REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3398/2010

In the matter between:

LEN COERTZEN **PLAINTIFF**

and

NEVES LEGAL PRACTITIONERS **DEFENDANT**

WERNER VAN RENSBURG **THIRD PARTY**

Neutral citation: *Coertzen v Neves Legal Practitioners* (I 3398/2010) [2013] NAHCMD 283 (14 October 2013)

Coram: PARKER AJ

Heard: **1 October 2013**

Delivered: **3 October 2013**

Reasons: **14 October 2013**

Flynote: Practice – Judgments and orders – Absolution from the instance – In order to survive absolution the plaintiff is to make a *prima facie* case in the sense that there was evidence relating to all elements of the claim, upon which a court, applying its mind reasonably to such evidence could or might (not should, or ought to) find for the plaintiff.

Summary: Practice – Judgments and orders – Absolution from the instance – In order to survive absolution the plaintiff is to make a prima facie case in the sense that the was evidence relating to all elements of the claim, upon which a court,

applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff – In instant case, the plaintiff instituted action in which he claims damages from a Law Firm (the defendant) which had represented him in a matter on the basis that the defendant or the Third Party failed to render professional services in a professional manner, diligently, with necessary skill and without negligence – The claim in these proceedings arises from the plaintiff (as defendant then) applying for leave to file further opposing affidavit to resist an application for summary judgment where the court mulcted the plaintiff in wasted costs – The court found that the plaintiff had not timeously given the Third Party (a professional assistant employed by the defendant) full and proper instructions when the initial opposing affidavit was prepared and filed necessitating launching an application for leave to file a further opposing affidavit which attracted wasted costs order – Court found further that the plaintiff was to blame for not giving timeously full and proper instructions to the Third Party when the initial opposing affidavit was prepared and filed – Consequently the court held the defendant (and the Third Party) have not been negligent when rendering professional services to the plaintiff – Court concluded that the plaintiff had not placed before the court evidence upon which a court acting reasonably might find for the plaintiff – Consequently, the court made an order granting absolution from the instance with costs.

Flynote: Practice – Pleadings – Amendment of Particulars of Claim – Notice of amendment submitted by counsel from the Bar to the court – Court found that the amendment application had not been brought timeously and there was no reasonably satisfactory explanation for the delay – Court found further that the proposed amendment would not assist the plaintiff – Consequently, the court refused the amendment.

Summary: Practice – Pleadings – Amendment of Particulars of Claim – Notice to amend submitted to the court at the commencement of the hearing of the defendant's application granting absolution from the instance notice of which had been given by counsel during trial the previous day – Court found that the amendment would not assist the plaintiff because if the amendment was allowed there was no evidence to support it – Court held that the amendment would therefore not assist the plaintiff because pleadings do not make out a case, facts do – Court

further found that the plaintiff had had ample time to bring the application to amend especially when the case went through the judicial case management procedures – Court found further that the plaintiff has not given any reasonably satisfactory explanation for the delay – For these reasons application to amendment was refused with costs.

JUDGMENT

PARKER AJ:

[1] This is a case of a client (the plaintiff) instituting action against a firm of legal practitioners (the defendant) that had represented the plaintiff in a matter *Johannes Hermanus Gabrielsen v Len Coertzen* under Case No. I 3062/2009 where the plaintiff was the defendant. In that action Gabrielsen launched an application for summary judgment. The present matter arises, from the plaintiff's contention that as respects the summary judgment application, the defendant acted negligently and failed to exercise due diligence and, further, failed to apply the necessary skill in all manner of ways adumbrated in the Particulars of Claim. And the plaintiff claims against the defendant: (a) payment in the amount of N$48 500,00, (b) interest *a tempore morae* on the amount at the rate of 20 per cent per annum from date of judgment until date of payment, (c) costs of suit, (d) further and alternative relief and (e) further or alternative relief. The defendant defended the action.

[2] In the course of events, a Third Party was joined. The defendant at all material times employed the Third Party as a professional assistant, and the Third Party represented the plaintiff in the aforementioned Case No. I 3062/2009.

[3] The plaintiff testified in support of his claim. No witness testified in support of the plaintiff's case. At the close of the plaintiff's case, Mr Corbett, counsel for the defendant, gave notice there and then that he would the following day apply for an order granting absolution from the instance. Before commencement of the hearing of the defendant's application on that day, Mr Barnard, counsel for the plaintiff, handed

to me from the Bar the plaintiff's Notice of Intention to Amend in which the plaintiff applies to amend para 5.6 of the Particulars of Claim. Mr Corbett did not object to the manner in which Mr Barnard brought the notice to the attention of the Court.

