

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
RULING

Case no: HC-MD-CIV-ACT-OTH-2017/00747

RIVOLI NAMIBIA (PTY) LTD

PLAINTIFF

and

CMC/OTESA CIVIL ENGINEERING (PTY) LTD JOINT VENTURE DEFENDANT

Neutral citation: *Rivoli Namibia (Pty) Ltd vs Cmc/Otesa Civil Engineering (Pty) Ltd Joint Venture* (HC-MD-CIV-ACT-OTH-2017/00747) [2017] NAHCMD 303 (24 October 2017)

Coram: PRINSLOO J

Heard: 12 September 2017

Delivered: 09 October 2017

Reasons Given: 25 October 2017

Flynote: Rule 57 – Principles to be considered when raising an exception that pleadings are vague and embarrassing – Not sufficient to base an exception on a mere technicality that would be cured by a simple amendment.

Summary: On or about November 2015, the Roads Authority of Namibia awarded a tender to the defendant for the rehabilitation and upgrading of the road between

Windhoek and Okahandja. Subsequently thereafter, the plaintiff and the defendant entered into negotiations for sub-contracting the project.

The defendant and the plaintiff having reached agreeable terms, the defendant agreed to accept the offer made by the plaintiff to subcontract for the project subject to the consent of VKE Engineers (the designated engineers for the project). With the engineers approving the project with the plaintiff, the parties commenced with plans to get the project off the ground with the required machinery and ancillary thereto.

On 11 May 2016, the defendant, transmitted to the plaintiff a final draft contract. On 12 May 2016, the plaintiff informed the defendant that the plaintiff has studied the draft contract and that the plaintiff was ready to sign it. Around the same period, the defendant concluded a further agreement with the plaintiff for the supply of ready-mix concrete for the project. During May 2016, the defendant sent the plaintiff a draft written sub-contracting contract ("the draft Contract").

On 10 June 2016, the defendant wrote the plaintiff a letter stating, amongst others, that an agreement on the final value of the contract cannot be reached and they regret to inform the plaintiff that the execution of the contract cannot be awarded to the plaintiff.

Two weeks after receipt of the above letter, on 29 June 2016, the plaintiff sent a formal letter of demand to the defendant. Three weeks later, on 21 July 2016, the defendant responded to the letter of demand denying that the plaintiff was appointed as a sub-contractor on the project.

Held – The laws governing determination of exceptions are trite and this approach was clearly set out by Smuts JA in the matter of *Van Straten v Namibia Financial Institutions Supervisory Authority*.¹

Held - It is clear that defendant was from the onset party to the negotiations for the sub-contracting of the project and that the citation of the defendant is nothing more than a 'misdescription' of the correct party.

¹ 2016 (3) NR 747 at paragraph 18.

Held further – That that a joint venture is not a legal entity capable of being sued in Namibian Law and there is thus a clear distinction between partnership and joint venture.

Held further - The authorities are clear in that a party must elect or choose one remedy and not decide to elect another when circumstances dictate otherwise.

ORDER

1. The defendants' first exception to the plaintiff's particulars of claim is dismissed.
2. The defendants' second, third and fourth exception to the plaintiffs' particulars of claim is upheld with costs consequent upon the employment of one instructing and two instructed counsel.
3. The plaintiff is granted leave, if so advised, to file amended particulars of claim within then (10) days from the date of this ruling.
4. The defendants is granted leave to file their respective amended pleas to the said amended particulars of claim within seven (7) days from the filing of the amended particulars of claim.
5. The plaintiff is to file its replication, if any, to the said amended plea within seven (7) days from the filing of the amended plea, if any.
6. The matter is postponed to 23 November 2017 at 15:00 for a status hearing.
7. The parties are ordered to file a joint status report three (3) days before the next date of hearing.

