to the alternative counterclaim*

[14] The grounds are set out in paragraphs 12 – 17:

'12. In the alternative the defendants allege that they, by virtue of an oral agreement is (*sic*) entitled to repurchase the second plaintiff's membership interest in and to the first plaintiff once the first defendant is in a financial position to do so which the latter alleged he is now.

13. Pursuant to such allegations the first defendant herewith tenders payment of the purchase price in the sum of N$620 000-00 in lieu for the second plaintiff's membership interest in and to the first plaintiff.

14. On the basis of the averments set out in paragraph 7, 8, and 9 of the defendants' claim in reconvention it is respectfully submitted that by virtue of the promulgation and implementation of the Agricultural (Commercial) Land Reform Amendment Act, 2002, Act 13 of 2002 which Amendment Act took effect on 31st March 2003, any disposal and/or alienation of commercial land as defined in the Act can only be done on the basis of section 17 of the Act which requires the Minister to grant a waiver before such sale and/or alienation could have any legal force and effect.

15. It follows that the first defendant's purported right to repurchase the second plaintiff's 100% membership interest in the first plaintiff is

completely is (*sic*) dependent as a precondition upon obtaining of such waiver from the Minister concerned before it could have any legal force and effect.

16. It is apparent that in their alternative claim no reliance is placed whatsoever on a waiver as a condition precedent implied by law by the defendants.

17. In the premises the defendant's (*sic*) claim in reconvention both in respect of their main claim as well as their alternative claim lacks averments necessary which could sustain a cause of action against the plaintiffs.'

The defendants' point *in limine*

[15] Mr *Obbes* on behalf of the defendants moved a point *in limine* in respect of the exception taken to the plea. He pointed out that the exception was filed about 18 months after the defendants had delivered further particulars as requested by the plaintiff. He submitted that an exception is a pleading and, with reliance on rule 26, read with rule 25(1), of the rules of this Court, that the plaintiffs had become (and remained) *ipso facto* barred from delivering any further pleading long before the exception was delivered. He applied for the exception to be struck out, alternatively that it be dismissed with costs.

[16] Rule 25(1) provides that a plaintiff shall within 15 days after service upon him or her of a plea, deliver a replication where necessary. If a party does not deliver such replication or subsequent pleading within this time period, rule 26 provides that the party shall be *ipso facto* barred.

[17] Counsel for the defendants referred me to *Stockdale Motors Ltd v Mostert* 1958 (1) SA 270 (O) in which the court dealt with the same situation where a plaintiff had filed an exception to the plea and counterclaim out of time, albeit that the rules applicable were those of the Orange Free State Provincial Division. The court held that the pleadings in the main action had closed by the time the exception was filed and that exceptions could not be taken after *litis contestatio* (at 271H). The court struck the exception out with costs.

[18] I note that the court in the *Stockdale Motors* case (*supra*) did not mention whether the plaintiff had been barred from pleading to the counterclaim. In the matter before me Mr *Obbes* confined the point *in limine* to the exception against the plea. This stance seems to me to be correct, as the plaintiffs had not been served with a notice of bar requiring of them to plead to the counterclaim. In this regard it is also relevant that the two exceptions before me are not identical in all respects.

[19] Mr *Strydom*, who appears for the defendants, submitted that the defendants should have taken issue with the lateness of the exception to the plea by way of a rule 30 application, failing which the defendants must be taken to have condoned the irregular step. However, as Mr *Obbes* pointed out, a similar argument was rejected in *Stockdale Motors Ltd v Mostert* (*supra*). I agree with counsel for the defendants that it was not peremptory for the defendants to follow the rule 30 route, but that they were entitled to raise the matter by way of a point *in limine* at the hearing of the proceedings.

[20] Counsel for the plaintiffs further contended that the point taken is dilatory only and not in the interests of moving the matter along. He submitted that the plaintiffs would be able to bring an application for removal of the bar at some future stage or to bring an application in terms of rule 33(4) to decide the questions of law raised in the exception. He further submitted that the points of law could also be separately dealt with in future in terms of the case management rules. Emphasising that the same points of law would in any event be considered when the exception to the counterclaim is heard, counsel submitted that the Court should follow a pragmatic approach and if need be rely on its inherent powers to condone the delay, remove the bar and hear the exception.

