

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-CON-2018/02780

In the matter between:

EUSA PHARMACEUTICALS CC TRADING UNDER THE NAME **PLAINTIFF**
AND STYLE OF CORNER PHARMACY

and

ADVEN INVESTMENT (PTY LTD) **FIRST DEFENDANT**
CORNER PHARMACY CC (NOW CORNER PHARM **SECOND DEFENDANT**
AND MEDICAL CC)

Neutral Citation: *Eusa Pharmaceuticals trading under the name and style of Corner Pharmacy vs Adven Investment (Pty) Ltd* (HC-MD-CIV-ACT-CON-2018/02780) [2019] NAHCMD 559 (13 December 2019)

CORAM: CLAASEN, AJ
Heard: 09 September 2019, 12 September 2019
Delivered: 13 December 2019
Reasons: 27 December 2019

Flynote: Written agreement – rectification – requirements of rectification of contract – Court finds that on the facts of this case the plaintiff has not satisfied requirements regarding common intention as to who the tenant was and that a mistake occurred in drafting of the contract – Plaintiff’s claim dismissed.

Summary – Plaintiff claims to be the tenant in a written lease alleged to have been concluded between the plaintiff and the first defendant. The plaintiff avers that there was a common mistake in the name and description of the tenant in the lease. The second defendant denied that the plaintiff was the tenant and also denied that any mistake occurred. According to the second defendant, the common intention of the parties was that Corner Pharmacy CC be the tenant.

Held – the overall onus was upon the plaintiff to prove all the requirements for rectification.

Held – plaintiff failed to present clear and sufficient evidence to satisfy the court that a mistake occurred in the drafting of the contract and that the written agreement did not accurately reflect the common intention of the parties.

Held – plaintiff’s claim dismissed with cost.

ORDER

The plaintiff’s claim is dismissed with cost.

JUDGMENT

CLAASEN, AJ:

Introduction

[1] The plaintiff instituted action seeking an order for the rectification of a lease agreement that according to the plaintiff, was concluded between the plaintiff and the first defendant. The averment was that the tenant was incorrectly referred to as 'Corner Pharmacy CC' in the written agreement whereas the correct name of the tenant is Eusa Pharmaceuticals t/a Corner Pharmacy.'

[2] The lease in question relates to shop 3A in the Shoprite U-Safe Centre that is situated at Erf 9517 Katutura, No 89-95 Abraham Mashego Street in Windhoek.

[3] The second defendant resisted the claim and in its plea admitted to the conclusion of a lease agreement but contended that the tenant was correctly described as 'Corner Pharmacy CC' in the lease.

[4] The key issues for determination related to the common intention of the parties as to who the tenant was and whether a common error occurred in the drafting of the lease that resulted in the written document not being an accurate reflection of the common intention of the parties to the contract.

The evidence

[5] Two witnesses testified on behalf of the plaintiff. The first witness was Ms Ebba Upindi (hereinafter referred to as Ms Upindi). She testified that she is a registered

pharmacist and the sole member of the plaintiff. The plaintiff operates a pharmacy on the specified premises.

[6] According to Ms Upindi, the plaintiff initially subleased the property from Bethesda Medical Centre CC which lease expired in October 2016. She testified that on 19 October 2016 the plaintiff, represented by herself and a certain Mr Richard Israel (hereinafter referred to as Mr Israel) concluded a written lease agreement, with the first defendant, who was represented by Vision Properties CC.

[7] Ms Upindi testified that clause 1.2 of the lease agreement incorrectly refers to the tenant as 'Corner Pharmacy CC', whereas the correct name of the tenant is 'Eusa Pharmaceuticals CC t/a Corner Pharmacy'.

[8] She testified about the second defendant, in particular that it was created in January 2015 with two members being herself and Mr Israel, each holding a 50% membership interest in the business. It was her testimony that from April 2015 until April 2017, she was the sole member of the second defendant, where after Mr Israel became the sole owner of the second defendant, and changed the name of the business to Corner Pharm and Medical CC.

[9] Ms Upindi testified that an error in the lease came about by the trade name of the plaintiff being Corner Pharmacy and the second defendant's previous registered name also being Corner Pharmacy CC. She attributed the error to the fact that the plaintiff's full details were not in the application which was admitted and marked as exhibit 'F'. Ms Upindi testified that the parties concluded the lease in the bona fide but mistaken belief that it was the correct description of the tenant that was recorded.

[10] She testified that the agent, Vision Property CC, sends tax invoices in name of Corner Pharmacy and that the water and electricity bills are issued to Eusa Pharmaceutical CC. She also gave evidence that the plaintiff paid the deposit and the stamp duties on the lease agreement.

