

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON APPLICATION FOR ABSOLUTION FROM THE INSTANCE

Case no: I 11/2014

In the matter between:

DAWN ADAMS REDELINGHUYS

PLAINTIFF

And

MARLETTE COFFEE-LIND

FIRST DEFENDANT

GUY VAN DEN BERG

SECOND

DEFENDANT

Neutral citation: *Redelinghuys v Coffee-Lind* (I 11/2014) [2018] NAHCMD 368 (31 October 2018)

Coram: Prinsloo, J

Heard: 13 - 14 May 2018; 16 - 18 May 2018; and 31 October 2018

Delivered: 31 October 2018

Reasons: 20 November 2018

Flynote: Contract – Misrepresentation – Plaintiff alleging that but for the misrepresentation, she would not have entered into the contract – Misrepresentation constituting material aspect of contract — Plaintiff entitled to cancel contract.

Practice – Trial – Absolution from the instance at close of plaintiff's case – Test to be applied – Test was whether evidence could or might lead a Court, applying its mind reasonably, to find for plaintiff – Evidence to be considered in relation to pleadings and law applicable to particular case.

Summary: An oral purchase agreement was concluded between the plaintiff and the second defendant, in term of which the plaintiff purchased 5% shareholding in Lightweight Energy Panels Africa (Namibia) (Pty) Ltd (herein after referred to as 'LEPA') from the second defendant for a purchase price of N\$ 250 000. The agreement was entered into and payment was made as a result of representations made by the first defendant to the plaintiff. The plaintiff further alleged that the conclusion of the said share purchase agreement was as a result of representations made to the plaintiff by the first defendant.

The plaintiff pleaded that the said representations made to her were to the knowledge of the first defendant and/or the second defendant false in all material respects. Alternatively the representations were wrongful in that the first defendant and/or the second defendant owed the plaintiff a legal duty not to make misrepresentations or misstatements and to render candid advice to the plaintiff, and was made negligently (the first defendant and/or the second defendant having failed to take reasonable care in establishing the correctness of the representation and the facts underlying same); and caused the plaintiff patrimonial loss.

In regard to the alleged misrepresentations, the plaintiff pleaded that as the first defendant made the representations, she intended the plaintiff to act thereon and to enter into an agreement and make the payment. The plaintiff was therefore induced by

the representations, whereas, had she known the true facts, she would not have entered into the agreement and made the payment. Thus, as a result of the first defendant's misrepresentation, the plaintiff cancelled the agreement and the first defendant is liable to pay the amount of N\$ 250 000 to the plaintiff.

In her plea, the first defendant admitted that she received the amount in question from the plaintiff but pleaded that she was acting in her capacity as agent for or on behalf of the second defendant and therefore denied that the plaintiff was impoverished or that she, the first defendant, was enriched.

The second defendant as well denied that she made any representation to the plaintiff prior to concluding the agreement between the plaintiff and the second defendant and in the event of the court finding that the first defendant made representations, which she denied, that she did so in her capacity as agent for the second defendant and that she act on his instruction.

At the closing of the plaintiff's case, the defendants moved for an application for absolution from the instance primarily on the basis that the plaintiff failed to prove its claims as prayed for and that the evidence led and concessions made during cross-examination did not support the allegations made in her particulars of claim as amended. In resisting the application for absolution, the plaintiff averred that she had *prima facie* established that first defendant made false representation (active and or passive) which were material to and induce the plaintiff to conclude the purchase of share (pursuant to an investment) and further that that the reasonableness of the plaintiff's action is based on her relationship with the first defendant and even if the court find that she acted with naivety, it should be born in mind that it is not the plaintiff's naivety that is on trial.

Held – One of the requirements which must be met by a person relying on misrepresentation is that the representation was false in fact.

Held – From the concessions made by the plaintiff, it is clear that she was unable to satisfy the requirement in respect of the factual falsity of the representations.

Held further – The plaintiff, without exercising due diligence as the expert in the construction industry, committed herself to the venture by purchasing the shares of the second defendant and then wished to bow out of the venture within a few weeks, without giving the venture a fair opportunity to become operational. The plaintiff then claimed material breach on the part of the second defendant.

Held further that – There are no merits in the claim of plaintiff that the first defendant and/or the second defendant made misrepresentation to her prior to the purchasing of the shares. The plaintiff conceded that the second defendant believed the truthfulness of the statements that she made.

Held further that – the evidence of the plaintiff does not support her claim in any way as pleaded in the amended particulars of claim. In fact it is diametrically opposed thereto.

ORDER

1. Absolution of the Instance is granted with in respect of both Defendants with costs.
2. Cost in respect of the First Defendant to include the costs of opposition to Summary Judgment Application.
3. Said costs to include cost of one instructing and one instructed counsel.
4. Matter removed from the roll: Regarded as finalized.

JUDGMENT

Prinsloo J:

[1] This is an application for absolution from the instance in respect of a claim instituted by the plaintiff against the first and second defendant. The plaintiff is Dawn Adams Redelinghuys, a major female Quantity Surveyor by profession, and resident of Windhoek.