[21] There are some attractive aspects to these submissions, but ultimately I am not persuaded that they are decisive. The most compelling reason is the complete disregard for the rules displayed by the plaintiffs and the lack of effort to do anything about it. The plaintiffs were forewarned by the defendants' heads of argument that the point *in limine* would be taken. They did not lodge an application for condonation and removal of the bar without delay as they should have done. There is no explanation, even from the bar, before me for the delay in filing the exception. While the prospects of success on the point relating to the alleged contravention of the ACLR Act are good, the

same cannot be said about the point on the right of *habitatio* in the absence of any averment in the plea that the right was sold. Moreover, the chances of an application for removal of bar succeeding at some point in future are slim indeed.

[22] The exception against the plea and the exception against the counterclaim are not on all fours. It therefore does not assist to argue that all the points will be argued anyway. To the extent that the same point is raised in both exceptions, any ruling on the matter will effectively dispose of the issue in the plea. This should afford the plaintiffs some consolation. Should the plaintiffs be advised to raise in some other way any points of law left undecided, so be it. In the face of the defendants' firm opposition to the granting of any indulgence at this stage, the combined force of the abovementioned considerations is such that the so-called pragmatic approach loses its appeal. The result is that the exception against the plea must be struck out with an appropriate order as to costs.

The merits of the exception to the counterclaim

(i) *Should the exception be entertained because it involves conflicting interpretations of statutory provisions?*

[23] As a precursor to the argument on the merits of the exception, Mr *Obbes* submitted that the main counterclaim is not excipiable as the parties are merely differing in their interpretation of the provisions of the ACLR Act. In this regard he relied on the following passage in *July v Motor Vehicle Accident Fund* 2010 (1) NR 368 (HC) (at 371G-I) where the following was said:

> '…[T]he fact that a plaintiff puts a particular interpretation on a statutory provision that is different from the interpretation that the defendant puts on that statutory provision, and the plaintiff makes a claim based on his or her interpretation of the said provision, cannot render the plaintiff's claim excipiable. In this regard, I do not see on what ground the plaintiff's pleading can be declared bad in law. It has been said that exception may be taken when the defect in the pleadings appears *ex facie* the pleadings. (Van Winsen et al *The Civil Practice of the Supreme Court of South Africa* (Cape Town, Juta 1997) at 492, and the cases there cited.)'

[24] The Court continued to state (at 371I-372A):

> '[12] In the instant case, I do not find any defect - *ex facie* or otherwise - in the plaintiff's pleadings, as claimed by the defendant in its exception (1). It would have been a different matter if the defendant's objection was that there is no provision in the MVA Fund Act on which the plaintiff could possibly base his claim, or that the plaintiff's claim is based on a provision of a statute other than the MVA Fund Act.'

[25] These statements were made in the following context. The plaintiff had issued summons for payment to him of a certain amount based on a settlement agreement in terms of which the defendant had undertaken to pay for certain of the plaintiff's medical expenses. The defendant excepted to the claim, *inter alia*, on the grounds that the claim by the plaintiff for payment to himself of a sum in respect of medical expenses undertaken by the defendant to be paid in terms of section 10(5)(a) of the Motor Vehicle Accidents Fund Act, 2001, was bad in law as the legislation only allows the defendant to undertake to make such a payment to the provider for the goods supplied or the services rendered. The Court noted that the exception is undoubtedly based on the interpretation and application of the relevant provisions of section 10 of the MVA Fund Act and rejected the exception as being without merit, *inter alia* because of the reason as set out in the quotation above.

[26] Mr *Strydom* strenuously argued that the approach taken in *July v Motor Vehicle Accident Fund* (*supra*) should not be followed and submitted that, as the exception is concerned with a legal issue and not dependent on any evidence to be given in future, the matter must be decided at this stage.

