REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON APPLICATION FOR ABSOLUTION FROM THE INSTANCE

HC-MD-CIV-ACT-CON-2019/02726

In the matter between:

TOBIAS MUNDJELE **PLAINTIFF**

And

ONESMUS TOBIAS AMADHILA **DEFENDANT**

Neutral citation: *Mundjele v Amadhila* (HC-MD-CIV-ACT-CON-2019/02726) [2021] NAHCMD 399 (3 September 2021)

Coram:	TOMMASI J
Heard:	**26, 27, 28 and 30 April 2021**
Delivered:	**3 September 2021**
Reasons released:	**6 September 2021**

Flynote: Practice – Absolution – Close of plaintiff's case – Court applying trite test – Whether plaintiff has made out a prima facie case requiring an answer from the defendant – Rectification of contracts – Principles relating thereto restated - *Prima facie* case must be made out on a balance of probabilities.

Summary: Plaintiff praying for rectification of an agreement which he alleges he entered into with the defendant and in the same breath stating that he signed such agreement under the mistaken belief that he was merely signing an amendment to reflect a change of name as opposed to signing off his member's interest in the close corporation. Defendant adamant that an agreement with the terms as reflected in the founding statement was reached. Plaintiff denying conclusion of agreement in evidence and tendering sketchy versions of the circumstances leading up to the conclusion or not of the agreement. Defendant applying for absolution from the instance at the close of plaintiff's case.

Held: That the principles applicable to rectification of contracts must be complied with before a court can order such a rectification

Held further that: For an application for absolution from the instance to succeed, the party seeking such relief must show to the court that the other party has failed to make out a *prima facie* case which relates to all the elements of the claim.

Court finding that in the circumstances, the application for absolution must succeed.

ORDER

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1. The application for absolution from the instance is granted.

2. The plaintiff must pay the defendant's costs, such costs to include the costs of one instructing and two instructed counsel.

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

RULING

Tommasi J,

[1] Defendant brought an application for absolution of the instance after the plaintiff closed his case. The question for consideration by this court is whether the application for absolution, brought by the plaintiff, is appropriate in the circumstances.

[2] According to the particulars of claim, on or about November 2004, the plaintiff and the defendant ("the Parties"), entered into an oral agreement in terms of which the former would furnish the latter with 50% member's interest in Oshoto Guesthouse CC ("the close corporation"). The agreement was entered into on condition that the defendant resuscitates the business of Oshoto Guesthouse CC.

[3] Sometime in March 2007, the parties effected amendments to Oshoto Guesthouse CC with the common intention to reflect a 50/50% member's interest for either party, i.e. the defendant and the plaintiff. According to the plaintiff, instead hereof the amended founding statement reflects that the defendant owns 80% and plaintiff 20% membership in Oshoto Guest House CC. Plaintiff allege that such a distribution of membership interest is void as a result of a common mistake between the parties as it is not in line with the oral agreement entered into between the parties.

[4] The plaintiff plead in the alternative, that, he signed "Annexure A" in error and in under the mistaken belief that it accorded with the agreement that the member's interest would be 50/50%. Furthermore that it was never his intention to cede more than 50% of the membership interest to the defendant. The plaintiff pleaded that the amended founding statement is accordingly void as a result of plaintiff's unilateral mistake in that it does not accord with the prior oral agreement.

[5] The plaintiff seeks rectification of the Amended Founding Statement to reflect the parties' intention as per the oral agreement so as to reflect the 50/50% membership representation in the Oshoto Guesthouse CC. The plaintiff prays that the court alters the membership of the Amended Founding Statement, direct the defendant to sign all documents to give effect to such an order and order the defendant to pay the costs of this action such cost to include costs of one instructing and one instructed counsel.

[6] On the other hand, the defendant, in his plea, raised a special plea of prescription which was dismissed and need not be dealt with for purposes of this judgment. The counterclaim was withdrawn. In his defense, the defendant averred that the parties agreed; he would own 80% of Oshoto Guesthouse CC inclusive of the property it owned at Erf 1783; and the plaintiff would own 20% as reflected in the amended founding statement.

[7] According to the defendant's plea, the agreement was entered into consciously and voluntarily executed by the parties during March - August 2007. It was the defendant's further averral, in his defence, that the agreement between the parties is as pleaded in the amended founding statement. He denies the mistake as pleaded by the plaintiff.

[8] To prove his claim, the plaintiff tendered evidence. He was the only witness called in support of his case.

[9] In *Neis v Kasuma* HC-MD-CIV-ACT-CON-2017/000939 [2020] NAHCMD 320 (30 July 2020), Parker, AJ, stated thus in paragraphs 4 & 6:

'[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:

". . . 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, or 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).)""

"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* 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".

