



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON APPLICATION FOR ABSOLUTION FROM THE INSTANCE

Case no: I 4315/2013

In the matter between:

CHAARDI BRIGITTA KLEIN

PLAINTIFF

And

DR FLORENCE UUANDJAE KAURA

FIRST DEFENDANT

DR SHAMENA-RONNI

SECOND DEFENDANT

MEDIBUILD INVESTMENTS CC

THIRD DEFENDANT

Neutral citation: *Klein v Kaura* (I 4315 / 2013) [2017] NAHCMD 1 (15 January 2017)

Coram: Prinsloo, J

Heard: 12 June, 13 June and 14 June 2017; 07 August 2017

Delivered: 07 August 2017

Reasons: 15 January 2018

Flynote: Civil Practice – Absolution from the instance at the close of the plaintiff's

case – When 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 the plaintiff establishes what would finally be required to be established - Court concluded that in the instant case the evidence of the plaintiff was pool of contradictions and improbabilities in respect of the both the main and alternative claim and as such her evidence cannot be accepted by this court – Absolution is granted.

Summary: Plaintiff instituted action against the defendants in respect of two claims, a main claim and an alternative claim by a way of amended particulars of claim. The claims were in short in terms of an agreement entered between the plaintiff and the defendants of a building contract of a medicentre which they are both shareholders, each holding 33.3%. The plaintiff made out a list with figures of amounts spend on constructon costs and bank loans and overdrafts, engineers and labourers, municipal fees, insurance and interest due to her and other ancillary costs that she spent money on and needed to be refunded. The second defendant objected on the ground that the plaintiff failed to give evidence on the figures presented and how she arrived at such amounts being claimed. At the close of the plaintiff's case, the second defendant applied for absolution from the instance.

Court held: 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, hence the test to be applied is not whether the evidence led by the 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.

Held further: Plaintiff's particulars of claim is not supported by the evidence presented. Plaintiff relied heavily on the report from FCS but failed to call the expert who could shed light on how the calculation was made and how the amount that is allegedly payable was calculated. The evidence of the plaintiff was mishmash of contradictions and improbabilities in respect of the both the main and alternative claim and as such her evidence cannot be accepted by this court. Plaintiff have altered her figures so many times

that she actually confused herself. There are also numerous incongruities between the evidence of the plaintiff, her particulars of claim and the further particulars that she furnished to the defendants and for these reasons and those as set out above I am not satisfied that the plaintiff has made out a prima facie case.

ORDER

1. Application for absolution from the instance is granted with costs.

JUDGMENT

Prinsloo, J

[1] The plaintiff is Chaardi Brigitta Klein, a major female pharmacists by profession, practicing as such as C/o Medibuild Investment CC of No.1137 Bach Street, Windhoek.

[2] The first defendant is Dr Florence Uundjae Kaura, a major female with full legal capacity, and a medical practitioner practicing as such at C/o Medibuild Investments CC situated at Erf No. 10 Dorado Park, better known as No.137, Bach Street, Windhoek.

[3] The second defendant is Dr Shamena-Roni, a major female with full legal capacity, and a medical practitioner practicing as such at C/o Medibuild Investments CC situated at Erf No. 10 Dorado Park, better known as No.137, Bach Street, Windhoek.

[4] The third defendant is Medibuild Investments CC, a close corporation duly registered in terms of the provisions of the closes corporations Act, 1988 (as amended)

with its registered address, alternatively principal place of business situated at Erf No. 10 Dorado Park, better known as No.137, Bach Street, Windhoek.

[5] The third defendant is the registered owner of Erf No. 10 Dorado Park, Windhoek. The plaintiff, the first and second defendant are the sole members of the third defendant, each of them holding 33.33% of the members interest in and to the third defendant.

The pleadings:

[6] The plaintiff brought an action by way of amended particulars of claim against the first, second and third defendants. The plaintiff in its main claim, claims the following orders:

‘1. An order confirming the partly oral, partly written agreement dated 15 December 2010.

2. An order confirming the tacit agreement dated on or about 29 December 2010.

3. An order declaring that:

3.1. the plaintiff duly exercised her pre-emptive right as contemplated by clause 4 of the partly written and partly oral agreement between Plaintiff and the first and second Defendants; and

3.2. the First and Second Defendants duly, in terms of the tacit agreement between Plaintiff and the First and Second Defendants accepted the Plaintiff's offer for N\$5,600.00.00;

4. Ordering and directing the First and Second Defendants to within 14 days from date of this order sign all/any documents necessary so as to give effect to the terms and conditions of the party written and partly oral agreement dated 15 December 2010, and the tacit agreement entered into between plaintiff and First and Second Defendants on

or about 29 December 2010, and in particular to cause the transfer of 33.33% of the membership held by each of the First and Second Defendants in Third Defendant, into the name of the Plaintiff, failing which the Deputy-Sheriff for Windhoek shall be authorized and directed to sign such documentation for and on behalf of the First and Second Defendants.

5. An order declaring the First and Second Defendants to be jointly and severally liable for payment of the amount of N\$1,221,209.15.'

[7] In the alternative, the plaintiff claimed the following:

'6. That the membership of First and second Defendants in and to the Third Defendant shall cease with immediate effect without any remuneration.

7. Alternatively to 6 above, that the Plaintiff acquires the First and Second Defendants' members' interest in and to the Third Defendant at such fair and reasonable price and on such terms and as to the manner and time of payment(s) as the above Honorable Court may deem meet;

8. That for the purpose of 7 above, the First and Second Defendant be ordered and directed to render to the Plaintiff a full account of the trading activities of the business of the Third Defendant for the period commencing 19 December 2003 to 14 July 2005 and 14 July 2005 to date hereof, duly supported by all documentation and vouchers.

9. That the documentation and vouchers referred to in 8 above shall inclusive of but not limited to such documentation as clearly support all/any contributions made by the First and second Defendant in whatever from to the Third Defendant.