[27] Erasmus, *Superior Court Practice,* B1-157, in the commentary on rule relating to exceptions is of the view that where a plaintiff relies for his claim on a particular provision of a statute it is necessary for the plaintiff to allege all the facts necessary to bring his claim within the statute. The author does so with reliance on *McKay v Stein* 1950 (4) SA 692 (W); *Van der Merwe v Santam* 1947 (2) SA 440 (C); and *Botha v Guardian Assurance Co. Ltd* 1949 (2) SA 223 (GW). In all these cases the exceptions were based thereon that the plaintiff's claim lacked certain averments *ex facie* the

pleadings to bring the claim within the requirements of the statutory provision. In my respectful view it follows that in order to determine whether the facts alleged are sufficient to sustain the claim, it is necessary to interpret the statute. Should the defendant's interpretation differ from that of the plaintiff's with the effect that it can be argued that the facts alleged do not make out a claim and that this goes to the root of the claim or part of the claim, it must, in my respectful view, mean that an exception may be brought.

[28] In *Lampert-Zakiewicz v Marine & Trade Insurance Co Ltd* 1975 (4) SA 597 (C) (at 599C-600B) the court stated as follows (the underlining is mine):

> 'The plaintiff has now filed a notice of exception which reads as follows:
>
> > "Plaintiff hereby excepts to sub-paras. (a), (b), (c), (d), (e) and (f) of para. 3 of defendant's plea as being bad in law in that no defence is disclosed inasmuch as upon a true construction of Act 29 of 1942 and Act 56 of 1972 and in the circumstances pleaded, plaintiff was not precluded from including in his particulars of claim the item for estimated future loss of earnings."
>
> Before I proceed to consider the question raised by the exception it is necessary to deal briefly with two other matters. Counsel for defendant submitted *in limine* that under the Uniform Rules of Court an exception can now only be taken to the whole of a pleading and not to a part thereof. Inasmuch therefore as the plaintiff's exception in the present case relates only to certain paragraphs of the plea the exception should be dismissed with costs. I was referred to cases such as *Dharumpal Transport (Pty.) Ltd. v Dharumpal*, 1956 (1) SA 700 (AD) at p. 706; *Saffer Clothing Industries (Pty.) Ltd. v Worcester Textiles (Pty.) Ltd.*, 1965 (2) SA 424 (C) at pp. 429 - 430, and *Santos and Others v Standard General Insurance Co. Ltd. and Another*, 1971 (3) SA 434 (O). The argument is not without substance but despite that I have decided not to uphold it. The remedy of an exception, it has often been stated, is available where the exception goes to the root of the opponent's claim or defence. If, for example, there is a point of law to be decided which will dispose of the case, in whole or in part, the proper course is to proceed by way of exception. I would with respect refer to and adopt the

following word of INNES, C.J., in *Barrett v Rewi Bulawayo Development Syndicate*, 1922 A.D. 457:

> "Exception should not be taken to particular sections of a pleading unless they are self-contained and amount in themselves to a separate claim or a separate defence, as the case may be."

The paragraphs in the defendant's plea to which exception has been taken in the present matter are, if I understand them correctly, self-contained and amount in themselves to a separate defence. It is the validity of that defence which is the subject-matter of the exception as I shall try to explain later in this judgment. A further consideration which has influenced me in coming to the conclusion not to dismiss the exception is that, as was pointed out in the *Dharumpal* case, *supra*, the main purpose of an exception that a declaration discloses no cause of action (and similarly, I take it, that a plea or a distinct part of a plea does not disclose a defence) is to avoid the leading of unnecessary evidence. It seems to me that, depending on which way the exception goes in the case, evidence as to future loss of earnings will or will not be necessary at the trial. To that extent the issue is a separate and distinct one which should, if possible, be decided at this stage. It is true that other machinery exists, such as Rule 33, by means of which the question can be decided but in my judgment that is not a sufficient reason why the matter should not be determined by way of exception.'

(See also *Van Lochen v Associated Office Contracts (Pty) Ltd* 2004 (3) SA 247 (W) at 252F –H; *Denker v Cosack* 2006 (1) NR 370 (HC) at 375E-G; *Hangula v Motor Vehicle Accident Fund* 2013 (2) NR 358 (HC) at 363G.)