[10] The plaintiff testified that in 2004 he signed off 50% membership interest in Oshoto Guesthouse to the defendant for the latter to resuscitate his business because he was experiencing financial difficulties. This agreement allotted a membership interest of 50/50 to either party.

[11] According to the plaintiff, he again, in 2007 signed an amended founding statement of Oshoto Guesthouse CC and it was his understanding that this was to

merely to confirm the agreement as aforementioned in the preceding paragraph to allocate 50/50 membership interest in the CC. It was his further testimony that the purpose of this agreement was not to change the membership but merely to alter the name of the Oshoto Guesthouse CC to Erf One Seven Eight Four Ondangwa CC.

[12] The plaintiff testified that a further amended founding statement was signed by him and the defendant in 2008. As per this agreement, the parties agreed to change the name of Erf One Seven Eight Four Ondangwa CC back to Oshoto Guesthouse CC. According to the plaintiff, the 2008 agreement goes further and attributes membership interest between the parties to be 80/20, i.e. 80% for the defendant and 20 % in favour of the plaintiff. Plaintiff testified that this was not a correct reflection of the agreement between the parties as he never agreed to sign off 80% member's interest to the defendant.

[13] Plaintiff went further to testify that he never intended to sign off more than 50% member's interest to the defendant and that if he did so, it was done by mistake on his part. He went on to testify that he may not have perused the founding statements thoroughly each time the defendant brought them to him for signature and, that he may have merely signed the papers when they were brought to him. He testified that never believed that the defendant would mislead him. According to the plaintiff, this document or exhibit D was blank when it was brought to him for signature. In another version the plaintiff maintained he conceded that there was some information printed on the amended founding statement but the 80%/20% allotment of membership interest was not inserted in the amended founding statement when he signed it. In yet another version he testified that it could have been there but does not know the reason for its inclusion.

[14] The defendant's argument is premised on the fact that the plaintiff seeks rectification of an agreement when he has failed to meet the principles applicable to it.

[15] According to the defendant, the plaintiff has failed to make out a *prima facie* case in that, there is no evidence relating to all the elements of his main claim. The defendant contends that plaintiff's evidence was confusing and contradictory.

[16] The defendant argues that the plaintiff, apart from being a poor witness, denied the existence of an agreement during March 2007 despite pleading its existence under paragraph 5 of his particulars of claim. The defendant argues, that the plaintiff notionally has no claim for rectification unless he accepts that there indeed was a contract but the common intention of the parties was not correctly recorded. According to the defendant, the fact that plaintiff alleged fraudulent misappropriation of his membership interest by him, is a different and independent cause of action in delict which was available to him but he chose to not pursue it.

[17] It was argued for the defendant the common cause facts as borne out by the evidence is that the oral agreement concluded between the Plaintiff and Defendant in 2004 was given effect to in November 2004 when the close corporation was registered as Oshoto Guesthouse CC. The Plaintiff could thus not have been thinking that he was signing 50%/50% founding statement in 2007 as he already signed such agreement in 2004.

[18] It was further argued that the plaintiff's evidence was of a poor quality. According to the defendant, plaintiff was under an obligation to tender satisfactory evidence to support his claim for rectification. He argued further that, the plaintiff gave no regard to the fact that rectification as a remedy is only available where all the parties to the contract were in fact of one mind but the written contract failed to accurately express their consensus. That, on the contrary, plaintiff throughout his pleadings, refers to a unilateral mistake.

[19] It was argued on behalf of the defendant that during cross-examination, the plaintiff changed and reconstructed his evidence and as a result, the evidence he tendered could not have been credible, particularly when regard is had to the fact that

he admitted to having taken Exhibit F, a draft agreement which reflects that he indeed held a 20% member's interest in Oshoto Guesthouse, to the defendant in Outapi.

[20] The plaintiff, in his address for the application for absolution to be refused, contends and argues that, the amendment of the founding statement effected during March 2007 and which seemingly, needed to reflect the same percentage of member's interest as initially agreed upon in November 2004, was entered into as a result of a common mistake or alternatively, a unilateral mistake.

[21] According to plaintiff's counsel, the agreement was signed by him under the mistaken belief that he was merely signing an amendment to correct the name of the corporation back to Oshoto and not to enter into a new agreement in terms of which he relinquishes his member's interest to hold only 20% and the defendant to hold 80% in the close corporation.

[22] Plaintiff's argument is that that only agreement he signed or agreed to, was the 2004 agreement in terms of which each party held a member's interest of 50/50 in the close corporation. Effectively therefore, it was argued on his behalf that that is the only agreement in terms of which he relies on for the relief he seeks, i.e. for rectification.

[23] According to the plaintiff, he has proved his case in terms of paragraph 4 of his particulars of claim especially when regard is had to the fact that there was no issue raised with him about the initial agreement of 50/50. He contends that he did not sign any other agreement, the only thing he did do was to sign exhibit D in light of the amendment effecting the name change of the corporation.

