REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: HC-MD-CIV-ACT-CON-2019/02405

In the matter between:

FEIST INVESTMENTS NUMBER SEVENTY TWO CLOSE CORPORATION **PLAINTIFF**

and

PERONDA – ANGOLA LDA **DEFENDANT**

Neutral citation: *Feist Investments Number Seventy Two Close Corporation v Peronda – Angola LDA (HC-MD-CIV-ACT-CON-2019/02405)* [2021] NAHCMD 144 (01 April 2021)

Coram: PRINSLOO J,
Heard: **08 & 09 March 2021**
Delivered: **01 April 2021**

Flynote: Civil Practice – Application for absolution from the instance at the close of the plaintiff's case – The test for absolution – Whether there is evidence on record upon which a court applying its mind reasonably could or might find for the plaintiff – Court finds plaintiff to have not established a *prima facie* case – Application granted with costs.

Civil Practice — Discovery and inspection — Duty of making discovery — Non-compliance with court order serious — Consideration of various factors in exercise of discretion.

Summary: The plaintiff sued the defendant based on a partly oral and partly written agreement entered into and between the parties for payment in the amount of N$5,940,000 together with interest; a debatement of the account; payment to the plaintiff of 50% of the net profit (together with interest) and cancellation of the oral agreement concluded between the plaintiff and the defendant during March 2018 and reduced to writing on 28 April 2018. After the evidence of the plaintiff was led and its case closed, the defendant applied for absolution from the instance. The court found that there is no evidence on record upon which this court applying its mind reasonably could or might find for the plaintiff and upheld the application with costs.

Held that it is trite that the purpose of discovery is to ensure that all parties involved in a dispute are made aware of the documentary evidence available before proceeding to trial. Parties then prepare their cases accordingly and set themselves up for trial. The plaintiff puts forward no reasons as to why the relevant documents it intended to rely upon did not form part of the discovery process.

Held that there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court.

Held further that as officers of this court, legal practitioners are expected to ensure that court orders are complied with in order to ensure the smooth operation of justice and ensure that their client’s case is executed as per instructions. Failure thereof can and will have dire consequences, as those evident in this matter.

Held furthermore that when absolution from the instance is sought at the close of the plaintiff’s case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is

evidence upon which a court applying its mind reasonably to such evidence could or might (not should or ought to) find for the plaintiff. Defendant's application granted with costs.

ORDER

The application for the absolution from the instance is granted with costs. Such costs to include the costs of two instructing and one instructed counsel, where so engaged.

RULING

PRINSLOO, J**:**

Introduction and background

[1] The plaintiff, Feist Investments Number Seventy Two CC, a close corporation duly registered in terms of the Close Corporation Laws of the Republic of Namibia, with its principal place of business located at Erf 1574, Northern Industrial Area, Windhoek, Republic of Namibia, instituted the proceedings serving before me.

[2] The defendant is Peronda-Angola LDA, a company duly registered and incorporated in terms of the laws of the Republic of Angola, trading at the Angolan Border Post, Santa Clara, Prox A Unidade, Dos Bombeiros, care of Du Pisani Legal Practitioners, No. 67, John Meinert Street, Windhoek, Republic of Namibia.

[3] The plaintiff's claim against the defendant is based on an oral agreement entered into and between the parties in March 2018, which according to the plaintiff was eventually reduced to writing on 28 April 2018. In terms of the particulars of claim[1] the

[1] Para 5 of the particulars of claim.

plaintiff alleges that the express, alternatively implied terms of the oral agreement were as follows:

> '3.1 The agreement between the Plaintiff and Defendant would subsist for a period of three years;
>
> 3.2 The Plaintiff, over the above on a period on a consignment basis, at the Defendant's premises, supply, sell and deliver various food items (to be agreed upon between the parties) to the Defendant, to the maximum value of USD 1,000,000.00;
>
> 3.3 The Defendant would resell the food products supplied sold and delivered by the Plaintiff, whereafter the Defendant's deduction of USD 1,000.00 for its expenses, the defendant would transfer 50% of the net profit in respect of the resold food products to the Plaintiff , into the Plaintiffs bank account in the Republic of Namibia.
>
> 3.4 As of the above paragraph the Defendant had an obligation to regularly, per consignment, render the Plaintiff a full account of all affairs in respect of each food product consignment, supported by vouchers.'

