

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

RULING

PRACTICE DIRECTIVE 61

Case Title: ARCH RESOURCES (PTY) LTD PLAINTIFF v CANDINO MINING & CONSTRUCTION CC 1 st DEFENDANT JURIUS NKOSHI 2 nd DEFENDANT	Case No: HC-MD-CIV-ACT-CON-2023/00932 INT-HC-EXP-2023/00233
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO	Date of hearing: 25 September 2023
	Delivered on: 13 October 2023
Neutral citation: <i>Arch Resources (Pty) Ltd v Candino Mining & Construction CC</i> (HC-MD-CIV-ACT-CON-2023/00932) [2023] NAHCMD 647 (13 October 2023)	
Results on merits: Merits not considered.	
The order: 1. The defendants' exception is upheld. 2. The plaintiff's particulars of claim are set aside and 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 defendants' costs occasioned by the exception. Such costs are to include the costs of one instructing and one instructed legal practitioner. 4. The case is postponed to 16 November 2023 at 15h00 for further case planning	

conference in terms of rule 23(5).

5. The parties shall file a joint case plan on or before 13 November 2023.

Reasons for orders:

Prinsloo J:

Introduction

[1] The parties are Arch Resources (Pty) Ltd, a private company with limited liability as the plaintiff and Candino Mining and Construction CC, a close corporation and Jurius Nkoshi, a major male businessman, as the defendants. I will refer to the parties as they are in the main action.

[2] Before me serves an exception raised in terms of rule 57 of the rules of court on the basis that the plaintiff's particulars of claim do not disclose a cause of action, alternatively, that the particulars of claim are vague and embarrassing and therefore, excipiable.

[3] The plaintiff was afforded the opportunity to remove the cause of the complaint in terms of rule 57(2), however, the parties could not resolve the defendants' complaint amicably resulting in the hearing of the exception.

Background

[4] For purposes of its claim against the defendants, the plaintiff relies on a written agreement entered into between the parties on 7 April 2021 wherein the plaintiff was

represented by Mr Justus Hausiku and the first defendant was represented by the second defendant. In terms of the written agreement, the plaintiff would provide a construction support facility on behalf of the first defendant in respect of the Katima Mulilo Airport runway rehabilitation.

[5] In terms of the agreement, the plaintiff would cause a performance guarantee to the value of N\$9 610 205,73, being 10 per cent of the value of the project, to be issued by Momentum Short-Term Insurance ('Momentum') on behalf of the first defendant to the Ministry of Works and Transport. The first defendant would be liable to pay facility fees in the amount of N\$4 million to the plaintiff, of which 50 per cent would be payable with the first progress payment, and the remaining 50 per cent would be payable with the second progress payment.

[6] The second defendant provided an 'unlimited suretyship' to the Plaintiff in respect of the guarantee provided to the first defendant and agreed to be held liable jointly and severally with the first defendant for any debt due to the Plaintiff by the first defendant.

[7] The plaintiff pleads that it complied with all its obligations in terms of the agreement between the parties in that it caused the performance guarantee to be issued by Momentum on or about 23 April 2021. The first defendant completed the project on or about 5 November 2022, and as a result, all the progress payments were received by the first defendant by the completion date.

[8] The plaintiff further pleads that the first defendant made a total payment of N\$2 250 000 to the plaintiff and failed to pay the remaining balance of N\$1 750 000 to the plaintiff, resulting in the first defendant's breach. Further, due to the first defendant's breach, the second defendant, as surety and co-principal debtor, is liable jointly and severally for the payment of N\$1 750 000. The plaintiff accordingly claims the said amount plus interest at the rate of 20% from 5

November 2022 and the costs of suit.

[9] Copies of the agreement and the performance guarantee were annexed to the particulars of claim as Annexure 'A' and 'B', respectively.

The exception

[10] The defendants' four grounds of exception are:

'GROUND 1

1. The plaintiff relies on a written agreement.
2. The plaintiff alleges that the written agreement is annexure A.
3. In paragraph 6, the plaintiff alleges 'the relevant express, alternatively tacit, in the further alternative implied terms of the agreement'.
4. Annexure A, however, does not mirror what is alleged in paragraph 6, including in regard to what is alleged in paragraphs 6.1 and 6.3.3.

GROUND 2

5. Insofar as the 'obligations in terms of the agreement between the parties' do not appear ex facie annexure A, the allegations contained in paragraph 7 that the plaintiff 'complied with all its obligations' are similarly unsustainable.

GROUND 3

6. In paragraph 6.10, the plaintiff alleges that 'the Second Defendant, as member of the First Defendant, provided an unlimited suretyship to the Plaintiff in respect of the guarantee provided to the First Defendant and agreed to be held liable jointly and severally with the First Defendant for any debt due to the Plaintiff by the First Defendant'.

