REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON APPLICATION FOR ABSOLUTION FROM THE INSTANCE

Case No: HC-MD-CIV-ACT-CON-2018/04326

In the matter between:

NAMPHARM (PTY) LTD **PLAINTIFF**

and

DR DANIEL CHRISTIAAN JORDAAN **DEFENDANT**

Neutral Citation: *Nampharm (Pty) Ltd v Jordaan* (HC-MD-CIV-ACT-CON-2018/04326) [2024] NAHCMD 219 (10 May 2024)

Coram: MASUKU J

Heard: **8 - 11 November 2022, 17- 26 November 2023 and 29 November 2023**

Delivered: **10 May 2024**

Flynote: Civil Procedure – Rule 100 – application for absolution from the instance at the close of plaintiff's case – Whether a court acting reasonably can be satisfied that plaintiff established a prima facie case requiring an answer from the defendant.

Summary: The plaintiff's claim is premised on an alleged oral agreement entered into by the parties, being the plaintiff and the defendant for the plaintiff to sell and deliver medical and related goods, to the defendant during or about April 2016, and at Windhoek, in the Republic of Namibia. It is alleged that the plaintiff was represented by Mr Marius Gouws and the defendant, acted in person. The alleged terms of the oral agreement were that (1) the plaintiff would, from time to time, on open account and at the defendant's instance and request, sell and deliver medical and related goods to the defendant; (2) the plaintiff would charge its normal rates as they may be from time to time in respect of the aforesaid goods sold and delivered and would invoice the defendant for any such goods sold and delivered to the defendant at the latter's instance; (3) the plaintiff would render monthly statements of the open account to the defendant on the 25th of each consecutive month; (4) the defendant would pay the plaintiff in respect of the aforesaid invoices, rendered on open account within 30 days of receipt of the respective monthly statements. Interest of 1.5% per month would be charged on all overdue amounts.

The total value of the goods sold and delivered was N$1 469 881.54, the plaintiff alleging that the defendant only paid N$1 040 000, resulting in an unpaid balance of N$593 847.22.

At the end of the plaintiff's case, the defendant applied for absolution from the instance on the basis that the plaintiff failed to make out a prima facie case. The question for determination is whether the plaintiff has crossed the low threshold of proof that the law sets when a plaintiff's case is closed but before the defendant's may be opened.

Held: The defendant's argument that the plaintiff should be bound by the pleadings and that the plaintiff has not made out a prima facie case as to the terms of the oral agreement cannot be proved at this juncture.

Held that: There is an oral agreement alleged by the plaintiff and its terms have been pleaded and evidence adduced by the plaintiff. The defendant therefor has a case to answer.

Held further that: The question whether or not the plaintiff's witnesses are credible or not, is not fit to be determined at this stage.

Held: That the application for absolution from the instance cannot succeed in the present circumstances. In *De Klerk v Absa Bank Ltd,*[1] the court reasoned as follows on an application for absolution: 'The question in this case is whether the plaintiff has crossed the low threshold of proof that the law sets when a plaintiff's case is closed but the defendant's is not.'
Application for absolution from the instance dismissed with costs.

ORDER

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1. The application for absolution from the instance is hereby dismissed.
2. The defendant is ordered to pay the costs, consequent upon the employment of one instructing and one instructed counsel.
3. The matter is postponed to 23 May 2024 at 08:30 for allocation of dates for continuation of the trial.

RULING

MASUKU J:

Introduction

[1] *De Klerk v Absa Bank Ltd* 2003 (4) SA 315 (SCA) at 321A.

[1] At the close of the case for the plaintiff, the defendant moved an application for absolution from the instance, alleging that the plaintiff had failed to make out a case requiring the defendant to be placed on his defence.

[2] In this ruling, the court will undertake, to the extent necessary, the chronicle of the evidence led, together with the arguments advanced by both parties and come to a decision as to whether or not the defendant is correct in his submissions that the application for absolution should be granted as prayed.

Background

[3] By combined summons dated 25 October 2018, the plaintiff, a private company, duly incorporated in accordance with the company laws of this Republic, sued the defendants for payment of an amount of N$593 847, 22. This amount was alleged to be owing by the defendant who had allegedly breached an oral agreement between the parties in that he had failed to make full payment in the amount of N$1 469 88,54 for the goods sold and delivered to him by the plaintiff at his instance.