[4] The plaintiff further pleaded that it performed in terms of the agreement between the parties. The defendant, however, failed to comply with its obligations in terms of the agreement, despite its receipt of the food products and its consequent resale thereof. The defendant, contrary to the terms of the agreement, failed to pay the plaintiffs invoices (attached to the particulars of claim as annexures "FN2 – FN26") and to regularly render an account to the plaintiff in respect of each food consignment sale. Furthermore, the defendant failed to pay the plaintiff (less the defendant's expenses) its 50% net profit in respect of all consignments. As a result thereof, the plaintiff caused summons to be issued against the defendant seeking payment in the amount of N$5,940,000 together with interest, a debatement of the account and payment owed to the plaintiff of the 50% net profit (together with interest) and cancellation of the oral agreement concluded between the plaintiff and the defendant during March 2018 and reduced to writing on 28 April 2018.

[5] The defendant filed its notice of intention to defend, which prompted the plaintiff to bring an application for summary judgment on 11 July 2019. In opposition of the application for summary judgment the defendant filed a comprehensive answering

affidavit and attached thereto a further affidavit deposed to by its director, Mr Melhelm El Lakkis. This affidavit was deposed to in anticipation of the return date of three rule nisi orders granted in favor of the plaintiff on 16 May 2019, 28 May 2019 and 30 May 2019 respectively, in proceedings preceding the current one before this court. In his extensive affidavit, Mr El Lakkis denied that the plaintiff exported the 25 consignments of onions to the defendant in Angola. The defendant further submitted that it is clear from its own investigations that the invoices produced by the plaintiff in support of its claim are a fabrication.

[6] The plaintiff elected not to proceed with the application for summary judgment pursuant to the filing of the defendant's answering papers. During the Judicial Case Management ("JCM") process, various documents were exchanged and directions from the court were given, based on various status and other case management reports filed by the parties. Compliance to these court orders forms the basis of the JCM process. On 31 July 2019, the parties were ordered to file their discovery affidavits and discovery bundles on or before 4 October 2019. The defendant complied with the said order and further requested for additional discovery in terms of rule 28(8)(a) on 20 January 2020.

[7] In terms of its notice the defendant requested the following further discovery:

'Please take note that the above-named defendant requires you, the plaintiff, within 15 days to deliver to the under-mentioned address a written statement setting out what documents of the following nature you have presently or had previously in your possession in respect of each of the 25 alleged consignments (Annexures "FIN2" to "FIN26") pleaded in the particulars of claim:

(a) Angola import permit;

(b) Customs clearance documents in respect of each country involved;

(c) Copies of Annexures "FIN2" to "FIN26" bearing the following stamps: 2

(i) Customs export and entry stamps;

(ii) AMTA (Agro-Marketing and Trade Agency) stamps;

(iii) Agriculture entry and exit stamps;

(iv) Customs clearing agent stamp;

(d) Supplier invoices;

(e) Service (transport) provider invoices.'

[8] The plaintiff failed to comply with the court order dated 31 July 2019. It addition, it neither filed its discovery affidavit nor did it exchange its bundles of discovered documents. The plaintiff further failed to provide the defendant with the additional discovery as requested. This remains the position to date and became a contentious issue during the trial, as will become clear from my discussion of the evidence.

Trial proceedings

[9] At the commencement of the trial, Ms Ihalwa, counsel for the plaintiff, brought an application to invoke rule 28(2)[2] as a result of her instructing counsel's failure to file a discovery affidavit and the bundles of discovery as ordered by the court.

[10] In support of its case the plaintiff called only one witness, Mr Ali Fadl Ayoub, the sole member of the plaintiff, who read his prepared witness statement into record which constituted his evidence-in-chief. Mr Ayoub's witness statement is a duplication of the particulars of claim and as such I will not repeat the contents thereof. The written agreement dated 28 April 2018 and the invoices attached to the particulars of claim and marked as Annexures FN1-FN26 were submitted as exhibits in support of the Mr Ayoub's evidence.

Cross-examination

[11] The following were the most salient points of Mr Ayoub's cross-examination.

Agreement concluded between the parties

[12] Mr Dörfling, counsel for the defendant, commenced his cross-examination by questioning Mr Ayoub on the agreement forming the basis of the plaintiff's claims.

