'Unreportable'

CASE NO.: I 525/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

MUNICIPAL COUNCIL OF THE MUNICIPALITY OF WINDHOEK	**Plaintiff**

and

TRUSTCO GROUP HOLDINGS (PTY) LTD	**First Defendant**
TRUSTCO GROUP INTERNATIONAL (PTY) LTD	**Second Defendant**
ATLANTA CINEMA CC	**Third Defendant**

***CORAM*:** **PARKER J**

Heard on: 2012 April 12

Delivered on: 2012 May 24

JUDGMENT

PARKER J: [1] In the action instituted against the first defendant, the second defendant and the third defendant the plaintiff prays for an order for:

(1) the ejectment of the first defendant, the second defendant and the third defendant, or of the first defendant, the second defendant or the third defendant, from –

(a) the property at Farming Unit 4 (shown on copy plan P/3141/A, annexed to the amended particulars of claim and marked 'POC1') ('the immovable property'); and
(b) the Ithumba Business.

(2) the return to the plaintiff of –

(a) the immovable property; and
(b) the Ithumba Business.

by the first defendant, the second defendant and the third defendant or by the first defendant, the second defendant and the third defendant.

(3) rectification of the written agreement (copy of which is annexed to the particulars of claim and marked 'POC2') ('the lease agreement') by the substitution of the words 'Council Resolution 178/06/2000' for the words 'Council Resolution 197/06/2000 wherever they appear in the said agreement.

(4) the award to it of its costs.

(5) Further relief and or alternative relief.

[2] The first defendant and the second defendant entered appearance to defend the action and, thereafter, they delivered a notice in terms of rule 23(1) of the Rules on the basis that 'the plaintiff's particulars of claim (as amended) do not contain the necessary averments to disclose a cause of action'. In satisfaction of rule 23(3) of the Rules, the first defendant and the second defendant have put forth grounds upon which the exception is founded.

[3] I flag the crucial point that the burden of this Court in the present proceeding is to determine whether the plaintiff's particulars of claim 'lack(s) averments which

are necessary to sustain' the 'action' (instituted by the plaintiff against the first defendant, the second defendant and the third defendant) within the meaning of rule 23(1) of the Rules. It is here reiterated that it is only the first defendant and the second defendant who have raised the exception; and so hereinafter they will be referred to simply as 'the defendants' where the context allows.

[4] It is submitted by Mr. Heathcote SC, counsel for the defendants, that in virtue of the plaintiff amending its particulars of claim, '[f]or the sake of completion, a new and fresh exception, on exactly the same grounds, is filed simultaneously with these Heads of argument.'

[5] The following facts are undisputed or indisputable. The first defendant was at all material times the holding company of the second defendant. As respects the lease agreement concluded between the plaintiff and the first defendant, the latter was represented by a Quinton van Rooyen, in his capacity as the first defendant's managing director. And the selfsame Quinton van Rooyen represented the second defendant in the conclusion of the agreement between the second defendant and the third defendant respecting the sale by the second defendant to the third defendant of the 'Business' whose name is 'Ithumba' ('the sale agreement'). As an adjunct to these facts which are undisputed or indisputable, as I say, is the issue of the correct reference to the plaintiff's resolution that is referred to in Clause 4 of the written agreement (at 'POC2') ('the resolution'). It is clear and incontrovertible from the 'Municipal Council Minutes: 2000-06-28' (annexed to the particulars of claim and marked 'POC3') that the correct reference of the said resolution is 'Resolution 197/06/2000'; and did not hear the defendants' counsel to say otherwise.

[6] I now proceed to treat the exception raised by the defendants and I do so by considering the grounds against the facts pleaded and against the well settled principles and approaches followed by the courts (in e.g. *Marney v Watson and Another* 1978 (4) SA 140 (C), cited with approval by the Court in, for example, the recent case of *July v Motor Vehicle Accident Fund* 2010 (1) NR 368).

[7] It seems to me clear from submission by the defendants' counsel that the exception is raised by the second defendant only, and it is on the basis that 'the plaintiff has failed to make out a case of breach of contract (as) against the second defendant on account of the fact that, according to counsel, 'the second defendant was never a party to the lease agreement, and could not have breached a contract to which it was not a party.' Mr Hinda, counsel for the plaintiff argues the opposite way. According to Mr Hinda the plaintiff does not dispute this fact but counsel says that the plaintiff's case is not founded on that fact. The plaintiff, counsel submits, relies on the fact that the second defendant purported to sell to the third defendant certain assets, including game mentioned in clause 1.2.2.10 of the sale agreement, but there is no evidence at this stage whether the first defendant has introduced game as contemplated in clause 4 of the lease agreement. That being the case, so counsel concludes, the second defendant had no title to the game in camp K54 which the second defendant purported to sell, as aforesaid and so, therefore, the plaintiff is entitled to make the averments and to lead evidence in due course to support its case. Mr Hinda makes the point that since the second defendant is a wholly subsidiary company of the first defendant it would have been fatal to the plaintiff's case if the second defendant was not joined.

