

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-DEL-2018/02104

In the matter between:

MINISTER OF INDUSTRIALISATION, TRADE AND SME DEVELOPMENT	1ST PLAINTIFF
THE MINISTER OF FINANCE	2ND PLAINTIFF
BUSINESS AND INTELLECTUAL PROPERTY AUTHORITY	3RD PLAINTIFF

and

TILEINGE ANDIMA	1ST DEFENDANT
HILMA SHILENGUDWA	2ND DEFENDANT
MARTIN SHILENGUDWA	3RD DEFENDANT
REBECCA ANNE SHILENGUDWA	4TH DEFENDANT
ESI INC	5TH DEFENDANT
REGISTRAR OF DEEDS	6TH DEFENDANT

Neutral citation: *Minister of Industrialisation, Trade and SME Development v Andima* (HC-MD-CIV-ACT-DEL-2018/02104) [2020] NAHCMD 99 (16 March 2020)

Coram: TOMMASI J
Heard: 31 October 2019
Delivered: 27 February 2020
Reasons given: 16 March 2020

Flynote: Sale – of land – Practice - Pleadings - Exceptions - Exception to particulars of claim as disclosing no cause of action - lack the necessary allegations to sustain a cause of action - pleading only excipiable if no possible evidence led on the pleadings could disclose a cause of action - General principles regarding exceptions considered.

Summary: This matter is concerned with the sale of property by the second and third defendants to the old Business and Intellectual Property Authority for an amount of N\$18 000 000.00. The old BIPA (Registered in terms of section 21 of the Companies Act, 2004 (Act 28 of 2004)) came into existence during July 2011. Subsequently the new BIPA which was established by statute (Business and Intellectual Property Authority Act 8 of 2016) came into existence on 16 January 2017. These two entities are referred to in the pleadings as old and new BIPA respectively. The said property was transferred into the name of old BIPA on 30 August 2017. On the same day, old BIPA was deregistered as a result of a process which was initiated during April 2017. The acquisition was funded by first plaintiff.

The plaintiffs instituted summons against the defendants in which they aver that the first to fifth defendants acted in concert to give effect to the purchase and sale of the property at an inflated price and acted unlawfully in giving effect to the transaction and causing payment to be made and as a result defrauding the plaintiffs. On 18 June 2019

this court granted the plaintiffs leave to amend their particulars of claim and it was so amended. The defendants raised various exceptions to the plaintiffs' amended particulars of claim on the basis that same do not disclose a cause of action in that same lack the necessary allegations to sustain a cause of action.

Held, that the plaintiff failed to plead how the third plaintiff "stepped" into the shoes of the old BIPA as these two entities are completely different and separate legal entities. The factual allegations in respect of the transfer of rights and obligations from one to the other, whether it is in terms of statute, contractual or by operation of the law are material for the remedy which the third plaintiff is claiming. It forms the basis for third plaintiff's claim against the defendants for cancellation and repayment of the contract price and transfer duty. The exception therefore has merit.

Held, further that the exception based on the Turquand Rule would not find application in light of the allegations of fraudulent conduct and the averment that the parties acted in concert as fraud may vitiate the underlying contract.

ORDER

1. The second to fourth defendants' exception to the plaintiffs' amended particulars of claim on the first ground is upheld with costs including cost of one instructing and one instructed counsel;
2. The fifth defendant's exception to the plaintiffs' amended particulars of claim on the first three grounds is upheld with costs including cost of one instructing and one instructed counsel;
3. The plaintiff is granted leave, if so advised, to file amended particulars of claim within fifteen days;
4. The case is postponed to 01 April 2020 at 14h15 for Status hearing (Reason: Further conduct of matter).

JUDGMENT

Tommasi J:

[1] This court is called upon to determine the defendants' exception to plaintiffs' amended particulars of claim.

[2] The first plaintiff is cited in his official capacity and as being responsible for the proper and lawful utilisation of funds belonging to the Ministry of Industrialisation, Trade and SME development. The second plaintiff is the Minister of Finance in his official capacity acting in the public interest due to the unlawful utilisation of public funds. The third plaintiff is the Business and Intellectual Property Authority (BIPA), a state-owned enterprise established in terms of section 3 of the Business and Intellectual Property Authority Act, 2016 (Act 8 of 2016) which commenced on 16 January 2017 (hereinafter referred to as new BIPA).