[24] It was the plaintiff's further argument that when he signed Exhibit D, the contents thereof were not explained and made clear to him, but that he at some point realised there was a mistake on the name and the description of the close corporation in Exhibit C and that is why he signed the amendment when the defendant brought the papers to him.

[25] The plaintiff prays for rectification of the agreement on the basis that he signed it as a result of a unilateral mistake. In his evidence, he however cites both a common and unilateral mistake. He denies that there was a further agreement to change from 50/50 to 80/20. The plaintiff goes further to argue that his claim is based on paragraph 4 of the particulars of claim and that based on the said paragraph, he has made out a case for the relief which he seeks.

[26] The defendant, on the other hand, argues to the contrary. According to him, the plaintiff's claim is defective in that it does not comply or meet the requirements of rectification for the very reason that, there is no contract to begin with, alternatively, if there is an agreement, there was no common mistake between the parties.

[27] Now, in order for this court to determine the sustainability of the plaintiff's claim, it needs to look at the law relating to rectification of contracts. This discussion follows immediately below.

[28] The court in *Shikale N.O. v Universal Distributors of Nevada South Africa (Pty) Ltd* 2015 (4) NR 1065 at paragraphs 27 and 28 said the following:

'The court a quo referred to the principles applicable to rectification; so did counsel on both sides, including the principle requiring what a litigant seeking a rectification of a written document must allege and prove as set out in *Denker v Cosak and Others* 2006 (1) NR 370 at 374E and as approved by this court in *Namibia Broadcasting Corporation v Kruger and Others* 2009 (1) NR 196 (SC) at 224 F, namely:

"(a) an agreement between the parties which had been reduced to writing;

(b) that the written document does not reflect the common intention of the parties correctly. In *Benjamin v Gurewitz* 1973 (1) SA 418 (A) at 425H Van Blerk JA says that in reforming an agreement all the Court does is to allow to be put in writing what both parties upon proper proof intended to be put in writing and erroneously thought they had (cf Meyer v Merchants' Trust Ltd 1942 AD 244 at 253);

(c) An intention by both parties to reduce the agreement to writing;

(d) that there was a mistake in the drafting of the document. See Von H Ziegler and Another v Superior Furniture Manufacturers (Pty) Ltd 1962 (3) SA 399 (T) at 411F-H. Rectification and **unilateral mistake** are mutually exclusive concepts. See Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis 1992 (3) SA 234 (A);

(e) The actual wording of the agreement as rectified. See Levin v Zoutendijk 1979 (3) SA 1145 (W) at 1147H-1148A."

[28] A number of these principles are emphasised in the following cases –

1) In Benjamin v Gurewitz, supra, where Van Blerk JA had this to say at 425H-426A:

''It remains to consider whether on proof of the common intention of the parties and of an error deliberately caused by one of the parties, the respondent would be entitled to claim a rectification of the contract. As De Villiers JA says in Weinerlein v Goch Buildings Ltd, supra, in reforming an agreement, all the Court does is to allow to be put in writing what both parties upon proper proof intended to put in writing and erroneously thought they had. This dictum postulates, as the same learned Judge says at p 288, the existence of an earlier agreement, an agreement in most cases antecedently arrived at by the parties; and the disparity between the preceding agreement and the subsequent written agreement will generally be the result of a bona fide **mutual mistake** made merely by accident. The mistake may, however, also be caused intentionally by one of the parties by dolus of one of the parties.'' (Weinerlein's case at p 291.)

2) Netherlands Bank of South Africa v Stern N.O. and Another 1955 (1) SA 667 (W) where Williamson J said at 672 C-F:

''But the party so seeking to rely upon a right to claim a rectification must establish the facts justifying a rectification "in the clearest and most satisfactory manner" . . . . The decision in the case of Meyer v Merchant's Trust Ltd, 1942 AD 244, made it clear that, in order to obtain rectification, it was not necessary to show that an antecedent agreement between the parties had by mistake not been embodied in the writing of the document sought to be rectified; it is sufficient if it is proved that the parties did have a common intention in some respect which they intended to express in the written contract but which through a mistake they failed to express''.

3) Levin v Zoutendijk, supra, where Coetzee J pointed out at p 1147H:

> "The purpose of an action for rectification is to reform a written document in a specific fashion and a wholesome practice has developed over the years to draft the actual wording of the term omitted and to pray that that be inserted at a suitable place in the writing . . . . It is essential for any party to a written contract to know what the other party contends regarding the actual wording of the contract. Important rights and obligations may arise or be affected by the form of a written contract".

