REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: HC-MD-CIV-ACT-CON-2020/04652

In the matter between:

RENATE HANS	**PLAINTIFF**

and

SILVER LINING INVESTMENTS AND PROPERTIES (PTY) LTD	**FIRST DEFENDANT**
GUY VAN DEN BERG	**SECOND DEFENDANT**
MULTISTRUCT TRADING CC	**THIRD DEFENDANT**
RUDI SOWDEN	**FOURTH DEFENDANT**

Neutral citation: *Hans v Silver Lining Investments and Properties (Pty) Ltd* (HC-MD-CIV-ACT-CON-2020/04652) [2023] NAHCMD 221 (26 April 2023)

Coram: PARKER AJ
Heard: **31 March 2023**
Delivered: **26 April 2023**

Flynote: Practice – Absolution – Close of plaintiff's case – Court applying trite test – Whether reasonable court satisfied that plaintiff has established prima facie case, requiring answer from the defendant – Court dismissing application.

Summary: The first defendant brought an application for absolution from the instance at the close of the plaintiff's case. The plaintiff, a building owner, entered into a building contract with the second defendant. The plaintiff had had an initial contact with a Nathan Auala who represented his company, Silver Lining Investment Properties (Pty) Ltd (SLIP) (the first defendant). In subsequent emails to the plaintiff, Aula informed the plaintiff that he and Guy van den Berg (the second defendant, who represented JL Group Co (Pty) Ltd and who was SLIP's contact person) were partners. He assured the plaintiff of quality workmanship that was 'fairly priced'. The court found that on the totality of the evidence and judging by the external manifestations, the plaintiff had proved to a prima facie degree that the parties to the building contract were the plaintiff on the one hand and the partners on the other. The court found further that the plaintiff has proved to a prima degree that she performed her obligations under the contract but the partners did not, because they abandoned the site leaving the project uncompleted. Therefore, as a direct result of the breach, the plaintiff suffered damages as she had to borrow moneys from the bank to pay for the completion of the outstanding works. The plaintiff's expert witness placed evidence before the court, establishing the value of the works completed and the value of the outstanding works. In the result, the court found that the plaintiff had made out a prima facie case, requiring answer from the defendant. Consequently, the absolution application was dismissed with costs.

Held, there is no formality prescribed by the law for the settling of a partnership agreement. The plaintiff only needed to prove to a prima facie degree the *essentialia* of a partnership, as set out by the court.

Held further, the question for the court when an absolution application is brought at the close of the plaintiff's case is whether the plaintiff has crossed the low threshold of proof that the law has set when the plaintiff's case is closed but the defendant's case is not.

ORDER

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1. The application for absolution from the instance is dismissed with costs, and such costs shall include the costs occasioned by the employment of one instructing counsel and one instructed counsel.

2. The matter is postponed to 7 June 2023 at 08h30 for a status hearing. (Reason: Court to determine the further conduct of the matter)

RULING

PARKER AJ:

[1] After the close of the plaintiff case, the first defendant brought an application for absolution from the instance. Ms Bassingthwaighte represents the plaintiff, and Ms Paulus the first defendant. The instant proceeding concerns the plaintiff and the first defendant only and it concerns claim 1 only.

Applicable principles and approaches

[2] In the instant proceeding, I make the point that in our common law tradition, a judge need not invent the wheel, as it were, regarding the application of principles of law. In the latest absolution application before me,[1] I stated:

'[2] In the latest absolution application before me,[2] I rehashed the principles and approaches applied in such application thus:

"[4] In *Neis v Kasuma* HC-MD-CIV-ACT-CON-2017/000939 [2020] NAHCMD 320 (30 July 2020), I stated thus:

"[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

[1] *Coenbritz Farming (Pty) Ltd v Gert Johannes Nelson* [2023] NAHCMD 97 (8 March 2023).
[2] *Stephanus v Kuutondokwa* NAHCMD 622 (16 November 2022) paras 12-13.

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:

“The test for absolution at the end of plaintiff’s case

[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 *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)

…

'[13] The court in *Bidoli* stated that the clause 'applying its mind reasonably', used by Harms JA in *Claude Neon Lights (SA) Ltd v Daniel*[3] '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'.'

