

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2021/01769

In the matter between:

TRUE MEDIA TRADING CC

PLAINTIFF

and

SWAPO YOUTH PARTY LEAGUE VOLUNTARY ASSOCIATION

DEFENDANT

Neutral citation: *True Media Trading CC v SWAPO Youth Party League Voluntary Association* (HC-MD-CIV-ACT-CON-2021/01769) [2023] NAHCMD 443 (17 August 2023)

Coram: COLEMAN J

Heard: 27 - 29 March 2023 & 21 April 2023

Delivered: 17 August 2023

Flynote: Contract – Specific performance – Court's discretion – Vague and unenforceable contract.

Summary: The parties entered into an agreement for the supply of a membership integrated system. The plaintiff claims payment of N\$14 049 000 in terms of the agreement. It transpires that the agreement relied on does not contain enforceable terms.

Held that, the agreement is void for vagueness, set aside and restitution is ordered in the exercise of the court's discretion.

ORDER

1. The agreement entered into between the parties on 9 July 2018 (annexure 'A' to the amended particulars of claim herein) is hereby declared void for vagueness and set aside.
 2. The defendant is ordered to return all the hardware, software and accessories for the membership integrated system which the plaintiff supplied in terms of the agreement within three months from the date of this order.
 3. Each party must pay their own costs.
 4. The matter is removed from the roll and regarded as finalised.
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JUDGMENT

COLEMAN J:

Introduction

[1] This is a claim for payment of N\$14 049 000 based on an agreement entered into between the parties on 9 July 2018. This amounts to a claim for specific performance in terms of the agreement that the plaintiff relies on.

Pertinent facts

[2] The plaintiff's case is that on 9 July 2018, it entered into a written agreement (annexed to the amended particulars of claim as annexure 'A') with the defendant. In terms of this agreement – the plaintiff alleges - the parties agreed that the plaintiff will

design and supply a membership integrated system for the defendant for the supply of 1 050 000 electronic PVC membership cards for members of the defendant and for the supply of all hardware and accessories in order for the system to be fully operational. The plaintiff also alleges that a project plan, annexed marked 'B' to the amended particulars of claim, had to be followed in order for the system to be fully operational.

[3] The plaintiff's case is further that it performed in terms of the agreement between the parties by installing the system, which is still operational. It could not supply all the membership cards because the defendant engaged another party to supply it. According to the plaintiff's amended particulars of claim, the defendant is in breach of the agreement by failing to effect payment of N\$14 050 000 (this was later amended to N\$14 049 000), being the contract price, which was due and payable on or about 10 November 2018. In addition, the plaintiff alleges that the defendant breached the agreement by not following the project plan and by engaging other suppliers for membership cards.

[4] The defendant pleads, in essence, that the agreement that the plaintiff relies on is a joint venture agreement between the parties and that the 1 050 000 membership cards had to be issued as required by the defendant's members. The defendant pleads further that the plaintiff stopped supplying membership cards after 6000 cards since its system and hardware broke down. Consequently, the defendant denies it owes the plaintiff the N\$14 049 000 as claimed.

[5] One witness was called on behalf of the plaintiff and two on behalf of the defendant. The common thread that runs through the evidence is that the parties intended a joint venture arrangement, that the plaintiff delivered hardware and software and installed the system. The system worked well for a short while and then malfunctioned. The parties are now at a point where the defendant is in possession of the system with its hardware and software, but cannot use it. The witness on behalf of the plaintiff testified that it expects to be paid N\$7 875 000 for the delivery of the 1 050 000 membership cards and that it foresees to recover N\$6 300 000 over 12 years for the system. The plaintiff gave the defendant a discount of N\$125 000. This amounts to a total of N\$14 050 000, which was amended to N\$14 049 000. According to the witnesses on behalf of the defendant, the payment of any money to

the plaintiff is predicated upon the delivery of the PVC membership cards. It is common cause that the plaintiff delivered only 6000 cards and the defendant paid for it.

