

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case No: HC-MD-CIV-ACT-CON-2019/05391

In the matter between:

**RACHEL AMANDA TSOEU**

**PLAINTIFF**

and

**BANK WINDHOEK LIMITED**

**DEFENDANT**

**Neutral citation:** *Tsoeu v Bank Windhoek Limited* (HC-MD-CIV-ACT-CON-2019/05391) [2023] NAHCMD 106 (10 March 2023)

**Coram:** USIKU J

**Heard:** 8 and 11 November 2022

**Delivered:** 10 March 2023

**Flynote:** Practice – Application for absolution from the instance – Court holding that the plaintiff has not placed before court evidence upon which a court could or might find in her favour – Application for absolution from the instance upheld.

**Summary:** The plaintiff instituted action against the defendant claiming payment from the defendant in the amount of N\$717 323.79. The plaintiff alleged that the defendant received amounts of money from certain insurance companies and wished

to prevent the defendant from enriching itself at the expense of the estate of her late mother. The court found that the plaintiff has not presented evidence before court upon which a court could find in her favour. Application for absolution from the instance by the defendant upheld.

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### **ORDER**

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1. The defendant's application for absolution from the instance, is granted.
  2. The plaintiff is ordered to pay the defendant's costs, such costs are to include costs of one instructing and one instructed counsel.
  3. The matter is removed from the roll and is regarded as finalized.
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### **JUDGMENT**

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USIKU J:

#### Introduction

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

[2] The plaintiff instituted action against the defendant seeking an order in the following terms:

- (a) payment in the amount of N\$717 323.79,
- (b) interest on the foregoing amount at the rate of 20% per annum calculated from the date of the death of the late Wilhelmina Swartz to the date of final payment, and;
- (c) costs of suit.

[3] According to the particulars of claim, the amount of N\$717 323.79 is calculated as follows:

- (a) N\$351 083.28, being the death benefits of the late Wilhelmina Swartz paid by an insurance company (not specified) and which was paid to the defendant,
- (b) N\$115 796.21, being the payment made by Sanlam to the defendant,
- (c) N\$9 060.67, being payment made by Sanlam to the defendant, and,
- (d) N\$241 383.63, being an amount that was unlawfully deducted by the defendant from the proceeds of a sale of an immovable property belonging to the late Wilhemina Swartz.

[4] In the particulars of claim, the plaintiff, among other things, makes the following averments:

- (a) the plaintiff is an adult female, unemployed and resides in Windhoek, Namibia,
- (b) on 28 December 2000, the late Wilhemina Swartz obtained a housing loan of N\$61 927 from the defendant. On 11 May 2005, the late Wilhemina Swartz obtained a second housing loan from the defendant in the amount of N\$68 230,
- (c) the late Wilhemina Swartz ceded her life insurance policies with Sanlam and Old Mutual, to the defendant,
- (d) on 4 April 2017, at the death of the late Wilhelmina Swartz, the defendant received N\$351 083.28 as death benefits on behalf of the late Wilhelmina Swartz,
- (e) the defendant administered the life insurance policies of Old Mutual, Santam, Welwitchia and Sanlam and paid premiums in respect of the aforesaid policies. The defendant billed premiums to the account of the late Wilhelmina Swartz,
- (f) the defendant billed the said account with legal fees of N\$89 345.13, in violation of the Usury Act,
- (g) the defendant unlawfully apportioned N\$241 383.63 from the sale of the late Wilhelmina Swartz's immovable property,
- (h) Sanlam has made pay outs to the defendant in the amounts of N\$115 796.21 and N\$9 060.67, and that,
- (i) this court has a duty to prevent the defendant from enriching itself, to the detriment of the late Wilhelmina Swartz.

[5] The plaintiff then proceeds to claim from the defendant the amounts as more fully set in out in para [2] and [3] hereof.

[6] In its plea, the defendant, among other things, makes the following averments:

(a) the late Wilhelmina Swartz obtained several (specified) housing loans between December 2000 and January 2008, from the defendant. At the time of the passing of the late Wilhelmina Swartz on 4 April 2017, the outstanding bond due and payable amounted to N\$83 583.66 (capital) and N\$133 363.11 (interest),

(b) the late Wilhelmina Swartz ceded the Old Mutual Life Insurance Policy to the defendant. An amount of N\$69 654.75 was paid towards the outstanding bond over the deceased's property on 15 November 2017,

(c) an amount of N\$115 796.21 was paid by Sanlam to the defendant, on 4 December 2017, towards the outstanding bond,

(d) the defendant was entitled to levy interest on the outstanding debt, being N\$150 998.83 at the time of the death of the late Wilhelmina Swartz,

(e) upon the sale and transfer of the immovable property of the late Wilhelmina Swartz, an amount of N\$408 687.51 interest was paid to the defendant. The amount of N\$241 385.65 was retained and the balance was paid into the deceased's estate, being interest written off,

(f) the amounts of N\$115 796.21 and N\$69 654.78 were the only payments received by the defendant from the insurers of the deceased,

(g) the defendant was entitled to payment of the outstanding bond and interest, upon the sale and transfer of the immovable property, and that,

(h) the defendant denies being indebted to the plaintiff.

