REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2182/2010

In the matter between:

REUBEN MILLER N.O.	**1st PLAINTIFF**
ENVER MOHAMED MOTALA N.O.	**2nd PLAINTIFF**
LINDIWE KAABA N.O.	**3rd PLAINTIFF**
and	
PROSPERITY AFRICA HOLDINGS (PTY) LTD	**DEFENDANT**

Neutral citation: *Miller N.O. v Prosperity Africa Holdings (Pty) Ltd* (I 2182/2010) [2013] NAHCMD 255 (17 September 2013)

Coram: Schimming Chase, AJ
Heard: 26 March 2013
Delivered: 17 September 2013

Flynote: Practice – Pleadings – Exception – On grounds that particulars of claim not disclosing cause of action. Plaintiffs relying on a written agreement in the form of a financial guarantee for the payment of the liabilities of a registered medical aid scheme incurred in terms of the Medical Schemes Act 1998, Act No 131 of 1998. Defendant raising 3 exceptions, namely that the agreement was not stamped and cannot be relied on, that plaintiffs failed to make the

allegation that the amount claimed is a liability under the Medical Schemes Act and that the agreement expired at the end of December 2007. On a proper interpretation of the pleadings, the failure to stamp the agreement did not render the claim unsustainable for purposes of the exception. The particulars of claim as amplified by the further particulars indeed aver that the amount claimed is a liability under the Medical Schemes Act. The provisions relating to the termination date can be interpreted in two possible ways and the necessity for extraneous evidence is a distinct possibility. Courts are reluctant to decide issues of interpretation of a contract unless the provisions are clear and unambiguous. Exceptions dismissed.

Summary: The plaintiffs, liquidators of the Renaissance Medical Aid Scheme (in liquidation) instituted action on the basis of a written agreement in terms of which the defendant agreed to on demand provide a financial guarantee as guarantor and co-principal debtor for the proper execution by Renaissance Medical Aid Scheme Act 1998, No 131 of 1998 of all its liabilities in terms of the Medical Schemes Act, 1998. The defendant raised three exceptions on the grounds that the particulars of claim did not disclose a cause of action. The first ground related to the failure to stamp the agreement in terms of the Stamp Duties Act 1993, No 15 of 1993. The second ground claimed that the plaintiffs failed to allege that the amount claimed in the action was a liability under the Medical Schemes Act. The third ground related to an interpretation of a provision in the agreement to the effect that it would continue to be of force and effect between the parties for the period ending December 2007. As regards the first ground the agreement was stamped by the date of hearing of the exception. The plaintiffs accordingly withdrew the exception and the court had to determine who should pay the costs thereof as there was no agreement to that effect.

Held: It was not clear *ex facie* the particulars of claim that it was executed in Namibia. Furthermore, the terms of the agreement fall within the definition of a promissory note as defined in section 7 the Stamp Duties Act in terms of which the person liable for duty and required to stamp any instrument shall in the case of a bill of exchange or promissory note, be the drawer or maker. In any event,

the parties were still at the pleading stage and the agreement had not yet been placed in evidence. For purposes of an exception, the court takes the facts as alleged in the pleadings as correct. Furthermore, the court could exercise its discretion in terms of section 12 of the Stamp Duties Act and require that the agreement be stamped at the hearing of the action. The exception did not go to the root of the claim. Accordingly the defendant was ordered to pay the costs.

Held: As regards the second exception it was clear from a perusal of the particulars of claim read with the further particulars that the plaintiffs indeed alleged that Renaissance as a medical scheme had incurred liability in terms of the Medical Schemes Act read together with its rules. Although this allegation could have been made in a clearer manner, it could not be said that no cause of action was disclosed. The exception was accordingly dismissed.

Held: As regards the third exception the provision of the contract shows that there are two possible interpretations for the particular provision. This aspect made it apparent that the court should express its reluctance to decide exceptions on interpretation of a contract. There was an element of ambiguity (that could possibly be clarified by extraneous evidence) that was better left to the trial court.

ORDER

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1. The second and third ground of exception is dismissed with costs, such costs to include the costs of one instructing and two instructed counsel.

2. The defendant is ordered to pay the costs of the first ground of exception, such costs to include the costs of one instructing and two instructed counsel.