[11] During cross-examination, counsel for the second defendant canvassed the processes that lead up to the conclusion of the lease as well as the circumstances wherein the lease was signed. In relation to a question as to who applied for the lease, initially Ms Upindi contended that it was the plaintiff represented by herself but after being confronted with the application form, she stated that it was Mr Israel who completed the application form on behalf of the plaintiff. Ms Upindi possessed no knowledge of negotiations preceding the lease nor could she recall the place where the lease was signed. She justified the lack of knowledge regarding the details of the lease by saying that the plaintiff was a previous sub-lessee and that she assumed that the plaintiff is merely taking over the lease on the same conditions.

[12] Counsel for the second defendant also questioned Ms Upindi as to why Mr Israel would sign the lease for the plaintiff and she replied that he signed as a 'personal suretyship'. She conceded that he should not have signed, that it was one of the aspects to be amended, and that she only noticed he signed in 2018 when she was evicted. This point was further driven as to why Mr Israel would apply for the lease on behalf of the plaintiff if she contends there was no relationship between him and the plaintiff. She replied that it was upon her request as a 'friend and business partner' and that she furnished him with the registration number and the VAT number.

[13] In respect of the postal address of the tenant, namely P. O. Box 91576 Klein Windhoek, she stated that she does not recognize the postal address.

[14] Ms Upindi advanced an explanation for the similarity in the trade names of the plaintiff and the second defendant that at some point, she had a 50% membership interest and that for two years, she was the sole member.

[15] In re-examination, the similarity of the trade names was pursued and she replied that she was a member of both the plaintiff and the second defendant. She furthermore explained that she resigned from the second defendant in April 2017 and because of the confusion between the names of the plaintiff and defendant, she requested Mr Israel to amend the name of the second defendant.

[16] Mr Jacobus Kotze testified as a second witness for the plaintiff. He testified that he is the major member of Vision Property CC, who manages Adven Property on behalf of the landlord. The only aspect that the plaintiff raised with the witness was in respect of the clause 11.1 of the lease agreement relating to the fact that the leased premises can only be used for a pharmacy. He confirmed that the second defendant has not has not applied for consent to conduct a business other than a pharmacy on the said premises.

[17] During cross examination, he explained that the lease was completed on the basis of an application form that was completed by Mr Israel. He testified that he signed the lease after it was signed by the members Ebba and Richard and he regards Corner Pharmacy as the tenant.¹

[18] Mr Richard Israel, a pilot and businessperson, testified on behalf of the second defendant. His testimony was that he was in a business relationship with Ms Upindi and in particular a 50% shareholder of the close corporation until 2017 when Ms Upindi resigned and he became the sole member.

[19] It was his testimony that it was the second defendant that concluded the lease agreement and at the time, the second defendant was represented by himself and Ms Upindi.

[20] According to Mr Israel, there was no common mistake in respect of the description of the tenant. According to him, the intention throughout was to have 'Corner Pharmacy CC' who was the second defendant on the lease agreement as the tenant.

[21] In respect of the registration number of the plaintiff that is on the lease agreement, he attributed it to a certain Ndina, with whom Ms Upindi sits at the office, who will be able to explain how that number was inserted in the form.

¹ Page 40 of the record.

[22] Mr Israel identified P.O. Box 91576, Windhoek, as a second postal address of the second defendant. Counsel for the plaintiff took issue that Mr Israel did not divulge this information in his witness statement.

[23] Mr Israel also contended that he branded the name Corner Pharmacy and that he merely changed it to Corner Pharm and Medical CC as he is not a pharmacist and he wants to trade in medical supplies. Counsel for the defense pointed out to him that Ms Upindi's version on the name change was that she requested Mr Israel to effect the name change and that Mr Israel did not dispute that in cross examination.

[24] Counsel for the plaintiff also put to Mr Israel that it is improbable that the second defendant can be the tenant as clause 11.1 of the lease agreement contains a restriction in that only a pharmacy can be operated on the premises, whereas the second defendant is not registered as a pharmacy. The witness conceded that the second defendant is not registered as a pharmacy but stated that he does not want to operate a pharmacy but it's the leased premises that he wants.

[25] In cross-examination, Mr Israel denied that the plaintiff paid the deposit, the rent, and other expenses and asserted that it was paid from an account of Corner Pharmacy CC. He was reminded that this information is not contained in his witness statement nor was it disputed when Ms Upindi testified about it.

