REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: **HC-MD-CIV-ACT-CON-2020/01979**

In the matter between:

EUDES NOUVELOT	**PLAINTIFF**
and	
JAQUES ROUSSET	**1ST DEFENDANT**
HOTEL PENSION LE MANOIR CC	**2ND DEFENDANT**

Neutral citation: *Nouvelot v Rousset* (HC-MD-CIV-ACT-CON-2020/01979) [2022] NAHCMD 32 (4 February 2022)

Coram: Schimming-Chase J

Heard: **6, 7, 8 December 2021**

Delivered: **4 February 2022**

Flynote: Practice – Trial – Absolution from the instance at close of plaintiff's case – Court must bring own judgment to bear on evidence adduced — Court must establish, prima facie viewed, whether there was evidence relating to the elements of the claim – Without such evidence no court could find for plaintiff.

Contract –Terms – A party alleging a contract must allege and prove those terms of the agreement he or she seeks to enforce.

Contract – Breach – A party wishing to rely on a breach or repudiation of a contract must allege and prove a breach of the contract.

Summary:

Plaintiff sued defendants for breach of contract. The particulars of claim alleged that an oral agreement had been concluded for the sale of member's interest in second defendant on the following terms, namely that the first defendant would sell to the plaintiff 100% member's interest in the second defendant for the purchase price of N$2,6 million, and that the plaintiff would make an advance payment of N$260,000 as a 10% deposit of the purchase price. It was further agreed that the terms of the oral agreement would be reduced to writing. The plaintiff pleaded that the first defendant materially breached the terms of the oral agreement by refusing or neglecting to effect the necessary amendments to the written draft sale agreement as revised by the plaintiff, and that the first defendant failed, refused or neglected to provide the plaintiff with material further particulars as requested relating to the business of the second defendant, which repudiation constituted a repudiation of the sale agreement between the parties.

After the plaintiff closed its case the defendants applied for absolution from the instance.

Held; 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.

Held; A court should, generally speaking, be cautious to grant absolution from the instance. But when the proper occasion arises, the court should not hesitate to grant this application

Held; On the plaintiff's pleadings, the first defendant's alleged breaches of the terms of the contract were terms that were not pleaded at all. As these terms were not pleaded and relied on, the contract could not be proved, nor could a breach of those terms be proved. In his evidence, the plaintiff conceded that there was no agreement in place at

the time same was alleged to have been concluded, or at all. On this basis alone the plaintiff could not prove the existence of an agreement, let alone a breach thereof. In these circumstances it was apparent that the plaintiff had not made out a prima facie case in respect of the elements of this claim, and accordingly, absolution would be granted.

ORDER

Absolution from the instance is granted with costs, such costs to include the costs of one instructing and one instructed counsel.

JUDGMENT

SCHIMMING-CHASE J

[1] At the close of the plaintiff's case, the defendants moved for absolution from the instance.

[2] The plaintiff's claim against the first[1] and second defendants[2] is based on an oral agreement which the plaintiff alleged he and the first defendant (in his capacity as sole member of the second defendant) concluded during December 2017, for the sale of the first defendant's members interest in the second defendant, to the plaintiff.

[3] The particulars of claim allege that the material express, alternatively implied and/or tacit terms of the aforesaid oral agreement were that:

[4] The first defendant would sell and plaintiff would purchase 100% member's interest in and to the second defendant.

[1] The first defendant is the sole member of the second defendant.

[2] The second defendant is a close corporation duly registered and incorporated in terms of the relevant close corporation laws of Namibia. An accommodation establishment is run in Opuwo under the auspices of the second defendant.

[5] The purchase price of the member's interest in the second defendant was the amount of N$2,6 million.

[6] The plaintiff would make an advance payment of N$260,000 as a 10% deposit of the purchase price.

(a) It was further agreed that the terms of the oral agreement would be reduced to writing.

[7] The plaintiff alleged that he performed in terms of the oral agreement by paying the amount of N$260,000 into the first defendant's bank account as agreed.[3] Consequently, the oral agreement was reduced to writing and a draft sale agreement was provided to the plaintiff by the first defendant, which draft was then further revised by the plaintiff.

