REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: HC-MD-CIV-ACT-CON-2021/00610

In the matter between:

MIS HAMZA CONSTRUCTION — **1ST RESPONDENT/PLAINTIFF**
HENDRIK HENRICH SALI — **2ND RESPONDENT/PLAINTIFF**

and

PATRICK JOHN BRITZ — **APPLICANT/DEFENDANT**

Neutral citation: *MIS Hamza Construction v Britz* (HC-MD-CIV-ACT-CON-2021/00610) [2022] NAHCMD 623 (16 November 2022)

Coram: PARKER AJ
Heard: **28 September 2022**
Delivered: **16 November 2022**

Flynote: Practice – Absolution – Close of plaintiff's case – Court applying trite test – Whether plaintiff has made out a prima facie case upon which a court applying its mind reasonably could or might find for plaintiff, requiring an answer from the defendant.

Summary: Practice – Absolution – Close of plaintiff's case – Plaintiffs' claim is based on *condition sine causa* firstly – Plaintiff's claim firstly that defendant received

an amount of N$300 000 that was due to a Mr Isak Jarson – Plaintiffs claim further that the Deputy-sheriff attached an amount of N$570 252,59 of the plaintiffs' and paid same to the defendant despite defendant having been paid the full amount of what was owed by plaintiffs to defendant – The plaintiffs further claim is that defendant was paid an amount of N$239 007,95 for the purchasing of solar pumps which was never bought – Plaintiffs claim yet further that from the N$350 000 loan defendant took, the defendant bought a truck to the value of N$76 500, which truck was to remain the asset of the first plaintiff, however it is in the possession of the defendant – Furthermore, the second plaintiff provided nine plastic tanks to the value of N$13,000, which have not been returned or for which he has not been compensated and which is in the possession of the defendant – In all this the plaintiffs plead that the defendant has been unjustly enriched in the amount of N$1 109 260,54 – At the close of the plaintiffs' case, defendant brought an application of absolution from the instance – On the evidence led by plaintiffs and on the basis of the law and the authorities the court granted the application.

Held, the trite test is whether a court applying its mind reasonably could or might find for plaintiff after close of plaintiffs' case.

Held further, 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 the requirements of the applicable law.

ORDER

---

1. The court hereby makes an order granting absolution from the instance with costs.

RULING

PARKER AJ:

[1] This matter concerns plaintiff's claim of unjust enrichment of defendant at the expense of plaintiff in the amount of N$1 109 260,54; a claim for the return of a truck now in defendant's possession worth N$76 500; and a claim for the return of nine plastic tanks worth N$117 000 now in defendant's possession.

[2] The first plaintiff in person represents the plaintiffs during the trial. He had at all material times before the trial, as mentioned previously, been represented by counsel. Ms Janser is counsel for the defendant.

[3] At the outset these facts and considerations thereanent must be set out in capitalities, done to reject and emasculate in the strongest terms the wild and unproven rantings second plaintiff that was the rejection by the court for a postponement was unfair.

[4] It is never the burden of the court to stop the wheels of justice from rolling along to allow an uncooperative litigant to board at his or her whims and caprices. The new ethos of just, fair and expeditious disposal of civil matters was put in sharp focus by O'Regan AJA in these insightful words:

> 'Delays of this sort are harmful, costly and inappropriate. They impair 'the inexpensive and expeditious institution, prosecution and completion of litigation', and at times also threaten the fair adjudication of civil proceedings. It is to avoid the harm caused by such delays that the High Court recently introduced a system of judicial case management in civil matters in the High Court. The goals of that system are to ensure that the adjudication of civil disputes is expeditious and fair, and the timely and diligent compliance with the Rules of the Courts will facilitate the achievement of those goals.'[1]

[5] In all this, it must be underlined that according to PD 62(1) the disposal benchmark of the instant matter is 12 months. Twenty months have passed since the issuance of the initiating process on 22 February 2021.

---

[1] *Arangies t/a AutoTech v Quick Build* 2014 (1) NR 187 (SC) para 14.

[6] The plaintiffs have had two separate legal practitioners to represent them on diverse occasions. They all withdrew at either the threshold or throes of the trial. The second and last counsel withdrew on 19 September 2022 on the ground that he had found it extremely difficult to consult the second plaintiff to prepare for trial. To force counsel to continue with the trial would be a sure recipe for disaster. More important, it would not be in the interest of due administration to ask counsel to conduct a trial on behalf of the party from whom he or she has not received proper instruction through proper consultation.