7. In paragraph 11, the plaintiff alleges that the second defendant was a 'surety and co-principal debtor'.

8. On the basis of the above allegations, the plaintiff seeks to hold the second defendant 'liable jointly and severally with the Plaintiff' for the claimed amount.

9. Annexure 'A', however, does not mirror what is alleged in paragraphs 6, 10 and 11. Without derogating from the aforementioned, Annexure 'A' does not reflect that the second defendant agreed to be 'held liable jointly and severally with the First Defendant for any debt due to the Plaintiff by the First Defendant' or that the second defendant bound himself as a 'co-principal debtor'.

10. The terms of the contract of suretyship must be embodied in a written document signed by or on behalf of the surety.

GROUND 4

11. Annexure A refers to 'subject to the terms, exclusions, provisions and conditions contained in the CONSTRUCTION SUPPORT FACILITY'.
12. A document by the above title is not attached to the particulars of claim.
13. Rule 45(7) requires a plaintiff who relies on a written contract to attach a true copy thereof or of the part relied on to the pleading.
14. This the plaintiff has failed to do.'

The law on exceptions

[11] Several trite principles apply to exceptions. I will not repeat all these principles but will highlight a few.

[12] The main purpose of an exception that a claim does not disclose a cause of action is to avoid leading unnecessary evidence at the trial.¹

[13] Where an exception is taken on the ground that no cause of action is disclosed, the facts as alleged in the plaintiff's pleadings are taken as correct for the purposes of deciding the exception. Admitting that all the allegations in the particulars of claim are true, the exception asserts that even with such admission, the particulars of claim do not disclose a cause of action. The excipient has a duty to persuade the court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed.²

[14] It is a first principle in dealing with matters of exception that if evidence can be led which can disclose a cause of action alleged in the pleadings, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action. Therefore, the remedy of an exception is only available where an exception goes to the root of a claim or defence.³

[15] Concerning an exception on the basis of a pleading being vague and embarrassing, an excipient must show vagueness amounting to embarrassment and embarrassment amounting to

¹ *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) at 553 G – I; *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) at 706.; Herbstein & Van Winsen, *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, 5th edition, at 638; *Denker v Cosack and Others* 2006 (1) NR 370 (HC).

² *Van Straten N.O and Another v Namibia Financial Institutions and Another* 2016 (3) NR 747 at 755.

³ *Lampert-Zakiewicz v Marine & Trade Insurance Co Ltd* 1975 (4) SA 597 (C) at 599F-G.

prejudice.⁴ The Court must not look too critically at the pleadings nor should it adopt an overly technical approach. Prejudice to a litigant facing an embarrassing pleading must lie ultimately in an inability to prepare properly to meet an opponent's case.⁵

[16] The onus of showing that a pleading is excipiable rests on an excipient.

Discussion

Grounds one and two

[17] I am of the view that the first two grounds of exception can be discussed as one.

[18] It is common cause that the plaintiff relies on a written agreement (Annexure 'A'), and in para 6 of the particulars of claim the plaintiff alleges the 'relevant express, alternatively tacit, in the further alternative implied terms of the agreement.' The defendants aver that the particulars of claim do not mirror the written agreement relied upon. In this regard, the defendants referred to paras 6.1 and 6.3.3 of the particulars of claim that state that:

'6.1 The Plaintiff would cause a performance guarantee to the value of N\$9,610,204. 73, being 10% of the value of the Project, to be issued by Momentum Short-Term Insurance Company ("Momentum") on behalf of the First Defendant to the Ministry of Works and Transport ("the Employer");

6.3.3 Should the total facility progress fee not have been paid by the last month of the project the full outstanding amount would become due and payable.'

[19] The defendants further maintain that the allegations in para 7 of the particulars of claim wherein the plaintiff avers that the plaintiff complied with its 'obligations in terms of the agreement between the parties', but the obligations do not appear ex facie Annexure 'A', is unsustainable.

[20] The plaintiff argued that whatever is pleaded in the particulars of claim are not at odds with Annexure 'A' to the particulars of claim. The court was referred to Annexure 'A' regarding the guarantee value and the due payment. Annexure 'A' in this regard provides as follows:

⁴ *Van Straten NO and Another v Namibia Financial Institutions Supervisory Authority and Another* 2016 (3) NR 747 (SC), paragraphs 19 and 20, at 756B-D and 756E.

⁵ *Standard Bank of SA Ltd v Hunky Dory Inv 194 (Pty) Ltd* (1) 2010 (1) SA 627 (C) at 630 paragraph 9 and paragraph 10; *Lowenthal v Street Guarantee (Pty) Ltd and Others* [2018] JOL 39436 GJ, paragraphs 6 & 7; Erasmus, Superior Court Practice at D1-342. See also *CrawfordBrunt v Kavnat and Another* 1967 (4) SA 308 (C) at 310G.

