



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CIV-ACT-DEL-2016/02898

In the matter between:

JOHN DARTON HASHONDALI ASHIKOTO

PLAINTIFF

and

TRUSTEES OF THE PREFERED INVESTMENT PROPERTY FUND

DEFENDANT

Neutral citation: *Ashikoto v Prefered Investment Property Fund* (HC-MD-CIV-ACT-DEL-2016/02898) [2018] NAHCMD 127 (16 May 2018)

Coram: PARKER, AJ

Heard: 26 - 29 March 2018, 26 April 2018

Delivered: 16 May 2018

(a)

Flynote: Practice – Absolution – Close of plaintiff's case – Court applying trite test – Whether plaintiff has made out a prima facie case upon which a court applying its mind reasonably could or might find for plaintiff – Court applying its mind reasonably requires court not to consider the evidence *in vacuo* but to consider admissible evidence in relation to the pleadings and requirements of the applicable

law. Principles in *Stier and Another v Henke* 2012 (1) NR 370 (SC); and *Bidoli v Ellistron t/a Ellistron Truck and Plant* 2002 NR 451 (HC) applied.

(a)

Summary: Practice – Absolution – Close of plaintiff's case – Court applying trite test – Whether plaintiff has made out a prima facie case upon which a court applying its mind reasonably could or might find for plaintiff – Court applying its mind reasonably requires court not to consider the evidence *in vacuo* but to consider admissible evidence in relation to the pleadings and requirements of the applicable law – Parties in these proceedings were parties to a loan facility agreement for implementation of a project – Defendant (financier) could only reimburse plaintiff for materials purchased for project – Plaintiff to satisfy defendant he has complied with conditions before payment could be made – As to claim 5.1 three earlier requests for reimbursements were satisfied by defendant though the conditions not complied with – Defendant refusing to make fourth payment on fourth request – Court rejected plaintiff's evidence that by paying the three requests defendant had in effect waived its right to insist on compliance with conditions of the Agreement – Court concluding that plaintiff could rely on such waiver only if the waiver was specifically pleaded and proved – In the absence of such specific pleading and such proof court found there was no such waiver – Regarding payment of claim 5.2 court found that plaintiff failed to indicate to court what particular invoices from an assortment of invoices supported plaintiff's claim – Court found that in respect of claims 5.1 and 5.2 plaintiff did not make out a prima facie case upon which a court acting reasonably could or might find for plaintiff – Consequently, court granted absolution from the instance at close of plaintiff's case.

(b)

Flynote: Practice – Applications and motions – Interlocutory application – What constitutes – Court held the test was the nature of the application to the court; and not the nature of the order which the court made – Court held therefore that application for an order granting absolution from the instant at the close of plaintiff's case is not an interlocutory application – The nature of such application is a decision of the court determining conclusively the final rights of the parties and bringing the trial to an end. The principles in *Salman v Warner* [1891] 1QB 734 (CA); and in *Guerrera v Guerrera* [1974] 2 All ER 460 (CA) applied.

(b)

Summary: Practice – Applications and motions – Interlocutory application – What constitutes – Court held the test was the nature of the application to the court; and not the nature of the order which the court made – Court held therefore that application for an order granting absolution from the instant at the close of plaintiff's case is not an interlocutory application – The nature of such application is a decision of the court determining conclusively the final rights of the parties and bringing the trial to an end – Plaintiff instituting application for order granting absolution from the instance at close of plaintiff's case – Court explaining the final/interlocutory distinction – Relying on authorities court concluded such application not interlocutory application – Consequently, court deciding that rule 32 of the rules of court not applicable to application for grant of absolution from the instance after close of plaintiff's case.