10. Debatement of the above account.

11. Ordering and directing the First and Second Defendants to within 14 days from date of this order sign all/any document necessary so as to give effect to the terms and conditions of the agreement dated 15 December 2010 and the tacit agreement entered into between Plaintiff and the First Defendant on or about 29 December 2010, and in

particular to cause the transfer of 33.33% of the membership held by each First and Second Defendants in Third Defendant, into the name of the Plaintiff, filing which the Deputy-Sheriff for Windhoek shall be authorized and directed to sign such documentation for and on behalf of the First and Second Defendants.'

[8] It should be noted that although a plea was filed on behalf of the first and second defendants the trial proceedings only proceeded in respect of the second defendant. In their plea, raised the following:

8.1 As background in this matter the defendants pleaded that the conduct of the plaintiff caused the dispute between the parties and it was the plaintiff who prevented the parties from resolving the disputes between them. As a result of the plaintiff's conduct the management of the business of the third defendant became impossible and the first, second and third defendant suffered financial prejudice to the extent that the third defendant was unable to pay its own debts. First and second defendants pleaded that it would be just and equitable for the third defendant to be wound up, which application would be brought in due course.

8.2 In further amplification to the issues that gave rise to the dispute between the parties defendants pleaded the following:

8.2.1 During construction of the property in question the plaintiff indicated that the cost to complete the construction was more than initially anticipated.

8.2.2 It was agreed that the plaintiff pay the additional costs in the excess of the agreed budget of N\$ 1 600 000 and that the third defendant would refund her upon completion of the construction. Plaintiff continuously changed the amount which she claimed and the parties agreed upon independent auditor to determine the amount based on the financial records submitted by the plaintiff.

8.2.3 Plaintiff was however unable to substantiate her entire claim and refused to accept the calculation arrived at by independent experts.

8.2.4 Payment in favor of the plaintiff in the amount of N\$ 500 000 was authorized by the second and the third defendant, which amount had been proven by the plaintiff. Plaintiff subsequently claimed a further N\$ 2,040,089.88.

8.2.5 During May 2005 plaintiff induced the first and second defendants to cease to be members of the third defendant by representing to them that a new close corporation would be registered, which would become the owner of the property, and in respect of which plaintiff, first defendant and second defendant would be members and would exist under the name of Dorado Medical Centre CC. The property in question would be transferred by plaintiff to the new CC.

8.2.6 First and second defendant resigned as members on 09 May 2005 and the position was rectified after the first and second defendant approached court during 2006 and an order was granted on 23 October 2006 reinstating the first and second defendant as members of the third defendant.

8.2.7 Defendants alleged that plaintiff misappropriated funds by transferring an amount of N\$ 250 000 to herself from the third defendant's account without their knowledge or consent.

8.2.8 Further misappropriation is alleged of funds of the third defendant earmarked for the completion of construction and plaintiff refused to account for it.

8.2.9 In order to pay the additional cost incurred during construction the plaintiff, first and second defendants obtained a loan in the name of third defendant from Nedbank Namibia Ltd, in the amount of N\$ 4 000 000, which was

the value of the property at the time. The bond in favor of Bank Windhoek was cancelled and a new bond was registered in favor of Nedbank Namibia.

8.2.10 Since July 2006 the plaintiff did not make her pro rata contribution to the repayment of the third defendant's loan contrary to the agreement between the parties and also refused to pay rent for the part of the property she occupies. Plaintiff also refuses to make contribution to monthly running cost of the building which includes water and electricity charges, rates and taxes, security costs, garden expenses and salaries of cleaners.

8.2.11 Plaintiff was initially appointed as managing member of the third defendant but failed to attend to management of the third defendant or to account to first and second defendant in respect thereof. No proper record were kept and no VAT returns were submitted to the Receiver of Revenue since March 2007 which resulted in debt of in excess of N\$ 1 900 000.

8.2.12 Plaintiff claimed input VAT of N\$ 528 791.63 for the period 05/2005 to 01/2007 in the name of the third defendant which was refunded but the plaintiff failed to account for it in the books of the third defendant.

[9] In respect of the main claim, the second defendant denies that an agreement was entered into on 15 December 2010 as the plaintiff refused to sign the agreement. The first and second defendants accepted the plaintiff's refusal as an indication that she did not wish to enter into the agreement or accept the terms thereof.

Application for amendment:

[10] As trial commenced, the plaintiff was called to testify. An application was moved from the bar during the evidence of the plaintiff to amend the prayer as set out in para 5 of the Main claim of the Plaintiff.

[11] The prayer to be amended to read as follows: 'An order declaring the first and second defendants to be jointly and severally liable for payment of the amount of N\$ 1 221 209.15.'

[12] The amendment moved for was that the said prayer read as follows: An order declaring the third, first and second defendant to be jointly and severally liable for payment of the amount N\$ 1 214 421.00.

[13] Mr. Namandje opposed the application and argued that the proposed amendment is an amendment to the substance of the Plaintiffs claim. The amount originally sought was in respect of interest and the proposed amendment would be in respect of the member's loan.

[14] Although the third defendant is a party to the proceedings no relief was sought in respect of the third defendant at the time plaintiff sought to amend the particulars of claim.

[15] The proposed amendment was refused and the matter proceeded on the amended particulars of claim as it stood.

Evidence adduced:

[16] The plaintiff is a pharmacist by profession.

[17] During 2001 the third Defendant purchased an undeveloped erf in Windhoek West, Windhoek.

[18] The first and second defendant with one Dr. Nghalipo held the members interest in the third defendant. The first and second defendant and Dr. Ngalipo intended to construct a small medical complex on the undeveloped Erf.

[19] During 2003, the plaintiff purchased the members share of Dr. Nghalipo and each of the members held a 33.3% interest in the third defendant.