[7] Counsel said that even if he was persuaded by the second plaintiff to come back on record to represent plaintiffs, he would not be available for the set down dates of 19 – 23 September 2020. Counsel added that he had attended court merely out of respect for the court. He informed the court that he and the entire family were indisposed.

[8] Defendant's counsel, argued strenuously against another postponement since if the matter was postponed, that would have been the second time the set down trial dates would have been vacated at the behest of the plaintiffs. There was no reasonable indication from the second plaintiff that he would scout for a third practitioner to represent plaintiffs. The upshot is that any new trial dates would be in the uncertain future, something which is plainly against the new ethos of disposal of civil matters in a just and expeditious manner. It be emphasized that the current practice 'removes the supervision of the progress of the cases from the hands of the parties' lawyers (or the parties) (if unrepresented), and places it in the hands of the Judge to whom it has been allocated'.[2]

[9] Any postponement would have been prejudicial to the defendant who would be bearing legal expenses unnecessarily without seeing the finalization of the matter within the aforesaid disposal benchmark. As I say, a fair trial must be fair to both parties. In a civil matter, it is the plaintiff who has dragged the defendant to court; and so, the plaintiff bears greater responsibility in seeing to it that the matter is disposed of expeditiously. The court should not pamper the plaintiffs by bending backwards to suit the manner he wishes the case to drag on unendingly. The court

[2] *Phakalane Estates (Pty) Ltd v Water Utilities Corporation* 2011 1 BLR 83 (HC) para 11.

should not be seen as assisting 'in discrediting the administration of justice and in the destruction of the courts integrity in the eyes of the public'.[3]

[10] What the second plaintiff conveniently overlooks is that the defendant, too, also enjoys the right to fair trial in equal measure. By his conduct he has 'imposed supererogatory costs burden on the opponent. The duty towards the court and the interest of the administration of justice has two aspects to it: the first is the convenience of the judge assigned to hear the case and the second is the proper functioning and control over the court roll.'[4]

[11] Rule 96(5) of the rules of court provide:

'In considering whether or not a postponement should be granted, prejudice to the opposing party is not the only consideration; convenience of the court and the interest of the administration of justice generally are also relevant considerations.'

[12] In the instant proceeding, on the facts and in the circumstances of the case, to have granted a postponement would have occasioned prejudice to the defendant, as Ms Janser submitted. Furthermore, postponement was not to the convenience of the court and not in the interest of due administration of justice.

[13] With these remarks behind us, I proceed to consider the application to grant absolution from the instance at the close of plaintiffs' case. The principles and requirements that a court faced with an absolution application ought to consider are now entrenched.

[14] As to those principles and requirements, it would be wise to refrain from inventing the wheel, as it were. I shall, accordingly, rehash what I said in the recent cases of *Muthoga v Medical and Dental Council of Namibia*,[5] where the authorities are gathered:

'[4] …

---

[3] *Arangies and Another v Unitrans Namibia (Pty) Ltd and Another* 2018 (3) NR 800 (SC) para 131.
[4] *Hailulu v Anti-Corruption Commission and Others* 2011 (1) NR 363 (HC) para 34.
[5] *Muthoga v Medical and Dental Council of Namibia* [2021] NAHCMD 534 (18 November 2021) paras 4 and 5.

"[6] The test for absolution from the instance has been settled by the authorities. The principles and approaches have been followed in several 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. . . ."

"[7] Thus, in *Dannecker v Leopard Tours Car & Camping Hire CC* (I 2909/2006) [2015] NAHCMD 30 (20 February 2015), Damaseb JP stated as follows on the test of absolution from the instance at the close of plaintiff's case:

"<u>The test for absolution at the end of plaintiff's case</u>

[25] The relevant test is 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. The reasoning at this stage is to be distinguished from the reasoning which the court applies at the end of the trial; which is: 'is there evidence upon which a Court ought to give judgment in favour of the plaintiff?

[26] The following considerations (which I shall call 'the Damaseb considerations') are in my view relevant and find application in the case before me:

(a) Absolution at the end of plaintiff's case ought only to be granted in a very clear case where the plaintiff has not made out any case at all, in fact and law.