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[2] (2) A document, analogue or digital recording that has not been disclosed and discovered in terms of this rule may not, except with the leave of the managing judge granted on such terms as he or she may determine, be used for any purpose at the trial by the party who failed to disclose it, but any –

(a) other party may use such document; and

(b) any document attached to the pleadings on which that party relies in support of allegations made by that party may be used by that party without discovery thereof under this rule.

[13] During cross-examination Mr Ayoub drew a distinction between two separate agreements entered into between the parties. The first was an oral agreement which he testified became effective on the date when the first consignment was delivered by the plaintiff, namely 10 March 2018. Thereafter, the parties entered into a written agreement, which only came into effect on 28 April 2018, being the signature date of the agreement. The oral agreement operated in respect of the consignments delivered from 10 March 2018 until the written agreement was concluded on 28 April 2018, whereafter the written agreement became operative for all subsequent consignments.

[14] Mr Dörfling challenged Mr Ayoub's testimony by referring to his particulars of claim in which it is averred that the oral agreement entered into between the parties in March 2018 was reduced to writing in April 2018. Further reference was made to the written agreement, which records that the agreement between the parties was effective from date of signature (ie. 28 April 2018). Therefore, if the plaintiff relied on the written agreement for its claims, such claims were restricted to transactions concluded as from 28 April 2018 and not those prior.

[15] Despite conceding that the terms of the oral agreement and the written agreement were identical and that the written agreement was a mere reduction of the terms of the oral agreement to writing, Mr Ayoub remained staunch in his view that there were two distinct agreements which formed the basis of the plaintiff's claims against the defendant.

Failure to respond to defendant's witness statement and to make discovery on behalf of the plaintiff

[16] At several points during Mr Ayoub's cross-examination the issue of the plaintiff's failure to make discovery and the implications thereof came to the fore.

[17] Mr Dörfling referred Mr Ayoub to the witness statement prepared by Mr El Lakkis, in which he stated, inter alia, that the invoices relied upon by the plaintiff for its claim were fraudulent and that only three of the transactions referred to by Mr Ayoub actually took place.

[18] Mr Ayoub strongly contested these averments, referring to them as “lies”. He went on to state that he had a great deal of evidence to refute Mr El Lakkis’ allegations in the form of supplier and service provider invoices, bank statements and deposit slips, as well as photographs and video recordings showing the consignments being delivered and exported into Angola.

[19] When questioned as to why he had neither put up a reply to dispute Mr El Lakkis’ witness statement nor made discovery to support his version of events, Mr Ayoub informed the court that he had informed his legal practitioner of the evidence in his possession and was advised that he could present same to the court during trial.

Plaintiff’s applications to found, alternatively confirm jurisdiction

[20] Mr Dörfling questioned Mr Ayoub on the plaintiff’s application to found, alternatively confirm this court’s jurisdiction through attachment the defendant’s food consignments.[3]

[21] Mr Ayoub had previously testified that the written agreement between the parties on which the plaintiff relied had been concluded in Namibia. Mr Dörfling submitted that by virtue of this fact this court was vested with jurisdiction to hear the dispute between the parties. He therefore questioned the true motive behind the plaintiff’s application.

[22] Ms Ihalwa objected to Mr Dörfling’s line of cross-examination, questioning its relevance as jurisdiction had ceased to be an issue between the parties ever since the defendant had consented to this court’s jurisdiction to adjudicate the dispute between the parties.

[23] Mr Dörfling submitted that his line of questioning spoke to the credibility of the witness, in that the plaintiff had been deceitful in failing to disclose to the court that the agreement in question had been concluded in Namibia. It was his submission that had the court been made aware of this fact it would not have granted the application.

[3] This application was brought under case number HC-MD-CIV-MOT-EXP-2019/00162.

[24] During cross-examination Mr Ayoub stated that he had been unconcerned with the issue of jurisdiction when making the application. The purpose behind the application was to put pressure on the defendant so that he could receive the money owed to him and that he was entitled to use whatever legal avenues were available to him in order to meet this purpose.

[25] At the close of the plaintiff's case the defendant indicated that it wished to move for absolution from the instance.

