

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING**

CASE NO.: HC-MD-CIV-ACT-DEL-2019/01089

In the matter between:

RUDOLF DAUSAB

PLAINTIFF

and

PIETER WILLEM VAN ZYL (SNR)

FIRST DEFENDANT

PIETER WILLEM VAN ZYL (JNR)

SECOND DEFENDANT

JACOBA VAN ZYL

THIRD DEFENDANT

MARIETTE VAN ZYL

FOURTH DEFENDANT

PK FAMILY TRUST

FIFTH DEFENDANT

THE PWM FAMILY TRUST

SIXTH DEFENDANT

NAMIBIA AFFIRMATIVE MANAGEMENT

AND BUSINESS (PTY) LTD

SEVENTH DEFENDANT

THE MINISTER OF ENVIROMENT AND TOURISM

EIGHTH DEFENDANT

Neutral Citation: *Dausab v van Zyl* (HC-MD-CIV-ACT-DEL-2019/01089) [2020]
NAHCMD 87 (10 March 2020)

Coram: RAKOW, AJ
Heard: 11 February 2020
Delivered: 03 March 2020
Reasons: 10 March 2020

Flynote: Practice — Pleadings — Exception — Exception as being vague and embarrassing — Determination whether pleading lacking the necessary averments to sustain the cause of action, resulting in vagueness and whether vagueness causes prejudice.

Summary: The plaintiff instituted two claims against the defendants, the first claim, a *rei vindicatio* alleging that he is the owner of a tourism concession in a proclaimed concession area. The plaintiff alleges that the defendants are in unlawful possession and control of the said concession, having usurped and procured registration of the concession in the name of an identically named company. The plaintiff therefore claims return, which is clarified as the re-registration in the name of the plaintiff's nominated entity, of the concession. Claim two related to a claim for the delivery and debatement of an account. The plaintiff alleges that he was at all relevant times the owner of a tourism concession and that the defendants continue to be unlawfully in charge of the administration, management and operations of the tourism concession business under the auspices of a company with an identical name. As a consequence of such control, the defendants unlawfully enriched themselves to the plaintiff's detriment.

The first to the seventh defendants filed an exception against the cause of action raised in the particulars of claim of the plaintiff on the averment that the particulars of claim discloses no cause of action, alternatively is vague, embarrassing and is excipiable.

The plaintiff argued that the Grounds of Exception constitute an impermissible insertion of misleading language and fake factual matter into the Particulars of Claim in the allegation that it was a personal right that was acquired. It is an insertion by the defendants and therefore constitutes a new and additional matter which raises no legal

question for determination. He further argued that the Grounds set out in the Particulars of Claim is clear and concise and contains all the necessary averments, and disclose an arguable case on the Pleadings as they stand.

On the other hand, the defendants argued that the *rei vindicatio* does not offer capable relief in respect of contractual and personal rights such as the rights claimed by the plaintiff. If this exception is upheld, it will dispose of the first claim in its entirety. The foundation of the plaintiff's claim with regard to the concession is a written contract and therefore, relates to a personal and contractual right that was allegedly acquired by him. The *rei vindicatio* is an action *in rem* and only competent when it is based on the right of ownership of movable or immovable property and to be successful, the plaintiff needs to allege ownership over a 'thing'.

Held – If the definition of the *rei vindicatio* is used, it must be clear that the property that should be returned, should be a thing and the right, a real right. It is clear when using the test for a real right that the right created by the concession contract is not a real right and does not meet the requirements for such a right. The owner of the land over which this concession is granted, is the State and the rights so granted is limited rights to perform certain acts, therefore, averments made in the pleading does not sustain the action instituted under claim one.

