

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING

Case No: HC-MD-CIV-ACT-OTH-2021/03751

In the matter between:

TIRONEN KAULUMA

PLAINTIFF

and

NUSKA TECHNOLOGIES (PTY) LTD

DEFENDANT

Neutral Citation: *Kauluma v Nuska Technologies (Pty) Ltd* (HC-MD-CIV-ACT-OTH-2021/03751) [2023] 244 NAHCMD (10 May 2023)

Coram: MASUKU J

Heard: 3 April 2023

Delivered: 10 May 2023

Flynote: Civil Procedure – Special Plea of lack of *locus standi in judicio* – Whether such a plea must be raised via an exception or special plea – Principles applicable to interpretation of documents, including written contracts – Cession and its effects on rights and claims.

Summary: The plaintiff approached the court seeking payment of N\$201 487.97, interest thereon and costs. The plaintiff claims that he entered into an agreement with the defendant a Mr Cohen for the sale of shares in the defendant. In terms of an earlier agreement, the defendant bought vehicles for the plaintiff and one Mr Walenga, the then plaintiff's co-director. The vehicles were procured from South Africa and as such, the defendant was entitled to a Value Added Tax (VAT) refund. It was subsequently agreed that the plaintiff should pay the amount of VAT, being N\$201 487.97 and that the defendant would reimburse him. The plaintiff and his co-director thereafter sold all their interests and shares in the defendant, to a Mr Cohen, for a consideration. A written agreement, to this effect was signed by the parties on 16 October 2020. This included the sellers ceding all their rights and interests in the defendant to the said Mr Cohen. They also gave a warranty that the defendant has no commitments to the directors or former directors and that there are no fees or other remuneration due to them or to any officers of the said company.

Held: That although it is permissible to bring a plea of lack of *locus standi* by way of an exception, there is no law against a defendant raising that plea as a special plea. In that event, a defendant makes an election, which the court may not overturn.

Held that: In interpreting statutes and contracts, the court must be mindful that interpretation, is in essence attributing meaning to the words employed; that, courts should approach construction of words used in the light of the document as a whole under the circumstances attendant to its coming into existence; that interpretation is a matter of law and is thus for the court and not witnesses; that effect 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 purpose to which it was directed and that interpretation is objective and not subjective and that a sensible meaning must be preferred to one that is not sensible, unbusinesslike or which undermines the purpose of the document.

Held further that: The plaintiff, by agreement, ceded all rights and interests together with all claims when he sold the shares in the defendant to the purchaser and as such, he no longer has the right in law, to claim the VAT refund.

Special plea upheld with costs.

ORDER

1. The defendant's plea of lack of *locus standi in judicio* by the plaintiff, is hereby upheld.
2. The plaintiff is ordered to pay the costs of the special plea, consequent upon the employment of one instructing and one instructed legal practitioner.
3. The matter is removed from the roll and is regarded as finalised.

RULING ON SPECIAL PLEA

MASUKU J;

Introduction

[1] What is the bone of contention in this matter? Simply put, the remit of this court presently, is to determine the legal question, raised as a special plea, whether the plaintiff, in this matter, has the necessary standing in law (*locus standi in judicio*), to institute the current proceedings against the defendant.

The parties

[2] The plaintiff is Mr Tironen Kauluma, an adult Namibian male. He resides in Erospark, Windhoek. The defendant is Nuska Technologies (Pty)

Ltd, a company duly incorporated and registered in terms of the company laws of this Republic. Its place of business is situate at No.3 Bauer Street, Klein Windhoek.

Representation

[3] The plaintiff was represented by Mr Strydom, whereas the defendant was represented by Ms Lewies. The court records its indebtedness to both counsel for the assistance they dutifully rendered in the determination of this matter. Whatever the outcome, will in no way be a reflection on counsel who appeared in court for the hearing.

Background

[4] Briefly stated, the facts that give rise to the present dispute appear to be largely common cause. It may be the interpretation placed on key issues and documents that may be the subject of disparate legal interpretations, which may affect the outcome. This is particularly so because the parties, in line with the provisions of rule 63, drafted an agreed statement of facts, which delineated the factual matrix, on which this dispute is to be settled. I proceed to state the material facts below.