RULING

Prinsloo J:

[1] This is an interlocutory ruling revolving around an exception raised by the defendant herein. The court had the benefit of receiving compelling heads of arguments and oral submissions made by Adv Heachcote SC on behalf of the defendant and Adv Bassingthwaighe, on behalf of the plaintiff and I will attempt to summarize the issues raised as concise as possible:

[2] The plaintiff is Rivoli Namibia (Pty) Ltd, a company duly registered in terms of the company laws of the Republic of Namibia, having its principle place of business at Unit N 3-4 City View Office Block, corner of Pasteur and Freud Streets, Windhoek West, Windhoek, Namibia.

[3] The defendant is said to be CMC/Otesa Civil Engineering (Pty) Ltd Joint Venture, a joint venture having its principal place of business at 18 Goethe Street, Windhoek, Namibia.

Summary of cause of action and background facts:

[4] The facts giving rise to the cause of action are set out in the particulars of claim and can be briefly summarized as follows: On or about November 2015, the Roads Authority Namibia awarded a tender for the rehabilitation and upgrading of the road between Windhoek and Okahandja. Subsequently thereafter, on or about December 2015, the plaintiff and the defendant entered into negotiations for sub-contracting the project.

[5] With the negotiations held between the parties coming to agreeable terms, on 8 March 2016, the plaintiff made an offer to sub-contract for the project in the amount of N\$93, 909,462.95 (Ninety Three Million, Nine Hundred and Nine Thousand, Four Hundred Sixty-Two and Ninety-Five Cents).

[6] Approximately after six days from the date on which the plaintiff made the offer to the defendant, i.e. on 14 March 2016, the defendant agreed to accept the

offer made by the plaintiff to subcontract for the project subject to the consent of VKE Engineers (the designated engineers for the project).

[7] On 25 April 2016, the defendant advised the plaintiff, by way of a letter, that VKE Engineers have approved the Plaintiff as the sub-contractor on the project. In the result, the parties commenced with plans to get the project off the ground with the required machinery and ancillary thereto.

[8] On 11 May 2016, Mr. Luca de Maria on behalf of the defendant, transmitted to Mr. Andrea Piacentini of the plaintiff a final draft contract. On 12 May 2016, Mr. Piacentini informed Mr. de Maria that the plaintiff has studied the draft contract and that the plaintiff was ready to sign it. Around the same period, the defendant concluded a further agreement with the plaintiff for the supply of ready-mix concrete for the project.

[9] During May 2016, the defendant sent the plaintiff a draft written sub-contracting contract ("the draft Contract"). The express or implied or tacit terms of the draft contract are, *inter alia*, the following:

1. The main works comprised the rehabilitation and upgrading of the road between Windhoek and Okahandja;
2. The duration of the Contract is two (2) years;
3. The site is located in Windhoek, Namibia;
4. The contract comprised the plaintiff's offer, the defendant's letter of acceptance, the letter of Intent dated 14 March 2016, the specifications and drawings; and
5. The letter of acceptance creates a binding contract between the parties and the defendant undertakes to fulfil all its obligations and duties in accordance with the contract.

[10] On 10 June 2016, the defendant transmitted a letter stating, amongst others, that an agreement on the final value of the contract cannot be reached and they regret to inform the plaintiff that the execution of the contract cannot be awarded to the plaintiff.

[11] Two weeks after receipt of the above letter, on 29 June 2016, the plaintiff sent a formal letter of demand to the defendant. Three weeks later, on 21 July 2016, the defendant responded to the letter of demand denying that the plaintiff was appointed as a sub-contractor on the project.

[12] It is on the above that the plaintiff institutes action against the defendant.

The applicable position in law

[13] As a starting point the court has to consider the provisions of Rule 57 of the High Court rules that provide that:

“(1) Where a pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or a defence, the opposing party may deliver an exception thereto within the period allowed for the purpose in the case plan order or in the absence of provision for such period, within such time as directed by the managing judge or the court for such purpose on directions in terms of rule 32(4) being sought by the party wishing to except.