Held – The plaintiff never made out a case that he acquired any rights under the concession agreement. There is no indication what the position is of the trusts mentioned in RD2 and the Witbooi Traditional Authority trust as they are not parties to this action. No indication is given from the plaintiff as to his position in relation to any of these trusts except his averment in the particulars of claim that he is acting in his personal capacity as well as in his representative capacity of the five family trusts and the Witbooi Traditional Authority Trust. These parties are however not cited and are not seeking any relief according to the description of the claims. The only person seeking relief is the plaintiff and from the pleadings, there is not a clearly established right to the relief by the plaintiff. Grounds two to four is therefore also upheld and the pleading is found to be vague and embarrassing.

ORDER

- a) The exceptions are upheld with costs.
- b) The plaintiff is afforded 10 days to amend its particulars of claim, if it is so advised, failing which the defendant is granted leave to apply for the dismissal of the plaintiff's action within 10 days of the expiry of the aforesaid 10-day period afforded to the plaintiff.
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RULING ON EXCEPTION

RAKOW, AJ:

Introduction

[1] The plaintiff is Rudolf Dausab, a major male and acting in his personal capacity as well as in his capacity as representative of five Family Trusts and the Witbooi Traditional Authority Trust. The first defendant is Pieter Willem van Zyl (Snr) N.O. and is a trustee of the PK Family Trust and cited in that capacity. The said trust is also a shareholder in the seventh defendant. The second defendant is Pieter Willem van Zyl (jnr) N.O. and is a trustee of the PWM Family Trust and cited in that capacity. The PWM Family Trust also owns shares in the seventh defendant. The third defendant is Jacoba van Zyl N.O. who is also a trustee of the PK Family Trust and cited in that capacity. The fourth defendant is Mariette van Zyl N.O. and she is cited in her capacity as trustee in the PWM Family Trust. The fifth defendant is the PK Family Trust, a duly established *inter vivos* Trust of which the First and Third defendants are the trustees. The sixth defendant is the PWM Family Trust, a duly established *inter vivos* Trust of which the second and fourth Defendants are trustees. The seventh defendant is Namibia Affirmative Management and Business (Pty) Ltd, a private company duly incorporated in terms of the company laws of the Republic of Namibia and the eighth defendant is the Minister of Environment

and Tourism, cited in his official capacity and duly appointed in terms of the Namibian Constitution.

[2] The plaintiff instituted two claims against the defendants, the first claim, a *rei vindicatio* alleging that he is the owner of a tourism concession in a proclaimed concession area. He alleged that he applied for and was granted the concession as part of an unincorporated entity called NAMAB (Pty) Ltd during 2008. This entity was made up out of seven family trusts and the Witbooi Traditional Authority Trust. The PK Family Trust and the PWM Family Trust, defendants five and six, formed part of the seven family trusts that made up the said NAMAB (Pty) Ltd. The plaintiff alleges that the defendants are in unlawful possession and control of the said concession, having usurped and procured registration of the concession in the name of an identically named company, NAMAB (Pty) Ltd No 2006/305. The plaintiff therefore claims return, which is clarified as the re-registration in the name of the plaintiff's nominated entity, of the concession.

[3] Claim two related to a claim for the delivery and debatement of an account. The plaintiff alleges that he was at all relevant times the owner of a tourism concession and that the defendants continue to be unlawfully in charge of the administration, management and operations of the tourism concession business under the auspices of the impugned NAMAB (Pty) Ltd. As a consequence of such control, the defendants unlawfully enriched themselves to the plaintiff's detriment. The plaintiff in the alternative alleges that the accounts rendered by the defendants are defective and inadequate in that they do not contain information about certain activities performed by the said NAMAB (Pty) Ltd related to various eco-route activities. He therefore demanded that the defendants render a full account supported by the necessary documentation regarding the NAMAB tourism concession business for the period 2008 – 2019 and debatement of the said account. He further demands payment to the plaintiff of whatever amount appears to be due to the plaintiff upon debatement of the account and interest upon such an amount.