Conclusion

[6] I considered all the pleadings, evidence and submissions in this matter and mean no disrespect by not articulating specifics. Counsel for the defendant argued some issues that were not pleaded. In particular, she raised the point that the agreement is neither an agreement of sale nor a joint venture agreement since its terms are so obscure as to render the agreement ineffective. In response to my questions, she conceded that restitution may be an appropriate remedy in this context. Similarly, when I raised this issue with counsel for the plaintiff, he conceded that cancellation of the agreement and restitution may be the solution here. The dilemma here is that it is not the plaintiff's case. The plaintiff came to court with a claim for specific performance of the agreement.

[7] The agreement annexed, marked 'A', to the amended particulars of claim is depicted as a 'joint venture agreement' and reads more like a memorandum of understanding than a commercial contract. In clause 2, the purchase price of the 'customized project' is determined as N\$14 050 000, which is made up of a 'project value' of N\$7 750 000 and N\$6 300 000 for the membership management system. In terms of clause 1.3 of the agreement the defendant is also granted a licence in respect of the software used in the system. According to clause 7 of the agreement, this licence will terminate immediately without notice if the plaintiff fails to comply with any of its provisions. The problem is that this aspect of the agreement was not addressed at all by the parties.

[8] The agreement consists of 19 clauses and does not contain any enforceable term. While it stipulates in clause 14 that it constitutes the entire agreement, clause 18 reads as follows: 'This agreement is valid and enforceable and read with the project plan'. It is a dispute between the witnesses on behalf of the parties whether or not the project plan should be part of the agreement. In my view, a perusal of the project plan reveals that reading it with the agreement does not assist at all. It

contains a detailed project budget in clause 4, but similarly no enforceable stipulations at all.

[9] I agree with counsel for the defendant that the agreement cannot be enforced.¹ Apart from the fact that the agreement (whether read with the project plan or not) does not contain enforceable terms, the evidence clearly demonstrates that the amount claimed is not due and payable. In my view, the agreement is void for vagueness² specifically because clause 2 determines a purchase price without any indication when it should be paid, who should pay and exactly for what. For example, it stipulates N\$ 7 750 000 as the project value while it appears from the project plan and the evidence that this amount was intended for the membership cards.

[10] In my view I have a discretion in this matter. The question is how wide a discretion? In *Haynes v Kingwilliamstown Municipality*³, De Villiers AJA said as follows:

'The discretion which a court enjoys, although it must be exercised judicially, is not confined to specific types of cases, nor is it circumscribed by rigid rules. Each case must be judged in the light of its own circumstances.'

[11] The plaintiff should not have approached the court for specific performance. Cancellation of the agreement and restitution would have been a more appropriate remedy. The parties did not canvass the cancellation – or setting aside – of the agreement on the pleadings. However, during argument counsel for both parties conceded that the voidness of the agreement is plausible and both accepted that should I find the agreement is void that restitution of the hardware and software provided by the plaintiff is an appropriate solution.

[12] For these reasons, I am also of the view that each party should pay its own costs. The trial may have been avoided if the matter was approached correctly on the pleadings from both sides. In its amended particulars of claim, the plaintiff asks for further or alternative relief.

¹ *Namibia Mineral Cooperation Ltd v Benguela Concession Ltd* 1997 (1) All SA 191 (A) 557 at 563.

² Christie. RH. *Law of Contract in South Africa* 6th edition 106-108.

³ *Haynes v Kingwilliamstown Municipality* 1951 2 SA 371 (A) 378G.

[13] As alternative relief I make the following order:

1. The agreement entered into between the parties on 9 July 2018 (annexure 'A' to the amended particulars of claim) is hereby declared void for vagueness and set aside.
2. The defendant is ordered to return all the hardware, software and accessories for the membership integrated system which the plaintiff supplied in terms of the agreement within three months from the date of this order.
3. Each party must pay their own costs.
4. The matter is removed from the roll and regarded as finalised.

G Coleman
Judge

APPEARANCES

PLAINTIFF:

C J Van Vuuren
Of Krüger, Van Vuuren & Co.,
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DEFENDANT:

E Shifotoka
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