CASE NO.: (I) 2123/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA
(MINISTER OF HEALTH AND SOCIAL SECURITY) **PLAINTIFF**

and

JACKMED RETAIL ENTERPRISES CC **DEFENDANT**

CORAM: KAUTA, AJ

HEARD ON: 19TH JUNE 2012
DELIVERED ON: 30TH JULY 2012

JUDGEMENT

KAUTA, AJ:

[1] The Plaintiff instituted an action against the Defendant seeking payment of N$2 193 525.64, together with interest from the date of judgment to date of payment with ancillary relief.

[2] After entering appearance to defend, the defendant delivered a notice in terms of Rule 23(1) of the Rules on the basis that 'the Plaintiff's particulars of claim did not contain the necessary averments to disclose a cause of action'. In satisfaction of Rule 23(3) of the Rules, the Defendant has put forth grounds upon which the exception is founded.

[3] Ms Botes, Counsel for the Defendant advanced two arguments in support of her contention that the Plaintiff's amended particulars of claim does not disclose a cause of action, or alternatively lacks the necessary averments to sustain the cause of action. The first ground is that the Plaintiff is seeking two inconsistent remedies: Firstly, a claim for the detrimental price difference, which she alleges is a claim for specific performance, secondly, damages as a result of Defendant's breach. The last ground advanced by the Defendant is that the agreement between the parties prohibits Plaintiff from instituting this action for damages.

[4] The following facts are common cause. The Plaintiff, through Tender No. A13-17/2007, invited interested parties to supply and deliver insecticides, herbicides and fumigants to the Ministry of Health and Social Services for the period 1 August 2007 to 31 July 2009. On the 8th February 2008, the Defendant was awarded the tender. As a result, the parties concluded a written agreement on the 22nd May 2008. This agreement was valid for a period of one year and six months commencing on 8 February 2008 to 31 July 2009, with a further option to extend for one year. From the 23rd June 2008 to 23 October 2008, the Plaintiff placed eight orders for the supply and delivery of the goods in terms of the agreement between the parties. The Defendant in breach of Clause 2.3, failed to honour the supply and delivery of the goods as required within a period of eight weeks upon receipt of the order. Consequently, on 9 October 2008, the Defendant wrote a letter to the Plaintiff in which it exhorted the Plaintiff to procure specified goods from a third party. On the 18th November 2008, the Defendant informed the Plaintiff to procure all goods in terms of the agreement between the parties from third parties. These two letters clearly meant that the Defendant was unable to perform in

terms of the agreement between the parties. The Plaintiff procured the goods from Southern Engineering at a cost of N$4 969 082.84. This sum was N$2 193 525.64 more than what the Plaintiff would have paid had it procured the goods from the Defendant in terms of the agreement between the parties. Hence this action.

[5] Clause 7.1.4 of the agreement between the parties provides that "should the contractor fail to furnish any goods or services within the period stipulated in the Agreement, the contractor shall be liable to compensate the Ministry for any detrimental price differences or any other damage or loss suffered by the Ministry."

[6]. Mr Marcus, Counsel for Plaintiff submitted that the Plaintiff's claim is not for specific performance but for damages because Plaintiff does not seek to enforce the contract but merely bases its action on a remedy afforded it by Clause 7.1.4 above. He further contends that even if the Defendant was correct, that the Particulars of Claim contained inconsistent remedies. The Defendant cannot in law raise the issue raised in this matter by way of an exception, but should have rather pleaded or raised the exception on the basis that the pleadings are vague and embarrassing because that would afford the Plaintiff an opportunity to remedy the defect. Lastly, Defendant submitted that what the contract between the parties prevents is delictual damages inter parties and not damages arising from a contractual breach, which is governed by Clause 7.1.4.

[7] It is trite law that for purpose of deciding an exception, the Court takes the facts alleged in the pleadings as correct. And an exception is generally not the appropriate procedure to settle questions of interpretations because, in cases of doubt, evidence may be admissible at the trial stage relating to surrounding circumstances which evidence may clear up the difficulties. In any event an exception is only open to the excipient when the defect contented for appears *ex facie* the pleadings. See: *Marney v Watson and Another* 1978 (4) SA 140 (C) at 144 F-G; *Murray & Roberts Construction*

Limited v FINAT Properties (Pty) Ltd 1991 (1) SA 508 (A); *Edwards v Woodnut NO* 1968 (4) SA 184 (R) at 186 E-H; and *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 754 F-G

[8] In my view, the Plaintiff's averments in their amended particulars of claim and the Defendant's objection thereto concern and are based on what each party considers to be the correct legal interpretations of Clauses 7.1.4 and 7.1.3 respectively. On the authorities in paragraph 7 above, issues of interpretations cannot be settled by way of an exception. If I accept as I must, on the pleadings, the facts set out in paragraph 4 above, that the Defendant informed Plaintiff in writing to order the goods from all the goods from a third party on the 18th November 2008, it will mean that the Defendant repudiated the agreement between the parties. On the authority cited by Ms Botes that where a contract is cancelled, certain rights which accrued prior to the cancellation survive the cancellation and remain enforceable, tend to support the Plaintiff's claim for damages arising ex contractu. I am fortified in this view by the submission of Ms Botes that a notice that a contract has been cancelled is inferred by service of a summons. See: *Bowring Barclays & Genote (Edms) Bpk v De Kock* 1991 (1) SA 145 (SWA) at 149J-150A; The *Principles of the Law of Contract*, 6th Ed at 729-730; *Contract* 10th *Ed* at 467.

[9] If issued and served, summons constitutes cancellation by necessary implication, excludes specific performance. For the above reasons and conclusions, I find that the Defendant has not made up a case for me to uphold the exception, based on the grounds raised. The exception therefore fails, and I consequently make the following order:

The Defendant's exception is dismissed with costs, such costs to include costs consequent upon the employment of one instructing Counsel and one instructed Counsel.

KAUTA AJ

COUNSEL ON BEHALF OF THE PLAINTIFF: **MR MARCUS**

INSTRUCTED BY: **GOVERNMENT ATTORNEY**

ON BEHALF OF THE DEFENDANT: **ADVOCATE SCHNEIDER**

INSTRUCTED BY: **FRANCOIS ERASMUS & PARTNERS**