[20] Subsequent to becoming a member of the third defendant, the plaintiff by agreement between the members became involved in the construction of the proposed medical center. Once all the formalities like the building plans and the required permits were obtained the plaintiff applied for a building loan with Bank Windhoek to fund the construction of the medical complex, due to be constructed at 137 Bach Street, Windhoek West.

[21] A building cost estimate in the amount of NAD 1,412,000.00 was submitted to Bank Windhoek, which was approved during January 2004.

[22] As the building cost estimation did not include the interior design of the building, further meetings were held to discuss the funding of the cupboards and interior design. It was agreed that the said cost would be included in the overall construction costs.

[23] The construction of the building proceeded until August 2004 when it became apparent that the loan obtained from Bank Windhoek would not be sufficient.

[24] During August 2004 the Plaintiff's mother passed away and in September 2004 the plaintiff inherited some money from her late mother's estate. She then proposed to the defendants that she will advance some money to the project whilst the third defendant applies for a mortgage bond of at least four million Namibian Dollar.

[25] Said loan was obtained from Nedbank and the Bank Windhoek loan was settled.

[26] During 2005 the construction was already in the excess of NAD 3,950,000.00. The parties then agreed that once the Bank Windhoek loan was settled the remaining money would be used to pay the plaintiff back for building and construction cost paid from her personal funds.

[27] The mortgage bond with Nedbank would be settled by the members by each paying one third of the monthly instalment.

[28] It was also agreed that the plaintiff would take over the third defendant and the plaintiff, first and second defendants would register a new CC called Dorado Medical Center CC.

[29] The first and second defendants were removed as members from the third defendant in 2005. However during 2005 the relationship between the members rapidly deteriorated to the extent that the members engaged in litigation.

[30] During 2006 the first and second defendants were reinstated as members of the third defendant after they took the matter to court to be so reinstated and were successful.

[31] The plaintiff made out a list with figures of amounts spend on constructon costs and bank loans and overdrafts, engineers and labourers, municipal fees, insurance and interest due to her and other ancillary costs that she spent money on and needed to be refunded. The second defendant objected on the ground that the plaintiff failed to give evidence on the figures presented and how she arrived at such amounts being claimed. The first and the second defendant started questioning the building and construction costs as claimed by the plaintiff. The first and second defendant then appointed an auditor to do an audit in respect of the said costs. On 02 November 2006 the parties however agreed that Ernest and Young Chartered Accountants will be appointed to do the forensic audit.

[32] There were however issues with the report by Ernest and Young and then in 2008 Financial Consultant Services (FCS) was appointed to do an audit by agreement between the parties.

[33] On 11 May 2010 the members of the third defendant received a report from FCS and they agreed that the report would be discussed two weeks later but the said meeting never materialized.

Tacit agreement:

[34] On 15 December 2010 the members had a meeting during which the second defendant announced her interest to purchase the property of the third defendant. According to the plaintiff the members apparently entered into a partly oral and partly written agreement. According to plaintiff she verbally accepted the terms of the written agreement.

[35] In terms of the agreement, the second defendant had to make the offer in writing and first defendant and plaintiff would have until 31 December 2010 to exercise their pre-emptive rights to either better or refuse the offer of the second defendant. Should no offer be received from the first defendant or the plaintiff the offer of the second defendant would be the only offer. Should either of the parties make an offer exceeding the offer of the second defendant then the higher offer would be accepted.

[36] On 28 December 2010 the second defendant delivered an offer in writing in the amount of NAD 5, 500,000.00 as well as confirmation of Bank Windhoek confirming the facility.

[37] On 29 December 2010 plaintiff delivered an offer to purchase first and second defendant's members interest for purchase consideration of NAD 5,600,000.00 and plaintiff testified that a tacit agreement came into existence that the plaintiff would purchase first and second defendants' members interest in the third defendant for the amount offered. During January 2011 plaintiff received correspondence from the first defendant to say that second defendant's offer will be considered as the only offer as the plaintiff's offer was not accompanied by an official letter from the banking institution providing the funds.

[38] Plaintiff stated that there was minutes of the meeting dated 15 December 2010 setting out the terms agreed upon but the minutes was not discovered although available.

Calculations by Plaintiff in support of main claim:

[39] The plaintiff set out various calculations as to the amount due and owing, not only in the amended particulars of claim but also in her amended witness statement.

[40] According to the calculation by the plaintiff, the first and second defendants are indebted to her in the amount of NAD 1,214,421. The parties however did not agree as to the terms of repayment of the amount but that the amount is interest bearing.

[41] In the particulars of claim of the plaintiff pleaded that the amount due and owing (NAD 1,214,421.00) by the third defendant should be set off against the purchase consideration (less the outstanding amount owed on the mortgage bond which was NAD 3,800,000.00 at the time) and the plaintiff tendered payment to the first and second defendant in the amount of NAD 195,193.00¹ as being purchase consideration for each of the said defendants.

[42] The plaintiff's prayer as per her main claim is that the first and second defendants are jointly and severally liable for payment of NAD 1,221,209.15, being interest from June 2005 up to December 2013 charged on the third defendant's loan, which forms the subject matter of the mortgage bond of Nedbank Namibia, and in respect of which the defendants failed to pay the instalments on due date².

[43] Further in paragraph 28 of the amended particulars of claim, plaintiff pleaded that she is entitled to set off the amount of NAD 1,221,209.15 against the purchase consideration of NAD 195,193.00 due to each of the first and second defendants',

¹ Paragraph 25 of the Plaintiff's amended particulars of claim, page 10 of Pleadings bundle.

² Paragraph 5 of the Plaintiff's prayers on the main claim, as per page 13 of the Pleadings bundle.

thereby extinguishing the purchase consideration due by plaintiff to first and second defendant, leaving a balance due to the plaintiff of NAD 830 643.15 by the first and second defendants. It was alleged by the plaintiff that the defendants should be held liable as they conducted the business of the third defendant recklessly alternatively negligently.