[8] The plaintiff alleged that in breach of the agreement:

(a) The first defendant refused or neglected to effect the necessary amendments to the written draft sale agreement as revised by the plaintiff, which repudiation constituted a repudiation of the sale agreement between the parties; and

(b) The first defendant failed, refused or neglected to provide the plaintiff with material further particulars as requested relating to the business of the second defendant.

[9] As a result of the first defendant's failure or refusal to effect the necessary amendments to the draft sale agreement as well as to provide the plaintiff with further particulars relating to the business of the second defendant, which materially formed the subject matter of the sale agreement[4], the first defendant unlawfully repudiated the oral sale agreement.

[10] In light of the foregoing, the plaintiff claimed entitlement to the reimbursement of the amount of N$260,000, alternatively that the first defendant has benefited at the

[3] This amount was paid to the first plaintiff on 27 April 2017.

[4] Emphasis supplied.

expense of the plaintiff in the same amount because the member's interest in the second defendant was never transferred to the plaintiff.

[11] On the above bases, the amount of N$260,000 was claimed from the first and second defendants jointly and severally, the one paying the other to be absolved.

[12] In their plea the defendants denied at the outset that the second defendant was a party to any agreement, or attempted or purported agreement between the plaintiff and the first defendant, and it was pointed out that the plaintiff did not allege any agreement or other action by the second defendant. Plaintiff was given notice that the pleadings were excipiable against the second defendant and notice was given to this effect together with the opportunity to remove the cause of complaint. Plaintiff did not amend his claim and an exception was not taken.[5]

[13] In amplification of his plea the first defendant pleaded the following:

(a) He advertised his membership in the second defendant for sale through various agencies in 2016.

(b) During 2017, the plaintiff and one Ms Gaspard showed an interest in purchasing the first defendant's members interest in the second defendant in the ratio of 95% and 5% respectively.

(c) It was an express, alternatively implied, alternatively tacit term of the oral agreement that the plaintiff would pay a non-refundable deposit of N$260,000 for a right of first refusal/right of pre-emption to purchase such member's interest, and for the first defendant to desist from negotiating with any other parties pending negotiations and the conclusion of a written agreement between the plaintiff, Ms Gaspard and the first defendant.

[14] The first defendant pleaded that in compliance with the agreement, he withdrew

[5] In the pre trial report it was indicated as an issue of fact, whether the plaintiff and the first defendant entered into an oral agreement of the sale of members interest in the second defendant, and whether such oral agreement of sale was reduced to writing.

the sale of the second defendant from the open market and negotiated solely with the plaintiff.

[15] The defendant confirmed receiving the amount of N$ 260,000, in terms of the agreement as pleaded by him.

[16] As regards the draft sale agreement which was reduced to writing and revised by the plaintiff, this aspect was not disputed by the first defendant.

[17] The first defendant denied that he was in breach of any oral sale agreement as alleged by the plaintiff, and he denied that he unlawfully repudiated any oral sale agreement as alleged.

[18] It is apparent from the pleadings that the main question for the court to determine is whether the agreement as alleged by the plaintiff was concluded, or whether an agreement as alleged by the first defendant to exist was so concluded. The court must also determine whether there was a breach of the agreement as pleaded, and whether the N$260,000 was a non-refundable deposit or not.

[19] Both parties filed witness statements. The plaintiff's witness statement was approximately one and a half pages. It is reproduced verbatim.

'In 2007 I entered into an oral sales agreement with Mr Jacques Rousset, it were (sic) the terms of the agreement the material express alternatively implied and or tacit terms of the aforesaid oral agreement were as follows, that Mr Jacques Rousset would sell to me 100% (hundred percent) members' interest and all claims in the close corporation as well as the movable properties and inventory presently situated in the establishment as well as Hotel pension Le Manoir.

Mr Jaques Rousset and I further agreed that, in partial fulfilment of the aforesaid agreement I would make 10% (ten percent) deposit of the purchase price as agreed between us in the amount of N$260,000.We further agreed that the terms of the oral agreement would be subsequently reduced to writing.