[4] Attached to the particulars of claim are also a number of annexures. The plaintiff relies on RD1 and RD2 to the particulars of claim as support for the allegations made

that he was granted the concession as part of an unincorporated entity. RD1 is titled Head Concession Agreement and is an agreement between The Government of the Republic of Namibia acting through the Ministry of Environment & Tourism represented by the Hon. Netumbo Nandi-Ndaitwah in her capacity as Minister and NAMAB (Pty) Ltd represented by Mr. Rudolf Dausab in his capacity as Director and duly authorized to do so by the Association. This is an agreement valid for 20 years which deals with concession rights to tourism development and operating rights and activity rights which include some non-exclusive rights to conduct guided sightseeing and game viewing drives etc. RD2 is a document seemingly prepared on behalf of Namab (Pty) Ltd with the title – ‘Who is the applicant for this concession?’ It then proceeds and sets out the shareholding structure of Namab (Pty) Ltd.

The exception

[5] The first to the seventh defendants filed an exception against the cause of action raised in the particulars of claim of the plaintiff. The averment is that his particulars of claim discloses no cause of action, alternatively is vague, embarrassing and is excipiable. The parties engaged in terms of rule 32(9) of the High Court rules and a report in terms of rule 32(10) was filed.

[6] Four grounds for the exception were filed. They are:

a) The plaintiff’s claim one is based on a *rei vindicatio* and this claim relates to an alleged personal right acquired by virtue of the Head Concession Agreement relating to a tourism concession, which return the plaintiff seeks. The ground raised is that the relief based on the *rei vindicatio* is not capable in respect of contractual and personal rights, which are the rights relied upon by the plaintiff. Therefore the particulars of claim in respect of claim 1 does not disclose a cause of action against the defendants or, alternatively the particulars of claim does not contain averments necessary to sustain a cause of action against the defendants.

b) The plaintiff's two claims are for delivery of an alleged personal right to a concession and the delivery and debatement of an account. The plaintiff further relies on annexures RD1 and RD 2 to the particulars of claim in support of the allegations that he was granted the concession as part of an unincorporated entity. The plaintiff alleges that NAMAB (Pty) Ltd. were to be made up of seven family trusts and the Witbooi Traditional Authority Trust and none of these entities, except for the fifth and sixth defendants are cited or defined. *Ex facie* the particulars of claim it is clear that neither RD1 nor RD2 support the allegation of the plaintiff that he was awarded a tourism concession or that he would be the holder of any rights in the unincorporated entity and therefore it is clear that the plaintiff would not have been a shareholder in the unincorporated entity. He could therefore not have received or been awarded the concession as part of an unincorporated entity nor does he make out a case in support of his claim for the delivery and debatement of an account relating to the use of the tourism concession. As ground two it is then argued that the plaintiff's particulars of claim does not contain averments necessary to sustain a cause of action against the defendants in respect of both claim 1 and 2.

c) In paragraph 3.2 of the particulars of claim the plaintiff alleges that he was granted the concession as part of the unincorporated entity made up of seven Family Trusts and the Witbooi Traditional Authority Trust and relies on RD1 and RD2 to support this allegation. In terms of RD1 the contracting party is however NAMAB (Pty) Ltd. This denotes in terms of s 55(1)(b) of the Companies Act, 28 of 2004 an incorporated private company. *Ex facie* the particulars of claim there is no basis to sustain an allegation that any rights were awarded to an unincorporated entity. RD 2 further does not refer to the Witbooi Traditional Authority Trust as being part of NAMAB (Pty) Ltd., neither is the plaintiff listed as a rights holder in the entity. It is therefore contended that the plaintiff's particulars of claim does not contain averments necessary to sustain a cause of action against the defendants in respect of both claim 1 and 2, alternatively is vague and embarrassing.