'*Should the total FPF's not have been collectable by the last month the full outstanding amount will become immediately due and payable.'

[21] Having considered the particulars of claim and the Annexure 'A', it is clear that:

a) There is no reference made in the agreement of Momentum. It is therefore not clear that Momentum advanced the guarantee (this is in fact not even clear from Annexure 'B' that it was indeed via Momentum that the plaintiff provided a guarantee).

b) The only reference made to the plaintiff (if one can call it a reference) is the plaintiff's logo on page 1 of the agreement.

c) The plaintiff pleads in para 6.3.3, 'should the total facility progress fees not have been paid by the last month of the project the full outstanding amount will immediately become due and payable' which clause is probably a reference made to the clause at the bottom of Annexure 'A' where the asterisk is. However, the 'asterisk' clause reads as follows: '*Should the total FPF's not have been collectable by the last month the full outstanding amount will become immediately due and payable'.

[22] As illustrated above, the particulars of claim and Annexure 'A' on material aspects do not speak to one another, and the exception in respect of grounds one and two is upheld.

Ground three:

[23] The third ground of exception relates to the suretyship of the second defendant. In para 6.10, the plaintiff alleges that: 'the Second Defendant, as member of the First Defendant, provided an unlimited suretyship to the Plaintiff in respect of the guarantee provided to the First Defendant and agreed to be held liable jointly and severally with the First Defendant for any debt due to the Plaintiff by the First Defendant' and in para 11, the plaintiff alleges that the second defendant was a 'surety and co-principal debtor'.

[24] Again, the plaintiff bases these averments on Annexure 'A'. The suretyship that the plaintiff relies on appears on page two of the agreement and consists of one line that reads '3. The contractor & its directors jointly and severally provide unlimited surety towards the guarantee provided.'

[25] The agreement is then concluded as follows:

'I, Jurius Nkoshi, in my capacity as managing member declare that I have read and understood the Terms and Conditions of this Quote and do hereby accept and bind myself and the company to the quote laid out herein and undertake to action and adhere to all the terms and conditions as stated.'

(Signed) On behalf of the Contractor'

[26] The following issues arise if one assumes that the second defendant, Mr Nkoshi, signed on behalf of the contractor (a joint surety):

- a) Clause 3 of Annexure 'A' referred to above refers to 'directors'. However, only a company has directors, yet in the current matter, the contractor is a close corporation;
- b) Mr Nkoshi is a 'managing member', meaning there must be more than one member, which member(s) did not sign the agreement;
- c) A suretyship will only be valid when all the members sign the agreement;⁶
- d) Furthermore, it is not clear that Jurius Nkoshi (the second defendant) in fact bound himself as surety. I say so for the following reasons:
 - i. Mr Nkoshi signed on behalf of the contractor, in his capacity as 'managing member' and not his personal capacity as a surety; and lastly,
 - ii. Mr Nkoshi is not identified as a surety, and it is not clear from the agreement that Mr Nkoshi bound himself as a surety in his personal capacity.

[27] In my view, the exception was well taken and must be upheld.

Ground four:

[28] The written agreement (Annexure 'A') states on the second page that 'it is agreed and understood that otherwise subject to the terms, exclusions, provisions and conditions contained in the CONSTRUCTION SUPPORT FACILITY or endorse thereon the following is also applicable'. The exception raised by the defendants is that this document is not attached to the particulars of claim. In response, the plaintiff contends that it does not rely on the Construction Support Facility document and that this document can be accessed by way of the discovery

⁶ Section 52(2) of the Close Corporation Act 26 of 1988 '. . .the provision of any particular security with the express previously obtained consent in writing of all the members of a corporation.'

process or even by way of a request for further particulars.

[29] The defendants submitted that this is contrary to the objectives of the rules as well as contrary to rule 45(7), which provides that a party must attach a contract relied upon. If the plaintiff intended to rely on only a portion of the written agreement, it would be expected to be pleaded accordingly. If not, then the complete agreement should be attached to the particulars of claim as provided for in rule 45 (7).

[30] It is my understanding that Annexure 'A' is the exclusive memorial of the agreement between the parties, and it is unsatisfactory to say the defendants must wait until discovery to receive the document. The overriding objectives of the Rules of Court are to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost-effectively as far as practicable. The plaintiff's failure in not filing the Construction Support Facility document may lead to amendment of the pleadings, which would be neither speedy nor cost-effective.

[31] The fourth ground of exception is thus upheld.

Order

[32] In the result, I make the order as set out above.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Applicants	Respondents
D OBBES (assisted by S HORN) of Theunissen, Louw & Partners, Windhoek	C VAN ZYL (assisted by F PRETORIUS) of Francois Erasmus & Partners Windhoek