JUDGMENT

SCHIMMING-CHASE, AJ

[1] This matter comes by way of three exceptions raised by the defendant to the plaintiffs' particulars of claim on the grounds that it lacks the necessary averments to sustain a cause of action.

[2] The plaintiffs' claim is based on a written agreement in terms of which the defendant bound itself as guarantor and co-principal debtor for the proper execution by Renaissance Medical Scheme (in liquidation) ("Renaissance") of all its liabilities in terms of the Medical Schemes Act 1998, No 131 of 1998 ("the Act") for an amount not exceeding N$5 million.

[3] The plaintiffs allege in the particulars of claim to be acting in their capacities as joint liquidators of Renaissance. They further allege that at all material times, Renaissance was registered as a Medical Aid Scheme in terms of the Act, and that Renaissance at all material times provided "assistance in defraying expenditure incurred by members in respect of health care services provided to members."

[4] The written agreement giving rise to the defendant's liability is alleged to have been concluded on 5 July 2007. A copy was annexed to the particulars of claim. The agreement was however not stamped. The terms of the written agreement are quoted in full below.

> "WHEREAS, "PROSPERITY AFRICA" provides a financial guarantee to ensure the financial stability of 'RENAISSANCE".
>
> NOW THEREFORE I, (Albertus Jacobus Struwig), in my capacity as Director of "PROSPERITY AFRICA" as "THE SURETY", and duly authorised to represent the Surety hereby:

(a) Bind the Surety as guarantor and Co-principal Debtor for the proper execution by "RENAISSANCE" of all its liabilities in terms of the Act; and

(b) Waive the benefits of the *beneficium ordinis seu excussionis et divisionis* and guarantee to pay, on the written request of "RENAISSANCE" and within 30 days of the day of such request, such amounts as may be requested, but not exceeding R5m (five million Rand), to "RENAISSANCE".

(c) This agreement shall, notwithstanding the signature date, be deemed to have become effective on the *(sic)* 1 January 2007 and shall continue to be of force and effect between the parties for the period ending December 2007 (termination).

(d) This guarantee may only be cancelled by the Surety with prior written consent of "RENAISSANCE" or after three months' written notice to "RENAISSANCE", but any liability attaching to this guarantee up to the time of its termination shall continue to exist. This guarantee is neither negotiable nor transferable."

[5] The plaintiffs also allege that at all material times "the defendant was a managed health care organisation for the purpose of providing a managed health care service, more particularly those health care services or health care programmes rendered to members which Renaissance was obliged in terms of its Rules to provide."

[6] In its request for further particulars, the defendant requested *inter alia* a copy of the Rules of Renaissance, which the plaintiffs duly provided in their further particulars.

[7] The defendant also requested plaintiffs to specify, with reference to the applicable paragraph numbers in the aforementioned Rules, which paragraphs were relied on for the allegations that Renaissance was obliged to provide a "managed health care service" and "health care services" and/or "health care programmes" to its members. The defendant was referred to paragraph 5 of the Rules, which provide that the objects of Renaissance are to:

"(a) undertake liability in respect of its members and their dependants, in return for a contribution or premium;

(b) make provision for the obtaining of any relevant health service;

(c) grant assistance in defraying expenditure incurred in connection with the rendering of any relevant health service; and/or agreement with, the Scheme;

(d) render a relevant health service, either by the Scheme itself, or by any supplier or group of suppliers of a relevant health service or by any person in association with, or in terms of an agreement with, the Scheme."

[8] Having summarised the background and issues for consideration on the pleadings, I now deal with the defendant's grounds of exception.

[9] The first ground relates to the fact that the written agreement was not stamped as required in terms of sections 3, 5, 6, 8, 9, 10 and 12 of the Stamp Duties Act, Act No 15 of 1993 ("the Stamp Act"). The defendant disputes the plaintiffs' entitlement to produce the written agreement in evidence or to make the document available to any court of law and places the responsibility of stamping the agreement on the plaintiffs. Consequently, the defendant submits that the particulars of claim do not disclose a cause of action.