(2) Where a party intends to take an exception that a pleading is vague and embarrassing he or she must, within 10 days of the period allowed to do so, by notice afford his or her opponent the opportunity of removing the cause of complaint.

(3) The party excepting must within 10 days from the date on which a reply to the notice referred to in subrule (2) is received or after the date on which reply is due, deliver his or her exception.

(4) If a party excepts to a pleading the managing judge must give directions when the exception will be heard and give such other directions as the managing judge considers proper or appropriate.

(5) Where an exception is taken to a pleading the grounds on which the exception is founded must be clearly and concisely stated.”

(6) Where an exception is taken to a pleading on the grounds that such pleading lacks the averments which are necessary to sustain an action or defence, no plea, replication or other pleading over is necessary.”

[14] The principles governing determination of exceptions are trite. In the instance where it is alleged that the particulars of claim does not disclose a cause of action,

as in the matter *in casu*, the approach was clearly set out by Smuts JA in the matter of *Van Straten v Namibia Financial Institutions Supervisory Authority*²:

[18] 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 correct³. 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 disclosed⁴. 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 excipiable⁵.

The exception

[15] The defendant alleges that the plaintiff's particulars of claim does not disclose a cause of action and lacks the necessary allegations to sustain a cause of action and raised the following exceptions to the plaintiff's particulars of claim:

AD CLAIM A AND B:

1.1 First ground: The sub-contract (unsigned) document on which the plaintiff relies on refers CMC/OTESA JOINT VENTURE, who is not the defendant named in the particulars of claim, i.e. the wrong defendant sued;

1.2 Second ground: The particulars of claim refers to the defendant as a joint venture which is not a legal entity capable of being sued in Namibian law;

1.3 Third ground: Plaintiff may not in law approbate and reprobate⁶;

AD CLAIM A:

1.4 Fourth ground: Paragraph 3 of the unsigned sub-contract, only incorporates the contract document upon signing of the document itself, however no allegation is made that the document was signed. Plaintiff therefor relies its claim on documents which were not incorporated.

² 2016 (3) NR 747 at paragraph 18.

³ *Marney v Watson and Another* 1978 (4) SA 140 (C) at 144F.

⁴ *Lewis v Oneanate (Pty) Ltd and Another* 1992 (4) SA 811 (A) at 817F – G followed by the High Court in *Namibia Breweries Ltd v Seelenbinder, Henning & Partners* 2002 NR 155 (HC) at 158H – J (Seelenbinder).

⁵ *McKelvey v Cowan NO* 1980 (4) SA 525 (Z) at 526D – G; see also *Seelenbinder* at 159A.

⁶ With reference to letter dated 29/06/2016 in which the plaintiff elected to claim specific performance in respect of both contracts but in particulars of claim the plaintiff accepts the defendant's alleged repudiation and cancels the agreement.

First Ground: Citation of the Defendant:

[16] It is argued by Mr. Heathcote that the defendant as cited in the particulars of claim “*CMC/OTESA Civil Engineering (Pty) Ltd Joint Venture*”⁷ is an entirely different entity to “*CMC/OTESA Joint Venture*” as referred to in the draft agreement⁸ relied upon by the plaintiff.

[17] It is argued that the inconsistency between the citation and description of the defendant, as pleaded, on the one hand and the description of the defendant, as pleaded in particulars of claim and the description of the defendant as reflected in the contract annexed to the particulars of claim renders it excipiable.

[18] Ms. Bassingthwaite in turn argued that should it be found that the defendant was incorrectly cited, that it is but a superficial defect which neither prejudice the defendant entities nor fails to disclose a cause of action and may be cured by a simple amendment.

[19] She further argued that defendant just argued that the name of the defendant is wrong but it is not contended that it is the wrong defendant before court. The defendant entered a notice of intention to defend this matter. If it was the wrong defendant that was sued there would be surely no party before court.

