

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
EX TEMPORE JUDGMENT

Case No.: HC-MD-CIV-ACT-CON-2022/03867

In the matter between:

EIG INVESTMENT CC

PLAINTIFF

and

DEIDRE DE WAAL ARCHITECTS

FIRST

DEFENDANT

PARAGON INVESTMENT HOLDINGS (PTY) LTD

SECOND

DEFENDANT

Neutral citation: *EIG Investments v Deidre de Waal Architects* (HC-MD-CIV-
ACT-CON-2022/03867 [2023] NAHCMD 431 (24 July
2023))

Coram: Schimming-Chase J

Heard: 20 July 2023

Order: 20 July 2023

Written Reasons: 24 July 2023

ORDER

1. The first defendant's exception is upheld.
 2. The plaintiff is ordered to pay the first defendant's costs, such costs to be capped in terms of rule 32(11).
 3. The plaintiff is granted leave to amend the particulars of claim within 15 days from the date of this order, if so advised.
 4. The matter is postponed to 31 July 2023 for allocation to a different managing judge.
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JUDGMENT

SCHIMMING-CHASE J:

[1] The first defendant excepts to the plaintiff's particulars of claim on the grounds that no cause of action is disclosed against the first defendant.

[2] The plaintiff is EIG Investments CC, a close corporation duly registered in terms of the applicable laws of Namibia. It sues the first defendant, Deidre de Waal Architects, a duly registered firm of architects in Namibia, and Paragon Investment Holdings (Pty) Ltd, a duly registered private company with limited liability, as second defendant.

[3] The plaintiff's action is premised on an oral agreement concluded between the plaintiff and the second defendant for payment allegedly due, owing and payable in respect of certain construction and renovation works undertaken and completed at the second defendant's restaurant during November 2021.

[4] The plaintiff alleges that the aforesaid agreement was concluded between the plaintiff represented by its member, and the first defendant acting on behalf of the second defendant. The plaintiff alleges that the first defendant was appointed as the second defendant's principal agent for the construction and renovation of the second defendant's restaurant, and inter alia that the final account would be provided to the first defendant for payment.

[5] The plaintiff alleges further that both the first and second defendants, jointly and severally, are in breach of the agreement by failing to pay the final account.

[6] The first defendant's exception is that ex facie the particulars of claim,¹ the plaintiff pleaded in paragraph 7 that the agreement relied on was concluded by the plaintiff represented by its member, and that the first defendant acted on behalf of the second defendant in concluding the agreement. The particulars do not allege that the first defendant was a party to the agreement. In this regard it was alleged that the first defendant was appointed by the second defendant as its principal agent for the aforesaid construction and renovation.

[7] The first defendant submits that in law, an agent does not incur personal liability.

[8] The plaintiff submits that its particulars are not excipiable firstly because although the general rule is that an agent cannot sue or be sued, an agent can be held personally liable if there is a breach of the implied warranty of authority. It is pointed out that this breach of warranty is not pleaded anywhere in the particulars of claim.

¹ Which are taken to be correct for purposes of consideration of the exception. See *Van Straten v Namibia Financial Institutions Supervisory Authority and Another* 2016(3) NR747 (SC).

[9] The plaintiff further alleges that the exception is bad in law especially when it is accepted that the first defendant was acting as an agent with authority to bind the principal. Should this authority not exist, then the agent can be held liable. It is not at all alleged in the particulars of claim that the first defendant did not have authority to conclude the agreement. This would in any event render the joint and severally liability claimed excipiable in the absence of further material allegations to substantiate the plaintiff's contentions.

[10] The plaintiff submits further that its cause of action is premised on the actions of the first defendant as principal agent. In particular the plaintiff alleges that "whether the terms pleaded and the conduct of the excipient is consistent with the authority of the agency provided or not is not the basis of the action against it and the principal. I fail to comprehend this submission.

[11] Further the plaintiff alleges that what has been pleaded is sufficient to establish what can be proven to hold the first defendant jointly and severally liable with the second defendant.

[12] It cannot be disputed that in law, an agent has no locus standi to sue or be sued on the principal obligation between the principal and the other party.²

[13] All that the claim states is that payment was to be made by the first defendant to the plaintiff. However the principal obligation and the parties to the agreement are the plaintiff and the second defendant, and not the first defendant who would be making payment on behalf of the second defendant. There are no allegations to substantiate the claim against the first defendant in the particulars of claim. There is accordingly no claim whatsoever made or pleaded in respect of the first defendant and the exception must accordingly succeed.

² Amlers precedents of Pleadings 8th Edition at 15 and the authorities there collected.

[14] In the circumstances, I make the following order:

1. The first defendant's exception is upheld.
2. The plaintiff is ordered to pay the first defendant's costs, such costs to be capped in terms of rule 32(11).
3. The plaintiff is granted leave to amend the particulars of claim within 15 days from the date of this order, if so advised.
4. The matter is postponed to 31 July 2023 for allocation to a different managing judge.

E M SCHIMMING-CHASE

Judge

APPEARANCES

PLAINTIFF:

P Elago
Of Tjombe-Elago Inc.,
Windhoek

FIRST DEFENDANT:

J Olivier
Of Ellis Shilengudwa Incorporated
Windhoek

SECOND DEFENDANT:

J Arnols
Of Sisa Namandje & Co. Inc.,
Windhoek