REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON ABSOLUTION

Case No.: HC-MD-CIV-ACT-CON-2022/01707

In the matter between:

VICTORIA EMMA NAOXAS T/A UIBASEN SERVICES **PLAINTIFF**

and

STACKS PROPERTY INVESTMENTS 69 CC **FIRST DEFENDANT**

ELLY HOAKHAOB **SECOND DEFENDANT**

Neutral citation: *Victoria Emma Naoxas t/a Uibasen Services v Stacks Property Investments 69 CC* (HC-MD-CIV-ACT-CON-2022/01707) [2024] NAHCMD 311 (13 June 2024)

Coram: SIBEYA J

Heard: **6, 8 and 13 March 2024**

Delivered: **13 June 2024**

Flynote: Practice – Absolution from the instance – Plaintiff instituted a contractual claim for damages based on breach of contract – Test for absolution from the instance restated – Absolution should be granted where plaintiff has not established its case and proceeding with a trial constitutes a waste of time – Plaintiff *prima facie* established that there was a tacit agreement between the parties and further that Stacks exercised the option to buy the vehicle – Absolution from the instance refused.

Summary: Serving before court is an opposed application for absolution from the instance. The plaintiff claims that the defendants breached a vehicle rental agreement which had a clause of an option to purchase. The plaintiff alleges that on 16 November 2021, Mr Hoakhaob duly representing Stacks, offered to purchase a 2017 Iveco bus owned by the plaintiff ('the vehicle'), on the terms of clause 11 of the Rental Agreement with an option to buy, that was concluded between the plaintiff and Stacks on 5 February 2021.

The first respondent (Stacks) stated in the plea that it took possession of the vehicle in September 2020 in terms of the lease agreement but never exercised the option to purchase the vehicle. Stacks contends that the offer to purchase lapsed on 30 November 2020. In any event, contended Stacks, the rental agreement lapsed on 31 August 2021, and the option similarly lapsed and could not be enforceable thereafter. The defendants, resultantly, called for the dismissal of the plaintiff's claim with costs.

Held: that emphasis should not be placed on the label but rather on the substance of the evidence led in determining whether there was a tacit agreement between the parties or not.

Held that: it was established on a *prima facie* basis that although the plaintiff testified that she does not know what a tacit agreement is, she went on to testify about facts that suggests that there was a tacit agreement between the parties, resultantly, the court finds on a *prima facie* basis that the defendants' argument that a tacit agreement was not established lacks merit.

Held further that: the plaintiff, *prima facie*, established that Stacks exercised the option to purchase the vehicle and undertook to pay the purchase price in monthly installments, which it failed to do.

ORDER

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1. The defendants' application for absolution from the instance is refused.

2. The first and second defendants must, jointly and severally, the one paying the other to be absolved, pay the plaintiff's costs for opposing the application for absolution from the instance.
3. The matter is postponed to 27 June 2024 at 08h30 for allocation of dates for continuation of trial.

RULING

SIBEYA J:

Introduction

[1] Serving before court is an opposed application for absolution from the instance. The plaintiff's claim that the defendants breached a vehicle rental agreement which had a clause of an option to purchase.

[2] The plaintiff's raised two claims. The first claim was for breach of the agreement emanating from the defendants' alleged failure to pay rental amounts from February 2022, totaling an amount of N$262 854. This claim became settled between the parties. The only live claim is, therefore, claim two. In the second claim, plaintiff alleges that the first defendant offered to purchase the plaintiff's motor vehicle, which offer the plaintiff accepted.

[3] The first defendant, however, plaintiff claims, failed to pay the purchase price of the motor vehicle despite possessing it, resulting in the plaintiff suffering damages in the amount of N$713 812,60. The plaintiff further claims interest on the said amount at the rate of 20 percent per annum calculated from date of judgment to date of final payment, together with costs of suit. The defendants defended the action.

The parties and legal representation

[4] The plaintiff is Ms Victoria Emma Naoxas t/a Uibasen Services, an adult businesswoman trading under the name and style of Uibasen Services and who resides in Swakopmund.

[5] The first defendant is Stacks Property Investments 69 CC, a close corporation dully registered as such in terms of the Close Corporation laws of the Government of the Republic of Namibia, with its principal place of business situated at Unit 7, JQC Smart Parts, Grenbach Industrial Park, Nelson Mandela Avenue, Swakopmund. The first defendant shall be referred to as 'Stacks'.

