

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-CON-2018/01274

In the matter between:

HERMAN PULE DIAMONDS

PLAINTIFF

and

**ALEXANDER FORBES INSURANCE COMPANY,
NAMIBIA LIMITED**

DEFENDANT

Neutral citation: *Diamonds v Alexander Forbes Insurance Company, Namibia Limited* (HC-MD-CIV-ACT-CON-2018/01274) [2021] NAHCMD 382 (30 August 2021)

Coram: USIKU, J

Heard: 27 and 29 April 2021

Delivered: 30 August 2021

Flynote: Practice – Absolution from the instance – Court applying trite test – Court holding that the plaintiff has not placed before court evidence upon which a court applying its mind reasonably to such evidence could or might find for the plaintiff – Application for absolution upheld.

Summary: The plaintiff was insured by the defendant against damage and liability caused in the driving of his motor. During the subsistence of the policy, the plaintiff was involved in a motor vehicle accident. He submitted a claim form to the defendant for indemnification. The defendant informed the plaintiff that it would repudiate the claim as the accident was a result of him driving the vehicle under the influence of intoxicating liquor and that the plaintiff failed to disclose a material fact. The plaintiff instituted action against defendant for breach of contract and consequent damages. At the close of the plaintiff's case the defendant applied for absolution from the instance. The court upheld the application.

ORDER

1. The application for absolution from the instance is granted.
 2. The plaintiff is ordered to pay the defendant's costs, including costs consequent upon the employment of one instructed and one instructing legal practitioner.
 3. The matter is removed from the roll and regarded finalised.
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JUDGMENT

USIKU, J

Introduction:

[1] This is an application for absolution from the instance made by the defendant, after the plaintiff closed his case.

[2] The plaintiff owned a VW Tiguan SUV motor vehicle. He entered into a contract of insurance with the defendant to provide comprehensive cover for the vehicle, on certain terms, conditions and exceptions. One of the specific exceptions in the said contract was that the defendant would not be liable to compensate the plaintiff for any loss or damage which occurred while the insured vehicle was being driven by a driver under the influence of intoxicating liquor or drugs.

[3] On or about 7 October 2017, in Windhoek the plaintiff was involved in a motor vehicle accident while driving the said vehicle, as a consequence of which the vehicle

was damaged beyond economical repair. On or about 10 October 2017 he completed a claim form and submitted it to the defendant for indemnification.

[4] On or about 25 October 2017, the defendant informed the plaintiff that it would repudiate the claim as the accident was a result of plaintiff's driving while under the influence of intoxicating liquor or drugs. The defendant also hinted intention to cancel the policy for failure to disclose material facts.

[5] Following the repudiation of the claim, the plaintiff instituted the present action, in which he claims:

- (a) payment of N\$416 825, being the insured value of the plaintiff's vehicle at the time of the collision;
- (b) payment of tow-in costs in the amount of N\$5 117.50;
- (c) payment of N\$35 000 being expenses plaintiff incurred to effect repairs to a third party's damaged vehicle;
- (d) payment of N\$5 839.94 'from the date of collision to the date of actual payment by the plaintiff to his banking institution, while he was not in possession of his motor vehicle';
- (e) payment of N\$40 000 for psychological stress as a result of not having a motor vehicle at his disposal and inconvenience caused by the collision;
- (f) interest at the rate of 20% p.a. from the date of judgment to the date of actual payment; and
- (g) costs of suit.

[6] The plaintiff is the only witness who testified in this matter. At the close of the plaintiff's case, the defendant applied for absolution from the instance. The plaintiff opposes the application.

Application for absolution from the instance

[7] Counsel for the defendant, Mr Strydom, submits that the plaintiff did not lead a single shred of evidence concerning the damages and the quantum thereof, allegedly suffered by the plaintiff. According to counsel, the plaintiff comes to court for damages and plaintiff did not call an expert witness or any other witnesses, relating

to any of the amounts that the plaintiff claims. As a result, counsel contends, the plaintiff has not proved that he suffered damages as a result of the alleged breach of contract and therefore the application for absolution from the instance be granted with costs.

[8] Counsel for the plaintiff, Mr Mbaeva, argues that the application for absolution is absurd, as the defendant does not deny the existence of the contract and that the defendant repudiated the plaintiff's claim. Mr Mbaeva submits that the plaintiff led evidence that he did not drive under the influence of intoxicating substances. According to counsel, the evidence led by the plaintiff shows that the defendant has a case to answer and must be placed on its defence to show that the plaintiff drove the vehicle under the influence of intoxicating substances.

Legal principles

[9] The test to be applied in an application for absolution is whether, at the end of the plaintiff's case, there is evidence upon which a court, applying its mind reasonably to such evidence, could or might find for the plaintiff.¹ This implies that a plaintiff has to make out a prima facie case, in the sense that there is evidence relating to all elements of the claim, to survive absolution, because without such evidence, no court could find for the plaintiff.² The underlying reason is that, it is ordinarily in the interests of justice to bring the litigation to an end in such circumstances.³

Analysis

[10] It is common cause that the plaintiff bears the *onus* to prove that he suffered damages as a result of the defendant's breach of the insurance contract, and to prove the quantum of such damages. It is also common cause that the plaintiff did not lead any evidence on the damages he suffered and the quantum thereof. Mr Mbaeva, counsel for the plaintiff conceded, correctly in my opinion, that the plaintiff did not lead such evidence.⁴ However, Mr Mbaeva contends that the contract

¹ *Chombo v Minister of Safety and Security* (I 3883/2013) [2018] NAHCMD 37 (20 February 2018) para 4.

² *Gordon Llody Association v Rivera and Another* 2001 (1) SA 92E-93A.

³ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 at 970A.

⁴ Page 91 of the transcribed record of proceedings.

entered between the parties set out the value for which the plaintiff's motor vehicle was insured and that this fact remedies the defect in the plaintiff's evidence.

[11] On that aspect, Mr Strydom for the defendant, argued that the fact that the vehicle is insured for a particular value does not mean that it still carried that value at the time of the accident. According to Mr Strydom, the plaintiff failed to provide evidence of the value of the motor vehicle at the time of the accident.

[12] In my opinion, Mr Mbaeva's contention on the issue of damages does not advance the plaintiff's case. Even if one accepts that the contract of insurance sets out the value for which the vehicle was insured, the fact remains that there is simply no evidence adduced by the plaintiff that he suffered damages to the value equal to the insured value of the vehicle.

[13] I am satisfied that the plaintiff did not prove that he suffered damages as a result of the defendant's alleged breach of the insurance contract. In my opinion, without such evidence, no court, reasonably applying its mind to the available evidence, could or might find for the plaintiff. Therefore, I am of the view that the application for absolution from the instance stands to be upheld.

[14] Having found in favour of the defendant on the above issue, it is unnecessary to consider whether there is sufficient evidence on the issues of the existence of the insurance contract or on the issue whether or not the defendant breached such contract.

[15] Insofar as the issue of costs is concerned, I am of the view that the general rule that costs follow the result must find application.

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

1. The application for absolution from the instance is granted.
2. The plaintiff is ordered to pay the defendant's costs, including costs consequent upon the employment of one instructed and one instructing legal practitioner.
3. The matter is removed from the roll and regarded finalised.

B USIKU
Judge

APPEARANCES:

PLAINTIFF:

Mr T Mbaeva
Of Mbaeva & Associates
Windhoek

DEFENDANT:

Mr J Strydom (assisted by Mr Erasmus)
Of PD Theron & Associates
Windhoek