[2] The first defendant is Marlette Coffee-Lind, a major female registered Chartered Accountant also a resident of Windhoek.

[3] The second defendant is Guy van der Berg, a major male employed at Lafrenz, Windhoek.

The pleadings

[5] The plaintiff brought an action by way of amended particulars of claim against the first and second defendants jointly and severally the following orders:

- '(a) Payment in the amount of N\$ 250 000.00.
- (b) Interest on the afore stated amount at the rate of 20% per annum a tempore morae, until date of final payment thereof.
- (c) Cost of suit, including cost of one instructing and one instructed counsel.
- (d) Further and alternative relief.'

[6] The amended particulars of claim of the plaintiff is extensive, consisting of principal claims and various alternative claims. The first portion of the particulars of claim relates to an investment made by the plaintiff, and only relates to the first defendant, whereas the second part of the particulars of claim relates to the purchase of the shares by the plaintiff, and as prelates to both the defendants. As the plaintiff is relying on the latter in opposing the application for absolution from the instance, I will not consider the entire particulars of claim for the sake of brevity and limit myself to considering paragraphs 36 to 37.22 of the amended particulars of claim.

[7] The plaintiff pleaded—that in the affidavit resisting summary judgment the first defendant *inter alia* alleged that:¹

- a) On or about 1 March 2011 an oral purchase agreement was concluded between the plaintiff and the second defendant, in term of which the plaintiff purchased 5% shareholding in Lightweight Energy Panels Africa (Namibia) (Pty) Ltd (herein after referred to as 'LEPA') from the second defendant for a purchase price of N\$ 250 000;
- b) The 5% shareholding referred to supra was being held by Gideon Johannes Jacobus Joubert on behalf of the second defendant;
- c) The first defendant received the amount of N\$ 250 000.00 on behalf of the second defendant;
- d) The aforesaid amount was 'appropriated and distributed' on the instructions of the second defendant.

[8] The agreement was entered into and payment was made as a result of representations made by the first defendant to the plaintiff, which included that:-

¹ Paragraph 36 of the Amended Particulars of Claim.

- (a) the first defendant was in partnership with certain other persons relating to “LEPA Namibia” (LEPA);
- (b) the plaintiff was, by making payment, investing in LEPA and that such investment was advisable and would yield positive returns for the plaintiff and would be to the plaintiff’s benefit;
- (c) LEPA would conduct business in Namibia and erect a factory in Namibia to produce panels to be supplied to clients in Angola.
- (d) LEPA secured contracts in Angola to supply LEPA building material and was entitled and authorized to do so;
- (e) the afore-said representations were made expressly, tacitly and/or by omission (the first and/or second defendants wrongfully having kept silent in the circumstances where there existed a duty to speak, particularly in respect of the information falling within either or both the defendants'. (Jointly referred to as “the representations”).

[9] In the principal claim of the plaintiff, it is pleaded that the representations were to the knowledge of the first defendant and/or the second defendant false in all material respects. Alternatively, the representations were wrongful in that the first defendant and/or the second defendant owed the plaintiff a legal duty not to make misrepresentations or misstatements and to render candid advice to the plaintiff, and the representations were made negligently (the first defendant and/or the second defendant having failed to take reasonable care in establishing the correctness of the representation and the facts underlying same); and caused the plaintiff patrimonial loss.

[10] It is further pleaded that as the first defendant made the representations, she intended the plaintiff to act thereon and to enter into an agreement and make the payment. The plaintiff was therefore induced by the representations, whereas, had she

known the true facts, she would not have entered into the agreement and made the payment. Thus, as a result of the first defendant's misrepresentation, the plaintiff cancelled the agreement and the first defendant is liable to pay the amount of N\$ 250 000.00 to the plaintiff.

[11] In the first alternative, the plaintiff pleaded that the representations were false in all material respects and that the representation was material and would have influenced a reasonable person to enter into an agreement and make a payment. It is further averred that it was foreseeable that the representations could induce the plaintiff into entering into an agreement and make payment.

[12] In the second alternative, the plaintiff pleaded that relying on the truth of the representations, which was material to the agreement and payment, the plaintiff entered into the agreement and made payment, however, the representations were false in all material respects.

[13] In the third alternative, the plaintiff pleaded that the relevant material express, alternatively tacit, alternatively implied terms of the agreement included that the second defendant would - within reasonable time after the conclusion of the agreement - ensure that LEPA was able to conduct business in Namibia and erect a factory in Namibia to produce panels to be supplied to Angola. The plaintiff duly performed her obligations in terms of the agreement however, in material breach of the terms of the agreement as pleaded supra the second defendant failed to - within reasonable time after the conclusion of the agreement - ensure that LEPA was able to conduct business in Namibia and erect a factory in Namibia to produce panels to be supplied to Angola, same forming an essential substratum underpinning the agreement and as a result of its failure:-

- a) the underlying basis and supposition on which the agreement was concluded has substantially disappeared;
- b) the purpose of the agreement could not be fulfilled; and

c) the agreement came to an end.