[4] The claim was defended by the defendant, culminating in a trial in which the plaintiff called five witnesses. These were Ms Margot Levy, Mr Marius Gouws, Ms Reinet Binneman, Ms Rianda Holmeberg and Dr Koster, as indicated in the pre-trial order. This is not, however, the order in which they were called by the plaintiff in the adduction of their evidence.

The plaintiff's evidence

[5] As indicated above, the plaintiff called five witnesses, their testimony under oath will be presented below.

Ms Margot Levy

[6] Ms Levy testified that she was employed by Mrs Santjie Bierman ('Mrs Bierman'), the former owner of Bismarck Pharmacy 'the pharmacy) prior to April 2016. She was employed as an administrative assistant for 9 years before Dr Jordaan, the defendant, took over the Bismarck Family Medical Practice in which the Bismarck Pharmacy is located.

[7] It was her evidence that at some point after April 2016, she was under the impression that the defendant purchased the pharmacy, but she had not entered into a new employment contract. She continued getting her salary, like the days when Mrs Bierman was still the owner. In her role, she attended to the medical aid claims for the pharmacy before and after Mrs Bierman sold the pharmacy. Two pharmacists were appointed in the pharmacy, namely, Ms Rianda Holmberg and Ms Danielle Ras. She does not know who appointed or employed them.

[8] The defendant's daughter, Ms Marna Oosthuizen, she further testified, was the manager and attended to payments and salaries at the pharmacy. It was her evidence that she never thought that the pharmacy belonged to Ms Rianda Holmberg or any other existing person but the defendant as from April 2016. She testified that she has no knowledge of what the agreement between the defendant and Ms Rianda Holmberg was, and that she was under the impression that Ms Rianda Holmberg was employed by the defendant.

[9] She testified that the pharmacy staff was told that the defendant would take over the pharmacy as from 1 March 2016, however the defendant only took over on 1 April 2016. It was her evidence that she resigned at the end of December 2018.

Mr Marius Gouws

[10] He testified that he is a major male and the Marketing Director of the plaintiff herein. During or about April 2016 and at Windhoek, the plaintiff, then and there duly represented by him, and the defendant, then and there acting personally, entered into an oral agreement.

[11] The following were the salient terms of the aforesaid agreement between the parties, according to his evidence:

> 11.1 The plaintiff would, from time to time, on an open account and at the defendant's instance and request, sell and deliver medical and related goods to the defendant;
>
> 11.2 The plaintiff would charge its normal rates as they may be from time to time in respect of the aforesaid goods sold and delivered and would invoice the defendant for any such goods sold and delivered to the defendant at the latter's instance;
>
> 11.3 The plaintiff would render monthly statements on open account to the defendant on the 25th of each consecutive month; and
>
> 11.4 The defendant would pay the plaintiff in respect of the aforesaid invoices, rendered on open account within 30 days of receipt of the respective monthly statements. Interest of 1.5% per month would be charged on all overdue amounts.

[12] It was his evidence that at this point he deemed it appropriate to elaborate as to how the agreement was concluded. Sometime during April 2016, the defendant contacted him telephonically and informed him that he wanted to open an account with

the plaintiff for delivery of medication to the Pharmacy, which he had recently purchased.

[13] The witness told the defendant that he would send him the account application form, but the defendant indicated to him that he was under pressure to stock the pharmacy and did not have time to complete a written application. The defendant asked the witness to complete the application form as he knows the industry and that the defendant would sign it when he came to Swakopmund again. The defendant stated that, in the meantime, he urgently needs medication because the previous owner, Ms Santjie Bierman left him with nothing (i.e. no stock).

[14] Mr Gouws testified further that he completed the application form and approved the application for an account to be opened for the defendant in the name of Bismarck Pharmacy and in the terms provided on the application form. After the account was opened in the name of Bismarck Pharmacy, business commenced and continued without the defendant signing the application form.