[3] In the instant matter, the claim of the plaintiff, the building owner,[4] is primarily this: An order confirming the cancellation of the agreement ('the building contract'[5]) between the plaintiff and the first defendant and second defendant (and/or third defendant); payment in the amount of N$605 936.65 and interest on the said amount at the rate of 20 per cent per annum from date of judgment to date of payment in full.

[4] The plaintiff's claim under claim 1 are as set out in the particulars of claim; and they raise the issues discussed in para 9 below.

[5] The crisp defence of the first defendant is couched neatly and concisely in the following terms, namely, that 'the first defendant only assisted the second defendant with his application process with Standard Bank (the financier of the building project) and that no partnership existed between the first defendant and the second defendant as respects the execution of the building project', that is, over and above the assistance with 'the application process'.

[6] It follows inexorably that the determination of the present application turns on this: Has the plaintiff placed before the court evidence, tending to substantiate to a prima facie degree the issues raised on the pleadings, requiring an answer from the first defendant?[6]

[7] It has been said that-

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[3] *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) Sa 403 (A) at 409 G-H.
[4] See Donald Keating *Law and Practice of Building Contracts* 3ed (1969) at 1.
[5] Loc. cit.
[6] *Stier and Another v Henke* 2012 (1) NR 370 (SC).

'Once pleadings are filed the parties are bound by them. If the pleadings raise certain issues and the evidence adduced at the trial does not substantiate them, the action or defence, as the case might be, would fail unless amendments are granted.[7]'

[8] Thus, the 'question is whether the plaintiff has crossed the low threshold of proof that the law sets when a plaintiff's case is closed but the defendant case is not'.[8]

[9] The evidence adduced by the plaintiff must at this stage of the proceedings substantiate to a prima facie degree the following issues, namely, that-

(a) the plaintiff, on the one hand, entered into a building contract with, JL Group (represented by Mr Guy van den Berg and who is also of Silver Lining Investment Properties ('SLIP') and its contact person) and Silver Lining Investment Properties (SLIP) (represented by Mr Nathan Auala, SLIP's owner), both entities being partners.

(b) the plaintiff complied with her obligations under the contract by paying in instalments the partners N$1 052 929.31 (ie N$27 773.30 more than the contract price).

(c) the partners breached the contract and the plaintiff has itemised in sufficient particularity the works that have remained uncompleted by the partners.

(d) the partners abandoned the site without notice to the plaintiff on or about 13 February 2018.

(e) to complete the project, the plaintiff borrowed additional funds from the First National Bank Ltd (FNB); and the borrowing would not have been necessary if the partners did not breach the contract.

(f) as a result of the breach, the plaintiff suffered damages in the amount of N$605 936.36.

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[7] I Isaacs *Beck's Theory and Principles of Pleading in Civil Actions* 5ed (1982) para 19.
[8] *Labuschagne v Namib Allied Meat Company (Pty) Ltd* [2014] NAHCMD 369 (1 December 2014), relying on *De Klerk v Absa Bank Ltd* 2003 (4) SA 315 (SCA) at 321A.

The evidence adduced by the plaintiff

[10] The plaintiff has adduced evidence which I am bound to accept as true, unless the evidence is incurably and inherently so improbable and unsatisfactory as to be rejected out of hand.[9]

[11] As to para 9*(a)* above, the crucial evidence which I am bound to accept as true unless the qualifications in the Damaseb considerations exist – and I do not find the qualifications to exist – it is laid out briefly in the succeeding paragraphs.

[12] Auala, who at the relevant time acted as the representative of the first defendant, was introduced to the plaintiff by the plaintiff's sister, Ms Doris Hans-Kaumbi, by way of an email dated 31 July 2017 as someone who is involved in building projects. Subsequently, Auala contacted the plaintiff to arrange a suitable time and date to visit the site of the building project.

[13] Auala and Mr Guy van den Berg (the second defendant) visited the site on 2 August 2017. Their visit was confirmed in an email of 4 August 2017 which Auala had sent to the plaintiff. Auala informed the plaintiff that he and Guy would prepare a quote and a comprehensive report and give advice on the way forward, including challenges, timelines, solutions and so forth. Auala added that he and Guy should have feedback for the plaintiff early in the following week.