[44] In her amended witness statement the plaintiff's calculations were adjusted to accommodate the change in the amount due in respect of the mortgage bond as at 31 March 2016.

[45] The plaintiff calculated the value of the first and second defendants members interest as minus NAD 159 147.66 each by setting off the amount of N\$ 1,214,421.00 against the purchase consideration (less the outstanding amount on the mortgage bond) which then reached a total of minus NAD 477,443.00.

[46] Plaintiff stated after payment was made to her by Nedbank Namibia an amount of NAD 1,214,421.00 was outstanding and claims that the first and second defendants would be liable jointly and severally to the plaintiff for the amount of NAD 1,214,421.00 in respect of her loan to third defendant.

Cross Examination of the Plaintiff

[47] The main claim as set out in the amended particulars of claim is for an amount of N\$1 221 209.15 for interest due and payable by the defendants, as set out above. The plaintiff however abandoned the said amount and conceded that by abandoning the claim for NAD 1,221,209.15 as prayed for in the main claim left her without a monetary claim in respect of the main claim³. The proposed amendment was to avoid this eventuality.

³ Page 360 of the transcribed record at line 14.

[48] When questioned as to how the plaintiff calculated the amount of N\$1,214,412.00 which she claims for, the plaintiff contends that part of the money is for construction costs and the bigger part of that amount is for interest and was based on a report compiled by FCS.

[49] On the issue of this interest the plaintiff indicated that the loan amount was interest bearing as agreed between the parties but that no fixed interest rate was agreed to and thus she calculated interest on the amount of NAD 1,214,421.00 at a rate of 6.25% which amounted to NAD 837 168.98. This interest amount was calculated from 01 April 2005 until February 2012. Initially the plaintiff indicated that the said amount was included in the NAD 1,214,421.00, which the plaintiff claimed as the loan advanced to the third defendant. With regards to the interest amount, it was put to the witness that the amount does not add up as the interest amount cannot exceed the capital amount, which on the calculations of the plaintiff would be NAD 377 252.02. At a later stage during cross-examination however, the plaintiff indicated that the said amount was not included in the amount of NAD 1,214,421.00⁴ and retracted what she said earlier in this regard.

[50] Plaintiff was extensively cross-examined regarding the cost of the construction and the funds that she received for the construction of the property concerned.

[51] Initially the building cost estimation was NAD 1,400,000.00 but the amount increased to NAD 3,950,000.00. It would appear that plaintiff received payment in an approximate amount of NAD 1,600,000.00 from Bank Windhoek in respect of the initial building costs and then received the remaining balance of the NAD 4,000,000.00 from Nedbank Namibia after the bond was discharged with Bank Windhoek. This amounted to an approximate amount of NAD 2,300,000.00. The sum total of the payments appears to be an approximate amount of NAD 3,900,000.00.

⁴ Page 297 of the transcribed record at line 30-32 and page 343 line 1.

[52] It was adduced in cross examination that the money received from Nedbank for construction costs, which plaintiff alleges she spent on constructing Medibuild, was paid into plaintiff's account and it was for her to pay herself as she was in charge of the account. Mr. Namandje confronted plaintiff with the fact that she claims interest for delayed payment of such construction costs, when the money has been paid into an account she was in charge of, yet claim for interest from the defendants whose liability have been discharged as soon as that amount was paid by Nedbank, therefore she can not claim interest from the defendants.

[53] Under cross examination, further evidence was adduced that when Nedbank paid money to the plaintiff, the plaintiff wrote out cheques for construction costs in the amount of N\$245 000.00 and it was just indicated as 'specific things' of which the plaintiff cannot submit documentary proof. Even the report from FCS on which the plaintiff relied on heavily found a number of payments and lack of proof thereof questionable.

[54] It was further put to the plaintiff that she received money from Inland Revenue/Ministry of Finance, an amount of NAD 528 791.63 for input VAT claimed by the third defendant and the plaintiff kept it for herself. Plaintiff agrees that the registered vendor was the third defendant and said monies were paid into the account of Medibuild Investment CC held at Standard Bank, which was the plaintiff's account, which she had sole control of. Plaintiff confirmed that at the time the plaintiff was not registered with Receiver of Revenue as VAT vendor and could not remember whether such amount was ever transferred into her personal account. Mr Namandje put it to the witness that if she was not personally registered, then she was not entitled to the input VAT that she claimed at the relevant time. Plaintiff answered in the affirmative. Therefore the second defendants contends that such money belongs to the 3rd Defendant and plaintiff defrauded the third defendant.

[55] It is the Plaintiff's case that she used the money from Ministry of Finance for construction costs, which is the money she is still claiming from the defendants. It is the

plaintiff's evidence that when the first and second defendants resigned in May 2005, she was the sole owner of the third defendant and the VAT refund from Ministry of Finance was for construction costs as she conducted her construction business through the CC/third defendant. It was emphasized on behalf of the second defendant that there is no evidence to show that the money received from Ministry of Finance, which belonged to the third defendant, was used for construction on behalf of the third defendant or the plaintiff's other constructions which she was busy with.

[56] It was determined under cross examination that while the plaintiff was the sole member of the third defendant, she used the CC/third defendant for her other projects and constructions costs. Plaintiff was questioned as to whether income was generated in respect of these other projects and she answered in the affirmative. It was then put to her that this means the third defendant made income but there are no books or records to show or reflect income made and how it was spent. The plaintiff's stance is that she was the sole member of the CC at the time and could use the CC as she wished.

