

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON EXCEPTION

Case No.: **HC-MD-CIV-ACT-CON-2020/01263**

In the matter between:

JACOBS FAMILY TRUST	1ST PLAINTIFF
DAUSAB FAMILY TRUST	2ND PLAINTIFF
SALOMON FAMILY TRUST	3RD PLAINTIFF
ROOI FAMILY TRUST	4TH PLAINTIFF
HENDRIK WITBOOI FAMILY TRUST	5TH PLAINTIFF
WITBOOI TRADITIONAL AUTHORITY TRUST WHICH IS THE SUCCESSOR TO THE /KHOWESEN DEVELOPMENT TRUST	6TH PLAINTIFF
RUDOLF DAUSAB	7TH PLAINTIFF
JOSELINE SOFIA WITBOOI FAMILY TRUST	8TH PLAINTIFF

and

PK FAMILY TRUST	1ST
DEFENDANT	
PWM FAMILY TRUST	2ND DEFENDANT
NAMIBIA AFFIRMATIVE MANAGEMENT AND BUSINESS (PTY) LTD	3RD DEFENDANT
PIETER WILLEM VAN ZYL (SNR) N.O	4TH DEFENDANT
PIETER WILLEM VAN ZYL (JNR) N.O.	5TH DEFENDANT

JACOBA VAN ZYL N.O.	6 TH DEFENDANT
MARIETTE VAN ZYL N.O.	7 TH DEFENDANT
KNIGHT FAMILY TRUST	8 TH DEFENDANT
BUSINESS AND INTELLECTUAL PROPERTY AUTHORITY	10 TH DEFENDANT
THE MINISTER OF ENVIRONMENT AND TOURISM	11 TH DEFENDANT
THE INSPECTOR-GENERAL OF THE NAMIBIAN POLICE	12 TH DEFENDANT
THE PROSECUTOR-GENERAL OF NAMIBIA	13 TH DEFENDANT
REGISTER OF COMPANIES	14 TH DEFENDANT

Neutral Citation: *Jacobs Family Trust v PK Family Trust* (HC-MD-CIV-ACT-CON-2020/01263) [2021] NAHCMD 48 (16 February 2021)

Coram: PRINSLOO J
Heard: 27 January 2021
Delivered: 16 February 2021

Flynote: Practice and Procedure – Pleadings – Rule 57 – Exception – Plaintiffs’ particulars of claim does not disclose a cause of action and is bad in law – Pleadings excipiable.

S 42 of the Companies Act, 28 of 2004 - effect of non-ratification of a pre-incorporation agreement is that it lapses.

Summary:

Plaintiff’s particulars of claim advanced five causes of action, namely fraud; theft (on the basis of condition furtive); rectification; debatement and breach of contract.

Plaintiffs’ pleaded that subsequent to and in terms of an oral agreement between the first, second, third, fourth, fifth and sixth plaintiffs, represented by the seventh plaintiff, and the first and second defendants represented by the fourth and fifth defendants, the seventh plaintiff, Mr Dausab, applied to the Minister of Environment and Tourism for the approval and award of a Tourism Concession on behalf of the third defendant, NAMAB (Pty) Ltd, whom they plead was an unincorporated

association at the time of the application. Plaintiff's further pleaded that the parties agreed that incorporation and registration of the unincorporated association was subject to the concession being awarded.

Plaintiffs' claimed that in breach of the oral agreement the fourth, fifth, sixth and seventh defendants (acting as agents for the first, second, eighth and ninth defendants) proceeded to incorporate and register the third defendant according to a shareholding contrary to that agreed to between the parties.

The defendants raised 13 grounds of exception to the plaintiffs' particulars of claim, of which five grounds were conceded by the plaintiffs. The exceptions were raised on the basis that plaintiffs' particulars of claim do not disclose a cause of action alternatively are vague and embarrassing and therefore excipiable.

Held that throughout the particulars of claim reference is made to an unincorporated association which will apply for the grant of a tourism concession. Even if a shelf company was purchased whose name would be changed to NAMAB (Pty) Ltd, it does not make the applicant in the application an unincorporated association. A shelf company is a company that is already registered but has never traded or conducted business and holds no assets of liabilities.

