

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA,
JUDGMENT
PRACTICE DIRECTION 61



MAIN DIVISION, WINDHOEK

Case Title: VENACIO SANDJONDJO HOMBA vs MEDIA KACHANA KAMWI HOMBA (BORN KAMWI)	Case No: HC-MD-CIV-ACT-MAT-2021/03719
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE MILLER AJ	Heard on: 9 - 10 May 2023; 12 May 2023
	Delivered on: 12 June 2023
Neutral citation: <i>Homba v Homba</i> (HC-MD-CIV-ACT-MAT-2021/03719) [2023] NAHCMD 309 (12 June 2023)	
ORDER	
<ol style="list-style-type: none">1. The application for absolution from the instance is dismissed with costs.2. Such costs to include the costs of one instructing counsel and one instructed counsel.	
REASONS:	
MILLER AJ	
<p>[1] The issues pending before me at the trial arise from the counterclaim filed by the defendant in the main action, which was essentially a claim seeking an order of divorce and ancillary relief. That issue has since become resolved when the court hearing the matter granted an order of divorce. The issues raised by the plaintiff in reconvention were not determined at that stage.</p> <p>[2] I will refer to the plaintiff in reconvention simply as ‘the plaintiff’ and likewise to the defendant in reconvention as ‘the defendant’.</p>	

[3] In her counterclaim under claims 2 and 3, the plaintiff relies upon certain oral agreements concluded between herself and the defendant, which agreements were concluded during the course of their marriage. They are said to be the following:

'Claim 2

6. During the subsistence of the marriage between the parties, the parties acquired an immovable property situated at erf 4596, Extension 9, Swakopmund, as co-joint owners.

7. On or about 2014, at Windhoek the Plaintiff and the Defendant, in their personal capacity, entered into an oral agreement whereby the Defendant was to assist the Plaintiff and his business, Nacio Construction CC, by signing as limited surety for an amount of N\$1,500,000.00 with Development Bank of Namibia (herein referred to as "DBN" for the loan in the amount of N\$11,199,158.95 to be advanced for the benefit of Nacio Construction CC. A bond over the Swakopmund property in the amount of N\$1,500,000.00 was as a result registered by DBN.

8. The oral/expressed/tacit terms of the oral agreement were agreed as follows:

8.1 The Defendant would, in her personal capacity, sign limited surety over the loan of Nacio Construction with DBN in the amount of N\$1,500,000.00;

8.2 The Defendant would pledge her half share in the Swakopmund property, to wit, Erf 4596(A portion of Erf 1543), Extension 9, Vineta, Swakopmund as collateral for the repayment of the loan;

8.3 That the Plaintiff in his personal capacity, in reciprocation of his obligations, would ensure that the loan with DBN is repaid by Nacio Construction, as per DBN's terms and avoid default at all times;

8.4 That the Plaintiff would, once the loan of Nacio Construction is settled, have the bond that is registered over the property in favour of DBN, cancelled;

8.5 That in the event that Nacio Construction CC default on the terms of DBN agreement and the collateral of N\$1,500,000.00 is called up for non-compliance, the Plaintiff would, in his personal capacity, make payment to the defendant/alternatively to DBN in the amount of N\$1,500,000.00 for the bond to be cancelled. The defendant would not have signed the surety agreement if it was not for the above condition.

Claim 3

13. During 2018 and at Windhoek, the Plaintiff and the Defendant entered into an oral loan agreement. The defendant agreed to lend money to the plaintiff in the amount of N\$870,000.00. The agreement was that the Plaintiff would loan the amounts, in his personal capacity, for use for his business, Nacio Construction CC.

14. The further oral/expressed/tacit terms of the oral agreement were that the Defendant would use the proceeds of the sale from her Cimbebasia property to loan an amount of N\$870,000.00 to the Plaintiff. It was further agreed that the Plaintiff would repay the amount over a period of two years, without interest, but in any event not later than January 2020.'

[4] In essence, the defendant in response thereto avers that the agreements relied upon by the plaintiff if concluded at all, were concluded between the plaintiff and an entity known as Nacio Construction CC, a close corporation of which the defendant was the sole member.

[5] The plaintiff testified in support of her claims and at the conclusion of her evidence, the plaintiff's case was closed.

[6] The defendant thereupon applied for an order of absolution from the instance.

[7] The evidence of the plaintiff is that the agreements she relies upon were concluded between herself and the defendant in their personal capacities. She denies that she was made to believe during the discussions between herself and the defendant, that the defendant was acting as the representative of Nacio Construction CC.

[8] The application for absolution is based upon what is alleged to the contradictions and inconsistencies in her evidence regarding, inter alia, with whom she concluded the alleged agreements.

[9] The correct approach to follow is to consider whether based upon the evidence tendered thus far, a reasonable court may find in favour of the plaintiff.¹

[10] In a recent judgment penned by me,² I stated the following regarding issues of

¹ *Stier and Henke* 2012 (1) NR 370; *Claude Neon Lights (S.A.) LTD v Daniel* 1976 (4) 403 (A).

² *Philander v Government of the Republic of Namibia* (HC-MD-CIV-ACT-DEL-2022/00984) [2023]

credibility raised in an application for absolution from the instance:

'Issues of credibility play a limited role in an application for absolution at the close of the plaintiff's case. Generally speaking, the court will not concern itself with issues of credibility, except in cases where the evidence tendered by the plaintiff is so lacking in credibility and so improbable to the extent that no court would place any reliance upon it.'

[11] I do not find, upon a consideration of the evidence of the plaintiff, that the evidence is such that no court would place any reliance upon it.

[12] In the result, the following orders are issued:

1. The application for absolution from the instance is dismissed with costs.
2. Such costs to include the costs of one instructing counsel and one instructed counsel.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff in reconvention	Defendant in reconvention
I Ambunda of Sisa Namandje & Co. Inc., Windhoek	A Shimakeleni of Appolos Shimakeleni Lawyers, Windhoek