

REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF
WINDHOEK



NAMIBIA MAIN DIVISION,

RULING

PRACTICE DIRECTION 61

<p>Case Title:</p> <p>CATERPILLAR FINANCIAL SERVICES SOUTH AFRICA (PTY) LTD PLAINTIFF</p> <p>and</p> <p>JOTO INVESTMENTS CC DEFENDANT</p>	<p>Case No: HC-MD-CIV-ACT-CON-2023/04551</p> <p>Division of Court: HIGH COURT (MAIN DIVISION)</p>
<p>Coram: HONOURABLE JUSTICE UEITELE</p>	<p>Date of hearing: Determined on the papers</p> <p>Delivered on: 30 April 2024</p>
<p>Neutral citation: <i>Caterpillar Financial Services South Africa Proprietary Limited v Joto Investments CC</i> (HC-MD-CIV-ACT-CON-2023/04551) [2024] NAHCMD 204 (30 April 2024)</p>	
<p>The order:</p> <ol style="list-style-type: none">1. It is declared that this Court has jurisdiction to hear this matter.2. The defendant must pay the plaintiff's costs in the interlocutory application and which costs are capped in terms of rule 32(11).3. The matter is postponed to 07 May 2024 at 08h30 for a Case Planning Conference Hearing and to, if necessary, determine a date to hear the summary judgment application.4. The parties must file a joint case plan by not later than 02 May 2024 at 15h00.	

REASONS FOR ORDERS

Introduction

'The principle of effectiveness means that a Judge has no right to pronounce a judgment, if he cannot enforce it within his own territory.'¹

[1] The dispute in this matter is whether this court has jurisdiction to hear this matter. The plaintiff is Caterpillar Financial Services South Africa Proprietary Limited, a public company with limited liability duly incorporated in accordance with the company laws of South Africa (with South Africa registration number 2017/486709/07) and with its principal place of business situated at 7, Lindsay Street, Witfontein, Kempton Park, 1620, Johannesburg, South Africa. The plaintiff is thus a *peregrine* of this Court.

[2] The defendant is Joto Investments CC, a close corporation incorporated in accordance with the laws of Namibia (with registration number CC/2008/3840) and with its principal place of business situated at No 482, Toivo Ya Toivo Street, Oluno, Ondangwa, Republic of Namibia. The defendant is thus an *incola* of this court.

Background

[3] The background facts which gave rise to this matter are in summary these. On 18 May 2021 and at Ondangwa, the plaintiff and the defendant concluded a written Master Instalment Sale Agreement (the agreement), in terms of which the plaintiff sold to the defendant a Caterpillar Motor Grader 140GC, with VIN number W 9200601 (the Caterpillar). The purchase price of the Caterpillar, according to the agreement, was N\$3 359 000, which the respondent agreed to pay in 48 monthly instalments of N\$86 002.56.

[4] In terms of the agreement, the plaintiff reserved and retained the right, title (that is ownership) and interest in the Caterpillar until the title or ownership is transferred to the defendant upon it performing and completing its obligations in terms of the agreement. The parties furthermore agreed

¹ Per Waddington J in *Makoti v Brodie and Others* 1988 (2) SA 589 (BGD) at 576.

that if the defendant defaulted with the payments of the instalment, the plaintiff would be entitled to cancel the agreement, repossess the Caterpillar, and retain the payments already made by the defendant and claim damages from the defendant.

[5] The plaintiff, alleging that the defendant breached the agreement in that it failed to pay its monthly instalments, commenced proceedings by issuing summons out of this court seeking amongst other remedies, an order confirming the termination or cancellation of the agreement and an order directing the defendant to return the Caterpillar to the plaintiff within a period of 7 court days from date of such order, failure of which, an order directing the Deputy Sheriff to attach and return the Caterpillar to the plaintiff.

[6] The defendant, faced with the combined summons, filed a notice of intention to defend. This was swiftly met with an application for summary judgment, with the plaintiff contending that the defendant has no valid or bona fide defence to his claim. The plaintiff alleged that the defendant had filed the notice to defend for no other purpose than to delay the plaintiff in the enjoyment of the fruits of its judgment.

