

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT

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| Case Title: FESTUS SHANINGWA NUUNYANGO v MATHEUS SHILUNGA | PLAINTIFF DEFENDANT | Case No: HC-MD-CIV-ACT-CON-2020/04581 |
| | | Division of Court: High Court, Main Division |
| Heard before: Honourable Lady Justice Claasen | | Heard on: 5 July 2023 |
| | | Delivered on: 6 September 2023 |
| Neutral citation: <i>Nuunyang v Shilunga</i> (HC-MD-CIV-ACT-CON-2020/004581) [2023] NAHCMD 549 (6 September 2023) | | |
| ORDER: 1. The application for absolution from the instance is refused. 2. The defendant is ordered to pay the plaintiff's costs relating to the application for absolution from the instance. 3. The matter is postponed to 6 November 2023 and 7 November 2023 at 10h00 for continuation of trial. | | |

REASONS FOR ORDERS:

CLAASEN J:

[1] This is an application by the defendant, a farmer in the Otavi district, for absolution from the instance, made after the plaintiff closed his case. The plaintiff is a businessman in Windhoek.

[2] The plaintiff sued the defendant essentially seeking to recover payment of N\$480 000 and N\$120 000 respectively, in addition to interest and costs for an alleged breach of contract. It was common cause that the parties concluded three different contracts and they were styled as follows:

- (a) 'Agreement of sale' concluded on 11 April 2019;
- (b) 'Sale agreement' concluded on 29 April 2019; and
- (c) 'Lease and settlement agreement' concluded on 29 April 2019.

[3] Four witnesses testified on behalf of the plaintiff. Mr Nuunyango's evidence reveals that in terms of the first agreement of sale, the parties agreed that the plaintiff will purchase farm Eqwe (the farm) in the Otavi district from the defendant for a purchase price of N\$7.5 million. The plaintiff had to pay the transfer costs and apply for a loan to fund the transaction, whereas the defendant had the obligation to obtain a certificate of waiver from the Ministry of Land Reform.

[4] About two weeks thereafter the parties signed another agreement, again a contract of sale, referred to as the second written agreement. This time the purchase price of the farm was N\$5.5 million which had to be paid towards the defendant's loan at Agribank. The agreement stipulated that the plaintiff will be responsible for the transfer cost and has to secure the necessary approval of a loan. The agreement was silent about who had the duty to obtain the certificate of waiver.

[5] Surprisingly, later in the day, still on 29 April 2019, the parties signed a third

agreement. In terms of the third agreement it was agreed that the plaintiff will lease the farm for the amount of N\$480 000 for a fixed period of 19 months as from 30 August 2019. Additionally, the parties also entered into an oral agreement wherein the plaintiff advanced N\$ 120 000 directly to the defendant, which amount would be deductible from the purchase price. Incidentally, the third agreement contained clauses under a heading 'Special conditions' to the effect that, in the event that no sale is concluded, the lease agreement shall be for a rental amount of N\$25 000 per month as from August 2019 for a period of 19 months and that the lessee shall be entitled to enforce his right for the recovery of the N\$ 480 000 in the event that the sale agreement between the parties does not succeed. Furthermore, that lessee shall in addition to the rental amount, pay N\$1.5 million within 12 months of date of registration of the transfer if the sale is finalised.

[6] The plaintiff testified that he paid N\$480 000 on the defendant's loan at Agribank, as well as an additional N\$120 000 directly into the bank account of the defendant. He also attested that during May 2019 he moved his 50 livestock to the farm but he was allocated merely two camps as opposed to the whole farm. The sum of his further evidence was that at some stage he realised that the defendant was not forthcoming with the waiver and approached a legal representative in Tsumeb, who drafted the first agreement. During that process the parties had a meeting in the office of the legal representative where they learnt that the defendant no longer wanted to sell the farm but it was agreed that the defendant will refund the monies. That did not happen, which resulted in the plaintiff asking the legal representative to issue a letter of demand which also did not heed results. The plaintiff vacated the farm during September 2020.

[7] Mr F Pretorius testified that he drafted the first contract of sale and that he was mandated to assist the defendant to offer the farm to the State, but that the defendant was not available to provide the information. He also confirmed that the parties met in his office in August 2020 at which time the defendant informed them that he is no longer interested in selling the farm. Thereafter the plaintiff instructed him to address a letter of demand to the defendant and he never received a response to the letter.

[8] Mr Fillemon Ngarangombe testified that he also leased the farm as from April 2019

for 6-month intervals at a rental amount of N\$150 000. He did so for two cycles until April 2020. He furthermore testified that in July 2019 he noticed another tenant (the plaintiff) moved in with his livestock. The plaintiff occupied two camps. Mr Ngarangombe confronted the defendant about the plaintiff also leasing the farm, but the defendant said that the lease permits that.