[20] It is common cause that the draft agreement refers to CMC/Otesa Joint Venture and in the correspondence exchanged between the parties defendant is referred to CMC/Otesa Joint Venture whereas the particulars of claim refers to CMC/OTESA Civil Engineering (Pty) Ltd Joint Venture.

[21] From the arguments advanced before this court it is clear that defendant was party to the negotiations for sub-contracting of a project for the rehabilitation and upgrading of the road between Windhoek and Okahandja and that the citation of the defendant is nothing more than a ‘misdescription’ of the correct party.

⁷ Paragraph 2 of Particulars of Claim.

⁸ Annexure RN 4 attached to the Particulars of Claim.

[22] In the *Four Tower Investments (Pty) Ltd v Andre's Motors*⁹ case, Galgut DJP stated that a process is not invalid in every instance where a litigant is a non-existent party. To this end the court held, at 45B – C, that '[w]hether a process is a nullity or not will depend on the facts of the case, and on the authorities it seems that it may be a question of the degree to which the given process is deficient. As I see it, however, the fact on its own that the citation or description of a party happens to be of a non-existent entity should not render the summons a nullity'. Galgut DJP concluded (at 47E) that 'if the citation of a party is nothing more than a misdescription, it should not matter whether the incorrect citation happens on the face of it to refer to a non-existing entity or indeed to an existing but uninvolved entity.'

[23] I am in agreement that the exception in this regard is merely technical and superficial which would neither prejudice the defendant nor fail to disclose a cause of action that a simple amendment cannot cure.

[24] The first exception is therefore dismissed.

Second Ground: Locus standi of the joint venture

[25] The concept of joint venture was discussed in the matter of *Gihwala and Others v Grancy Property Ltd and Others*¹⁰ and the court held that not every joint venture should be regarded as a partnership, sometimes the distinction between a joint venture and partnership is blurred and sometimes what is referred to as a joint venture is in fact a partnership where the essentialia are accordingly present.

[26] On page 366 B-C at paragraph 61 Wallis JA described a joint venture as:

'The agreement could be described as a joint venture, a convenient expression commonly used to describe a business agreement bearing some resemblance to a partnership, but lacking one or more of its essential elements. It does not convey any specific legal meaning, as every joint venture is dependent on specific terms on which the parties agree.'

⁹ 2005 (3) SA 39 (N).

¹⁰ 2017 (2) SA 337 (SCA).

[27] Mr. Heathcote argued that a joint venture is not a legal entity and is not capable of being sued in Namibian Law. He further argued that the grounds for the exception is not that a joint venture cannot be a partnership or that a partnership cannot be referred to as a joint venture but that the exception is more fundamental in nature, in that it is inappropriate and legally impermissible to simply refer to a party as a joint venture without stating that such a joint venture is also a partnership in the particular case.

[28] In the plaintiff's heads of argument it was argued that a joint venture is a *de facto* partnership (alternatively ostensible partnership) and may therefore be cited as such as per Rule 42¹¹ of the Rules of Court. It was further argued in the heads of argument that a joint venture is in effect a partnership between companies and in effect, the defendant's joint venture amounts to a partnership both for litigation and for the enforcement of rights and duties between the parties themselves.

[29] In *Tonateni Hebei Construction CC v The University of Namibia*¹² Masuku J considered the question whether a partnership and a joint venture have the same meaning and as such, whether principles applicable to the one also apply to the other.¹³ In absence of persuasive authority, Masuku J proceeded on the assumption of the position advocated by the parties that principles applicable to a partnership also apply to a joint venture. In that instance the parties seems to have been satisfied that the necessary allegations were made for the joint venture to be regarded as a partnership.

[30] Shortly thereafter, the Supreme Court of Namibia through Frank AJA in the matter of *Chico/Octagon Joint Venture v Roads Authority and Three Others*¹⁴ held that:

'Here it must be borne in mind that the joint venture is not a legal entity distinct from the parties to the joint venture agreement.'