[26] Counsel also sought an answer as to why the lease recorded both Ms Upindi and Mr Israel as owners of the business, although at the time he was not a member of the plaintiff or the second defendant. In his reply, he referred to an exit agreement entered into between him and Ms Upindi wherein it was agreed that the plaintiff exits the close corporation and that he stays because of the premises. Mr Israel volunteered that Mr Kotze does not know that the he was not a member of the close corporation as they went to sign as owners of the close corporation.²

² Page 73 of the record.

[27] Counsel for the plaintiff put it to Mr Israel that the lease agreement incorrectly indicates Corner Pharmacy CC because of an error that was occasioned by the letters “CC” added in the application. Mr Israel did not budge on this and reiterated that there was no mistake as Corner Pharmacy CC owned by Ebba and Richard signed the agreement.³

[28] Mr Israel also testified that after they signed the lease agreement, things did not work out. Ms Upindi decided to give him 100% membership interest of the second defendant and went to the north.⁴ Again, he was reminded that none of this information was in his witness statement.

The law and application to facts

[29] The remedy of rectification is available where a written contract does not accurately record the contract that the parties agreed on, subject to certain requirements that must be proven by the party that seeks rectification.

[30] The author Harms⁵ summarizes the principles of rectification of a contract as follows:

- a) An agreement between the parties which was reduced to writing;
- b) That the written agreement did not reflect the common intention of the parties correctly;
- c) An intention by both parties to reduce the agreement to writing;
- d) A mistake in the drafting of the document ;
- e) The wording of the agreement as rectified.

[31] The overall onus was upon the plaintiff to satisfy the court of these requirements in order to succeed in its claim.

³ Page 75-76 of record.

⁴ Page 77 of record.

⁵ LTC Harms, Amler's Precedents of Pleadings 7th ed at 336 – 337.

[32] Although there were aspects that were not contradicted by the second defendant, it does not follow that uncontested evidence necessarily have to be accepted by the court. Whether the evidence is accepted by the court or not depends entirely on the quality thereof, as there may well aspects that renders the evidence problematic, in which case it will not pass muster. This principle was stated in *Siffman v Kriel*⁶ as follows:

‘It does not follow, because evidence is not contradicted, that therefore it is true. Otherwise the court, in cases where the defendant is in default, would be bound to accept any evidence the plaintiff might tender. The story told by the person on whom the onus rests may be so improbable as not to discharge it.’

[33] It was common cause that there is a written lease agreement, admitted and marked as exhibit ‘G’ and that the parties intended to have a written agreement.

[34] It was however the other requirements regarding common intention of the parties and mistake that turned out to be the main source of contention in this matter and I turn to that.

[35] In order for a litigant to be successful in its claim for rectification, such litigant must prove that because of a common mistake, the written agreement does not reflect the common intention of the parties. In *Levin v Zoutendijk*,⁷ J Coetzee stated this principle at 1148A:

‘The very cause of action for rectification postulates that the parties’ agreement or common intention was clear and unmistakable on those aspects in respect whereof the writing is to be reformed.’

[36] Regarding the intent of the parties, counsel for the plaintiff submitted that since the first defendant did not defend the action and Ms Upindi was the sole member of both the plaintiff and second defendant, the court can only consider her evidence in

⁶ 1909 TS 538.

⁷ 1979 (3) SA 1145 (W)

regard to the intention of the parties in respect of who the tenant is. Reliance was placed on the matter of *Futeni Collections (Pty) Ltd v De Duine (Pty) Ltd*.⁸

[37] The Futeni matter is distinguishable from the present matter since the plaintiff in the case before court subpoenaed a witness who was a representative of the first defendant and thus, the court heard evidence from the perspective of the lessor/landlord that cannot be ignored in the weighing of issues before court.

[38] Counsel for the plaintiff argued that the lease agreement did not accurately convey the common intention of the parties with regard to who the tenant is and that the plaintiff's version is more probable on the basis that the intention was to conduct a pharmacy which can only be done by Ms Upindi as the registered pharmacist, that the plaintiff occupied the premises since 2014 and that only Ms Upindi as sole member of the plaintiff and second defendant, can convey the intention of the plaintiff and second defendant.

[39] I do not accept this argument for the following reasons.

[40] The court heard direct evidence regarding the intention of the parties from the other parties who signed the agreement, which evidence creates a different impression than the one that the plaintiff subscribes to.

[41] Although the case for the second defendant was not a model of clarity and completeness, Mr Israel's evidence that there was no common mistake in respect of the tenant and that the intention throughout was to have 'Corner Pharmacy CC' as the tenant was not refuted.