Defendant's submissions

[26] Mr Dörfling, on behalf of the defendant, argued that the dispute is not about whether or not there is an agreement, but rather whether there was performance in terms of the agreement. Counsel developed his argument with reference to four topics, the first is the issue of the effective date of the agreement between the parties. The second was the issue of the plaintiff's failure to secure exporting documents from Namibia and the improbability of the plaintiff's version on that score and how it impacts on the calibre or quality of the evidence that is before this court. Then, thirdly, the plaintiff's failure to make discovery, the probability of documents and evidence that was available but did not find its way before court and the plaintiff's version on that score. And then lastly, Mr Dörfling in more broader and general terms dealt with the quality of the evidence presented by the plaintiff with reference to credibility, the probabilities thereof and the lack of evidence to support some essential elements of the plaintiff's claim.

[27] *Effective date of the agreement*: Mr Dörfling submitted that on the plaintiff's own version the first 13 invoices could not have risen out of the written agreement which only came into existence on 28 April 2018. The written agreement is clear on the commencement date, the commencement date being the date of signature i.e. 28 April 2018. Counsel argued that at the start of Mr Ayoub's evidence he testified of a non-specific date when the oral agreement was entered into, but once confronted with sequentially numbered invoices Mr Ayoub was firm that the commencement of the agreement was 10 March 2018. Mr Dörfling argued that Mr Ayoub was opportunistic in

this regard and that there is a critical problem with the plaintiff's version as it is in direct conflict with the written agreement dated 28 April 2018, which clearly indicates that the commencement date of the agreement is the date of signature of the agreement.

[28] Further to this if one has regard to the earlier application[4] lodged by the plaintiff in 2019 to which Mr Ayoub filed an affidavit in support of the application he stated pertinently that the plaintiff engaged with the defendant during April 2018 because of their intention to trade in various goods in the Angolan market

[29] Counsel argued that the plaintiff failed to mention that in that affidavit:

(a) the discussions between the plaintiff and the defendant's representative led to an oral agreement that was entered into in March 2018;

(b) this oral agreement was later codified and reduced to writing on 28 April 2018;

(c) the contract commenced on a date in March, let alone 10 March 2018.

[30] Mr Dörfling argued that the plaintiff's challenge lay therein because of the consequence that flows from these omissions in the event that the court makes the finding that the only agreement between the parties was the one dated 28 April 2018. That would exclude all the transactions prior to the date of commencement of the agreement. This would also exclude the three transactions that the defendant pleaded to and which Mr Ayoub attempted to link to those invoices relied upon by the plaintiff.

[31] *Failure to secure exporting documents*: Mr Dörfling, argued that it is common cause before the court that all the documents for the movement of the onions out of South Africa, into and through Namibia, and up to the border post for entry into Angola, were in the name of Feist Investment Number Seventy Two CC, the plaintiff. The plaintiff was at all relevant times the exporter of the onions out of Namibia to Angola and that plaintiff effectively controlled that process. Mr Ayoub was instrumental in securing the transport, arranging his own transporter to deal with the transportation and the

[4] As per footnote 3 supra.

exportation of the onions. And even if the court were to for a moment accept Mr Ayoub's evidence that his responsibility would have seized once the goods were handed over to the defendant, the fact of the matter remains that the plaintiff remained the liable party for the effective exportation of the onions out of Namibia. The clearing and exporting was to happen in the name of Feist Investment Number Seventy Two CC, who would remain the liable company and not Peronda Angola LDA.

[32] Mr Dörfling argued that Mr Ayoub's evidence that he thought the 25 invoices with the stamp and signature of the defendant's employee would be sufficient to prove his case does not hold water because he could not have held that belief beyond the time when he saw the defendant's plea as well as all the other documents filed in support of the defendant's case wherein it was made quite clear that the 25 invoices that the plaintiff relies upon are considered to be fraudulent. The defendant also called upon the plaintiff to produce the customs clearance documents in respect of each country involved, etc as set out in the request for further discovery but the plaintiff failed to produce these documents.

[33] Mr Dörfling argued that it is inconceivable that a businessman of Mr Ayoub's calibre, who on his own version was not trusting of the person he was dealing with (the defendant's Mr El Lakkis) would not have secured and obtained copies of all the paperwork confirming the export of the product out of Namibia. He further argued that it is highly improbable that Mr Ayoub could not have been able to secure copies of all these export documents pertaining to the 25 transactions over a protracted time period of the duration of this litigation from May 2019. Mr Dörfling argued that on the plaintiff's own version he was able to obtain the documents pertaining to 12 or 13 transactions. Counsel queried why the plaintiff could not then obtain documents for all 25 transactions. He submitted that Mr Ayoub's version will never be able to withstand the test of being reliable at the culmination of these proceedings.