[15] It was his evidence that in pursuance of the agreement *inter* partes, as aforesaid, and during the period from April to June 2016, the plaintiff sold and delivered to the defendant, at the latter's instance and request, on open account, goods as specified in the respective invoices (a bundle of which has been discovered as items 3 to 648, including relevant credit notes and journal entries), the contents of which the witness confirmed as true and correct.

[16] The aforesaid goods were sold and delivered by the plaintiff to the defendant at the prices as set out in the said invoices, which prices constituted the plaintiff’s normal rates at the relevant times. He testified further that the defendant was duly invoiced for all goods sold and delivered to him by the plaintiff. The total value of goods so sold and delivered by the plaintiff to the defendant is N$1 469 881,54, which amount excludes interest. The plaintiff also duly rendered monthly open account statements to the defendant in respect of the goods so sold and delivered by the plaintiff to the defendant.

[17] It was his evidence that the plaintiff duly complied with all those obligations in terms of the agreement between the parties that required compliance in order to entitle the plaintiff to the relief claimed. He further testified that a period of 30 days from the date of rendering the respective monthly statements of account having expired and demand notwithstanding, the defendant has only paid an amount of N$1 040 000, leaving a balance of N$593 847,22, which balance includes interest up to and including 31 August 2018.

Ms Reinet Binneman

[18] Ms Binneman testified that prior to April 2016, she was employed by Mrs Bierman, the former owner of the pharmacy. During November 2015, the employees of the Bismarck Medical Centre, were informed by Dr Bierman and Mrs Bierman (as a collective, 'the Biermanns') that the defendant wanted to buy the entire practice and pharmacy from the Biermanns.

[19] It was her evidence that two pharmacists were appointed in the pharmacy, namely Ms Rianda Holmberg and Ms Danielle Ras. She testified further that she does not know who appointed them. The defendant's daughter, Ms Marna Oosthuizen, was the manager and attended to payments and salaries in relation to the pharmacy. Ms Oosthuizen also handled all payments. She testified that as members of staff, they were told that the defendant would take over the pharmacy as from 1 March 2016, however the defendant actually took over on 1 April 2016.

[20] She testified that she never thought that the pharmacy belonged to Ms Rianda Holmberg or any other person. It was her impression that the pharmacy belonged to the defendant, as he was the one who made the decisions and he paid their salaries as staff of the pharmacy.

[21] She adduced evidence to the effect that she recalled that Ms Rianda Holmberg was requested to complete forms for the pharmacy on the instructions of the defendant and she was under the impression that these related to the registration of the pharmacy. She also recalled that there were times that Ms Rianda Holmberg complained that she had not received her entire salary.

[22] It was her evidence that Ms. Rianda Holmberg resigned and left during or about September 2016 but she, the witness, stayed on but in the course of time, also resigned. She testified that she never worked for Ms Rianda Holmberg, and that she was employed at all times by the defendant. It was also her impression that after Ms Rianda Holmberg resigned, Mr Jacques Marais' name was used as owner of the pharmacy, but she is unsure whether he actually purchased the pharmacy. She said this was because, even when Mr. Jacques Marais was at the pharmacy, which was not often, she still got the impression that he answered to the defendant and that it was the defendant's pharmacy.

Dr Koster

[23] He testified that, he is a major male, a duly registered medical doctor. As from April 2016, he was employed by the defendant as a medical doctor at Bismarck Medical Centre. The defendant paid his salary.

[24] Prior to that, the defendant employed him at his practice in Olympia, Windhoek. At the beginning of 2016, the defendant informed him that he was looking for a pharmacist under whose name he could operate the Bismarck Pharmacy, which he was in the process of buying as part of the sale of the Bismarck Medical Centre.

[25] It was his evidence that previously, Mrs Santjie Bierman owned that pharmacy. As far as he knew, the pharmacy belonged to the defendant as from April 2016 and onwards. He is not aware of any other owner of the pharmacy.

[26] The defendant, he further testified, was the one who made decisions in respect of the pharmacy and he operated it. According to Dr Koster's evidence, the defendant managed the pharmacy as if he owned it. He testified that as far as he is aware, all income of the pharmacy was paid into the defendant's account. As he did not, at that time, have his own practice number, all his fees were also paid into the defendant's account.