[5] The plaintiff sued the defendant for payment of an amount of N\$201 487.97 and interest thereon and costs. It was averred that the amount in question was due, owing and payable by the defendant to the plaintiff as a refund to the latter. This was due to the latter having paid the said amount to the VAT Administrator in South Africa, which amount was paid to the defendant by the VAT Administrator into the defendant's bank account.

[6] The plaintiff avers that the defendant is not entitled to the said amount as it was not due nor owing to the defendant. It was the plaintiff's averral that the said amount was personally paid by him and despite demand, the defendant refused to pay the said amount over to him, hence the present claim.

[7] In response, the defendant, as it was entitled to, defended the claim and filed a special plea and further proceeded to plead over on the merits. For present purposes, it is unnecessary for the court, to consider the plea on the merits. The court's remit presently, as stated earlier, is to determine the sustainability or otherwise of the special plea.

[8] In its special plea, the defendant pleaded that on 16 October 2020, the plaintiff, acting in person and a Mr Doron Cohen, entered into written sale of equity agreement, 'the agreement' in terms of which the plaintiff ceded, on an out and out basis, all his rights, title and interest in and to all claims, to the purchaser, Mr Cohen. It was accordingly averred that the plaintiff does not have the necessary standing, in law, to institute the present proceedings. The defendant accordingly prayed that the claim be dismissed with costs, consequent upon the employment of one instructing and one instructed legal practitioner.

[9] The parties thereupon drafted a statement of agreed facts in terms of rule 63. In terms of the said statement, it appears that the disputes, if any, are very limited and will probably turn on the interpretation to be accorded to the agreement. In summary, the following are the agreed facts and which will apply in the ultimate determination of the matter.

(a) The plaintiff was a 50% shareholder of the defendant. The latter had previously traded under the name C-Sixty Investment (Pty) Ltd. The defendant entered into an instalment sale agreement with Bank Windhoek Ltd. In pursuance of that agreement, the defendant purchased two second-hand motor vehicles, which were donated to the two directors of the plaintiff at the material time and of which the plaintiff was one.

(b) The vehicles were procured from Decar Isle Motors, in Sandton, South Africa. The amount paid for the vehicles was N\$1 655 978.31, including Value Added Tax, ('VAT'). The motor vehicle donated to the plaintiff, was a 2017 BMW X5M Sport Utility Vehicle and it was duly registered in his name. In terms of the agreement, the plaintiff was liable to pay for VAT in relation to the

vehicle in question. Furthermore, the plaintiff was entitled to claim the VAT refund on behalf and in favour of the defendant.

(c) As it was entitled to, the defendant claimed and received a VAT refund from the VAT Refund Administrator (Pty) Ltd. The defendant, in this connection, received payment in the amount of N\$201 487.97 and this was on 6 July 2021. On 16 October 2020, the plaintiff, acting in person, and Mr John Walenga, also acting in person and as sellers, of the one part, and Mr Dorn Cohen, as the purchaser, of the other part, and who also acted in person, entered into a written sale agreement of equity, ('the agreement').

(d) The salient terms of the agreement included the following:

- (i) 'Claims' was defined in the agreement, to mean all amounts of any nature whatsoever owing by the Company to the Sellers on the Closing Date from any cause whatsoever, including by way of loan account or otherwise or in delict, actual or contingent, including interest accrued thereon (clause 2.2.1);
- (ii) 'Completion' is defined to mean completion of the Transaction, in accordance with the provisions of the Sale Equity Agreement (clause 2.2.5);
- (iii) 'Sale Equity' is defined to mean collectively the Sale Shares Agreement and Claims (clause 2.2.15);
- (iv) 'Sale Shares' is defined to mean the total shares in the defendant as would constitute 100% of the entire share capital of the Company (clause 2.2.14);
- (v) The Sellers jointly sell the Sale Shares and cede (on an out-and-out basis) their rights, title and interest in and to the Claims as one indivisible transaction to the purchaser, who would purchase and accept the cession of the Sale Shares and the Sale Claims (clause 4.1);
- (vi) Notwithstanding any provision to the contrary in the Sale of Equity Agreement, the sale of Equity takes effect on the Effective Date/Signature and ownership of and all risk in, and benefit attaching

to the Sale Equity, would, subject to the payment of the Purchase Consideration (as defined) in full within 10 working days from the effective date, be deemed to have passed to the Purchaser on the Effective Date/Signature Date (clause 4.2) and