[6] The second defendant is Mr Elly Hoakhaob, an adult businessman and member of Stacks, and whose address of service is the address of Stacks.

[7] Where reference is made to the first and second defendants jointly they shall be referred to as 'the defendants' whilst where reference is made to the plaintiff and the defendants jointly, they shall be referred to as 'the parties'.

[8] The plaintiff is represented by Mr Avila while the defendants are represented by Ms Shifotoka.

The pleadings

[9] The plaintiff claims, in the particulars of claim, that on 16 November 2021, Mr Hoakhaob duly representing Stacks, offered to purchase a 2017 Iveco bus owned by the plaintiff ('the vehicle'), in terms of clause 11 of the Rental Agreement with an option to buy, that was concluded between the plaintiff and Stacks on 5 February 2021. It is alleged that the written agreement was preceded by an oral written agreement. The plaintiff claims that Stacks offered to purchase the vehicle for the amount of N$713 812,60, which she accepted.

[10] The plaintiff claims further, in the particulars of claim, that Stacks was to commence monthly payments of N$60 227,94 inclusive of the value added tax (VAT) towards the purchase price of the vehicle in January 2022. Stacks which had possessed the vehicle subject to the rental agreement with effect from 25 September 2020, remained with the vehicle to the subsequent sale agreement.

[11] The plaintiff claims that after the termination of the initial agreement, the parties conducted themselves in a manner that give rise to an inference that they

both desired to revive their contractual relationship on the same terms as before. As a result, she contends, a new (tacit) agreement was concluded on 1 September 2021, between her and Stacks, on the same terms except for the following changes:

(a) That the rental term shall commence on 1 September 2021 until duly cancelled;

(b) That Stacks has the option to buy the vehicle at the amount of N$713 812,60 inclusive of VAT and may pay it instalments of N$60 227,94 starting from 31 January 2022, and thereafter on or before every end of the succeeding month.

[12] The plaintiff claims that Stacks breached the agreement by failing to pay the monthly instalments of the purchase price. She contends that it is not vehicle to repossess the vehicle as it is no longer roadworthy. As a result, she claims the purchase price of the vehicle from Stacks.

[13] The defendants, in their plea, admitted the written lease agreement of the vehicle with an option to purchase. The defendants stated further, *inter alia*, that Stacks did not accept the offer to buy the vehicle neither did it exercise the option to purchase the vehicle, hence it did not comply with the later part of clause 11 of the agreement to pay the instalments towards the purchase of the vehicle. The defendants contend that, consequently, clause 11 became unenforceable.

[14] Stacks further stated in the plea that it took possession of the vehicle in September 2020, in terms of the lease agreement but never exercised the option to purchase the vehicle. Stacks contends that the offer to purchase lapsed on 30 November 2020. In any event, contended Stacks, the rental agreement lapsed on 31 August 2021, and the option similarly lapsed too and could not be enforceable. The defendants, resultantly, called for the dismissal of the plaintiff's claim with costs.

Evidence led

[15] The plaintiff took to the stand and testified, *inter alia*, that on 5 August 2020, Mr Hoakhaob informed her that Stacks secured a cleaning tender at Husab Mine and needed a vehicle to transport its employees to and from the mine. She expressed reservations about renting out her vehicle as she had past unpleasant experiences.

Mr Hoakhaob proposed to rent the vehicle with an option to purchase. She stated that she accepted the proposal.

[16] The plaintiff testified further that on 21 September 2020, she met Mr Hoakhaob and he informed her that he still intended to purchase the vehicle for Stacks. They agreed on the terms of the agreement and she provided him with a written agreement. On 25 September 2020, Mr Hoakhaob took possession of the vehicle. Stacks paid rental for in November and December 2020. She testified further that Stacks was in arrears with the rental and had not paid towards the purchase price of the vehicle. She stated that, when questioned, Mr Hoakhaob informed her that the first defendant obtained a loan at high interest rate and once that account is settled in April 2021, Stacks would settle its arrear rentals and the outstanding invoices for the purchase price of the vehicle. She handed to Mr Hoakhaob the three months outstanding invoices for the rentals and the invoices for the four unpaid instalments towards the purchase price of the vehicle.

[17] The plaintiff testified further that only on 5 February 2021, did Mr Haokhaob sign the written lease agreement of the vehicle with an option to buy following several reminders to sign same. The written agreement provided, *inter alia*, that the rental term will be from 1 September 2020 to 31 August 2021 at a monthly rental of N$21 390. It was agreed that Stacks was afforded an opportunity to inspect the vehicle before taking possession of it and it was in good order. The agreement has an option to buy.