¹¹ Rule 42 of Rules of the High Court of Namibia deals with proceedings by and against partnerships, firms and associations.

¹² (I 2376/2015) [2017] NAHCMD 146 (19 May 2017).

¹³ At paragraph 40 onwards.

¹⁴ SA 81/2016 at paragraph 22.

[31] Resultantly the issue is now settled by the Supreme Court that a joint venture is not a legal entity capable of being sued in Nambian Law and there is thus a clear distinction between partnership and joint venture.

[32] The second exception is therefore upheld.

Third ground: Approbate and Reprobate

[33] Plaintiff in its letter of demand dated 29 June 2016¹⁵ stated as follows:

“We therefore demand, as we hereby do, that you honor the agreement failing legal action for specific performance and claim of damages will immediately be instituted should you not comply with this demand within 10 (ten) days upon receipt of this letter.”

[34] Paragraph 20 of the particulars of claim notwithstanding reads as follows:

‘In the premises, the Plaintiff accepts the repudiation and/or the breach of the contract by the Defendant.’

[35] Plaintiff on the one hand elected to claim specific performance on 29 June 2016 and on the other hand canceled the agreement by accepting alleged repudiation and/or breach by the defendant and proceeded to claim damages when summons was issued on 03 March 2017.

[36] In respect of this exception raised by the defendant, De Villiers JP in *Hlatshwayo v Mare and Deas* 1912 AD 242 at 259 stated as follows:

‘At bottom the doctrine is based upon the application of the principle that no person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed to blow hot and cold, to approbate and reprobate.’

[37] Furthermore, in *Administrator, Orange Free State, and Another v Mokopanele and Another* 1990 (3) SA 780 (A) at 787G – H it was held that:

¹⁵ RN 6 annexed to the Particulars of Claim.

'The legal doctrine here involved may perhaps best be described as that of election. But in a situation such as this the exact nomenclature is less important than a recognition of the fundamental principle that a contracting party who has once approbated cannot thereafter reprobate.'

[38] The above principle was again reiterated in *Merry Hill (Pty) Ltd v Engelbrecht* 2008 (2) SA 544 (SCA at 550B – E (para 15) which expressly approved the following statement of the law by Friedman JP in *Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd* 1996 (2) SA 537 (C) [1996] 1 All SA 509 at 542E – F:

'When one party to a contract commits a breach of a material term, the other party is faced with an election. He may cancel the contract or he may insist upon due performance by the party in breach. The remedies available to the innocent party are inconsistent. The choice of one necessarily excludes the other, or, as it is said, he cannot both approbate and reprobate. Once he has elected to pursue one remedy, he is bound by his election and cannot resile from it without the consent of the other party.'

[39] As per the above, the authorities are clear in that a party must elect or choose one remedy and not decide to elect another when circumstances dictate otherwise.

[40] The third exception is therefore upheld.

Fourth Ground: Draft subcontracting agreement

[41] Plaintiff is relying upon the draft subcontract which is attached to the particulars of claim as “RN 4”. This draft subcontract consists *inter alia* of the Subcontracting Agreement, the Contractor's letter of acceptance, the particular Conditions of Subcontract and Annexures.

[42] Mr Heathcote argued on behalf of the defendant that paragraph 3¹⁶ of the unsigned subcontracting agreement only incorporates the contract documents upon signing of the document itself. As a result plaintiff relies for its claim on documents which were not incorporated.

[43] In plaintiff heads of argument it is conceded that plaintiff relies, amongst other, on the draft subcontract which was not signed by the parties and the correspondence exchanged between the parties¹⁷.

[44] Plaintiff however relies on the case of *Novartis South Africa (Pty) Ltd v Maphil*¹⁸ where the Supreme Court of South Africa held that parties can conclude a valid and enforceable contract which comprised a written document, oral agreement and electronic mails exchanged between the parties. From the draft contract, correspondence and the conduct of the parties, the court is therefore to infer that the parties have concluded a contract.