First Defendant's plea

[14] In her plea, the first defendant admitted that she received the amount in question from the plaintiff but pleaded that she was acting in her capacity as agent for or on behalf of the second defendant and therefore denied that the plaintiff was impoverished or that she, the first defendant, was enriched.

[15] The first defendant denies that she made any representation to the plaintiff prior to concluding the agreement between the plaintiff and the second defendant and in the event of the court finding that the first defendant made representations, which she denied, that she did so in her capacity as agent for the second defendant and that she act on his instruction.

[16] The first defendant pleaded that during 2011 Bonsai Investments 27 (Pty) Ltd and Bonsai Investments 73 (Pty) Ltd were purchased as shelf companies with their purpose to acquire an installer and manufacturing license from LEPA South Africa for the rights to construct houses using alternative building technology panels in Namibia and to distribute same to Angola. Bonsai Investments 27 (Pty) Ltd was subsequently renamed as Lightweight Energy Panels Africa (Namibia) or LEPA Namibia.

[17] Regarding the material breach alleged by the plaintiff in paragraph 37.19 of her particulars of claim, the first defendant pleaded that should the court find that the first defendant entered into an oral agreement with plaintiff, which is denied, the first defendant avers that such material breach was due to no fault on her part.

[18] In amplification, the first defendant pleaded that the terms of the agreement required the cooperation and assistance of LEPA South Africa in that LEPA South Africa had to issue licenses which would entitle LEPA Namibia to carry on business.

However, LEPA South Africa failed to issue the licenses it was required to issue and therefor performance in terms of the agreement became impossible.

[19] Throughout her plea, the first defendant denied having made any representations be it fraudulent, negligent or innocent and put the plaintiff to the proof of the averments made in her particulars of claim.

Second defendant's Plea

[20] The second defendant pleaded that he and first defendant discussed the selling of 5% of his shareholding in LEPA Namibia and first defendant approached him with the proposition that she will source a purchaser for his 5% shareholding. The purchaser was the plaintiff.

[21] The second defendant denies having made any representations to the plaintiff in the selling of his shares. He further pleads that he bears no knowledge of presentations made by the first defendant to the plaintiff. The second defendant admits that 5% of his shareholding in LEPA Namibia was caused to be transferred to the plaintiff for a purchase price of NAD 250 000.00. He received NAD 80 000.00 as a result of the transaction. The first defendant directly negotiated and communicated with the plaintiff regarding the sale of the 5%.

[22] He further denies being jointly and severally liable to pay the amount claimed by the plaintiff. The second defendant further pleaded that on 08 April 2011 he received a letter from the offices of Du Plessis Attorneys, who acted on behalf of the plaintiff and the first defendant demanding payment in the amount of NAD 268 524.00 in respect of the first defendant and NAD 250 000.00 in respect of the plaintiff, alternatively that all shares be transferred to first defendant, in which instance the first defendant and plaintiff will abandon any claim against the second defendant. The second hereafter transferred his shares to the first defendant.

[23] The second defendant throughout his plea denies having any knowledge of the representations made by the first defendant to the plaintiff and put the plaintiff to the proof thereof.

Replication:

[24] In replication, the plaintiff pleaded that if the first defendant acted as agent on behalf of the second defendant, it was not disclosed to her. Regarding the performance becoming impossible as pleaded by the first defendant, the plaintiff averred that the impossibility which may have arisen, arose after the first defendant fell in *mora* and/or was self-created and as such the first defendant could not rely on a supervening impossibility of performance.

Plaintiff's case

[25] The plaintiff called one witnesses namely, Mr. Hennie Gouws, besides testifying herself. I will recite the relevant portions of their evidence and then decide whether, in the light of their evidence, an application for absolution from the instance is competent.

Dawn Adams Redelinghuys

[26] The plaintiff stated that she is a quantity surveyor by profession and from 2009 the first defendant was utilized by the plaintiff's professional practice to render accounting services and during this relationship, the first defendant compiled her financial statements and advised her on various investment opportunities.

[27] According to the plaintiff, she trusted the first defendant with regards to her financial affairs and over the years, a close professional relationship developed.

[28] The plaintiff stated that on 01 March 2011 the first defendant invited her for breakfast and approached her with an investment opportunity called LEPA. The first defendant presented the plaintiff the opportunity to purchase shares from one of the four partners. During the conversation, the first defendant informed the plaintiff that she needs the plaintiff's expert advice regarding plaintiff's knowledge as a practicing professional in the construction industry. Plaintiff did not enquire as to the first defendant's intentions as she trusted her to have plaintiff's best interest at heart.

[29] From their discussions, the plaintiff understood that LEPA produced prefabricated light weight concrete panels for the erection of houses and she did not hesitate to get involved.

[30] On 04 March 2011, after making due arrangements with Western Insurance Company to fund the investment in LEPA, plaintiff paid the amount of NAD 250 000.00 subsequent to the oral agreement concluded between her and the first defendant. The payment was made directly into the account of the first defendant as Guy, the second defendant did not have a bank account.