(a) The plaintiff is not to be lightly shut out where the defence relied on by the defendant is peculiarly within the latter's knowledge while the plaintiff had made out a case calling for an answer (or rebuttal) on oath.

(b) The trier of fact should be on the guard for a defendant who attempts to invoke the absolution procedure to avoid coming into the witness box to answer uncomfortable facts having a bearing on both credibility and the weight of probabilities in the case.

(c) Where the plaintiff's evidence gives rise to more than one plausible inference, anyone of which is in his or her favour in the sense of supporting his or cause of action and destructive of the version of the defence, absolution is an inappropriate remedy.

(d) Perhaps most importantly, in adjudicating an application of absolution at the end of plaintiff's case, the trier of fact is bound to accept as true the evidence led by and on behalf of the plaintiff, unless the plaintiff's evidence is incurably and inherently so improbable and unsatisfactory as to be rejected out of hand".

[5] Another important principle that the court determining an absolution application should consider is this. The clause 'applying its mind reasonably', used by Harms JA in *Claude Neon Lights (SA) Ltd* 'requires the court not to consider the evidence *in vacuo* but to consider the evidence in relation to the pleadings and in relation to the requirements of the law applicable to the particular case.' (*Bidoli v Ellistron t/a Ellistron Truck & Plaint* 2002 NR 451 at 453G)'

[15] In the instant proceeding, as I have intimated previously, the following relief verbatim is claimed by plaintiffs:

'1. An order directing defendant to pay the Plaintiffs an amount of N$1 109 260.54.

2. Interest at the rate of 20% per annum tempore morae.

3. An order directing the defendant to return the truck and the 9-litre plastic tanks to the plaintiff.

5. Costs of suit on attorney and client scale.

6. Further or alternative relief.'

[16] On their own pleadings, plaintiffs plead in no uncertain terms that by an agreement between the parties, out of the total amount of the project price or value of N$2 666 132.97:

1. Defendant was to be paid:

(a) N$554 273.54 in satisfaction of a judgment debt in favour of the defendant against the plaintiffs;

(b) N$350 000 regarding the loan obtained by the defendant from the now liquidated SME Bank (the SME Bank in Liquidation) ('the SME Bank') to enable the defendant to complete the project;

(c) N$280 000 to be paid for the labour employed to complete the project; and

(d) N$239 007.95 towards the purchasing of Solar pumps.

2. A Mr Isak Jarson was to be paid N$300 000. But in his examination-chief-evidence, **first** plaintiff changed the amount to N$200 000.

3. N$1 116 891 was to be paid to the SME Bank In Liquidation.

[17] The plaintiff's pleaded further thus. The defendant bought a truck valued at N$76 500 from the bank loan of N$350 000 and the defendant 'received payment in full' from the plaintiffs. But the defendant held on to the possession of the truck, although it was 'to remain as an asset of the first plaintiff'.

[18] For all this, plaintiffs aver that the defendant has been unjustly enriched in the amount of N$1 109 260,54; and defendant owes plaintiffs N$76 500 in respect of the truck and N$117 000 in respect of the nine plastic tanks. It must be flagged and underlined that at all material times up to the trial, that in the preparation of the pleadings and other process, plaintiffs were represented by legal practitioners.

[19] In his examination-in-chief-evidence, the second plaintiff conceded that a Mr Eiseb bought the said truck from first plaintiff and Mr Eiseb is in possession of it. Furthermore, in his cross-examination-evidence, the second plaintiff testified that the nine plastic tanks were not in defendant's possession. It was in the possession and control of the Ministry of Agriculture, Water and Forestry, the employer in the project, and that the Ministry has taken ownership of the tanks upon completion of the project.

[20] In his cross-examination-evidence, second plaintiff was asked to explain to the court how he arrived at the figure of N$1 109 260,54 as the amount at which they claim defendant was unjustly enriched. He failed to give any explanation therefore. He rather conceded that that amount was not correct. The correct amount, according to second plaintiff, is N$823 160,60. Even as respects this amount, plaintiff failed to give satisfactory and adequate explanation as to how he arrived at that figure.

