

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

RULING

PRACTICE DIRECTION 61

Case Title: EMPIRE FISHING COMPANY (PTY) LTD // BISHOP KLEOPAS DUMENI & 3 OTHERS	Case No: HC-MD-CIV-ACT-CON-2021/00191
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE PARKER, ACTING	Heard on: 7-10 AUGUST 2023; 14 AUGUST 2023
	Delivered on: 27 SEPTEMBER 2023
Neutral citation: <i>Empire Fishing Company (Pty) Ltd v Dumeni</i> (HC-MD-CIV-ACT-CON-2021/00191) [2023] NAHCMD 599 (27 September 2023)	
Order:	
<ol style="list-style-type: none">1. Absolution from the instance is granted with costs.2. The matter is considered finalised and removed from the roll.	
Reasons:	
PARKER AJ: [1] After the close of the plaintiff's case, the first and second defendants, represented by Mr Shikongo, brought an application for absolution from the instance ('the absolution application'). Mr Chibwana represents the plaintiff. [2] The test for absolution from the instance has been settled by the authorities. The	

principles and approaches have been followed in several cases. They were approved by the Supreme Court in *Stier and Another v Henke*¹. 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....”

[3] Additionally, in *Dannecker v Leopard Tours Car & Camping Hire CC*² (I 2909/2006), Damaseb JP stated as follows on the test of absolution from the instance at the close of plaintiff's case:

¹ *Stier and Another v Henke* 2012 (1) NR 370 (SC).

² *Dannecker v Leopard Tours Car & Camping Hire CC* [2015] NAHCMD 30 (20 February 2015).

'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.

(b) 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.

(c) 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.

(d) 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 her cause of action and destructive of the version of the defence, absolution is an inappropriate remedy.

(e) 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.'

[4] Another important principle which 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*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

³ *Neon Lights (SA) Ltd*, see para 2 above.

to the case.⁴

[5] In the instant matter, I see that the particulars of claim indicates undoubtedly that the plaintiff's claim is based solely on a breach of contract on the part of the first defendant. The plaintiff averred that the contract was partly oral and partly written. The oral part was entered into between the plaintiff (represented by Mr Ephraim Dozzee lileka) and the first defendant, and the written part was entered into between the plaintiff (represented by Mr Ananias Martin) and the first defendant. Both lileka and Martin were directors of the plaintiff at the relevant time. They appeared in the instant proceedings as the plaintiff witnesses. It is crucial to underline my finding that the second defendant was not privy to the alleged contract. Furthermore, no order is sought against the third defendant, a public authority.

[6] The plaintiff's first, second and third alternative claims are in truth – as a matter of law – not alternative claims. They are consequential claims that might, not should, follow if the plaintiff's main and primary claim was successful.

[7] I have found previously that the plaintiff's claim is based solely on the said alleged contract. In that case, it is trite that the plaintiff – and the plaintiff alone – bears the burden of establishing the existence of the contract it has sued on. The first defendant bears no such onus. The requirement that he or she who alleges must prove is basic to our law.⁵ Therefore, naturally, the next level of the enquiry is to consider the evidence that the plaintiff has placed before the court to establish, to a prima facie degree, the existence of the alleged contract, requiring answer from the first and second defendants.⁶

[8] The plaintiff says that the contract sued on was partly written and partly oral. According to lileka, the oral part of the contract was entered into between him and the first defendant on a date that he could not recall. Martin testified that the written part of the contract is the 'Last Will and Testament' of the first defendant, dated 10 October 2015. It is the first defendant's last Will and Testament wherein he declared that to be his last testament and 'revoked all codicils, wills and other testamentary writings that I made or may have made'.

[9] Nowhere in the last Will and Testament does the name of the plaintiff appear. The last Will and Testament cannot be a valid and enforceable contract for the following reasons. First,

⁴*Bidoli v Ellistron t/a Ellistron Truck & Plant* 2002 NR 451 at 453G.

⁵*Pillay v Krishna and Another* 1946 AD 946.

⁶*Stier and Another v Henke* (SO) footnote 1.

a contract is a composite and coherent juristic act concluded between two or more persons with the intention of creating legal obligations.⁷ One cannot contract with oneself.⁸ Second, the oral part of the contract was, on the evidence, settled in October 2000. lileka did not testify that it was in their contemplation that 15 years from 2000 the first defendant would settle a will that would form part of the alleged oral contract. There is no evidence before the court that lileka is a clairvoyant. What is more, the last Will and Testament does not make one iota of reference to any such oral contract concluded by and between the first defendant and the plaintiff, through lileka 15 years previously.

[10] The ineluctable conclusion is that the plaintiff has failed to prove the existence of the contract he relies on to sue the first defendant and the second defendant. I have found previously that the second defendant is not privy to the alleged contract.

[11] Of the view I have taken of the case, Mr Chibwana's eloquent and forceful submission on the concept of 'simulated contract' is irrelevant. It is labour lost. It is of no assistance on the point under consideration. Indeed, it does not find application in this proceeding.

[12] For the forgoing analysis and conclusions thereanent, I find that the plaintiff has failed to surmount the bar set by the Supreme Court in *Stier and Another v Henke*⁹ which is that for the plaintiff to survive absolution, the plaintiff must make out a prima facie case upon which a court could or might find for the plaintiff. The result is that the plaintiff has not made out a prima facie case, requiring the first defendant and the second defendant to answer.

[13] Based on these reasons, I order as follows:

1. Absolution from the instance is granted with costs.
2. The matter is considered finalised and removed from the roll.

Judge's signature:	Note to the parties:
	Not applicable.

⁷ Dale Hutchinson (Ed) and Chris-James Pretorius (Ed) *The Law of Contract in South Africa* 2 ed (2014) at 6.

⁸ RH Christie *The Law of Contract in South Africa* 3 ed (1996) at 21.

⁹ *Stier and Another v Henke* footnote 1.

Counsel:	
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