Held further that the fact that the intention was that the shelf company's name will be changed to that of the third defendant does not change the fact that it remains an existing company.

Held further that the result of a pre-incorporation agreement not being subsequently ratified is that that it lapses.

ORDER

1. The third, fourth and fifth grounds of exceptions raised by the defendants are upheld with costs. Such cost to include the cost of one instructing and two instructed counsel.

2. The plaintiffs' particulars of claim are struck and the plaintiffs are granted leave to file their amended particulars of claim, should it be so advised, within 20 days from date of release of reasons.
3. Cost shall not be limited to Rule 32(11).
4. The matter is postponed to **25 March 2021** at **15:00** for Status Hearing.
5. A joint status report must be filed on or before 22 March 2021 regarding the further conduct of the matter.

JUDGMENT

Introduction

[1] The first to eighth defendants ("the defendants") raised 13 grounds of exception to the plaintiffs' particulars of claim on the basis that it does not disclose a cause of action, alternatively that it is vague and embarrassing and therefore excipiable. The second, sixth, eighth, ninth and eleventh grounds of exception were conceded and therefore need no discussion.

Background

[2] The plaintiffs' particulars of claim set out two main claims against the defendants, which are set out in detail and for the sake of brevity I do not intend to repeat all the averments set-out therein. For purposes of the ruling I will therefor refer in summary to certain portions.

[3] In essence, the plaintiffs advance five causes of action. The first cause of action relates to fraud and the second one relates to theft (on the basis of condition furtive). Then in the event that the plaintiffs are successful the next matter arising is one of rectification, to correct the defendants alleged fraudulent conduct, by rectifying a certain share register. Following hereon the plaintiffs claim debatement in respect of the financial record of the third defendant and lastly the issue of breach of contract.

[4] The plaintiff pleaded that during 2008 first, second, third, fourth, fifth and sixth plaintiffs, represented by the seventh plaintiff, Mr Rudolf Dausab, entered into an oral agreement with the first and second defendants represented by the fourth and fifth defendants. In terms of the said oral agreement the first, second, third, fourth, fifth and sixth plaintiffs and the first and second defendants would form an unincorporated association that would apply for a Tourism Concession within the Namib Naukluft Park from the Ministry of Environment and Tourism. In compliance with the oral agreement between the parties the seventh plaintiff, Mr Dausab, applied on behalf of the unincorporated association to the eleventh defendant, the Minister of Environment and Tourism (Minister of MET) for the approval and award of the concession to the third defendant, NAMAB (Pty) Ltd.

[5] In terms of the oral agreement Mr Dausab would be the sole party authorised to act for and represent the unincorporated Association and prepare the application for the grant of the Tourism Concession by MET to the unincorporated Association.

[6] In terms of the oral agreement between the parties the unincorporated Association would be registered and incorporated with the predecessor of the Business and Intellectual Property Authority¹ and the Registrar of Companies² in the event that the application for the grant of the Tourism Concession was approved by the Minister of MET. In terms of the oral agreement the entity was to be registered and incorporated and would be named NAMAB (Pty) Ltd.

[7] Further in terms of the oral agreement between the parties Mr Dausab would be the sole party responsible for registering and incorporating the third defendant, NAMAB (Pty) Ltd.

[8] On 15 July 2009 the concession was awarded to the third defendant and the Head Concession Agreement was entered into between the Minister of MET and Mr Dausab on the same date.

[9] Thereafter on a date unknown to the plaintiffs the fourth, fifth, sixth and seventh defendants (acting as agents for the first, second, eighth and ninth defendants) in breach of the oral agreement between the parties proceeded to

¹ Tenth defendant.

² Fourteenth defendant.

register and incorporate the third defendant. In so doing they recorded and registered a different shareholding than what the parties had agreed upon. It is the plaintiffs' complaint that the defendants conduct was unlawful and in violation of several different agreements, namely:

- a) the terms of the oral agreement between the parties;
- b) the Head Concession Agreement entered into with the eleventh defendant because no approval had been obtained from or granted by the eleventh defendant for changes in the shareholding structure of the third defendant;
- c) the terms of oral agreement did not register the total shares that were due to the first, third and fourth plaintiff.

