

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT: ABSOLUTION FROM THE INSTANCE

Case No: HC-MD-CIV-ACT-CON-2017/04658

In the matter between:

WONDER INVESTMENTS CC

PLAINTIFF

and

KLIPKOP LODGE & FARMING LODGE CC

DEFENDANT

Neutral citation: *Wonder Investments CC v Klipkop Lodge & Farming Lodge CC* (HC-MD-CIV-ACT-CON-2017/04658) [2021] NAHCMD 246 (21 May 2021)

Coram: USIKU, J

Heard: 16-17 November 2020 and 29 January 2021

Delivered: 21 May 2021

Flynote: Civil Procedure – Application for absolution from the instance – Pleadings – Plaintiff pleading a particular case and seeking to establish a different case at trial – A party is, at trial, confined to the case he has pleaded – Plaintiff has failed to furnish evidence at the end of its case, upon which a court could find for the plaintiff – Absolution from the instance granted.

Summary: The plaintiff pleaded a case based on breach of contract on the basis that the defendant failed to effect repairs on a certain Caterpillar Grader. At trial the plaintiff sought to establish a case based on breach of contract on the basis that the

defendant misrepresented to the plaintiff that the Caterpillar Grader the defendant sold to the plaintiff was in a good and working condition. At the end of plaintiff's case, the defendant applied for absolution from the instance. The court grants absolution from the instance.

ORDER

1. The application for absolution from the instance is granted in favour of the defendant.
 2. The plaintiff is ordered to pay the costs of the defendant relating to this application and the main action, such costs to include costs of one instructing one instructed legal practitioner.
 3. The matter is removed from the roll and regarded as finalized.
-

JUDGMENT

USIKU, J

Introduction

[1] This is an application by the defendant for absolution from the instance.

[2] In the main action, the plaintiff sues the defendant, seeking relief in the following terms:

- (a) an order for the cancellation of the agreement;
- (b) payment in the amount of N\$ 200 000; and
- (c) costs of suit.

[3] In its particulars of claim, the plaintiff alleges to the effect that:

- (a) the parties entered into a written hire purchase agreement for the sale and purchase of a Caterpillar Grader;
- (b) the purchase price for the Grader was N\$ 290 000
- (c) the plaintiff would pay N\$ 200 000 by 10 February 2015;
- (d) upon payment of the N\$ 200 000, the defendant would hand over the Grader to the plaintiff for use;

- (e) the Grader would be in good working condition; and
- (f) the plaintiff would be liable for any damage to the Grader before it is fully paid for.

[4] The particulars of claim further allege that:

- (a) the plaintiff duly paid the N\$ 200 000 and took possession of the Grader;
- (b) upon taking possession of the Grader, it emerged that the Grader was not in good working condition and not fit for the purpose it was purchased;
- (c) the plaintiff demanded that the defendant attends to the defects which defects and demand the defendant acquiesced to;
- (d) despite the aforesaid acquiescence, the defendant failed to effect the necessary repairs to the defects;
- (e) the aforesaid conduct of the defendant amounts to breach of contract, which breach was accepted by the plaintiff and entitling the plaintiff to cancel the agreement and demand restitution;
- (f) as a result of the aforesaid breach, the plaintiff has suffered damaged in the amount of N\$ 200 000 for which the defendant is indebted and liable to pay to the plaintiff.

Evidence during trial

[5] During trial, the plaintiff called three witnesses. In summary, the evidence led on behalf of the plaintiff was to the effect that:

- (a) the parties have entered into an agreement in terms of which the defendant sold the Grader to the plaintiff;
- (b) the plaintiff took possession of the Grader upon payment of N\$ 200 000;
- (c) it was later discovered that the Grader was not in a good working condition;
- (d) the plaintiff elected to cancel the agreement and return the Grader to the defendant and seek the refund of the purchase price;
- (e) the defendant insisted on repairing the Grader;
- (f) the plaintiff denies having agreed to have the defendant repair the Grader.

[6] At the close of the plaintiff's case, the defendant applied for absolution from the instance. The application is opposed by the plaintiff.

Application for absolution from the instance

[7] The legal practitioner for the defendant contends that the plaintiff sues the defendant on a compromise, to the effect that the defendant's failure to effect repairs on the Grader constitutes breach of contract and that the plaintiff is entitled to a refund of the purchase price.

[8] According to the defendant's legal practitioner, what the plaintiff ought to have proved is that there was agreement to effect repairs on the Grader and that there was breach of such agreement by the defendant. Thereafter, the plaintiff ought then to have proved that it suffered damages as a result of the breach.

