REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 791/2013

In the matter between:

MARKUS MUKUVE MPEPO **PLAINTIFF**

And

STECKEL'S TOYOTA CC **FIRST DEFENDANT**

DE WALD SWART **SECOND DEFENDANT**

C K HEYDT **THIRD PARTY**

Neutral citation: *Mpepo v Steckels Toyota CC* (I 791-2013) [2015] NAHCMD 137 (11 June 2015)

Coram: PARKER AJ

Heard: **23 March 2015; 25 March 2015; 28 – 30 April 2015; 11 – 12 May 2015; 21 May 2015**

Delivered: **11 June 2015**

Flynote: Practice – Trial – Absolution from the instance at the close of the plaintiff case – When to be granted – Plaintiff must lead admissible evidence on which court, applying its mind reasonably to the evidence, could or might find for the plaintiff – It requires the court to consider the evidence not *in vacuo* but to consider the admissible evidence in relation to the pleadings and to the requirements of the law applicable to the particular case.

Summary: Practice – Trial – Absolution from the instance at the close of the plaintiff's case – When to be granted – Plaintiff must lead admissible evidence on which court, applying its mind reasonably to the evidence, could or might find for the plaintiff – It requires the court to consider the evidence not *in vacuo* but to consider the admissible evidence in relation to the pleadings and to the requirements of the law applicable to the particular case – In present case plaintiff relying on fraudulent misrepresentation on a material aspect of the contract of sale of a motor vehicle concluded between the plaintiff and the defendants – Plaintiff led admissible evidence on defendants' fraudulent misrepresentation – Considering the pleadings and the applicable law on the case, particularly in relation to the aeditilian remedies and the evidence, court concluded that on the evidence a court might find for the plaintiff – Court therefore refused to grant absolution from the instance – Consequently, application for order granting absolution from the instance is dismissed with costs.

ORDER

(a) The application is dismissed with costs.

(b) A status hearing to determine the further conduct of the matter is to be held today.

JUDGMENT

PARKER AJ:

[1] This matter revolves around the sale of a motor vehicle by the first defendant to the plaintiff. The second defendant is an employee of the first defendant. The sale

agreement was an oral agreement. In the course of events the third party was joined by the defendants. The instant proceedings concern an application for an order granting absolution from the instance.

[2] On orders granting absolution from the instance, I cannot do any better than to rehearse here what I said in *Coertzen v Neves Legal Practitioners* (I 3398/2010) [2013] NAHCMD 283 (14 October 2013), which Mr Boesak, counsel for the defendants, referred to me. There, at paras 11 and 12, I stated thus:

'[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:
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> > [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."

'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.

[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*.'

[3] Ms Shifotoka, counsel for the plaintiff, also referred to me *Bidoli v Ellistron t/a Ellistron Truck & Plant* 2002 NR 451 which, like *Coertzen v Neves Legal Practitioners*, deals with the test to be applied where absolution from the instance is applied for at the close of the plaintiff case. As I see it, the efficacy and significance of *Bidoli* are these. There, at 453D-F, after approving the test enunciated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H (also relied on by the court in *Coertzen*), Levy J determined the interpretation and application of the phrase 'applying its mind reasonably' used by Harms JA in *Neon Lights (SA) Ltd* thus:

'The phrase "applying its mind reasonably" requires the Court not to consider the evidence *in vacuo* but to consider the admissible evidence in relation to the pleadings and in relation to the requirements of the law applicable to the particular case.'

Levy J concluded, at 453G:

'If a reasonable Court keeping in mind the pleadings and the law applicable, considers that a Court "might" find for the plaintiff, then absolution must be refused.'

[4] In the amended particulars of claim, in the alternative, the plaintiff claims that the second defendant, in the course of his employment with the first defendant, falsely represented to the plaintiff that the motor vehicle in question was a 2008 model, was covered by a two-year warranty and was fit for the purposes for which it was intended. The plaintiff claims further that the misrepresentation was material: it induced him to enter into the agreement which he did to his detriment in that he suffered damages. The plaintiff claims also that the first defendant and the second defendant were negligent in making the representation because they did not make

proper inquiries as to the history of the vehicle before selling it to the plaintiff. I do consider the alternative claim because the evidence that the plaintiff placed before the court relates to, and was meant to prove the claim 'in the alternative'. In that regard, I find that the plaintiff relies on fraudulent misrepresentation as well as negligent representation. He pleaded them and he placed evidence before the court to prove them.

[5] On the issue of fraudulent misrepresentation, the evidence is that the motor vehicle was not a 2008 model as the defendants represented to the plaintiff. And what pieces of evidence are placed before the court to support this claim? They are the following:

(a) The advert placed by the first defendant on its website which the plaintiff read and answered indicates the item '2008 Year'.

(b) A black and white photo of a plate inside the vehicle indicating that the vehicle was manufactured in November 2005.

