



REPORTABLE

CASE NOS. SA 46/2016

SA 69/2016

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ELIZABETH JOHANNA BRINK N O

First Appellant

MADELENE COWLEY

Second Appellant

and

ERONGO ALL SURE INSURANCE CC

First Respondent

THE MINISTER OF LANDS,

RESETTLEMENT AND REHABILITATION

Second

Respondent

THE REGISTRAR OF DEEDS

Third Respondent

CORAM: SHIVUTE CJ, DAMASEB DCJ and CHOMBA AJA

Heard: 26 March 2018

Delivered: 22 June 2018

Summary: The appellants instituted an action in the High Court against the respondents seeking an order declaring an agreement between the late Mr GS Neethling (the deceased) and the first respondent illegal and unenforceable. The appellants also sought an order cancelling the usufruct registered over the farm in favour of the first respondent. The farm is registered in the name of the deceased but in terms of the deceased's last will and testament, it is to be inherited by the second appellant. The appellants claimed that the agreement is simulated and entered into with the intention to circumvent the provisions of the Agricultural (Commercial) Land Reform Act 6 of 1995. The first respondent excepted to the claim on the bases that the second appellant lacked standing to institute the claim and that the claim itself lacked averments necessary to sustain a cause of action.

After hearing argument from the parties, the court *a quo* upheld the exception on the basis of the two grounds raised by the first respondent. Dissatisfied with the result of their case in the High Court, the appellants appealed to this court against that decision.

On appeal, it was argued on behalf of the appellants that there was no rule of law prohibiting an executrix from entering into an agreement with a legatee to institute declaratory proceedings as co-plaintiffs. The appellants correctly conceded that the law authorised the executrix to act on behalf of the estate in all matters concerning the estate, including instituting legal proceedings on behalf of the estate. The appellants further argued that this general rule should not be applied without considering its impact on the overriding principle of access to justice. On the other hand, the first respondent argued that there existed no exceptional circumstances in the case to warrant granting standing to the second appellant. The first respondent on the contrary argued that allowing the second appellant to have *locus standi* in the circumstances of the case would offend against the well-established principle and set a bad precedent. It was contended on behalf of the first respondent, as it was done in the High Court, that the particulars of claim lacked material facts to sustain a cause of action.

This court accepted that section 13 of the Administration of Estates Act 66 of 1965 authorises only a person who has been granted letters of executorship by the Master of the High Court to liquidate and distribute assets of a deceased's estate. This provision has not been constitutionally challenged and the court endorses that our law only allows the authorised executor/executrix to administer the affairs of the estate. However, there is no rule or principle which prohibits an executor from joining forces with a legatee to institute legal proceedings to recover a specific asset of the estate.

This court found that it is trite law that only the executor is legally recognised as the person to represent the estate of the deceased and that no legal proceedings can be instituted against a deceased's estate, or for the recovery of, or laying claim to, any assets belonging to such estate without joining the executor of the estate as a party to the suit. However, this rule is not absolute and there exist exceptions to it.

This court held that the circumstances of the present case are exceptional in that the executrix and the legatee joined forces in the action to assert the legatee's constitutionally entrenched right of access to court. This is different from a situation where an heir or legatee 'goes on a frolic of his or her own' and institutes proceedings to vindicate an asset of the estate without the consent and/or cooperation of the executor. The court held further that it would be in the interests of justice to allow the legatee in the present case to participate in the proceedings and to assist the court in making an informed decision on the matter before it. Additionally, the court held that the rule that only the executor was authorised to liquidate and distribute a deceased's estate was formulated to protect vulnerable heirs and to avoid duplication of suits by heirs in circumstances where there are conflicts between the executor and heirs.

For policy considerations, particularly in our constitutional dispensation, the right of access to justice should be enforced by allowing members of the society to access courts of law to assert their rights when there is an apprehension of infringement of such rights. The first respondent did not allege or show that it would suffer prejudice

should the second appellant be permitted to participate in the proceedings. Hence, the High Court erred in holding that the second appellant lacked standing to participate in the action.

