REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-ACT-CON-2017/00939

In the matter between:

ELIZABETH NEIS **PLAINTIFF**

and

KENNETH THIONGO KASUMA **1ST DEFENDANT**

JOSEPHINA KWALIMUSHE AMUTSE **2ND DEFENDANT**

Neutral citation: *Neis v Kasuma (*HC-MD-CIV-ACT-CON-2017/00939) [2020] NAHCMD 320 (30 July 2020)

Coram: PARKER AJ

Heard: 30 September, 1 October, 3 October & 14 November 2019; 3-4 March, 30 June, 1 July & 21 July 2020

Delivered: **30 July 2020**

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 – On the issue of undue influence on plaintiff when she entered into sale agreement with first defendant court finding no prima facie case made out – On the issue of agreement about first defendant

buying a house for plaintiff on top of paying the purchase price of plaintiff's house court finding out prima facie case made out requiring answer from first defendant – Court held the two issues were severable.

Summary: Practice – Absolution – Close of plaintiff's case – Court applying trite test to issue of plaintiff selling her house to defendants when under their undue influence – Court concluding that plaintiff has not made out a prima facie case requiring defendants to answer – Applying test to issue of first defendant agreeing with plaintiff that he would give her N$2 000 000 to buy a house after sale of her house to defendants on top of paying the purchase price of plaintiff's house – Court finding that on that issue plaintiff has made out a prima facie case requiring first defendant's response – Consequently, absolution granted in respect of issue of undue influence and dismissed in respect of issue of the agreement regarding first defendant giving N$2 000 000 to plaintiff to buy a house to replace her house sold to defendants.

ORDER

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1. The application for absolution from the instance regarding-
   (a) the claim of undue influence is granted;
   (b) the claim that by an agreement between plaintiff and first defendant, first defendant was to pay the purchase price of the house and also give N$2 000 000 to plaintiff for her to buy a house in Windhoek is refused.
2. On this day of the judgment, the court shall determine a set down date for continuation of trial.
3. Costs are to stand over for argument in due course during the continuation of trial.

JUDGMENT

PARKER AJ:

[1] After plaintiff closed her case, Mr Amoomo brought an application for absolution for the instance ('absolution application'). On the test for absolution from the instance, I had this to say in *Konrad v Shanika* (HC-MD-CIV-MOT-GEN-2016/00239 [2019] NAHCMD 366 (24 September 2019), where the authorities are also gathered:

'[6] The test for absolution from the instance has been settled by the authorities. The principles and approaches have been followed in a number of cases. They were approved by the Supreme Court in *Stier and Another v Henke* 2012 (1) NR 370 (SC). There, the Supreme Court stated:

> "[4] At 92F-G, Harms JA in *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA) referred to the formulation of the test to be applied by a trial court when absolution is applied at the end of an appellant's (a plaintiff's) case as appears in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409 G-H:
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> ". . . when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, 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).)"
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> "Harms JA went on to explain at 92H - 93A:
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> "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* 4 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. . . ."

‘[7] Thus, in *Dannecker v Leopard Tours Car & Camping Hire CC* (I 2909/2006) [2015] NAHCMD 30 (20 February 2015), Damaseb JP stated as follows on the test of absolution from the instance at the close of plaintiff’s case:

> “The test for absolution at the end of plaintiff’s case
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> [25] 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. The reasoning at this stage is to be distinguished from the reasoning which the court applies at the end of the trial; which is: ‘is there evidence upon which a Court ought to give judgment in favour of the plaintiff?’
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> “[26] The following considerations (which I shall call ‘the Damaseb considerations’) are in my view relevant and find application in the case before me:
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> (a) 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;
> (b) 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 had made out a case calling for an answer (or rebuttal) on oath;
> (c) 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;
> (d) 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 cause of action and destructive of the version of the defence, absolution is an inappropriate remedy;
> (e) 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”.’