[7] As it was entitled to, the defendant filed an answering affidavit in response to the plaintiff's allegations filed in support of the application for summary judgment. The main contention by the defendant is that it did not file the notice to defend for the nefarious purpose of delaying the granting of the judgment. To the contrary, the defendant claims that it has a bona fide and valid defence to the plaintiff's claim, namely, that the plaintiff's particulars of claim are defective in that the plaintiff allegedly does not plead that this court has jurisdiction to entertain the plaintiff's claim. The defendant further pleaded that in terms of clause 21 of the agreement, this court's jurisdiction to hear the dispute between the parties is ousted.

[8] At a case management conference held on 18 March 2024, this court directed that the issue of the court's jurisdiction must be determined first before any other issue. The parties agreed to file heads of arguments addressing the question of whether or not this court has jurisdiction to hear the plaintiff's claim (the defendant had to file its heads of argument on 28 March 2024 and the plaintiff had to file its heads of arguments on 11 April 2024). The parties furthermore agreed that the issue of jurisdiction may be determined on the papers filed. It therefore follows that, at this juncture, all that I am called upon to determine is whether this court has jurisdiction to hear the plaintiff's claim.

Does the court have jurisdiction?

[9] The defendant argued that the plaintiff's particulars of claim are mute about the averments in relation to the jurisdiction of this court in non-compliance with rule 45(5)(a). The defendant submitted that the plaintiff's failure to aver jurisdiction in the particulars of claim was deliberate and misleading in light of clause 21 of the agreement. The defendant, relying on clause 21 of the agreement, argued that the agreement provided that only a Division of the South African High Court has the power to hear this case, to which jurisdiction the defendant has consented to and the plaintiff is entitled to sue. The defendant thus argued that the plaintiff is bound by what they have agreed namely that, it may only institute its claim in a Division of the High Court of South Africa.

[10] Counsel for the plaintiff, on the other hand, argued contrary. She argued that clause 21 of the agreement makes it clear that the plaintiff may elect (as opposed to/is obliged to/must) to institute action in a South African High Court. In other words, the plaintiff will be entitled to, should it so elect, institute proceedings in a South African Court (provided, of course, such proceedings are competent in such court). She proceeded and argued that the use of that phrase gives a right, not an obligation, to the plaintiff and is akin to the use of the word "may" which has been held to be permissive and not mandatory. Furthermore, no ouster or exclusive jurisdiction is borne out by the clause in question and no basis for such an interpretation is presented.

[11] In *Sciacero & Co v Central South African Railways*,² Innes CJ is reported to have said:

'The general rule in regard to the bringing of actions is *actor sequitor forum rei*. The plaintiff ascertains where the defendant resides, goes to his forum and serves him with the summons there.'

[12] Section 16 of the High Court Act³ provides that the High Court shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within Namibia and all other matters of which it may, according to law. Section 16 of the High Court Act takes cognizance of and gives effect to the principle of effectives which was approved by this court in *Cabinet of the Transitional Government of South West Africa v Dagnin*⁴. The court confirmed the principle and reasoned that the jurisdiction of the High Court of Namibia does not rest exclusively upon the residence of the defendant. It is now well established that grounds on which the High Court will exercise jurisdiction will depend upon the subject matter of the litigation and the relief claimed.

² *Sciacero & Co v Central South African Railways* 1910 TS 119 at 121.

³ High Court Act, 1990 (Act 16 of 1990).

⁴ *Cabinet of the Transitional Government of South West Africa v Dagnin* 1990 NR 14 (HC).

[13] Walter Pollak⁵ argued that because our courts have accepted the principle of effectiveness, jurisdiction must depend not only on the classification of actions that has come down to us from Roman law but on the nature of the relief claimed. This view has in South Africa found support in *Bisonbord Ltd v K Braun Woodworking Machinery (Pty) Ltd*⁶ where the Appellate Division of the Supreme Court said:

‘The inquiry is a dual one: (1) is there a recognised ground of jurisdiction; and, if there is, (2) is the doctrine of effectiveness satisfied - has the Court power to give effect to the judgment sought? See *Hugo v Wessel* 1987 (3) SA 837 (A) at 849H - 850A.’