d) In paragraph 3.2 of the particulars of claim the plaintiff alleges that he acted on behalf of an unincorporated entity 'christened as NAMAB (Pty) Ltd. He makes no

allegations as to whether the unincorporated entity was ever incorporated. Accordingly any agreement concluded by the plaintiff was on behalf of a non-existent principal. If the plaintiff's intention with concluding the agreement was for it to be a pre-incorporation agreement, the plaintiff makes no allegation that such entity on behalf of which the agreement was concluded was ever incorporated not that the pre-incorporation agreement was ever adopted by any such subsequent duly incorporated entity. It is again contended that it follows that the particulars of claim does not contain averments necessary to sustain a cause of action against the defendants in respect of both claim 1 and 2 or alternatively, is vague and embarrassing.

The Arguments

[7] For the plaintiff, it was argued that the Grounds of Exception constitute an impermissible insertion of misleading language and fake factual matter into the Particulars of Claim in the allegation that it was a personal right that was acquired. It is an insertion by the defendants and therefore constitutes a new and additional matter which raises no legal question for determination. The plaintiff argues that the Grounds set out in the Particulars of Claim is clear and concise and contains all the necessary averments, and disclose an arguable case on the Pleadings as they stand.

[8] The plaintiff insists that their case is a case for the recovery of title or ownership to the tourism concessionary right pertaining to State land combined with a derivative accounting claim to ascertain the monetary quantum of the claim. The plaintiff therefore argues that the right at issue is a limited real right pertaining to State land which is adjudicable by way of the *rei vindicatio*. The annexures RD1 and RD2 prove the ownership of the plaintiff on a balance of probabilities and it is open to the defendants to allege and prove at trial that a third party and not the plaintiff is the owner of the Concession. The claim for delivery and debatement of the account is further a derivative claim as it stands or falls on whether the vindication claim has been properly made.

[9] The plaintiff proceeded and argued that there are four classes of rights distinguishable. These are rights to corporeal material things, right to certain aspects of

his personality or personality rights, rights of performance of personal rights and the rights to the ideal, non-tangible creations of a person's mind which is referred to as immaterial or industrial property rights. It is therefore argued that the so called Concessionary Right in issue is an immaterial real right which is subsumed under a concept of a thing or property being movable or immovable property which can be claimed under the *rei vindicatio*. They further continue and submit that the right at issue is a limited real right pertaining to the right of ownership of immovable property, which is capable of restricting the exercise of right of Ownership to State land by the State and is capable of registration.

[10] The plaintiff argues that the question whether the plaintiff was granted a Concessionary Right is a question of fact and not law and can be challenged by presenting evidence. They allege that the defendants criminally appropriated an incorporated a like named entity named NAMAB (Pty) Ltd. with an alien share structure. Similarly, the question of the shareholding of NAMAB (Pty) Ltd. is a factual issue and not a legal question and evidence is relevant to settle this point in issue and there exception raised against these allegations does not disclose a legal question to be determined by the Court and should be dismissed. With regard to the fourth ground they argued that the allegations pertaining to incorporation or otherwise of an entity or action in *essentialia* advancement of an interest of a non-existent principal are not directly relevant to the suit of *rei vindicatio*.

[11] On the other hand, the defendants argued that the *rei vindicatio* does not offer capable relief in respect of contractual and personal rights such as the rights claimed by the plaintiff. If this exception is upheld, it will dispose of the first claim in its entirety. The foundation of the plaintiff's claim with regard to the concession, is a written contract and therefore relates to a personal and contractual right that was allegedly acquired by him. The *rei vindicatio* is an action *in rem* and only competent when it is based on the right of ownership of movable or immovable property and to be successful, the plaintiff needs to allege ownership over a 'thing'.

