



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2097/2014

In the matter between:

RAIMO NDAPEWA NAANDA
IRMA NDATEGA NAANDA

FIRST PLAINTIFF
SECOND PLAINTIFF

And

ALBINUS INDILA EDWARD
BERTHA INODHIMBWANDJE KADHILA
SUAMA NDATAAMBA KAPOLO
HUMAN CAPITAL FISHING COMPANY CC

FIRST DEFENDANT
SECOND DEFENDANT
THIRD DEFENDANT
FOURTH DEFENDANT

Neutral citation: *Naanda v Edward* (I 2097-2014) [2015] NAHCMD 239 (8 October 2015)

Coram: PARKER AJ

Heard: 24 September 2015

Delivered: 8 October 2015

Flynote: Practice – Exceptions – Exception cannot be taken against the relief a party prays the court to grant at the conclusion of a trial – The defendants are not called upon to plead to the relief – Whether or not on the evidence the plaintiff would succeed in due course in the relief he or she seeks under a claim cannot found an exception.

Summary: Exceptions – Exceptions taken against the relief the plaintiff prays the court to grant at the conclusion of the trial – Court concluded that exception cannot be taken against the relief on the basis that defendants are not called upon to plead to the relief – The plaintiff has prayed the court to grant certain relief under claim 3 – In the prayers after the pleadings relating to claim 3, plaintiffs ask the Court to grant certain items of relief under claim 3 – Court held that whether or not on the evidence the plaintiff would succeed in due course in the relief they seek cannot found an exception – Court accordingly dismissed the exception raised against the plaintiff's relief under claim 3.

ORDER

- (a) The defendants' exception to paras 6, 7, 8 and 9 (under Claim 3) is dismissed.
- (b) The defendants' exception to para 24 (under Claim 3) is upheld; and the plaintiffs' are granted leave to amend the paragraph accordingly not later than 20 October 2015.
- (c) There is no order as to costs against, or in favour of, any party.
- (d) The legal representatives must attend a status hearing before Miller AJ at 15h30 on 29 October 2015 for the further conduct of the matter.

JUDGMENT

PARKER AJ:

[1] The defendants have excepted to certain portions of the plaintiffs' particulars of claim on the basis that –

- (a) the particulars of claim (in as far as it pertains to Claim 3) fails to disclose a cause of action against the relevant defendants.
- (b) the particulars of claim (in as far as it pertains to Claim 3) does not contain all the necessary averments to sustain a cause of action against the relevant defendants.

[2] It goes without saying that the exception delivered in terms of rule 57 of the rules of court is against those portions of the particulars of claim dealing with Claim 3. I shall, therefore, not concern myself with the portions of the particulars of claim dealing with claim 1 and claim 2.

[3] The defendants have raised exception against the relief sought by the plaintiffs under Claim 3. I should, with respect, say that the exception is not well taken for the simple reason that the defendants are not called upon to plead to the relief sought from the court, as Mr Frank SC (with him Ms Bassinthewaighte), counsel for the plaintiffs, correctly submitted. The relief is not the cause of action. Whether or not on the evidence the plaintiff would succeed in due course in the relief they seek under Claim 3 cannot found an exception. An exception cannot be taken against the relief a party prays the court to grant at the conclusion of the trial in terms of the *liberum arbitrium* of the court.

[4] Based on these reasons I hold that paras 6, 7, 8 and 9 which concern the relief sought under claim 3 are not excipiable. I proceed to consider para 24 under Claim 3 against which an exception is also raised.

[5] Paragraph 24 is formulated thus:

'The said agreement is not valid and binding vis-à-vis the second and third defendants as they did not accept or agree to the purchase price, alternatively never intended to pay and still refuses to pay the said purchase price.'

[6] The argument of Mr Töttemeyer SC (with him Mr Obbes), counsel for the defendants, went along these lines. In para 24 the plaintiffs allege in the alternative that 'the said agreement is not valid and binding vis-à-vis the second defendant and third defendants as they ... never intended to pay and still refuse ... to pay the said purchase price'. In law, whether or not a party to a contract intended to perform does not impact on the validity and binding nature of the contract. Counsel concluded that the plaintiff cannot rely on the aforementioned allegations as a basis to conclude that the said agreement is not valid and binding.

[7] I think Mr Töttemeyer's submission has merit. I find that para 24 is excipiable. I do not think para 24, as formulated, discloses a course of action. It is excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action; and para 24 goes to the root of the claim. In any case, Mr Frank appeared to have conceded that the words 'alternatively never intended to pay and still refuses to pay the said purchase price' may be excepted.

[8] What remains is to determine costs. The exception raised against paras 6, 7, 8 and 9 which concerns the relief sought under Claim 3 is rejected. The exception raised against para 24 under Claim 3 is upheld. Since the parties have shared the honours equally, I think this is a good case where the justice of the case demands that the parties pay their own costs.

[9] In the result, I make the following order:

- (a) The defendants' exception to paras 6, 7, 8 and 9 (under Claim 3) is dismissed.
- (b) The defendants' exception to para 24 (under Claim 3) is upheld; and the plaintiffs' are granted leave to amend the paragraph accordingly not later than 20 October 2015.
- (c) There is no order as to costs against, or in favour of, any party.

- (d) The legal representatives must attend a status hearing before Miller AJ at 15h30 on 29 October 2015 for the further conduct of the matter.

C Parker
Acting Judge

APPEARANCES

PLAINTIFFS: T J Frank SC (assisted by N Bassingthwaighte)
Instructed by AngulaCo. Inc., Windhoek

DEFENDANTS: R Töttemeyer SC (assisted by D Obbes)
Instructed by Metcalfe Legal Practitioners, Windhoek