(c) A copy vehicle identification indicates that the vehicle was delivered to a Mr Danie Coffee on 29 March 2006 by a selling dealer Pupkewitz Nissan, Windhoek.

(d) Copies of W/S Pro-Forma Invoices, dated 15 February 2012 and the other, dated 21 February 2012, indicate that the date of first registration of the vehicle is 29 March 2006.

(e) The Vehicle Invoice that the first defendant invoiced to Standard Bank Vehicle & Asset Finance and supplied to the plaintiff carries this piece of relevant information: '2008 NISSAN NAVARA 4.0 D/CAB'.

[6] Items (b), (c), (d) and (e) impel me to the conclusion that the notation 'Year 2008' in the advert, referred to in item (a) could not mean anything else but that the

vehicle was a 2008 Model. And that is what the defendants represented to the plaintiff.

[7] Although, documents mentioned in items (a) to (e) of para 5 are copies, they are admissible because they were discovered by the parties and it has not been established that their admissibility was disputed in terms of rule 28(7)*(c)* of the rules of court. Moreover, the Proposed Pre-Trial Order records that the documents in the discovered bundles of the respective parties 'shall be used as exhibits' pursuant to rule 26(6)*(g)* of the rules of court. It follows inexorably that the ruling I made during the trial that the original of the so-called Service Manual would not be admitted did not affect admission of the copies of pages thereof because they had been discovered and, as I have said, their admissibility was not disputed in terms of rule 28(7)*(c)*.This is the submission that Ms Shifotoka made and which I accept.

[8] The aforementioned documents are admissible, and I find that they have probative value. They establish that the vehicle was not a 2008 Model as the defendants represented to the plaintiff. Their representation is fraudulent: it is a perversion or distortion of the truth'. See CR Snyman, *Criminal Law*, 3rd ed, p 488. It is more probable than not that the defendants knew that the vehicle was not a 2008 model, if regard is had to the following: the photo of the plate in the vehicle indicating the year of manufacture (item (b), para 5), the vehicle identification (item (c), para 5) and the Pro-forma Invoices (item (d), para 5).

[9] It must be remembered that we are not dealing here with a vehicle owner, for instance, a person who sells 'kapana' in the Soweto Market, Windhoek, or a legal practitioner involved in the private sale of his or her motor vehicle. We are dealing here with defendants who are dealers in new and pre-used motor vehicles. And what is more; the representation made by the defendants to the plaintiff that the motor vehicle was a 2008 Model, when they knew it was false, goes beyond mere praise or commendation, referred to as mere 'puffing'. It had great materiality to the known purpose of the vehicle which the plaintiff was interested in purchasing. The representation was one of fact put forth as such by the defendants and not as the

second defendants' opinion; and it was not obvious to the plaintiff, even if he was gullible, that the defendants were merely singing the praises of the motor vehicle, 'as sellers have ever been want to do'. The representation was of a kind which exceeded mere puffing. It was a material statement, dicta it promissa, made by the defendants to the plaintiff during negotiations, 'bearing on the quality of the res vendita and going beyond mere praise and commendation. (*Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 at 418) And it has been said, if the res does not come up to the dicta et promissa aedilitian remedies are available to the buyer, for rescission or a reduction in the price. (See GRJ Hackwill, M*ackeurtan's Sale of Goods in South Africa*, 5th ed (1984), paras 9.7.1 – 9.7.3; and the cases there cited.) Accordingly, I respectfully reject Mr Boesak's submission that the representation was mere 'puffing'.

[10] Thus, in the instant case, the plaintiff appears to be content to get his money back with rescission of the contract of sale as claimed in the Particulars of Claim where he 'hereby does (tender) and tenders the return of the vehicle to the First Defendant'. (See M*ackeurtan's Sale of Goods in South Africa*, ibid., para 9.7.2) In that event the issue of damages which must be proven would not arise; and so, Mr Boesak's submission that the plaintiff has not proved his damages, though has merit generally speaking, becomes irrelevant.

[11] Having applied my mind reasonably, that is, having considered the evidence not *in vacuo* but taking into account the admissible evidence in relation to the pleadings and in relation to the requirements of the law applicable to the case in relation to fraudulent misrepresentation set out previously, I hold that a court might find for the plaintiff in his claim based on fraudulent misrepresentation for aedilitian remedies.

[12] One should not lose sight of 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's case unless the occasion arises'. (*Coertzen v Neves Legal Practitioners*, para 23) Based on the foregoing reasoning and conclusions, I hold that the occasion

has not arisen in the instant case to grant an order of absolution from the instance. Consequently, in the exercise of my discretion the application for an order granting absolution from the instance is refused; whereupon, I make the following order:

(a) The application is dismissed with costs.

(b) A status hearing to determine the further conduct of the matter is to be held today.

C Parker

Acting Judge

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APPEARANCES

PLAINTIFF : E Shifotoka
Of Conradie & Damaseb, Windhoek

DEFENDANTS: A W Boesak
Instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek

THIRD PARTY: G S G Van den Heever
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