I duly performed in terms of the oral agreement and paid the N$260,000. Directly into Mr Jacques

Rousset's bank account as per the 10% deposit that we agreed upon in respect of the [purchase price. Consequently the oral agreement was reduced to writing and a draft sale agreement was provided to Mr Jacques Rousset by me, which he revised.

In breach of the sale agreement, Mr Jacques Rousset failed, refused and/or neglected to effect the necessary amendments on the written draft sale agreement as revised by him, which refusal constituted a repudiation of the sale agreement between us. In further breach of the agreement Mr Jacques Rousset refused and or neglected to provide me with material further particulars as requested relating to the business of Hotel Pension Le Manoir cc in respect of which I sought to purchase members interest. As a result of Mr Jacques Rousset failure/and or refusal; to effect the necessary amendments to the written draft sale agreement to me, Mr Jacques Rousset unlawfully repudiated the oral agreement between us.

Therefore Mr Jacques Rousset has benefited at my own expense in terms of the oral agreement for the sale of member's interest in and to Hotel Pension Le Manoir which were never transferred to me as a result of the unlawful repudiation.'

[20] It is necessary to again deal with the importance of filing full and comprehensive witness statements. Rule 92 is clear in its requirement that a witness statement must contain the oral evidence intended to be adduced at the the trial in relation to any issues of fact. The witness statement was wholly inadequate and did not deal with many of the issues pleaded in the particulars of claim. In order not to prejudice the witness, leave was granted (to a certain extent) to amplify the statement during evidence in chief, which resulted in two and a half hours of court time being wasted for the amplification of the evidence in chief.

[21] This also caused prejudice to the defendants, who had prepared for hearing on the contents of the plaintiff's witness statement. Practitioners are advised that the delivery of witness statements containing a summary of the pleadings is not a proper witness statement. In fact, it is a breach of the overriding objectives of case management because it causes unnecessary delays and a waste of judicial resources, not to mention a failure to fully comply with a client's instructions, and preparation for trial.

[22] During the amplification of the evidence, the plaintiff testified in essence that he was of the intention to purchase an accommodation establishment in Namibia and he

responded to an advertisement placed online by the first defendant. He and the first defendant entered into discussions concerning the sale of the member's interest in the second defendant. The plaintiff visited Namibia for those purposes and met with the first defendant.

[23] The terms of the agreement pleaded by the plaintiff were discussed through various email exchanges, after which, it was agreed that the deposit would be paid, which was paid on 27 April 2017.

[24] During the course of negotiations and after the first defendant's lawyer sent a draft, the plaintiff noted some discrepancies in the draft. For example, the plaintiff had no proof that the second defendant was the owner of the property, and therefore according to him, he did not know what he was paying for. There was also no guarantee of the assets belonging to the second defendant, or their value, given that the asking price was N$2.6 million. The plaintiff found himself in a situation where he desperately tried to revise the agreement. He indicated to the defendant that he was still willing to purchase the property, but that the agreement would need to be revised. In fact, the plaintiff insisted on the agreement being revised before he signed it.

[25] The plaintiff testified that the monies paid were for a right of first refusal and to demonstrate good faith from his side. He was asked in his evidence in chief to comment on the plea that the deposit was non-refundable.

[26] In this regard, it was pointed out to the plaintiff that the draft agreement of sale did not contain any express provisions to the effect that the deposit paid was non-refundable. In fact the clause in question provided that "payment of an amount of N$260,000 of the purchase consideration will be paid by the purchaser to the seller against signature hereof, which amount the seller acknowledges have received".

[27] His response was "I knew about this line from the beginning but I accepted to pay and as he did not follow his part of the agreement, we could forget this paragraph."

[28] The plaintiff was further referred to email transmissions between the two parties where the plaintiff himself referred to a 10% deposit, as opposed to his claim for the

amount being paid for purposes of a first right of refusal. His response to this was "as long as we are still discussing the agreement there is no deal even though I paid 10% deposit." The plaintiff confirmed also, that the first defendant had later indicated that the deposit would not be refunded.