This court further found that the appellants' particulars of claim were not execipiable because they had set out the 'material facts' necessary to sustain a cause of action. The court was satisfied that the appellants' particulars of claim had *prima facie* met the requirements of rule 45(5) of the Rules of the High Court which requires pleadings to contain clear and concise statements of the material facts on which the pleader relies with sufficient particularity to allow the opposite party to reply. The court found that it is unnecessary to make a determination whether the agreement was simulated and entered into in *fraudem legis*.

The appeal was upheld with costs and the matter remitted to the High Court to be placed under judicial case management process.

APPEAL JUDGMENT

SHIVUTE CJ (DAMASEB DCJ and CHOMBA AJA concurring):

[1] This is an appeal against the judgment and order of the High Court granting an exception taken by the first respondent to the appellants' particulars of claim. The appeal is also directed at the decision of the High Court ruling that the second appellant had no *locus standi* to institute the claim.

Background

[2] The first appellant is the executrix of the estate of the late Mr GS Neethling (the deceased), who died on 15 March 2014. The second appellant is the widow of

the deceased. The first respondent is Erongo All Sure Insurance CC, a close corporation incorporated in terms of the laws of the Republic of Namibia. The second respondent is the Minister of Lands, Resettlement and Rehabilitation. The third respondent is the Registrar of Deeds. The second and third respondents are cited in their official capacities and did not participate in the proceedings before this court and the court *a quo*.

[3] The first and second appellants instituted an action against the first, second and third respondents in the High Court, seeking an order declaring an agreement allegedly concluded between the deceased and the first appellant illegal and unenforceable. The appellants further sought an order cancelling a usufruct registered in favour of the first respondent over Farm Kalkwerf Portion 1 of Farm Florence Number 249 (the farm). The appellants also sought an order ejecting the first respondent from the farm and the costs of suit.

[4] The appellants' claims against the respondents are founded upon an oral agreement allegedly entered into between the deceased and the first respondent, the latter being represented by one Mr Piet Louw in 2005. The appellants, in their particulars of claim, averred that the terms of the agreement were, amongst others, that the deceased would cause a lifelong usufruct to be registered in favour of the first respondent over the farm; the deceased would, in his last will and testament, bequeath the farm to the first respondent, and that the first respondent would pay the deceased an amount of N\$1 350 000.

[5] The appellants further averred that in terms of the agreement, a 99-year usufruct was registered over the farm in favour of the first respondent and the deceased was paid the agreed amount.

[6] The appellants' complaint, as related in their particulars of claim, was that the alleged agreement was a simulated transaction in that (a) it amounted to an unenforceable *pacta successoria* and/or (b) a deliberate attempt by the parties to the agreement to circumvent the provisions of the Agricultural (Commercial) Land Reform Act 6 of 1995 as amended (the Act).

[7] In this context, the appellants averred that as a result of the simulated transaction, and if the usufruct is not set aside, the second appellant would inherit an encumbered farm.

[8] The first respondent excepted to the particulars of claim on the basis that they lacked averments necessary to sustain a cause of action. The first respondent, in essence, raised three grounds in support of its exception. The first ground of exception concerns the *locus standi* of the second appellant to sustain the action. It was contended that the second appellant, as an heir, had no standing to bring any action or proceedings against the first respondent until the liquidation and distribution account has been settled and s 35 of the Administration of Estates Act 66 of 1965 has been complied with.

[9] The second ground related to the alleged illegality and severability of the agreement. It was contended that the alleged agreement, even if illegal, was severable and the constitution and registration of the usufruct was not in contravention of the provisions of the Act.

[10] The third ground concerned the allegation in the particulars of claim that the agreement was a simulated transaction in as far as it sought to evade the provisions of the Act. The third respondent contended that the appellants had simply regurgitated the terms of the oral agreement in the particulars of claim without setting out material facts to establish the alleged simulated agreement. The first respondent therefore contended that the appellants failed to allege a real agreement different from the alleged simulated one.