[3] The plaintiffs' claim against first to third defendants (Claim A) is for: (i) cancelation of a deed of sale and sale transaction; (ii) repayment of the purchase price of N\$18 million; (iii) repayment of an amount of N\$2 160 000.00; and (iv) interest on the above amounts from date of summons to date of payment. Claim B is against fourth to fifth defendants for exactly the same relief.

[4] The first defendant is cited as being the Chief Executive Officer of the third plaintiff and signatory to the disputed sales agreement. Second and third defendants are the alleged owners and sellers of the property which forms the subject matter of the sale agreement. The fourth defendant is cited as a female legal practitioner and admitted conveyancer who is alleged to have appeared before the Registrar of Deeds when the property which formed the subject matter of the deed of sale was transferred. The fifth defendant is cited as the firm of attorneys which was given instructions by first defendant to give effect to the transfer.

[5] The plaintiffs' aver, inter alia that:

- (i) The second and third defendants, during March 2014, made an initial offer to sell the property to the Business and Intellectual Property Authority (BIPA) a section 21 Company (Old BIPA) for the sum of N\$11 978 400.00. The first defendant, the Finance, Risk Management and Audit Committee and the Technical and Legal Committee of Old BIPA considered this amount to be too high.
- (ii) During March 2015, first defendant represented to the acting director of first plaintiff that the sellers made an offer to sell the property at a price of N\$18 000 000.00. The first defendant however deemed it to be too high and the second and third defendants revised their offer to an amount of N\$12 000 000.00 which he viewed as acceptable.
- (iii) On 06 July 2017, after the commencement of the New BIPA and while the first defendant was tasked with the process of deregistering Old BIPA, the deed of sale (titled "Offer to Purchase"), was signed by second and third defendants (the sellers) and first defendant on behalf of Old BIPA (the purchaser) for the amount of N\$18 000 000.00.
- (iv) The first defendant, requested the Permanent Secretary of first plaintiff to avail the funds for the purchase of the property. The first defendant who held a position of trust, failed to disclose all material information to the Permanent Secretary of first plaintiff, *inter alia*, the fact that he had a personal relationship with the sellers, the true value of the property and the view of the committees of old BIPA's in respect of the preceding offer.
- (v) The first defendant, pursuant to the deed of sale and on behalf of New BIPA, instructed fifth defendant, a firm of attorneys, to transfer the property in the name of BIPA. The fourth defendant was appointed by the sellers by virtue of a power of attorney to appear before the Registrar of deeds in order to give effect to the transfer of the property. The fourth defendant was employed by fifth defendant as a director and was acting in the course and scope of her employment with fifth defendant. She was

solely responsible for handling the sale transaction and was in charge of affecting the transfer. In the alternative the plaintiff avers that fourth defendant was acting in her own stead as attorney and conveyancer.

- (vi) The amount of N\$18 000 000.00 was paid into the fifth defendant's bank account by the Offshore Development Corporation (ODC), on the instructions of the Permanent Secretary of first plaintiff. It was thereafter transferred to an interest bearing account and it earned the amount of N\$31 956.16 in interests. The fourth defendant paid this amount to second defendant's nominated bank account whereas same was due and payable to BIPA.
- (vii) The fourth defendant, in her capacity as director of Anne Shilengudwa Attorneys submitted an invoice to new BIPA (third plaintiff) in the sum of N\$52 000.00 in respect of the sale and transfer. The first defendant paid this amount from New BIPA'S account despite the fact that she was not appointed to attend to and effect the transfer; and that these services were rendered by fifth defendant.
- (viii) The fourth defendant, applied to The Minister of Finance: Department of Inland Revenue (second plaintiff) to issue a transfer exemption receipt. When an examiner queried this exemption, the fourth defendant cited section 31(7) of the BIPA Act, 2016 (Act 8 of 2016). The exemption provided for in this section however is only applicable in respect of the transfer of assets or rights by the State to BIPA. The second plaintiff later demanded the payment of transfer duty in the sum of N\$2 160 000.00. The first defendant requested the Permanent Secretary of first plaintiff to pay this amount but this amount was subsequently paid by first defendant from the bank account of new BIPA (third plaintiff).
- (ix) The first to fifth defendants acted in concert to give effect to the purchase and sale of the property at an inflated price and acted unlawfully in giving

effect to the transaction and causing payment to be made as set out below.

