

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING ON EXCEPTION

Case no: HC-MD-CIV-ACT-OTH-2020/04153

In the matter between:

HENDRIK JACOBUS VAN WYK

1ST PLAINTIFF

SARITA VAN WYK

2ND PLAINTIFF

and

JASON NANDAGO

1ST DEFENDANT

BLUE DIAMOND PROPERTIES (PTY) LTD

2ND DEFENDANT

AUCTION DYNAMICS

3RD DEFENDANT

M P KIRSTEN

4TH DEFENDANT

BAREND N VENTER

5TH DEFENDANT

Neutral citation: *Van Wyk v Nandago* (HC-MD-CIV-ACT-OTH-2020/04153) [2021] NAHCMD 171 (19 April 2021)

Coram: SIBEYA J

Heard: 19 March 2021

Delivered: 19 April 2021

Reasons: 20 April 2021

Flynote: Practice – Exception – That particulars of claim do not sustain cause of action – Court to determine whether or not the particulars of claim lack the necessary averments required to sustain a cause of action — Settled

law that in adjudicating exceptions, averments alleged by the plaintiff are accepted as correct – Excipient bears the onus of persuading the court that particulars of claim are excipiable – Court retains a duty to interpret legislation, agreement or document – Court of the view that the particulars of claim are capable of being read to disclose a cause of action.

Summary: The first defendant raised an exception to the plaintiffs' particulars of claim on the basis that the particulars of claim do not sustain a cause of action. The first defendant based his exception on the ground that clause 9.5 of the agreement for the sale of a farm which provides for first defendant to indemnify the plaintiffs for payment of VAT, if it is not zero-rated, only comes into effect when the plaintiffs are liable to pay such VAT. First defendant argues that liability to pay VAT does not amount to demand or a claim by the Receiver of Revenue but an obligation to pay in fact and in law.

The plaintiffs chose not to amend the particulars of claim and opposed the exception. The plaintiffs allege that they were compelled to pay the VAT claim by the Receiver and the first defendant breached the agreement when he refused to put the indemnification into effect.

Held – It is trite that in adjudicating exceptions, the court must accept the facts alleged by the plaintiffs as correct and that the excipient bears the onus of persuading the court that the particulars of claim are excipiable in that on every interpretation thereof, no cause of action is disclosed.

Held – Courts retain the responsibility to interpret legislations, agreements or documents and not witnesses.

Held – Reading the provisions of the VAT Act together and not in isolation reveal that the sale of a farm can be interpreted as a taxable activity.

Held – The intention of the parties to an agreement is vital to determine the meaning afforded to a clause of an agreement.

Held – An exception is upheld only if upon any reasonable reading of such pleading, no cause of action is disclosed and in this matter particulars of claim are capable of disclosing a cause of action for damages based on clause 9.5 of the agreement (indemnification).

Held – The first defendant is capable of appreciating the nature of the case he is facing and can meet such allegations. The exception is dismissed with costs subject to rule 32(11).

ORDER

1. The first defendant's exception brought against the plaintiffs' particulars of claim is dismissed.
 2. The first defendant is to pay the plaintiffs' costs of opposing the exception, subject to rule 32(11).
 3. The matter is postponed to 18 May 2021 at 14:00 for a case planning conference.
 4. The parties must file a joint case plan on or before 06 May 2021.
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JUDGMENT

SIBEYA J:

Introduction

[1] This is an exception that revolves around an indemnification clause against liability for payment of value added tax (VAT) in accordance with the Value Added Tax Act 10 of 2000. This matter is clouded by the meaning of liability to pay VAT by one party in order for the indemnification by the other to be triggered and whether same is pleaded in the particulars of claim. (My underlining emphasis added).

The parties

[2] The plaintiffs are Mr. Hendrik Jacobus Van Wyk, an adult Namibia male and Mrs. Sarita Van Wyk, an adult Namibian female, both of whom are pensioners and are married to each other in community of property, residing at No. 49 Rugby Street, Gobabis.

[3] The first defendant is Mr. Jason Nandago, an adult Namibian male businessman residing at No. 24 Daan Bekker Street, Olymplia, Windhoek. The second to the fifth defendants are not parties to the exception proceedings.