[4] Be that as it may, it was then decided to hear both the amendment application and the absolution application together. After hearing arguments of Mr Corbett and Mr Barnard I told both counsel that I shall pronounce my decision in open court on 3 October 2011. I made an order (dated 3 October 2013): (a) dismissing the application to amend with costs, including costs of one instructing counsel and one instructed counsel, and (b) granting absolution from the instance with costs, including costs of one instructing counsel and one instructed counsel. I added then that reasons for my decision would follow in due course. These are my reasons.

[5] I shall now consider the plaintiff's application to amend, mentioned previously. To start with, I agree with Mr Barnard that the court may during the hearing (of an application for leave to amend) at any stage before judgment grant leave to amend a pleading. But that is the rule in its generality. It has been said that it does not mean that 'leave to amend can be obtained merely for the asking. The litigant seeking to make an amendment is in fact *craving an indulgence* and must offer some explanation for why the amendment is required and more especially if the application for amendment is not timeously made, some reasonably satisfactory account for the delay'. (Emphasis added) (Herbstein and Van Winsen, *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, vol 1, 5 ed: p 680; and the cases there cited) The learned authors go on to state, 'Where a proposed amendment will not contribute to the determination by the court of the real issues between the parties, it ought not to be granted'. (Ibid., p 681) In this regard it has been said that an 'amendment is refused when … the new view (ie the amendment) will not assist the party …' (*Bankorp Ltd v Anderson-Morshead* 1997 (1) SA 251 (W) at 253 (cited in *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, loc. cit.)

[6] In the instant case the plaintiff has not placed before the court 'some reasonably satisfactory account for the delay' in applying to amend. In this regard one must not lose sight of the following important aspects. Combined Summons was

issued from the registrar's office on 1 October 2010. The matter went through the Judicial Case Management (JCM) procedures. In the parties' case management report submitted to the managing judge on 5 July 2011, it is recorded that no interlocutory motions were foreseen by the parties. The parties' joint proposed pre-trial order does not also contemplate the bringing of any notice of application to amend the pleadings by either party.

[7] I have set out these important aspects for a good reason. It is to underline the fact that the plaintiff has no good reason not to have brought the application to amend timeously. Indeed, the plaintiff had more than ample time and opportunities to bring an application to amend. He brushed aside all ample time and squandered all opportunities to bring such application, and he decides to bring the application at this hour in the day when he has closed his case and the court was about to hear the defendant's application for an order granting absolution from the instant. And in all this, the plaintiff has not put fourth one iota of reasonably satisfactory account for the delay. All that Mr Barnard says is that the rule entitles the plaintiff to bring such application at any time before judgment is delivered. That may be so; but with great deference to Mr Barnard, Mr Barnard misses the point. The plaintiff is craving for the court's indulgence. The plaintiff did not bring the application timeously. And he has not placed before the court any reasonably satisfactory account – not even a phantom account – for the delay. These are irrefragable facts that must weigh heavily against the plaintiff's application to amend.

[8] As I have said previously, the application to amend is brought after the plaintiff has closed his case and at the point when counsel for the defendant is just about to argue its application for an order granting absolution from the instance. As I see it, the application to amend is brought at this late hour in the proceedings when the plaintiff realizes that he has failed to make out a case for his claim because what he has placed before the court does not account for what he pleads in the Particulars of Claim.

[9] The upshot of this is that if the amendment was allowed it will stand nude in the proceedings because there would be no evidence to support it; and pleadings do not make out a case; facts, that is, facts accepted by the court do. Thus, there would

be no evidence supporting the amended pleading (if allowed) upon which the court might find for the plaintiff. In sum, the amendment will not assist the plaintiff.

[10] For all these reasons, I exercised my discretion in favour of refusing the amendment. The plaintiff's application was accordingly dismissed with costs.