[10] Central to the plaintiffs' claims are a number of documents attached to the particulars of claim on which they rely in support of these claims, namely:

- a) Concession application (annexure RD-1);
- b) Written representation made to the Minister of MET (annexure RD-2);
- c) Head Concession Agreement (annexure RD-3);
- d) Application and approval of reservation of name of the company in terms of the oral agreement (annexures RD-4 and 5).

[11] It is then also these annexures to the particulars of claim that gave rise to some of the grounds of exception raised by the defendants.

Grounds of exception

[12] The grounds of exception are principally and in summary founded on six bases:

- a) The first two grounds of exception deal with the citation and *locus standi* of the plaintiffs. The second ground was conceded and need not be dealt with.
- b) The third, fourth and fifth grounds of exception deal (albeit on different scores) with the contradiction between the plaintiffs' allegations of an unincorporated contracting entity and the incorporated entity referred to in annexures RD 1 and RD 3 of the particulars of claim on which the plaintiffs rely.
- c) The sixth ground of exception deals with the statutory impossibility of "recording and registration" of shares with the Registrar of Companies and/or

Business and Intellectual Property Authority. This ground of exception was conceded.

d) The seventh and eighth grounds of exception deal with the alleged non-compliance with contractual obligations relied upon by the plaintiffs and the facts relied upon. It is the defendants' case that the facts do not bear out the obligations, thus rendering the alleged non-compliances non-existent *ex facie* the particulars of claim. In this instance it must be pointed out the eighth ground of exception was conceded and requires no discussion.

e) The ninth, tenth, eleventh and twelfth grounds of exception deal with the plaintiff's failure to plead allegations necessary to sustain a cause of action or competent relief relating to (i) misappropriation and/or theft; (ii) enrichment; (iii) rectification; and (iv) debatement. As indicated earlier, the ninth and eleventh grounds of exception were also conceded.

f) Lastly, the thirteenth ground of exception deals with the contradictory nature of the plaintiffs' claim for cancellation and at the same time specific performance with the agreement they seek to cancel.

[13] Parties are in agreement that in the event that court uphold the third to fifth grounds of exception then there will be no need to deal with any of the remaining grounds of exception as the third to the fifth grounds of exception cut to the heart of the matter.

Argument on behalf of the excipients/defendants

[14] Mr Töttemeyer commenced his argument by referring specifically to para 23 of the particulars of claim which reads as follows:

'In compliance with the terms of the oral Agreement between the parties Mr Rudolf Dausab duly applied on behalf of the unincorporated Association to the Eleventh Defendant for the approval and award of the Concession to the Third Defendant. In applying for the Concession Mr Rudolf Dausab expressly represented to the Eleventh Defendant that he was duly authorized to represent the unincorporated Association. The representation made by the Eighth Plaintiff to the Eleventh Defendant in support of the Concession Application is attached hereto marked 'RD-1.'

[15] Further to this the plaintiffs in para 23.2 of the particulars of claim proceeded to allege that "...the Eleventh Defendant and Mr Rudolf Dausab representing the

unincorporated Association entered into a Head Concession Agreement. A copy of the Agreement is attached hereto marked as **Annexure 'RD-3'**.

[16] Mr Töttemeyer submitted that the plaintiffs' refer throughout their particulars of claim to an unincorporated association and the allegation that Mr Dausab acted on behalf of such unincorporated association stands in contradiction to the document referred to as annexure RD-1, which is supposed to support the averments as set out in para 23. Instead, Annexure RD-1 in a number of instances refers to an already incorporated entity, namely NAMAB (Pty) Ltd. Furthermore RD-3 in contradiction with para 23.2 also does not refer to an unincorporated association but instead refers to the name NAMAB (Pty) Ltd, as being the contracting party.