[27] He operated under the defendant's practice number at the time. There were separate accounts for the medical fees and the pharmacy, although he had no access or insight into these respective accounts. During or about January 2016, and while Ms Rianda Holmberg was employed by Mrs Santjie Bierman as a locum pharmacist at Bismarck Pharmacy, the witness introduced her to the defendant.

[28] He testified that he was aware that the defendant offered her employment and that he eventually paid her less than what he had promised. Dr Koster testified that the defendant did the same to him in that he paid him less than what had been agreed between the parties.

[29] Lastly, it was his evidence that the defendant also personally told him that he had agreed with Ms Rianda Holmberg and Ms Danielle Ras that, after five years, they would share ownership in the pharmacy with him.

Ms Rianda Holmberg

[30] She testified that she is a major female person and duly qualified as a registered pharmacist. At the beginning of 2016, she was employed by Victoria Pharmacy in Windhoek. Some time prior to April 2016, Dr Henk Koster, approached her and informed her that the defendant wanted to purchase the Bismarck Family Medical Practice in Swakopmund, including the Bismarck Pharmacy, he informed her further that the defendant was looking for a pharmacist to run the pharmacy on his behalf. Dr

Koster asked her whether she would be willing to move to Swakopmund and take up employment at Bismarck Pharmacy with the defendant.

[31] It was Ms Holmberg's evidence that Bismarck Pharmacy was known to her as she had, in the past, performed locum services there for the previous owner, Mrs Bierman. Shortly thereafter, the defendant contacted her telephonically and informed her that he may not in terms of the law formally own a pharmacy. For that reason, he needed someone to 'run' the pharmacy on his behalf. He wanted to make her as head pharmacist and that the pharmacy would be operated under her continued supervision.

[32] She further testified that the defendant offered her a salary of N$100 000 per month. The defendant further told her that after 54 months, he would offer her shares in the building where the medical practice and pharmacy were housed. She accepted the offer and started her move to Swakopmund to take up employment with the defendant at the Pharmacy.

[33] It was her evidence that the defendant told her that he would have to register the pharmacy as being under her continuous supervision for legal requirements. The pharmacy, however, belonged to the defendant. She cannot say whether the defendant legally owned the pharmacy or not, but he did, in truth and in fact, own the pharmacy, she further testified. It was her evidence that she never purchased the pharmacy and that, she never paid for it. She was, at all times, employed by the defendant as a supervising pharmacist.

[34] Ms. Holmberg testified further that, the defendant requested her to sign a number of documents in order to register her as the head pharmacist. She was not provided with copies of these documents and she also cannot recall all these documents. It was her evidence that she merely signed as instructed by the defendant. She expressly denied that she ever entered into any agreement with Mrs Bierman for the purchase of the pharmacy.

[35] It was her evidence further that when she started her employment with the defendant at the Pharmacy, the defendant informed her that she should order medication and supplies from Geka Pharma. She, however, told the defendant that she preferred doing business with the plaintiff as she had a good working relationship with the plaintiff over a number of years. The defendant agreed to her suggestion and said he would arrange for the opening of an account for the pharmacy with Mr Marius Gouws, the Marketing Director of the plaintiff.

[36] Ms Holmberg testified that the end of April 2016, Mrs Bierman and her husband, Dr Bierman, asked to see her. The Biermans, according to her evidence, were the ones who sold the Bismarck Medical Centre and Pharmacy to the defendant — as far as she was aware, the purchase price was about N$21 000 000 but she is not certain of the exact figure. They informed her that the defendant had apparently not paid them in accordance with their sale agreement and, as a result, they are going to take over the medical practice and pharmacy again and that she should thus vacate the pharmacy, which she did. Two weeks later, the defendant apparently paid Dr Bierman and his wife and she was called back to the pharmacy by the defendant personally to resume her duties.

[37] She testified that all payments to the Bismarck Pharmacy went into the defendant's bank accounts. She never received any income from the pharmacy except for the salary the defendant paid her monthly. Shortly after she started placing orders for medication, the defendant approached her and reprimanded her because he was of the view that she was ordering excessive stock. She testified that she explained to him that, in order to manage a pharmacy profitably, one must, amongst others, make use of ‘deals’, i.e. where medication is ordered in certain quantities or combinations in order to secure better prices.