[9] Mr Simasiku is a former employee of Agribank and he handled the plaintiff's loan application for the intended purchase of the farm. He testified that the plaintiff qualified for the loan to purchase the farm and that the only outstanding document was a certificate of waiver from the State, which was not forthcoming. Eventually in September 2020 the plaintiff informed Mr Simasiku that the defendant no longer want to sell the farm.

[10] During the course of the trial it became apparent that the claim of N\$120 000 was no longer disputed. The only issue in dispute is the date from which interest is to run as it appeared from cross-examination by the legal practitioner that the contention was that the letter of demand was not received by the defendant. As far as the opposition to the other claim was concerned the assertion was that the plaintiff is not entitled to payment of N\$480 000 because that amount was paid for the lease of the farm, and that the defendant was responsible for the collapse of the sale as he did not furnish an approval for a loan from a bank.

[11] In arguing that the plaintiff has failed to make out a case to answer, the contention appears to be that the agreements were structured in such a way, in order to circumvent formalities and misrepresent the true value of the farm to the prejudice of the defendant and the tax authorities. In support for the position that the plaintiff cannot succeed with the claim, on account of the illegality, counsel for the defendant cited case law to the effect that a party cannot rely on a contract that is tainted by illegality. It was also submitted that the claim for N\$480 000 was pure rental that was paid and that the plaintiff conceded that he stayed on the farm.

[12] In countering the application reference was made to the clause under the heading of 'special conditions' wherein it was stated that if the sale does not materialise the

plaintiff will be entitled to recover the amount of N\$480 000. The contention was that the reason why the sale failed was attributed to the inaction of the defendant and he should thus come and explain. Alternatively, if the contention was that it was rental, the plaintiff's evidence shows that although the whole farm was covered in the lease, the defendant only availed two camps. It was also pointed out that the argument about purported illegality in the contract surfaced as an afterthought and that nothing in the evidence suggested that the parties intended to circumvent the payment of tax on the transaction.

[13] In turning to the law on absolution, in general, absolution at the close of the plaintiff's case is not readily granted. In *Stier and Another v Henke*¹ it was stated at para 4 that :

'At 92F-G Harms JA in *Gordon Lloyd Page & Associates v Rivera and Another* 2001(1) SA 88 referred to the formulation of the test to be applied by a trial court when absolution is applied at the end of a appellant's case as appears in *Claude Neon Lights (SA) Ltd v Daniel* 1976(4) SA 403 (A) at 409G-H:

“. . . (W)hen 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, nor ought to) find for the plaintiff."

[14] It is trite that the court will not concern itself with issues of credibility at this stage, except in cases where the evidence tendered by the plaintiff is so poor or so improbable to the extent that no court would place any reliance upon it. Furthermore, where the plaintiff's evidence give rise to more than one plausible inference, anyone of which is in his or her favour in the sense of supporting his or her cause of action and is destructive of the version of the defence, absolution is an inappropriate remedy.²

[15] From the evidence presented at this juncture it is clear that the parties entered into

¹ *Stier and Another v Henke* SA 53/2008 [2012] NASC 2 (03 April 2012).

² *Dannecker v Leopard Tours Car and Camping Hire CC* (I 2909/2006) [2015] NAHCMD 30 (20 February 2015).

agreements and that the plaintiff parted with N\$480 000 as a result of the agreement(s). That was not disputed by the defendant and it calls for an explanation as to his understanding on which of the contracts he received payment of N\$48 000 and why he is not liable to return all or any portion of it. Through the course of the trial, it became clear that liability for the N\$120 000 was no longer in dispute. However, given that the receipt of the demand letter appears to be in dispute the date of interest will depend on that. I am also constrained to agree with counsel for the plaintiff insofar as he argued that, had it been the defence that the transactions were arranged in such a fashion in order to defraud the tax authorities that ought to have been pleaded and made its way into the evidence.

[16] In emphasizing the test at this stage of the proceedings, it is my view that the application for absolution from the instance must be refused with costs. Hence, I make the following orders:

1. The application for absolution from the instance is refused.
2. The defendant is ordered to pay the plaintiff's costs relating to the application for absolution from the instance.
3. The matter is postponed to 6 November 2023 and 7 November 2023 at 10h00 for continuation of trial.

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| Judge's signature | Note to the parties: |
| | Not applicable. |
| Counsel: | |
| Plaintiff | Defendants |
| N Tjombe Of Tjombe-Elago Inc, Windhoek | A Delport Of Delport Legal Practitioners, Windhoek |