Background

[4] In October 2020, the plaintiffs instituted action against the defendants for damages suffered in the amount of N\$3 013 217.76, representing the claim of the Receiver of Revenue (“the Receiver”) for VAT, together with interest calculated thereon but where penalties were deducted. Plaintiffs claim that they were compelled to pay the said aforesaid amount.

[5] In 2012 the plaintiffs and the first defendant entered into a written agreement of sale of immovable property where the plaintiffs sold their farm to the first defendant for an amount of N\$10 964 953.13. The agreement contains an indemnification clause which provides that:

‘9.5 Any amount offered in terms hereof shall be exclusive of V.A.T. and if any V.A.T. is or becomes payable (if the transaction is not regarded as zero rated supply) as a result of this sale the Purchaser shall be liable for payment of such VAT and hereby indemnifies the Seller accordingly...’

[6] Plaintiffs claim that they were compelled to pay when the Receiver demanded payment for VAT. This, plaintiffs claim, was attributed to the first defendant acting in breach of the agreement by refusing to put into operation the indemnity clause.

[7] The first defendant (excipient) raised an exception to the plaintiffs' particulars of claim. He contends that the particulars of claim lack averments necessary to sustain a cause of action. It should be cleared from the onset that it is not first defendant's case that the particulars of claim are vague and embarrassing. To the contrary, his exception is solely on the basis of no cause of action being made out.

[8] The ground on which the exception is based is that clause 9.5 of the agreement is to the effect that the first defendant shall be liable for payment of VAT if VAT becomes payable and only then shall the first defendant indemnify the plaintiffs accordingly. First defendant argues further that clause 9.5 can only be put into effect when the plaintiffs are *de facto* and *de jure* liable to pay the Receiver. Furthermore, in order to sustain the claim, the plaintiffs had to allege that they were, in fact and in law liable, to the Receiver for VAT payment in connection with the sale of the farm. This is a liability enforceable by law and not by demand, so it is argued.

[9] First defendant laid bare his exception by stating that plaintiffs will have no claim against him if they paid the Receiver without an obligation to do so. He states further at the backdrop of the VAT Act, that the VAT charged by the Receiver was not due or not applicable to the agreement in question. He further argues that the sale of the farm cannot be considered as a taxable activity, as it is not carried on continuously or regularly.

[10] Based on the above-mentioned grounds, first defendant claims that the exception should be upheld with costs and further that the plaintiffs be afforded leave to amend their particulars of claim.

[11] The plaintiffs elected not to amend the particulars of claim in order to cater for the complaint of the first defendant and opposed the exception.

The law

[12] The first defendant raised an exception empowered by rule 57(1) which provides that:

‘Where a pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or a defence, the opposing party may deliver an exception thereto within the period allowed for the purpose in the case plan order or in the absence of provision for such period, within such time as directed by the managing judge or the court for such purpose on directions in terms of rule 32(4) being sought by the party wishing to except.’

[13] The Cape High Court in *Colonial Industries Ltd v Provincial Insurance Co Ltd*¹ stated the following regarding the approach to exceptions:

‘Now the form of pleading known as an exception is a valuable part of our system of procedure if legitimately employed: its principal use is to raise and obtain a speedy and economical decision of questions of law which are apparent on the face of the pleadings: it also serves as a means of taking objection to pleadings which are not sufficiently detailed or otherwise lack lucidity and are thus embarrassing. Under the name of "demurrer" it grew under the old English practice into a most pernicious evil: the Courts of Law abnegating their functions as Courts of Justice directly countenanced and encouraged the ingenuity of counsel in drafting fine "demurrers" which ignored the rights on which they were called to adjudicate. 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.’²

[14] It is well established that the purpose of the pleadings is to define the issues in order to enable the other party to know the case it has to meet.

¹ *Colonial Industries Ltd v Provincial Insurance Co Ltd* 1920 CPD 627 (at 630).

² This approach to exceptions has been consistently followed in this Court, see *Namibia Breweries Ltd v Seelenbinder, Henning & Partners* 2002 NR 155 (HC), *Total Namibia (Pty) Ltd v Van der Merwe t/a Ampies Motors* 1998 NR 176 (HC).