[38] Finally, she testified that, one evening, she noticed that the lights in the pharmacy were still on and she went in to investigate. She found Ms Danielle Ras

packing medication to be returned on the instruction of the defendant because he felt that the pharmacy was overstocked. The plaintiff then closed its case.

Bases for absolution from the instance

[39] At the close of the plaintiff's case, Mr. Mouton, for the defendant indicated that he wished to move an application for absolution from the instance.

[40] The defendant's application for absolution from the instance rests on the premise that there is no evidence placed before court upon which a court, acting reasonably, can be satisfied that the plaintiff established a prima facie case, requiring an answer from the defendant.

[41] The defendant submitted that out of the five witnesses called by the plaintiff, only one, Mr. Marius Gouws, gave evidence pertaining to the oral agreement allegedly concluded between the parties and that is one of the major issues that had to be resolved during trial.[2]

[42] The defendant held the view that the other four witnesses were called to prove that the defendant is the owner of the pharmacy. The defendant submitted that this is not a triable issue or an issue of fact that needed to be resolved during trial, neither in the pleadings nor in terms of the pre-trial order.

[43] The defendant's basis for this submission was that the plaintiff had the onus to prove the oral agreement allegedly concluded between Mr Marius Gouws representing the plaintiff and the defendant, acting personally.

[44] Mr Mouton further attacked the plaintiff's evidence in that Mr Gouws, did not know the reasons why certain credits and debits were made on the 'Statement of Account' and in respect of the invoices so reflected on the statement of account.

[2] Defendant's heads of argument para 10, part C.

Further, he was the marketing director and he was not in control of, or in the financial department of the plaintiff. These are some of the submissions on evidence, amongst others, on the defendant's behalf.

[45] Mr Barnard, for the plaintiff, highlighted the issues that the plaintiff had to prove according to the joint pre-trial report filed by the parties. At the core of the plaintiff's case, in terms of the pre-trial order, it had to prove that:

'45.1 The conclusion of the agreement with Dr Jordaan contemplated in paragraph 1.1 thereof;

45.2 Whether the plaintiff had sold and delivered to the defendant, the goods that were referred to in paragraph 1.2 thereof;

45.3 Whether the defendant paid to the plaintiff the amount reflected in paragraph 1.6 thereof;

45.4 Whether, as reflected by paragraph 1.7 of the pre-trial order, a balance of N$593 847.22, including interest, remained due and payable by defendant to the plaintiff as at 31 August 2018.'[3]

[46] Mr Barnard submitted that Mr Gouws presented a clear and basic evidence concerning and underpinning the conclusion of the agreement that the plaintiff relies upon, in his witness statement.

[47] He further submitted that the applicable legal principles on absolution from the instance at this stage of the proceedings are that it is not whether such evidence is correct or not. It is also not appropriate at this stage to attempt to make an evaluation of the evidence or to consider other evidence for the purposes of determining whether such further evidence contradicts the basic evidence given by Mr Gouws. He added that, at this juncture of the proceedings, Mr Gouws' evidence should be taken as correct.

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[3] Paragraph 3 of the plaintiff's heads of argument, p 2.

Applications for absolution from the instance

[48] Applications for absolution form the instance, are governed by the provisions of rule 100. The said rule provides the following:

'At the close of the case for the plaintiff the defendant may apply for absolution from the instance in which case the –

(a) the defendant or his legal practitioner may address the court;
(b) the plaintiff or his legal practitioner may reply; and
(c) the defendant or his legal practitioner may thereafter reply to any matter arising out of the address of the plaintiff or his legal practitioner.'

[49] The plaintiff cited a plethora of cases in its heads of arguments. One particular case referred to was the case by Prinsloo, J *in Katiti v Namibia Institute of Pathology Ltd*[4], which laid out the principles of applications from absolution.

'[34] The applicable test to be applied by a trial Court when absolution from Wthe instance is sought at the close of the plaintiff's case has been stated by Miller AJA in the matter of Claude Neon Lights (SA) Ltd v Daniel:[5]

'… when absolution from the instance is sought at the close of the 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. (Gascoyne v Paul and Hunter, 1917 TPD 170 at p. 173; Ruto Flour Mills (Pty) Ltd v Adelson (2), 1958 (4) SA 307 (T)).'

