

Practice Directive 61

"ANNEXURE 11"

IN THE HIGH COURT OF NAMIBIA

Case Title: ARYSTEQ FINANCIAL SERVICES (PTY) LTD v QUINTO OCKHUIZEN	Case No: HC-MD-CIV-ACT-CON-2019/00478
	Division of Court: HIGH COURT(MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	Date of hearing: 1 June 2020
	Date of order: 25 June 2020
	Reasons delivered on: 2 July 2020
Neutral citation: <i>Aristeq (Pty) Ltd v Ockhuizen</i> (HC-MD-CIV-ACT-CON-2019/00478) [2020] NAHCMD 266 (25 June 2020)	
Results on merits: Merits not considered.	
The order: <ol style="list-style-type: none">1. The special plea raised by the Defendant is hereby dismissed with costs.2. Matter is postponed to 9 July 2020 at 15h00 for Status hearing.3. Joint status report on the further conduct of the matter to be filed on or both <u>6 July 2020</u>.	
Reasons for orders:	
PRINSLOO J	
[1] The plaintiff, Arysteq Financial Services (Pty) Ltd, instituted action against the defendant on 8 February 2019 claiming rectification of a written loan agreement entered into between the parties on 14 June 2017.	
[2] The action was defended by the defendant on 1 March 2019 and subsequent to the case planning	

conference, filed his plea on 24 April 2019. The defendant raised a special plea in respect of the plaintiff's claim in the following terms:

'A1. The defendant's special plea I limine of non-locus standi and/or non-authority

- 1.1 The Defendant admits that the citation of the Plaintiff on the face of the Combined Summons;
- 1.2 The Defendant furthermore denies that the Plaintiff is registered as a financial institution as contemplated in the Namibian Financial Institutions Supervisory Authority Act, Act No, 3 of 2001, and more specifically Section 1 and/or 1(d) and/or 1(n) thereof to render financial services as contemplated in Section 1 thereof;
- 1.3 The Defendant therefore pleads that the Plaintiff has no locus standi and/or authority to have entered into the Loan Agreement, Annexure "A", and/or to have rendered the financial services as aforesaid.

WHEREFOR the Defendant prays that the Plaintiff's action be dismissed with costs on an attorney and own client scale, such cost to include one instructing and one instructed counsel.'

[3] Following on the plea and special plea of the defendant the plaintiff directed a request for trial particular to the defendant. The plaintiff required defendant to state in terms of which section of the Namibian Financial Institutions Supervisory Authority Act ('the Act') or its regulations is it stated that a financial institution as defined, must be registered as such, and if so, where and in what manner.

[4] The defendant pleaded in amplification in his response to the plaintiff's request for trial particulars that the plaintiff refers to and relies on section 1(d)¹ and 1(n)² of the Act as well as the definitions in section 1 of the said Act with specific reference to 'financial institution and 'financial services'(which included the reference to section 1(d) of the

Act to a moneylender³ as defined in the Usury Act⁴ as well as ss 3⁵, 10⁶ and 25⁷ of the Act. In addition thereto the

¹ "financial institution" means-

(d) a moneylender as defined in section 1 of the Usury Act, 1968 (Act 73 of 1968);

² (n) any other person who renders a financial service as a regular feature of the business of that person, but who is not registered as a financial institution or authorised to render a financial service under a law referred to in paragraph (a) to (l) of this definition;

³ "money lender" means- (a) any person who is granting or has granted a loan of a sum of money to a prospective borrower or to a borrower in terms of a money lending transaction; (b) any person to whom, whether by delegation, cession or otherwise, the rights or the rights and obligations of a moneylender in respect of a money lending transaction have passed; (c) the holder of an instrument of debt executed in respect of a money lending transaction; (d) any manager; [Definition of "moneylender" substituted by sec 1(l) of Act 90 of 1980.]

⁴ 73 of 1968.

⁵ **Functions of Authority The functions of the Authority** are- (a) to exercise supervision, in terms of this Act or any other law, over the business of financial institutions and over financial services; and (b) to advise the Minister on matters related to financial institutions and financial services, whether of its own accord or at the request of the Minister.

⁶ **10 Board:-** (1) There shall be a board of the Authority which, subject to this Act, shall manage and control the affairs of the Authority and exercise the powers conferred and perform the duties imposed on the Authority by this Act or any other law. (2)

defendant pleaded that he will rely on the Regulations promulgated in Government Gazette 6438 dated 10 October 2017 of Government Notice 265 of 2017 and more specifically s 1 and s 2, 15 and 21 of the Regulations. The defendant further indicated that he will rely on s 1 of the Financial Intelligence Act⁸ with specific reference to 'accountable institutions' and s2 thereof and section 4, 6 and 16 of Schedule 1.