[11] It remains to consider the defendant's application for the granting of absolution from the instance. In *Etienne Erasmus v Gary Erhard Wiechmann and Fuel Injection Repairs & Spares CC* (I 1084/2011) [2013] NAHCMD 214 (24 July 2013) at para [18], I stated thus concerning absolution from the instance:

'[18] The test for absolution from the instance has been settled by the authorities in a line of cases. I refer particularly to the approach laid down by Harms JA in *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA) at 92E-F; and it is this:

"[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H in these terms:

… (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T))"

And Harms JA adds, "This implies that a plaintiff has to make out a prima facie case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff." Thus, the test to apply is not whether the evidence established what would finally be required to be established but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, or ought to) find for the plaintiff. (HJ Erasmus, et al, *Superior Court Practice* (1994): p B1-292, and the cases there cited)'

[12] The approach has been followed in Namibia in a number of cases; see, for example, *Stier and Another v Hanke* 2012 (1) NR 370 (SC); *Aluminium City CC v*

Scandia Kitchens & Joinery (Pty) Ltd 2007 (2) NR 494 (HC), apart from *Etienne Erasmus*.

[13] The evidence adduced by the plaintiff (ie his written witness statement and the oral evidence) does not establish the plaintiff's averments in is Particulars of Claim. Little wonder then that the plaintiff's counsel, having seen the writing on the wall, sought to amend certain relevant and key aspect of the plaintiff's Particulars of Claim, but which for the reasons given I have refused.

[14] The plaintiff and the defendant had concluded an oral agreement in September 2009. In terms of the oral agreement the defendant would render professional services as legal practitioners to the plaintiff in the aforementioned Case No. I 3062/2009 where the plaintiff was the defendant and Gabrielsen the plaintiff.

[15] The plaintiff pleads in the instant proceeding that the terms of the agreement were that the defendant would perform the services of a legal practitioner in professional manner, diligently, with the necessary skill and without any negligence. It was further pleaded that the defendant would attend to any ancillary tasks necessary to give effect to the instructions that the plaintiff would give it. The plaintiff pleads further that the defendant breached the agreement and acted negligently by failing to exercise due diligence and to apply the necessary skill because, according to the plaintiff – (a) The defendant failed to give proper attention to the matter in order to appreciate the nature of the matter; (b) The defendant failed to attend to the matter timeously resulting in an application for summary judgment being attended to in a hurry and an inadequate affidavit resisting summary judgment being filed; (c) As a result, a further affidavit supplementing the first affidavit had to be prepared and an application for leave to file such affidavit brought, resulting in an adverse cost order. Thus the plaintiff alleges that the aforesaid breach caused a bill of costs to be taxed in an amount of N$45 909,95. The plaintiff further pleads that Gabrielsen took steps to execute the order which resulted in the plaintiff being liable to pay a total amount of N$48 500,00 to stay the execution. It is this amount which the plaintiff claims in damages in these proceedings.

[16] I find that the plaintiff pleads that the necessity of bringing the application to file a further affidavit was the cause of the adverse costs order that my Sister Tommasi J made in Case No. I 3062/2009 on 19 January 2010. The material part of that order reads:

> ‘(1) That condonation is granted to the applicant for non-compliance with Rule 6(1).
>
> (2) That the applicant (ie the defendant in the instant proceedings) pay the wasted costs *for the application brought for leave to file further affidavits* including the costs of two counsel up to today and including the costs of drafting heads of argument in the application for summary judgment on an attorney and client scale. (Italized for emphasis)
>
> (3) That the matter is hereby postponed *sine die*.’

[17] From the ipssisima verba of Tommasi J’s order, it is as clear as day that the plaintiff was mulcted in wasted costs on account of launching an application for leave to file further opposing affidavits. It is not within the province of this court to determine whether the order is unfair or unreasonable or, indeed, wrong. In any case it has not been established that the plaintiff applied for a variation or rescission of the order and that the application was granted or that Tommasi J interpreted the order upon request of the plaintiff. As the order stands, for the purposes of the instant proceeding, the questions that immediately arise for determination are these: (a) Was the filing of a further affidavit by the plaintiff necessary? (b) If it was necessary to file a further affidavit, as it was done, were there good reasons why the facts appearing in the further affidavit could not have been set out in the initial opposing affidavit? On the facts and circumstances of the case, at whose door should the blame of filing further affidavit, which attracted adverse costs order, fall?

[18] I now proceed to determine these significant questions. On the totality of the evidence, I make the following factual findings. The plaintiff could not have, during the first consultation with the Third Party, which was conducted telephonically, given any documents or other writing, containing a summary of events, and cheques to the Third Party tending to establish that the plaintiff was no longer indebted to Gabrielsen in the amount of N$51 580,00 claimed by Gabrielsen in Case No. I

3062/2009. Thus, at the first consultation in September 2009 the only information available to the Third Party as instructions from the plaintiff was that the plaintiff was not indebted to Gabrielsen in the amount of N$51 580,00 claimed by Gabrielsen. The Third Party could not have annexed any documents or other writing and cheques to the first founding affidavit as proof of the plaintiff's contention. The plaintiff deposed to his initial opposing affidavit and signed it on 20 October 2009, resisting Gabrielsen's application for summary judgment.