[31] Plaintiff stated that the agreement entered into and the payment made was as a result of the representations made by the first defendant during March 2011. She further stated that during this she did not perceive the first defendant to be the agent on behalf of the other investors but rather as being part of the whole investment and that she was trying to get the project going and wanted the plaintiff involved due to her expert knowledge in the construction industry.

[32] These representations included that:

a) The first defendant was in partnership with certain other persons relating to LEPA;

- b) That plaintiff was investing into LEPA through purchasing of shares from one of the partners, i.e. the second defendant;
- c) LEPA would conduct business in Namibia and would erect a factory in Namibia to produce prefabricated concrete panels to be supplied to clients in Angola;
- d) LEPA secured contracts in Angola to supply LEPA building material and was entitled and authorized to do so; and
- e) Her payment entitled her to certain shareholding in LEPA.

[33] It was the plaintiff's evidence that the representations were, to the knowledge of the first defendant false in all material respects.

[34] Plaintiff further stated that when the first defendant made the representations, she intended for the plaintiff to act thereon and enter into the agreement and make the payment. This was done whilst the first defendant was mindful of the plaintiff's financial position and her access to available funds.

[35] The plaintiff stated that she was induced by the representation to enter into the agreement as any reasonable person would have been. She stated that the prospects of good return on her investment were attractive and had she known the correct true and correct facts, she would not have entered into the agreement and made the payment to the first defendant.

[36] Plaintiff submitted that further terms of the agreement included:

- a) That the first defendant would exercise reasonable professional skill and diligence in rendering investment advice to plaintiff;

- b) That the first defendant would on behalf of the plaintiff and for her benefit invest the amount of N\$ 250 000.00 in LEPA;
- c) That the first defendant would act in her best interest and not misappropriate the funds paid to her by the plaintiff;
- d) That the first defendant would within a reasonable time after the conclusion of the agreement ensure that LEPA was able to conduct business in Namibia and erect a factory in Namibia to produce the concrete panels to be supplied to Angola.

[37] It is the case of the plaintiff that she complied with her obligations but that in serious breach of the important terms, the first defendant:-

- a) Failed to exercise reasonable professional skill and diligence in rendering investment advice to the plaintiff and therefore failed to act in her best interest.
- b) Failed to invest the entire amount of N\$ 250 000.00 in LEPA, unlawfully misappropriated same and in doing so failed to act in the plaintiff's best interest;
- c) Failed to ensure that LEPA was able to conduct business in Namibia within a reasonable time, and because of the failure:
 - i. The substratum of the agreement substantially disappeared;
 - ii. The purpose of the agreement could not be fulfilled and
 - iii. The agreement has come to an end.

[38] As a result of the first defendant's breach, the plaintiff cancelled the agreement.

[39] On 13 April 2011 the plaintiff proceeded to request the first defendant in writing to repay her the NAD 250 000.00 as plaintiff did not receive anything in return for the amount paid. According to the plaintiff, she only saw the purported share certificates after her action was initiated but submitted that certificates as well as the shares are worthless.

[40] On 10 May 2011 the first defendant via e-mail correspondence indicated to the plaintiff that she will effect payment of the monies and as a result, so it was submitted by the plaintiff, the first defendant acknowledged that she is liable to repay the monies to her.

[41] As a result of the e-mail correspondence, the plaintiff prepared an acknowledgment of debt she required the first defendant to sign, however the said acknowledgement was not signed by the first defendant to date. The first defendant now actually refuses to repay the money.

[42] According to the plaintiff, she suffered damages as a result of the first defendant's conduct. She submitted that in the event that the court finds that no agreement was entered into, she paid the money to the first defendant in the reasonable belief that such an agreement was concluded and as a result the first defendant was enriched.

[43] During the course of her evidence, the plaintiff was presented with a number of documents for identification, many of which was apparently not disclosed to the plaintiff during the March 2011 agreement, which the plaintiff submitted establishes the falsity of representation made to her by the first defendant. According to the plaintiff, the first defendant failed to disclose the alleged underlying transactions and the relationship between central figures linked to the investment and the structures sought to be put in place relating thereto, was tenuous and unstable.

[44] The documents referred to related to the construction license and fees and the manufacturing plan license, transfer of shares certificates, e-mail correspondence and various other correspondence, etc.

[45] The plaintiff denied that she was part of any correspondence directed by the legal practitioner of the first defendant to either the second defendant or to LEPA South Africa. Plaintiff stated however that she came to know of an issue regarding an issue with a license in April 2011 but was not sure as to the nature of the problem experience.

Hendrik Gous

[46] Mr Gous testified in his capacity as expert in this matter. Mr. Gous is employed with PriceWaterhouseCoopers and currently holds the position of Senior Manager Direct & International Tax.

[47] The witness stated that he based his analyses and opinion on the documents received from the plaintiff's legal practitioner. In his evidence he expressed his opinion on the following issues:

- a) Professional skill and diligence;
- b) Money allegedly received on behalf of another;
- c) Conflict of interest;
- d) Proper accounting records/deregistration;
- e) Value of shareholding.