[2] This case, according to plaintiff’s pleadings, has the markings of hocus-pocus and witchcraft. It all started close to the end of 2013. Plaintiff testified that while working as a nurse (she retired at the end of 2017), she lent N$100 000 to a patient

she cared for at the Katutura State Hospital. His name is Herman de Preez. Du Preez promised that he would repay the loan when he was discharged. He was discharged, but he broke his promise. Plaintiff says, she made several abortive attempts to recover the N$100 000. She said she was worried about her finances because the money she had lent to Du Preez came from her 'life savings'.

[3] Herein enters first defendant, according to plaintiff's testimony. Plaintiff's sister Frieda Guriras advised plaintiff to speak to first defendant, because Frieda had had such problem before, and plaintiff helped her. Plaintiff, Frieda and one of their nephews went along to see plaintiff, but only Frieda and the nephew went into plaintiff's house. Plaintiff, at the urging of Frieda, accepted to speak to plaintiff and also agreed to enter plaintiff's house. According to plaintiff, from her conversation with first defendant, first defendant knew about her financial problems that were caused by her losing the aforementioned N$100 000 to Du Preez. First defendant then told plaintiff that he had a lot of money; knew about her money problems; and he would give her money.

[4] For what she testified she felt for consulting first defendant, plaintiff placed expert evidence before the court through two expert witnesses, namely, Dr Joab T. Mudzanapabwe, a clinical psychologist, and Ms Ute Sinkala, also a clinical psychologist.

[5] It need hardly saying that the root cause of plaintiff's problems, according to the pleadings and plaintiff's evidence, was financial, brought on solely by Du Preez's failure to repay the loan of N$100 000. Therefore, the sole reason for accepting Frieda's advice to consult first defendant was that, persuaded by Frieda's experience when she was in a similar situation, first defendant by some magical powers, would be able to assist her in getting back the money she had lent to Du Preez, after her own abortive attempts to get the money back from Du Preez.

[6] Plaintiff does not say what first defendant told her he would do to get the money back from Du Preez. No evidence came from Frieda, apparently because she had died. No evidence came from one of her nephews who accompanied her and Frieda to first defendant's house. No evidence was placed before the court as to the attempts that plaintiff took herself to recover the money from first defendant.

Additionally, no evidence in the form of bank statements or suchlike statements, was placed before the court, tending to show the account from which she took N$100 000 in order to hand it over to Du Preez; and if she had kept the money in a house or somewhere other than a bank or a financial institution, where the money was kept. No evidence *aliuende* was placed before the court to establish that, indeed, a Du Preez was a patient of plaintiff's at the Katutura State Hospital at the material time.

[7] Thus, there is not one grain of evidence tending to prove that Du Preez existed at the material time and he was plaintiff's patient at the Katutura State Hospital. There is also no evidence to establish that plaintiff had such money which she had given to Du Preez.

[8] It is on the basis of such lack of evidence on material aspects that Dr Mudzanapabwe, after reading plaintiff's witness statement and applying the theories of psychology to the witness statement, was prepared to make the bold conclusion that 'plaintiff was unduly influenced to sell her house to the defendant'.

[9] Dr Mudzanapabwe's report, as he himself said in both his examination-in-chief-evidence and cross-examination-evidence is a 'purely academic' essay on some general principles of psychology. It is 'not a health services', the good Doctor testified further. What the Doctor says here is most instructive for our present purposes. He testified:

> 'The aim of the review of the scientific literature is to form the bias of formulating an expert opinion, as to whether Ms Elisabeth Neis (plaintiff) was unduly influenced when she purportedly agreed to transfer her house into the name of Ms Josephine Kwalimushe Amutse (second defendant). This is purely an academic exercise, and not a health service.'

[10] A further weighty demerit of the Doctor's evidence is that he 'relied solely on (the) scientific literature and on the witness statements provided by the instructing lawyers' of plaintiff'. 'At no point in time,' the witness testified further, 'did I have the opportunity to undertake consultation with any of the witnesses involved in this matter'. And that, I hasten to add, included plaintiff, the subject of the Doctor's analysis and conclusions!