[5] In its replication the plaintiff pleaded that it has not alleged that the plaintiff is a registered financial institution. In the pre-trial order the parties are at ad idem that the plaintiff is neither registered as a financial institution nor is the plaintiff registered as a commercial bank

Argument on behalf of the defendant

[6] Mr Naude argued that central to the plaintiff's claim is its locus standi and/or authority to have entered into the loan agreement with the defendant. He argued the fact that the plaintiff's failure to allege that it was duly registered as a financial institution or rendering financial services is fatal to the plaintiff's case.

[7] Mr Naude referred the court to s 1, 3, 10 and 25 of the Act as well as the Usury Act and the Financial Intelligence Act in support of his submissions. In this regard Mr Naude submitted that having considered the legislative provisions:

- a) The plaintiff incorrectly denies and pleads that it has not alleged that it is registered as a financial institution to its detriment, while the plaintiff clearly falls under the definition of a financial institution which renders financial services;
- b) It is clear from the name of the plaintiff, as well as the written loan agreement in terms of which it agreed to lend money to the defendant, that it is involved in the financial service business and is a 'financial organisation' by granting loans and entering into written loan agreements and is thus a 'money lender' as contemplated in the Usury Act and the Namibian Financial Institutions Supervisory Authority Act. In addition thereto, the plaintiff is an accountable institution as contemplated and stipulated in terms of the

The board shall be constituted, and its members, including the chairperson and the vice-chairperson of the board, shall be appointed in accordance with, and for a period as determined under, sections 14 and 15 of the State-owned Enterprises Governance Act, 2006. [Subs-sec (2) substituted by sec 49 of Act 2 of 2006.] (3) The Minister may appoint an alternate member for each member of the board. (4) The names of the persons appointed as members and the names of the persons appointed as alternate members of the board, and their date of appointment, must be notified in the Gazette.

⁷ **25 Levies**:- (1) The Minister must, on the recommendation of the board, impose by notice in the Gazette levies on financial institutions. Sub-sections 2-7 not inserted.

⁸ 13 of 2010.

Financial Intelligence Act.

- c) The fact that the plaintiff did not allege that it was a duly registered financial institution in terms of the aforesaid legislation is fatal to the case of the plaintiff and consequently the plaintiff had no *locus standi in judicio* or authority to have rendered the financial service or to have entered into a loan agreement with any person and has thus acted unlawfully and as a result has thus no locus standi to bring the action.

Argument on behalf of the plaintiff

[8] Mr Vaatz indicated from the onset that it is clear from the pleadings of the plaintiff that it does not allege that it is registered as a financial institution and the plaintiff does not deny that it is per definition a financial institution and the issue is thus whether it had to be registered or not.

[9] Counsel argued that the defendant relies on sections 1(d) and 1(n), 3, 10 and 25 of the Act in support of his special plea but submitted that these sections are not of assistance to the defendant in his case for the following reasons:

- a) Sections 1(d) and 1(n) merely defines what the term financial institution means and plaintiff accepts that it falls within that definition, however, neither ss 1(d) and 1(n) nor any of the other subsections of s 1 indicates that a financial institution must be registered as such.
- b) Section 3 of the Act, only defines the created supervisory authority in terms of the Act and sets out that it has to exercise supervision over the business of financial institutions and financial services and to advise the Minister. Counsel argued that nowhere in the said section is there a reference that a financial institution has to be registered.
- c) Section 10 states how the supervisory authority is to be structured but nothing in the section refers to the registration of financial institutions.
- d) Section 25 states that the created authority and the Minister is entitled to impose levies on financial institutions, but again does not refer to the fact that the financial institution must be registered.
- e) Similarly the other Acts referred to by the defendant in his trial particulars, such as the Usury Act does not state anywhere that a financial institution must be registered as such.
- f) Sections 1, 2, 4, 6 and 16 of the Financial Intelligence Act on which the defendant also relies does not state that the financial institution must be registered.

[10] Mr Vaatz argued that the defendant is silent in his special plea and his heads of argument regarding the relevant statutory provisions that requires the financial institution to be registered. In addition thereto there is no indication as to how and in what manner such registration, if required, must take place. Mr Vaatz pointed out that there is also no indication of where such a financial institution has to register.

[11] On the argument by the defendant that the plaintiff is a money lender who conduct money lending transactions, Mr Vaatz argued that the plaintiff does not take issue with that argument but again emphasizes that the plaintiff is not required by law to be registered as there is no requirement or procedure provided for the registration of a money lender or a financial institution and on that basis Mr Vaatz argued the defendant's special plea is without any merit.