[14] This court recently, in *Nedbank Namibia Limited v Emvula*⁷ relying on *Metlike Trading LTD and Others v Commissioner, South African Revenue Service*,⁸ endorsed the doctrine of effectiveness and approved the reasoning in *Metlike Trading LTD and Others v Commissioner, South African Revenue Service*⁹ that ‘if the respondent is an *incola*, the court may assume jurisdiction to grant an interdict (whether mandatory or prohibitory) in *personam* no matter if the act in question is to be performed or restrained outside the court's area of jurisdiction’.

[15] In the present case, the defendant is in Namibia (being a locally registered and trading corporation and an *incola* of this court). The agreement between the parties was concluded and executed in Namibia, the breach relied upon occurred within Namibia and the movable property that forms the subject matter of the relief sought is in the jurisdiction of this court. I therefore agree with counsel for the plaintiff that this court ‘as of right’ has jurisdiction to determine the title to the possession of the movable property.¹⁰

[16] The defendant further relied on its contention that the plaintiff's particulars are defective in that they allegedly do not plead that this court has jurisdiction and therefore, do not comply with rule 45(5)(a). In *Cabinet of the Transitional Government of South West Africa v Dagnin*¹¹ Levy J reasoned that:

⁵ Walter Pollak; *The South African Law of Jurisdiction*, Hortors Limited, 1937 at 31-32.

⁶ *Bisonbord Ltd v K Braun Woodworking Machinery (Pty) Ltd*. (384/88) [1990] ZASCA 86; 1991 (1) SA 482 (AD); [1991] 1 All SA 201 (A) (10 September 1990).

⁷ *Nedbank Namibia Limited v Emvula* (HC-MD-CIV-MOT-GEN-2021/00399) [2022] NAHCMD 591 (28 October 2022). Also see *Parents' Committee of Namibia and Others v Nujoma and Others* 1990 (1) SA 873 (SWA).

⁸ *Metlike Trading LTD and Others v Commissioner, South African Revenue Service* 2005 (3) SA 1 (SCA).

⁹ (*ibid*).

¹⁰ *Dias Compania Naviera SA v MV Al Kaziemah and Others* 1994 (1) SA 570 (D).

¹¹ *Supra* footnote 4.

'It is sufficient to point out that a summons which does not set forth particulars showing that the court has jurisdiction is bad and liable to dismissal.'

[17] The question in this matter is whether the plaintiff's particulars of claim do not comply with rule 45(5)(a). Rule 45(5) provides as follows:

'(5) Every pleading must be divided into paragraphs, including subparagraphs, which must be consecutively numerically numbered and must contain a clear and concise statement of the material facts on which the pleader relies for his or her claim, defence or answer to any pleading, with sufficient particularity to enable the opposite party to reply and in particular set out –

- (a) the nature of the claim, including the cause of action; or
- (b) the nature of the defence; and
- (c) such particulars of any claim, defence or other matter pleaded by the party as are necessary to enable the opposite party to identify the case that the pleading requires him or her to meet.'

[18] I do not agree with counsel for the defendant that the plaintiff's particulars of claim are defective, in that the plaintiff does not plead that this court has jurisdiction to hear this matter. I say so for the following reasons. What rule 45(5) requires of a litigant is that a litigant must clearly and concisely set out the material facts on which the pleader relies for his or her claim. As regards the jurisdiction of this court, the question that must be asked is whether the plaintiff has clearly and concisely set out facts upon which the jurisdiction of this court may be inferred. The answer to that question is in the affirmative. Paragraph 3 of the plaintiff's particulars of claim reads as follows:

'On or about 18 May 2021, the Plaintiff, duly represented by Shameema Rahman in his capacity as Credit and Operations Manager, and the Defendant, represented by Jonathan Amupolo in his capacity as member, entered into a written Master Instalment Sale Agreement and a schedule thereto (the Agreement), at Ondangwa, in terms of which the Plaintiff undertook to sell to the Defendant a Caterpillar Motor Grader 140GC, with VIN number W9200601 as identified in Schedule Number 01 to the Master Instalment Sale Agreement, over time against a monthly instalment. A true copy of the Agreement is annexed hereto and marked annexure "A".'

