

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

In the matter between:

Case no: I 3841/2012

KOOS COETZEE

PLAINTIFF

And

TRANSNAMIB HOLDINGS LTD

1ST DEFENDANT

JOHN.D.VAN WYK

2ND DEFENDANT

Neutral citation: *Coetzee v TransNamib Holdings Ltd* (I 3841-2012) [2015]
NAHCMD 231 (01 October 2015)

Coram: MILLER AJ

Heard: 11 August 2015

Delivered: 01st October 2015

Flynote: Statutes – Interpretation - National Transport Service Holding Company Act, 1998 – Interpretation of ‘transport services’ in the context of transportation of goods – Courts to depart from the literal meaning if such would not reveal the true intention of the legislature – Exception to the rule of interpretation of Statutes – words interpreted in the context within which they are used – ‘transport services to mean any other type of

services offered by the first respondent in relation to the transportation of goods –
Application dismissed.

ORDER

1. The application is dismissed.
2. The matter is postponed to the 8 October 2015 at 15h30 for status hearing.

JUDGMENT

MILLER AJ:

Brief Background

[1] The plaintiff instituted action against the defendants on 6 December 2012 claiming the sum amount of N\$ 3 872 100 for general and special damages suffered by the plaintiff from a train accident which occurred on 07 December 2009. The plaintiff suffered significant bodily injuries which caused him severe pain and limited his independent muscular movements. The first defendant, being the employer, is sued vicariously for the actions of the second defendant, employee of first defendant, who was the driver of the train at the time the accident occurred.

[2] The summons was served on the defendants on 19 December 2012 and 21 January 2013 respectively. The first defendant raised a special plea of prescription on 03 May 2013 stating that in terms of s 12(1) of the Prescription Act, 1969, the plaintiff's claim has prescribed 'on or about 6th December 2012'. Secondly, the first defendant

sought aid from s 8(1) and (2) of schedule 1 of the National Transport Service Holding Company Act, 1998 ('Act') which reads:

'(1) Notwithstanding anything in any law, subject to item 1(3) and to paragraph (2) of this item, no claim against the holding company arising from the transportation of Goods by the Holding company or its transport services shall be enforced and the Holding Company shall not be liable in respect of such claims, unless a notice in writing of the intention to institute such claim has been submitted by hand or registered post to the Holding Company at its registered office within a period of 90 days after cause of action concerned arose'

(2) Notwithstanding paragraph (1)-

(a) if a competent court, on application made to it not later than the expiration of the relevant period of prescription in terms of the Prescription Act, 1969 (Act 68 of 1969), is satisfied that the Holding Company shall not be prejudiced by reason of the failure by the plaintiff or applicant to submit a notice as required by, and within the period of 90 days referred to in, that paragraph, and that the plaintiff or applicant could not reasonably have been expected to so have submitted such notice within such period of time, such court may, on good cause shown, grant the plaintiff or applicant special leave to institute such claim, and the court may make such order as to the costs of the application as it may consider reasonable; and

(b) this item shall not apply to any operation of the Holding Company in relation to its international carriage by air of passengers or goods as contemplated in the Carriage by Air Act, 1946 (Act 17 of 1946).

[3] Plaintiff's notice to institute legal proceedings was forwarded to the defendants by letter dated 22 November 2012 and the first defendant states that such notice does not comply with s 8(1) of the said Act and that no period has, on request by the plaintiff, been extended by a court. It is on these grounds that the first defendant relies for the dismissal of the plaintiff's claim with costs. The plaintiff brought an application on 29th January 2015 seeking the courts indulgence in terms of item 8(2) of the Schedule, ie for the court to extend the time periods to allow the plaintiff to proceed with its action against the defendants. The application was opposed on the basis that it was a delayed

application and that no condonation was sought explaining the full reasons for the delay. The parties, in their joint Case management report dated 18 March 2015 that the interlocutory issues raised be heard first before the court pronounces itself on the legal issue of damages. The matter was finally heard on 11 August 2015 and it goes without saying that the late filling of heads of arguments and the Applicants replying affidavit is condoned.

Issues to be decided by the court

[4] The court raised, *mero motu*, the question whether the plaintiff's claim falls within the causes of actions covered by item 8(1) of Schedule 1 to the Act. The determination on this issue will have an effect on the status of the interlocutory issue before court. I will therefore proceed to decide on the questions posed by the court first.

Is the Applicant's cause of action subjected to item 8 of schedule 1 to the Act?

[5] Both parties' position on this is that, considering the definition of the term transport service in the Act to mean the transportation of passengers and goods, the interpretation should be applied to the whole Act and that the words in schedule 1, which reads 'no claim against the holding company arising from the transportation of Goods by the Holding company or its transport services shall be enforced' should also be read to include transportation of passengers. Counsel for the plaintiff relied on the principle of *ex visceribus actus* which requires a harmonious interpretation between different parts of a statute. Counsel on behalf of the defendants thus maintains that the plaintiff's action is subject to item 8 of Schedule 1 and that failure to comply thereto subjects the application to a dismissal.