[12] Mr Vaatz submitted in conclusion that if one compares the situation of money lenders and financial institutions it is clear that there are many different types of entities in the commercial world, referring to for example:

- a) Companies with limited liability;
- b) Close corporations;
- c) Partnerships;
- d) Individuals; and
- e) Voluntary associations

[13] And in respect of some of these entities there is a requirement for registration, for example a company with limited liability must be registered in terms of the Companies Act, but the Companies Act and Regulations clearly prescribes what must be done and what documents must be submitted and what steps must be taken for purposes of registering the company. The same applies to close corporations and the likes.

[14] Mr Vaatz submitted that financial institutions and money lenders must also comply with all the laws regulating financial matters without there being a specific requirement for each of them to be registered.

The position in law and the application thereof to the facts

[15] *Locus standi in judicio* concerns 'the sufficiency and directness of a litigant's interest in proceedings which warrants his or her title to prosecute the claim asserted', and should be one of the first things to establish in a litigation matter.

[16] Namibia's current law on standing is very restrictive. It requires the applicant to demonstrate a direct and substantial interest in the subject matter and outcome of the application. This interest must be current and actual, as opposed to being abstract, academic, hypothetical or simply too remote⁹.

[17] The general rule is that it is for the party instituting proceedings to allege and prove its locus standi and the onus of establishing that rests on that party.

Does the plaintiff have locus standi

[18] In essence it is common cause that a written loan agreement was entered into between the parties and that money was paid out to the defendant. It is the case of the defendant that the plaintiff did not have authorisation to enter into the loan agreement and/or render financial services in terms of the Act, read with the various other statutory provisions referred to, and as a result thereof the plaintiff has no locus standi to institute the claim before court.

[19] The defendant maintains that because the plaintiff is not registered as a financial institution it may not render financial services as the conduct of the plaintiff is contrary to the provisions of the statutory frame work that is in place and thus in effect unlawful. Mr Naude argued that that if one have regard to the relevant legislation it is clear that there is a clear regulatory framework within which any of the bodies as defined in s 1 of the Act had to operate and that plaintiff has not applied to be exempted from the operation of such Act. However, in the same breath Mr Naude concede that he could not find any section in the Act that provided that the plaintiff must be registered but argued that in light of the regulatory framework it is implied that the plaintiff must be registered as a financial institution in order to conduct financial transactions.

[20] This cannot be a sound argument. If the court considers the sections of the different Acts that the defendant referred to, the inference that Mr Naude sought to draw from it is not possible. The legislature is very clear to specify the different types of financial institutions (s 1 (a) to (l)) and in terms of the relevant legislation the processes are set

⁹ *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC) para 12.

out to register these institutions. There is no guess work involved of how to register such a financial institution. The exceptions appear to be a financial institution in terms of the Usury Act (s 1(d)), which does not require registration, and those which falls within the ambit of s 1(n), ie unregistered financial institutions.

[21] It is common cause that the plaintiff is a financial institution as per the definition of the Act and also a moneylender as per the definition in the Usury Act. The Act makes specific provisions for those businesses that renders financial services as a regular feature of the said business but is not registered as a financial institution and which does not fall within the specific categories of financial institutions listed in paragraphs (a) to (l) of s 1 of the Act.

[22] There is no provision for registration of financial institutions as referred to in s 1(n) of the Act, nor is there a process in place of how such an unregistered financial institution would go about registering in terms of the Act.

[23] Even if a financial institution is unregistered it must comply with the relevant legislation. It will remain regulated by the Act, where applicable, and also in terms of the Usury Act, which appears to be the current legislative frame work for money moneylenders who are allowed to operate without being registered with Namfisa.

[24] Mr Vaatz drew a very apt analogy of the traffic environment wherein a number of entities take part in the traffic and all of them must abide but the traffic laws and regulations but not all of them need to be registered in terms of the relevant legislation. For example a motor vehicle and a motorcycle must be registered but a bicycle need not be registered, however all of them need to adhere to the rules of the road when they wish to take part in the traffic.

[25] The same applies to the plaintiff. Not all financial institutions need to register in terms of the Act but if it wishes to conduct business within the commercial environment it must abide by the law that regulate the relevant commercial activities engaged in.

[26] In my view the action between the parties will determine the defendant's obligations to the plaintiff, if any, with reference to the written loan agreement entered between the parties. The plaintiff is entitled to exercise its rights herein and entitled to approach courts, to enforce its rights and has the standing before this court to do so. There is nothing before me to convince this court that the plaintiff did not have the authority to enter into the agreement with defendant and that as a result he would not have standing before this court.

[27] I can therefor find no merits in the special plea raised on behalf of the defendant and the special plea is dismissed with costs.

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff	Respondent
Mr A Vaatz from Andreas Vaatz & Partners	Mr A Naude From Dr Weder, Kauta and Hoveka