[19] The particulars of claim clearly state that the defendant is a close corporation, which is

registered in accordance with the laws of Namibia and its principle place of business is situated at No 482, Toivo Ya Toivo Street, Oluno, Ondangwa, Republic of Namibia. The particulars of claim furthermore set out where the agreement was signed. The agreement was signed in Ondangwa which is in the Republic of Namibia. In terms of s 16 of the High Court Act,¹² the High Court has jurisdiction over all persons residing or being in and in relation to all causes arising within Namibia. From the particulars of claim, allegations were made that the defendant is resident in Namibia and the contract was signed in Namibia, and the breach of the contract occurred in Namibia. The defendant's contention that the plaintiff's particulars of claim are defective is thus baseless.

[20] The second basis on which the defendant submits that this court does not have jurisdiction, is its reliance on clause 21 of the agreement. Clause 21 of the agreement reads as follows:

'This Agreement is governed by and construed under the laws of the (*sic*) South Africa. We will be entitled to institute all and any proceedings against you in connection with this Agreement, in any division of the High Court of South Africa, and you hereby consent and submit to the jurisdiction of that High Court (including a dispute relating to the existence, validity or termination of such document or any non-contractual obligation arising out of or in connection with the Agreement).'

[21] Clause 21 of the agreement thus provides that the agreement is governed by and construed under the laws of South Africa. The agreement further provides that the plaintiff will be entitled to institute all and any proceedings against the defendant in connection with the agreement in any division of the High Court of South Africa, and the defendant consents and submit to the jurisdiction of that High Court.

[22] Our courts have time and again restated that interpretation is the process of attributing meaning to words used in a document¹³ and that the starting point is always to, where the words of a document (being it a statute or contract) are clear and unambiguous, give words their ordinary, literal and grammatical meaning, unless such an interpretation would lead to manifest absurdity, inconsistency or hardship or would be contrary to the intention of the legislature.¹⁴

[23] The Concise Oxford Dictionary¹⁵ defines the word 'entitle' to mean 'give (someone) a legal

¹² Supra.

¹³ *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distribution CC* 2015 (3) NR 733 (SC) at paras 17-20.

¹⁴ *Torbitt v International University of Management*, the court referred to *Minister of Justice v Magistrate's Commission* 2012 (2) NR 743 (SC) para 27.

¹⁵ The Concise Oxford Dictionary.

right or a just claim to receive or do something'. It thus follows that clause 21 of the agreement simply confers on or gives the plaintiff a right to institute proceedings against the defendant in connection with the agreement in any division of the High Court of South Africa. Clause 21 does not, as it is contended by the defendant, vest exclusive jurisdiction in a division of the High Court of South Africa and thereby oust this court's jurisdiction. I therefore have no hesitation to find that this court has jurisdiction to entertain this matter.

[24] What is left is the question of costs. The general rule is that costs are in the discretion of the court and that costs must follow the course. The plaintiff has not discharged the onus resting on it to convince the court that the limitation in rule 32(11) must not apply.

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

1. It is declared that this Court has jurisdiction to hear this matter.
2. The defendant must pay the plaintiff's costs in the interlocutory application and which costs are capped in terms of rule 32(11).
3. The matter is postponed to **07 May 2024 at 08h30** for a Case Planning Conference Hearing and to, if necessary, determine a date to hear the summary judgment application.
4. The parties must file a joint case plan by not later than **02 May 2024 at 15h00**.

SFI Ueitele
Judge

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	

Plaintiff	Defendant
C E van der Westhuizen Instructed by Koep & Partners Windhoek	A Shapumba of Shapumba & Associates Incorporated Windhoek