[48] In the opinion of the witness, the relationship between the plaintiff and the first defendant was one of the first defendant acting as auditor/account for the plaintiff. He is

of the opinion that the lack of written contractual arrangements and documentary proof of the various transactions entered into by and regarding the various parties involved in the matter it is not in line with how advisory services are undertaken in general by Auditors.

[49] He stated that giving investment advice, especially relating to private company investments, places an additional burden of care and diligence on an auditor, especially in cases where the auditor is a co-investor in a private company.

[50] Mr. Gous stated that one would have expected that third party funds, as those received from the plaintiff, would have been deposited into a Trust Account, and accordingly distributed from said Trust Account. If the first defendant acted as an agent for the sale of shares transaction, then the use of a Trust Account would have been expected.

[51] It was the opinion of the witness that a conflict of interest existed between the first defendant's services rendered to the plaintiff and the first defendant's own interest in the said venture.

[52] The witness's evidence in respect of the proper accounting/deregistration and value of shareholding need not be discussed for purposes of this ruling.

Cross-examination of the Plaintiff

[53] During cross-examination, Mr. Wylie set out to show to this court that the evidence of the plaintiff is not supporting her amended particulars of claim. The following was determined during cross-examination:

- a) The plaintiff purchased the shares of the second defendant for a purchase consideration/price of N\$ 250 000.00 and the first defendant received the monies

and had to distribute it to the second defendant. The plaintiff knew that the shares belonged to the second defendant and not the first defendant.

- b) The plaintiff was aware of the fact that the money paid for the shares was for the second defendant to do with as he pleased.
- c) The first defendant never gave the plaintiff any advice and the plaintiff admitted that she acted unreasonably and should have done her own due diligence instead of blindly going ahead and buying the shares. The plaintiff however maintained her position that in her opinion the first defendant had a conflict of interest.
- d) The plaintiff admitted that the first defendant had no knowledge of the construction industry and that the first defendant was not in the position to advise the plaintiff.
- e) The plaintiff admitted that there was no misappropriation of funds alternatively that if the money was misappropriated, she has no evidence thereof.
- f) On the issue of the alleged breach that the first defendant did not insure that LEPA Namibia could conduct business within a reasonable time and that she failed to ensure that the factory was erected within a reasonable time, the plaintiff conceded that she did not give the first defendant any time to get the venture up and running. Apart from that the plaintiff conceded that the first defendant never committed herself to these steps in any event during their conversations.
- g) The plaintiff conceded that had the first defendant made any representations to her, it was done in good faith and were not false when it was made, for example:
 - i. That LEPA would conduct business in Namibia;
 - ii. That the first defendant was a partner in the venture;
 - iii. That share certificates was issued;

- iv. That there was a bona fide impression created by LEPA SA that the construction license was issued and the distribution license was authorized.
- h) The plaintiff never made any mistake regarding the payment she made as she knew who she was paying and why;
- i) The plaintiff accepted the first defendant is currently engaged in a defended legal battle in South Africa with LEPA South Africa due to their breach of contract with LEPA Namibia;
- j) On the issue of conflict of interest: Mr. Gous was unable to give any factual basis for his opinion.

The Absolution Application

Argument advance on behalf of the First Defendant

[54] Mr. Wylie, for the defendant moved for an absolution from the instance application which was heard on 16 August 2018 arguing on behalf of the first defendant that the evidence of the plaintiff does not support her particulars of claim.

[55] He maintained that the principle claim and alternative claims should be dismissed. He further maintained that at all times, the plaintiff knew that the alleged factual basis upon which these claims are false.

[56] Mr. Wylie argued that the claims set out in the amended particulars of claims are premised on the allegations that the plaintiff made an investment in LEPA Namibia, however the plaintiff admitted that:

- a) She never invested in LEPA Namibia;

- b) She in actual fact purchased the shares belonging to the second defendant;
- c) First defendant was never able to advise her otherwise and that the plaintiff was actually the person who had the knowledge for this venture;
- d) Any representation made by first defendant was in fact made innocently and in good faith.
- e) First defendant had a bona fide belief in the representation, if any, that she made.
- f) The plaintiff entered blindly into the purchase agreement and admitted that she did not act like a reasonable person in those circumstances.
- g) She failed to give the first defendant any time whatsoever to actually ensure that LEPA Namibia could conduct business in Namibia and erect a factory.
- h) The plaintiff did not make the payment in error; and
- i) She signed the transfer of shares certificates.

[57] Mr. Wylie submitted that the plaintiff failed to prove:

- a) Enrichment in any form whatsoever which would entitle her to a claim for enrichment against either of the defendants.
- b) That she was impoverished or that either of the defendants were enriched at her expenses; and
- c) Any factual basis or substantiation for any of her claims that first defendant misappropriated the monies (even if this is so, then it would be for the second

defendant to claim it from the first defendant and not the plaintiff as she has no *locus* to claim this).

[59] It is further Mr. Wylie's argument that the plaintiff intentionally misled the court with her claims as there are many allegations made therein which are clearly fabrications.

[60] Mr. Wylie strongly argued that it should go to the plaintiff's credibility as a witness and should weigh against her.