Notwithstanding, courts still retain a central role in adjudicating the real issues between the parties raised in the pleadings, in keeping with the principle that pleadings are made for the court and not the court for the pleadings.³

[15] A person is required to plead to the material facts and this requirement has developed the often-cited distinction for remembrance at all times between *facta probanda* (the facts that had to be proved) and the *facta probantia* (the facts that would prove those facts).

[16] The parties are *ad idem* on the legal position applicable to exceptions. The excipient bears the *onus* of persuading the court that the pleading is excipiable.⁴ The question to be asked is whether upon every interpretation which the particulars of claim can reasonably be subjected to, it can be said that no cause of action is disclosed. This is so bearing in mind that the court takes the averments in the particulars of claim as correct.⁵

[17] Plaintiffs make, *inter alia*, the following averments in the particulars of claim:

'10. The following constituted the express, alternatively the implied, in the further alternative the tacit terms of the sale agreement so concluded between the parties: ...

10.2 The property was sold through the second and/or third defendants, acting as the duly appointed auctioneers/estate agents/ for and on behalf of the plaintiffs;

10.3 The first defendant agreed to pay, over and above the amount offered as purchase price, buyer's commission of 5.75% together with VAT calculated thereon and which amount would be paid to the second and third defendants; ...

10.6 All costs incidental to the transfer and registration of the property into the name of the first defendant shall be for the account of the first defendant and all risk of ownership shall pass to the first defendant on date of transfer of the property;

³ Erasmus Superior Court Practice, Farlam et al at B1-129-B1-130.

⁴ *Kotsopoulos v Bilardi* 1970 (2) SA 391 (C) at 395D.

⁵ *Denker v Cosack and Others* 2006 (1) NR 370 (HC) 373H-374B.

10.7 All amounts offered in terms of the sale agreement shall be exclusive of VAT and if any VAT becomes payable (in the event of the transaction not regarded as zero rated) the first defendant shall be liable for payment of the VAT and to that end indemnifies the plaintiffs from such liability;

10.8 The bid made by the first defendant and eventual purchase price of the property amounted to N\$10 964 953.13 and the first defendant undertook to also pay any VAT on the said amount if same should become due; ...

12. On or about the 7th of June 2018 the Receiver of Revenue presented the plaintiffs with a tax demand in the amount of N\$7 533 836.28 which amount represented the VAT due on the purchase price together with penalties and interest calculated thereon.

13. First defendant, who by contract and consequently by law, (sic) obliged to pay the VAT however breached the terms of the sale agreement by failing to pay the outstanding VAT thereon and/or by failing to indemnify the plaintiffs against the claim from the Receiver of revenue to pay same on account of which the plaintiffs were compelled and obliged to pay same.

14. By virtue of the first defendant's breach as aforesaid the plaintiffs suffered damages to the tune of N\$3 013 217.76 which amount represents the Receiver of Revenue's claim for VAT together with interest calculated thereon but in respect of which the penalties were deducted and which amount the plaintiffs were compelled to pay to the Receiver.'

[18] Mr. Barnard, who appeared for the first defendant, submitted that the indemnity is not against the claim for VAT but against the actual liability of the plaintiffs to pay VAT. He drove the submission home by stating that such liability does not emanate from a demand by the Receiver but from liability to pay VAT. If the Receiver makes a spurious claim, the plaintiffs are duty bound to oppose such claim until liability for payment of VAT thereof is proven and only then will the indemnity arise, so the argument went.

[19] It was argued further that plaintiffs do not make the averments that they are in fact and in law liable to pay VAT to the Receiver in order to hold the first

defendant liable. Mr. Barnard concluded with submissions that the provisions of the VAT Act furthermore do not render the sale of the farm in this matter VAT taxable.

[20] Mr. Strydom, who appeared for the plaintiffs, was not to be outmuscled in the contest and submitted that the averments set out in the particulars of claim disclose a cause of action to which the first defendant can plead. He submitted further that the defence that the first defendant is not liable to indemnify the plaintiffs as the plaintiffs' claim is based on the Receiver's demand and same can be addressed in evidence. He invited the court to dismiss the exception for being bad in law.