- (vii) The Sale Equity is sold together with all rights of any nature attached or accruing to them on or after the Completion (including the right to receive all dividends and distributions declared, paid or made by the Company on or after the Closing Date (as defined), but at all times subject to the remaining provisions of the Sale Equity Agreement (clause 4.3).
- (viii) It is recorded that the purchaser complied with all the obligations in terms of the agreement as defined therein.

[10] The legal question that arises, is whether, in view of the agreement entered into by the parties, the plaintiff does have *locus standi in judicio* to institute these proceedings. This question arises in particular, when regard is had to certain provisions quoted above and which appear to vest ownership of all liabilities and benefits in the defendant, from a specified date.

The defendant's contentions

[11] Because this is a special plea, it must be remembered that the defendant is in a sense, the *dominis litis* in this stage of the proceedings. That being the case, it follows that the onus is on the defendant to show that its special plea must be sustained.

[12] The defendant started off its argument on making two propositions of law. First, that the plaintiff does not have a right in law to claim the payment in question since the plaintiff claimed the VAT refund for and on behalf and in favour of the defendant. If there is any right to claim a refund at all, it accrues to the defendant and not the plaintiff.

[13] The second proposition is that if the court finds that the plaintiff has a right to claim payment of the VAT refund from the defendant, that right, which

forms the subject matter of this cause of action attaches to the plaintiff's shareholding in the defendant and this was specifically excluded from claims by clause 2.2.1 of the agreement. As such, so contends the defendant, the plaintiff does not have the requisite right or standing in law to bring the proceedings and must fail in his quest to claim the payment in question.

[14] Arguing, *au contraire*, Mr Strydom submitted that the plaintiff does have *locus standi in judicio*, to institute the present claim. It was his contention that the plaintiff has a direct and substantial interest, as opposed to a mere financial interest in the matter. It was submitted in this regard that where proceedings determine the parties' rights and obligations vis-à-vis each other, the parties will have a direct and substantial interest in the outcome of the proceedings.

[15] It was Mr Strydom's further argument, which does not appear on the heads of argument, as it appears that he was engaged very late in the day, to argue the matter on papers and arguments, which had been filed, that the defendant adopted a wrong approach in dealing with this matter. It was his contention that *locus standi* is both procedural and a matter of substantive law. Relying on *Ahmadiyya Najuman Ishaati-Islam Lahore (South Africa) v Muslim Judicial Council (Cape) and Others*,¹ he argued that the issue of lack of *locus standi*, must be raised not as a special plea, but as an exception. This, he argued must be so as invoking the former may serve to bring action proceedings to an abrupt end. The court was urged to, at least afford the plaintiff an opportunity to amend its particulars of claim.

[16] In reply, Ms Lewies argued that the special plea is good. It was her contention that the defendant had an election to make, as to whether to approach this matter by way of an exception or a special plea and it, in exercise of its election, chose to approach the matter by raising a special plea. She argued that the court must have no regard for the issue of an

¹ *Ahmadiyya Najuman Ishaati-Islam Lahore (South Africa) v Muslim Judicial Council (Cape) and Others* 1983 (4) SA 855.

exception because it had not been properly raised in the papers but came as an appendage, in oral argument.

Determination

[17] In determining this matter, and considering that the determination of the matter in dispute, may turn on the interpretation to be accorded certain provisions of the agreement, it is appropriate for the court to remind itself of the cardinal principles applicable to the interpretation of contracts and agreements.

[18] The leading case in our jurisdiction is *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC*.² At para 19, the Supreme Court, per O'Regan AJA made an exposition of the principles to be applied in the interpretation of agreements. I find it unnecessary, for present purposes, to quote from the judgment. It would suffice, if I merely extrapolate the important principles adumbrated in the judgment. I proceed to do so below.