[57] The plaintiff was questioned regarding the whereabouts of all the financial statements setting out the expenditure claimed. Plaintiff testified that some financial statements are with Receiver of Revenue and she does not have copies or cannot remember where they are. It was further put to the plaintiff that she did not record proper financial reports, neither did she submit them for the period that the CC was under sole control of the plaintiff. Plaintiff asserts that financial reports for 2006 ending 2007 should have been submitted

[58] Lastly, during cross-examination the plaintiff admitted that she did not make her one third monthly contribution to the repayment of the mortgage bond with Nedbank Namibia since 2007 and accepted that the first defendant continued to make the said monthly payments which is in the excess of amount of NAD1, 600,000.00.

[59] At the closing of the plaintiff's case, the second defendant gave notice that she would bring an application for absolution from the instance which I heard on 14 July 2017.

The Absolution Application

[60] The second defendant points out that the aforesaid amount of N\$1, 221,209.15 was the only monetary claim being claimed by the plaintiff in its particulars of claim however the largest part of the plaintiff's evidence turned on the amount of N\$1 214,421.00 due and payable regarding a loan to the third defendant. The second defendant however argued that such amount was not sought by way of any order in the amended particulars of claim. Further, on both the main and alternative claim, the second defendant submit that the plaintiff's case was a poor one, self-destructive and a case on which was not supported by the plaintiff's evidence.

[61] On behalf of the second defendant, Mr. Namandje, submitted that what was required to succeed with the application for absolution from the instance was to show that the plaintiff did not make out a prima facie case, that is, there is no evidence relating to all the elements of her main claim or in the alternative, her alternative claim at the end of the case.

[62] The second defendant submit further that in relation to the plaintiff's claim in respect of a tacit agreement alleged to have been entered into on 29 December 2010, it was obligatory on the part of the plaintiff to plead, allege and prove the conduct on which she relies in seeking certain orders on the basis of a tacit agreement. Plaintiff was under cross examination, unable to allege any conduct on which she based the tacit agreement.

[63] Mr. Namandje argued that in that respect, the plaintiff was under an obligation to make out a case with due regard to the established test where a tacit agreement is

alleged and in that regard, he referred the Court to the Supreme Court judgment of *Stier v Henke*⁵ where it stated at para 5 as follows:

[5] In Gordon's matter supra at 951 – 96A *Harms JA* also set out the test where a tacit agreement is alleged, as follows:

“Since this case is concerned with the test for absolution at the end of a plaintiff's case I am obliged somewhat to restate the ordinary test for proof of tacit contract (Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vornor Investment (Pty) Ltd 1984 (3) SA 155 (A) at 164G – 165G; cf Samcor Manufacturers v Berger 200 (3) SA 454 (T)). It was, at that stage, at least necessary for the appellant to have produced evidence of conduct of the parties which justified a reasonable inference that the parties intended to, and did, contract on the terms of the alleged, in other words, that there was in fact consensus ad idem.”

Court was further directed to the case of *South African Railways and Harbours v National Bank of South Africa*⁶, where Wessels JA stated:

‘The Law does not concern itself with the working of the minds of the parties to a contract, but with the external manifestation of their minds. Even therefor if from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the la will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what he parties purport to accept as a record of their agreement. This is the only practical way in which Courts of law can determine the terms of a contract.’ 27625860925

[64] Mr. Namandje further went on to argue that the plaintiff was a poor witness and to substantiate his point, he enumerated a few issues that he submitted portray the plaintiff's case:

'64.1. Amendments of her witness statement,

⁵ 2012 (1) NR 370.

⁶ 1924 AD 704 at 715.

- 64.2. Material contradictions on simple issues of fact,
- 64.3. Leading of evidence that contradicts the plaintiff's pleaded case,
- 64.4. Plaintiff's apparent irritation on simple questions of fact,
- 64.5. Concessions that the plaintiff has used the third defendant's VAT account to claim money for personal use when she was not personally registered for VAT.
- 64.6. Reconstruction of evidence throughout cross-examination and refusal to answer simple questions,
- 64.7. Admission that she has not, as agreed by all members of the third defendant, paid her monthly installments to Nedbank since 2007 to date, and
- 64.8. The plaintiff failed to call available expert witnesses on hose reports she relied in support of her case.'

[65] As a result, Mr. Namandje contends that the plaintiff did not come out of the trial as a credible witness as she reconstructed her evidence freely, and appeared confused on the nature, extent and details of her own case and emphasized that the plaintiff fits the bad witness description in the matter of *Gordon v AA Mutual Insurance Ltd*⁷ where the Court stated:

'Mrs Lourens was not an impressive witness. She contradicted herself, reconstructed freely and she may even have felt she should favour the defendant in her testimony. The overriding impression that she created was, however, that of dullness. . .'

[66] On behalf of the second defendant it was further contended that in view of the aforesaid, a court acting reasonably at the end of plaintiff's case, and in the face of this

⁷ 1988 (1) SA 398 at 401.

application for absolution from the instance, would be inclined to grant such application for the plaintiff's evidence was remarkably poor and unhelpful.

[67] Mr. Namandje's, asserts that the plaintiff led evidence contradicting her own pleadings and in this regard points out that the defendants sought further particulars to which the plaintiff responded, inter alia the following further particulars were requested and respectively responded thereto in the following manner: (Will be quoted as in the second defendant's heads).

21.1. The plaintiff was asked as to when the dispute arose between the parties. She indicated that the dispute arose during July 2005.⁸

21.2. The plaintiff was asked the nature of the dispute concerning the parties' respective financial contributions to the third defendant. She stated that the dispute was a contractual and delictual one.⁹ In her evidence she never alleged any basis for a delictual claim.

21.3. The plaintiff was asked as to when the amounts she was claiming became due, owing and payable by the defendants.¹⁰ She responded that the amounts being claimed became due on 5 December 2013, and/or to be determined by the Court.¹¹ She appears to have stated this to avoid a special plea of prescription at the time.

