

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case No: HC-MD-CIV-CON-2017/01344

In the matter between:

**J&M CASINO CONSULTING CLOSE CORPORATION PLAINTIFF**

and

**UNITED AFRICA GROUP (PTY) LTD**

**DEFENDANT**

**Neutral Citation:** *J & M Casino Consulting CC v United Africa Group (Pty) Ltd* (HC-MD-CIV-CON-2017/01344) [2018] NAHCMD 176 (18 June 2018)

**CORAM:** PRINSLOO J

**Heard:** 27 April 2018

**Delivered:** 6 June 2018

**Reasons:** 18 June 2018

---

---

## RULING IN TERMS OF PD 61

---

PRINSLOO, J:

Introduction:

[1] The plaintiff<sup>1</sup> issued summons against the defendant claiming amounts totaling N\$ 91,557,230 plus interest of 20% per annum calculated on various amounts making up the first mentioned amount.

[2] The cause of action of the plaintiff concerns the written agreement entered into between the parties to operate a casino in Windhoek and said agreement was signed on 10 November 2009.

How are the parties before court?

[3] The defendant raised an exception to the plaintiff's particulars of claim on various grounds and as a result of the exception raised, the plaintiff gave notice of its intention to amend the particulars of claim in terms of Rule 52(1), ostensibly to remove the cause of the exception. The defendant objected to the intended amendment which resulted in the application for leave to amend. Rule 52 of the Rules of Court regulates the procedure to be followed when a party seeks to amend a pleading. The application of the rule involves the exercise of discretion by the court to which an application to amend has been made. That discretion must obviously be exercised judicially.<sup>2</sup>

---

<sup>1</sup> For the sake of convenience I will refer to the parties as they are in the main action.

<sup>2</sup> Cilliers, Loots and Nel *Herbstein and Van Winsen: The Civil Practice of the High Courts of South Africa* (5 ed) (Vol 1) Cape Town, Juta and Co: 2009, 678. See too *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168, 243; *Caxton Ltd and others v Reeve Forman (Pty) Ltd and another* 1990 (3) SA 547 (A), 569G.

Why are the parties before court?

[4] The defendant raised an exception to the particulars of claim on various grounds, i.e.

- a) the non-joinder of the nominee company.
- b) that the written agreement is unenforceable due to it being in violation of s 25(1)(a) and (b) and s 33 of the Casino and Gambling Houses Act, Act 32 of 1994 (as amended);
- c) violation of provisions of s 38 of the aforementioned Act.

Submissions by the parties

[5] The defendant's objection to the intended amendment is on the basis that it is excipiable as it perpetuates the failure to disclose a cause of action due to the written agreement being in violation of the Casino and Gambling Houses Act, Act 32 of 1994 (as amended) and therefore unlawful and unenforceable.

[6] The first objection entails a plea of non-joinder of the nominee company. Defendant based the objection of on the fact that if the amendment is allowed it would refer to another entity, i.e. 'Pride of Africa Hospitality (Pty) Ltd trading as Plaza Casino', who would have a direct and substantial interest in the proceedings and its outcome. Defendant argued that it will not serve any purpose to allow the amendment. The defendant contends that the agreement between the parties does not make provision for assignment.

[7] The second objection to the intended amendment of the particulars of claim is that the written agreement is unenforceable due to it being in violation of s 25(1)(a) and (b) and s 38 of the Casino and Gambling Houses Act.

[8] In reply, the plaintiff argued on the issue of non-joinder of the nominee company, that a nominee can be, and often is, a representative or agent of a party holding right and acting on behalf of its principal and that on be the most beneficial interpretation this would be eminently plausible. Plaintiff argued that what the actual arrangement between the defendant and Pride of Africa Hospitality (Pty) Ltd is will be a matter for evidence.

[9] Plaintiff further argues there is nothing in the Act, particularly s 25 and s 38, which is to the effect that a contravention would amount to an underlying contract being null and void and upon following the *Standard Bank v Estate van Rhyn*<sup>3</sup> approach, it would seem that the law is content with the penalty expressly provided.

[10] Plaintiff further argued that whether a contravention of s 25 or 38 of the Act would lead to invalidity of the underlying agreement would depend on the interpretation of the Act itself and that it is now trite in Namibia that interpretation of documents, including legislation, is done by having regard to the context and the circumstances upon its coming into existence which would require evidence.

#### Principle applicable

[11] The general principle<sup>4</sup> relating to amendments of pleadings is that the court is generally inclined to allow an amendment intended to 'obtain a proper ventilation of the dispute between the parties to determine the real issues between them, so that justice

---

<sup>3</sup> 1925 AD 266 Per Solomon JA held (Innes CJ and Wessels JA concurring at 274: 'The contention on behalf of the respondent is that when the Legislature penalises an act it impliedly prohibits it, and that the effect of the prohibition is to render the act null and void, even if no declaration of nullity is attached to the law. That, as a general proposition, may be accepted, but it is not a hard and fast rule universally applicable. After all, what we have to get at is the intention of the Legislature, and, if we are satisfied in any case that the Legislature did not intend to render the act invalid, we should not be justified in holding that it was. As Voet (1.3.16) puts it – "but that which is done contrary to law is not ipso jure null and void, where the law is content with a penalty laid down against those who contravene it." Then, after giving some instances in illustration of this principle, he proceeds: "The reason of all this I take to be that in these and the like cases greater inconveniences and impropriety would result from the rescission of what was done, than would follow the act itself done contrary to the law".