[29] Erasmus, (*supra*) at B1-158 states that a pleading lacks averments which are necessary to sustain a defence where the pleading does not justify the conclusions drawn therein (with reliance on *Miller v Muller* 1965 (4) SA 458 (C) 467H); or (ii) where the defence raised, <u>though adequately pleaded</u>, does not in law constitute as defence to the claim (relying on *Lampert-Zakiewicz* (*supra*)). I see no reason why the same should not apply *mutatis mutandis* to a pleading dealing with a cause of action.

[30] In the premises I regrettably find myself unable to agree with the approach taken by the learned judge in *July v Motor Vehicle Accident Fund* as set out *supra.* I think I

should respectfully add here that the requirement on which emphasis was placed in that case, namely that the defect should appear *ex facie* the pleadings means only this, namely that '…. in deciding whether a particular averment in a pleading should be struck out the Court must have regard only to the pleadings filed and cannot consider any fresh matter introduced either by way of evidence on affidavit or in any other manner.' (*Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 754F-G).

(ii) *The relevant provisions under the ACLR Act and their subsequent amendment in 2003*

[31] At the time when the farm was donated and the agreement in terms of annexure "B" was concluded section 17(1) and (2) of the ACLR Act read as follows:

> '**17 Vesting in State of preferent right to purchase agricultural land**
>
> (1) Subject to subsection (3), the State shall have a preferent right to purchase agricultural land whenever any owner of such land intends to alienate such land.
>
> (2) Subject to subsection (3), no agreement of alienation of agricultural land entered into by the owner of such land after the date of commencement of this Part shall be of any force and effect until the owner of such land-
>
> (a) has first offered such land for sale to the State; and
>
> (b) has been furnished with a certificate of waiver in respect of such land.'

[32] The definition of 'alienate' in relation to agricultural land meant 'sell, exchange or otherwise dispose of against any valuable consideration of whatever nature' and 'alienation' had a corresponding meaning.

[33] The Agricultural (Commercial) Land Reform Amendment Act, 2002 (Act 13 of 2002) ('the ACLR Amendment Act'), introduced certain changes. The expression 'alienate' was amended to read:

"'alienate', in relation to agricultural land, means sell, exchange, donate or otherwise dispose of, whether for any valuable consideration or otherwise, and includes, in the case where such land is registered in the name of –

(a) a company, the sale or transfer of shares of the company which results in the controlling interest in the company being passed to another person; or

(b) a close corporation, the sale or transfer of an member's interest in the close corporation, or any portion of such interest, which results in the controlling interest in the close corporation being passed to another person,

and 'alienation' has a corresponding meaning."

[34] After amendment by the ACLR Amendment Act the relevant parts of section 17 read as follows:

'**17 Vesting in State of preferent right to purchase agricultural land**

(1) Subject to subsection (3), the State shall have a preferent right to purchase agricultural land whenever any owner of such land intends to alienate such land.

(1A)Whenever one or more members of a company or close corporation which is the owner of agricultural land intends to sell or transfer –

(a) in the case of a company, any shares of the company which would have the effect of passing the controlling interest in the company to another person; or
(b) in the case of a close corporation, any interest or interests in the close corporation, or any portion of such interest, which would have the effect of passing the controlling interest in the close corporation to another person,

it shall, for purposes of subsection (1) of this section and section 17A(3), be deemed that the company or close corporation in its capacity as owner of the agricultural land held by it, intends to alienate such land.

> (2)Notwithstanding anything to the contrary in any law contained but subject to subsection (3), no agreement or alienation of agricultural land entered into by the owner of such land, or, in the case where such land is alienated by a company or close corporation in the circumstances contemplated in paragraphs (a) and (b), respectively, of the definition of 'alienate', no agreement of sale or instrument of transfer or transfer otherwise of any shares of the company or of any member's interest in the close corporation or of any portion of such interest which, but for this subsection, would have passed the controlling interest in the company or close corporation to another person, shall be of any force and effect until the owner of such land –
>
> (a) has first offered such land for sale to the State; and
>
> (b) has been furnished with a certificate of waiver in respect of such land.'