[34] *Failure to make discovery of the relevant documents*: Mr Dörfling, argued that it is highly improbable that the documents on which the plaintiff relies exist. In support of this argument Mr Dörfling submitted that it is improbable that if these documents existed that

the plaintiff's legal practitioner of record would not discover same and not answer to the defendant's statement in opposition to the plaintiff's action. Counsel submitted that if the court is to believe the witness then all the available documents (and photographs and video material) were handed to plaintiff's legal practitioner who was fully instructed in respect of Mr El Lakkis' plea that the invoices are fraudulent, yet he did nothing in respect of the information at his disposal. Mr Dörfling argued that even if some delays and impropriety could be attributed to its legal team, ultimately the plaintiff had the duty to ensure that all the relevant evidence is placed before court.

[35] *Witnesses credibility*: Mr Dörfling argued that if one reflects on the evidence of the plaintiff's Mr Ayoub, a number of adjectives come to mind: argumentative, contradictory, vindictive, improbable and lacking essential support. He was clearly evasive during his cross-examination. Mr Dörfling submitted that if one adds up these building blocks in the evidence of the plaintiff, then the court should take a view with reference to the full context and the full scope of the evidence to decide whether this is a case where this court could or might be able to make a finding for the plaintiff. Mr Dörfling further submitted that if one looks at the full picture that has developed during the course of this argument the court would not be in a position to refuse the absolution application.

Plaintiff's submissions

[36] Ms Ihalwa, counsel for plaintiff, relied on the authority of *Stier and Another v Henke*[5] a Judgement of the Supreme Court of Namibia wherein the Court outlined the test to be whether a reasonable Court was satisfied that sufficient evidence had been adduced which would require the Defendant to answer the Plaintiff's case. Counsel submitted that there is on a *prima facie* basis evidence that would require the defence to prove their case. Counsel further submitted that the plaintiff has at least on a *prima facie* basis established an agreement before 28 April 2018 when the written agreement was signed and with regards to the written agreement it should be about substance and not form. Ms Ihalwa submitted that at least to some extent the clearance invoices attached to the defendant's witness statement showed that that the defendant indeed owed plaintiff.

[5] *Stier and Another v Henke* 2012 (1) NR 370.

[37] On the issue of discovery, Ms Ihalwa indicated that she would not make submissions on discovery because it was very clear that there was no discovery affidavit deposed to by the plaintiff. The plaintiff however relied on the attachments to the Particulars of Claim as allowed by rule 28(2) of the Rules of Court and further relies on the discovery that is before Court by the defendant. In conclusion, she submitted that putting in perspective the circumstances of the agreement and the reliance on the three clearance customs invoices by the defendant that on a *prima facie* basis the plaintiff has adduced evidence to entitle and require the defendant to come and prove his case.

The applicable law

[38] In discussing the applicable law I will couple the discussion of discovery and the laxity of the plaintiff's legal practitioners.

[39] Discovery is regulated by Rule 28[6]. According to Herbstein & Van Winsen,[7] 'The term 'discovery' is used to describe the process by which parties to a civil cause (action, application or proceeding) are enabled to obtain, within certain defined limits, full information of the existence and the contents of all relevant documents or (tape) recordings relating to any matter in question between them and which are, or have been, in their possession, custody or power or in the possession of their agents, attorneys or any other persons on their behalf.'

[40] The *raison d'etre* for discovery of documents in trial proceedings was discussed by Masuku, J in the case of *Gamikaub (Pty) Ltd v Schweiger* [8] wherein he indicated that one can do no better in this regard than to quote from the luminary works of Erasmus[9], where the learned author states the following in regard to discovery:

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[6] Ibid.

[7] Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa, 5th ed, Juta & Co. Vol I, p 777.

[8] *Gamikaub (Pty) Ltd v Schweiger (I 3762/2013) [2015] NAHCMD 88 (15 April 2015)* Par 15-17.