[17] Mr Töttemeyer further argued that it is evident from the papers filed on behalf of the plaintiffs that there was already a registered entity in place at the time of application for the concession and the granting of the said concession. This fact can be deduced from the fact that it was NAMAB (Pty) Ltd who was the contracting party. Mr Töttemeyer submitted that regard must be had to s 55(1)(b) of the Companies Act, 28 of 2004 which provides as follows:

'(b) the name of a private company having a share capital must include as its last two words "(Proprietary) Limited.'

[18] Mr Töttemeyer contended that there is thus *ex facie* the particulars of claim read with annexure RD-1 no basis to sustain an allegation that Mr Dausab acted on behalf of an unincorporated association when the application for the concession was made and the document relied on by the plaintiffs does not sustain their cause of action.

[19] In respect of the plaintiffs' allegation that the Head Concession Agreement (annexure RD-3) was entered into on behalf of the unincorporated association Mr Töttemeyer argued that on the most beneficial interpretation of the particulars of claim for the plaintiffs and ignoring the unsustainable nature of the allegations, the plaintiffs can at best rely on a pre-incorporation agreement. Mr Töttemeyer argued that para 23.3 actually suggests that is what the plaintiffs attempted to do (ie taking initial steps towards incorporating the entity).

[20] Mr Töttemeyer argued that any agreement so concluded was on behalf of a non-existent principal at the time and where a contract is concluded on behalf of a non-existing or fictitious principal no contract comes into existence between the third party and the fictitious principal, nor is the would-be agent personally liable as principal. In this regard the court was referred to *Peak Lode Gold Mining Co Ltd v Union Government*³.

[21] Mr Töttemeyer contended that in so much as the plaintiffs' intention with concluding any 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, and neither does the particulars of claim contain the further allegation, which is necessary under the circumstances, that the pre-incorporation agreement was ever adopted by any such subsequently duly incorporated entity. Mr Töttemeyer submitted that it is trite that a pre-incorporation contract which is not subsequently ratified by the company in the aforesaid manner, lapses.

[22] Mr Töttemeyer concluded in this regard that it follows that the plaintiffs particulars of claim does not sustain a cause of action against the defendants in respect of all claims, alternatively that it is vague and embarrassing.

Argument on behalf of the plaintiffs

[23] Mr Chibwana in response to the defendants' third and fourth grounds of exception that the seventh plaintiff acted on behalf of an entity named NAMAB (Pty) Ltd and their reliance on that contention which is premised on the annexures to the combined summons, submitted that that contention is a matter of fact which is a question of evidence, which should be resolved during trial.

[24] Mr Chibwana submitted that annexure RD-1 specifies the approach to the registration of the said NAMAB (Pty) Ltd and that RD-1 must be read together with annexures RD-4 and RD-5, which are attachments to RD-1. Mr Chibwana contended that it is clear that a shelf company was purchased with instructions given to the auditors to change the name of the shelf company from NEW FOUNDLAND (Pty) Ltd to NAMAB (Pty) Ltd. Mr Chibwana also argued that it is evident that a name was

³ *Peak Lode Gold Mining Co Ltd v Union Government* 1932 TPD 48.

reserved as Namibia Affirmative Management and Businesses (Pty) Ltd. Mr Chibwana argued that it is for the trial court to decide if a debate arises as to whether or not NAMAB was incorporated or not.

[25] To fortify his point in respect of the status of the corporation Mr Chibwana referred the court to page 28⁴ of the record (RB-1), which reads as follows:

‘ • . . .A shelf company was purchased with the old name of NEW FOUND LAND PTY (Ltd) and instructions were given to the auditors three months ago, to change the name to NAMAB PTY (Ltd), in which entity this application is made (*sic*). All the parties involved are in the process of getting all the paperwork signed, including the trusts, shareholders agreement, company documentation etc. and will this (*sic*) be finalized shortly.’

[26] Mr Chibwana argues that it should be clear to anyone reading the papers that the company was still being registered and therefore it is unincorporated. Mr Chibwana argued that one must then immediately consider the certificate of change of name of company⁵ wherein one would find a certificate of change of name from Manmar Investments Thirty-Six (Proprietary) Limited to Newfoundland (Proprietary) Limited, and this is the company identified in the application that will be changed to Namibian Affirmative and Businesses (Pty) Ltd, on a date beyond the application.