[12] In support of grounds 2 to 4, the defendants argued that the plaintiff's two claims are for delivery of an alleged personal right to a concession and the delivery and debatement of an account related to the running of the concession. Such a personal right can never exist if the plaintiff is not the person who – *ex facie* the agreement attached as RD1 – acquired the rights thereunder. According to the allegation in the particulars of claim and RD1 and RD2 attached thereto as support, the plaintiff was granted the concession as part of an unincorporated entity. Neither RD1 nor RD2 support the plaintiff's allegation that he was awarded the tourism concession or that he is the holder of any rights in the unincorporated entity, or that he would even be a shareholder in the unincorporated entity. It then follows that he also did not make out a case in support of his claim for the delivery and debatement of an account relating to the use of the tourism concession. This demonstrates the vague and embarrassing nature of the particulars of claim.

[13] The defendants then proceeded, in support of ground 3 and 4, to show that the plaintiff never made out a case that he acquired rights under the contracts relied upon. In paragraph 3.2 of the particulars of claim, the plaintiff alleges that he was granted the concession as part of the unincorporated entity made up of 'seven family trust(s)' and the 'Witbooi Traditional Authority Trust' and relies on RD1 and RD2 in support. Annexure RD1 however states that the contracting party and concessionaire is NAMAB (Pty) Ltd and there is therefore no basis *ex facie* the particulars of claim to sustain an allegation that any rights were awarded to an unincorporated entity, as the entity NAMAB (Pty) Ltd. is in terms of s 55(1) (b) of the Companies Act, 28 of 2004, an incorporated private entity. From the face of RD2, it further does not appear that the plaintiff is in any manner of form a rights holder in NAMAB (Pty) Ltd.

The legal principles

Exception

[14] The basis of an exception is found in Rule 45(5) and 45(6) of the Rules of the High Court which requires that:

'(5) Every pleading must be divided into paragraphs, including subparagraphs, which must be consecutively numerically numbered and must contain a clear and concise statement of the material facts on which the pleader relies for his or her claim, defence or answer to any pleading, with sufficient particularity to enable the opposite party to rely and in particular set out –

(a) The nature of the claim, including the cause of action; or

(b)

(c) Such particulars of any claim, defence or other matter pleaded by the party as are necessary to enable the opposite party to identify the case that the pleading requires him or her to meet.

(6) Every allegation in the particulars of claim or counterclaim must be dealt with specifically and not evasively or vaguely. '

Pleadings must therefore be lucid and logical and in an intelligible form and comply with Rule 45.

[15] When deciding on an exception one should bear in mind what was said in *Colonial Industries Ltd v Provincial Insurance Co Ltd*¹(at 630):

'I think that the possibility of such abuse of legal proceedings should be jealously watched and that save in the instance where an exception is taken for the purpose of raising a substantive question of law which may have the effect of settling the dispute between the parties, an excipient should make out a very clear, strong case before he should be allowed to succeed.' And also in *South African National Parks v Ras*,² Van Heerden J quoting some writers, said the following:

'The court should not look at a pleading with a magnifying glass of too high power. It is the duty of the court when an exception is taken to a pleading first to see if there is a point of law to be decided which will dispose of the case in whole or in part. If there is not, then it must see if there is an embarrassment which is real as a result of the faults in the pleadings to which

¹ 1920 CPD 627.

² 2002 (2) SA 537 (C).

exception is taken. Unless the excipient can satisfy the court that there is such a point of law or such real embarrassment the exception should be dismissed.'

[16] It is important to consider the exception within the guideline provided in *Van Straten N.O and Another v Namibia Financial Institutions and Another*³ by Smuts JA:

'Where an exception is taken on the grounds that no cause of action is disclosed or is sustainable on the particulars of claim, two aspects are to be emphasised. Firstly, for the purpose of deciding the exception, the facts as alleged in the plaintiff's pleadings are taken as correct. In the second place, it is incumbent upon an excipient to persuade this court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed. Stated otherwise, only if no possible evidence led on the pleadings can disclose a cause of action, will the particulars of claim be found to be excipiable.'

