

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON ABSOLUTION FROM INSTANCE

CASE NO: HC-MD-CIV-ACT-CON-2017/00635

In the matter between:

EA MOUTON BUILDERS CC

PLAINTIFF

and

SANTAM NAMIBIA

DEFENDANT

Neutral Citation: *EA Mouton Builders CC v Santam Namibia* (HC-MD-CIV-ACT-CON-2017/00635) [2019] NAHCMD 179 (07 June 2019)

CORAM: PRINSLOO J

Heard: 05 April 2019

Delivered: 07 June 2019

Reasons: 10 June 2019

ORDER

1. The application for absolution from the instance is dismissed.
2. The Defendant is ordered to pay the Plaintiff's costs.
3. The matter is postponed to **11 June 2019** at **08:30** in chambers for allocating dates for the continuation of the trial.

RULING IN TERMS OF PD 61(9) OF THE PRACTICE DIRECTIVES

PRINSLOO J

[1] The plaintiff in this matter is EA Mouton Builders CC, a close corporation registered in terms of the laws of the Republic of Namibia. The sole member of the plaintiff is Mr E A Mouton.

[2] The defendant is Santam Namibia, a private company incorporated in terms of the Companies Act of the Republic of Namibia and which carries on insurance business in Namibia.

[3] The plaintiff and the defendant entered into and concluded an insurance contract (indemnity contract) in terms of which defendant undertook to indemnify the plaintiff in the event that one of its motor vehicles, but more specifically in the matter *in casu*, a Ford Ranger registration number N 525-525 R, is involved in an accident.

Factual Background

[4] On 19 September 2016 Mr Mouton was on his way to Oshivelo with the aforementioned vehicle on the B1 road when he struck a guinea fowl causing damage to the bonnet, the grill and the intercooler of the vehicle.

[5] The defendant had, in terms of the policy, elected to repair the damage to the vehicle. The defendant instructed Hot Rod Panel Beaters and Spray Painters ('Hot Rod Panel Beaters') in Oshakati to effect the repairs to the vehicle and defendant, subsequent to the repairing of the vehicle, paid the cost of the repairs to Hot Rod Panel Beaters.

[6] Hot Rod Panel Beaters returned the vehicle to the plaintiff after repairing the said vehicle and during the first journey from Oshakati to Ondangwa the vehicle overheated. The vehicle was returned to Hot Rod Panel Beaters, who subsequently informed the plaintiff that the vehicle had a knock in the engine.

[7] The plaintiff lodged a subsequent claim with the defendant, however this claim was rejected, which then gave rise to the plaintiff instituting action in this matter for specific performance in terms of which it seeks the defendant to be ordered to indemnify it by repairing the damage caused to the engine of the Ford Ranger.

Current application

[8] After the close of the plaintiff's case the defendant applied for an absolution from the instance.

[9] The application for absolution is founded in four grounds, namely:

- (a) that the plaintiff has not proven its incorporation and registration as a close corporation;

- (b) that the plaintiff failed to lead any monetary damages;
- (c) that the plaintiff failed to establish an agency relationship between the defendant and Hot Rod Panel Beaters; and
- (d) that the claim was consequential and/or mechanical loss/damage which is excluded by an exclusion clause in the defendant's commercial policy.

The legal principles relating to application for absolution from the instance

[10] The reasoning in an application for absolution from the instance at the closing of the plaintiff's case is different from that applicable when the court comes to consider, after having heard the evidence for the plaintiff and that of the defendant, the merits of the case, which is: 'Is there evidence upon which a Court ought to give judgment in favour of the plaintiff?'¹

[11] The relevant test is not whether the evidence led by the plaintiff 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.²

[12] The test which the court applies for such applications has been authoritatively stated in various judgments and adopted by this court and our Supreme Court³. The leading case normally referred to in this regard is *Claude Neon Lights (SA) Ltd v Daniel*⁴ where Miller AJA propound the applicable test in the following terms —

'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 plaintiff establishes what would finally be required to

¹ *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA) at 92-93.

² *Labuschagne v Namib Allied Meat Company (Pty) Ltd* (I 1-2009) [2014] NAHCMD 369 (1 December 2014), para 7; *Stier and Another v Hanke* 2012 (1) NR 370 (SC).

³ The approach has been followed in Namibia in a number of cases; see, for example, *Stier and Another v Hanke* 2012 (1) NR 370 SC); *Aluminium City CC v Scandia Kitchens & Joinery (Pty) Ltd* 2007 (2) NR 494 (HC). *Absolut Corporate Services (Pty) Ltd v Tsumeb Municipal Council* 2008 (1) NR 372 (HC).

⁴ 1976 (4) SA 403 (A) at 409G – H.

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'.

[13] Applying the principles set out in the aforesaid paragraphs to the facts of the instant case, I heed to the words of Parker AJ in *Erasmus v Wiechmann*⁵ where he stated the following:

'[20] I am alive to the principled judicial counsel that a court ought to be chary in granting an order of absolution from the instance at the close of the plaintiff case unless the occasion arises. In that event the court should order it in the interest of justice.'

[14] On behalf of the defendant a detailed argument was advanced in support of its application for absolution. The defendant addressed its grounds for the current application and a firm argument was advanced that the claim is for mechanical damages within the exception clause and that the defendant had discharged all its obligations of indemnifying the plaintiff against the collision event. The defendant further maintained that the defendant failed to demonstrate that it suffered damages, the extent of the damages and who caused the damages.

[15] It is the plaintiff's case that the damage which occurred after the repair of the vehicle by the defendant's agent is not consequential in nature. It was argued further that the defendant cannot be relieved from liability and that the damage suffered was direct damage which falls under the risk cover and therefor the defendant is liable. It is further the plaintiff's case that the panel beaters acted as an agent of the defendant as the defendant did not only instruct Hot Rod Panel Beaters but also paid for the repair services rendered.

[16] Having considered the evidence adduced by the plaintiff, I am of the opinion that a court exercising its mind reasonably could find for the Plaintiff in his claim.

[17] My order is there as follows:

⁵ (I 1084/2011) [2013] NAHCMD 214 (24 July 2013).

- (a) The application for absolution from the instance is dismissed.
- (b) The Defendant is ordered to pay the Plaintiff's costs.
- (c) The matter is postponed to **11 June 2019** at **08:30** in chambers for allocating dates for the continuation of the trial.

JS Prinsloo
Judge

APPEARANCES:

FOR THE PLAINTIFF:

F Bangamwabo

For FB Law

Chambers

FOR THE DEFENDANT:

J-P Jones

Instructed by Viljoen & Associates