ORDER

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

JUDGMENT

PARKER AJ:

A. Introduction

[1] This matter concerns a 'loan facility Agreement' entered into between plaintiff (respondent in the present proceedings, and I shall refer to him as plaintiff in the rest of this judgment) and defendant (a Fund) (applicant in the instant proceedings, and I shall similarly refer to the Fund as defendant in the rest of this judgment). In a few words, the Agreement is a loan facility agreement for a 'project' (as defined in clause 2.2.61 of the Agreement) whereby defendant is to reimburse plaintiff for expenses plaintiff incurred in the implementation of the project. In addition, there is a provision entitled 'Lender's Profit Split', which is not really relevant in the instant proceedings. Both counsel, Ms. Campbell for the defendant, and Ms. Miller for the plaintiff, ably made useful submissions to the court, supported by authorities. I have consulted the

authorities and distilled from them principles that are of real assistance on the points under consideration.

[2] The present proceedings concern an application that defendant instituted at the close of the plaintiff's case for an order granting absolution from the instance. The principles and approaches relating to absolution from the instance at the close of plaintiff's case are trite. On that score I accept Ms. Campbell's submission on the point. I now proceed to set out those principles and approaches. But before I do that, I wish to get out of the way the issues whether an application for absolution from the instance at the close of plaintiff's case is an interlocutory application and whether rule 32 of the rules of the court applies to it. Ms. Campbell raised the issues apparently in relation to whether subrules (9) and (10) of rule 32 applied; and more important, whether rule 32(11) on costs applied. On her part, if I understood her well, Ms. Miller's submission was simply that costs should follow the event.

B. Nature of application for an order granting absolution from the instance at the close of plaintiff's case: The final/interlocutory distinction

[3] In *De Beers Marine (Pty) (Ltd) v Jacobs Izaaks* (LCA 28-2006) [2009] NALC 2 (6 February 2009) I had the occasion to consider the issue as to what an interlocutory application is. I stated there that it had been said authoritatively in 22 *Halsbury* (3 ed): para 506 that an order which does not deal with the final rights of the parties is termed 'interlocutory'; and 'it is an interlocutory order, even though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals.' (*Guerrera v Guerrera* [1942] 2 All ER 460 (CA)) Thus, the fact that an order is conclusive as to the subordinate or preliminary matter with which it deals does not make such order conclusive of the main dispute or conclusive of the final rights of the parties, which a decision in due course is to determine. (See *Re Gardner, Long v Gardener* (1894) 71 LT 412 (CA); *Blakey v Latheam* (1889) 43 Ch D 23 (CA); *Kronstein v Korda* [1937] 1 All ER 357 (CA); *Guerrera v Guerrera* [1974] 2 All ER 460 (CA); *Salter Rex & Co. v Ghosh* [1971] 2 QB 597 (CA).) And more important, Lord Esher, MR stated in *Salman v Warner* [1891] 1 QB 734 (CA) that the test was the nature of the application to the court; and not the nature of the order which the court made.

[4] It is therefore not simply that an application for absolution from the instance at the close of plaintiff's case is an interlocutory application just because the application is instituted in the course of the trial. Such argument is, as I demonstrate, simplistic and fallacious.

[5] When a defendant institutes an application to the court praying the court to grant absolution from the instance at the close of plaintiff's case, the nature (i.e. 'the basic or inherent feature') (see *Concise Oxford English Dictionary*, 11th ed) of the application is that of a decision of the court determining conclusively the final rights of the parties and bringing the trial to an end. That indubitably is the nature of an application for absolution from the instance at the close of plaintiff's case. The order the court made mattered tuppence; for, 'the test was the nature of the application to the court; and not the nature of the order which the court made.' (*Salman v Warner*; see para 3 above).

[6] It follows inevitably that an application for absolution from the instance instituted at the close of plaintiff's case is not an interlocutory application. I should have said so if I had not looked at the authorities. However, when I look at *Salter Rex & Co v Ghosh*; *Salman v Warner*; and *Guerrera v Guerrera*, I feel no doubt that an application for absolution from the instance at the close of plaintiff's case is not an interlocutory application. Accordingly, I accept Ms. Campbell's submission that rule 32 does not apply to it; and so, rule 32 (11) on costs does not apply in the instant application.