[14] The next communication was an email from Auala to which he attached the first quote for an amount of N$1 443 940. In that email, Auala referred to the second defendant as his partner and stated that he (the second defendant) is familiar with the property/project. On top of that, Auala stated that they, ie Auala and Guy, guaranteed their work; and 'we nail our reputation to every job. So you can rest assure of quality workmanship that is priced fairly'.

[15] The quotation which Auala sent to the plaintiff under cover of his email of 14 August 2017 was on the letterhead of a JL Group, represented by Guy. The bank account selected for payment of the deposit on acceptance of the quote was a Bank Windhoek account, with account number 8004515839, Branch code 485272. The

[9] See the Damaseb considerations in para 2 above.

plaintiff did not accept that quote due to insufficiency of funds and informed the defendants accordingly in an email of 31 August 2017. The second defendant responded the same day by return of an email, copied to Auala, indicating that he would provide a 'cut to bone quote' with some of the items done away with. The amended quote was for an amount of N$1,025,156 and it is on the letterhead of JL Group. The said bank account number appears on the quotation.

[16] The plaintiff met with the second defendant, Auala (on behalf of the first defendant) and her father, Mr Willem Hans, on 7 September 2017 at the boardroom of Ueitele & Hans Legal Practitioners. It was at that meeting that the plaintiff agreed to the quoted amount. The quote was subsequently signed by her and the second defendant on 11 September 2017. Auala was not present when the quote was signed. The remaining fees, after the deposit had been paid, were stipulated to be payable to Silver Linings, Auala's company. The quote signed by the parties contained a note to that effect. It should be remembered, generally 'the parties to the agreement are the persons from whose communications with each other the agreement has resulted'.[10]

[17] Two account numbers were in the quotation. The plaintiff testified that she assumed they were account numbers for the first defendant and second defendant. Her assumption was based on an email she had received from the second defendant on 7 September 2017 in which the second defendant suggested that the deposit be split between JL Group and Silver Linings. On 11 September 2017, the plaintiff paid the deposit of N$268,650 into the account of the third defendant in accordance with the second defendant's instructions.

[18] The plaintiff informed the defendants that they would be required by the Bank to complete documents for approval as the builders/contractors. Significantly, the following appears from the Bank's documents: Auala signed the Builders/Contractors/Developers application form on 22 September 2017. He declared that the information provided in the document was correct and undertook to abide by the Bank's minimum specifications for building loans. The form was completed by Auala who identified the name of the company as Silver Lining Investment Properties (Pty) Ltd (SLIP), indicating that he is the owner of SLIP. Auala

[10] *Chitty on Contracts: General Principles* Vol 1, 28 ed (1999) para 19 – 004.

also identified the parties as Silver Lining Investment Properties (Pty) Ltd (SLIP) and JL Group with the contact person being Guy van den Berg. The CVs that were attached were CVs of the first defendant and second defendant.

[19] Guy completed the tender document, identifying the contractor as Guy van den Berg. The plaintiff signed the document on 25 September 2017. The plaintiff completed the document entitled 'Home Loans Building Loan Agreement Additional Conditions' by inserting her details. The plaintiff signed the document as the building owner and Auala signed the document in the space provided for the person who was supposed to sign on behalf of Standard Bank Namibia. In any case, this clearly patent error did not detract from the success of the application. The builder/contractor was required to sign the 'Waiver of Lien' which is contained in clause 15 of the Building Loan Schedule of Information and Regulations; and Auala signed the Waiver of Lien which provides, as I have said, for the builder's signature. The plaintiff also signed the Waiver of Lien. The plaintiff testified that she just sent the forms to Auala and the second defendant and left it to them to decide how they would complete the forms.