- (x) The fourth defendant, had a legal duty as provided for in terms of the Deeds Registry's Act 47 of 1937 and Regulation 34 of the Deeds Registry Regulations; and the fourth defendant, intentionally alternatively negligently breached the legal duties in order to deceive Inland Revenue and the Registrar of deeds into granting the transfer duty exemption and register the property in the name of Old BIPA in furthering the fraudulent scheme.
- (xi) The property was transferred to old BIPA on the same day that the old BIPA was deregistered as a company. The property has become *bona vacantia* and vests in the State.

[6] The plaintiffs' claim against first, second and third defendants jointly and severally, the one paying the other to be absolved, is that, as a result of the fraudulent scheme and misrepresentation; to the extent necessary, the new BIPA, as successor to the old BIPA, and acting on its behalf, alternatively the new BIPA acting on behalf of the first and/or second plaintiffs claim cancelation of the sale transaction; the first plaintiff, alternatively the second plaintiff alternatively the third plaintiff claim repayment of the purchase price of N\$18 000 000.00. The third plaintiff claims repayment of the transfer duty paid in the sum of N\$2 160 000.00.

[7] The second claim of the plaintiffs against fourth and fifth defendants jointly and severally, the one paying the other to be absolved, is that, as a result of the fourth defendant's breach of her duties and/or as a result of her participation in the fraudulent scheme the plaintiff suffered loss : to the extent necessary, the new BIPA as the successor to the old BIPA, and acting on its behalf, alternatively the new BIPA acting on behalf of the first, and/or second plaintiff, cancel the sale agreement; the first plaintiff, alternatively the second alternatively the third plaintiff claim repayment of the purchase price of N\$18 000 000.00 and repayment of the transfer duty paid in the sum of N\$2 160 000.00. The fifth defendant is held vicariously liable to compensate the plaintiffs for

the loss suffered and in the alternative the fourth defendant is held personally liable for the loss suffered.

The exceptions

Second to fourth defendants

[8] The second, third and fourth defendants raised an exception to the plaintiff's claim on the basis that it does not disclose a valid cause of action and/or the particulars of claim do not make the necessary allegations to sustain the relief claimed on the following grounds(summarized):

[9] The first ground is that the plaintiff's claim is for cancelation with restitution of a sales contract which has been perfected by the performance of all its terms, resulting in the transfer of the immovable property into the name of the purchaser and payment of the purchase price to the sellers. The plaintiffs however are not parties to the agreement and as such they cannot, in law, derive the right to cancellation in terms of the sales contract. No rights were validly transferred to any of the plaintiffs.

[10] The Defendants maintain that third plaintiff, new BIPA is the successor to old BIPA and the averment that the new BIPA is acting on its behalf, is unsustainable because:

- (i) Old Bipa was deregistered and ceased to exist as a legal entity capable to be represented; and
- (ii) It is trite that someone acting on behalf of someone else is an agent, and an agent cannot sue in his own name to enforce a claim belonging to his principal.

[11] The defendants submit further that the only provision in the BIPA act is for the transfer of rights, assets, liabilities and agreements from the State to BIPA. The State was not a party to the sales contract and derived no rights which it could transfer to the third plaintiff.

[12] The Plaintiff's response hereto is that the particulars of claim deal with the background to the creation of new BIPA and deregistration of old BIPA. It is Plaintiffs' submission that these paragraphs provide the necessary factual allegations to sustain the relief sought by new BIPA. These allegations include reference to the fact that old BIPA is the predecessor of new BIPA; that it has been in existence since July 2011; that it was deregistered as it served its purpose and could not co-exist with new BIPA. In short the Plaintiffs submit that new BIPA succeeded, replaced and stepped into the shoes of old BIPA. It is further submitted that: new BIPA and old BIPA cannot be divorced as if they are unrelated entities; old BIPA was deregistered for new BIPA to replace it, notwithstanding that the nature of the juristic entity of new BIPA differs from that of old BIPA; and new BIPA, as old BIPA's successor, acquired everything that previously vested in old BIPA. It is argued that if the defendants dispute this fact, evidence will be led at trial in respect of the extent of new BIPA's succession and the consequences thereof.

[13] Two separate issues are raised in the second ground of the exception. The first is that no direct allegations of fraud are made against second and third defendants and that plaintiffs' reliance thereon is unsustainable in law to found a cause of action. The defendants' counsel submitted that allegations of fraud, dishonesty or bad faith must be supported by particulars and the other party is entitled to the particulars on which the allegations are based.