[11] Thus, despite not having seen and examined plaintiff, the expert witness was prepared to conclude in this way:

> 'It is my considered opinion, in view of the above systematic literature review and findings from the witness statements that there are sufficient grounds to conclude that Ms Neis was unduly influenced to sell her house to the defendant.'

[12] Unlike Dr Mudzanapabwe, Ms Sinkala did consult with plaintiff in June 2016, that is, more than two years after the alleged cause of plaintiff's financial woes arose. Ms Sinkala did conduct clinical evaluation and intervention. Ms Sinkala's assessment, which was based on interview with plaintiff and follow-up sessions revealed that plaintiff suffered 'from symptoms of depression and anxiety that exacerbated by the financial strain, unary incontinence, fatigue and chronic depression'. 'Her depression', Ms Sinkala surmised, 'is affected by her financial stress as well as housing situation'.

[13] Ms Sinkala's assessment and conclusions were influenced in no small measure by the personal history of plaintiff, as told to her by plaintiff. Furthermore, unlike Dr Mudzanapabwe, Ms Sinkala does not testify that plaintiff was under the undue influence of first defendant when she sold her house to defendants, which is at the core of the present dispute. Her conclusions dwell on plaintiff's depression and how it could be treated effectively; and the need for her to undergo long-term individual psychotherapy and for follow-up sessions. For this reason, I should return to Dr Mudzanapabwe's assessment and conclusions mentioned previously.

[14] In any opinion, one need not be a scientist or psychologist to conclude that where general principles (scientific and otherwise) are applied to facts that do not exist or which are not correct, conclusions drawn such facts cannot – as a matter common sense and logic – be correct. Any such conclusion is bound to be perverse. This view becomes unimpeachable where, as is in the instant proceeding, the expert witness concerned testified that his report and conclusion drawn are a 'purely academic' exercise, and 'not a health service'; an academic exercise done when the subject involved was absent from the scene and conclusions reached solely upon the reading of witness statements.

[15] In that regard, it is important to make this crucial point, a point which is apposite to the instant proceedings. Objectivity is impossible in psychological assessment of persons. It is a problem in psychology because it involves human beings studying human beings; and so, it is difficult to study the behaviour of people in an unbiased way. (SA McLeod, *Psychology as a Science*, (2008)) Look, for example, at the commission of Dr Mudzanapabwe. The expert witness was to assess in May 2019 plaintiff, based on the witness statement of plaintiff and the witness statements of plaintiff witnesses, in order to support plaintiff's claim that plaintiff was under undue influence of first defendant, brought on by her depression and other psychological conditions, when she sold her house to defendants in 2015, that is, four years after the material event or events that occurred in 2013-2015. And it must be remembered, when evaluating expert evidence, what is required of the court is for the court to determine whether and to what extent the expert opinion put forth is founded on logical reasoning. (*Lopez v Minister of Health and Social Services* 2019 (4) NR 972 (HC), para 29, relying on authority) Dr Mudzanapabwe's opinion, in my view, based on the reasoning put forth previously, is not founded on logical reasoning.

[16] Based on the foregoing, the conclusion is irrefragable and inescapable that it would be unsatisfactory and unsafe to rely on the Dr Mudzanapabwe's conclusion. With the greatest deference to Dr Mudzanapabwe, his evidence has no probative value. In that regard, I conclude that the expert evidence cannot assist plaintiff's case.

[17] Applying the principles in *Stier and Another v Henke* to the foregoing analysis and conclusions, I hold that there is no 'evidence upon which a court, applying its mind reasonably to such evidence, could or might …find for the plaintiff' (see para 1 above). Accordingly, I find that plaintiff has not made out a prima facie case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution'. (See *Marine & Trade Insurance Co Ltd v Van der Schyff* (referred to in para 1 above).) The claim is contained in paras 1 and 2 of the prayers in the amended particulars of claim regarding undue influence. I accept Ms Mondo's submission that absolution at the end of the plaintiff case will be granted sparingly. However, 'when the occasion arises, a court should order it in the interest of

justice….' (*Gordon Lloyd Page & Associates v Rivera and Another* (see para 1 above))

[18] Based on these reasons, I think the time has come for this court to order absolution as to the claim of undue influence when plaintiff sold her house to plaintiff. But that is not the end of the matter.