[27] Mr Chibwana referred the court to RD-4 wherein there is an application for reservation of a proposed name Namibia Affirmative Management and Business (Pty) Ltd. The only minor change according to Mr Chibwana is the word in the proposed name is ‘Business’ instead of ‘Businesses’.

[28] In respect of the fifth ground of exception Mr Chibwana submitted that it is the understanding that it is based on a pre-incorporation agreement as contemplated in s 42 of the Companies Act. Mr Chibwana argued that there is a fundamental flaw in the argument of the defendants as s 42 refers to pre-incorporation agreements which are sought to be made binding and enforceable on companies. It provides the company, once incorporated, with the opportunity to indicate that the contract entered into was without the company’s authority. In the current instance the parties are not in disagreement as to whether or not the company itself is tied down to the oral agreement between the parties, whether natural or juristic. The debate at present relates to an oral agreement that is reduced to writing setting out a

⁴ Page 3 of the presentation Annexure RB-1.

⁵ Page 45 of the Record.

shareholding structure. Mr Chibwana argued that shares are property and a party who is suing for property has a personal right in relation to the property and therefore an attempt to advance s 42 of the Act falls flat.

[29] In respect of the fifth ground of exception Mr Chibwana argued that the defendants acted fraudulently and incorporated their own company with their own shareholding structure contrary to the representations made by way of the application. Mr Chibwana argued that the case advanced in relation to the incorporated entity is that it was a fraudulent entity that the defendants fraudulently misrepresented to the entity that was awarded the concession and that there can therefore be no question related to adoption of any agreement by the third defendant because it is a fraudulent entity. Mr Chibwana submitted that the exception addresses a case that is not advanced by the plaintiffs.

Principles applicable to exceptions

[30] In *Van Straten NO and Another v Namibia Financial Institutions Supervisory Authority and Another*⁶ Smuts JA summarized the legal principles relating to exceptions to pleadings on the ground that they lack averments necessary to sustain a cause of action as follows:

'[18] 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.'

[31] Our law recognizes several grounds which a party may rely on when taking an exception. These grounds may be technical in nature when they go beyond what is in the pleadings. An exception may aim at disposing of the matter in its entirety or, in effect, delaying its disposal. The defendants filed an exception and advanced several

⁶ *Van Straten NO and Another v Namibia Financial Institutions Supervisory Authority and Another* 2016 (3) NR 747 (SC).

grounds in support of the exception all on the basis that the particulars of claim lack averments necessary to sustain a cause of action.

[32] In *Brink NO and Another v Erongo All Sure Insurance CC and Others*⁷ Shivute CJ discussed the position regarding 'no cause of action' as follows:

[52] The correct position of our law in the determination of whether the pleadings are excipiable on the ground that they lack sufficient averments to sustain a cause of action is illustrated through rule 45(5) of the Rules of the High Court and the principles developed through case law. The requirement of clear and concise statement of the material facts upon which the pleader relies for his claim is fundamental to alert the other party to the conduct complained of and to enable it to plead. This means that a pleader is only required to plead what is material. Facts that are not material need not be pleaded.

[53] As stated above, this court adopted the definition of 'cause of action' in *McKenzie v Farmers' Co-operative Meat Industries Ltd*, to determine whether the particulars of claim meet the criteria as stated by the then South African Appellate Division. Paragraphs 9 to 12 of the particulars of claim in this matter appear to me to contain material facts sufficient to disclose a cause of action. On this point, I agree with counsel for the appellants that the pleadings disclosed the *facta probanda*. It seems to me that counsel for the first respondent was asking for more than what is required by rule 45(5). It is therefore necessary to emphasise that the requirement of clear and concise statement of material facts relied on would be met if the pleader discloses only material facts necessary to be proved and not every fact.

[54] As noted in [16] above, the approach to be followed in the determination of exceptions taken on the ground that no cause of action is disclosed was recently restated by this court. However, it is necessary to emphasise that it is incumbent upon an excipient to persuade the court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed.'