[7] I proceed to consider the absolution application; and I do so under Part C.

C. Absolution from the instance at the close of plaintiff's case

C (1) Principles and approaches regarding determination of an application for an order granting absolution from the instance at the close of plaintiff's case

[8] In *Etienne Erasmus v Gary Erhard Wiechmann and Fuel Injection Repairs & Spares CC* (I 1064/2011) [2013] NAHCMD 214 (24 July 2013) at para [18], I stated thus concerning absolution from the instances:

[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 (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)

[19] And 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)’

[9] These principles and approaches have been followed in a number of cases. For instance, they were approved by the high authority of the Supreme Court in *Stier and Another v Henke* 2012 (1) NR 370 (SC). There, the court stated:

[4] At 92F-G Harms JA in *Gordon Lloyd Page & Associates v Rivera and Another* 2001(1) SA 88 referred to the formulation of the test to be applied by a trial court when absolution is applied at the end of a appellant's case as appears in *Claude Neon Lights (SA) Ltd v Daniel* 1976(4) SA 403 (A) at 409G-H:

“...(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.)

‘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.”

[5] In the *Gordon’s* matter *supra* at 95I – 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* 2000(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 alleged, in other words, that there was in fact *consensus ad idem*.”

‘In *South African Railways and Harbours v National Bank of South Africa Ltd* 1924 AD 704 at 715 Wessels JA stated:

“The Law does not concern itself with the working of the minds of parties to a contract, but with the external manifestation of their minds. Even therefore 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 law 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 the 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”.’

[10] Furthermore, in *Mpepo v Steckel's Toyota CC* (I 791/2013) [2015] NAHCMD 137 (11 June 2015) referred to me by Ms. Campbell, wherein relying on *Bidoli v Ellistron t/a Ellistron Truck & Plant* 2002 NR 451, I stated:

‘[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’s 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”.’

[11] Furthermore, there is the principle that a court should be chary in granting an order for absolution from the instance unless the occasion arises. If the occasion has arisen, the court should order it in the interest of justice. (See *Coertzen v Neves Legal Practitioners* (I 3398/2010) [2013] NAHCMD 283 (14 October 2013.)) In my view whether the occasion has arisen or has not arisen depends on whether the plaintiff has made ‘out a prima facie case – in the sense that there is evidence relating to all the elements of the claim upon which the ‘court could find for the plaintiff’. (*Henke*, para 4) If plaintiff fails to make out a prima facie case, the occasion has

arisen to grant absolution from the instance. That is the manner in which I determine the present application. And in doing so, I think it is important to take counsel from *Dannecker v Leopold Tours Co & Camping Hire CC* (I 2909/2006) [2015] NAHCMD 30 (20 February 2015). There, Damaseb JP summarized the considerations to be taken into account in considering application for absolution from the instance ('The Damaseb considerations').

C (2) Application of the principles and approaches to the facts

[12] Indeed, the facts, which are relevant in the instant proceedings are not really in dispute and they turn on a short compass. The following are not disputed. In order for plaintiff to be reimbursed for expenses incurred in purchasing materials for the project he should, in terms of the original Agreement, submit 'utilization requests' to defendant. And in every such submission plaintiff must satisfy every requirement contained in clause 6.

[13] It is not contested that defendant had made payments to plaintiff in respect of the first, second and third 'draw downs' (reimbursements) in terms of the utilization requests plaintiff submitted to defendant. The present dispute is therefore on defendant's refusal to make payment in respect of the fourth 'draw down', i.e. the fourth utilization request. It is important to note that defendant admitted unmistakably that, indeed, he did not, as respects the fourth utilization request, comply with the conditions in clause 6.1.2.3 of the Agreement. Furthermore, he did not comply with the conditions in Clause 6.2.2 of the Agreement. I find that those are material conditions and they go to the root of the Agreement.