[21] Be that as it may, on his own version, the first plaintiff testified that the project value is N$2 666 132,87. He pleaded that the defendant is entitled, as demonstrated previously, to N$1 184 273,54. The SME Bank is entitled to N$1 116 891,87. The cost of the solar pumps is N$232 825. All these amounts come up to N$2 533 990,41. If this amount is deducted from the project value of N$2 666 132,87, what remains is N$132 142,46 which is polar apart from N$1 109 260. It is eight times larger than N$132 142,46.

[22] And it should be remembered, the essential allegation which must be proved by the plaintiff is that the amount of N$1 109 260,54 was paid to the defendant.[6] That is the law applicable to the unjust enrichment claim.

[23] Besides, the plaintiffs pleaded that despite the defendant having been paid what was due to him, upon defendant's urging, the Deputy Sheriff of Windhoek proceeded to execute a garnishee order against N$565 243,84 that stood in the first plaintiff's account held at the First National Bank (FNB). In the end, according to second plaintiff's version, an amount of N$570 252 was attached in execution by the deputy sheriff in favour of defendant.

[24] During the cross-examination of the second plaintiff, Ms Janser put to the second plaintiff that the plaintiffs have placed no proof before the court that the defendant was paid that amount of money by the deputy sheriff. Second plaintiff offered no answer to that suggestion.

[25] Based on these reasons, I hold that the inexitable result is that the plaintiffs, at the close of plaintiffs' case, have failed to prove to a prima facie degree how the defendant could have been enriched in the amount of N$1 109 260,54 at the expense of the plaintiffs, as plaintiffs claim. And from his testimony, it is proved that the nine plastic tanks belong to the Ministry, and the Ministry is in possession of them; and a Mr Eiseb bought the truck.

---

[6] *Klein NO v SA Transport Services* 1992 (2) SA 509 (W); *Wills Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202 (A).

[26] Thus, at the close of plaintiffs' case, having considered the evidence in relation to the pleadings and in relation to the requirements of the law applicable to the case,[7] I conclude that the plaintiffs have not made out a prima facie case upon which a court applying its mind reasonably could or might find for plaintiffs, requiring an answer from the defendant.[8]

[27] 'It does not,' said Masuku J, 'make economic and legal sense to keep a defendant in harness in a trial and compel him to tender evidence, together with that of his or her witnesses, as the case may be, when it is apparent at the close of the plaintiff's case that no reasonable court, acting carefully, may require the said defendant to adduce evidence in rebuttal.' Masuku J continued: 'The court should therefore avoid compelling a defendant at a treat cost, to flag what is clearly a horse that kicked the bucket at the end of plaintiff's, so to speak.'[9]

[28] In the instant proceeding, I have held that plaintiffs have not made out a prima facie requiring, the defendant to answer in keeping with *Stier and Another v Henke*[10] and *Soltec CC v Swakopmund Super Spar*[11]

[29] I have taken into account all the foregoing reasoning and conclusions thereanent. I have also kept in my mind's eye the judicial counsel that a court ought to be cautiously reluctant to grant an order of absolution from the instance at the close of plaintiff's case, unless the occasion has arisen. If the occasion has arisen, the court should grant absolution from the instance in the interest of justice.[12] I have also kept in my mental spectacle the Damaseb considerations. Having done all that, I conclude that the plaintiff has not passed the mark set by the Supreme Court in *Stier v Henke*, which is that for plaintiff to survive absolution, plaintiff must make out a prima facie case upon which a court could find for the plaintiff.

---

[7] *Bidoli v Ellistron t/a Ellistron Truck & Paint* 2002 NR 451 at 453G.
[8] *Stier and Another v Henke* 2012 (1) NR 370 (SC) paras 4.
[9] *Soltec CC v Swakopmund Super Spar* NAHCMD 159 (3 June 2016) para 14.
[10] *Stier and Another v Henke*, footnote 6.
[11] *Soltec CC v Swakopmund Super Spar*, footnote 7.
[12] *Etienne Erasmus v Gary Erhard Wiechmann and Fule Injunction Repairs & Spares* [2013] NAHCMD 214 (24 July 2013).

[30] Based on all these reasons, I hold that the occasion has surely arisen in the instant proceedings for the court to make an order granting absolution from the instance in the interest of justice. In the result I make the following order:

1. The court hereby makes an order granting absolution from the instance with costs.

____

C PARKER

Acting Judge

APPEARANCES

PLAINTIFFS:	In Person
DEFENDANT:	J Janser Of Shikongo Law Chambers, Windhoek