[29] As regards the issues relating to finalisation of the agreement, the plaintiff testified that there were some aspects of the draft agreement that were not acceptable to him, and he expected the first defendant to play his part in concluding the final aspects. To the plaintiff's mind, some aspects of the draft agreement were vague and it was necessary to add certain terms, which plaintiff insisted on, in order to properly finalise the agreement. After all, the defendants did not receive any favourable offers.

[30] Some of the aspects raised by the plaintiff, according to the various email transmissions placed in evidence, included the fact that the plaintiff wanted to insert a clause that in the event of his death before finalisation of the agreement, the 10% deposit would not be repayable (which benefitted the first defendant), that a proper list of business assets be provided, and that the first defendant must coach the plaintiff in the running of the business for a period of 5 months. The plaintiff was also not clear about the ownership of the land in question, and wanted to know whether or not it was agricultural land. Further the plaintiff was not prepared to be solely responsible for the legal costs of drafting the agreement, and wanted the costs to be shared between the parties.

[31] It would appear amongst others, that the first defendant was not amenable to a five month coaching period or to add any information concerning the business assets. By 11 October 2017, and some time after the deposit was paid, the first defendant in an email advised through his lawyer that should the plaintiff not sign the draft within 15 days, the agreement would be cancelled, and the property would be placed back on the market without refund of the deposit. In a follow up email dated 2 November 2017, the plaintiff confirmed receipt of an email from the first defendant which complained *inter alia* about the fact that months after the deposit was paid, the plaintiff wanted to add aspects to the agreement that had not been previously discussed between the parties.

[32] In an email dated 14 December 2017, the plaintiff confirmed to the first defendant

that he would be coming to Namibia from 12-24 January 2018 and that they should meet to finalise the agreement. The plaintiff also indicated that he was under the impression that the first defendant was comfortable with the proposed changes and that the plaintiff should liaise with the first defendant's lawyer to have the agreement redrafted. Also, the plaintiff indicated that he would not be in a position to pay the balance of the purchase price before 2019. The parties did not meet in the end, for reasons not relevant to this judgment.

[33] In cross examination the plaintiff confirmed that his action was based on a breach of contract. It was put to him that in order for such a claim to exist, there must be a contract in place, which plaintiff also confirmed. He was also asked whether on his version the agreement was concluded when the deposit was paid, which the plaintiff responded to in the negative. He was asked whether he paid the deposit before concluding the agreement, and his response was "yes, it looks like it."

[34] The plaintiff was asked whether by the time he paid the deposit, he had concluded the oral agreement referred to in his particulars of claim. The plaintiff responded that there was no such thing as an oral agreement. The first defendant put so much pressure on him because he knew that the plaintiff wanted to purchase property and settle in Namibia, so the plaintiff surrendered to the first defendant's terms. He further testified that there was nothing said when he paid the deposit, except goodwill from his side.

[35] The plaintiff was asked what happened in December 2017 that gave rise to an oral agreement (if the agreement was indeed concluded then). The plaintiff stated that there was no oral agreement, even in December 2017, they never came to a point where they signed. Plaintiff was then referred to paragraph 5 of his particulars of claim where he pleaded that he and the first defendant concluded an oral agreement for the sale of member's interest in the second defendant. The plaintiff conceded that this was not a correct allegation, and he did not understand.

[36] It was put to the plaintiff that according to his evidence, there was no agreement, and that instead, there was an understanding that in future, an agreement would be concluded between the parties. The plaintiff reiterated that it was the first defendant's fault that there was no agreement and that he took the plaintiff's 10% deposit and took

him for a ride without signing a contract.

[37] It was further put to the plaintiff that for purposes of concluding the agreement, the parties never got out of the starting blocks. His response was that he did his part.

