

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

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| Case Title: | Case No: |
| The Town Council of Rehoboth | HC-MD-CIV-ACT-OTH-2020/01403 |
| Plaintiff | Division of Court: |
| | Main Division |
| and | Heard on: |
| | 25 February 2022 |
| Willie Isaskar Swartz | 1 st Defendant |
| Retirement Fund for Local Authorities | |
| and Utility Services in Namibia | 2 nd Defendant |
| Minister of Urban and | |
| Rural Development | 3 rd Defendant |
| Heard before: | Delivered on: |
| Honourable Mr. Justice Usiku, J | 18 March 2022 |
| Neutral citation: <i>The Town Council of Rehoboth v Swartz & 2 Others</i> (HC-MD-CIV-ACT-OTH-2020/01403) [2022] NAHCMD 126 (18 March 2022) | |
| Order: | |
| 1. The exception is upheld. | |
| 2. The plaintiff's particulars of claim are set aside and the plaintiff is granted leave to amend its particulars of claim, if so advised, within 15 days of this order. | |
| 3. The plaintiff is ordered to pay the first defendant's costs occasioned by the | |

exception.

4. The matter is postponed to 27 April 2022 at 15:15 for additional case planning conference.
5. The parties shall file a joint case plan on or before 20 April 2022.

Reasons for order:

USIKU, J:

Introduction

[1] This is an exception taken by the first defendant against the plaintiff's particulars of claim, on the basis that it does not disclose a cause of action.

[2] In the main action, the plaintiff issued summons against the first defendant, (Willie Isaskar Swartz), the second defendant, (Retirement Fund For Local Authorities and Utility Services in Namibia) and the third defendant (the Minister of Urban and Rural Development).

[3] The second and third defendants are, according to the particulars of claim, cited for convenience, as far as they may have interest in the matter. The second and third defendants did not enter appearance to defend.

[4] In the particulars of claim, the plaintiff alleges that the first defendant was employed by the plaintiff on 20 June 2011 and tendered resignation on 24 February 2015. Subsequent to the resignation, the first defendant's position was advertised on 02 March 2015.

[5] On 20 March 2015, the first defendant withdrew his resignation. On 26 May 2015 the plaintiff resolved to accept the resignation and rejected the withdrawal of the resignation. On 14 July 2015 the first defendant lodged a dispute of unfair dismissal with the office of the Labour Commissioner.

[6] On 14 December 2015, newly elected councillors of the plaintiff resolved to reinstate the first defendant in the position he previously occupied and resolved, among other things, to pay the first defendant a total amount of N\$325 142.33 representing the amount the first defendant would have earned had he not resigned. In addition, a total amount of N\$1 271 506.23 was paid by the plaintiff to the first defendant, during the period between January 2016 to March 2018, representing earnings and other entitlements pertaining to first defendant's position of

employment.

[7] According to the particulars of claim, the Minister of Urban and Rural Development instituted an investigation, after which the plaintiff's councillors were advised that their decision to reinstate the first defendant was unlawful and must be reversed. The councillors refused and/or neglected to reverse their decision. The Minister suspended the councillors, in terms of s 92 of the Local Authorities Act of 1992 and appointed Ms Nathalia Goagoses as Ministerial Representative to take over the affairs and management of the plaintiff.

[8] In March 2018, the plaintiff resolved to rescind its resolution of 14 December 2015 which reinstated the first defendant.

[9] The plaintiff alleges that, the decision to reinstate the first defendant is void by virtue of the provisions of the *Local Authorities Act*, 1992 ("the Act") and the *Standing Rules* in connection with the convening and holding of meetings of the Local Authorities Councils ("the Standing Rules"), in that:

- (a) the council was in recess, as contemplated by s 13(1) of the Act¹, at the time the meeting to reinstate, was held, and ,
- (b) the Chief Executive Officer of the plaintiff failed to cause notice of the meeting to be furnished to all council members with at least 72 hours' notice, as prescribed by rule 2 of the Standing Rules.

[10] The plaintiff alleges that the first defendant was unlawfully and unjustifiably enriched at the expense of the plaintiff, whilst the plaintiff was impoverished, in the amount of N\$1 596 603.51.

[11] The plaintiff, therefore, prays for an order in the following terms:

- (a) payment in the amount of N\$1 596 603.51;
- (b) interest on the aforesaid amount, at the rate of 20 % p.a., calculated from the date of judgment to the date of final payment;
- (c) an order directing the second defendant to, in terms of s37D (b)(ii) of the Pension Funds Act 1956, deduct N\$1 596 603. 51, from the pension benefits of the first defendant and pay such amount over to the plaintiff within fifteen days of the judgment, and;
- (d) Costs of suit.

¹ Section 13(1) deals with vacation of office by members of local authority councils and filling of vacancies. It has no relevance for the present purposes.

The exception

[12] At the outset, it is necessary to deal with a point in *limine* raised by the plaintiff. The plaintiff argues that the first defendant did not comply with the provisions of rule 32(9) and (10), in that he did not engage the second and third defendants prior to the bringing of the exception.

[13] The plaintiff, however, acknowledged that the first defendant has engaged the plaintiff in terms of rule 32 (9) and (10). The plaintiff, therefore, contended that the exception must fail, for the alleged non-compliance.

[14] It is common cause that the second and third defendants have not entered appearance to defend. The second and third defendants have not complied with the provisions of rule 14 of the rules of court. It is also common cause that the first defendant did not engage the second and third defendants in terms of rule 32.

