

REPUBLIC OF NAMIBIA



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

Case Title: COENBRITZ FARMING (PTY) LTD vs GERT JOHANNES NELSON	Case No: HC-MD-CIV-ACT-CON-2021/04662
	Division of Court: HIGH COURT(MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE PARKER AJ	Date of hearing: 01 February 2023
	Released on: 8 March 2023
Neutral citation: <i>Coenbritz Farming (Pty) Ltd v Nelson</i> (HC-MD-CIV-ACT-CON-2021/04662) [2023] NAHCMD 97 (8 March 2023)	
IT IS HEREBY ORDERED THAT: 1. The application for absolution from the instance is dismissed with costs. 2. The matter is postponed to 22 March 2023 at 08h30 for a status hearing. (Reason: Court to determine the further conduct of the matter).	
Reasons for orders:	
<p>[1] After the close of plaintiff's case, the defendant bought an application for absolution from the instance. Mr Small represents the plaintiff, and Mr Mukondomi the defendant.</p> <p>[2] In the latest absolution application before me,¹ I rehashed the principles and</p>	

approaches applied in such application thus:

[4] When a similar application was brought 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 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

¹ *Stephanus v Kuutondokwa* NAHCMD 622 (16 November 2022) paras 12-13.

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;
- (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 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".'

'[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 & Plaintiff* 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*² '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 his submission, Mr Small submitted that as he had placed before the court during the trial, the plaintiff abandoned item 7.5 of its claim under claim 1, as well as its claim 2 and claim 3. What remained therefore, according to Mr Small, were items 7.1 (for N\$48 023), 7.2 (for N\$72 000) and 7.3 (for N\$110 469.11) under claim 1.

[4] The basis of the plaintiff's claim is that in terms of an oral agreement, upon the defendant's request, the plaintiff lent and advanced certain moneys to the defendant by making payments to the defendant's creditors.

[5] It was also a term of the parties' agreement that the defendant would repay the

² *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) Sa 403 (A) at 409 G-H.

loans as and when the defendant's financial situation improved. The plaintiff testified that the financial situation of the defendant improved when the defendant went behind the back of the plaintiff and sold a truck he had given to the plaintiff as security for the loans.

[6] The defendant pleaded that the moneys were not loans but incentives to make the defendant remain in the service of the plaintiff. This cannot be true, because to defray the debt the defendant made payments amounting to N\$80 000 to the plaintiff from 1 May 2017 to 31 January 2019.

[7] I accept the plaintiff's version because at the close of the plaintiff's case when an absolution application is brought, the court 'is bound to accept as true the evidence of the plaintiff, unless the plaintiff's evidence is incurably and inherently so improbable and unsatisfactory to be reject out of hand'.³ I do not find the plaintiff's version to be incurably and inherently improbable or unsatisfactory; and so, I accept it.

[8] Moreover, I find that the plaintiff's evidence gives rise to more than one plausible inference, and any one of them supports his cause of action and destructive of the version of the defendant. For that reason, absolution is an inappropriate remedy.

[9] Based on these reasons, I find plaintiff has made out a prima facie case, requiring answer from the defendant.⁴ Therefore, the occasion has not arisen for the court to grant absolution from the instance in the interest of justice.⁵

[10] In the result, I order as follows:

1. The application for absolution from the instance is dismissed with costs.
2. The matter is postponed to 22 March 2023 at 08h30 for a status hearing. (Reason: Court to determine the further conduct of the matter).

Judge's signature	Note to the parties:
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³ See para 2 above.

⁴ *Stier and Another v Henke* 2012 (1) NR 370 (SC).

⁵ *Etienne Erasmus v Gary Erhard Wiechmann and Fuel Injection Repairs & Spares CC* [2013] NAHCMD 214 (24 July 2013).

	Not applicable.
Counsel:	
Plaintiff	Defendant
A J B SMALL Instructed by Joos Agenbach Attorney & Notary	L MUKONDOMI of Gaenor Michaels & Associates