Findings of the High Court

[11] In relation to the first ground, the court *a quo* held that as a general rule, where there is any property that is the subject of any action after the death of a deceased, the party authorised to deal therewith is the executor or executrix, who in terms of the law, takes charge of the administration and eventual distribution of the assets and settling the debts of the estate. The court *a quo* referring to various authorities, including *Stellemacher v Christians*¹, held that the appellants in the instant matter had not presented evidence or alleged any exceptional circumstance to warrant a

¹ 2008 (2) NR 587 (HC).

departure from the well-settled position that only the executrix of an estate has *locus standi* to bring an action on behalf of a deceased's estate. Accordingly, the court concluded that the second appellant had no standing to maintain the action.

[12] As for the second ground, the court *a quo* declined to make a final determination on the issues at the exception stage. It reasoned that the issues of illegality and severability of the alleged agreement were interconnected and making a determination without the benefit of oral evidence would yield some injustice. The court was therefore of the opinion that in order to come to an informed decision, it was preferable that evidence was led on these issues supplemented by extensive legal argument. In light of this consideration, the court afforded an opportunity to the first respondent, if so advised, to file its plea and to deal with these issues, which may ultimately be the subject of determination at the trial.

[13] As to the third ground, the court stated that if no possible evidence led on the pleadings could disclose a cause of action, the particulars of claim would be found excipiable. In this connection, the court held that the averments appearing in the particulars of claim do not contain material facts from which a conclusion can reasonably be made that the agreement in question was a simulated one and one entered into in *fraudem legis*. The court further held that the particulars of claim failed to meet the criteria for determining what a simulated transaction may entail according to the standards set in *Strauss v Labuschagne*².

² 2012 (2) NR 460 (SC) para 44.

[14] Consequent to its finding that the particulars of claim did not contain sufficient material facts to disclose a cause of action, the High Court granted leave to the appellants to amend their particulars of claim within fifteen days of the order. The court further directed the respondents to reply thereto within ten days of receipt of the amended particulars. Despite being granted leave, the appellants elected not to amend their particulars of claim. Instead, they noted this appeal.

Principles governing the determination of exceptions

[15] In dealing with each of the exceptions raised, I find it apposite at this stage to briefly set out the approach followed in the determination of exceptions.

[16] In a recent judgment of this court, *Van Straten v Namibia Financial Institutions Supervisory Authority & another*³, Smuts JA summarised the legal principles relating to exceptions to pleadings on the ground that they lack averments necessary to sustain a cause of action. At para 18 the learned judge set out the following:

‘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.’

³ 2016 (3) NR 747 (SC).

The appeal

Submission in respect of locus standi

[17] Mr Heathcote, who appeared for the appellants, submitted that the exception raised against the second appellant's *locus standi* was wrongly framed as what was complained against is in reality the issue of misjoinder, which should not have in any event been taken by exception. Counsel contended that the issue for determination was not to be approached as if the second appellant, as heir, was the only plaintiff in the case. According to counsel, as a result of the wrong approach to the issue for determination, the court *a quo* addressed the wrong question of *locus standi* of a lone plaintiff heir, instead of the issue of misjoinder.

[18] Counsel submitted that an exception raised against a plaintiff heir who approaches the court for an order having the effect of liquidating the estate, and while doing so without the permission of the Master of the High Court or the duly appointed executor or executrix, is arguably good in law. In argument, counsel distinguished the position stated above to the present case and contended that in the instant case, the second appellant had the consent of the first appellant (the duly appointed executrix) to institute the claim. Counsel argued that the second appellant did not only have the permission of the first appellant, but the first appellant actually joined the second appellant to the proceedings as a co-plaintiff. Counsel therefore contended that it was incorrect for the court *a quo* to have treated the second appellant as if she was the only plaintiff in the action.

[19] In relation to the proposition that the second appellant should have waited for the filing of the liquidation and distribution account before approaching the court, counsel argued that such a proposition had a potential of doing injustice to the second appellant. In developing this argument, counsel presented a hypothetical situation where an executrix institutes an action and the claim fails, and decides (*bona fide* but wrongly) not to appeal against the decision. After the liquidation and distribution account is approved, an heir then approaches the court to protect his or her rights. Counsel contended that in such a situation, the heir will be met with a special plea of *res judicata*. The result is that such heir will be unable to protect his or her rights.