[9] Superior Court Practice by Bertelsmann, E Van Loggerenberg, DE

'[15]. . . The object of discovery was stated *in Durbach v Fairway Hotel Ltd*[10] *to be 'to ensure that before trial both parties are made aware of all the documentary evidence that is available. By this means, the issues are narrowed and the debate of points which are incontrovertible is narrowed.' Discovery has been said to 'rank with cross-examination as one of the mightiest engines for the exposure of the truth ever to have been devised in the Anglo-Saxon family of legal systems. Properly employed where its use is called for, it can be a devastating tool. But it must not be abused or called in aid lightly in situations for which it was not designed or will lose its edge or become debased. . . The underlying philosophy of discovery of documents is that a party in possession or custody of documents is supposed to know the nature thereof and thus carries a duty to put those documents in proper order for both the benefit of his or her adversary and the court in anticipation of the trial action. Discovery assists the parties and the court in discovering the truth and, by doing so, helps towards a just determination of the case. It also saves costs.*'

[16] On the other hand, the learned authors Herbstein & Van Winsen[11] say of discovery:

> "The function of discovery is to provide the parties with the relevant documents or recorded material before the hearing so as to assist them in appraising the strength or weaknesses of their respective cases, and thus to provide the basis for a fair disposal of the proceedings before or at the hearing. Each party is therefore enabled to use before the hearing or to adduce in evidence at the hearing documents or recorded material to support or rebut the case made by or against him or her to eliminate surprise at or before the hearing relating to documents or recorded evidence and to reduce the costs of litigation."

It is fitting to mention though that although the above authorities relate to cases in the South African jurisdiction, it appears to me that though there may be a difference in wording and to some extent the procedures adopted or prescribed, of the respective rules of court, the principles enunciated therein are however fully applicable even in this jurisdiction and will offer a useful guidance.

[17] A few issues can be distilled from the foregoing quotations regarding the need to make discovery in action proceedings. These include:

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[10] 1949(3) SA 1081 (SR).

[11] The Civil Practice of the High Courts of South Africa, 5th ed, Juta, 2012 Vol. I at p 777.

(a) avoiding the element of surprise and ambush in the conduct of litigation;

(b) to promote fair play and transparency as it were between and amongst protagonists;

(c) to properly assess the strengths and weaknesses of the respective cases;

(d) to properly identify the real issues in dispute between the parties;

(e) to redeem the time expended on litigation; and

(f) to curtail costs by avoiding following useless causes.'

[41] On the issue of the plaintiff's legal practitioner failing to file discovery and discovery bundles as ordered by the Court in my opinion amounts to negligence. In the matter of *Katjiamo v Katjiamo and Others*[12] Damaseb DCJ discussed the effect of negligence or remissness of a legal practitioner on a litigant as follows:

'The negligence and remissness of a legal practitioner are only to be visited on the litigant where he or she contributed thereto in some way, was aware of the steps that need to be taken in furtherance of the prompt conduct of the case, or through inaction contributed to the matter stalling and thus impeding the speedy finalisation of a contested matter. The following dictum by Steyn CJ in *Salojee and Another NNO v Minister of Community Development*[13] has been cited with approval by our courts:

> "There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court."'

[42] In a judgment delivered by this Court in the matter of *Akwenye v Amadhila*[14] the following was held:

'It needs to be understood that it is not the intent of this court to punish parties for the neglect or disregard of their legal practitioners to comply with court directives, but it cannot be avoided. As officers of this court, legal practitioners are expected to ensure that court orders are complied with as ordered, in order to ensure the smooth operation of justice and ensuring that

[12] *Katjiamo v Katjiamo and Others* 2015 (2) NR 340 (SC).

[13] 1965 (2) SA 135 (A) at 141C; cited with approval in, for example, *Leweis v Sampoio* 2000 NR 186 (SC) at 193; *De Villiers v Axiz Namibia (Pty) Ltd* 2012 (1) NR 48 (SC) at 57 para 24.

[14] *Akwenye v Amadhila* (HC-MD-CIV-ACT-CON-2017/02946) [2018] NAHCMD 114 (27 April 2018).

their client's case is executed as per instructions. Failure thereof can and will have dire consequences, as those evident in this matter.'

[43] It is therefore further trite that the purpose of discovery is to ensure that all parties involved in a dispute are made aware of the documentary evidence available before proceeding to trial.[15] Parties then prepare their cases accordingly and set themselves up for trial. The plaintiff puts forward no reasons as to why the documents did not form part of the discovery processes.

