



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2333/2011

In the matter between:

1.1.1.1.  
**PLAINTIFF**

**CLAUD BOSCH ARCHITECTS**

And

**AUAS BUSINESS ENTERPRISES**

**NUMBER 123 (PTY) LTD**

**DEFENDANT**

**Neutral citation:** Claud Bosch Architects v Auas Business Enterprises *Number 123 (Pty) Ltd (I 2333-2011) [2016] NAHCMD 195 (7 July 2016)*

**Coram:** Miller AJ

**Heard:** 20 January 2016

**Delivered:** 7 July 2016

**Flynote:** Exception – Laws applicable to exceptions - A pleading is only exceptible on the basis that no possible evidence led on the pleading can disclose a cause of action or defence – Practice of Close Corporations as architects – Whether the relevant minister prescribed the kinds of work reserved for architects - The legislature prohibits the carrying out of architectural or surveying work for gain by entities other than natural persons, unless an exemption was granted - The exception to the Plaintiff's Particulars of claim are upheld with costs.

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### ORDER

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1. The exception to the Plaintiff's Particulars of claim are upheld with costs. Such costs are ordered to include the costs of two instructed and one instructing counsel.
2. The Plaintiff is afforded an opportunity to amend its Particulars of claim within 14 days from the date of delivery of this judgment.
3. The matter is postponed to the 18<sup>th</sup> of August 2016 for status hearing.

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### JUDGMENT

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Miller AJ

Brief Background

[1] The Plaintiff is a Close Corporation, which issued summons against the Defendant for architectural fees. The Defendant filed an exception to the Plaintiff's Particulars of Claim, saying that the relevant Act does not permit a Close Corporation to practice as architects.

[2] The Plaintiff is described as a close corporation, which at all material times conducted a business as Claud Bosch Architects, 'alternatively' a firm, the sole proprietor of which is the aforesaid close corporation.

[3] The Plaintiff's main claim against the defendant herein is based on a contract for architectural services rendered. In the alternative, the plaintiff relies on enrichment in respect of the rendering of the said architectural services. The Plaintiff, in support of his claim, relies on a written agreement entered into between the two parties entitled the 'Client – Architect Agreement', numbered W09-058.

#### *The Application - Exception*

[4] In short, the defendant raises the following grounds:

#### Principal Submissions:

*'4.1. The Plaintiff is not (and cannot be) registered as an architect and could therefore not have rendered professional architectural services, which is the basis of both the principal and the alternative claims. This is the essence of the first and fourth grounds of exception as set out below.*

*4.2. Insofar as it may held that the plaintiff could have rendered professional architectural services despite it not having been registered as a professional architect, and is entitled to claim, either contractually or by way of enrichment, the value of such alleged services, the plaintiff is claiming for services which it, by its own admission, had not performed.*

*4.3. The plaintiff, in its attempt to overcome the hurdle of registration as a professional architect, relies on an allegation that it was within the contemplation of the parties that the services would not be rendered by the plaintiff, but by another*

person. This is contrary to the non-variation clause in the written agreement between the parties.

4.4. Finally, insofar as the plaintiff, in the alternative, relies on enrichment for its claim vis-à-vis the defendant, the plaintiff fails to make the requisite allegations relating to its impoverishment. On its own version, it had not performed the services for which payment is sought. Moreover, it is not a registered architect, and therefore it cannot, through an enrichment claim, legalise what is specifically criminalised and an illegality.

[5] The Plaintiff in its Heads of Argument, referred to a couple of sections in the “ Act which described what an architect is in the above passage:

*’12. Section 1 of the Act described an architect as-*

*A person registered as an architect in terms of any provision of section 11(1).*

*13. section 11(1) of the Act provides that –*

*Any person who desires to be registered as an architect ... shall lodge with the council, in the manner prescribed by it, an application in writing for such registration, and such application shall be accompanied by the prescribed registration fee and such information as may be required by the council.’*

[6] Plaintiff referred me to sections dealing with who an architect is, who is exempted from being one, how it is registered and what qualifies its duties, kind of work and performances, to reply to the first ground laid by the Applicant. In support they referred to the following section:

*'Section 7(3)(b) of the Act provides that –*

*(3) the Minister may, after consideration and approval of any recommendation made by the council under subsection (1) –*

*(a) ...;*

*(b) subject to the provisions of subsection (4), prescribe the kinds of work in connection with projects, undertakings or services of an architectural or quantity surveying nature which shall be reserved for architects of quantity surveyors, as the case may be.*

*16. a claim which may possibly not be enforceable by reason of the provisions of a regulation cannot be excepted to as not disclosing a cause of action since courts do not take judicial cognisance of regulations with the result that the defendant will need to present evidence to establish –*

*16.1 whether the relevant minister prescribed the kinds of work reserved for architects;*

*16.2 the nature and extent of such prescription; and*

*16.3 that the architectural services contemplated in the agreement falls within those kinds of work.'*

[7] Additionally, the Plaintiff alleged that the second ground raised by the Defendant is clearly based on misrepresentation of the particulars and they submit that it is baseless.

[8] In addition to the grounds set out above, the Plaintiff further avers that the third and fourth grounds raised by the Defendant are based on unsupportable premises than an artificial juristic person is practically capable itself of performing the architectural services as per the agreement. They submitted that these grounds are without merit.

[9] The Defendant filed additional submissions which are an amplification of the Defendant's principal submissions. These additional submissions were filed with reference to a judgment which was delivered by Mr. Justice Masuku, in *Kondjeni Nkandi Architects and Another v The Namibian Airports Company*<sup>1</sup>, which the Defendant alleged it had similar issues to the case before me.