[20] Counsel submitted that although it is generally accepted that the executor and he or she alone, is legally recognised as the person to represent the estate of the deceased, there existed no rule in our law which prohibited an executor and heir or legatee from acting as co-plaintiffs seeking a declaratory relief on behalf of the estate. In support of this proposition, counsel referred the court to Silungwe AJ's remarks in *Stellemacher v Christians*⁴ wherein it was stated that:

'There is, however, a distinction between an heir against whom proceedings have been instituted as a respondent or defendant in his/her personal capacity, and an heir who takes legal action to vindicate the estate. With regard to the latter, as previously shown, it is not open to the beneficiary to vindicate the assets of the estate since it is only the executor that can legitimately do so. But it is permissible in a suitable case,

⁴ 2008 NR 587 (HC)

for such a beneficiary to sue on his own behalf in order to safeguard his right to inheritance where the right is infringed or threatened to be infringed.⁵

Counsel argued that the above remarks are illustrative of the point that the general rule is capable of exceptions and does not automatically preclude an heir or legatee from participating in declaratory proceedings brought on behalf of an estate subject to the executrix's consent and participation. Counsel contended that the instant case is a suitable case referred to by the learned judge in his remarks, as the right of the second appellant to inheritance is threatened to be infringed.

[21] Counsel further submitted that if the rule that only the executor/executrix has *locus standi* to institute legal proceedings to vindicate an asset of the estate is strictly applied, it would have the potential of doing an injustice to society. In this context, counsel submitted that the balance of convenience is an important consideration. Counsel indicated that at common law courts have the power, at the instance of the plaintiff, to direct the joinder of a defendant, if it appeared that considerations based on justice, equity and convenience dictated that joinder should be directed. Counsel submitted that an important consideration in determining whether or not the balance of convenience finds favour with joinder must be inferred from the facts contained in the pleadings.

[22] Counsel contended that the allegations in the particulars of claim justify the joinder of the second appellant on the grounds of convenience. This is so, because the issue that falls for determination between the second appellant and the first

⁵ Para 13

respondent depends upon the exact determination of an issue that could have been determined between the first appellant and first respondent.

[23] Mr Tötemeyer, on behalf of the first respondent, contended that the action brought by the appellants is of vindicatory nature. Counsel sought to distinguish vindicatory actions from declaratory ones. In support of this submission, he referred to *Clark v Barnacle NO.*⁶ In that case, an heir made an application to be joined with the two executors as a co-plaintiff in an action to recover assets of the estate. The heir's *locus standi* was challenged. After hearing the application, the court affirmed the general rule that the executor is the only authorised person to bring vindicatory actions on behalf of the estate.

[24] It must, however, be noted that in that case the application was dismissed on two related grounds. In the first instance, the application was dismissed because the court found that the process of joining the heir to the proceedings was going to cause prejudice to the other parties in obtaining instructions as the heir resided in Northern Ireland. The second ground of dismissal was founded on the possibility that other beneficiaries interested in the estate may also approach the court to be joined.

[25] In the instant case, the circumstances are different; the second appellant is the only legatee with an interest in the asset sought to be vindicated. In addition, there are no allegations on the part of the first respondent that the joining of the second appellant would be prejudicial to its case. As such, I am of the view that the court a

⁶ 1958 (3) SA 41 (SR).

quo should have taken the aspect of prejudice in consideration as one of the determining factors in deciding *locus standi* of the second appellant.

[26] Counsel for the first respondent submitted that the general rule that it is not open to a beneficiary to vindicate the assets of the estate as it is only the executor who is permitted to do so is confirmed by authorities of this jurisdiction. In this connection, counsel referred to *Stellemacher* and *Gramowsky v Kahl & another*⁷. Counsel particularly drew a distinction between *Gramowsky* and the present matter, and contended that the heir in *Gramowsky* acquired *locus standi* after the confirmation of the liquidation and distribution account. Counsel further contended that, in the *Gramowsky* matter, an important distinguishing factor was the allegation that the claim which the plaintiff sought to maintain was awarded by the executor to the plaintiff in the final liquidation and distribution account.