[38] It was also put to the plaintiff that despite his evidence that had the first defendant done his job, the contract would have been finalised, the plaintiff had indicated to the defendant that he would only be able to pay the balance of the purchase price some two years after the deposit was paid. His response was that this period was a rough estimation of the time it would take to sell his assets and leave his job, and had the contract been signed in January 2018 as envisaged, that would give him a year to pay the balance of the purchase price.

[39] It was put to the plaintiff that on his version that the deposit was paid without any agreement, and that accordingly the allegation in his particulars of claim to the effect that the plaintiff would make an advance payment of N$260,000 as a deposit could not be sustained. The plaintiff accepted that the deposit was paid before conclusion of any agreement.

[40] Although attempts were made in re-examination to bring to the fore an agreement that the deposit was refundable, unfortunately, this aspect was not canvassed properly in the pleadings or the evidence in chief, which I deal with below.

[41] The defendants thereafter applied for absolution from the instance.

[42] In the matter of *Gordon Lloyd Page & Associates v Rivera and Another*[6], the test for absolution from the instance was stated to be thus:

> '.… a plaintiff has to make out a prima facie case — in the sense that there is evidence relating to <u>all the elements of the claim</u>[7] — to survive absolution because without such evidence no court could find for the plaintiff . . . . '[8]

[6] *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA) ([2000] 4 All SA 241; [2000] ZASCA 33) at 92H – I.

[7] Emphasis supplied.

[8] See also *Bidoli v Ellistron t/a Ellistron Truck & E Plant* 2002 NR 451 (HC) at 453D – F.

[43] The test to be applied is therefore not whether the evidence led by the plaintiff established 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.[9] The phrase 'applying its mind reasonably' requires the court not to consider the evidence *in vacuo* but to consider the admissible evidence in relation to the pleadings and in relation to the requirements of the law applicable to the particular case.[10]

[44] When 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.[11]

[45] The application for absolution from the instance should be granted sparingly. The court must generally speaking, be cautious in granting this application. But when the proper occasion arises, the court should not hesitate to grant this application[12].

[46] The arguments in support of the application for absolution were firstly that the plaintiff had pleaded the existence of an oral agreement for the purchase of the entire member's interest in the second defendant, and that it was a further term of the agreement that the plaintiff would make an advance payment of N$260,000 as a deposit and further that the terms of the oral agreement would be reduced to writing. The agreement according to the plaintiff, was breached because the first defendant refused to effect the necessary amendments to the written draft sale agreement which constituted a breach and an unlawful repudiation which entitled the plaintiff to return of the deposit.

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[9] *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A).

[10] *Stier v Henke* 2012 (1) NR 370 (SC); *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.

[11] *General Francois Olenga v Erwin Spranger*, and the authorities cited therein.

[12] *General Francois Olenga v Spranger* (supra); *Ashikoto v Prefered Investment Property Fund* NAHCMD 127 – 16 May 2018 (HC-MD-CIV-ACT-DEL-2016/02898) para 11 .

[47] The plaintiff testified in cross examination that there was no agreement with regard to the sale of the member's interest and conceded that he paid a deposit when there was no agreement. In fact, the evidence is clear that there was an agreement to agree, and that the terms of the agreement were in any event not agreed to.

[48] Further the breaches pleaded to the effect that the defendant failed to effect necessary amendments or to provide material further particulars was not even pleaded as terms of the agreement, and it was apparent from the plaintiff's evidence that these aspects formed part of a disagreement as to the terms of the agreement to agree. On this basis, it was argued that there could not be a breach when no agreement was concluded.

[49] The submission was made that if one considers the pleadings and the evidence, the pleadings are not in line with the evidence, and therefore there is no evidence relating to all the elements of the claim on which the court could find that the plaintiff has adduced *prima facie* evidence to meet his case. This argument was also based on the principle that the onus in this case is on the plaintiff to allege and prove the terms of the agreement that he seeks to advance, including the terms alleged not to exist.[13]

[50] As regards the second defendant, the plaintiff sued the first and second defendants jointly and severally the one paying the other to be absolved. Yet, at the outset and in the defendants' plea the plaintiff was advised that it had not disclosed a cause of action against the second defendant. However the plaintiff persisted and it was evident from the evidence adduced that no case was made out against the second defendant.