Application to the facts

[33] There can be no argument that the annexures RD-1 to 3 are the crux upon which the exception turns. If one has regards to the averments made in the particulars of claim and the aforementioned attachments then the following is clear:

- a) Throughout the particulars of claim reference is made to an unincorporated association which will apply for the grant of a tourism

⁷ *Brink NO and Another v Erongo All Sure Insurance CC and Others* 2018 (3) NR 641 (SC).

concession. The applicant in respect of the application for the concession is described in the application in the following terms:

'The applicant for the application for this concession is NAMAB PROPRIETARY LIMITED'⁸

b) On page 28 of the record the presentation goes further and elaborated on the identity of the applicant as follows:

• The shareholding of NAMAB PTY (Ltd) is clearly shown in the above organizational structure of the company and thereof it is show that 75% (seventy five percent) shareholding in this company is owned by previous disadvantage Namibians.

- All the shareholders in NAMAB PTY (Ltd) are Namibian citizens.
- NAMAB PTY (Ltd) is a company registered in the Republic of Namibia, an owned by Namibian citizens alone. The company was registered for the purpose of creating a legal entity to apply for this concession. . .' (my underlining)

c) Hereafter the application makes reference to the shelf company FOUND LAND PTY (Ltd)⁹ that was purchased which name would be changed to NAMAB PTY (Ltd). Further reference is made to instructions which were given to the auditors, to change the name to NAMAB PTY (Ltd), in which name the application was made.

d) When one reads the application it is clear that there is consistent reference to NAMAB PTY (Ltd) and no mention is made of an unincorporated association.

[34] Mr Chibwana submitted that evidence can be lead to demonstrate that the award was made to NAMAB (Pty) Ltd, in particular Namibia Affirmative Management and Business (Pty) Ltd as opposed to the third defendant, and that would be the end of the matter.

[35] I can unfortunately not agree with this argument advance because even if evidence is lead in this regard the evidence would be in direct conflict with the particulars of claim. The application and presentation was done in the name of a company, in this instance not the third defendant, which was registered according to the plaintiffs at a date unknown, and it goes without saying that it must have been a

⁸ Page 27 of the Record.

⁹ According to p 45 of the record the name is indicated as NEWFOUNDLAND INVESTMENTS (PROPRIETARY) LIMITED.

date after the Head Concession Agreement was entered into. Even if a shelf company was purchased whose name would be changed to NAMAB (Pty) Ltd, it does not make the applicant in the application an unincorporated association. A shelf company is a company that is already registered but has never traded or conducted business and holds no assets or liabilities. The bottom line is that it remains a company that is incorporated. The fact that the intention was that the shelf company's name will be changed to that of the third defendant does not change the fact that it remains an existing company.

[36] The Head Concession agreement was reached between the Government of the Republic of Namibia through the Ministry of Environment and Tourism and NAMAB (Pty) Ltd represented by Mr Dausab in his capacity as Director and duly authorised to do so by the Association. This is the only time that there is reference made to 'the Association'. Yet again the concessionaire is the company and not the unincorporated association. This is in clear contradiction with the averments made in the particulars of claim.

[37] If the court accepts that the most beneficial interpretation of the particulars of claim is that the application for the concession was the unincorporated association (which is contrary to the papers before me) and that plaintiff relies on a pre-incorporation agreement then s 42 of the Companies Act applies.

[38] In *Unistrat Property Development Five Seven Two Seven (Pty) Ltd v The Chairperson of the Council for the Municipality of Windhoek*¹⁰ Angula DJP discussed the s 42 as follows:

[32] The legal position is prescribed by s 42 of the Companies Act, Act No. 28 of 2004. The section reads thus:

'Any contract made in writing by a person professing to act as an agent for a company not yet incorporated is capable of being ratified or adopted by or otherwise made binding upon and enforceable by that company after it has been duly incorporated as if it had been duly incorporated at the time when the contract was made and that contract had been made without its authority, but, the memorandum on its registration, must contain a statement with regard to the ratification or adoption of or acquisition of rights and obligations in respect of that contract, and that two copies of that contract, one of which must be certified by a notary public, have been lodged with the Registrar together with the lodgment for registration of the memorandum and articles of the company.'