[15] In my opinion, it is not necessary, in the circumstances of the present case, for the first defendant to comply with rule 32, in regard to the second and third defendants, as they have not entered appearance to defend. For the foregoing reason, the plaintiff's point in *limine* has no merit and is dismissed.

[16] The first defendant raised two grounds of exception.

First ground of exception

[17] In the first ground of exception, the first defendant states that, in regard to the first category of payments, (i.e. N\$325 142.33), made to the first defendant, as a result of his reinstatement, the plaintiff's claim does not disclose a cause of action, because, in terms of the *Turquand rule*, it is bad in law to allege that first defendant's reinstatement was void because the Act and the Standing Rules were not complied with, without alleging that the first defendant was a party to the illegality.

[18] In response, the plaintiff contends that it is not necessary to make a specific allegation that the first defendant was aware that plaintiff's internal procedure were not followed, as the *onus* rests on the defendant, being the party raising that defence.

[19] In terms of the *Turquand rule*, an outsider who enters into a contract with a company in good faith, is entitled to assume that the internal requirements and procedures of the company, have been complied with.² As a result, the company will be bound by the contract even if the internal requirements and procedures were not followed. However, the outsider cannot claim under the *Turquand rule*, if he/she was aware that the internal requirements and procedures have not been complied with. The effect of the *Turquand rule* is that an outsider entering into a contract with a company is not required to ascertain whether the company's internal requirements have been met.

[20] An exception is a legal objection to a pleading. The object is to cut the proceedings short and to weed out cases without legal merit.

[21] For the purposes of the exception, all allegations in the particulars of claim are taken as true, and where the exception is taken on the ground that the particulars of claim do not disclose a cause of action, it is deemed that the excipient asserts that, even with such truth, the particulars of claim do not disclose a cause of action.

[22] In the present matter, the particulars of claim allege that the reinstatement of the first defendant was void because the Chief Executive Officer of the plaintiff failed to cause the requisite notice of the meeting, at which the reinstatement was resolved, to be furnished to all council members with at least 72 hours notice. In my view, the alleged failure by the Chief Executive Officer is an act regarding internal management of the plaintiff. Absent an allegation that the first defendant was aware of, or somehow complicit in, the alleged irregularity, I am of the opinion that the particulars of claim do not disclose a cause of action against the first defendant. I am, therefore, of the opinion that the first ground of exception stands to be upheld.

[23] In regard to the second ground of exception, the first defendant argues that, in respect to the second category of payments (i.e. N\$1 271 506.23), the plaintiff acknowledges that an employment relationship existed between it and the first defendant. The plaintiff further acknowledges that the first defendant rendered services to the plaintiff during the period between January 2016 and March 2018 and was remunerated for the services rendered. The first defendant, therefore, submits that, if he received payment in return for the services rendered, there can be no unjustifiable enrichment, and the plaintiff's particulars of claim do not disclose a cause of action, for that reason.

² *City of Tswane Metropolitan Municipality v RPM Bricks* 2008 (3) SA 1 at p 5 H-I.

[24] In response, the plaintiff contends that the first defendant appears to raise a defence that he was entitled to payment as an employee. The plaintiff, therefore, submits that the first defendant should raise that defence in his plea and not in the form of an exception.

[25] In order to succeed with a claim based on unjustifiable enrichment, the plaintiff is required to allege and prove four requirements, namely:

- (a) the defendant was enriched,
- (b) the plaintiff was impoverished,
- (c) the defendant's enrichment was at the expense of the plaintiff, and,
- (d) the defendant's enrichment must have been unjustified (which means that it must be without a legal cause).³

[26] As far as the last requirement is concerned, a plaintiff may succeed only if the enrichment was without a legal cause. Where the particulars of claim allege that payment was made to the defendant in return for services rendered, then in my opinion, the particulars of claim do not disclose a cause of action against the defendant. That is because, such 'enrichment' cannot be said to be without legal cause. For the reason foregoing, I am of the view that the first defendant's second ground of exception also stands to be upheld.

[27] In conclusion, the exception raised by the first defendant is to be upheld. Insofar as the costs are concerned, I am of the view that the costs must follow the result.

[28] Where an exception on the basis that the pleadings do not disclose a cause of action is upheld, the principle is that, the court should set aside the pleading.⁴ I shall therefore make an order to that effect.

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

1. The exception is upheld.
2. The plaintiff's particulars of claim are set aside and the plaintiff is granted leave to amend its particulars of claim, if so advised, within 15 days of this order.
3. The plaintiff is ordered to pay the first defendant's costs occasioned by the

³ *Bowman De Wet Du Plessis NNO and Others v Fidelity Bank Ltd.* 1997 (2) SA 35 at 43 D-F.

⁴ *Total Namibia (Pty) Ltd v Van der Merwe* 1998 NR 176 at 180C-D.

exception.

4. The matter is postponed to 27 April 2022 at 15:15 for additional case planning conference.
5. The parties shall file a joint case plan on or before 20 April 2022.

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| Judge's signature | Note to the parties: |
| B Usiku Judge | Not applicable |
| Counsel: | |
| Plaintiff: | First Defendant: |
| Ileni Gebhardt Of Ileni Gebhardt & Co. Inc. Windhoek | Rachel Mondo Of Nixon Marcus Public Law Office Windhoek |
| | Second Defendant: |
| | Charles Visser Lorentzangula Inc. |
| | Third Defendant: |
| | Mkhululi Khupe Of Office of the Government Attorney Windhoek |