

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA

Practice Directive 61

<b>Case Title:</b> MONS VINUM LEISURE (PTY) LTD v TENBERGEN INVESTMENTS ONE PTY LTD	<b>Case No:</b> HC-MD-CIV-ACT-OTH-2023/02498
	<b>Division of Court:</b> (MAIN DIVISION)
<b>Heard before:</b> CLAASEN J	<b>Date of hearing:</b> 14 NOVEMBER 2023
	<b>Date of order:</b> 28 NOVEMBER 2023
<b>Neutral citation:</b> <i>Mons Vinum Leisure (Pty) Ltd V Tenbergen Investments One Pty Ltd</i> (HC-MD-CIV-ACT-OTH-2023/02498) [2023] NAHCMD 769 (28 November 2023)	
<b>ORDER</b>	
<ol style="list-style-type: none"><li>1. The defendants' exception brought against the plaintiff's particulars of claim is dismissed.</li><li>2. The defendants must pay the plaintiff's costs of opposing the exception, jointly and severally, the cost to be limited in terms of rule 32(11).</li><li>3. The matter is postponed to <b>17 January 2024</b> at <b>08h30</b> for case planning conference.</li><li>4. The parties must file a joint case plan report on or before 15 January 2024.</li></ol>	
<b>REASONS</b>	
Claasen J	
<u>Introduction</u>	

[1] This is an opposed interlocutory application by the defendants who raised an exception to the plaintiff's particulars of claim on the ground that it does not sustain a valid and enforceable cause of action.

### Background

[2] The plaintiff instituted an action against the defendants on the basis of a lease agreement for a certain property that was concluded between the plaintiff and first defendant hereinafter called 'Tenbergen', who owns the property. The second defendant is Spearmint Investments (Pty) Ltd, a private company which is a subsidiary of Standard Bank Namibia Limited (hereinafter called 'Spearmint'). Spearmint is the sole shareholder of Tenbergen. The third defendant is Standard Bank Namibia Limited. The fourth defendant is the Namibian Property Rental's Trust.

[3] This lease pertains to an immovable property, 'Tenbergen Village' and the plaintiff occupies the property in terms of the lease. The plaintiff claims rectification of the lease agreement and a declaratory order that the lease is valid. This is on account of having received a notice to vacate from Spearmint, to whom the first defendant had ceded its right, title and benefit to the lease agreement. The notice to vacate indicates two issues namely no consensus was reached on the determination of the turnover rental amount and that the bondholder, Standard Bank had not given any written consent for the lease agreement. On that basis Spearmint regards the lease as void ab initio.

[4] The exception centers around the issue of there being a mortgage bond over the property in favour of Standard Bank. Counsel for the defendants Ms Kuzeeko, pointed out that the plaintiff fails to plead that there was compliance with the terms of the mortgage bond agreement, in particular that Tenbergen entities shall not let the mortgaged property without the written consent of Standard Bank. Her argument was that the first defendant required the consent of the Bank upfront. She avers that the consent issue should have been pleaded, as it's a material issue.

[5] Counsel for the plaintiff, Adv Barnard countered these contentions. He argued that the plaintiff's case is not premised on a contention that written consent had been given.

Plaintiff's case is that Standard Bank had waived the requirements of written consent to conclude the lease. He points out that the mortgage bond agreement does not prevent a waiver of rights. He submits that in an exception the allegations by the plaintiff on the waiver must be accepted and that evidence can be presented on that.

[6] Adv Barnard submitted that Standard Bank, at all material times, was aware of the lease and accepted payment, yet it now wants to call 'foul play.' In this regard he made reference to the relevant portions in the particulars of claim.

[7] The principles for the adjudication of exceptions are well established, thus it is not necessary to repeat them at length. The Supreme Court set out principles in *Van Straten v Namibia Financial Institutions Supervisory Authority and Another*<sup>1</sup> and stated that when determining an exception taken on the grounds that no cause of action is disclosed, two considerations ought to be considered. First, for the purpose of deciding the exception, the facts as alleged in the plaintiff's pleadings are taken as correct. Second, to succeed, the excipient must satisfy the court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed. In other words, only if no possible evidence led on the pleadings can disclose a cause of action, will the particulars of claim be found to be excipiable.

[8] The relevant para in the particulars of claim is set out below:

'28: All rentals prior to the cession of the lease have been paid to Standard Bank due to a cession of rentals by Tenbergen in favour of Standard Bank.

29. Standard Bank accepted payment of the rentals.

30. In accepting payment of the rentals, Standard Bank tacitly, alternatively, by way of conduct, waived the requirement for it to have provided a written consent for the leased premises to be leased to Mons Vinum.

31. To the knowledge of Standard bank, Spearmint accepted cession of the lease agreement.

32. Standard Bank tacitly, alternatively, through its conduct, waived the requirement for it to have provided written consent for the leased premises to Mons Vinum.

33. Standard Bank was at all material times aware of the lease agreement and willing to and accepted the benefits (rentals) in terms of the lease agreement.'

[9] Having considered the *Van Straten* principles to the facts herein, I came to the

---

<sup>1</sup> *Van Straten v Namibia Financial Institutions Supervisory Authority and Another*, 2016 (3) NR 747 SC, para 18.

conclusion that there is no merit in the contention that the claim does not constitute a valid cause of action. The defendants can plead to the claim and evidence can be led by the parties the averments that constitute the thorn in the flesh herein.

[10] Accordingly, I make the following order:

1. The defendants' exception brought against the plaintiff's particulars of claim is dismissed.
2. The defendants must pay the plaintiff's costs of opposing the exception jointly and severally, the costs to be limited in terms of rule 32(11).
3. The matter is postponed to 17 January 2024 at 08h30 for case planning conference.
4. The parties must file a joint case plan report on or before 15 January 2024.

<b>Judge's signature</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Applicant</b>	<b>Respondent</b>
Ms M Kuzeeko Of Dr Weder Kauta & Hoveka Inc.	Adv P Barnard Instructed by Lubbe & Saaiman Incorporated.