[45] In respect of the fourth ground of exception raised by the defendant, I find the following fitting in the circumstances where the Appellate Division in *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23 provided as follows:

"... every 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 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.

'It is important to bear in mind that the definition relates only to material facts, and at the same time to have due regard to the distinction between the *facta probanda* and the *facta probantia*. Care must be taken in any given case 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*).'

¹⁶ Paragraph 3: 'For the purpose of the interpretation, the priority of these documents shall be in accordance with the abovementioned sequence. By signing these Particular Conditions of the Subcontract Agreement, the Subcontractor is deemed to have received a complete set of the Main Contract's Document including (but not limited to) the drawings, the specifications, schedules and any other technical document pertaining to the Subcontractor's scope of work.'

¹⁷ Paragraph 71 of Plaintiff's Heads of Argument.

¹⁸ 2016 (1) 518 (SCA).

[46] Furthermore, in *Spes Bona Bank Ltd v Portlands Water Treatment South Africa (Pty) Ltd* 1983 (1) 978 (A) at 981A-D Botha JA said:

'The agreement relied upon by the appellant is alleged to have been entered into tacitly. In regard to the proof of a tacit agreement generally, Nestadt J (at 630E-631B of the reported judgment) referred to certain authorities, some of which suggest that in relation to a tacit contract a higher standard of proof is required than in the case of an express contract. That is not so. The general rule is now well established that the onus of proof in respect of any factum probandum in a civil case can be discharged on a balance of probabilities. The instance of a tacit contract is no exception to the general rule. That such a contract needs to be proved by way of inference from circumstantial evidence does not render the criterion of proof on a balance of probabilities inapplicable, for in a civil case that criterion applies also to the drawing of inferences from proved facts.'

[47] The fourth exception is therefore upheld.

Conclusion

[48] In the defendant's comprehensive submissions, the defendant succinctly submits that the common practice of this court is to uphold the exception, and grant the party leave to deliver an amended pleading.¹⁹ However, the defendant submits that in this case, the plaintiff would be unable to amend its particulars of claim to cure the complained exception due to the position that, the defendant submits that this court would not have jurisdiction over one of the parties to the joint venture. Thus, an amendment to the pleadings would not be possible.

[49] The court is of the opinion that the proper order is to grant the plaintiff leave to amend the offending pleading within a specified period and not to dismiss the claim or grant judgment.

[50] In the premises, the following order is hereby issued:

1. The defendants' first exception to the plaintiff's particulars of claim is dismissed.

¹⁹ *Hallie Investment 142 CC t/a Wimpy Maerua and Another v Caterplus Namibia (Pty) Ltd t/a Blue Marine Interfish* 2016 (1) NR 291 (SC).

2. The defendants' second, third and fourth exception to the plaintiffs' particulars of claim is upheld with costs consequent upon the employment of one instructing and two instructed counsel.
3. The plaintiff is granted leave, if so advised, to file amended particulars of claim within then (10) days from the date of this ruling.
4. The defendants is granted leave to file their respective amended pleas to the said amended particulars of claim within seven (7) days from the filing of the amended particulars of claim.
5. The plaintiff is to file its replication, if any, to the said amended plea within seven (7) days from the filing of the amended plea, if any.
6. The matter is postponed to 23 November 2017 at 15:00 for a status hearing.
7. The parties are ordered to file a joint status report three (3) days before the next date of hearing.

J S PRINSLOO
JUDGE

APPEARANCES:

PLAINTIFF:

N BASSINGTHWAIGHTE

INSTRUCTED BY:

SISA NAMANDJE & CO. INC

DEFENDANT:
CAMPBELL)

R HEATHCOTE (with Y

INSTRUCTED BY:
PARTNERS

FRANCOIS ERASMUS &