[20] The plaintiff received several invoices from Auala for purposes of progress payments. For instance, there was an invoice, dated 9 October 2017, for an amount of N$315,200 on the letterhead of the first defendant. The invoice amount was paid on 18 October 2017 in two instalments of N$204 721 and N$92 000 into the bank account of the first defendant. The second progress request was for an amount of N$377 555.31 requested by Auala on 2 November 2017. The invoice amount was paid on 22 November 2017. And on 14 December 2017 Auala sent an email to Ms Katjivena of the financier bank and Mr Kanyemba (the valuator) to which he attached a progress claim for an amount of N$368 750. In the email he wrote: '[T]he difference between the attached and the amount still available has been discussed with client (ie the plaintiff building owner)'. That invoice was not paid by the bank.

[21] The plaintiff made a further payment of N$110 000 to the second defendant after she had received an expense report from the second defendant on 10 December 2017 in which the second defendant listed outstanding payments for roof sheeting in the amount of N$68 450 and ceilings in the amount of N$42 500. The

plaintiff explained that because the wooden roof trusses had been installed by 10 December 2017 and were at risk of being exposed to heavy rain and strong winds that could result in damage to the roof trusses, she decided to make payment for the cost of roof sheeting and ceilings directly to the second defendant in order for the work involved to be completed expeditiously. The plaintiff believed that the second defendant and Auala were communicating with each other. That important testimony remained unchallenged at the close of the plaintiff's case.

[22] Auala sent an email to the plaintiff and the second defendant on 16 February 2018 wherein he discussed the *stoep* and enquired about the progress of the works. When the enquiry was made and Auala notified her that the *stoep* was not included in the plans, the plaintiff requested a meeting at the site. The meeting was held on 8 December 2017. Auala was present at the meeting. For the purposes of facilitating the first progress payment, the plaintiff informed Auala that they would need to sign a document in which they would indicate who would be responsible for what part of the construction works. Following a request from the Bank, the plaintiff decided to carry out some works, which were separate from what was agreed with the defendants, herself. It was necessary and required for those works be specified in a document signed by her and the builder/contractor.

[23] In response to that request, Auala prepared a document in which he identified Guy to be 'of Silver Linings Investments Properties (Pty) Ltd (SLIP)'. He also stated in that letter that the first defendant managed to negotiate with the relevant service providers, venders and other trade partners on discounted pricing based primarily on cash discounts and short turnaround times. Furthermore, Auala identified the works which the plaintiff agreed to carry out at a time of her choosing. The works consisted of the tiling and painting of the building, installation of balustrade and light fittings. The document, dated 9 October 2017, was signed by the plaintiff and Auala.

[24] The plaintiff placed before the court a series of bank statements from which several payments were made to Auala by the plaintiff, including payments that were not related to the building project. There were, for example, payments made to a liquor store and restaurants and for electricity purchases. From the bank statements, I find that Auala received payment in the amount of N$20 000 on 19 October 2017, a

day after the first progress payment was paid to the first defendant. There were other payments that appear to have been made either to Guy or Auala in October 2017, eg a payment made on 26 October 2017 with the legends 'Dobra' and 'Silver Linings' in the amount of N$20 000. Similarly, on 31 October 2017, there was a transfer of N$2 500 with the legend 'Nathan north Trip.' There were also several payments for fuel. Additionally, several other payments were seemingly made to Auala for labour/wages/salaries in the amounts of N$20 000 on 19 October 2017, N$2 500 on 24 October 2017, N$15 000 on 24 November 2017 and N$30 000 on 27 November 2017.

[25] From the foregoing evidence, any reasonable court or tribunal, minded to act judicially, will come to the irrefragable conclusion that it has been proved to at least a prima facie degree that the first defendant and the second defendant, acting as partners, entered into the building contract. The sheer weight of the overwhelming evidence disprove – at least to a prima facie degree – the first defendant's plea that the first defendant 'only assisted the second defendant with the application process, with Standard Bank'. The series of acts and conduct of the first defendant (represented by Auala), testified to by the plaintiff, are totally and materially inconsistent with the role that any reasonable person, familiar with the facts, would assign to an individual **X** whose role was merely to assist another **Y** who was to execute the kind of works pleaded by the plaintiff.

[26] And, *a fortiori*, a crucial email sent to the plaintiff by Auala on 14 August 2017 confirms categorically and unambiguously that -

> 'As mentioned previously, my partner, Guy van den Berg is familiar with the property/project … We guarantee our work and we mail our reputation to every job. So you can rest assured of quality workmanship that is priced fairly.'