[21] Can VAT be charged on the sale of a farm? The VAT Act provides for the following amongst others:

- (a) That any sale of goods is deemed to be a supply of goods;⁶
- (b) That sale is an agreement of purchase and sale and includes any other transaction or act whereby ownership of goods passes from one person to another;⁷
- (c) That goods mean all kinds of property inclusive of immovable property;⁸
- (d) That a taxable supply is the supply of goods in the course or furtherance of a taxable activity, other than an exempt supply;⁹
- (e) That a taxable activity is a taxable activity as defined in s 4(1). This is any activity carried out continuously or regularly by a person in Namibia

⁶ Section 3(1)(a)(i).

⁷ Section 1.

⁸ Section 1.

⁹ Section 1.

whether for profit or not, involving or intended to involve the supply of goods or services to any person for consideration.¹⁰

[22] The VAT Act is silent on what is meant by an activity carried out continuously or regularly. What is apparent from the VAT Act however is that the supply of goods is a taxable activity attracting VAT charges unless excluded by s 4.

[23] Tax legislations are not subjected to interpretation by courts daily and are not drafted in a straight forward manner either. It is an arduous task to interpret provisions of the tax laws inclusive of the Vat Act. Notwithstanding, the court still retains the responsibility to interpret legislation. Harms DP in the Supreme Court of Appeal in *KPMG Chartered Accountants (SA) v Securefin Ltd and Another*¹¹ stated as follows regarding the court's duty to interpret:

'Interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question'

[24] Courts should therefore not shy away from carrying out their task to interpret legislation, agreements or documents. Interpretation should not be left to witnesses, even if such witnesses are expert witnesses.

[25] The ordinary dictionary meaning of continuously, is perpetual progression of a matter without interruption, while regularly means a constant patten.¹² If one was to read s 4(1) in isolation, it would be concluded that the sale of a farm is a once-off transaction which is not continuous and certainly not regular. The rules of interpretation compel courts to read and interpret provisions in conjunction with other provisions of the same legislation.

[26] Section 3(2) and (3) provides that:

¹⁰ Section 1 and 4(1)(a).

¹¹ 2009 (4) SA 399 (SCA) para [39].

¹² Oxford English Dictionary, 11th ed.

'(2) The disposition of a taxable activity as a going concern, or part of the taxable activity that is capable of separate operation, shall be deemed to be a supply of goods made in the course or furtherance of that taxable activity.

(3) For the purposes of subsection (2), a taxable activity, or a part of a taxable activity that is capable of separate operation, is disposed of as a going concern where -

(a) all the goods and services necessary for the continued operation of that taxable activity, or part of a taxable activity, are supplied to the transferee; ...'

[27] I hold the view that the sale of a farm is capable of being interpreted as part of a taxable activity, capable of separate operation and in this matter, all goods incidental to the sale of the farm were transferred to the first defendant. It therefore cannot be said that on all reasonable interpretations to be afforded to the particulars of claim, the sale of the farm is not a taxable activity.

[28] Clause 9.5 of the agreement quoted herein above qualifies the obligation for payment arising out of a liability where the transaction is not a zero-rated supply. I accept that the parties signed the agreement with the understanding of the provisions of the VAT Act applicable to zero rating.

[29] The Act provides as follows regarding zero rating transactions:

'9(1) Where, but for this section, a supply of goods or services would be charged with tax imposed under section 6(1)(a), any such supply shall, subject to compliance with subsection (2), be charged with tax at the rate of zero per cent if that supply is specified in paragraph 2 of Schedule III as a zero-rated supply.

(2) Where the rate of zero per cent has been applied by a registered person to a supply under this section, the registered person shall obtain and retain such documentary proof acceptable to the Commissioner substantiating the registered person's entitlement to apply the zero rate to the supply.'

[30] Paragraph 2(q) of Schedule III of the VAT Act states that subject to paragraph 3, goods or services supplied are zero-rated where a supply of a

taxable activity or part of a taxable activity is a going concern, provided a notice in writing signed by the transferor and the transferee detailing the supply is provided to the Commissioner within 21 days after the supply.