[19] In the nature of the instant case, the holding in para 18 should not, and cannot, absolve defendant completely and bring the entire proceedings to an end by the dismissal of the action. If plaintiff was not unduly influenced by first defendant when she sold her house to defendants, then this court cannot at this stage dismiss the action in its entirety. Like the proverbial double-edged sword, the holding in para 18 should cut both ways – of the suit.

[20] Plaintiff has alleged and led evidence in her attempt to prove that first defendant promised to give her N$2 000 000 to buy a house, when she sold her house to defendants, on top of paying the purchase price of plaintiff's house. He told her to find a house she wanted. Indeed, plaintiff testified that she went house-hunting and found two houses in Khomasdal. But plaintiff dissuaded her against buying any one of them because 'the ancestors told him that I could not have those houses because they had the same problems as my house'. I respectfully reject Mr Amoomo's submission that plaintiff has not pleaded this. She has, and she sought to prove it.

[21] She testified further that she found another house, which belonged to a Mr Daniel Stephanus and a Mrs Mina Stephanus, situated at Erf 4645, Williams Street, Khomasdal. The purchase price was N$1 615 000. Her attempts to get plaintiff to transfer the amount to her for her to buy the house come to naught.

[22] It should be underlined that these pieces of evidence of plaintiff stood undismantled at the close of plaintiff's case, and I cannot say they are 'so incurably and inherently improbable and unsatisfactory as to be rejected out of hand.' We should not lose sight of this pithy statement by Damaseb JP in *Dannecker v Leopard Tours Car & Camping Hire CC*, para 26 (e) (see para 1 above):

'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.'

[23] Furthermore, the reasoning at this stage, where absolution from the instance is sought at the close of plaintiff's case, 'is to be distinguished from the reasoning which the court applies at the end of the trial; which is: 'Is there evidence upon which a court ought to give judgment in favour of the plaintiff'. (*Dannecker* para 25 (see para 1 above))

[24] Based on the foregoing reasons, I hold that on plaintiff's evidence on the current issue, absolution is not an appropriate remedy as respects this aspect of the action. (*Dannecker*, loc cit) Plaintiff has made out a prima facie case threanent which will be conclusive proof in the absence of an answer from defendants. Consequently, I hold that as respects this part of the plaintiff's claim, the occasion has not arisen for this court, in the interest of justice, to make an order granting absolution from the instance at the close of plaintiff's case (see *Etienne Erasmus v Gary Erhard Wiechmann and Fuel Injection Repairs & Spares CC* (I1064/2011) [2013] NAHCMD (24 July 2013), para 18). Therefore, I decline to make an order granting absolution form the instance as respects plaintiff's and first defendant's agreement that first defendant shall, apart from paying the purchase price of the house, give plaintiff N$2 000 000 for her to buy a comparable house. As respects this claim, I hold that plaintiff has made out a prima facie case requiring defendants' answer (see *Stier and Another v Henke*). Doubtless, the claim based on undue influence and the claim based on the aforementioned agreement are severable, and they are, accordingly, severed.

[25] In the result, I order as follows:

1. The application for absolution from the instance regarding-
   (a) the claim of undue influence is granted;
   (b) the claim that by an agreement between plaintiff and first defendant, first defendant was to pay the purchase price of the house and also give N$2 000 000 to plaintiff for her to buy a house in Windhoek is refused.

2. On this day of the judgment, the court shall determine a set down date for continuation of trial.

3. Costs are to stand over for argument in due course during the continuation of trial.

C PARKER

Acting Judge

APPEARANCES:

PLAINTIFF:	R Mondo Of Nixon Marcus Public Law Office, Windhoek.
DEFENDANT:	K Amoomo Of Kadhila Amoomo Legal Practitioners, Windhoek