(iii) *The merits of the exception to the principal counterclaim*

[35] Mr *Strydom* submitted on behalf of the plaintiffs that the provisions of the ACLR Act prior to the amendments contained no provision prohibiting a donation of agricultural land. Likewise, he submitted, there was no provision prior to the amendments which restricted the sale of a member's interest in a close corporation which was the owner of agricultural land, except in cases where the purchaser of the interest was a foreign national as provided for by section 58(2) of the ACLR Act at the time.

[36] Mr *Obbes*, on the other hand, submitted on behalf of the defendants, in summary, that the composite scheme whereby the first defendant sold his member's interest in the close corporation (i.e. the first plaintiff) to the plaintiff for the sum of N$620 000.00, while donating the farm to the close corporation, constituted a disposition of the farm for valuable consideration; that this constituted an 'alienation' within the meaning of the ACLR Act prior to amendment; and, as the farm had not been offered to the State and a certificate of waiver obtained, such alienation was in contravention of section 17 as it then read.

[37] In spite of an initial inclination to the contrary view, it seems to me upon proper consideration that Mr *Strydom* is indeed correct. When the terms of annexure "B" are considered, it is clear that what is being sold is the 100% member's interest which was to vest at a future date in the first plaintiff upon its incorporation. The parties acknowledge in the preamble that the first defendant as seller has applied for the registration of a close corporation (first plaintiff); that the first defendant is about to become the registered and beneficial holder of the total member's interest in the close corporation; that the close corporation, once incorporated will become the registered owner of the farm; that the second plaintiff as purchaser is desirous of acquiring the benefits to be derived from the farm to be registered in the name of the close corporation and that it has been agreed that the method of the purchaser so doing shall be by means of the purchaser buying from the seller the member's interest. The terms of the agreement are further all in accordance with the agreed purpose set out in the preamble. Of particular significance is clause 4 of the agreement in which the parties agree that the 'purchase consideration' of the subject matter, i.e. the member's interest, payable by the purchaser to the seller shall be the sum of N$620 000.00. Clause 5 determines that the full payment shall be made on the 'effective date', which is defined as *inter alia*, the date of registration of the farm in the name of the close corporation and registration of the amended founding statement in favour of the purchaser. Clearly the valuable consideration given is for the member's interest and not for the farm.

[38] Mr *Obbes* referred to certain paragraphs in the defendants' plea which allege what the sole purpose and intention of the second plaintiff and the first defendant were in constructing the transaction as they did and emphasised that the intention was that the transaction should be an 'alienation' of agricultural land as described in the ACLR Act applicable at the time. He submitted that these allegations of fact must be taken to be correct at the exception stage and that evidence should first be led during the trial to establish these allegations.

[39] Mr *Obbes* made these submissions when he addressed argument on the exception to the plea, but indicated later in general that the same arguments apply in relation to the exception to the counterclaim. However, the particular allegations of fact made in

the plea are not repeated in the counterclaim and therefore counsel's submissions do not apply.

[40] Furthermore, as Mr *Strydom* pointed out, the purpose and intention of the parties should be determined with reference to the written agreement and in the agreement, even when considered in conjunction with the fact of the donation of the farm to the first plaintiff, there is no intention expressed or implied, that the transaction was intended to be an 'alienation' as contemplated in the ACLR Act. Indeed, it seems to me, the very purpose of the parties was to avoid the provisions of the Act, and this they were entitled to do, as long as the transaction is not simulated and therefore *in fraudem legis* (*Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 at 548; *Strauss and another v Labuschagne* 2012 (2) NR 460 (SC) at para [44]). I further agree with Mr *Strydom* that the counterclaim does not make out any case that the transaction was *in fraudem legis.*

[41] Counsel for the plaintiffs submitted that one can infer from the amendments brought about by the ACLR Amendment Act that the legislature intended to render transactions like the one under discussion illegal precisely because they were not so before the amendments. I agree with this submission, which is strengthened by the fact that section 31(2) of the ACLR Amendment Act specifically provided that the amendments to the definition of the expression 'alienate' and 'alienation' and the amendments to section 17 shall come into operation 60 days after the date of commencement of that Act. It is clear that the legislature thought it wise to provide persons with an opportunity to regulate their affairs in accordance with the new statutory provisions. It is very unlikely that this opportunity would have been provided if transactions of the kind under discussion were in contravention of the ACLR Act prior to amendment.