[19] In the attestation clause of the affidavit, the Commissioner of Oaths before whom the plaintiff deposed to his initial opposing affidavit says that the plaintiff declared that he knows and understands the contents of the affidavit and that the contents of the affidavit are true and correct. In my opinion the probabilities are that the plaintiff saw then that no documents or other writing and cheques were annexed to his affidavit, and the plaintiff did not raise a finger. In this regard, it must be remembered that the plaintiff is not a stranger to the English language, the language in which the contents of the plaintiff's opposing affidavit is drafted. The plaintiff understood the contents of his affidavit and he swore therein that the contents are true and correct, as the Commissioner of Oaths attests.

[20] That is not all. I find further that during the initial consultation in September 2009 between the Third Party and the plaintiff, the plaintiff did not give full instructions to the Third Party in respect of the total claim of Gabrielsen, contrary to what the plaintiff contends. The plaintiff became aware of the full extent of the services rendered by Gabrielsen and on which Gabrielsen's claim was based only after the Third Party had received on 12 November 2009 a letter from Gabrielsen to the Third Party stating how the amount of Gabrielsen's claim had been calculated. It was, therefore, during a second consultation which occurred after 12 November 2009 that the plaintiff informed the Third Party about the terms of an oral agreement that the plaintiff and Gabrielsen had entered into and all the payments that the plaintiff had made to Gabrielsen which, according to the plaintiff, exceeded the amount claimed by Gabrielsen. This could then promote a set-off. In sum, the plaintiff's initial opposing affidavit could not have contained anything more than what he had given to Third Party as instructions to the Third Party, namely, that the

plaintiff was not indebted to Gabrielsen because he had paid Gabrielsen 'for all services' Gabrielsen had rendered to him.

[21] It cannot, therefore, on any pan of scale be said that the Third Party or the Defendant was negligent or that they did not act deligently in the matter of opposing the summary judgment respecting the initial opposing affidavit. I find that the plaintiff knew that he had not at that material time given full and timeous instructions to the Third Party. The Third Party, as Mr Corbett correctly submitted, could not manufacture evidence in support of the plaintiff's case.

[22] For all these factual findings it emerges inexorably that there was a good reason to apply for leave to file a further opposing affidavit in which facts relied on in support of the plaintiff's opposition to the summary judgment application could be adequately and properly aired. And since the plaintiff could not have given the Third Party full instructions before the filing of the initial opposing affidavit, the badges of negligence and failure to render professional services diligently cannot be pinned on the lapel of the Third Party or the defendant. Accordingly, I hold that any negligence or any course that necessitated the need to file a further opposing affidavit should be placed squarely at the door of the plaintiff. The plaintiff concedes, and neither can he deny, that he did not timeously and properly give full instructions to the Third Party at the first consultation with the Third Party, necessitating the application for leave to file a further affidavit for which the plaintiff was mulcted in wasted costs, as I have found, that is, costs which the plaintiff now claims in the present action.

[23] In the face of the aforegoing factual findings and reasoning and conclusions, it is clear that at the close of the plaintiff's case the plaintiff had not made out a *prima facie* case against the defendant or the Third Party. As I said in *Etienne Erasmus v Gary Erhard Wiechmann and Fuel Injection Repairs & Spares CC* at para [19], '… it must be remembered that at this stage it is inferred that the court has heard all the evidence available against the defendant (Erasmus, *Superior Court Practice* ibid, p B1-293).' Furthermore, I have kept in my mental spectacle the principled judicial counsel that a court ought to be chary in granting an order of absolution from the instance at the close of the plaintiff case unless the occasion arises. In that event the court should order it in the interest of justice. Taking into account all the aforegoing

factual findings and reasoning and conclusions, I think it was in the interest of justice that I granted the order of absolution from the instance. Accordingly, I exercised my discretion in favour of granting the order first before set out in para 4.

[24] In the result, I refused the plaintiff's application to amend with costs and granted the defendant's application for the granting of absolution from the instance with costs.

C Parker

Acting Judge

APPEARANCES

PLAINTIFF:	P C I Barnard Instructed by Francois Erasmus & Partners, Windhoek
DEFENDANT AND THIRD PARTY:	A W Corbett Instructed by Neves Legal Practitioners, Windhoek