[4] *Katiti v Namibia Institute of Pathology Ltd* (HC-MD-CIV-ACT-CON-2019/02012) [2022] NAHCMD 54 (11 February 2022).

[5] *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409 G – H.

[50] The plaintiff further referred the court to matter of *De Klerk v Absa Bank Ltd and others*[6] by Schutz JA. The question in this case was whether the plaintiff had crossed the low threshold of proof that the law sets when a plaintiff's case is closed but the defendant's is not.

[51] In *Okorusu Fluorspar (Pty) Ltd v Tanaka Trading and Another*,[7] this court, in dealing with an application for absolution from the instance referred to *Gordon Lloyd Page and Associates v Rivera and Another,*[8] where Harms J.A. stated the principles applicable to the application in the following terms:

'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 from the instance because without such evidence, no court could find for the plaintiff. . . . As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be reasonable one . . . 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 . . . – a test which had its origin in jury trials when the "reasonable man" was a reasonable member of the jury . . . 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.'

[52] The plaintiff further referred to *Rosherville Vehicle Services (Edms) Bpk v Bloemfonteinse Plaaslike Oorgangsraad,*[9] which cited the following remarks:

'[42] C W H Schmidt Law of Evidence, loose leave edition at 3-16 to 3-18, the learned author stated that 'if the plaintiff's case is based on a document and the interpretation of the

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[6] *De Klerk v Absa Bank Ltd and others 2003* (4) SA 315 (SCA).

[7] *Okorusu Fluorspar (Pty) Ltd v Tanaka Trading and another* (I 2055/2013) [2016] NAHCMD 16 (5 February 2016).

[8] *Gordon Lloyd Page and Associates v Rivera and Another* 2001 (1) SA 88 (SCA) at 93.

[9] *Rosherville Vehicle Services (Edms) Bpk v Bloemfonteinse Plaaslike Oorgangsraad* 1998 (2) SA 289 (O) at 293 B-C and 293 G-H and 296 G

document is in dispute, the interpretation on which the defendant relies must be virtually beyond doubt before his application for absolution can succeed.'

[53] The defendant referred the court to the case of *Brenner v Doeseb*,[10] by Swanepoel AJ, this matter focused on the issue of diverting from the pleadings during trial and stated the following:

'[27] Without an appropriate amendment to the declaration, the plaintiff has not succeeded to prove what he alleged and is bound to be met with an order of absolution from the instance.'

[54] The defendant further referred the court to the matter of *Billy v Mendonca*.[11] This case relied on the principles laid down in *Stier v Henke*.[12] It is unnecessary to deal in much detail with the law applicable to applications for absolution from the instance, for the reason that the position of the law in this regard is trite. To the extent necessary, the cited cases above, I believe set out the principles applicable.

Application of the law to the facts

[55] The defendant referred the court to the case of *Brenner v Doeseb*,[13] by Swanepoel AJ. This matter dealt with the issue of a plaintiff diverting from the issues as pleaded in the pleadings and further made it clear that the plaintiff cannot rely on a cause of action that is not properly pleaded and the only recourse for the plaintiff, is to amend the pleadings.

[56] I am of the opinion that findings of that matter are completely different from the matter at hand. The issues tried in this matter are those that are set out in the pre-trial

[10] *Brenner v Doeseb* 2010 (1) NR 279.

[11] *Billy v Mendonca* (I3954/2013) [2020] NAHCMD 242 (18 June 2020)

[12] *Stier v Henke*, 2012 (1) NR 370 (SC) at para 20.

[13] *Supra.*

order and the plaintiff has not diverted from those issues of fact and law to be determined at trial.

[57] I agree with Mr Barnard in his submission regarding the applicable legal principles to absolution from the instance. The test at this stage of the proceedings is not whether such evidence is correct or not. It is also not appropriate at this stage to attempt to make an evaluation of the evidence or to consider other evidence for the purposes of determining whether such further evidence contradicts the basic evidence given by Mr Gouws.

[58] The defendant's argument that the plaintiff should be bound by the pleadings and that the plaintiff has not made out a prima facie case as to the terms of the oral agreement cannot be proved at this juncture.