Absolution from the instance

[44] Absolution from the instance has been explained in many cases as this court is faced with the test on a frequent basis. Both counsel are in agreement as to the test for absolution from the instance after the close of the plaintiff's case. In their oral submissions counsel argued that the test is whether there is evidence upon which a court, applying its mind reasonably could or might for the plaintiff.

[45] In *Aluminium City CC v Scandia Kitchens and Joinery (Pty) Ltd*[16], Silungwe AJ stated the tests as follows:

> 'It is often said that in order to escape absolution from the instance a plaintiff has to make out a *prima facie* case in that it is on *prima facie* evidence – which is sometimes reckoned as evidence requiring an answer (*Alli v de Lira* 1973 (4) SA 635 (7) at 638 B-F) in that a Court or could or might find for the plaintiff. However, the requisite standard is less stringent than that of a *prima facie* case requiring an answer, it is sufficient for such evidence to have at least the potential for a finding in favour of the plaintiff.'

[46] In *Stier & Another v Henke,*[17] Mtambanengwe, AJA quoting from the matter of *Gordon Lloyd Page & Associates v Rivera & Another* said the following with regard to the test for absolution from the instance:

[15] *Skye Distribution (Pty) Ltd v Jacobs* (HC-MD-CIV-ACT-CON-2018/02507) [2019] NAHCMD 477 (08 November 2019).

[16] *Aluminium City CC v Scandia Kitchens and Joinery (Pty) Ltd* 2007 (2) NR 494 at 496 E-G.

[17] Supra at footnote 4.

'When absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court applying its mind reasonably to such evidence could or might (not should or ought to) find for the plaintiff. *Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Puto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T)'.

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." '

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

<u>Application to the facts</u>

[48] In analysing the evidence presented what stands out is the absence of evidence upon which the court can assess the plaintiff's claim and how the amount due was arrived at. This omission is unfortunately fatal as performance is an element of the plaintiff's case. The best evidence available to the plaintiff was not presented to the court. The court should be placed in a position to assess such evidence but cannot do so when mere lip service is paid to such a requirement.

[49] The plaintiff failed to provide this court with documentary evidence corroborating its claim i.e. exporting documents with valid stamps or closing its case without calling further witnesses even after the defendant had filed affidavits disputing performance on the part of the plaintiff. During cross examination plaintiff alluded to the fact that he had footage as proof on his cellphone where he recorded delivery of the consignments to the defendant. Again this was also not provided to the court to assist it in reaching a conclusion.

[50] The plaintiff on its own version mentioned that the defendant's representative Mr El Lakkis was a crook yet the plaintiff continued conducting business with the defendant for quite some time without receiving any form of payment.

[51] As for the oral agreement I am not convinced that the terms of that agreement are the same terms that were reduced to writing on 28 April 2018, as that written agreement clearly states that the agreement only becomes effective from date of signature. The three invoices marked as DEF1, DEF2 and DEF3 all precede the written agreement and as such would not form part of the current matter serving before me.

[52] On the conduct of the plaintiff's legal practitioner, it is rather disappointing that litigants have to suffer the consequence of their legal practitioner's conduct. The plaintiff's legal practitioner (not counsel before court) comprehensively failed to comply with the Court ordering the parties to file a discovery affidavit and bundles of discovery. Not only was there no reasonable explanation as why discovery was not made but there was simply no explanation offered at all.

Costs

[53] The defendant specifically addressed its defence in its opposing affidavit to the summary judgment which afforded the plaintiff a chance to get its house in order. in the same vein the defendant requested for additional discovery affording the plaintiff another opportunity to get all the documentary evidence it needed to support its case. It appears the plaintiff elected to proceed in setting the matter down for trial and confirming its readiness for trial without having complied with the court order or request by the plaintiff.

[54] Had the plaintiff complied with the court order and/or provided discovery and requested additional discovery and paid attention to the defendant's affidavits in opposition to the summary judgment, the cost order could have been avoided. The plaintiff must therefore be liable for costs in this matter.

Conclusion

[55] After having considered the evidence and the submissions made by counsel my order is as follows:

The application for the absolution from the instance is granted with costs. Such costs to include the costs of two instructing and one instructed counsel, where so engaged.

J S PRINSLOO

APPEARANCES:

For the Plaintiff:	L IHALWA Instructed by Murorua Kurtz & Kasper Inc Namibia
For the Defendant:	ADV D DŐRFLING SC Instructed by Du Pisani Legal Practitioners, Namibia