[19] First, interpretation is the attributing of meaning to the words employed in a document, legislation or some other statutory instrument, or contract. This is done, having regard to the context, by reading the particular provision implicated, in the light of the document, as a whole, under circumstances attendant upon its coming into existence. Second, it was stated that Namibian courts should approach the question of construction of language employed on the basis that context, is always relevant. This is so, regardless of whether or not the language employed, is ambiguous or not.

[20] Third, the court stated that interpretation is a matter of law and not one of fact. That being the case, the issue of interpretation, is one reserved for the court and not for witnesses. Fourth, regardless of the nature of a document, consideration must be given to language employed in the light of ordinary rules of grammar and syntax; the context in which the provision appears; the

² *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC* 2015 (3) NR 733 (SC).

apparent purpose to which it is directed and the material known to those responsible for its production.

[21] Fifth, the interpretation process, is not objective and not subjective. Sixth, a sensible meaning is one to be preferred than one that leads to insensible or un-businesslike results or which undermines the apparent purpose of a document. Sixth, interpretation is no longer a process that appears in stages but is essentially one unitary exercise. Last, but by no means least, the extent that evidence may be admissible to contextualise the document is establishing its factual matrix and purpose (because context is everything). Its factual matrix and purpose for identification, must be used as conservatively as possible.

[22] I must mention that Ms Lewies, as recorded earlier, made two propositions of law, which she submitted, should, if accepted, see the claim thrown out of the window, as it were. I am of the considered view that this is an appropriate case in which I should deal with the second proposition, namely, that I will assume, without necessarily holding as a matter of law, that the plaintiff had a right to claim the VAT refund.

[23] I now proceed to deal with the second proposition, namely, whether the plaintiff's claim for the VAT refund, was not excluded by the provisions of the agreement. In answering the question, it is necessary that regard must be had to the language employed in the relevant parts of the agreement.

[24] I commence the exercise with clause 2.2.1. It records, and I paraphrase, that 'claims' means all amounts of money of any nature whatsoever owing by the defendant to the sellers on the closing date, arising from whatsoever cause, including interest accrued thereon. Clause 4.2 reads that 'Notwithstanding any provision to the contrary in the Sale Equity Agreement, the sale Equity takes effect on the Effective / Signature Date and ownership of and risk in, and benefit attaching to the Sale Equity, would subject to the payment of the Purchase Consideration (as defined) in full

within 10 working days from the effective date, be deemed to have passed to the Purchaser on the Effective Date/Signature Date.

[25] It is clear, from the agreement, that claims refer to those arising prior to the closing date, ie the signature of the agreement, namely 16 October 2020. In the instant case, it is clear that the plaintiff's claim is one that arises after the date of signature of the agreement. In terms of clause 4.2, it is stated that any claim or benefit, arising from the contract will, 10 days after the signature of the agreement or the effective date, be deemed to have passed to the purchaser.

[26] There is, furthermore, a warranty and declaration from the plaintiff and Mr Walenga contained in clause 7.1. I intend to quote the relevant parts thereof below:

'7.1 The Sellers hereby declare and warrant in favour of the Purchaser as at the signature date and on the closing date:

...

7.1.11 the business has been conducted in the usual course, in accordance with the way in which it was conducted in respect of the financial year recorded in the 2020 statements, and no transactions or obligations were incurred, undertaken or committed to be incurred or undertaken, other than in the Ordinary Course of Business.

...

7.1.14 the company is not party to any agreement whatsoever other than the contracts and is not in breach of any of the contracts.

...

7.1.18 the company has no commitments to directors or former directors or officers and there are no fees or other remuneration, pensions, or leave outstanding to any director or officer.'

[27] When proper regard is had to the provisions quoted above, certain matters become apparent. First, there was a warranty given to the purchaser that the defendant has no commitments, fees, or other remuneration due to the former directors. This means that if there was any amount owing to these

directors by the defendant, that would have been specifically mentioned and the purchaser would have known from the date of signature of the agreement of the nature and extent of these commitments. The amount claimed was not mentioned. If anything, the purchaser was informed there is no amount outstanding to the former directors.