Argument advance on behalf of the Second Defendant:

[61] The second defendant supported the application of the first defendant in respect of the application for absolution from the instance but did not advance any further arguments in addition to that of the first defendant already advanced.

Plaintiff's Reply in re Absolution Application

[62] Mr. Muhongo argued that there was no basis upon which this court can grant the application for absolution from the instance.

[63] It was further argued by Mr. Muhongo that plaintiff has *prima facie* established that first defendant made false representation (active and or passive) which were material to and induce the plaintiff to conclude the purchase of share (pursuant to an investment).

[64] The plaintiff's claim is principally placed in misrepresentation. The plaintiff is relying on the second part of the particulars of claim to resist the application. The first

portion of the particulars of claim is regarding the investment whereas the second part of the particulars of claim is regarding the purchase of the shares.

[65] It was also submitted that the reasonableness of the plaintiff's action is based on her relationship with the first defendant and even if the court find that she acted with naivety that it should be born in mind that it is not the plaintiff's naivety that is on trial.

[66] Mr. Muhongo argued that it cannot be said that the manner in which the plaintiff pleaded her case is unreasonable as the plaintiff was in the dark as to what was happening and hence the amended particulars of claim, introducing paragraphs 36.1 to 37.22 of the amended particulars of claim after the plaintiff had regard to the documents discovered.

[67] It was submitted that the plaintiff had a *prima facie* basis for her particulars of claim.

[68] Mr. Muhongo argued that the first defendant acted in her capacity as the plaintiff's financial advisor and the promotor of the investment that is the subject matter of the proceedings and in the process, the first defendant abused her relationship with the plaintiff and failed to rise to the occasion as far as disclosure of material information regarding the investment is concerned.

[69] In conclusion it was prayed that this court should dismiss the application by the defendants with costs.

Law applicable on absolution from the Instance

[70] 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:²

² 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.

“...(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.)

[71] 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.”

[72] 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.’

[73] In the case of *Van Zyl NO and Others v Hoffmann NO and Others*, the following was stated:³

‘[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 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.’⁴

³ (3762/2010) [2012] ZAFSHC 123 (22 June 2012).

⁴ See *BUILD-A-BRICK BK EN 'N ANDER v ESKOM* 1996 (1) SA 115 (O) at 123 A – E. See also *ROSHERVILLE VEHICLE SERVICES (EDMS) BPK v BLOEMFONTEINSE PLAASLIKE OORGANGSRAAD* 1998 (2) SA 289 (O) at 293 D – H and Schmidt C W H, **Law of Evidence**, loose leave edition, p. 3-16 to 3-18.

[74] In *Dannecker v Leopard Tours Car & Camping Hire CC*,⁵ 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;⁶
- 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;⁷
- 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.⁸

[75] My task, at this juncture, is to consider whether a court, reasonably directed, might find for the plaintiff in the light of the evidence led by the plaintiff. In order to do so, it is imperative to have due regard to the issues and criticisms levelled by the defendants at the evidence led by the plaintiff. It would seem to me that there is one principal basis for the attack. It is that the plaintiff has failed to adduce prima facie evidence to show or suggest that the first defendant made a misrepresentation either innocently, negligently or fraudulently, which induced the plaintiff in buying the shares of the second defendant.

⁵ (I 2909/2006) [2015] NAHCMD 30 (20 February 2015).

⁶ *Compare, Supreme Service Station (1969) (Pty) Ltd v Fox & Goodridge (Pty)* 1971 (4) SA 90 (RA) at 92.

⁷ *Mazibuko v Santam Insurance Co Ltd & Another* 1982 (3) SA 125 (A) at 127C-D.

⁸ *Atlantic Continental Assurance Co of SA v Vermaak* 1973 (2) SA 335 (A) at 527.

[76] It was maintained on behalf of the plaintiff that the defendants lauded the application for absolution from the instance because the first defendant specifically tried to avoid the uncomfortable questions that might follow however as the authorities showed, the court must determine if the plaintiff made out a *prima facie* in order to survive the absolution application before court.

Law applied to the facts

[77] In doing so, the court must consider the critical issue in this matter and that is whether there were misrepresentations made to the plaintiff and who made that misrepresentation, if so made.

[78] It is common cause that the second defendant had no interaction with the plaintiff regarding the sale of his shares. The only person that the plaintiff interacted with was the first defendant. She only met the other shareholders briefly but had not had discussions with them.

[79] The plaintiff maintains that the first defendant made certain representations⁹ to her as a result of which she entered into the agreement and made payment. She maintained that the said representations were to the knowledge of the first defendant false in all material respects. It further pleaded that the defendant owed the plaintiff a duty of care.

[80] On the other hand, the case as pleaded by the first defendant is that she made no representations to the plaintiff prior to the concluding of the agreement

⁹ Par 14 of Witness statement, page 8 of the Witness Statement Bundle:

'14.1 The first defendant was in partnership with certain other persons relating to LEPA;

14.2 I was investing into LEPA through purchasing of shares from one of the "partners",

14.3 LEPA would conduct business in Namibia and would erect a factory in Namibia to produce prefabricated concrete panels to be supplied to clients in Angola;

14.4 LEPA secured contracts in Angola to supply LEPA building material and was entitled and authorized to do so; and

14.5 The payment entitled me to certain shareholding in LEPA.

between the plaintiff and the second defendant. She also pleaded that in the event that the court finds that she made representations to the plaintiff, then it was done in her capacity as agent of the second defendant and in doing so she was acting on the instructions of the second defendant.