[27] In the same vein, in a 'To-whom-it-may-concern' written communication of October 2017, signed by both Auala (of S. L. I. P Namibia) and the plaintiff, it is stated:

> 'This letter serves to confirm that Mr Guy van den Berg of Silver Linings Investments & Properties (Pty) Ltd (S. L. I. P) …'

[28] Only a person, who, for self-serving interest and who wants to do damage to the English language, will argue contrariwise to the fact that JL Group (represented by Guy of SLIP) and SLIP (represented by Auala) are, as partners, parties to the building contract.

[29] On the totality of the evidence, supported by the bevy of uncontroverted documentary proof, I make the following important prima facie findings: JL Group (represented by Guy and who is also of S. L. I. P) and S. L. I. P (represented by Auala and where Guy is the contact person), acting as partners, entered into the building contract between the said partners, as the building contractors,[11] on the one hand and the plaintiff (the building owner) on the other hand for the execution of the works, as pleaded by the plaintiff.

[30] It was the intention of the parties of enter into the building contract; and so, the court should give effect to contract. It should be remembered, the purpose of interpretation of a contract is to give effect to the intention of the parties. And in ascertaining the common intention of the parties, I have considered the grammatical and ordinary meaning of the words that the parties have used [12] and the evidence of previous conversations and negotiations between the parties and the parties' conduct in executing their obligations.[13]

[31] Common sense and human experience[14] tell me that it is inconceivable that **X**, who is not a party to contract will take it upon himself to execute any obligations under that contract in furtherance of the implementation of the terms of such contract and gain financial benefits there from, as Auala, on behalf of S. L. I. P, did in the instant matter.

[32] Accordingly, I respectfully roundly reject Ms Paulus' submission that the first defendant 'was used merely as a conduct and assisted with the Standard Bank

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[11] Donald *Keating Law and Practice of Building Contracts* footnote 2 loc. cit.
[12] Dale Hutchison (Ed) and Chris-James Pretorius (Ed) *The Law of Contract in South Africa* 2ed (2012) at 273.
[13] See *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC* 2015 (3) NR 733 (SC) para 29.
[14] *Geomar Consult CC v China Harbour Engineering Company Ltd Namibia* [2021] NAHCMD 455 (5 October 2021) para 5, and the authorities relied on.

application process'. As I have demonstrated previously, the evidence, which, as I have said, I am bound to accept as true, debunk Ms Paulus's submission in material respects.

[33] It should be remembered that there is no formality prescribed for the settling of a partnership. For instance, as Ms Bassingthwaighte, reminded the court, a partnership agreement need not be in writing. What the plaintiff need to prove are the following essentialia: (a) each party must undertake to bring into the partnership money, labour or skill; (b) the business is to be carried on for the joint benefit of all the parties; and (c) the common object is to make a profit.[15]

[34] On the evidence, I hold that on her part, the plaintiff has adduced sufficient and satisfactory evidence to sustain prima facie proof the existence at the relevant time of the said partnership. The defence relied on by the defendant is peculiarly within the defendant's knowledge while, as I have said, the plaintiff has made out a prima facie case calling for an answer on oath or by affirmation.[16]

[35] As to para 9*(b)* above, the first defendant did not plead thereto as to whether the allegation there is denied or admitted. Accordingly, I accept Ms Bassingthwaighte's submission that pursuant to rule 46(3) of the rules of court, that allegation is regarded the rule of court, that allegation is regarded as having been admitted.

[36] As to para 9*(c)* above, the plaintiff adduced expert evidence regarding the value of the works completed and the value of the works remaining to be completed. Having applied common sense to the evaluation of the expert evidence, I conclude that the expert opinions put forth are founded on logical reasoning; and so I accept it.[17]

[37] As to para 9*(d)* above, the evidence is that it was the second defendant (representing JL Group) who was on site because JL Group, pursuant to the partnership's internal arrangement, was responsible for the actual physical work

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[15] LTC Harms *Amler's Precedents of Pleadings* 4ed (1993) at 239, and the authorities relied on.
[16] See the Damaseb considerations in para 2 above.
[17] *Lopez v Minister of Health and Social Services* 2019 (4) NR 972 (HC) para 29.