[31] There is no averment in the particulars of claim that the parties provided the Commissioner with a notice in terms of s 9, read with paragraph 2 of Schedule III in order to regard the transaction as zero rated. Mr. Barnard submitted that as a result, the plaintiffs acceded to a demand by the Receiver which was not due according to law.

[32] The VAT Act does not burden a particular person with an agreement consisting of the responsibility to provide the notice in terms of s 9 read with paragraph 2 of Schedule III to the Commissioner. To the contrary, the absence of a requirement or directive placing the burden on a particular person to launch the notice is indicative of the fact that both parties retain the responsibility to provide such notice to the Commissioner. Neither party may therefore lay blame on the other for not providing the Commissioner with the notice, which may trigger the zero-rating process within 21 days of the supply as all parties may be found wanting in the process.

[33] The intention of the parties to an agreement is vital to determine the meaning to be attributed to a particular clause of the agreement. Roper J in *Maskalik v Levitt*¹³ said the following at p 325:

‘when the parties entered into clause 8 of the agreement they must have known that that any sum apportioned to the plaintiff would not merely increase his taxation by the amount which would have been leviable upon the apportioned amount had it stood alone; but that it would grade up the amount payable upon his income regarded as a whole. Clause 8 shows that both parties knew that the sum apportioned would not be the plaintiff’s sole income, because it refers to a salary earned by the plaintiff. The wording of clause 8, though ambiguous, does not exclude an interpretation which is consistent with an intention to indemnify the plaintiff against such an increase, and in my view, formed upon the document as a whole, that was the intention of the parties.’

¹³ 1947 (4) SA 321 (W).

[34] In consideration of the above principle, it transpires that the reading of clause 9.5 reveals that the parties were well aware that their sale agreement was subject to VAT charges. The only determination that needed to be made is the rate at which VAT is to be charged, that is whether zero-rated or not. Strictly speaking, a zero-rate charge is VAT charged at the rate of zero percent. It follows therefore that a VAT charge at any rate other than at the rate of zero percent to which the plaintiffs are liable is subject to indemnification by the first defendant.

[35] The particulars of claim provide that the Receiver presented to the plaintiffs a VAT tax demand in the amount of N\$7 533 836.28 due on the purchase price of the farm inclusive of penalties and interest. The particulars of claim provide further that the Receiver's claim for VAT was reduced to N\$3 013 217.76 after deducting the penalties. Considering that the only deductions made from the original VAT claim were penalties, it can be interpreted amongst other possible interpretations that the Receiver does not regard the VAT rate applicable to be zero-rated, because if he did then he would have applied the rate of zero percent to the entire claim. The deduction of penalties only on the VAT claim leaving the remainder intact, supports the finding that the VAT charge was not zero-rated.

[36] On the interpretation of the averments in the particulars of claim, it can be said that the plaintiffs became liable to pay the Receiver after the Receiver decided not to charge VAT at zero percent. There can be merit in the suggestion that perhaps the Receiver overcharged the plaintiffs or there could be errors in calculations but this reduces nothing (does not detract) from the interpretation that the VAT was not zero-rated.

Conclusion

[37] In the view of my findings and conclusions stated above, I find that the averments in the particulars of claim can be interpreted to mean that the plaintiffs are liable for payment of VAT charged and the first defendant is liable to indemnify the plaintiffs accordingly. The first defendant is capable of

understanding the nature of the case he has to meet and to plead to it accordingly. I further find that the qualms raised by the first defendant can be pleaded as the averments in the particulars of claim can sustain a cause of action, after which evidence should be led. In the premises, I am of the considered view that the exception was not properly taken and falls to be dismissed.

[38] In the result, it is ordered that:

1. The first defendant's exception brought against the plaintiffs' particulars of claim is dismissed.
2. The first defendant is to pay the plaintiffs' costs of opposing the exception, subject to rule 32(11).
3. The matter is postponed to 18 May 2021 at 14:00 for a case planning conference.
4. The parties must file a joint case plan on or before 06 May 2021.

O S Sibeya
Judge

APPEARANCES

PLAINTIFFS: J A N Strydom
Instructed by Fisher, Quarmby & Pfeiffer
Windhoek

FIRST DEFENDANT: P C I Barnard
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