21.4. When the plaintiff was asked inter alia to set out terms of the tacit agreement alleged, she refused to provide particulars on the basis that such particulars were matters of evidence. Yet, during her testimony the plaintiff was unable to set out a single conduct on which she relies in respect of the tacit agreement alleged.

21.5. Further the plaintiff gave testimony on matters that contradicted, in several respects, her pleaded and alleged written contracts. In that respect, she

⁸ Pleadings Record, p.170 to 184.

⁹ Pleadings Record, p. 176.

¹⁰ Pleadings Record, p. 176.

¹¹ Pleadings Record, p. 171.

contravened the well-known parol evidence rule which prohibits a party to lead evidence in contra with the written contract. See in this respect *Afgri Corporation Ltd v Mathys Izak Eloff and Another*¹²

21.6. When the plaintiff was asked as to when the amount she was claiming became due and payable, she readily conceded that such amount became due and payable during 2005, thereby contradicting the further particulars she furnished. She was unable to meaningfully answer to the questions that should she have given such particulars – that the amount she is claiming fell due already in 2005, the second defendant would have raised prescription by a special plea.'

[68] With the above stated submissions, Mr. Namandje submits that a plea of prescription would have been brought earlier had they not been misled by the plaintiff and for that, the second defendant asks the court to dismiss such claims on the basis of prescription.

[69] Mr. Namandje pointed out the following issues with the plaintiff's claim as it arose during cross examination:

'24. The plaintiff admitted that she has not, as agreed with the first and second defendants, paid her loan instalments since 2007, while the other two members of the CC continued paying their monthly instalments to date.

25. She abandoned her only monetary claim in the amount of N\$1,221,209-15.

26. She initially stated at page 195 to 197 of the transcribed record that as part of the amount of N\$867,168-00 was in respect of an interest claim. She later abandoned that claim after being cross-examined on its basis.

27. The plaintiff admitted at page 212 of the transcribed record that she was paid in accordance with the agreement between the parties an amount of about N\$1.6 million by

¹² Judgment of the Supreme Court of Appeal of South Africa delivered on 29 September 2016.

Bank Windhoek. She conceded that Bank Windhoek and the third defendant discharged their obligation in respect of the plaintiff's quotation (initial quotation).¹³

28. The plaintiff was in cross examination told that her claim is frivolous as on her version she is not owed any money after she was paid the amount of N\$3,950,000-00 agreed upon as due by April 2005.¹⁴ She strangely abruptly closed her case without calling available expert witnesses she promised to call in support of her claim.

29. The plaintiff readily contradicted herself about the manner in which she claimed an amount of over N\$500,000-00 using the third defendant's VAT number, and the reasons for doing that, and refused to answer relevant questions in that regard.¹⁵

30. She did not produce financial statements for the period 2005 to 2008, during which she was the sole member of the CC. On the other hand, the defendants produced the financial statements in accordance with the Close Corporations Act.

[70] The second defendant submits that both on account of fact and law, the plaintiff's case was a bad one to the extent that both in respect of the main and alternative claims the plaintiff's case suffers from material and inner contradictions on the basis of which it cannot be said that the plaintiff made out a prima facie case in accordance with the above mentioned concessions.

Plaintiff's Reply in re Absolution Application

[71] Advocate Visser for the plaintiff started off by pointing out that, courts in order to determine whether the plaintiff at the close of her case, made out a prima facie case for the relief sought, one has to first of all consider the relevance of and the terms of the parties' joint pre-trial order, which such order binds the parties on another ground and such order is a compromise through and through.¹⁶

¹³ Transcribed Record, p. 212, lines 10 to 30.

¹⁴ Transcribed Record, p. 244.

¹⁵ Transcribed Record, p. 249 to 262.

¹⁶ See *Farmer v Kriessbach* I 1408/2010 – I 1539/2010 [2013] NAHCMD 128 (16 May 2013) (unreported).

[72] With regards to the prescription advanced by the second defendant, counsel for the plaintiff submitted that the special plea of prescription is not contained in the parties' pre-trial order and there is no application before court, showing good cause from the second defendant, showing this court to amend the parties' signed pre-trial order. Moreover, the said intended special plea does not raise a triable issue on the facts of the case.

[73] It was further submitted by Advocate Visser, counsel for plaintiff that the second defendant has not in her heads of argument made out a case upon which the defense of prescription could be sustained. No further facts are foreshadowed or anticipated in the said heads of argument, given the facts already placed on record and the second defendant's reliance upon the oral evidence of the plaintiff during cross-examination that the debt owing by the first and second defendants to plaintiff, became due, owing and payable approximately two and a half years before July 2005. It would be incumbent upon the second defendant to set out further facts to explain quite how a defense of prescription would arise in the context of the facts already on record, and this the second defendant has not done.

[74] It was further submitted by the plaintiff that as far as her claim for the existence and enforcement of the aforesaid agreements is concerned, prescription only started to run on 29 December 2010, when the plaintiff offered to purchase the first and second defendants' members' interest in and to the third defendant, and the first defendant, in fact, acknowledged the agreement of 15 December 2010, but disputed the plaintiff's compliance with one alleged term of the agreement¹⁷ and second defendant, it would appear, simply denied the agreement of 15 December 2010 having been concluded at all.

[75] The plaintiff states that they issued summons, which was duly served on the defendants on 6 December 2013 and prescription, as far as the aforesaid contractual claims are concerned, was therefore, duly interrupted in terms of the provisions of

¹⁷ Plaintiff's discovery bundle, page 109 – Exhibit "Y"

section 15 of the aforesaid 1969 Prescription Act. In this respect, she referred the court to the case of *Mias De Klerk Boerdery (Edms) Bpk v Cole* 1986 2 SA 184 (N) at 286C – D.