[17] Although it is in general true that the presumption that the facts as alleged in the plaintiff's pleadings are taken as correct exist, one must stress that it:

'has been held, however, that the principle that a court is obligated to take the pleadings as they stand for the purpose of determining whether an exception to them should be upheld is limited in operation to allegations of fact, and cannot be extended to inferences and conclusions not warranted by the allegations of fact. This principle does not obligate a court to stultify itself by accepting facts which are manifestly false and so divorced from reality that they cannot possibly be proved'⁴

Pleading lacks averments which are necessary to sustain an action

[17] It is true that, in order to disclose a cause of action, the plaintiff's particulars of claim must set out:

³ (SA 19/2014) [2016] NASC 10 (08 June 2016).

⁴ Herbstein & van Winsen's *The Civil Practice of the High Courts of South Africa*; 5th edition by Cilliers, Loots and Nel, published by Juta 2009, volume 1 page 633; with reference to *Natal Fresh Produce Growers' Association v Agroserve (Pty)Ltd* 1990 (4) SA 749 (N) at 754-755.

'every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved' (see *McKenzie v Farmers' Co-operative Meat Industries Ltd 1922 AD 16* at 23). However, this relates only to material facts and, in considering an exception, a distinction must be drawn between the facts which must be proved in order to disclose a cause of action (the *facta probanda*) and the facts which prove them (the *facta probantia*).⁵

[18] In *Colonial Industries Ltd v Provincial Insurance Co Ltd 1920 CPD 627* at 630 Benjamin J said in regard to the general approach to exceptions:

'Save in the instance where an exception is taken for the purpose of raising a substantive question of law which may have the effect of settling the dispute between the parties, an excipient should make out a very clear, strong case before he should be allowed to succeed.' The excipient has the duty to persuade the court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed.'

Pleadings that are vague and embarrassing

[19] In *Trope v South African Reserve Bank and Another and two other cases*⁶ a two-fold consideration is proposed by Mccreath J. He said:

'An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced. As to whether there is prejudice, the ability of the excipient to produce an exception-proof plea is not the only, nor indeed the most important, test. If that were the only test, the object of pleadings to enable parties to come to trial prepared to meet each other's case and not be taken by surprise may well be defeated. Thus it may be possible to plead to particulars of claim which can be read in any one of a number of ways by simply denying the allegations made: likewise to a pleading which leaves one guessing as to its actual meaning. Yet there can be no doubt that such a pleading is excipiable as being vague and embarrassing. It follows that

⁵ *South African National Parks v Ras (supra)*.

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averments in the pleading which are contradictory and which are not pleaded in the alternative are patently vague and embarrassing - one can but be left guessing as to the actual meaning (if any) conveyed by the pleading. ‘

[20] In Herbstein & van Winsen’s ‘The Civil Practice of the High Courts of South Africa’,⁷ the authors listed a number of general principles relating to an exception taken on the ground that a pleading is vague and embarrassing, summarizing these principles as set out by Heher J in *Jowell v Bramwell-Jones*.⁸ In deciding on whether or not a pleading is vague and embarrassing, the following principles must be kept in mind:

- The object of all pleadings is that a succinct statement of grounds upon which a claim is made or resisted shall be set forth shortly and concisely, and the pleader is thus merely required to plead a summary of the material facts.
- It is therefore incumbent upon a plaintiff only to plead a complete cause of action which identifies the issues upon which he seeks to rely and on which evidence will be led, in intelligible and lucid form and which allows the defendant to plead to it.
- An attack on a pleading as being vague and embarrassing cannot be found on the mere averment of lack of particularity....
- Where a statement is vague, it is either meaningless, or capable of more than one meaning. It is embarrassing in that it cannot be gathered from it what ground is relied on, and therefore it is also something which is insufficient in law to support in whole or in part the action or defence.
- The test whether a pleading is vague and embarrassing has also been stated to be whether an intelligible cause of action (or defence) can be ascertained.
- An exception that a pleading is vague and embarrassing may only be taken when the vagueness and embarrassment strikes at the root cause of action or the defence.
- An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action (or defence) and not its legal validity.
- Minor blemishes are irrelevant.
- Pleadings must be read as a whole; no paragraph can be read in isolation.’