[27] Counsel argued that the considerations stated under para [26] above, are absent in the case before this court. Counsel also submitted that the appellants failed in their particulars of claim to allege that the stage of *dies venit* had been reached or that there was any transfer of rights to the second appellant conferring some rights to institute the claim. Counsel therefore argued that in the absence of any of the above-mentioned factors, the general rule that the right to vindicate estate property vests in the executor alone applied.

⁷ 1998 NR 115 (HC).

[28] With reference to *Cumes v Estate Cumes*⁸, counsel pointed out that if an heir or other interested person maintains that an executor should take steps for the recovery of assets in an estate, then his proper remedy, if such action is not instituted, is either to seek the removal of the executor for breach of duty or take an action and cite the executor as a nominal defendant. Counsel submitted that the second appellant cannot rely on this consideration in any event as the executor in the present matter did not refuse or fail to institute the action. Counsel contended that the circumstances in the present appeal further weigh negatively against the second appellant as there are no allegations pleaded in respect of the refusal or failure of the first appellant instituting the claim.

[29] The most contentious issue in this appeal appears to be the question of *locus standi* on the part of the second appellant. However, before analysing this issue, I propose to deal first with the submission of counsel for the appellants that the exception was erroneously framed in a form of an exception and secondly with the question of whether the court *a quo* answered the wrong question of a lone plaintiff.

[30] Our law recognises several grounds which a party may rely on when taking an exception. These grounds may be technical in nature where 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 first respondent filed an exception and advanced several grounds in support of the exception. In para 3 of the exception, the standing

⁸ 1950 (2) SA 848 (A).

of the second appellant to pursue the action was challenged. In my considered view, the attack is an expansion of the contention that the second appellant had a vested right against the executrix and that such right could only be enforced upon the finalisation of the liquidation and distribution account.

[31] The first respondent had an option to file a special plea to attack the particulars of claim on *locus standi* but elected to only raise an exception. It seems to me that the grounds for the exception in this case are intertwined and it was a matter of convenience to raise *locus standi* in the exception without having to prepare a special plea.

[32] Counsel submitted that the court *a quo* erred in that it answered the wrong question of *locus standi* of a lone plaintiff. I have had the pleasure of studying the judgment of the court *a quo*. It appears to me that that court addressed the correct question of *locus standi* of a legatee or heir who has been joined by the executrix. There is no basis for the criticism levelled at the court on this score as the court made reference to pertinent authorities in reaching its conclusion.

[33] In relation to the authority submitted by counsel for both parties, it is clear that courts have followed the principle that only the executor/executrix has the authority to institute proceedings on behalf of the estate. However, as stated in *Stellemacher v Christians*, it is permissible in appropriate cases, for such a beneficiary to sue on his

or her own behalf in order to safeguard his right to inheritance where the right is infringed or threatened to be infringed.

[34] Counsel for the first respondent correctly distinguished the present matter and the *Gramowsky* matter, and contended that the heir in *Gramowsky* acquired *locus standi* after the confirmation of the liquidation and distribution account. I agree with this distinction. However, a distinguishing feature of this case is that there exist exceptional circumstances in the present case to depart from the operation of the general rule.

[35] I say this for the following reasons: firstly, the second appellant did not approach the court as a lone plaintiff, but she did so with the executrix's consent and the two joined forces to assert the second appellant's rights; secondly, the court has not been informed of any other legatees that stand to benefit from the farm; thirdly, the effect of the order sought is not to 'liquidate or distribute' the assets of the estate as those words are used in s 13(1) of the Administration of Estates Act but to safeguard the second appellant's rights and lastly, the second appellant has a potential right to inherit the property being the subject matter of the usufruct. Therefore, a potential threat or infringement of that right ought to be protected and the only way to do so is to approach a court of law, and that is precisely what the second appellant did in this case. The facts in the instant matter are different from a situation where an heir goes on a frolic of his or her own and without the consent or

cooperation of the executor institutes proceedings in a misguided attempt to vindicate an asset of the estate.