### Trial

[7] At trial, the plaintiff only called one witness, namely Chriss Nyambe ('Mr Nyambe').

[8] Mr Nyambe testified that:

- (a) he is traditionally married to the plaintiff,
- (b) on or about May 2017, a certain Hildegard Brenner ('Ms Brenner') from the legal branch of the defendant, continually contacted the plaintiff in regard to life cover claims that could settle the outstanding debt of the late Wilhelmina Swartz,
- (c) he could hear the conversation between the plaintiff and Ms Brenner because the plaintiff placed the call on speaker, enabling him to hear the conversation,
- (d) during the above phone conversation, he heard Ms Brenner informing the plaintiff that there is an Old Mutual Life cover policy in the amount of N\$1,2 million which would cover the outstanding debt.

[9] Mr Nyambe also asserted that during December 2017, the plaintiff and him were informed by a Mr Maritz at the offices of defendant's attorneys of record, about the N\$1 200 000 Old Mutual pay out.

[10] At the close of the plaintiff's case, the defendant applied for absolution from the instance.

#### Application for absolution from the instance

[11] The defendant applied for absolution from the instance on the basis that:

- (a) the substance of the evidence relied upon to prove the plaintiff's case is based on the telephone conversation that Mr Nyambe overheard between Ms Brenner and the plaintiff. Both Ms Brenner and the plaintiff have not testified in court and the truth of what they are alleged to have said cannot be tested in court. The defendant submits that Mr Nyambe's evidence amounts to inadmissible hearsay in that respect,
- (b) the plaintiff's cause of action seems to be premised on enrichment (*condictio sine causa*) and to succeed the plaintiff must allege and prove:
  - (i) receipt by defendant of money or goods to which the plaintiff was entitled,
  - (ii) the absence of a valid cause for such receipt, and that,
  - (iii) the defendant's enrichment, was at the expense of the plaintiff.

(c) the defendant submits that the plaintiff has failed to lead any admissible evidence on any of the foregoing elements.

[12] The defendant, therefore, submits that, at the end of the plaintiff's case there is no evidence upon which a reasonable court might find in favour of the plaintiff and that absolution from the instance be granted with costs, including costs of one instructing and one instructed counsel.

### Analysis

[13] It is trite that, 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 could or might find for the plaintiff. This implies that, to survive absolution, a plaintiff has to make out a *prima facie* case, in the sense that there is evidence relating to all elements of the claim, because without such evidence, no court could find for the plaintiff.<sup>1</sup> The underlying reason is that, it is ordinarily in the interest of justice to bring the litigation to an end in such circumstances.<sup>2</sup>

[14] To ascertain whether the plaintiff has adduced evidence relating to all elements of her claim, the starting point is to consider the elements of the plaintiff's claim.

[15] From the averments made by the plaintiff in her particulars of claim, it appears that her claim is that:

- (a) the defendant had received certain payments from certain insurance company or companies,
- (b) the defendant 'unlawfully apportioned' certain amounts of money that it received, and that,
- (c) the plaintiff wishes to recover the aforesaid payments from the defendant.

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

<sup>2</sup> *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 at 970A.

[16] From the foregoing averments, it appears that the plaintiff's claim is based on unjustified enrichment (*condictio sine causa*) on the part of the defendant. I cannot find any other reasonable interpretation.

[17] In order to succeed with this type of claim, the plaintiff is required to allege and prove:

- (a) receipt by the defendant of the money to which the plaintiff is entitled,
- (b) the absence of a valid *causa* for such receipt,
- (c) enrichment of the defendant by the receipt of the money, at the expense of the plaintiff and that,
- (d) the plaintiff was thereby impoverished.

[18] In regard to the first element mentioned above, the plaintiff has not presented evidence that the defendant has received money to which the plaintiff is entitled. Furthermore, the plaintiff has neither alleged nor proved, the basis upon which she claims the amounts of money that were paid by insurance companies to the defendant, in respect a ceded life insurance cover.

[19] Regarding the second element, the plaintiff has likewise failed to present evidence showing absence of a valid *causa* for the defendant's receipt of the money in question.

[20] Equally, there is no evidence adduced, at the close of the plaintiff's case, that by receiving the amount of money in question, the defendant was thereby enriched and that such enrichment was at the expense of the plaintiff. Furthermore, there is no evidence before court that the plaintiff was impoverished by the payments received by the defendant.

[21] Having assessed the evidence led on behalf of the plaintiff, I am of the opinion that the plaintiff has failed to adduce evidence upon which a court might find in her favour. The application for absolution from the instance therefore stands to be granted.

[22] As for the issue of costs, I am of the view that the general rule that costs follow the result, must find application in this matter.

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

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

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B USIKU  
Judge



## APPEARANCES:

PLAINTIFF: RA Tsoeu (the plaintiff – in person)  
Windhoek

DEFENDANT: L Lochner (with her Mr Turck)  
Instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek