



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1016/2011

In the matter between:

EASIGAS (PTY) LTD

FIRST APPLICANT

And

AUTOGAS NAMIBIA (PTY) LTD

SECOND RESPONDENT

Neutral citation: *Easigas (Pty) Ltd v Autogas Namibia (Pty) Ltd* (I 1016/2011)
[2012] NAHCMD 17 (5 October 2012)

CORAM:

UEITELE, J

Heard:

18 SEPTEMBER 2012

Delivered:

5 OCTOBER 2012

ORDER

The following order is made:

- (a) The exception succeeds and the defendant's counterclaim is set aside with costs;
- (b) The defendant is given leave, if so advised, to file an amended counterclaim and declaration within 15 days from the delivery of this judgment.

JUDGMENT

UEITELE J:**INTRODUCTION:**

[1] The plaintiff has excepted to the defendant's counterclaim on the basis that it does not disclose a cause of action, alternatively that the defendant's counterclaim is vague and embarrassing.

[2] The background to this matter is briefly that the plaintiff instituted action against the defendant, in which action the plaintiff claims payment for an amount of N\$ 1 196 208, 55 from the defendant. The facts pleaded by the plaintiff are amongst others that:

- (a) During March 2006, the plaintiff and the defendant concluded a written supply agreement (the supply agreement incorporated a confidential letter dated 28 February 2006) in terms of which the plaintiff was to supply the defendant with Liquefied Petroleum Gas. (I will in this judgment use the acronym LPG). The LPG was to be delivered to the defendant's bulk storage facilities situated at Erf 196, Southern Industries, Windhoek. The first consignment was delivered on 18 September 2006.
- (b) The supply agreement was to endure for a period of ten years from the commencement date. The commencement date is defined (in the written agreement) as the date of first delivery of the LPG to the defendant's bulk storage facility.
- (c) The plaintiff would install LPG storage tanks, related piping and required equipment with an estimated value of N\$ 1 200 000; the tanks would be installed at the defendant's depot in Windhoek.
- (d) The storage tanks and the related equipment would remain the property of the plaintiff.
- (e) The plaintiff would purchase the LPG Tanker from the defendant at an amount of N\$ 345 000.
- (f) The defendant would buy back from the plaintiff the LPG Tanker at a purchase price of N\$ 345 000 – the loan was to be repaid within 36 months from the date of commencement of bulk supply to Windhoek and any financial amounts outstanding after the 36 months period would need to be settled in full at the end of that 36 month period.

- (g) The defendant breached the supply agreement (incorporating the confidential letter) by failing to pay the:
- (i) amount of N\$ 875 202.75 in respect of goods sold and delivered;
 - (ii) amount of N\$ 321 005.80 in respect of the loan advanced to it.

[3] The defendant requested further particulars, which particulars were supplied. After it received the particulars which it requested, the defendant pleaded to the plaintiff's particulars of claim and its plea was accompanied by a counterclaim. In the counterclaim the defendant admits certain allegations made by the plaintiff. The defendant pleaded the following facts in its counterclaim:

- (a) That during or about 2007 the plaintiff and the defendant entered into an addendum to the supply agreement. The addendum was for the increase of the LPG that was supplied by the plaintiff to the defendant in terms of the supply agreement.
- (b) The defendant further pleaded that the addendum was annexed as Annexure "A" to the counterclaim.

[4] After the defendant filed its counterclaim the plaintiff took an exception to the counterclaim. The plaintiff initially raised ten different grounds upon which it was excepting to the defendant's counterclaim. At the hearing of the exception Mr. Coleman who appeared for the plaintiff and Mr. Elago who appeared for the defendant informed me that they have agreed to confine the exception to the tenth ground of complaint. The tenth ground of exception relied on by the plaintiff reads as follows:

'[The defendant] relies on a document which it alleges is an agreement. Annexure "A" to the defendant's counterclaim is at best recording concerns. By no stretch of imagination can it be construed to be an agreement. Therefore it also does not comply with the non-variation clause in paragraph 17.6 of the supply agreement. (Annexure 'PC1' to the particulars of claim).'

The Legal Principles

[5] I will now proceed to consider whether the exception raised by the plaintiff can be upheld or not. Before doing so I will briefly set out the legal principles applicable to exceptions.

[6] The *onus* of showing that a pleading is excipiable rests on an excipient (see *Kotsopoulos v Bilardi*¹)

[7] The Cape Provincial Division of the High Court of South Africa articulated the general approach to exceptions in the case of *Colonial Industries Ltd v Provincial Insurance Co Ltd*² as follows:

‘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.’ (My emphasis.)

[8] This approach to exceptions has been consistently followed in this court (see for example, *Namibia Breweries Ltd V Seelenbinder, Henning & Partners*³ *Total Namibia (Pty) Ltd v Van der Merwe t/a Ampies Motors*⁴ *July v Motor Vehicle Accident Fund*⁵, and the approach is neatly summed up by one writer⁶ in the following manner:

‘The court should not look at a pleading with a magnifying glass of too high power. It is the duty of the court when an exception is taken to a pleading first to see if there is a point of law to be decided which will dispose of the case in whole or in part. If there is not, then it must see if there is an embarrassment which is real as a result of the faults in the pleadings to which exception is taken. Unless the excipient can satisfy the court that there is such a point of law or such real embarrassment the exception should be dismissed.’

¹1970 (2) SA 391 (C) at 395D

²1920 CPD 627 (at 630):

³infra,

⁴1998 NR 176 (HC)

⁵infra

⁶See Joubert (ed) *Law of South Africa* vol 3 part 1 (first re-issue by Harms and Van der Walt, 1997) at para 186.)

[9] This court⁷ has accepted the principle stated in the case of *Mckelvey v Cown NO*⁸ that:

'It is a first principle in dealing with matters of exception that, if evidence can be led which can disclose a cause of action alleged in the pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action.'

The Legal Principles applied to the Law

[10] In the present matter the defendant alleges that during May 2007 it and the plaintiff concluded an addendum to the supply agreement (incorporating the confidential letter) which is annexed to the counterclaim as Annexure "A".

[11] The general rule is that I must accept these factual averments by the defendant as correct. If I do accept them as correct, they will in my view, constitute a cause of action against the plaintiff.

[12] The question, however, is does Annexure 'A' to the defendant's counterclaim constitute an agreement? Mr. Coleman who appeared for the plaintiff argued that 'the addendum marked as "A" and annexed to the defendant's counterclaim is not an agreement but a letter by defendant registering 'concerns''. Mr. Elago who appeared for the defendant on the other hand argued that none of the grounds raised by the plaintiff go to the heart of the defendant's claim for breach of contract.

[13] I will, in examining whether addendum 'A' is a contract or not, in detail quote the contents of that addendum. The document is on Easigas's letter head and it reads as follows:

'Dear Sir

Implementation for phase 2

This letter serves to confirm our conversation between Yourself [i.e. Antonio Mendonca] and Mike Criswell where it was agreed that Easigas main focus for Namibia is in autogas and it's financial will be focused for the establishment of autogas sites only subject to volume verification. Based on what was discussed Easigas will be investing directly on Eros, Barry's Auto, Otavi, and Oshakati only as priority sites for phase 2.

⁷In the case of *July v Motor Vehicle Accident Fund* 2010 (1) NR 368 (HC) at page 371

⁸1980 (4) SA 525 (Z) at page 526

The following installations are proposed based on the volume indications that you provided.

Site	Monthly Estimated Volume	Size Tank	Dates
Otavi	30 000 Liters	9 000 Liters	March
Eros	30 000 Liters	5 000 Liters	March
Barry's Auto	20 000 Liters	5 000 Liters	March
Keetmanshoop	50 000 Liters	22 500 Liters	March
Namutuni	80 000 Liters	22 500 Liters	March
Oshakati	100 000 Liters	22 500 Liters	March
Ondangwa	Depot	90 000 Liters	June
Gobabis	18 000 Liters	9 000 Liters	June
Swakopmund	50 000 Liters	22 500 Liters	June
Walvis Bay	30 000 Liters	9 000 Liters	June

We will obtain quotations from the contractor for the priority installations after which the contractor will be sent to carry out installations after authorization of capex and subject to the availability of Tanks.

Yours faithfully.'

[14] The addendum clearly states what it is, it states that it is a letter which confirms the conversation between Messers Mendonca and Criswell. The addendum furthermore suggests that the conversation between Messers Mendonca and Criswell resulted in an agreement that the plaintiff's focus for Namibia is autogas. I agree with Mr. Coleman that the addendum is not an agreement but a letter which confirms a conversation that took place between Messers Mendonca and Criswell.

[15] Mr. Elago further argued that if the matter were to proceed to trial the plaintiff will be able to lead evidence as to what terms the parties agreed upon during the conversation between Messers Mendonca and Criswell. Mr. Coleman's reply to this argument was simply that a verbal agreement will not be a valid amendment to the supply agreement, especially if one has regard to paragraph 17.6 of that agreement (i.e. the supply agreement). Paragraph 17.6 of the supply agreement reads as follows:

'17.6 No addition to or variation or agreed termination of this agreement shall be of any force or effect unless put in writing and signed by or on behalf of the authorized representatives of the parties'.

[16] In the matter of *Mushimba v Autogas Namibia (Pty) Ltd*⁹ this Court per Damaseb JP¹⁰ said the following:

‘Where the parties have incorporated a non-variation clause in their written agreement, any attempt to agree informally on a topic covered by the non-variation clause is not permissible. See *Brisley v Drotsky* 2002 (4) SA 1 (SCA) (2002 (12) BCLR 1229); *HNR Properties CC and Another v Standard Bank of SA Ltd* 2004 (4) SA 471 (SCA) ([2004] 1 All SA 486) at 479C (SA). An oral agreement to alter the terms of payment (e.g. extension of time) where the parties have bound themselves to a non-variation clause is therefore not permissible unless it is reduced to writing and agreed by both parties: *Van Tonder en ‘n Ander v Van der Merwe en Andere* 1993 (2) SA 552 (W)’

[17] I am therefore of the view that the purported verbal agreement is not a valid and binding agreement between the parties and such the defendant’s pleadings do not disclose a cause of action.

[18] The plaintiff prayed that the defendant’s counterclaim be dismissed with costs. That would mean that the defendant would have to start *de novo* with proceedings. In a decision¹¹ by this Court accepted the principle that, in exceptions on the basis that the pleadings do not disclose a cause of action, the Court should set aside the pleadings and not dismiss the action.

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

- (c) The exception succeeds and the defendant’s counterclaim is set aside with costs;
- (d) The defendant is given leave, if so advised, to file an amended counterclaim and declaration within 15 days from the delivery of this judgment.

S F UEITELE
Judge

⁹2008 (1) NR 253 (HC)

¹⁰At page 260

¹¹*Total Namibia (Pty) Ltd v Van der Merwe t/a Ampies Motors supra* footnote 4 at page 180.

APPEARANCES

PLAINTIFF:

ADV COLEMAN

**Instructed by Fisher, Quarmby & Pfeiffer,
Windhoek**

DEFENDANT:

MR PST ELAGO

Of Tjombe-Elago Law Firm Inc, Windhoek