Practice Directive 61

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case Title: University of Namibia v Leatitia Fransman	**Case No:** HC-MD-CIV-ACT-CON-2019/00374
	Division of Court: High Court Main Division
Heard before: Honourable Lady Justice Rakow, J	**Date of hearing:** 4 November 2021
	Date of order: 24 November 2021 **Reasons:** 9 December 2021
Neutral citation: *University of Namibia v Fransman* (HC-MD-CIV-ACT-CON-2019/00374) [2021] NAHCMD 583 (24 November 2021)	

IT IS HEREBY ORDERED THAT:

1. Condonation is granted for the late filing of the heads of the plaintiff.
2. The application for absolution from the instance is not granted.
3. Cost of the application awarded to the plaintiff.
4. The case is postponed to **24 January 2022 at 10h00** for the continuation of the trial.

Reasons for orders:

Background

[1] The plaintiffs instituted a claim of Six Hundred and Twenty-Four Thousand Thirty-

Five Namibian dollars and Five Cents (N$ 624 035.05) for damages suffered as a result of the defendant's breach of contract. The claim is on the basis that on the 8 th of April 2014, the parties entered into an agreement in terms of which the defendant would pursue further studies to obtain a qualification of PhD level for 1 year as from 01 January 2014 to 31 December 2014. It is alleged that the breach occurred when the plaintiff left the employ of the University of Namibia (UNAM) on or about the end of December 2016 without working back her bonding period of one year after she obtained her Phd qualification. She thereafter failed or neglected to repay the salary and financial assistance which she received when she was relieved from her duties to study full time during 2014.

[2] The plaintiff further filed a condonation application for the late filing of its heads of argument. The respondent took no issue with the late filing and the court grants the application and condones the late filing of the heads of argument.

The pre-trial order

[3] As part of the agreed facts, in the Pre- trial report dated 22 April 2021, the parties agreed that the parties entered into a contract as annexed to the plaintiff's particulars of claim. That the plaintiff advanced funds towards the defendant's studies for her PhD qualification based on the parties' agreement for staff development. And further, that the plaintiff resigned in December 2016 (as corrected at the trial) from full-time employment with the plaintiff, without having completed her PhD qualification.

[4] In terms of the pre-trial order dated 22nd April 2021, the court is to determine the following factual issues:

- 'Whether the defendant repudiated the agreement between the parties
- Whether the defendant worked her bonding period
- Whether the defendant is liable to the plaintiff in the amount of N$ 624 032.05 for the financial assistance provided to her during the period of studies at the University of Pretoria
- Whether the Defendant completed her PHD qualification before resignation from employment with the plaintiff (although it seems that this point was admitted)
- Whether the bonding period can be extended to the period after defendant's resignation

from full-time employment with plaintiff.'

[5] Two legal issues were identified for determination:

- 'Whether there was a breach of contract by the defendant
- Whether the bonding period applies before successful completion of studies of the Staff Development Status Holder.'

The evidence presented by the plaintiff.

[6] The plaintiff called two witnesses, Ms. Seibes who testified that she spoke to the defendant after an inquiry into the amount that the defendant still owed the plaintiff and forwarded certain correspondence via email to the defendant and a certain Ms. Katuuo who is in charge of the staff development section and has been working with this program for several years. The plaintiff's witnesses testified that the defendant violated the terms of the agreement and they indicated that the defendant did not work her bonding period as the bonding period kicks in only upon successful completion of studies, which defendant resigned before she could do so.

[7] The witnesses further indicated that the defendant should pay the amount paid to her because the plaintiff spent the money on her while she was not working and was on leave away from duty station during the period of full-time study in 2014. The plaintiff covered certain expenses for substitute lecturers and other workers to perform the functions of the defendant during the time that she was on full-time study. It was further testified that the plaintiff covered some additional costs in relation to the studies of the defendant, for example, the traveling costs to South Africa when she had to attend Pretoria University.

[8] Both witnesses testified that the bonding period could not extend to a period of further employment of the defendant by the plaintiff because she already resigned and left the employ and specific position that she held with the plaintiff and the breach of the agreement, therefore, happened at the resignation from the post that she was in when she entered into the contract.

The basis for absolution from the instance

[9] The process for the application for absolution from the instance is set out in rule 100 of the High Court rules, it however does not set out what needs to be considered. The test for granting absolution from the instance at the end of a plaintiff's case is set out in *Claude Neon Lights (SA) Ltd v Daniel*[1] where Miller AJA said:

'(W)hen 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.'