[59] Further, the defendant is of the view that the evidence presented by the plaintiff is rather destructive to the allegations made in the pleadings pertaining the oral agreement allegedly concluded by the parties. I find it in the interest of justice to have the defendant granted an opportunity to have his case heard.

[60] There is an oral agreement alleged by the plaintiff and its terms have been pleaded to and evidence presented by the plaintiff, the defendant therefor has a case to answer to. Whether or not the plaintiff's witnesses are credible or not, this is not the juncture to determine that.

[61] I find it apposite, at this juncture, to quote from the works of the learned authors, Herbstein *et al*, where they state the following in relation to such applications:[14]

'In deciding whether or not absolution should be granted, the court must assume that in the absence of very special circumstances, such as the inherent unacceptability of the evidence adduced, the evidence true. The court should not at this stage evaluate and reject the plaintiff's

[14] Herbstein & Van Winsen, *The Civil Practice of the Supreme Court of South Africa*, 4th ed, Juta & Co, 1997, p 683.

evidence. The test to be applied is not whether the evidence led by the plaintiff establishes what will finally have to be established.'

[62] If I were to give in to the entreaties advanced spiritedly by Mr Mouton, I would in effect be departing from the applicable legal principles stated by the learned authors above. The court is, in the circumstances, entitled to assume, in the absence of inherent unacceptability of the plaintiff's evidence, that it is true. I do not find that the special circumstances exist in this case to require a departure from the beaten track. This accordingly calls for the dismissal of the application.

[63] That is not all. The same authors proceed to state the following:[15]

'An application for absolution from the instance stands on much the same footing as an application for the discharge at the end of the case for the prosecution in a criminal case. If the defence is something peculiarly within the knowledge of the defendant and the plaintiff has made out some case to answer, then the plaintiff should not lightly be deprived of a remedy without first hearing what the defendant has to say. A defendant who might be afraid to go into the witness box should not be permitted to shelter behind the procedure of absolution from the instance.'

[64] I find these sentiments apposite in the present matter. That plaintiff has adduced some evidence that requires the defendant to come into the witness box and state his side of the story. The defendant, among other things, denies that he owned the pharmacy in question and is therefor not liable to pay the amounts claimed. The evidence by the plaintiff's witnesses contradict that version as pleaded and put in cross-examination to the plaintiff's witnesses. It would thus be inappropriate and unjust for the court to terminate the proceedings at this juncture and in this manner, with some questions requiring an answer and which only the defendant is competent and available to answer and clarify. He should have his day in the witness' box and advance his case as put in cross- examination to the plaintiff's witnesses.

Conclusion

[15] *Op Cit* p 682.

[65] In the premises, I am of the considered view that the application for absolution from the instance cannot succeed in the present circumstances. In *De Klerk v Absa Bank Ltd,*[16] the court reasoned as follows on an application for absolution:

> 'The question in this case is whether the plaintiff has crossed the low threshold of proof that the law sets when a plaintiff's case is closed but the defendant's is not.'

[66] In view of the discussion that precedes the conclusion of this judgment, it is my considered view that the necessary threshold has been reached by the plaintiff in this matter. In that regard, the defendant should be called to his defence.

Costs

[67] The applicable principles to costs are hardly a matter of controversy. The costs follow the event. In the instant case, there is nothing that requires the court to depart from this beaten track. No submission was made that would require the court to, in its discretion, order otherwise, nor does it appear from a full consideration of the attendant facts that the general rule as to costs should not apply.

[68] In the premises, I am of the considered view that the following order appears to me to be condign in all the circumstances of this case:

1. The application for absolution from the instance is hereby dismissed.
2. The Defendant is ordered to pay the costs, consequent upon the employment of one instructing and one instructed Counsel.
3. The matter is postponed to **23 May 2024** at **08:30** for setting dates for continuation of the trial.

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[16] *De Klerk v Absa Bank Ltd* 2003 (4) SA 315 (SCA) at 321A.

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T S MASUKU

Judge

APPEARANCES:

PLAINTIFF: T. A Barnard
Instructed by: Dr Weder, Kauta & Hoveka Inc., Windhoek

DEFENDANT: C. Mouton
Instructed by: Van der Merwe-Greef Andima Inc., Windhoek