¹⁰ *Unistrat Property Development Five Seven Two Seven (Pty) Ltd v The Chairperson of the Council for the Municipality of Windhoek* HC-MD-CIV-MOT-GEN-2018/000456 [2020] NAHCMD 149 (6 May 2020)

[33] The effect and import of s 42 (formally s 35 of now repealed Companies Act, 1973) has been the subject of discussion and comment by well-known authors on the subject of company law in a number of well-known textbooks such as by Cilliers and Benade¹¹; Meskin¹²; RC Beuthin and SM Luis¹³ and LAWSA Vol. 4 para 20.

[34] The gist of the legal position, as may be gathered from those learned authors can be summarized as follows: At common law, a person cannot conclude a contract on behalf of a non-existent principal. As regards a company, before its incorporation it cannot conclude a contract and cannot be bound by representations made by a person on its behalf. It follows also that, the company cannot be bound by estoppel to anything done before its incorporation. This position relating to companies was changed by the Legislature with the introduction of s 35 of the Companies Act, 1973 (now section 42 of the Companies Act, 2004).

[35] A company may, within a reasonable time after its incorporation, ratify or adopt any contract made in writing by a person professing to act as its agent or trustee before its incorporation. For a company to exercise that power: its memorandum must on its registration contain as an object of the company the ratification or adoption of that particular contract or the acquisition of rights and obligations arising from such contract; and two copies of the contract in writing, one certified by a notary public, must have been lodged with the registrar of companies together with the memorandum and articles of association.'

[39] From careful reading of the plaintiffs' particulars of claim it is clear that no allegations were made in the particulars of claim that the contract entered by the unincorporated entity was subsequently ratified and accepted as a pre-incorporated entity when the company was eventually registered.

[40] What then would be the result if the pre-incorporation agreement was not subsequently ratified by the company in the manner set out above? The result is that the agreement lapses.

[41] The fact remains that the particulars of claim on all possible interpretations thereof is at odds with the attachment relied upon by the plaintiffs in support of their case. The documents as indicated form the crux of the plaintiffs' action and I do agree with Mr Töttemeyer that they do not sustain the plaintiff's action. The third,

¹¹ *Company Law* 4th edition at 59 to 67;

¹² *Henochsberg on the Companies Act*, 4th edition Volume 1 at 51 to 54.

¹³ *Beuthin's Basic Company Law*, 2nd Edition at 39 to 45.

fourth and fifth grounds of exception raised on behalf of the defendants must thus be upheld.

Remainder of grounds of exception

[42] In light of my earlier ruling I do not deem it necessary to pronounce myself on the remainder of the grounds of exception raised by the defendants.

Costs

[43] I am of the view that the matter before is of a complex nature and although a number of concessions were made on behalf of the plaintiffs the issues could have been substantially reduced if these concessions were made during the rule 32(9) engagement between the parties. It is indeed so that a number of concessions were made but a number of those concessions were made at the time of the filing of the heads of argument or during oral argument which is at a very late stage of the proceedings.

[44] My order is as follows:

1. The third, fourth and fifth grounds of exceptions raised by the defendants are upheld with costs. Such cost to include the cost of one instructing and two instructed counsel.
2. The plaintiffs' particulars of claim are struck and the plaintiffs are granted leave to file their amended particulars of claim, should it be so advised, within 20 days from date of release of reasons.
3. Cost shall not be limited to Rule 32(11).
4. The matter is postponed to **25 March 2021** at **15:00** for Status Hearing.
5. A joint status report must be filed on or before 22 March 2021 regarding the further conduct of the matter.

J S Prinsloo
Judge

APPEARANCES:

FIRST TO EIGHTH PLAINTIFFS: T Chibwana
Instructed by Murorua Kurtz Kasper Inc.
Windhoek

FIRST TO EIGHTH DEFENDANTS: R Töttemeyer SC (with him C van der
Westhuizen)
Instructed by Dr Weder, Kauta & Hoveka,
Windhoek