[10] The second ground of exception is based on an allegation contained in paragraph 7 of the particulars of claim. In this paragraph the plaintiffs allege that "upon and following the winding up of Renaissance the liabilities of Renaissance exceeded R5 million and as at December 2007 its liabilities were R62,838,774.00". (emphasis supplied)

[11] The defendant also made reference to the allegation in paragraph 6.1 of the particulars of claim, to the effect that "the defendant agreed to provide a financial guarantee to Renaissance and to that end bound itself as guarantor and co-principal debtor for the proper execution by Renaissance of all its liabilities under the Medical

Schemes Act 1998." (emphasis supplied) The basis of the exception, as I understand it, is that the plaintiffs failed to make the allegation that the amount claimed in the action is a liability as envisaged in paragraph 6.1 of the particulars of claim (i.e. a liability under the Act). This, according to the defendant is an essential allegation, without which no cause of action is disclosed against the defendant.

[12] The third ground of exception relates to the provisions of clause (c) of the written agreement quoted above, which I repeat for ease of reference:

> "this agreement shall notwithstanding the signature date, be deemed to have become effective on the (*sic)* 1 January 2007 and shall continue to be of force and effect between the parties for the period ending December 2007 (termination)."

[13] The defendant argues that in terms of this clause, the agreement expired at the end of December 2007 and was, from that date, of no force and effect.

[14] I preface evaluation of each of the grounds of exception by reiterating some well established legal principles regarding the court's approach in dealing with exceptions. In Colonial Industries Ltd v Provincial Insurance Co Ltd [1] it was stated with regard to the general approach to exceptions that:

> "Save in the instance where an exception is taken for the purpose of raising a substantive question of law which may have the effect of settling the dispute between the parties, an excipient should make out a very clear, strong case before he should be allowed to succeed."

[15] When an exception is taken to a pleading, the excipient proceeds on the assumption that each and every averment in the pleading to which exception is taken is true, but nevertheless contends that as a matter of law the pleadings do not disclose a cause of action. [2] Thus, the court for the purposes of an exception, takes the facts as alleged in the pleadings as correct.

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[1] 1920 CPD 627 at 630

[2] See for example Amalgamated Footwear & Leather Industries v Jordan Co Ltd 1948(2) SA 891 (C).

[16] The excipient must also satisfy the court, on all reasonable constructions of the plaintiff's particulars of claim as amplified and amended, and on all possible evidence that may be led, that no cause of action is or can be disclosed. [3]

> "Exceptions should be dealt with sensibly. They provide a useful mechanism to weed out cases without legal merit. An over technical approach destroys their utility. An exception should be like a sword that cuts through the tissue of which the exception is compounded and exposes its vulnerability." [4]

[17] It has also been held that a commercial document executed by the parties with a clear intention that it should have commercial operation should not lightly be held to be ineffective. [5]

[18] The courts are reluctant to decide upon exception questions concerning the interpretation of a contract. [6] Thus, when the exception is based on an interpretation of a contract, the excipient is required to demonstrate that the contract is unambiguous. In Michael v Caroline's Frozen Yoghurt Parlour (Pty) Ltd, [7] reference was made to the case of Sacks v Venter, [8] a case involving a clause in a deed of sale of certain immovable property which provided that the sale was subject to a particular condition to which an exception was taken on the grounds that no cause of action was disclosed Ramsbottom J observed:

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[3] Per Maritz (as he then was) in Namibia Breweries Ltd v Seelenbinder, Henning & Partners 2002 NR 155 HC at 158 H – 159 A and the authorities collected there. See also Lewis v Onenanate (Pty) Ltd and Another 1992(4) SA 811 (A) at 817F.

[4] Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006(1) SA 461 (SCA) at 465.

[5] See Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd 1991(1) SA 508 (A) at 514 E-F.

[6] See Sun Packaging (Pty) Ltd v Vreulink 1996(4) SA 176 (A) at 186J; approved in Francis v Sharp 2004(3) SA 230 (C) at 237 F-G.

[7] 1991(1) SA 624 W

[8] 1954(2) SA 427 (W)

> "I think it is clear that if the condition is unambiguous so that evidence is not admissible for its interpretation, the question of its interpretation can properly be decided on exception; Standard Building Society v Cartoulis, 1939 AD 510, is authority for this. The question then is whether clause 7 unambiguously bears the meaning contended for by Mr. Goldsmid or whether it is ambiguous and whether evidence of the circumstances in which the agreement was made would be admissible to elucidate its meaning. In order to succeed, the excipient must show that the clause is unambiguous and that the meaning for which he contends is the correct meaning." [9]

[19] I now proceed to deal with the exceptions.