[36] Counsel for the first respondent referred this court to *Cumes v Estate Cumes* in support of its contention. However, I find that the principles set out in *Cumes* are of no application as the facts in that case are distinguishable from those in the present matter. Unlike in *Cumes*, in the instant case the executrix is a co-plaintiff in the action.

[37] An important feature of this case is that the second appellant is not just an heir but a legatee with an interest in the farm. This means that she has direct and substantial interest in the matter since she stands to inherit the farm with its encumbrances. In my considered view, denying her the right to be heard seems to go against the dictates of public policy.

[38] Public policy requires principles of law to be applied in a manner that does not result in injustices and thereby failing to serve their ultimate purpose. In light of this overriding consideration, I find that the rule which only authorises an executor to sue on behalf of the estate was developed for the following reasons: to avoid duplications of suits by heirs who may have conflicting interests, who may act exclusively without the consent or cooperation of the executor and therefore potentially prejudice other heirs or legatees or creditors; for the protection of vulnerable heirs who may not afford costly litigation to safeguard their rights to inheritance. I agree with counsel for the

appellants that a rigid application of the rule has the potential of doing an injustice to heirs and legatees.

[39] Access to justice is one of the rights guaranteed by our constitution as a means for people to protect and enforce their rights. To close the doors of justice to a widow with a legitimate interest in the subject matter of the litigation and who combines forces with the executrix would fly in the face of her constitutional right to be heard by an impartial and independent court, particularly in a dispute involving land which is of paramount importance to the citizens of Namibia.

[40] Therefore, I am of the considered view that where a sole legatee acts with the consent of the executrix to vindicate a specific asset of the estate because his/her right in the asset in question is infringed or threatened, the rule should be relaxed to allow the heir or legatee to institute proceedings jointly with the executor. In light of the above considerations, the ground of exception based on *locus standi* should have been dismissed. The court below erred in upholding the exception based on this ground.

Submission in respect of no cause of action

[41] As already noted, the first respondent excepted to the appellant's particulars of claim on the basis that it lacks averments necessary to sustain a cause of action.

[42] The first respondent contended that the appellants simply regurgitated the provisions of the alleged oral agreement between the parties without in any way specifying the conduct leading to a conclusion that the agreement is indeed illegal and amounts to a simulated transaction in order to evade the provisions of the Act. The first respondent further averred that no real agreement different from the alleged simulated oral agreement is alleged. As a result, it was contended that the appellants had failed to set out material facts to establish that the alleged agreement was simulated and entered into *fraudem legis*.

[43] On behalf of the appellants, counsel submitted that the particulars of claim clearly and concisely alleged the material facts to sustain a cause of action on the ground that the deceased and the first respondent entered into a simulated transaction with the intention of circumventing the provisions of the Act. Counsel stated that in determining whether material facts were pleaded to establish a simulated transaction, the pleadings of the appellants should be read as a whole and not in isolation.

[44] Counsel contended that for the court to make a determination of whether material facts were sufficiently pleaded, it was necessary to distinguish *facta probanda* from *facta probantia*. Care must be taken to distinguish the facts which must be proved in order to disclose a cause of action (the *facta probanda*) from the facts which prove them (the *facta probantia*). In this context, counsel referred to the decision in *China Henan International Cooperation (Pty) Ltd v De Klerk*⁹ wherein the

⁹ (I 1673/2012) [2013] NAHCMD 356 (26 November 2013).

court stated that a useful exposition of the applicable principles – also placing the arguments by counsel in better context - is found in *Erasmus Superior Court Practice* at B1-156 (Service 40, 2012) where it was stated as follows:

‘While rule 18(4) requires every pleading to contain “a clear and concise statement of the material facts upon which the pleader relies for his claim”, rule 20(2) requires a declaration to “set forth the nature of the claim” and “the conclusions of law which the plaintiff shall be entitled to deduce from the facts stated therein”, and this subrule warrants an exception if a pleading “lacks averments which are necessary to sustain an action.”