[76] Plaintiff further submits that with regards to the plaintiff's claim for repayment of the loan pleaded in paragraphs 19 and 20 of her amended particulars of claim¹⁸ and her subsequent plea of set-off of the amount of N\$ 1, 214, 421.00, the parties in terms of their joint pre-trial order agreed that a dispute has developed between the parties of and concerning:

'The amount due and owing and payable by the third defendant to the plaintiff; and the amount due, owing and payable by first and second defendants to the plaintiff.

[77] For this, the plaintiff submitted that in terms of the said pre-trial order, the second defendant acknowledged the defendants being liable for the repayment of the loan pleaded in paragraphs 19 and 20 of the plaintiff's amended particulars of claim. The plaintiff further submits that as such, the dispute to be resolved pertains to the amount owed by the defendants to the plaintiff and not per se the defendants' liability for the debt towards the plaintiff.

[78] The plaintiff further submits that the parties during September 2004 agreed that the plaintiff will continue to use her own private funds until such time as the new Nedbank Namibia mortgage bond and/loan had been approved, at which time all building and construction costs so paid by her personal funds and from funds from her pharmacy to the third defendant, would be refunded to her from the said mortgage bond / loan money. Plaintiff alleged that the evidence was not disputed by the second defendant during the plaintiff's cross examination.

[79] The plaintiff in her heads states that although the second defendant denies the conclusion of the partly written, partly oral agreement on the basis that the plaintiff did not sign the written portion of the agreement and for that refused to enter into the

¹⁸ Plaintiff's amended particulars of claim, Record page 8 to 9, par. 19 and 20.

agreement, it is however important to note that as far as the issue of prescription is concerned, both the first and second defendants signed the written portion of the agreement, and in doing so, tacitly and implicitly acknowledged that they are liable towards the plaintiff for the repayment of her claim in respect of the aforesaid loan to the third defendant.

[80] In light of the above mentioned, the plaintiff submits that the running of prescription in respect of the plaintiff's claim did not commence to run and will not commence to run until the dispute between the parties has been determined and was interrupted on 15 December 2010 by the first and second defendants' tacit acknowledgment of the plaintiff's claim when they signed the written portion of the agreement, and for that reason, the special plea of prescription shall be dismissed with costs.

[81] Plaintiff argued in respect of the construction costs against first and second defendants for third defendant's medical center.

[82] Plaintiff in her amended particulars of claim, claimed set-off of the amount of N\$1,214,421.00 against the purchase consideration for the first and second defendants' members' interest in and concerning the third defendant, thereby partially extinguishing the purchase consideration due to first and second defendants.¹⁹ This was one of the issues that was addressed in the parties' joint pre-trial order, as to whether or not the plaintiff is entitled to set the amount of N\$1, 214,421.00 off against the purchase consideration of 5,600,000.00.

[83] In respect of these arguments, it was stated by Advocate Visser, that a party wishing to rely on set-off must allege and prove the following:²⁰

'82.1. the indebtedness of the plaintiff to the defendant;

¹⁹ Plaintiff's amended particulars of claim, Record page 9 to 10, par. 23 to 25.

²⁰ Plaintiff's Heads of Argument, page 23, par. 82-83.

82.2. that the plaintiff's debt is due and legally payable²¹

82.3. that both debts are liquidated debts.

83. Further, a debt is liquidated if:

83.1. It is liquid in the sense that it is based on a liquid document;

83.2. It is admitted;

83.3. Its money value has been ascertained; or

83.4. it is capable of prompt ascertainment²²

[84] Because of the abovementioned advances made by plaintiff, she submits that the second defendant's application for absolution from the instance based on the plaintiff's abandonment of her alleged only monetary claim for interest in the amount of N\$1,221,029.15 against the defendants, should be dismissed with costs.

[85] The plaintiff in summary, submitted that due to the oral evidence, both during evidence-in-chief and cross examination, as well as the documentary evidence in regard to the partly written, partly oral agreement between the parties on 15 December 2010, the plaintiff has respectfully made out a prima facie case, to establish the tacit agreement between herself and the first and second defendants on 29 December 2010.

Issue of prescription

[86] The issue of prescription was not pleaded by the defendants as it only became an issue during cross-examination. It was put to the plaintiff that she appears to avoid a special plea on the issue of prescription by stating that the claim became due on 05 December 2013, which was the date of issue of the summons. Plaintiff however mentioned that the dispute arose in July 2005. As the issue of prescription was only raised by the defendants only in the application for absolution and not pleaded by them, the court will not deal with it nor discuss it further.

²¹ Mahomed v Nagdee 1952 (1) SA 410 (A); Schnehage v Bezuidnhot 1977 (1) SA 362 (O).

²² Fatti;s Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd 1962 (1 SA 736 (T)

Law applicable on absolution from the Instance

[87] As a starting point, this court will look at the Supreme Court judgment of *Stier and Another v Henke*, outlining the test applied when applications for absolution from the instance is sought:²³

“... (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 the 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).” (My underlining.)

[88] Harms JA went on to explain at 92H- 93A:

“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 (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972(1) SA 26 (A) at 37G-38A; *Schmidt Bewysreg* 4th ed at 91-2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (*Schmidt* at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is ‘evidence upon which a reasonable man might find for the plaintiff’ (*Gascoyne (loc cit)*) – a test which had its origin in jury trials when the ‘reasonable man’ was a reasonable member of the jury (*Ruto Flour Mills*). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another ‘reasonable’ person or court. Having said this, absolution at the end of a plaintiff’s case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interest of justice.”

²³ Case number: SA 53/2008 delivered on 3 April 2012, at paragraph 4 which cites Harms, JA in *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA), at page 92 paragraphs F – G.

[89] Moreover, I will refer to the approach laid down by Harms JA in *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (A) 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).’