Rei vindicatio

⁷ 5th edition by Cilliers, Loots and Nel, published by Juta 2009, volume 1 page 634 – 635.

⁸ 1998 (1) SA 836 (W).

[21] Silberberg and Schoeman's 'The Law of Property'⁹ explain the principle of Vindication as that of an owner who cannot be deprived of his property against his will, which means that he is entitled to recover it from any person who possesses it without his consent. They continued on page 274 and set forth the following requirement for instituting the *rei vindicatio*:

'An owner who institutes the rei vindicatio to recover his property is required to allege and prove no more than

- (a) That he is the owner of the thing – the burden rests upon the vindicator, in the absence of an admission on the pleadings of his title, to prove it. Once the acquisition of ownership has been proved by the plaintiff on a preponderance of probability, its continuation is presumed;*
- (b) That it was in the possession of the defendant at the commencement of the action. '*

[22] They also attempt to define a thing (*res*) by looking at the characteristics, which are 'corporeality: the fact that it has an impersonal nature and is therefore external to man; its existence as an independent or individual entity; its susceptibility to human control; and the fact that it must be of use and value to the legal subject.'¹⁰ The writers of *The Law of Property* further distinguished four classes of legal objects namely things, interests of personality, immaterial property and performances and the rights related to these objects are real rights, personality rights, immaterial property rights and personal rights.¹¹ For the *rei vindicatio* to be used it is therefore essential to make out a case that the object that should be returned should be classed as a 'thing'.

[23] The rights one acquire in respect of a thing is a real right. The test for real rights as set out in *Willow Waters v Koka*¹² was stated as follows:

'To determine whether a right or condition in respect of land is real, two requirements must be met: (a) the intention of the person who creates the right must be to bind not only the

⁹ Page 273 - 274 3rd edition by DG Kleyn, A Boraine assisted by W du Plessis, Published by Butterworths 1992.

¹⁰ Silberberg and Schoeman's *The Law of Property* (*supra*) page 9 .

¹¹ Silberberg and Schoeman's *The Law of Property* (*supra*) page 10.

¹² *Willow Waters Homeowners Association (Pty) Ltd v Koka NO and Others* 2015 (5) SA 304 (SCA) ([2014] ZASCA 220) para 16.

present owner of the land, but also successors in title; and (b) the nature of the right or condition must be such that its registration results in a subtraction from dominium of the land against which it is registered. Whether the title condition embodies a personal right or a real right which restricts the exercise of ownership is a matter of interpretation. The intention of the parties to the title deed must be gleaned from the terms of the instrument, ie the words in their ordinary sense, construed in the light of the relevant and admissible context, including the circumstances in which the instrument came into being. The interest the condition is meant to protect or, in other words, the object of the restriction, would be of particular relevance.'

Application

[23] Having regard to the four grounds of exception raised against the particulars of claim of the plaintiff, ground one will be discussed separate and grounds two, three and four will be discussed together. Ground one deals with a specific exception raised against the usage of the *rei vindicatio* as a claim to the return and re-registration of the Concession in the name of the plaintiff or his nominated entity.¹³ The right allegedly acquired by virtue of RD1 however seems to be a right granted by the Minister of Environment and Tourism, on behalf of the State as a concession and the said concession is defined in the agreement as the restricted rights to develop tourism infrastructure and conduct tourism activities on business principles in proclaimed protected areas and which is further outlined under Annex 1 to the agreement. Annex 1 then deals with concession rights which are divided into Tourism development and operating rights and activity rights. These include the exclusive right to develop and operate tourism accommodation and camping facilities and an exclusive right to retail trade within the concession area as well as non-exclusive rights to conduct guided sightseeing and game viewing drives and walks. It further sets capacity limits and determine the concession period, which is 20 years. The agreement under clause 15.7 titled No Third Party Beneficiaries specifically determines that this Head Concession Contract is made exclusively for the benefit of the Ministry and the Concessionaire and no third party shall have any rights hereunder or be deemed to be a beneficiary hereof except as may expressly provided herein. There seems to be no provision for the transfer of any rights under the agreement.