The last sentence in this quotation is quite apposite as regards the situation that obtained in the present case. At p 1148A the Learned Judge also stated:

> "The very cause of action for rectification postulates that the parties' agreement or common intention was clear and unmistakable on those aspects in respect whereof the writing is to be reformed. Cf Anglo-African Shipping Co (Rhod) (Pty) Ltd v Buddeley and Another 1977 (3) SA 236(R) at 241"

4) Von Ziegler and Another v Superior Furniture Manufacturers (Pty) Ltd 1962 (3) SA 399 where Trollip J said at 409H:

> ". . . in practice our Courts rigorously insist upon the party who relies on rectification, pleading all the essentials thereof and proving them on a substantial balance of probabilities (see, for example Lax v Hotz, 1913 CPD 261 at p 266; Venter v Liebenberg, 1954 (3) SA 333 (T) at p 337; Senekal v Home Sites (Pty) Ltd, 1947 (4) SA 726 (W) at p 730; Bardopoulos & Macrides v Multiadous, 1947 (4) SA 860 (W) at pp 863-864; Netherlands Bank of South Africa v Stern, N.O., 1955 (1) SA 667 (W) at p 672B-F)."

5) South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (AD) where Corbett JA pointed out at 548A-C that the word onus has been used to denote two distinct concepts:

> "(i) The duty which is cast on the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim or defence, as the case may be; and
>
> (ii) The duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent. Only the first of these concepts represents onus in its true and original sense. In Brand v Minister of Justice and Another, 1959 (4) SA 712 (AD) at

> p 715, Ogilvie Thompson, JA, called it "the overall onus". In this sense the onus can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal ("weerleggingslas"). This may shift or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other. (See also Tregea and Another v Godart and Another, 1939 AD 16 at p 28; Marine and Trade Insurance Co Ltd v Van der Schyff, 1972 (1) SA 26 (AD) pp 37-39)".

[29] From the discussions above, it is clear that the rectification of contracts is based on a common mistake between the parties to a contract. It is further based on the premise that at the time of executing the written agreement, the parties had a common intention which, as a result of a mistake on the part of both parties, the agreement failed to accurately reflect.

[30] In the present case, the plaintiff disputes the agreement alleged to have been entered into by the parties as is contended by the defendant. However, the plaintiff on the other hand also says that, when he signed the agreement, he did so not knowing that he was signing away his member's interest from 50% to only 20%. The plaintiff then argues that this was a unilateral mistake on his part and as a result, now pleads with the court to rectify the agreement to reflect the common intentions of the parties.

[31] It is common cause that the plaintiff bears the onus to prove on a balance of probabilities that he has complied with the principles applicable to rectification as outlined above. The plaintiff however has a few versions of the events which occurred when he signed the offending amended founding statement all of which are mutually destructive. He denies the existence of a further agreement and in the same breath, he confirms an agreement wherein a unilateral mistake is made on his part; the very same plaintiff goes further to state that he never had any intention to enter into an agreement for the transfer of his member's interest, but that he merely signed an amendment as presented to him by the defendant under the guise of an amendment to change the name of the close corporation. More disconcerting is his acknowledgement that he was

aware of a draft agreement incorporating the change of the allotment of membership from 55/50 to 80/20.

[32] The mistake by the plaintiff cannot be termed “common” as between the parties, hence this application before the court. If it were, the parties would have easily resolved the issue without having to resort to instituting court proceedings.

[33] It was incumbent upon the plaintiff to not only plead, but to also prove all the essentials of rectification on a balance of probabilities and he failed to do so.

[34] Considering the evidence and pleadings presented, the court is inclined to refuse the grant of the prayer for rectification as sought by the plaintiff. It goes without saying that based on the plaintiff’s evidence, particularly the denial of the conclusion of the agreement in 2007, as well as the sketchy evidence surrounding whether or not he did in fact, entered into such agreement, there is no case for the defendant to answer.

[35] In dealing with applications of this nature, the assumption is that the version of the plaintiff is correct. The plaintiff must make out a *prima facie* case to which the defendant is answerable. Put differently, the defendant, in order to succeed in his application for absolution from the instance must show that the plaintiff did not make out a *prima facie,* i.e. that he failed to provide evidence relating to all the elements of the claim.

[36] It follows therefore that, because there is no evidence led by the plaintiff that would require an answer from the defendant, the application for absolution must succeed.

[37] Similarly, it also follows that costs follow the event. The court thus orders costs, which costs shall include the costs of one instructing and two instructed counsel.

[38] In the premises the court makes the following Order

1. The application for absolution from the instance is granted.
2. The plaintiff must pay the defendant's costs, such costs to include the costs of one instructing and two instructed counsel.
3. The matter is removed from the roll and is regarded as finalised.

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M.A. Tommasi

Judge

APPEARANCES:

PLAINTIFF:	W. Boesak
Instructed by:	instructed by Tjitemisa & Associates. Windhoek
DEFENDANT:	S. Namandje (with E. Shifotoka)
	of Sisa Namandje & Co. Inc. Windhoek