[10] The Plaintiff also filed additional submissions were they submitted respectfully that the judgement is wrong and should not be followed.

### The Applicable Law

[12] According to Harms - <sup>2</sup>

*'An exception is a valuable part of the system of procedure: its principal use is to raise and obtain a speedy and economical decision on 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. Unless an exception is taken for the purpose of raising a substantive question of law which may have the effect of settling a dispute between the parties, an excipient should make out a very clear case before he is allowed to succeed. If evidence can be led which can disclose a cause of action or defence alleged in a pleading, that pleading is not excepiable. A pleading is only excepiable on the basis that no possible evidence led on the pleading can disclose a cause of action or defence.'*

[13] The Court must assume that the facts alleged in the pleading are correct.

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<sup>1</sup>(I 3622/2014) [2015] NAHCMD 223 (11 September 2015)

<sup>2</sup> Harms. (1998). Civil Procedure in the Supreme Court. Butterworths, p285, para J26.

[14] According to Erasmus:<sup>3</sup>

*'In order to succeed, an excipient has a duty to persuade the court that upon every interpretation which the pleading in question, and in particular the document on which it is based, can reasonably bear, no cause of action or defence is disclosed; failing this, the exception ought not to be upheld.'*

[15] In the case of *Kondjeni Nkandi Architects and Another v The Namibian Airports Company*, Mr. Justice Masuku said the following:

*'By virtue of the maxim ex turpi causa non oritur action (from a dishonourable cause no action arises) agreements in violation of the law are rendered unenforceable. It is common cause that the maxim admits of no exception. In the instant case, it is clear that the agreement in which the contractants entered was in violation of the Act as aforesaid. In IS & GM V Construction Tunmer,<sup>4</sup> the following is recorded:*

*"The plaintiff further submitted that the Act merely made the receiving of consideration by an unregistered homebuilder an offence but did not preclude such person from receiving consideration. In my view, this submission is without substance and flies in the face of the clear and unambiguous wording of the Act, which unequivocally prohibits such a person from receiving and consideration. The Court will not make an order contrary to an express prohibition imposed by legislation. The Court cannot be asked to order the performance of a prohibited or criminal act. I am satisfied that the particulars of claim do not disclose a cause of action in that the plaintiff, in view of the facts pleaded, is obliged to allege that it is a registered home builder as defined in the Act before it can receive any consideration."*

[16] Further in para 39 and 40 of the said judgment, Masuku J states:

<sup>3</sup>Erasmus. (2014). Superior Court Practice. RS 45. Rule B1, p152-153

<sup>4</sup>2003 (5) SA 218 (W) at 220.

[39] *Having regard to the foregoing authorities, it would appear that where the legislature criminalises certain behaviour or conduct, any contract entered into in violation of the statutes becomes unlawful and for that reason, it will not normally behove the court to countenance that conduct by giving it any degree of legitimacy by sanctioning and effect to same. Put in the particular facts of the case, the defendant's case is that the legislature prohibited the carrying out of architectural or surveying work for gain by entities other than natural persons, unless an exemption was granted. There can be no doubt that the work carried out by the plaintiffs in this instance, was for gain and therefore, in violation of the provisions of the section in relation to the first plaintiff.*

[40] *if the court were to give effect to a contract concluded in violation of this piece of legislation, the the court would be seeking to facilitate or encourage the very act or conduct that parliament, in its wisdom, saw it fit to prescribe and render a criminal offence.'*

[17] In *Raad Vir Kuratore Vir Warmbad Plase v Bester*,<sup>5</sup> the following was stated:

*'a claim which by reason of the provision of a statute is unenforceable does not disclose a cause of action and can be excepted to because the courts take judicial cognisance of statutes and the validity of a statute cannot ordinarily be challenged, whereas a claim which may possibly not be enforceable by reason of the provisions of a regulation cannot be excepted to as not disclosing a cause of action since not only do the courts not take judicial cognisance of regulations but in addition the regulation may itself not be valid. And until it has been proved the question of its validity does not arise.'*

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<sup>5</sup>1954 (3) SA 71 (T), at p 74.



Application of the Law to the Facts

[19] I am of the view that the Act is clear that any other person than a natural person who carries out architectural or quantity surveying work, unless properly exempted in terms of the Act, commits an offence. The only time in which work is done by a person, other than a natural person registered in terms of the Act, is when that person or entity has been exempted in terms of the Act.

[20] The judgement by Masuku J in *Kondjeni Nkandi Architects and Another v The Namibian Airports Company*, is binding on me, unless I am satisfied that it is clearly wrong. I do not think that Masuku J was wrong. In fact, I agree with him.

[21] The following orders are made:

1. The exception to the Plaintiff's Particulars of claim are upheld with costs. Such costs are ordered to include the costs of two instructed and one instructing counsel.
2. The Plaintiff is afforded an opportunity to amend its Particulars of claim within 14 days from the date of delivery of this judgment.
3. The matter is postponed to the 18<sup>th</sup> of August 2016 for status hearing.

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P J MILLER

Acting Judge

APPEARANCE:

PLAINTIFF: J MARAIS SC (with him D Obbes)

INSTRUCTED BY: Koep and Partners, Windhoek

DEFENDANT: R HEATHCOTE SC (with him Van der Westhuizen)

INSTRUCTED BY: Van Der Merwe-Greef Andima, Windhoek