Although these rules do not explicitly require the plaintiff’s particulars claim or declaration to disclose a cause of action, it is generally accepted that this is in fact what they require.¹⁰

[45] Counsel also referred to *McKenzie v Farmers’ Co-operative Meat Industries Ltd*¹¹ where the court adopted the definition of ‘cause of action’ as construed in an English case to mean:

‘[E]very 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.’

[46] In support of the contention that the particulars of claim disclosed the cause of action, counsel submitted that the allegations in paras 9, 11 and 12 were concise and sufficient for the first respondent to comprehend the appellants’ case and to plead thereto.

¹⁰ *Makgae v Sentraoer (Koöperatief) Bpk* 1981 (4) SA 239 (T) at 244C.

¹¹ 1922 AD 16 at 23.

[47] Paras 9, 11 and 12 of the particulars of claim are formulated as follows:

- '9. The following were the salient express, alternatively implied in the further alternative tacit terms of the aforesaid agreement:
- 9.1 The late GS Neetling shall cause a lifelong usufruct to be registered in favour of the defendant over the farm;
- 9.2 The late GS Neetling shall, in his last will and testament, bequeath the farm to the defendant;
- 9.3 The defendant shall pay the GS Neetling an amount of N\$ 1 350 000.
11. The aforesaid agreement was however a simulated transaction in that:
- 11.1 It amounted to an unenforceable *pacta successoria*; and /or
- 11.2 Was a deliberate attempt by the parties thereto to circumvent the statutory provisions and requirements relating to the alienation of land or interest in such land in terms of the Land Act and is consequently illegal and unenforceable
12. The purpose of the simulated contract was to create the impression that the first defendant would indeed become the holder of a 99 year usufruct, whereas in truth and fact, the agreement and enforcements thereof was merely an effort to evade the provisions of section 17 of the Land Act (requiring a seller of agricultural land to first offer the land to the State and obtain a waiver certificate before the land can be sold to a third party).'

[48] Counsel submitted that the crucial question for determination was whether or not the pleadings bear no cause of action on every interpretation. It was argued on behalf of the appellants that by taking every possible interpretation of the facts pleaded, the exception would not stand. Counsel therefore contended that the allegations contained under paras 9, 11 and 12 of the particulars are sufficient to establish that the agreement was a simulated transaction and entered into *fraudem legis*.

[49] On behalf of the first respondent, counsel submitted that at the centre of this inquiry is whether or not the appellants as required by the law, had pleaded the material facts to substantiate the claim that the agreement was simulated and entered into *fraudem legis*. In this regard, counsel further submitted that a party that alleges a simulated transaction is required to set out all material facts from which a conclusion can reasonably be made that the agreement in question was simulated and one entered into in *fraudem legis*.

[50] Counsel submitted that the correct approach to the question was set by *Amler's Precedents of Pleadings*¹² in formulating pleadings of a simulated transaction. According to *Amler's*, proof of a transaction is *prima facie* evidence that the transaction was not simulated. *Amler's* also places the burden of proof on the party who alleges simulation to rebut the *prima facie* inference. *Amler's* further states that

¹² *Amler's Precedents of Pleadings* 8 ed at 345.

simulations are detected by considering the facts leading up to the contract and by taking account of any unusual provision embodied in it.

[51] Counsel submitted that when one has regard to the appellants' particulars of claim, they do not disclose any primary fact which the appellants could prove, to rebut the *prima facie* inference of genuine transaction that arose on the pleadings. It was further submitted that the appellants had only made legal conclusions without advancing primary facts to support them. In this context, counsel referred to paras 11 and 12 of the particulars and contended that the appellants, instead of setting out material facts in support of their contention that the transaction was simulated, simply made legal conclusions. On this score, counsel submitted that the court *a quo* had correctly found that the appellants should have pleaded the facts leading up to the contract and any unusual provisions embodied in it, but failed do so.

[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 of 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. Paras 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 para [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. Applying this principle to the present case and on the totality of the pleadings, as exemplified by paras 9 to 12 of the particulars of claim, I am not persuaded that the particulars of claim lack necessary averments to disclose a cause of action. I say so for the following reasons.