[8] As I see it, the following undeniable facts are found in the pleadings. (1) There is the aforementioned relationship between the first defendant and the second

defendant. (2) It is not stipulated in the memorandum of the sale agreement the nature of the second defendant's entitlement to sell the assets. (3) A Quinton van Rooyen, the managing director of the first defendant, represented the defendant when the lease agreement was entered into, and the selfsame Quinton van Rooyen represented the second defendant when the sale agreement was concluded. From the apparent establishment of the nexus co-joining (1) and (2) and (3), the plaintiff goes on to aver that the 'purported sale of Ithumba business and the grant of the right to use the immovable property by the second defendant to the third defendant 'is unlawful and in breach of the lease agreement' for the following reasons, that is to say, the first defendant did not obtain any prior permission or consent of the plaintiff, as it was required to do in terms of clause 4 of annexure 'POC2' hereto; neither the first defendant nor the second defendant was the owner or holder of a lawful title to and in respect of the Ithumba business and neither of them did have any right to sell it to the third defendant. But then Mr Heathcote argues, 'A contract of sale may be validly entered into by a seller who is not the owner.' And in support of what I characterize as a general principle of law, counsel cites a passage by Voet which is cited with approval by Hoexter JA in *Frye's (Pty) Ltd v Ries* 1957 (3) SA 575 (A) at 319 at 381B-C:

> ' "Furthermore it matters little whether things are one's own or belong to others, *in so far as the seller is put under obligation to buy up such property in the other person's hands and to make it good*, unless he prefers to have judgment given against him for damages if he has knowingly sold the property of another ..." '

[Emphasis added]

[9] The general principle of law proposed by Voet and cited with approval by Hoexter JA is reasonable and it makes good business sense. But in the instant

case, I fail to see how Voet and Hoexter JA can assist the first defendant and the second defendant: they were not ‘put under obligation (none at all) to buy up’ the Ithumba business ‘and to make it (the obligation) good’.

[10] But that is not the end of the matter. It is the position of the defendants, that the averment is bad in law and therefore excipiable where the plaintiff relies on clause 11 of the lease agreement to assert that the purported sale of Ithumba business and the grant of the right to use the immovable property by the second defendant to the third defendant is unlawful and in breach of the lease agreement on the basis that first defendant did not obtain any prior permission or consent of the plaintiff, as it was required to do in terms of clause 4 of the lease agreement (‘POC2’). According to the defendants the ‘agreement between the second defendant and the third defendant (is) not a lease agreement but an agreement of sale, and so, the defendants conclude, ‘clause 11 of the agreement of lease does not find application.’

[11] Mr Hinda’s response in his submission is that the plaintiff’s case is not based on the fact that the first defendant sublet the subject of the lease. According to Mr Hinda, the plaintiff’s complaint is rather ‘that the first defendant did not obtain any prior permission or consent of the plaintiff as it was required to do in terms of clause 4 of the lease agreement (‘POC2’). In this regard, it is a part of the pleading that as far as the plaintiff is concerned, the ‘sale of the Ithumba Restaurant to other investors is regarded as a sublet without written approval from the Lessor and as such a breach of the Lease Agreement.’

[12] In my view, the plaintiff’s averments in this regard and the defendants’ objection thereto concern and are based on what each party considers to be the

correct interpretation of clause 4 and clause 11 of the lease agreement. And for this, I accept Mr Hinda's submission that an exception is generally not the appropriate procedure to pursue in order to settle disputes respecting interpretation of words, terms or legal documents and instruments which are the subject of action proceedings.

[13] It has been said authoritatively that other than 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 or she should be allowed to succeed (Erasmus, *Superior Court Practice* (1994): pp B1-152-153, and the cases there cited). It is my view that the defendants have not raised substantive questions of law whose determination may have the effect of settling the dispute between the parties.

[14] For the aforegoing reasoning and conclusions, I find that the defendants have not made out a case for me to uphold the exception based on the grounds that are raised: they cannot succeed in the exception. The exception fails; whereupon, I make the following order:

> The exception raised by the first defendant and the second defendant is dismissed with costs; to be paid jointly and severally, the one paying, the other to be absolved; and such costs to include costs consequent upon the employment of one instructing counsel and one instructed counsel.

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PARKER J

ON BEHALF OF THE PLAINTIFF:

Adv G Hinda

Instructed by: Dr Weder, Kauta & Hoveka Inc.

COUNSEL ON BEHALF OF THE DEFENDANTS:

Adv R Heathcote SC

Adv H Schneider

Instructed by: Van der Merwe-Greeff Inc.