[42] Furthermore, Mr Kotze, who represented the landlord and signed the lease agreement in that capacity, testified during cross-examination that he regards Corner Pharmacy as the tenant. He explained that the lease agreement was concluded on the basis of the application form that was completed and forwarded by Mr Israel. He

⁸ 2015 (3) NR 829 (HC).

testified that 'I signed the final lease agreement, it was signed by me after it was also signed by the two members, Ebba and Richard.'⁹ This answer does not indicate that that he regarded Eusa Pharmaceuticals CC, with Ms Ebba Upindi as the sole member, as the tenant or that there was any mistake perpetuated in the drafting of the lease agreement.

[43] It is also telling that the plaintiff opted not to raise critical components of its case, namely the common intention of the parties as to who the tenant is and that the written lease agreement contains a mistake as Mr Kotze testified.

[44] I disagree with the submission by counsel for the plaintiff that Ms Upindi's evidence was clear as to who the tenant was. In my view, her evidence does not depict a cogent story.

[45] It is significant that Ms Upindi, who claims that her business is the tenant, did not even recall where the lease was signed, though the document shows that she and Mr Israel signed on the same date.

[46] According to exhibits 'A', 'K', and 'L', the postal address of the plaintiff's business is P.O. Box 1060, Oshakati. This is opposed to the postal address for the tenant on the agreement which was indicated as P.O. Box 91576, Windhoek. Ms Upindi was unable to recognize this postal address at all, whereas Mr Israel identified it as one of the second defendant's postal addresses. It begs the question, if the plaintiff was the tenant and had its own postal address, why did Ms Upindi not raise alarm about this 'unknown' postal address in the contract.

[47] It was also Ms Upindi's testimony that the VAT number as depicted on exhibit 'F' as 588295-01-01 is that of the plaintiff, with the correction that the last digits should be a '1' at the end. It appears that she does not know the VAT number of the plaintiff as on exhibit 'K' the VAT registration number allocated to Eusa Pharmaceuticals CC is indicated as 5881 295 015.

⁹ Page 39 of the record.

[48] Furthermore, despite Ms Upindi being the sole member of the plaintiff, she testified that when the lease was concluded, the plaintiff was represented by both Ms Upindi and Mr Israel. This was also borne out by their respective signatures in the spaces allocated for the tenant. It amounts to an internal contradiction in her evidence, as the plaintiff's founding statement, exhibit 'A', shows her to be the sole member of the plaintiff and she knew that. When she was pressed as to in what capacity did Mr Israel applied on plaintiffs behalf, her answer was not clear and convincing as follows:¹⁰

'As a friend, I cannot really remember, but to tell you the truth I only saw this application for business when this dispute came about but I remember furnishing him or him calling me somewhere and I furnished him with the registration number and the VAT number.'

[49] Finally, the plaintiff instituted action in the name of Eusa Pharmaceuticals CC t/a Corner Pharmacy. According to exhibit 'A' being the founding statement of the plaintiff, the business is merely registered as 'Eusa Pharmaceuticals CC'. This document represents the official registration record and it requires the full name of the business. Despite that, it does not reflect the trade name 'trading as Corner Pharmacy' that the plaintiff contends to have. The same omission is evident from exhibit 'K' which is the Notification of Registration for Value Added Tax Purposes issued by the Ministry of Finance and exhibit 'L', which is the a Certificate of Good Standing that was issued as recent as 16 November 2017 by the Ministry of Finance. Thus, there is no proof before the court that the business in respect of which the plaintiff is seeking rectification to be reflected as tenant, is duly registered at the appropriate authority.

[50] In considering the evidence regarding the requirements for rectification, it is my view that the plaintiff has not fulfilled the yardstick as set out in *Netherlands Bank of South Africa v Stern NO and Another*¹¹ at 672C-F:

¹⁰ Page 26 of the record.

¹¹ 1955 (1) SA 667 (W).

'But the party so seeking to rely upon a right to claim rectification must establish facts to justify rectification in its clearest and most satisfactory manner...'

[51] In conclusion, the plaintiff has failed to present clear evidence to satisfy the court that that the common intention of the parties to the lease was that the tenant be Eusa Pharmaceuticals CC trading as Corner Pharmacy and that a mistake occurred in the name of the lease agreement in respect of the name of the tenant.

[52] In the result the order is as follows:

The plaintiffs claim is dismissed with costs.

C CLAASEN
ACTING JUDGE

APPEARANCES:

PLAINTIFF: A van Vuuren
On instructions of Fisher, Quarmby and Pfeifer

DEFENDANT: A Jason
Shikongo Law Chambers