[20] As regards the first exception, a stamped copy of the written agreement was handed up by Mr Heathcote SC appearing for the plaintiff assisted by Ms van der Westhuizen. Mr Tötemeyer SC who appeared for the defendant assisted by Mr Obbes accordingly withdrew the first ground of exception. The parties were however not agreed on the issue of costs, each party arguing that the other should pay the costs of the first exception. Thus the court must determine which party should pay the costs of the first exception.

[21] In this regard Mr Heathcote argued that it was not a requirement for the agreement to be stamped, and if it was a requirement, the provisions of section 7 of the Stamp Act placed the responsibility to stamp the agreement on the defendant. Section 3(1) of the Stamp Act provides that:

> "3 Stamp duty to be charged in accordance with Schedule 1
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> (1) Every instrument referred to in Schedule 1, not being an instrument in respect of which exemption is provided for in this Act or in that Schedule shall be subject to the duties prescribed in that Schedule in respect of such instrument, if the instrument is executed in Namibia on or after the date of commencement of this Act or if the instrument is executed outside Namibia on or

[9] At 420 C-D

after the said date and relates to the transfer or hypothecation of any property situated in Namibia or any matter or thing to be performed or done therein."

[22] Section 7 of the Stamp Act deals with the persons liable to stamp various instruments. It provides as follows:

"Persons liable to stamp various instruments

7(1) The persons respectively liable for duty and required to stamp any instrument referred to in this section shall be -

(a) …

(b) in the case of a bill of exchange or promissory note, the drawer or maker."

[23] The Stamp Act defines a promissory note as

"any unconditional promise in writing made by one person to another, signed by the maker, and engaging to pay on demand or at a fixed or determinable future date a sum of money to or to the order of such person or any other specified person or to bearer, but does not include a bank note."

[24] Mr Heathcote submitted that it cannot be established from the contents of the written agreement that it was executed in Namibia. It is clear *ex facie* the agreement that the parties rely on South African legislation and the amount is expressed in South African currency. Mr Heathcote referred the court to the definition of promissory note and submitted that read together with section 7(1)(b) of the Stamp Act, the written agreement is a promissory note by definition and in terms of section 7 the drawer or maker, namely the defendant, is responsible to stamp the document (if it is indeed liable to be stamped). He further argued that it is untenable for a defendant not to comply with the provisions of the Stamp Act, fail to pay what is due and when sued, raise an exception that the document which contains its undertaking to pay may not be used. In such circumstances, the court would exercise its discretion in favour of

the plaintiff by ordering the defendant to stamp the document whereafter the document would become admissible in a court of law in terms of section 12. Finally Mr Heathcote argued that the exception does not go to the core of the plaintiff's claim if the court may by exercising a discretion, allow the document to be submitted in evidence. Thus, the exception does not cut through the tissue of Renaissance's claim.

[25] Mr Tötemeyer argued that the plaintiff was responsible to stamp the agreement and had failed to comply with the provisions of the Stamp Act. He further relied on the provisions of Rule 18(6) of the High Court Rules which provides that a party who in his or her pleading relies upon a contract shall state whether the contract is written or oral, where and by whom it was concluded, and if the contract is a true copy thereof or the part of the pleading of the part relied on in the pleading shall be annexed to the pleading. It was submitted that the failure to comply with the Stamp Act and the failure to comply with Rule 18(6) result in the plaintiffs not being entitled to make the written agreement available for any purpose, and thus the plaintiff's claim – premised exclusively on the written agreement – is unsustainable.

[26] I agree with the submissions of Mr Heathcote. It does not appear that the written agreement was concluded in Namibia based on the pleadings as they stand. Secondly, one cannot dispute that the terms of the written agreement fall within the definition of a promissory note, as a result of which it would in terms of section 7 of the Stamp Act, be the responsibility of the defendant to stamp the agreement. In any event, one should not overlook the principle that when dealing with an exception, the excipient proceeds on the assumption that each and every averment in the pleading to which the exception is taken is true. The written contract is annexed to the particulars of claim. For purposes of proving the written agreement in evidence at the hearing of the matter, the agreement would need to be stamped and the court would be required to order that the agreement be stamped before it is used in evidence. However at this early stage of the pleadings, the agreement has not yet been placed in evidence and as such, I hold the view that the exception is without merit. Thus the defendant must pay the costs of the first ground.