involved in the building project. Such an arrangement, I should say, is not strange to the building industry where the building contractor (as opposed to the building owner) performs myriad functions necessary for the carrying out of the building project; especially where the building contractor is constituted by partners, as is in the instant matter, only one of the partners may carry out the actual construction work, with the other partner carrying out some necessary and required functions, eg the taking of possession of the site of the project, the recruitment of employees and sub-contractors the receiving of funds and dispensing funds, the pursuing contacts with architects and surveyors, etc.[18] Therefore, it stands to reason to say that, since the building contractor consisted of two entities, acting as partners, as I have found, the action of one abandoning the site can reasonably and, as a matter of law, be attributed to the other, even though the last named entity was not on site, as Ms Bassingthwaighte submitted.

[38] The issues in paras 9*(e)* and *(f)* should be dealt with together and in turn with the discussion set out already on para 9*(c)* because they are intertwined. In that regard, I re-iterate the point that the plaintiff adduced sufficient and satisfactory evidence regarding the work done and the outstanding work, and value of the outstanding work. The evidence was not challenged in cross-examination. At this stage of the proceeding, I am bound to accept the evidence as true. In any case, I have accepted the expert evidence on the issue.

[39] Accordingly, I find that the plaintiff has set up prima facie evidence as to the reason why she had to borrow that amount of money from FNB to complete the project and how much the borrowing cost her. The evidence was that first defendant did not respond to the demand that required him (on behalf of S. L. I. P to complete the project. Even at that late hour, he never responded that he was not a party to the agreement and so the completion of the outstanding work should not be placed at his door.

[40] What the plaintiff claims are contractual damages. A party who sues on contract sues to have his or her bargain or its equivalent in money and in kind. In such claims, it would seem the 'difference theory' is forward looking: it presents a comparison between two financial positions of the plaintiff: but for the breach, the

[18] See Donald Keating *Law and Practice of Building Contracts* footnote 1 at 1 – 6.

plaintiff would have been in a fulfilment (of the contract) position.[19] Thus, in the instant matter, at this stage the proved damages to a prima facie degree is an amount equal to the difference between the project price and the amount expended by the plaintiff as a result of the breach. It follows that whether the plaintiff can establish the quantum of damages in due course in the trial should not engage this court at this stage. '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?[20]

[41] For all the foregoing analysis and conclusions thereanent, I find that the evidence adduced by the plaintiff so substantiate the issues that the plaintiff has raised on the pleadings, the action stand to succeed:[21] A court, 'applying its mind reasonably to the 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?" '[22]

Conclusion

[42] Based on these reasons, I find that the plaintiff has made out a prima facie case, requiring answer from the first defendant.[23] Doubtless, the occasion has not arisen for the court to grant the application in the interest of justice.[24] The plaintiff has crossed the low threshold of proof that the law has set at this stage of the proceeding.[25]

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[19] Ibid at 331.
[20] See the Damaseb considerations in para 2 above.
[21] I Isaacs *Beck's Theory and Principles of Pleading in Civil Actions* footnote 10 loc. cit.
[22] See the Damaseb considerations in para 2 above.
[23] *Stier and Another v Henke* footnote 3 loc. cit.
[24] *Ettienne Erasmus v Gary Erhard Wiechmann and Fuel Injection Repairs CC* [2023] NAHCMD 214 (24 July 2013).
[25] *Labuschagne v Namibia Allied Meat Company (Pty) Ltd* footnote 6 loc. cit.

[43] In the result, I order in the following terms:

1. The application for absolution from the instance is dismissed with costs, and such costs shall include the costs occasioned by the employment of one instructing counsel and one instructed counsel.

2. The matter is postponed to **7 June 2023** at **08h30** for a status hearing. (Reason: Court to determine the further conduct of the matter)

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C PARKER

Acting Judge

APPEARANCES

PLAINTIFF:	N BASSINGTHWAIGHTE Instructed by Ueitele & Hans Inc., Windhoek
FIRST DEFENDANT:	S PAULUS Of Dr Weder, Kauta & Hoveka Inc., Windhoek