[42] To sum up thus far, the exception to the defendants' principal claim is good.

(iv) *The merits of the exception to the defendants' alternative counterclaim*

[43] The plaintiffs' submission in summary is that as a result of the amendments brought about by the ACLR Amendment Act, the re-purchase of the membership interest, should such an agreement be proved in evidence, will be subject to the provisions of the ACLR

Act as amended. The effect is that any agreement to purchase the second plaintiff's 100% membership interest is dependent for its legal force and effect upon compliance with section 17(2) as amended, i.e. the farm must first have been offered for sale to the State; and the Minister must have furnished a certificate of waiver in respect of the farm. The alternative counterclaim does not, however, make any averments regarding any condition precedent of this nature implied by law.

[44] On behalf of the defendants it was submitted that it is arguable that, because the agreement to re-purchase was already concluded during 2000 and prior to the amendments brought about by the ACLR Amendment Act, this Act would not apply to this agreement. This argument is based on the further particulars provided in response to the plaintiffs' question in paragraph 4.1 of their request for further particulars, which reads as follows:

> '4.1 On what basis in law, with specific reference to the provisions of the Agricultural (Commercial) Land Reform Act no 6 of 1995 as amended would the defendants be entitled to repurchase a majority share of the second plaintiff?'

In response the defendants stated:

> '4.1 No reference is made in paragraph 12 as to the provisions of the Agricultural (Commercial) Land Reform Act, Act No. 6 of 1995.
>
> The defendants, insofar it may be necessary, however states (sic) that the defendants, in terms of the provisions of the Agricultural (Commercial) Land Reform Act, Act No. 6 of 1995 applicable at the stage when the agreement was entered into would have been and indeed still are entitled to repurchase a majority share of the second plaintiff as the amendment which prohibits such a repurchase of a majority share of the second plaintiff was promulgated a substantial period after the parties entered into the agreement entitling the defendant to repurchase same.'

[45] The submission on behalf of the defendants was made almost in passing with no reference to authority and was not addressed at all by the plaintiffs, although the issue

was very briefly mentioned in the defendants' heads of argument. The focus of the argument during the hearing was mainly on the exception to the plea and perhaps because both counsel merely referred to the same arguments raised in respect to the plea when they addressed the counterclaim, this issue did not receive the attention it deserves. Unfortunately the Court also did not notice it at the time. In the premises I prefer not to express any opinion about it. Should it be necessary or expedient, the point might be addressed at some stage in the future.

[46] The defendants' case on the pleadings, read with the further particulars to the alternative counterclaim, is that a waiver is not required, but in the event that it is required, the prayer in respect of the alternative counterclaim is adequately worded as it prays for an order of retransfer of the second plaintiff's member's interest 'after all statutory requirements, including the obtaining of a waiver insofar as it may be required to the transfer had been fulfilled by second defendant.' (I pause to note here that section 17, as amended by the ACLR Amendment Act, places the obligation to comply with the statutory requirements on the 'owner' of the agricultural land (in this case the first plaintiff) and not on the purchaser (in this case the second defendant).) However, as Mr *Obbes* submitted in the heads of argument, the Court could grant an order in the properly worded by way of further or alternative relief.

[47] In all these circumstances I am not inclined to uphold the exception in respect of the alternative counterclaim. However, as the plaintiffs are successful with respect to the principal claim, I think it would be just to award them their costs.

Order

[48] In the result the following order is made:

1. The plaintiffs' exception to the defendants' plea is struck out with costs, such costs to include the costs of one instructing and one instructed counsel.

2. The plaintiffs' exception to the defendants' principal counterclaim is upheld with costs, such costs to include the costs of one instructing and one instructed counsel.

3. The defendants are given leave to amend their counterclaim, should they be so advised, within 21 days of this order.

____(Signed on original)_____

K van Niekerk

Judge

APPEARANCE

For the plaintiffs/excipients: Adv J A N Strydom

Instr. by Van der Merwe-Greeff Inc

For the defendants/respondents: Adv D Obbes

Instr. by Dr Weder, Kauta & Hoveka Inc.