[27] As regards the second exception, Mr Heathcote submits that it is factually incorrect. The basis for this submission is that the exception claims that the plaintiffs failed to make the allegation that "the amount claimed in this action" is a liability as envisaged in paragraph 6.1 of the particulars of claim, and that it is clear from the recordals of the written agreement and in terms of the Act, that the plaintiffs plead that the liability is incurred by virtue of the registered Rules. Moreover, it was argued that the particulars of claim read with the annexures (as it should be) and the further particulars, state that the Renaissance's liabilities as at 31 December 2007, exceeded N$5 million, that such liabilities were incurred by virtue of the registered rules of Renaissance and lastly that the obligations arise from rule 5 read with the other rules. He further submitted that it is also clear *ex facie* the pleadings that Renaissance was registered as a medical scheme in terms of the Act. The rules are registered in terms of the Act and set out in detail what liabilities would be incurred.

[28] It was also argued that the second exception assumes that there must be in existence an obligation of an accessory nature, but that properly construed, only one allegation is required to sustain a cause of action and that is that written demand was made by Renaissance.

[29] Mr Tötemeyer in this regard submitted that the plaintiffs failed to make the allegation that the amount claimed in the action is a liability as envisaged in paragraph 6.1 of the particulars of claim (i.e. a liability under the Act). This, it was argued, is an essential allegation without which no cause of action is disclosed against the defendant.

[30] It is clear to me that *ex facie* the pleadings as amplified, the plaintiffs allege that Renaissance as a medical scheme incurred liability in terms of the Act read together with its registered Rules. The allegation in paragraph 6.1, read together with paragraph 7, bear this out. I do not see any other construction that can be placed on the pleadings to justify the submission that there was a failure to make the allegation that the amount claimed is a liability as envisaged in paragraph 6.1 of the particulars of claim, rendering the particulars of claim excipiable. The further particulars make the connection between

paragraph 7 dealing with the liabilities of Renaissance and paragraph 6.1 dealing with the amount claimed as a liability envisaged in paragraph 6.1. The particulars would be a lot clearer if that aspect was reiterated in paragraph 7, but this omission does not result in the particulars not disclosing a cause of action. In my opinion, this ground of exception also fails.

[31] As regards the third ground of exception, namely that the agreement expired at the end of December 2007 and from that date was of no force and effect between the parties, Mr Tötemeyer submitted that relying on the plain, unambiguous ordinary and grammatical meaning of the terms of the written agreement that its language demonstrates that the efficacy of the written agreement was limited in time and was invoked by the plaintiffs only after its expiry.

[32] Mr Heathcote on the other hand argued that the provisions of the agreement relating to termination as at end of December 2007 simply means that the agreement does not attract an additional liability in future, in particular in respect of liabilities incurred after December 2007. Thus the plaintiff could make demand for liabilities incurred up and until December 2007 at any time.

[33] In my opinion the provisions of this clause read within the context of the contract as a whole, could mean either that the agreement is in force and effect for all liabilities incurred up until the period ending December 2007, or that the guarantee or the timeframe for the guarantee ends in December 2007. Armed with these two possible interpretations, I hold the view that although the court should not shirk from its duty to decide the question of an interpretation of a contract on exception, this is an example of a situation when the courts should be reluctant to decide upon exception questions surrounding the interpretation of a contract because there is ambiguity in the particular provision. The defendant has not yet pleaded and there is more than a notional or remote possibility that extraneous evidence could be led to prove the meaning of this clause and clarify the ambiguity. It is therefore apparent that this ground of exception does not go to the root of the claim and that on all reasonable constructions of the plaintiffs' particulars of claim as amplified, and on all possible evidence that may be led in the pleadings, a cause of action is indeed

disclosed. In the result the third ground of exception fails.

[34] In light of the foregoing the following order is made:

1. The second and third ground of exception is dismissed with costs, such costs to include the costs of one instructing and two instructed counsel.

2. The defendant is ordered to pay the costs of the first ground of exception, such costs to include the costs of one instructing and two instructed counsel.

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EM Schimming-Chase

Acting Judge

APPEARANCES

PLAINTIFFS:	Mr R Heathcote SC (assisted by Ms van der Westhuizen) Instructed by Erasmus & Associates, Windhoek
DEFENDANT:	Mr R Tötemeyer SC (assisted by Mr Obbes) Instructed by Metcalfe Attorneys, Windhoek