[55] The first respondent submitted in its heads of argument that; 'it appears that the allegations are that the agreement is a simulated transaction and that the real agreement would be in terms whereof the farm was alienated. This flows from the

allegations that it was an attempt to circumvent s 17 of the Act'. A submission of this nature clearly shows that the first respondent appreciated that the real agreement which the appellants referred to in their particulars of claim, was an agreement intended to alienate land as contemplated in s 17.

[56] Para 9 of the particulars of claim allege the agreement between the parties and the terms thereof. Para 10 goes on to indicate that the said agreement amounted to an unenforceable *pacta successoria*; was a deliberate attempt by the parties thereto to circumvent the statutory provisions and requirements relating to the alienation of land or interest in such land in terms of the Act, and is consequently illegal as well as unenforceable.

[57] I would like to pause here and point out that para 10 suggests that there was a hidden agreement of alienation which was dressed in what seemed to be a usufruct. This averment to me is sufficient to disclose a cause of action that the transaction was simulated. As if that is not enough, para 12 further alleged that the purpose of the simulated contract was to create the impression that the first defendant would indeed become the holder of a 99 year usufruct, whereas in truth and fact, the agreement was merely an effort to evade the provisions of s 17 of the Act. In my respectful view, it cannot be clearer than how the appellants framed it.

[58] As noted above, counsel for the first respondent relied on *Amler's Precedents of Pleadings* and forcefully submitted that failure to meet the criteria set out in *Amler's*

in respect of simulated transactions renders the pleadings excipiable. This court accepts and endorses the use of *Amler's* by legal practitioners to frame pleadings, but it must be understood that *Amler's* is only a guide and point of reference. Therefore, failure to strictly follow the examples given in *Amler's* in framing pleadings on the allegation of a simulated transaction does not mean that the other party will be prejudiced thereby. As I have already indicated, the purpose of pleading is to alert the opposing party of the pleader's case and to allow such a party to respond accordingly. The appellants' particulars of claim clearly set out the material facts to disclose a cause of action and the first respondent should have pleaded thereon. On this score, I am of the view that this ground should also have failed.

Concession on illegality and severability

[59] The court *a quo* held that delving into the intricate and involving issues of severability and illegality of the agreement at the stage of an exception would yield some injustice. That court then directed the first respondent to file its plea and deal with these issues, which may ultimately be the subject of determination at the trial.

[60] The parties to this appeal, both in their heads of argument and during oral submissions pointed out that it is not in principle necessary to address these aspects at this stage. I too hold the same view and it is therefore not necessary to say much on this point than that these issues remain for determination for another day.

[61] It remains of this court to consider the request contained in the first respondent's relief on appeal. An ancillary argument raised by counsel of the first respondent was that the appellants were granted an opportunity to amend their particulars of claim but elected not to do so. In the event that the appeal is declined, the appellants must not be given a second bite at the cherry. In that instance, this court must strike the appellant's particulars of claim and further dismiss the claim or grant an order of absolution from the instance. As is apparent from what has been said so far, the appeal is destined to succeed. In those circumstances, it becomes academic to decide this issue. Nothing more need be said on it. It remains to consider the issue of costs.

Costs

[62] The general rule is that costs of suit shall be allowed to the prevailing party as a matter of course. In the present matter, there are no good reasons why the costs should not follow the result. It will accordingly be so ordered.

Order

[63] The following order is made:

- (a) The appeal is upheld with costs, including the costs of one instructing legal practitioner and two instructed legal practitioners.
- (b) The judgment and order of the court *a quo* is set aside and substituted for the following order:

'The exceptions are dismissed with costs, including the costs of one instructing

legal practitioner and two instructed legal practitioners.’

(c) The matter is referred back to the High Court for judicial case management.

SHIVUTE CJ

DAMASEB DCJ

CHOMBA AJA

APPEARANCES

APPELLANTS:

R Heathcote (with him C J Van Zyl)

Instructed by Van Der Merwe-Greeff

Andima Inc, Windhoek.

FIRST RESPONDENT:

R Töttemeyer (with him R L Maasdorp)

Instructed by Francois Erasmus &

Partners, Windhoek