

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

PRACTICE DIRECTIVE 61

<b>Case Title:</b> COENBRITZ FARMING (PTY) LTD vs GERT JOHANNES NELSON	<b>Case No:</b> HC-MD-CIV-ACT-CON-2021/04662
	<b>Division of Court:</b> HIGH COURT(MAIN DIVISION)
<b>Heard before:</b> HONOURABLE MR JUSTICE PARKER ACTING	<b>Date of hearing:</b> 5, 6, 8, 9 December 2022; 1 February 2023; 8, 29 & 30 March 2023; 6 April 2023
	<b>Released on:</b> 17 May 2023
<b>Neutral citation:</b> <i>Coenbritz Farming (Pty) Ltd v Nelson</i> (HC-MD-CIV-ACT-CON-2021/04662) [2023] NAHCMD 271 (17 May 2023)	
<b>ORDER:</b>  1. Judgment for the plaintiff in the amount of N\$111 492,11, plus interest on that amount at the rate of 20 per cent per annum, calculated from the date of this judgment to the date of full and final payment.  2. The defendant's counterclaim is dismissed.  3. The defendant shall pay 50 per cent of the plaintiff's costs; and the costs shall include costs of one instructing counsel and one instructed counsel.	

4. The matter is finalised and removed from the roll.

**Reasons for the above order:**

PARKER AJ:

[1] The basis of the plaintiff's claim and the relief sought are set out in the court's judgment of 8 March 2023 on his unsuccessful absolution-from-the-instance application. It serves no purpose to rehearse them here. It is noted that the defendant instituted a claim in reconvention.

[2] As a matter of law, the dismissal of the absolution leads to the irrefragable conclusion that the plaintiff has made out a prima facie case. Therefore, in the instant proceedings, the defendant bears the evidential burden in order to combat the prima facie case.<sup>1</sup>

[3] The plaintiff, represented by Mr Small, has abandoned item 7.5 in Claim 1, and Claim 2 and 3 in their entirety. What remains are items 7.1 (for N\$48 023), item 7.2 (for N\$72 000), item 7.3 (for N\$110 469,11) and item 7.4 (for N\$25 000), all in Claim 1.

[4] Let us consider the evidence the defendant has placed before the court in his attempt to discharge the onus cast on him. In his examination-in-chief-evidence, the defendant testified that he did not owe the plaintiff the moneys the plaintiff claimed. But in his cross-examination-evidence, the defendant admitted his indebtedness to the plaintiff in terms of item 7.3. The defendant did so when he was confronted with documentary proof in respect thereof.

[5] Indeed, the defendant repaid part of the debt of N\$110 469,11 in the amount of N\$80 000, factorised as follows: N\$15 000 (1 May 2017), N\$25 000 (8 September 2017) and N\$40 000 (31 January 2019). Consequently, I reject as baseless the submission by Mr Mukondomi, counsel for the defendant, that it was a term of the agreement between the defendant and the plaintiff that the defendant shall pay the debt only when the defendant was able to do so.

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<sup>1</sup> *Konrad v Shanika* [2020] NAHCMD 259 (30 June 2020) para 9; and the cases relied on.

[6] Furthermore, I reject the following submission by Mr Mukondomi. Counsel submitted thus: The plaintiff paid N\$25 000 (item 7.4) legal fees voluntarily, unsolicited by the defendant, on behalf of the defendant in a matter where the defendant had instituted action to evict a tenant of his from his abattoir, because the plaintiff was interested in his abattoir.

[7] The evidence I accept is that the defendant was bent on evicting the tenant from his abattoir because (1) the tenant had failed to pay the rent of N\$30 000 per month for a long period, much to the financial loss of the defendant; and (2) the plaintiff offered to pay a rent of N\$50 000 per month if he rented the abattoir, much to the defendant's financial gain. I conclude that for that benefit and that gain, the defendant, an adult businessman, did not require the plaintiff to cajole him to pursue the action to evict the errant tenant. I find that the defendant has failed to parry the debt of N\$25 000. Mr Mukondomi's submission is respectfully rejected.

[8] The defendant testified that he was entitled to refuse to pay the debt because the plaintiff had failed to give him 50 per cent share in the plaintiff's farming business, albeit they discussed the matter of '50/50' share before the defendant went to work for the plaintiff. On the defendant's version, it is clear that the plaintiff always put off negotiating and concluding a contract for such sharing of the farming business. The defendant's defence has no legal leg to stand on. It has been held that a mere agreement to negotiate is not a contract 'because it is too uncertain to have any binding force'.<sup>2</sup>

[9] Mr Mukondomi urged the court to reject the debt of N\$72 000 (item 7.2 of Claim 1). That will not be necessary. In his particulars of claim, the plaintiff states that the tractor which the defendant bought was sold for N\$72 000 on or about 1 July 2021; and therefore, the outstanding balance should be reduced by N\$72 000. The plaintiff's concession disposes of the defendant's counterclaim. The defendant testified that he had counterclaimed the N\$80 000 he had paid to the plaintiff because the plaintiff had sold the tractor and kept the proceeds for himself.

[10] Consequently, bar the plaintiff's concession in respect of item 7.2 and his

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<sup>2</sup> H G Beale (Gen. Ed.) *Chitty on Contracts: General Principles* Vol 1 28ed (1999) para 2-126.

abandoning item 7.5, the defendant has failed to combat the prima facie case made by the plaintiff<sup>3</sup> as regards item 7.1 (for N\$48 023), item 7.3 (for N\$110 469,11) and item 7.4 (for N\$25 000), totalling N\$183 492,11. The amount of N\$183 492,11 should be reduced by N\$72 000, leaving N\$111 492,11.

[11] As to costs, I accept Mr Mukondomi's submission that the fact that the plaintiff abandoned two out of his five items in Claim 1 and Claim 2 and Claim 3 in their entirety at a late hour of the proceedings should have costs consequences.

[12] Based on these reasons, the plaintiff succeeds in his claim to the extent indicated in the order below. I have previously found that the defendant's counterclaim cannot succeed. In the result, I order in the following terms:

1. Judgment for the plaintiff in the amount of N\$111 492,11, plus interest on that amount at the rate of 20 per cent per annum, calculated from the date of this judgment to the date of full and final payment.
2. The defendant's counterclaim is dismissed.
3. The defendant shall pay 50 per cent of the plaintiff's costs; and the costs shall include costs of one instructing counsel and one instructed counsel.
4. The matter is finalised and removed from the roll.

<b>Judge's signature</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Plaintiff</b>	<b>Defendant</b>
A J B SMALL	L MUKONDOMI

<sup>3</sup> See para 2 above.

Instructed by Joos Agenbach Attorney & Notary	of Gaenor Michaels & Associates
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