[28] Second, clause 4.2, referred to above, makes it plain that as at the effective date of the agreement, all risks and benefits attaching to the agreement, would, subject to the payment of the consideration, be deemed to have passed to the purchaser on the effective date or signature of the agreement. There is no dispute that the purchaser paid the consideration in line with the agreement. There is also no dispute about the fact that the claim now made by the plaintiff, firstly, goes against the warranty given in clause 7.1.18, quoted above.

[29] Moreover, the interpretation to be accorded to clause 2.2.1 dealing with 'claims', as defined in the agreement, is that it refers to all amounts of any nature whatsoever, owing by the defendant to the sellers on the closing date and arising from whatsoever cause, whether a loan account or otherwise, whether sounding in contract or delict, actual or contingent, including interest accrued thereon. This means it excludes claims that arise after the closing date of the agreement. As such, it appears to me that the plaintiff is not entitled and thus has no right or standing in law, to claim the amount in question from the defendant. He must be held to the contract that he signed.

[30] It must be pointed out further that in terms of the agreement, clause 4.1 and 4.3, in particular, there was a cession of rights, title and interest amongst the contractants. The said clauses read as follows:

'4.1 Subject to 4.2, the Sellers hereby jointly sell the Sale Shares and cedes (*sic*) (on an out-and-out basis) their rights, title and interest in and to the Claims as one indivisible transaction to the Purchaser, who hereby purchases and accepts the cession of the Sale Shares and Sale Claims. . .

4.3 The Sale Equity is sold together with all rights of any nature attached or accruing to them on or after Completion (including the right to receive all dividends and distributions declared, paid or made by the Company on or after the Closing Date, but at all times subject to the remaining provisions of this Agreement.'

[31] When one reads these clauses, it becomes as clear as noonday that the sellers ceded all their title and interest in and to all claims and this was accepted by the purchaser. It becomes clear, from clause 4.3 that the sale of shares was accompanied by the transfer, so to speak, of all rights of any nature, attached or accruing to the shares sold. This, to my mind, suggests that the defendant became entitled to any rights and benefits that would have otherwise accrued to the purchasers after the signature date, being 16 October 2020.

[32] I am of the considered view, in the premises, that any rights that the plaintiff may have had to claim a VAT refund in the ordinary course, was ceded to the purchaser on the signature of the agreement. The concomitant result is that the plaintiff, by virtue of the cession agreement, amongst other things, no longer has any *locus standi in judicio*, to file the claim for VAT refund.

[33] The court was helpfully referred to *Standard General Insurance Co Ltd v SA Barke CC*.³ In that case, the court dealt with the question and effect of cession. At para 18, the court reasoned as follows:

'I come then to the effect of the short cession. Had it purported to cede a right with the present cash value, the effect would have been that for as long as SA Brake was indebted to the bank – as it at all material times was – SA Brake, having divested itself of the right, would no longer have had locus standi to enforce it. *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* [1992] ZASCA 208; 1993 (1) SA 77 (A) 87G-H. There could also have been no doubt that the cession would have constituted both the obligatory and transfer agreements. Apart from the fact that cession is according to our law primarily just that: an act of transfer.'

³ *Standard General Insurance Co Ltd v SA Barke CC* 1995 (3) SA 806 (AD), 815E-F.

[34] In my considered view, the cession served, as cessions ordinarily do, to transfer that right, in the instant case, to claim the VAT refund, to the purchaser, Mr Cohen. He thus is, in terms of the law, the only person clothed with the necessary *locus standi*, to recover the VAT refund. Clause 2.2.5 recorded that all rights of any nature accruing to the shareholding on or after the completion, were sold to the purchaser, together with the shareholding. To this extent, the plaintiff divested himself of that very right when he ceded all claims to Mr Cohen. He cannot be allowed to approbate and reprobate at the same time and be seen, after the cession, to lay claim to the right to the VAT refund.

[35] To this extent, I am of the considered opinion, that the special plea is sustainable and must be upheld therefor. This will, however, be subject to the argument belatedly mounted by Mr Strydom and which is not included in the heads of argument. It was as such sprung both on Ms Lewies and the court.