¹³ As per prayer for judgement – claim 1.

[24] If the definition of the *rei vindicatio* is used it must be clear that the property that should be returned, should be a thing and the right, a real right. It is clear when using the test for a real right that the right created by the concession contract is not a real right and does not meet the requirements for such a right. The owner of the land over which this concession is granted, is the State and the rights so granted is limited rights to perform certain acts. It is not an unregulated or uninterrupted right to access to the land as it is limited to the performance of specific act (conducting tourism activities) and cannot be said to subtract from the dominium of the land, neither that intention of the person who created the right was to bind not only the present owner of the land, but also successors in title. The pleading relating to claim one therefore lacks averments which are necessary to sustain an action or differently put, the averments made in the pleading does not sustain the action instituted under claim one.

[25] Having regard to the second to fourth grounds of exception, the plaintiff's instituted two claims, one for the return and re-registration of the concession in the name of the plaintiff or his nominated entity, and subsequently the de-registration of the simulating entity NAMAB (Pty) Ltd No 2006/305 and a second claim that the defendants renders a full account, supported by vouchers of the NAMAB tourism concession business for the period 2008 – 2019, debatement of the said account and payment to the plaintiff of whatever amounts appears to be due to the plaintiff upon debatement of the account. In order for these claims to succeed the plaintiff must at least show some or other right to exist where he should be the beneficiary of. The documents attached to the particulars of claim in support of these claims indicate nowhere that the plaintiff is in any way a beneficiary or party to neither the concession agreement nor a proposed shareholder in the unincorporated entity NAMAB (Pty) Ltd.

[26] The plaintiff never made out a case that he acquired any rights under the concession agreement. There is no indication what the position is of the trusts mentioned in RD2 and the Witbooi Traditional Authority trust as they are not parties to this action. No indication is given from the plaintiff as to his position in relation to any of these trusts except his averment in the particulars of claim that he is acting in his personal capacity as well as in his representative capacity of the five family trusts and the

Witbooi Traditional Authority Trust. These parties are however not cited and are not seeking any relief according to the description of the claims. The only person seeking relief is the plaintiff and from the pleadings, there is not a clearly established right to the relief by the plaintiff. Grounds two to four is therefore also upheld and the pleading is found to be vague and embarrassing.

[27] The defendant invited the court to make a cost order that allows for one instructing council and two instructed council and not to limit the cost order in favour of the first to seventh defendant in terms of rule 32(11). The exception raised by the defendant in this matter was indeed an interlocutory proceeding as contemplated in rule 32(11) and costs should therefore not exceed N\$20 000.00. Save for asking that this limitation should not apply due to the complexity of the matter, no other argument was advanced as to why the rule should not find application. The court is not convinced that circumstances exists that will allow the court to find no application for rule 32(11) and therefore find that the costs awarded may not exceed the amount of N\$20 000.00

Accordingly I find the following:

- a) The exceptions are upheld with costs.
- b) The plaintiff is afforded 10 days to amend its particulars of claim, if it is so advised, failing which the defendant is granted leave to apply for the dismissal of the plaintiff's action within 10 days of the expiry of the aforesaid 10-day period afforded to the plaintiff.

E RAKOW

Acting Judge

APPEARANCES:

PLAINTIFF:

P Elago

Tjombe – Elago Inc.

FIRST – SEVENTH DEFENDANTS:

R Töttemeyer

Instructed by Dr Weder, Kauta & Hoveka Inc.