[90] In the case of *Van Zyl NO and Others v Hoffmann NO and Others*, the following was stated:²⁴

‘[21] Hattingh J found that the test to be applied in determining the question whether the defendant’s application for absolution from the instance should be granted is not whether the adduced evidence required an answer, but whether such evidence held the possibility of a finding for the plaintiff, or put differently, whether a reasonable Court can find in favour of the plaintiff. The plaintiff’s evidence should consequently at the absolution stage hold a reasonable possibility of success for him and should the Court be uncertain whether the

²⁴ (3762/2010) [2012] ZAFSHC 123 (22 June 2012).

plaintiff's evidence has satisfied this test, absolution ought to be refused. Where the claim is based on a document of which the interpretation is in dispute, the interpretation on which the defendant relies should be established beyond reasonable doubt before his application for absolution can succeed.²⁵

[91] In *Dannecker v Leopard Tours Car & Camping Hire CC*²⁶ Damaseb JP stated the considerations relevant to absolution at closing of the plaintiff's case as follows:

'Absolution at the end of plaintiff's case ought only to be granted in a very clear case where the plaintiff has not made out any case at all, in fact and law;

- a) The plaintiff is not to be lightly shut out where the defence relied on by the defendant is peculiarly within the latter's knowledge while the plaintiff has made out a case calling for an answer (or rebuttal) on oath;
- b) The trier of fact should be on the guard for a defendant who attempts to invoke the absolution procedure to avoid coming into the witness box to answer uncomfortable facts having a bearing on both credibility and the weight of probabilities in the case;²⁷
- c) Where the plaintiff's evidence gives rise to more than one plausible inference, anyone of which is in his or her favour in the sense of supporting his or her cause of action and destructive of the version of the defence, absolution is an inappropriate remedy;²⁸
- d) Perhaps most importantly, in adjudicating an application of absolution at the end of plaintiff's case, the trier of fact is bound to accept as true the evidence led by and on behalf of the plaintiff, unless the plaintiff's evidence is incurably and inherently so improbable and unsatisfactory as to be rejected out of hand.²⁹

²⁵ See **Build-A-Brick Bk En Ander v Eskom 1996 (1) SA 115** (O) at 123 A – E. See also **Rosherville Vehicle Services (Edms) Bpk v Bloemfonteinse Plaaslike Oorgangsraad** (O) at 293 D – H and Schmidt C W H, **Law of Evidence**, loose leave edition, p. 3-16 to 3-18.

²⁶ (I 2909/2006) [2015] NAHCMD 30 (20 February 2015).

²⁷ *Compare, Supreme Service Station (1969) (Pty) Ltd v Fox & Goodridge (Pty)* 1971 (4) SA 90 (RA) at 92.

²⁸ *Mazibuko v Santam Insurance Co Ltd & Another* 1982 (3) SA 125 (A) at 127C-D.

²⁹ *Atlantic Continental Assurance Co of SA v Vermaak* 1973 (2) SA 335 (A) at 527.

[92] Having considered the particulars of claim of the plaintiff, it is evident that she abandoned the only monetary claim she had. As for the amount of NAD 1,214,421.00 the manner in which it was calculated by the plaintiff is questionable to say the least. Plaintiff contradicted herself repeatedly regarding the said calculation.

[94] If the plaintiff is correctly understood she acknowledged that she received payment approximately NAD 3,900,000.00 which was within the amount agreed between the parties. In addition thereto she received the payment from the Receiver of Revenue that the plaintiff choose not to take into consideration in her calculations. Plaintiff failed to make payment toward the mortgage bond from December 2007 whereas the second defendant paid approximately NAD 1,600,000.00 toward the mortgage bond. In spite of all this defendants will in effect have to pay the plaintiff to 'buy' their member's interest in the third defendant as according to the plaintiff's calculations the member's interest of the first and second defendant appear to be in the negative figures and on top of that the defendants would also be liable in respect of the bond loan allegedly owed by the third defendant.

[95] Plaintiff's particulars of claim is not supported by the evidence presented. Plaintiff relied heavily on the report from FCS but when the opportunity presented itself elected not to call the expert who could shed light on how the calculation was made and how the amount that is allegedly payable was calculated. The report referred by plaintiff during evidence in chief does however not appear to be in favor of plaintiff's case and thus explaining plaintiff's failure to call the expert in this regard.

[96] The relief prayed for the alternative claim consists of certain declarators with reference to the so-called tacit agreement.

[97] I accept that not all agreements need to be in writing nor do they need to be signed, however in this instance there are minutes available of the meeting between the parties and which was signed by all the parties present. Presenting the minutes of the

meeting would be the best evidence and would resolve any possible issues that could be arise as to the terms of the agreement.

[98] Plaintiff is in possession of the minutes but she failed to discover the said minutes and also failed to present it to court during the course of her evidence and the question must inevitably be 'why is that so?'.

[99] Interestingly enough the offer made by the second defendant was accompanied by a confirmation by the bank regarding the facility and the subsequent letter by the first defendant pointed out to the plaintiff that her offer did not comply with the agreement as it did not contain a confirmation by the banking institution providing the funds.

[100] As the minutes of the meeting is not before court the court cannot determine if that was a material term agreed upon between the parties. The plaintiff also failed to plead any conduct on which she relied on in respect of the tacit agreement alleged.

[101] In conclusion, the evidence of the plaintiff was mishmash of contradictions and improbabilities in respect of the both the main and alternative claim and as such her evidence cannot be accepted by this court. Plaintiff have changed her figures so many times that she actually confused herself. There are also numerous contradictions between the evidence of the plaintiff, her particulars of claim and the further particulars that she furnished to the defendants and for these reasons and those as set out above I am not satisfied that the plaintiff has made out a prima facie case.

[102] My order is therefore as follows:

1. Application for absolution from the instance is granted with costs.

JS PRINSLOO

JUDGE

APPEARANCE:

FOR PLAINTIFF:

Adv. Visser

Instructed by:

Chris Brandt Attorneys

FOR SECOND DEFENDANT:

Mr Namandje

Of:

Sisa Namandje & Partners.