[9] What the plaintiff tried to prove at the trial, according to the defendant's legal practitioner, is a case based on misrepresentation that the defendant sold the plaintiff a defective Grader and therefore the plaintiff is entitled to a refund of the purchase price.

[10] The defendant's counsel further submits that the plaintiff has not brought a case premised on misrepresentation and that the plaintiff may not seek to put forth at trial a case that it did not plead. In other words, the plaintiff cannot plead one case and then seek to prove a different case at trial.

[11] The defendant therefore contends that the plaintiff has not led evidence relating to proving all elements of its claim, entitling the plaintiff to the relief it seeks on its pleadings, and therefore, the defendant is entitled to absolution from the instance.

Plaintiff's response to the application for absolution

[12] The plaintiff's legal practitioner contends that the plaintiff's cause of action is not based on a compromise. According to the plaintiff's legal practitioner, the agreement between the parties was that the defendant would provide the plaintiff a suitable Grader in a good working condition for the plaintiff's use. The defendant sold the plaintiff a defective Grader and that the plaintiff now seeks refund of the purchase price.

Analysis

[13] The cardinal question that arises for consideration is whether the case pleaded by the plaintiff is based on a compromise, namely, the failure by the defendant to effect repairs on the Grader.

[14] It is trite that a compromise is a substantive contract which exists independently of the cause which gave rise to it.¹

[15] In the present case, the plaintiff contends that it had never pleaded a compromise and does not rely upon a compromise. I disagree. Paragraph 6 -12 of the particulars of claim reads as follows:

6. Plaintiff duly paid the N\$ 200 000 and took possession of the grader from the Defendant.

7. Upon taking possession of the Grader in February 2015 it emerged that in fact the grader is not in good working and operating condition, and not fit for the purpose for which it was purchased.

8. Plaintiff on numerous occasions informed Defendant that the grader was intended to be used for a specific project and demanded that Defendant attend to the defects, which unfitness and demand the Defendant acquiesced to respectively.

9. Despite the aforementioned acquiescence the Defendant failed to effect the necessary repairs to the defects up to the end of June 2015 when the project for which the grader was purchased ended and the purpose for which it had been sought to be purchased ceased.

10. The aforementioned conduct of the Defendant amounts to breach of contract, the agreement between the parties which breach was accepted by Plaintiff and entitling Plaintiff to cancel the agreement and demand restitution.

11. As a result of the aforesaid breach the Plaintiff has suffered damages in the amount of N\$ 200 00 for which Defendant is indebted to and liable to pay to Plaintiff.

12. Despite demand, alternatively summons constituting demand, the Defendant failed and/or refuses to pay.'

[16] It appears to me that para 6 – 12 of the particulars of claim show clearly that the plaintiff alleges that the parties compromised their dispute about the sale of the

¹ *Hamilton v Van Zyl* 1983 (4) SA 379 at 383H-289B.

defective Grader and concluded an agreement to the effect that the defendant shall repair the Grader. The reference to the sale agreement, in the circumstances, merely provides the historical background that led to the conclusion of the compromise.

[17] In *Minister of Safety and Security v Slabbert*² the court observed that:

‘The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.’

[18] I fully agree with the sentiments expressed in the foregoing case and I am of the opinion that the foregoing sentiments applies to the present matter. The plaintiff having pleaded a case based on a compromise cannot seek to establish a case based on a different cause of action at the trial. Having considered the evidence at the end of the plaintiff’s case, against the case pleaded by the plaintiff in its particulars of claim, I am of the view that there is no evidence upon which a court could or might find for the plaintiff.

[19] For the foregoing reasons, I am of the opinion that the defendant is entitled to absolution from the instance and I shall make an order to that effect.

[20] In so far as costs are concerned, I am of the view that the general rule that costs follow the result, should find application in this matter.

[21] In the result, I make the following order:

1. The application for absolution from the instance is granted in favour of the defendant.
2. The plaintiff is ordered to pay the costs of the defendant relating to this application and the main action, such costs to include costs of one instructing one instructed legal practitioner.

² *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 SCA para 11.

3. The matter is removed from the roll and regarded as finalized.

B USIKU

Judge

APPEARANCES:

PLAINTIFF:

N Ndilula-Ndamanomhata
Of Kadhila Amoomo Legal Practitioners
Windhoek

DEFENDANT:

J Diedericks (assisted by B Erasmus)
Instructed by PD Theron & Associates
Windhoek