[14] The plaintiff's response in his cross-examination-evidence was that he had used the impugned procedure in respect of the first, second and third requests, and yet defendant had made payment to him without telling him that he had not complied with the aforementioned conditions. In her submissions, plaintiff's counsel, Ms. Miller, rehearsed this untenable response. The fact that defendant might not have complained earlier does not necessary follow that defendant had waived its rights under the Agreement.

[15] In any case, as a matter of law, waiver should be express and must be pleaded and proved; and what is more, clear evidence of a waiver is required

(*Hepner v Roodeport Marais Town Council* 1962 (4) SA 772 (A); *Borstlap v Spangenberg* 1974 (3) SA 695 (A)). I accept Ms. Campbell's submission that plaintiff did not specifically plead waiver; he did not place before the court clear evidence of waiver of defendant's rights under the Agreement in respect of the conditions, which are the subject matter of the instant proceedings and which plaintiff admitted he did not comply with. It follows irrefragably that at the stage plaintiff closed his case, plaintiff had not produced relevant evidence of such waiver as far as the fourth utilization request, which is the subject matter of the present proceedings, is concerned; and a fortiori, plaintiff did not plead waiver, let alone prove it, as I have found previously. But *Bidoli v Ellistron t/a Ellistron Truck and Plant* at 453G tells us that considering an application for absolution, 'a reasonable court' ought to keep 'in mind the pleadings and the law applicable'.

[16] In order to establish claim 5.2, plaintiff sought to rely on what Ms. Campbell described as 'a morass of invoices by Penny pinchers'; that is, an assortment of invoices. It is remarkable that plaintiff failed totally during his cross-examination-evidence, despite being given the opportunity to do so, to indicate to the court what invoices supported plaintiff's claim 5.2. With respect, I cannot accept Ms. Miller's submission that the amount claimed 'can still be proved'. It is as well to remember the principle that at the close of plaintiff's case, it is inferred that the court has heard all the evidence available against the defendant ('the *Erasmus* principle'). See para 8 above.

[17] If the *Erasmus* principle was applied to claim 5.2, too, the following emerges inevitably. At this stage when it is inferred that the court has heard all the evidence against defendant, the conclusion is irrefragable that plaintiff has not produced evidence to a prima facie degree to establish claim 5.2, too.

[18] The preponderance of the conclusions I have reached are unaffected by the fact that the original Agreement was amended by the so-called 'Reinstatement Agreement', because for our present purposes, as Ms. Miller submitted, the 'Reinstatement Agreement provides that it is subject to all terms and conditions of the Principal Agreement'.

C (3) *Conclusion and decision*

[19] I have taken into account all the foregoing reasoning and conclusions. I have also kept in my mind's eye the judicial counsel that a court ought to be cautiously reluctant to grant an order of absolution from the instance at the close of plaintiff's case, unless the occasion has arisen. If the occasion has arisen, the court should grant absolution from the instance in the interest of justice (see *Etienne Erasmus Wiechman v Fuel Injection Repairs & Spares CC*). I have also kept in my mental spectacle the *Damaseb* considerations. Having done all that, I conclude that the plaintiff has not passed the mark set by the Supreme Court in *Stier v Henke*, which is that for plaintiff to survive absolution, plaintiff must make out a prima facie case upon which a court could find for the plaintiff.

[20] Based on all these reasons, I hold that the occasion has surely arisen in the instant proceedings for the court to make an order granting absolution from the instance in the interest of justice, whereupon –

I make an order granting absolution from the instance with costs, including costs of one instructing counsel and one instructed counsel.

C Parker
Acting Judge

APPEARANCES

For plaintiff: S Miller
 of Shikongo Law Chambers, Windhoek

For defendant: J Campbell
 instructed by Ellis Shilengundwa Inc., Windhoek