[14] The plaintiffs, in response hereto, refers to the allegation that the sellers made the initial offer to sell the property to the old BIPA at a price of N\$11 978 400.00 and ultimately sold it to the old BIPA for N\$18 000 000.00 which is vastly in excess of its fair market value. An allegation is further made that first defendant had a personal relationship with the sellers and this relationship was not disclosed by first defendant to the first plaintiff nor the fact that such a purchase price was considered by various constituents to be too high. The allegation is made that the sellers' "Offer to purchase" was for the sale of the property for N\$18 000 000.00 and that the sellers appointed fourth defendant as the duly authorised conveyancer to appear before sixth defendant to give effect to the transfer.

[15] The particulars of claim further states that third defendant paid N\$200 000.00 from the proceeds into the trust account of fourth defendant's law firm following the transfer of the property, having obtained transfer duty exemption and payment of interest earned on the purchase price to the second defendant's nominated bank account.

[16] The plaintiffs argue that the particulars of claim make the averment that the parties acted in concert and their conduct constituted a fraudulent scheme between the first to fifth defendants to inter alia cause the property to be purchased at an inflated price and improperly financially benefit one or more of the first to fifth defendants. In light of the allegation that they acted in concert, it is unnecessary to link each element of the cause of action to each party individually as the conduct complained of is attributable to all the parties. Plaintiffs' counsel called upon the court to read the particulars of claim as a whole, composite pleading.¹

[17] The defendants' second issue is that old BIPA is a section 21 company, and as such it is precluded from raising lack of authority on behalf of its CEO by both the common law turquand rule and the statutory turquand rule embodied in section 40 of the companies Act 2004.

[18] The plaintiff's short answer to this is that the plaintiffs do not rely on lack of authority as the basis of its cause of action; it is only one of the material facts which form part of the non-disclosure and the turquand rule does not find application where fraudulent conduct is involved.

[19] The third ground of exception is that the agreement was given effect to in that the property was transferred. The abstract system is applicable to transfer of immovable property. The validity of the real (as opposed to the underlying) agreement is nowhere put into question neither is it alleged that the real agreement was vitiated.

¹ Lampert-Zakiewicz v Marine & Trade Ins Co Ltd 1975 (4) SA 597 (C).

[20] The plaintiffs argue that the sales agreement is challenged in view of the fraudulent scheme, in that it was never the old BIPA's intention to purchase the property. The contract is therefore impugned by implication.

Exception raised by fifth Defendant

[21] The fifth defendant claims that the plaintiff's amended particulars of claim is excipiable on the basis that it does not disclose a cause of action and/or it does not contain all the necessary averments to sustain a cause of action on the following grounds:

[22] The first ground is that new BIPA's predecessor, old BIPA, had already been in existence since July 2011 and that it was finally deregistered on 30 August 2017. Old BIPA concluded an agreement of sale of immovable property prior to it's deregistration on 6 July 2017. There is however no provision contained in the BIPA Act, 2016 (Act 8 of 2016) which regulates the transfer of rights and/or liabilities as and between old BIPA and new BIPA or any of the other plaintiffs. No allegation is made relying on any provision of the Act or any other basis on which a transfer of rights and obligations occurred. There is thus no basis on which new BIBA or any other plaintiff could seek to step into the shoes of old BIPA and purport to exercise any rights which may have vested in old BIPA. The relief sought under claim A and B is thus unsustainable.

[23] The second ground is that there is no basis upon which the third plaintiff (new BIPA) alleges that it is the successor to old BIPA, or that it may act on behalf of the old BIPA. There is no basis upon which the third plaintiff, acting on its own or on behalf of any of the plaintiffs in fact or in law can purport to cancel the sales transaction or allege that the sale transaction can be cancelled in the circumstances and considering the deregistration, the failure to cite the directors of the old BIPA.

[24] The third ground is that there is no basis disclosed as to the grounds upon which the plaintiffs could purport to claim repayment of the purchase price.

[25] The above three grounds are similar to the first ground of second to fourth defendants. The plaintiff submits that they are not relying on agency but on the fact that new BIPA is acting in its capacity as successor of old BIPA.

[26] The fourth ground is that the plaintiffs allege that fourth defendant owed a duty to the purchaser as well as first second and third plaintiffs but no basis is disclosed as to the ground upon which it is alleged that the duty was owed to second and third plaintiffs.