<sup>4</sup>*Dowles Manor Properties LTD v Bank of Namibia* 2005 NR 59 (HC) at page 65 (per Caney J in *Trans-Drankensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967(3) 632 (D) at 638A).

may be done,<sup>5</sup> unless the application to amend is *mala fides* or unless such amendment would cause injustice to the other side which cannot be compensated by costs, or in other words, unless the parties cannot be put back for the purpose of justice in the same position as they were when the pleadings which it is sought to amend was filed.’<sup>6</sup>

[12] The approach of the defendant in this matter is that should the court allow the amendment of the particulars of claim, it would render the pleadings excipiable. As the objection is on the basis that the amendment particulars of claim will not disclose a cause of action, the principle relating to exceptions finds application.

[13] The accepted approach is that an amendment should not be granted where the introduction of such amendment would render such pleadings excipiable,<sup>7</sup> however before an amendment will be refused on the grounds of excipiability, it must be clear that the amendment **will** (not may) render the pleadings excipiable.<sup>8</sup>

[14] The principle is that 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 correct. Secondly, 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 disclosed. 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 excipiable.<sup>9</sup>

---

<sup>5</sup> Supra (per Caney J in *Trans-Drankensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967(3) 632 (D) at 638A).

<sup>6</sup> Supra (per Watermeyer J in *Moolman v Estate Moolman* 1927 CPD 27 at 29).

<sup>7</sup> *Cross v Ferreira* 1950 (3) SA 443 (C) at 449G-450 G.

<sup>8</sup> *Bowring Barclays & Genote (Edms) Bpk v De Kock* 1991 (1) SA 145 (SWA).

<sup>9</sup> *Van Straten NO and another v Namibia Financial Institutions Supervisory Authority and Another* 2016 (3) NR 767 SC at [17]- [20]. *Namibian Breweries Ltd v Seelinbinder, Henning & Partners* 2002 NR 155 (HC) at p. 160: ‘In deciding this point, the Court must remind itself that, having taken the exception, the defendant must satisfy the Court that, on all reasonable construction of the plaintiff’s particulars of claim as amplified and amended and on all possible evidence that may led on the pleadings, no cause of action is or can be disclosed. The most beneficial construction that can be given to the pleadings. . . .’

[15] *On the issue of non-joinder*: Non-joinder does not affect the cause of action. It is a dilatory plea which, if upheld, will cause the matter to be postponed to allow joinder. It does not affect the cause of action, i.e. the validity of the cause of action.

[16] *On the issue of the invalidity of the contract due to the contravention of s 25 and 38 of the Gambling Act*: Whether a contravention of the provision of s 25 or s 38 of the Act would lead to invalidity of the underlying agreement, would depend on the interpretation of the Act itself.

[17] In *Namibian Association of Medical Aid Funds and Others v Namibia Competition Commission and Another*<sup>10</sup> at para 39, Smuts JA remarked:

'[39] This court in *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC* recently referred to the approach to be followed in the construction of text and cited the lucid articulation by Wallis JA of the approach to interpretation in *South Africa in Natal Joint Municipal Pension Fund v Endumeni Municipality*:<sup>11</sup>

Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusiness-like results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used.'

---

<sup>10</sup> 2017 (3) NR 853 (SC).

<sup>11</sup> 2012 (4) SA 593 (SCA) ([2012] 2 All SA 262.

[18] This interpretation most probably requires evidence. Where an issue raised in an exception is inextricably intertwined with the dispute on the merit which can be canvassed at the trial, it is preferable that the exception be deferred for adjudication at the trial.

[19] The fact that the plaintiff puts a particular interpretation on a statutory provision that is different from that which the defendant puts thereon, does not, in and of itself, render the proposed amendment excipiable.

[20] In order to decide this issue, the provision of the agreement must be evaluated in the light of s 25 and s 38. Exception against the wording of a contract based on legislation would require both to be interpreted and evidence is necessary. The court also needs to determine what the intention of the legislature was and it is not appropriate to raise an exception in this regard at this stage because the court cannot interpret the agreement and the relevant legislation without hearing evidence.

[21] I am not convinced that the defendant was able to satisfy the court that on all reasonable construction of the plaintiff's particulars of claim as amplified and amended, and on all possible evidence that may be lead on the pleadings, that no cause of action is or can be disclosed.

### Costs

[22] With regards to the issue of costs, it is trite that costs follow the event. The general rule which governs the costs of applications for amendment is that the party seeking the amendment should pay the costs occasioned by such application. This is so because the applicant is seeking an indulgence for the court.<sup>12</sup>

---

<sup>12</sup> A C Celliers: *Law of Costs* at page 2-26 para 2.32.

Order:

- a) The plaintiff is granted leave to amend its particulars of claim by the introduction of the amendments as set out in the Notice of intention to amend dated 16 November 2017;
  
- b) Plaintiff to pay the cost occasioned by the application.

---

J S Prinsloo  
Judge



## APPEARANCES:

PLAINTIFF:

P C I Barnard

instructed by Cronjé &amp; Co., Windhoek

DEFENDANT:

N Tjombe

of Tjombe–Elago Inc., Windhoek