[10] In *Ramirez v Frans and Others,*[2] this court dealt with the application and the principles applicable. Concerning case law, the following principles were extracted:

'(a) (T)his application is akin to an application for a discharge at the end of the case for the prosecution in criminal trials ie in terms of s 174 of the Criminal Procedure Act — *General Francois Olenga v Spranger*[3];

(b) the standard to be applied is whether the plaintiff, in the mind of the court, has tendered evidence upon which a court, properly directed and applying its mind reasonably to such evidence, could or might, not should, find for the plaintiff — *Stier and Another v Henke*[4] "

(c) the evidence adduced by the plaintiff should relate to all the elements of the claim because in the absence of such evidence, no court could find for the plaintiff — *Factcrown Limited v Namibian Broadcasting Corporation*;[5].

(d) in dealing with such applications, the court does not normally evaluate the evidence adduced on behalf of the plaintiff by making credibility findings at this stage. The court assumes that the evidence adduced by the plaintiff is true and deals with the matter on that basis. If the evidence adduced by the plaintiff is, however, hopelessly poor, vacillating or of so romancing a character, the court may, in those circumstances, grant the application — *General Francois Olenga v Erwin Spranger;*[6]

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[1] *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G – H

[2] *Ramirez v Frans and Others* [2016] NAHCMD 376 (I 933/2013; 25 November 2016) para 28. See also *Uvanga v Steenkamp and Others* [2017] NAHCMD 341 (I 1968/2014; 29 November 2017) para 41.

[3] *General Francois Olenga v Spranger* (I 3826/2011) [2019] NAHCMD 192 (17 June 2019), infra at 13 para 35.

[4] *Stier and Another v Henke* 2012 (1) NR 370 (SC) at 373.

[5] *Factcrown Limited v Namibian Broadcasting Corporation* 2014 (2) NR 447 (SC).

[6] *General Francois Olenga v Erwin Spranger* (I 3826/2011) [2019] NAHCMD 192 (17 June 2019) and the authorities cited therein;

(e) the application for absolution from the instance should be granted sparingly. The court must generally speaking, be shy, frigid, or cautious in granting this application. But when the proper occasion arises, and in the interests of justice, the court should not hesitate to grant this application — *Stier and General Francois Olenga v Spranger (supra).'*

[11] In the case of *Hurwitz vs Neofytou* [7] the principles were explained as follows:

'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) 37G-38A; Schmidt Bewysreg 4th ed 91-92). 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 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 interests of justice."

Discussion

[12] The plaintiff instituted a claim for general damages resulting from a breach of contract. The terms of the contract were adequately testified to by the witnesses as well as the contract was produced for perusal. In the interpretation of the contract, each word must be given its ordinary meaning. This court has previously indicated that the context provided by the contract as a whole and the circumstances wherein it came into existence is also of importance.[8]

[13] The plaintiff's case is that the plaintiff and the defendant entered into an agreement in April 2014, the agreement was for the period of 1 year to allow the

[7] *Hurtwitz vs Neofytou* Unreported judgement of the South Gauteng High Court case no. 23542/2015 delivered on 2 June 2017.
[8] See *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC* 2015 (3) NR 733 (SC).

defendant to obtain her PhD degree from the University of Pretoria. It is an explicit term of the agreement that the defendant, upon completion of her studies, would work for the plaintiff for a period equivalent to the duration of the study leave granted. A further term of the agreement is that in case of failure to return and or work for the defendant after successful completion of the fellowship, the defendant shall be liable to repay all financial support provided to her during the fellowship. The evidence is that the defendant was granted study leave for one year, where she received her salary and benefits and she then resigned before completion of her PhD degree.

[14] From the evidence provided by the plaintiff, it is clear that the plaintiff adduced evidence upon which a court acting reasonably could find for the plaintiff.

[15] As a result, I make the following order:

1. Condonation is granted for the late filing of the heads of the plaintiff.
2. The application for absolution from the instance is not granted.
3. Cost of the application awarded to the plaintiff.
4. The case is postponed to **24 January 2022 at 10h00** for the continuation of the trial.

Judge's signature	**Note to the parties:**
	Not applicable.
Counsel:	
Applicants E Shikongo of Shikongo Law Chambers Windhoek	**Respondent** N Enkali of Kadhila Amoomo Legal Practitioners Windhoek