

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

CASE NUMBER: I 1241/2016

In the matter between:

GRACELAND ARCHITECTS CC

PLAINTIFF

And

HOWARD & CHAMBERLAIN ARCHITECTS

1ST DEFENDANT

DEMUSHUWA PROPERTY DEVELOPERS (PTY) LTD

2ND DEFENDANT

Neutral Citation: Graceland Architects CC v Howard & Chamberlain Architects (I
1241/2016) [2017] NAHCMD 307 (27 October 2017)

Coram: MILLER AJ

Heard: 20 October 2017

Delivered: 27 October 2017

ORDER

- [a] The first exception is dismissed.
- [b] The second exception is upheld.
- [c] The plaintiff is granted leave to amend its pleadings, if so advised, in the light of this judgment.
- [d] There shall be no order as to costs.
- [e] There shall be a status hearing before Oosthuizen J on **20 November 2017** at **14h00**.
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RULING

MILLER AJ:

- [1] The plaintiff is a Close Corporation which conducts its business in the Republic of South Africa. It is accepted before me that its business is that of an architect.
- [2] The first defendant practices as an architect in Namibia.
- [3] In terms of a written agreement the plaintiff was appointed as a sub-contractor to the first defendant in order to do some work reserved for architects, which work relates to a building to be constructed in Namibia.
- [4] It is alleged in no uncertain terms that the work done by the plaintiff was not done in Namibia, but in South Africa I assume.

[5] The plaintiff now seeks to recover payment for the work it had done, for which it says it did not receive payment. That action is based upon the agreement concluded earlier.

[6] In the alternative, the plaintiff seeks damages based on the law of delict. Its claim as formulated at present, following some amendments, is that the first defendant had intentionally or negligently and moreover unlawfully provided the plaintiff with legal advice which proved to be wrong.

[7] The defendants except to the particulars of claim. For present purposes the defendants, insofar as relief is claimed against them, contend that neither the claim based on the agreement, nor the alternative delictual claim, discloses a cause of action.

[8] As far as the claim based on the agreement is concerned, counsel for the defendants submit that the agreement relied upon is null and void. At the heart of the submission lies the argument that the agreement, is in contravention of the Architects and Quantity Surveyors Act, 13 of 1979 (the Act) which prohibits Close Corporations from performing architectural work in Namibia. Counsel rely on *Kondjeni Nkandi Architects and Another vs. the Namibian Airports Company Limited*¹ and *Claud Bosch Architects v Auas Business Enterprises Number 123 (Pty) Ltd.*² It is apparent that the plaintiff is not permitted to do work in Namibia.

[9] Counsel for the plaintiff accept that the conclusion reached in the judgments I referred to in the preceding paragraph are correct. Counsel submits that the facts of the present case are different and distinguishable. For that reliance is placed on the fact that the plaintiff did not render its services in Namibia, but somewhere else.

[10] Section 11 of the Act determines who may or may not render services as an architect, and under what circumstances they may do so.

¹ 2016 (1) NR 223 HC.

² (I 2333-2011) [2016] NAHCMD 195 (7 July 2016).

[11] The issues raised in the different views expressed by Counsel must be resolved by an interpretation of particularly s 11 and s 13 of the Act. Questions as to what it permits or prohibits and to what extent, find their answer in the Act itself, properly interpreted.

[12] The approach of the court is primarily to determine the intention of the legislature. As a first step it will look at the words used to express its intention and bear in mind that the task of the court is to apply the law and not to make law. If the words used are unambiguous the court must give effect thereto in the form in which they are expressed.

[13] Section 11 of the Act must be read together with s 13 thereof. Section 13 (1)(b) (i) of the Act reads as follows:

'(b) Any person other than a natural person which-

(i) For gain performs any kind of work reserved for architects . . . shall be guilty of an offence . . . '.

[14] The phrase *'for gain performs any work'* is clear and unambiguous. It is not disputed that the phrase is confined to work performed in Namibia.

[15] I do not read and interpret the relevant section of the Act as prohibiting the utilization of architectural work performed elsewhere, in erecting a building which happens to be in Namibia. If that is what the legislature intended, it would have said so.

[16] The first exception must fail as a consequence.

[17] The second exception which is aimed at the alternative claim must succeed. I was not referred to any law or judgment to the effect that the passing of legal advice between persons, particularly those who are architects, and not lawyers, if that advice is wrong, will be actionable in delict, and I have found none.

[18] Counsel for the plaintiff drew my attention to *Miller and Others vs. Bellville Municipality*.³ Although the context differs from the present case, the principle that a mistake in law is not actionable, *per se* was found to be one which is well established. The following is stated at page 920A:

'The fact that the view of one layman, the assistant town clerk, was confirmed by the view on another, the plaintiffs' architect, did not relieve the plaintiffs from the necessity of making a proper enquiry as to the law.'

[19] Counsel for the defendants correctly submitted that if the allegation is that the advice was given fraudulently, no exception can arise. No allegation of fraud is made on the pleadings as they stand, nor can such an allegation be inferred.

[20] The second exception is upheld.

[21] As far as costs are concerned each of the parties achieved a measure of success in more or less equal measures. A proper order in my view is that no order as to costs needs to be made.

[22] The following order will be issued:

[a] The first exception is dismissed.

[b] The second exception is upheld.

[c] The plaintiff is granted leave to amend its pleadings, if so advised, in the light of this judgment.

[d] There shall be no order as to costs.

³ 1973 (1) SA 914 (CPD).

[e] There shall be a status hearing before Oosthuizen J on **20 November 2017 at 14h00.**

K MILLER
Acting Judge

APPEARANCES

PLAINTIFF/RESPONDENT: Mr Tötermeyer SC, assisted by Mr G Dicks
for Plaintiff/Respondent
Instructed by Koep & Partners
Windhoek

DEFENDANT/APPLICANT: Mr Healthcote, assisted by Ms Van der Westhuizen
for 1st and 2nd Defendants
Instructed by Francois Erasmus & Partners and
Ellis Shilengudwa Incl.,
Windhoek