

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: I 1586 /2016

In the matter between:

**THE BUILDHARD SERVICES (PTY) LTD
t/a E HARD-BUILD CENTRE**

PLAINTIFF

and

CHRECHEN MUUKUA

DEFENDANT

Neutral citation: *The Buildhard Services (Pty) Ltd t/a E Hard-Build Centre v Chrechen Muukua* (I 1586/2016) [2018] NAHCMD 120 (08 May 2018)

Coram: UNENGU AJ

Heard: 19 March 2018

Delivered: 08 May 2018

Flynote: Civil Practice – Application for absolution from the instance at the close of the plaintiff's case – The test for absolution – Whether there is evidence on record upon which a court applying its mind reasonably could or might find for the plaintiff – Court finds plaintiff to have established a *prima facie* case – Application dismissed with costs.

Summary: The plaintiff sued the defendant for an outstanding amount on the account due and payment by the third party (a builder) who was building her (defendant) house which she (defendant) undertook in writing to pay. The defendant, after the evidence of the plaintiff was led and its case closed, applied for absolution from the instance. However, the court found and held that there is evidence on record upon which this court applying its mind reasonably could or might find for the plaintiff and dismissed the application with costs.

ORDER

The application for the absolution from the instance is dismissed with costs, including the costs of one instructing and one instructed counsel.

RULING

(ABSOLUTION FROM THE INSTANCE)

UNENGU AJ:

[1] The defendant in the matter has applied for an absolution from the instance after the case for the plaintiff was closed. Thereafter, the matter was postponed until today for argument. Both counsel prepared and filed written heads of argument which they expanded on with oral arguments.

[2] In this matter the plaintiff, The Buildhard Services (Pty) Ltd t/a E Hard Build Centre, issued a combined summons against the defendant claiming from the defendant payment in the amount of N\$100 000 plus interests on the amount at a rate of 20% per annum from the date of service of summons until the date of final payment and cost of suit including the cost of one instructing and one instructed counsel.

[3] At the start of the trial, Mr Wylie, counsel for the plaintiff briefly addressed the court and stated that the defendant admits the facts set out in the pre-trial order that she executed a written under-taking to settle the credit facility of Mr Siegfried

Katjiseua to a maximum amount of N\$100 000. Mr Katjiseua a builder at the time was building the house of the defendant.

[4] According to Mr Wylie, it has been admitted by the parties that on the 2 September 2014 a payment in the amount of N\$ 98 342.05 was made by the builder, Mr Katjiseua into his credit account with the plaintiff. He said that the issue is now whether this amount paid to the plaintiff by Mr Katjiseua was paid on behalf of the defendant or not. According to Mr Wylie, the plaintiff was of the view that the amount was not paid on behalf of the defendant but on his own because he owed the plaintiff money in his account. Mr Wylie further told the court that the defendant admitted everything in the particulars of claim except for the liability.

[5] As a result, therefore, the plaintiff called Ms Annegret Timm to testify. Ms Timm read her pre-prepared witness statement into record after she was sworn in and admonished by the court in terms of Rule 93 (4) of the High Court Rules. In her evidence-in-chief, Ms Timm confirmed what Mr Wylie told the court in his opening address. She denied that the amount paid by the builder, Mr Katjiseua was paid on behalf of the defendant to release her from the obligation contained in the deed of suretyship the defendant signed and acknowledged to settle the credit account of Mr Katjiseua in case there was an outstanding balance due and payable to the plaintiff. The deed of suretyship or acknowledgement letter signed by the defendant was handed up and marked Exh. "B" by the court.

[6] Ms Timm was cross-examined by Mr Andima, on behalf of the defendant and after the cross-examination the plaintiff closed its case prompting Mr Andima to apply for an absolution from the instance. The plaintiff has opposed the application.

[7] Both counsel are agreed with regard to the test for absolution from the instance after the close of the plaintiff's case. In their written heads of argument counsel argued that the test is whether there is evidence on record upon which a court, applying its mind reasonably could or might find for the plaintiff.

[8] In *Stier & Another v Henke*,¹ Mtambanengwe, AJA quoting from the matter of *Gordon Lloyd Page & Associates v Rivera & Another* said the following with regard to the test for absolution from the instance:

‘When absolution from the instance is sought at the close of the 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 or ought to) find for the plaintiff. *Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Puto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T)’.

[9] As already indicated above, both are *ad idem* about the test for absolution from the instance at the close of the plaintiff’s case. What remains is whether, on the evidence presented by the plaintiff in the matter, this court applying its mind reasonably to the evidence so presented, could or might find for the plaintiff. In my view, the answer to the question is unequivocally yes.

[10] Plaintiff testified that the defendant signed an understanding to settle any outstanding amount due to the plaintiff in the credit account of Mr Katjiseua with N\$100 000, if the money owing was used to buy building materials for the defendant’s house. There was indeed an outstanding amount on Mr Katjiseua’s credit account for building materials bought for use on the defendant’s house. It is further the plaintiff’s evidence that Mr Katjiseua made a payment in the amount of N\$ 98 342.05 on the account by means of a cheque drawn from his personal bank account to cover for the building materials bought for the defendant’s house and for own debts with the plaintiff. According to the plaintiff, the amount paid by Mr Katjiseua was not paid to the plaintiff for and on behalf of the defendant. Mr Andima attempted in cross-examination to persuade Ms Timm to agree that the payment made by Mr Katjiseua was made on the defendant’s behalf, therefore, the defendant was no longer liable to pay the N\$100 000.00 she undertook to pay.

[11] The contents of the undertaking (Exhibit “B”) are clear that she (the defendant) agreed to settle the amount of Mr Katjiseua, not exceeding N\$100 000 with the plaintiff with the money due to her by Standard Bank as per the letter of

¹ 2012 (1) NR 370

grant dated 21 July 2014, not through Mr Katjiseua, who was building her house. The money paid to Mr Katjiseua by Standard Bank was money due and payable to Mr Katjiseua for labour and materials he bought from, among others, the plaintiff and other suppliers. This is his own money not the defendant's money.

[12] In my view, if regard is had to the evidence of the plaintiff as a whole, a *prima facie* case had been established and if not rebutted, may establish a conclusive proof on a balance of probabilities and the court could find for the plaintiff. That said, I make the following order:

The application for the absolution from the instance is dismissed with costs, including the costs of one instructing and one instructed counsel.

P Unengu
Acting Judge

APPEARANCES

PLAINTIFF: T M Wylie
instructed by Theunissen, Louw & Partners, Windhoek

DEFENDANTS: T Andima
instructed by Van Der Merwe-Greef Andima Inc., Windhoek

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