[36] It was submitted for the plaintiff that the defendant has, in this case, barked the wrong tree. This is because the proper course for the defendant to have adopted, was to raise an exception and not to file a special plea. Store, in this regard, was laid on the case of *Ahmadiyya Najuman Ishaati-Islam Lahore (South Africa) v Muslim Judicial Council (Cape) And Others*.⁴ As I understood Mr Strydom, he bemoaned the fact that a special plea normally has irreversible consequences in that the special plea, if upheld, does not allow the plaintiff to proceed with the claim. It is final in nature and effect. On the other hand, if the defendant had raised an exception, the plaintiff would have the luxury, if I may call it that, of resorting to an amendment, to cure the defect.

[37] Even if I had sympathy for Mr Strydom's argument, and I am non-committal on that, the point of the matter is that this is not an issue that was properly raised in the papers and which the court would derive benefit of proper argument on. As I see it, there is nothing in law that precludes a

⁴ *Ahmadiyya Najuman Ishaati-Islam Lahore (South Africa) v Muslim Judicial Council (Cape) And Others* 1983 (4) SA 855.

defendant from raising a special plea where it is of the view that a special plea is called for. The defendant has an election on how it wishes to prosecute its case. If its choice is oppressive on the plaintiff, and the court is being called upon to intervene, the basis of the intervention must be properly canvassed in the papers and the court must be assisted by counsel in deciding that issue. That has not been the case *in casu*.

[38] As far as matters go, after reading the *Ahmadiyya* judgment, it becomes plain, from the said judgment that it is competent for a party to raise lack of *locus standi in judicio*, on exception. Tebbutt J, dealing with this issue in *Ahmadiyya* stated the following at 860 F-G;

‘It is unnecessary for me to repeat the reasoning of the learned Judge or survey once again the authorities to which he referred. Suffice to say that, having regard to the cases cited by him, I respectfully agree with his reasoning and similarly agree with his conclusion that the question as to whether a particular party has the necessary *locus standi* to sue or be sued, is a matter which can competently be dealt with on exception.’

[39] It is plain that a defendant, in such a case, may approach the issue of *locus standi* by raising an exception. There is no prohibition however, for such a party to raise a special plea. This means that a party, such as the defendant in this case, is at large, to make an election as to how it wishes to approach the issue of *locus standi*. In the instant case, the defendant chose to employ the route of a special plea, which is not prohibited and is an option available.

[40] I am of the considered view that there is nothing in law that precludes the defendant from adopting the position that it did. As such, the court cannot, in these proceedings prescribe to a litigant how it must prosecute its case. I am of the considered view that the court cannot come to the plaintiff’s rescue, as it were, and grant an order that the plaintiff be allowed to amend its particulars of claim. The special plea raised by the defendant does not admit of that procedure and I cannot chart such a course, even in exercise of a discretion, if I was said to properly have any.

Conclusion

[41] Proper regard being had to what has been stated above, including the discussion and the law applicable to the facts of the matter, the court comes to the conclusion that this is a case in which the defendant's special plea of lack of *locus standi*, must be upheld. I do so accordingly.

Costs

[42] The approach adopted by courts when it comes to the issue of costs has become a well-trodden path. The ordinary course is that costs should follow the event. There is nothing submitted by the plaintiff nor is anything apparent from the pleadings that would suggest the propriety of departing from the general rule. The costs will therefor be borne by the plaintiff in the instant matter.

Order

[43] Having regard to what has been stated above, the order that commends itself as being appropriate in this matter, is the following:

1. The defendant's plea of lack of *locus standi in judicio* by the plaintiff, is hereby upheld.
2. The plaintiff is ordered to pay the costs of the special plea, consequent upon the employment of one instructing and one instructed legal practitioner.
3. The matter is removed from the roll and is regarded as finalised.

T S MASUKU
Judge

APPEARANCES

PLAINTIFF: J Strydom
Instructed by: Veiko Alexander Inc., Windhoek

DEFENDANT: R Lewies
Instructed by: Cronjé & Co. Windhoek