[6] The concerned passage reads as follows:

Notwithstanding anything in any law, subject to item 1(3) and to paragraph (2) of this item, no claim against the holding company arising from the transportation of Goods by the Holding company or its transport services shall be enforced and the Holding Company shall not

be liable in respect of such claims, unless a notice in writing of the intention to institute such claim has been submitted by hand or registered post to the Holding Company at its registered office within a period of 90 days after cause of action concerned arose’.

[7] I am persuaded to quote Parker, J in his judgment of *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others*¹ wherein he stated that:

‘The rule is firmly established in the practice of this court that in interpreting statutes recourse should first be had to the golden rule of construction because the plain meaning of the language in a statute is the safest guide to follow in construing the statute. According D to the golden or general rule of construction, the words of a statute must be given their ordinary, literal or grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent that such a literal construction falls within one of those exceptional cases in which E it will be permissible for a court of law to depart from such a literal construction, for example where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent: ‘

[8] It is trite that words should not be read into a statute where the intention of the legislature is clear. One consequence of this rule is that a statute may not be extended to meet a case for which provision has clearly and undoubtedly not been made. The basic reasoning behind this approach is that, by remedying a defect which the Legislature itself could have remedied, the Court is usurping the function of the Legislature and making law, not interpreting it.² There is however an exception to this statutory rule of interpretation which entails, in the words of Hannah, J, that words can be added by implication if it is necessary to give the provision sense and meaning in its context; the literal meaning of a statute may be departed from where to insist on the literal meaning of the words would lead to an `absurdity so glaring that it could never

¹ 2009 (2) NR 793 (HC) at 797C-G.

² *Engels v Allied Chemical Manufacturers (Pty) Ltd and Another* 1992 NR 372 (HC) at 372H-I.

have been contemplated by the Legislature, or if it leads to a result contrary to the intention of Parliament.³

[9] Both counsel rely on the literal meaning of the words 'transport services' as defined by the Act to mean transport of passengers or goods. Applying the literal interpretation, this would therefore mean that no claim for bodily injuries suffered by a person shall lie after the expiration of a period of 90 days or after an extended period by the court. Meaning that, any claim will have to be made within the period of three months after the accident occurred and that failure to institute such claim takes away the common law right to sue for damages for bodily injuries, or in the case of dependents, for loss of support. I do not think this is the intention of the legislature to be unreasonable by limiting the common law right, hence the presumption that legislature does not intend to alter the existing law more than is necessary, especially in light of the fact that the Prescription Act, 1969 already regulates the time within which an action may be instituted. The intention to change the period from 3 years to 3 months in my view is not logical and if that was the legislature's intention, it would have expressly stated so, e g with the Defence Act, 2002 which limits any civil actions to two years⁴ or the Police Act, 1990 which limits the period to 12 months.⁵ In the absence of an express wording by the legislature therefore would exclude such an interpretation. The next step is therefore to determine what the intention of the legislature is within the context in which the paragraph is used.

[10] Item 8(1), which deals with notices of claims against the first respondent, is subjected to item 1(3) which deals with claims for death or injuries caused to livestock. The legislature expressly stated that any claims '*arising from the transportation of Goods*'_which means that what is concerned here are claims for loss or damaged goods; this is followed by words '*or any transport services*' which in this context would mean that any other service that may be given by the holding company, which may

³ Ibid, at 373A-B.

⁴Section 73 of Act 1 of 2002.

⁵ Section 39 of Act 19 of 1990.

include the handling of goods before or after the actual transporting of goods. Thus, the words 'transport service' in this context would not be referring to transportation of passengers but the services in relation to the transport of goods offered by the first defendant. Notice the word 'or' to mean in the alternative, ie, that claims may lie as against the first defendant either for the actual transportation of goods or any other services in relation to the transportation of goods, whichever the case may be.

[11] I am therefore of the view that in this context, the words 'transport services' mean any services offered by the first defendant in relation to the transportation of goods. These are the claims which are subjected to a period of 90 days within which the respective claims are to be enforced. This therefore means that the plaintiff's claim is not subjected to item 8(1) and as such, the plaintiff would not need the court's special leave to institute a claim against the defendants. The application would as a result then be dismissed.

[12] The defendants however still can pursue the avenue of the special plea of prescription in terms of the Prescription Act, 1969, but that is a matter that has to be decided on a different footing.

[13] I accordingly make the following order:

3. The application is dismissed.
4. The matter is postponed to the **8 October 2015 at 15h30** for status hearing.

PJ Miller
Acting

APPEARANCES

Plaintiff

D Khama

On instructions of

Sibeya & Partners

1st and 2nd Defendant

SS Makando

Of

Conradie & Damaseb