[81] A representation and misrepresentation was defined as follows in *The Principles of the Law of Contract* by AJ Kerr:¹⁰

'A representation has been judicially defined as a statement made by one party to the other before or at the time of the contract of some matter or circumstance relating to it¹¹. It does not become part of the contract. If such a statement is incorrect it is a misrepresentation¹².'

[82] In the authoritative work of Christie on *The Law of Contract in South Africa*,¹³ the learned author discusses misrepresentation. He states as follows:

'To appreciate why it is necessary to distinguish with some care between what is and what is not a representation it should be understood where a misrepresentation fits in schematically between a mere puff and a term of the contract. The scheme of the things is well set out by Claassen J in *Small v Smith* 1954 3 SA 434 (SWA) 436:

"(a) Statements of commendation or puffing have no binding effect. The same applies in general to expression of opinion or estimation as to quantity or quality (*Digest* 19.2.22.3).

(b) A statement by the seller not falling under (a) may either be a representation inducing the contract or it may be one which becomes a term of the contract. A statement which merely induces a contract is one which the parties did not intend to become a term of the contract (*Wright v Pandell*, 1949 (2) SA 279 (C), and *Wessels*, paras 1015 and 4456).

¹⁰ Sixth Edition on page 267.

¹¹ *Wright v Pandell* 1949 2 SA 279 at 285 per Herbstein J: 'A representation is a statement or assertion made by one party to the other before or at the time of the contract of some matter or circumstances relating to it.'

¹² Also see *Wilke NO v Swabou Life Assurance Company Limited* 2000 NR 23 (HC).

¹³ 5th Edition page 273.

(c) A statement made seriously and deliberately during the negotiations of a verbal contract becomes a term of the contract, if the parties by mutual intention either expressed or implied intended it to be a terms of the contract. “

[83] According to the plaintiff, the first defendant told her about the LEPA venture during their meeting on the 1st of March 2011 with so much enthusiasm that it would appear that the first defendant's excitement about the venture was contagious. So much so that the plaintiff immediately made work of securing money to purchase shares in LEPA, without having seen any cash flow projections or documentation.

[84] The plaintiff also stated that the first defendant told her that she had prospects of good returns on her investment but conceded that there are not definite in investments. She stated she also understood that the first defendant invested in the excess of a million Namibian Dollars in the project and that got the plaintiff to think that it sounded like a good investment and the she wanted to be part of it.¹⁴

[85] If one has regard to the discussion between the plaintiff and the first defendant, in order for the plaintiff to obtain the information regarding the venture and for her to be interested therein, the first defendant had to make certain statements to the plaintiff which clearly amounted to a representation. These representations did not only amplify the plaintiff's interest but also induced her into wanting to get involved in the LEPA venture.

[86] Hereafter the first defendant acted as an intermediary or agent acting on behalf of the second defendant and brought the plaintiff into a contractual relationship with the second defendant.

[87] The question that begs the answer now is whether the representations made by the first defendant was false or not, as maintained by the plaintiff.

¹⁴ Page 54 of transcribed record at line 29- page 53 line 23.

[88] One of the requirements which must be met by a person relying on misrepresentation is that the representation was false in fact.

[89] In the matter of *Trust Bank of Africa Ltd v Frysch* 1977 3 SA 562 (A) Corbett JA (as he then was with whom Jansen JA concurred in a dissenting judgment) set out the following:

'A party who seeks to establish the defence that the contract which he entered into is voidable on the ground of misrepresentation must prove (the onus being upon him) (i) that a representation was made by the other party in order to induce him to enter into the contract; (ii) that the representation was material; (iii) that it was false in fact; and (iv) that he was induced to enter into the contract on the faith of the representation (see *Karoo and Eastern Board of Executors and Trust Co. v Farr and Others*, 1921 AD 413 at p. 415).

[90] It was determined during cross-examination that the alleged representation referred to by the plaintiff in her amended particulars of claim¹⁵ and which were alleged to be false¹⁶ in all material respects were conceded to be truthful statements which were made during 1 March 2011 and 4 March 2011, for example:

- a) The first defendant was indeed in partnership with certain other persons relating to LEPA;
- b) That plaintiff obtained shares LEPA through purchasing of shares from one of the partners, i.e. the second defendant;
- c) LEPA would conduct business in Namibia and would erect a factory in Namibia to produce prefabricated concrete panels to be supplied to clients in Angola. Said construction license was obtained from LEPA South Africa and distribution license was authorized;

¹⁵ Paragraph 37.1 of the Amended Particulars of Claim.

¹⁶ Paragraph 37.2 of the Amended Particulars of Claim.