[51] On behalf of the plaintiff, it was argued that the portions of the particulars of claim that were not pleaded as part of the agreement between the parties should be disregarded, and that the plaintiff indeed made out a *prima facie* case against the defendant on the portion of the particulars of claim that dealt with the terms of the agreement, namely to sell 100% interest in the second defendant to the plaintiff, for the purchase price of N$2,6 million, that the plaintiff would make an advance payment of N$260,000 which was paid and that the terms of the agreement would be reduced to

[13] *Marx v Hunze* 2007 (1) 228 at 235(G).

writing. Those terms were confirmed in the defendants' plea which, which apart from denying that an agreement as alleged in the particulars of claim was concluded, pleaded that

> 'It was an express, alternatively implied, alternatively tacit term of the oral agreement then entered into between the plaintiff (representing himself and Eve Gaspard) and the first defendant that the plaintiff would pay a non-refundable deposit of N$260,000 for a right of first refusal/right of pre emotion to purchase such members' interest and for the first defendant to desist from negotiating any other parties pending negotiations and the conclusion of a written agreement between the plaintiff, Eve Gaspard and the defendant.'

[52] It was also raised that the plaintiff was not permitted (as a result of an objection which was sustained) to testify in detail as regards how the parties engaged with each other during this time.[14] It is also noted that the plaintiff sought to rely on additional emails between the parties to prove his case, however these emails were not discovered, and the objection against leading evidence on this aspect was equally sustained.

[53] It was further submitted on behalf of the plaintiff that the inference could not be drawn that there was no agreement because the defendant confirmed an oral agreement. It was apparent from the emails that the defendant never intended to refund the N$260,000. It was also submitted that the N$260,000 was one and the same thing. For a first right of refusal and part of the purchase price.

[54] It is important to note firstly, that this submission was not part of the pleadings, nor the evidence led. Further, it is apparent that the plea referred to a separate oral agreement namely an agreement to pay the first defendant a non-refundable deposit to desist from negotiating with other parties pending the conclusion of a written agreement between the parties. The plaintiff drew the onus to prove that this agreement alleged by the defendant did not exist.

[55] On the plaintiff's own evidence, an agreement was not concluded because he wanted additional terms to be added and was adamant that he would not sign unless these additional terms were included. There was therefore no agreement. There was an

[14] This evidence should have been included in the witness statement.

agreement to agree on the plaintiff's own version.

[56] The fact that the parties, who had verbal negotiations, contemplated on the plaintiff's version, the execution of a formal document is an element in considering whether the verbal negotiations resulted in a binding agreement. After all it is the plaintiff's case that he was not happy with the written draft and sought, after the fact, to include terms not previously discussed, and then threatened not to sign the agreement if those additional terms were not met.

[57] It is therefore apparent that there was no consensus even on the agreement to agree. The oral agreement pleaded, which is not supported by the evidence, was not a complete bargain.[15]

[58] It bears mentioning that the particulars of claim are also excipiable. Not only do the particulars of claim not disclose a cause of action against the second defendant, they also do not disclose a cause of action against the first defendant, and it behoved the first defendant to set both exceptions down for hearing.

[59] The terms pleaded were not the terms that the first defendant allegedly breached. Therefore the existence of a contract that was breached was not properly pleaded. As regards the deposit of N$260,000, the parties were not *ad idem* as to the purpose of the deposit, and the plaintiff in his own evidence testified that he was aware that the first defendant regarded the deposit as non-refundable.

[60] In light of the foregoing, this is one of the instances where a proper case has been made out for the granting of absolution from the instance, and the following order is made:

> Absolution from the instance is granted with costs, such costs to include the costs of one instructing and one instructed counsel.

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EM SCHIMMING-CHASE

[15] *OK Bazaars v Bloch* 1929 WLD 37 at page 44.

APPEARANCES

PLAINTIFF	Ms N Ndamanomhata of Kadhila Amoomo Legal Practitioners
DEFENDANTS	Mr G Dicks Instructed by Kinghorn Associates