[27] The plaintiffs' point of view is that fourth defendant had a legal duty by virtue of her appointment as conveyancer and her knowledge that the funds were advanced by first plaintiff who is cited as acting in the public interest due to the unlawful utilisation of public funds. Plaintiff submits that new BIPA succeeded and replaced old BIPA and as such, the fourth defendant owed a duty to new BIPA on this basis alone.

[28] In *Van Straten NO v Namibia Financial Institutions Supervisory Authority 2016 (3) NR 747 (SC)* it was held that when an exception is taken on the grounds that no cause of action was disclosed, the facts as alleged in the plaintiff's pleadings must be taken as correct, and only if no possible evidence led on the pleadings could disclose a cause of action, would the particulars of claim be excipiable.

[29] In the *Lampert-Zakiewicz, supra* the following was stated at 599G-H:

'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 words of Innes CJ in *Barrett v Rewi Bulawayo Development Syndicate Ltd 1922 AD 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."

[30] The relief claimed by the plaintiffs' is that of cancelation of a contract on the ground of fraudulent misrepresentation. In the law of contract in South Africa, RH Christie, 5th edition, page 271, the following is stated:

'The general effect of misrepresentation and fraud on a contract can be shortly stated. A party who has been induced to enter into a contract by the misrepresentation of an existing fact is entitled to rescind the contract provided the misrepresentation was material, was intended to induce him to enter into the contract and did so induce him. If the misrepresentation was fraudulent or negligent the innocent party is also entitled to damages." [my emphasis]

[30] On the assumption that the facts pleaded in the particulars of claim are correct, the plaintiff's case is that third plaintiff, who is the successor in title to the old BIPA and by virtue of this fact, they are now stepping into the shoes of Old BIPA and become a party to the contract; and thus entitled to the rescission/cancellation of the contract in light of the alleged fraudulent scheme perpetrated by first to fifth defendants and to claim back payments made in respect of the agreement i.e. the purchase price and the transfer duty.

[31] The difficulty with this scenario is the fact that the plaintiffs failed to plead the factual basis to establish the transfer of rights and obligations (cession and delegation) which would accord new BIPA the same rights as old BIPA. The existence of the relationship between old and new BIPA must be established as these two entities are completely different and separate legal entities. The transfer of rights and obligations from one to the other, whether it is in terms of statute, by contract or by operation of the law is material for the remedy which the third plaintiff is claiming in its own capacity and on behalf of the other plaintiffs. It forms the basis for third plaintiff's claim against the defendants for cancellation and repayment of the contract price and transfer duty. It goes to the root of the plaintiffs' claim and as such it ought to be specifically pleaded. The factual averments to establish the legal basis on which the plaintiffs rely to establish the transfer of rights and obligations which would allow third plaintiff to 'step into the shoes' or to "act on its behalf" or to become the 'successor in title' of old BIPA, are vital for the plaintiffs to succeed in the relief they are seeking. There is therefore merit in the exception of the second to fourth defendant's on the first ground and fifth defendant's first three grounds.

[32] It is my considered view that the pleading as a whole, if the facts are taken as correct and if evidence is led on the facts pleaded, makes the necessary allegations for fraudulent non-disclosure by first defendant. The factual averment that they acted in concert, if taken as correct and if evidence is led in respect thereof, would mean that his conduct may be imputed to second to fifth defendants.

[33] In light of this conclusion, the second to fourth defendant's second ground cannot be sustained. The Turquand Rule would not find application in light of the allegations of fraudulent conduct and the averment that the parties acted in concert. The same can be said about second to fourth defendants' third ground. Fraud may vitiate the underlying contract. The fifth defendant's fourth ground, in my view, although worded differently, stands on the same footing as the first three grounds given the relief which is claimed from fourth defendant.

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

1. The second to fourth defendants' exception to the plaintiff's amended particulars of claim on the first ground is upheld with costs including cost of one instructing and one instructed counsel;
2. The fifth defendant' exception to the plaintiff's amended particulars of claim on the first three grounds is upheld with costs including cost of one instructing and one instructed counsel;
3. The plaintiff is granted leave, if so advised, to file amended particulars of claim within fifteen days from the date of this judgment.
4. The case is postponed to 01 April 2020 at 14h15 for Status hearing (Reason: Further conduct of matter).

M Tommasi
Judge

APPEARANCES

For Plaintiffs:

P Kauta,
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For 2nd, 3rd and 4th Defendants:

R Heathcote SC
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