- d) LEPA secured contracts in Angola to supply LEPA building material and was entitled and authorized to do so; and
- e) The plaintiff's payment entitled her to certain shareholding in LEPA. Transfer of shares was effected and the plaintiff signed the share certificates.

[91] From the concessions made by the plaintiff, it is clear that she was unable to satisfy the requirement in respect of the factual falsity of the representations.

[92] As for the prospect of good return on her investment the following can be said with reference to the matter of *Van Heerden and Another v Smith*¹⁷ where Grobler J said:

'A dishonest and erroneous opinion about an event which is to take place in the future may, therefore, in my opinion, form the basis of an action for fraudulent misrepresentation, but in such case the cause of action will be the dishonesty of the person about the state of his own mind when he gave expression to the erroneous opinion, and not the mere fact that the opinion afterwards proved to be wrong.'

[93] Christie states the following in this regard:

'An expression of opinion which turns out to be mistaken is not a misrepresentation, nor is a speculation or a prophecy concerning the future, which is simply one form of expression of opinion, so if the future does not unfold as forecast the other party normally has no remedy, except possibly in delict if he can show that the statement was made negligently. He may however have a remedy if the facts are not equally known to both sides, in which case a statement of opinion by the one who knows the facts best may involve the statement of a material fact, for his is impliedly stating that he knows facts which justifies his opinion. A party intending to rely on the opinion of the person with whom he is bargaining should protect himself by having the expressions of opinion recast in promissory form as a term of the contract. If he fails to do so he has no grounds for complaint.¹⁸ (my underlining)

¹⁷ 1956 3 SA 273(O) at 276.

¹⁸ Christie at page 274.

[94] The plaintiff conceded during cross-examination that she was aware that there were no guarantees as to the investment she made as there is 'no definite in any investment'. Nothing regarding possible returns was recorded as a term of the contract between plaintiff and second defendant and it must be pointed out yet again that the plaintiff, on her own version, apparently relied on the opinion of a person who confessed she had no knowledge of the construction industry, without exercising due diligence.

[95] The plaintiff also strongly relies on the utmost good faith of the first defendant and to advise her in respect of possible investments and that this instance was not different but it appears the proverbial tables were turned in this instance as the plaintiff stated that the first defendant told her that she has no knowledge of the construction industry and that the plaintiff's expertise in this field would be invaluable to the venture. To therefor state that the first defendant advised the plaintiff in this instance as well would not be technically correct. What is interesting and which was so pointed out on behalf of the first defendant is that the plaintiff did not include a claim for professional misconduct/negligence (as claimed in paragraph 24A of the Amended Particulars of Claim) under the second part of her particulars, i.e. the purchase agreement of the shares. The first defendant, on the plaintiff's own version, was not in the position to advise her on a field on which the first defendant had no expertise on or knowledge of.

[96] On this score, the evidence of Mr. Gous did not take the matter any further either. He based his opinion that there was conflict of interest on the part of the first defendant on the documents that he received from plaintiff's legal practitioner however when confronted of during cross-examination, Mr. Gous was unable to substantiate his opinion with a factual basis for said opinion.

[97] The plaintiff, without exercising due diligence as the expert in the construction industry, committed herself to the venture by purchasing the shares of the second defendant and the wish to bow out of the venture within a few weeks, without giving the venture a fair opportunity to become operational. Then the plaintiff claims material breach on the part of the second defendant when the factory was not erected in

Namibia within a reasonable time after the conclusion of the agreement. The reasonable time in this instance appears to be less than two months. Plaintiff confirmed during cross-examination the first defendant did not commit herself to any of the alleged steps to be taken to ensure that the venture was up and running.

[98] There are no merits in the principle claim and/or the alternative claims of plaintiff that the first defendant and/or the second defendant made misrepresentations to her prior to the purchasing of the shares. The plaintiff conceded that the second defendant believed the truthfulness of the statements that she made. As for the third alternative claim the breach by the second defendant of the material, alternatively tacit, alternatively implied terms of the agreement to ensure that LEPA was able to conduct business in Namibia and erect a factory in Namibia to produce panels, is also without merit.

[99] It is important to note that the evidence of the plaintiff does not support her claim in any way as pleaded in the amended particulars of claim. In fact it is diametrically opposed thereto. The credibility of the plaintiff must be called into question and for these reasons and those as set out above I am not satisfied that the plaintiff has made out a prima facie case. I am of the considered opinion that no reasonable court could or might give judgment in favour of the plaintiff.

[100] My order is therefore as follows:

- a) Absolution of the Instance is granted with in respect of both Defendants with costs.
- b) Cost in respect of the First Defendant to include the costs of opposition to Summary Judgment Application.
- c) Said costs to include cost of one instructing and one instructed counsel.

d) Matter removed from the roll: Regarded as finalized.

J S PRINSLOO

Judge

APPEARANCES:

FOR PLAINTIFF:

T Muhongo

instructed by Ens Africa, Windhoek

FOR FIRST DEFENDANT:

T Wylie

instructed by Theunissen, Louw and Associates,
Windhoek

FOR SECOND DEFENDANT:

In-Person