[18] The plaintiff testified further that Stacks defaulted with the rental payments and there were several reminders as a result. In an email of 30 July 2021, Ms Job, an employee of the plaintiff reminded Mr Hoakhaob of the outstanding rentals and further stated that it was apparent that Stacks could not afford to pay the purchase of the vehicle. On 31 August 2021, the written agreement lapsed by effluxion of time, while Stacks still possessed the vehicle. On 1 September 2021, Stacks made a rental payment for the month of March 2021.

[19] The plaintiff testified further that on 22 September 2021, she met Mr Hoakhaob to discuss the outstanding rentals. The suggested date of the meeting of 16 September 2021, appearing in paragraph 53 of the witness statement was

corrected to 22 September 2021. At the meeting, they agreed on a payment arrangement and further that Stacks would also purchase the vehicle as initially agreed to between the parties. On 16 November 2021, Ms Job followed up on the payment arrangement. Ms Irene, on behalf of the defendants, responded that Stacks was still awaiting payment from the mine, and that from 30 November 2021, Stacks would pay N$23 000 for the rental and would commence in January 2022 to make payments towards the purchase price of the vehicle. The plaintiff testified that she accepted this proposal. The email communications were received into evidence. On 24 January 2022, Ms Job, in an email, followed up on the arrangement to start making monthly payments towards the purchase price of the vehicle.

[20] The plaintiff testified that Stacks never paid the purchase price of the vehicle. Around 7 June 2023, and in the documents discovered by the defendants, she noticed an invoice from R.G Vehicle Solutions ('RG') who are alleged to have carried out repairs on the vehicle. She testified that Mr Hoakhaob took the vehicle to RG despite being aware that the vehicle was insured and that the plaintiff informed him that the vehicle should only be repaired at an Inveco garage.

[21] The plaintiff testified further that, together with her legal representative, they went to RG on 12 June 2023, and found the vehicle parked while exposed to the elements of weather for an extended period of time, it began to rust and was in a horrible state. She towed it to her place and it was not roadworthy.

The law on absolution

[22] Damaseb JP in *Dannecker v Leopard Tours Car & Camping Hire CC*[1] said the following on the applicable law to absolution from the instance:

> 'The test for absolution at the end of plaintiff's case
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> [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

[1] *Dannecker v Leopard Tours Car & Camping Hire CC* (I 2909/2006) [2015] NAHCMD 30 (20 February 2015) paras 25-26.

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 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’

[23] It is plain from the above authority that the plaintiff is required to make out a *prima facie* case regarding all the elements of the claim. This is so as in the absence of such evidence, the court will not find in favour of the plaintiff.[2]

[24] The Supreme Court in *Stier and Another v Henke*[3] considered the test for absolution from the instance and remarked as follows:

‘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.’

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[2] *Factcrown Ltd v Namibia Broadcasting Corporation* 2014 (2) NR 447 (SC) para 72.

[3] *Stier and Another v Henke* (SA 53 of 2008) [2012] NASC 2 (3 April 2012) para 4.

[25] It follows, therefore, that during the assessment of the evidence led for the plaintiff at this stage, such evidence is accepted as true unless it is inherently improbable as to be rejected outright. The rationale behind this approach is that, before court, is only the plaintiff's evidence. Consequently, in the absence of evidence to gainsay it, or such evidence being inherently improbable, there is good reason to accept such evidence as true, since it is the only evidence available.

Analysis

[26] The plaintiff testified that the parties entered into a tacit agreement on 1 September 2021, where all the terms of the written agreement formed were the terms of the tacit agreement except clause 4 regarding the mileage, and the date in clause 11.

[27] It is common cause between the parties that Mr Hoakhaob introduced himself to the plaintiff as the owner and managing director of Stacks, authorised to act for Stacks and eventually signed the written agreement on behalf of Stacks. During subsequent discussions and arrangements, I find on a *prima facie* basis that Mr Hoakhaob acted for Stacks as this was, *inter alia*, a continuation of the earlier written agreement. Any suggestions by the defendants that Mr Hoakhaob was not authorised by Stacks to enter into an agreement with the plaintiff regarding the vehicle, as intimated in the plea, is found, on a *prima facie* basis, to constitute an afterthought and lack merit.

[28] Ms Shifotoka argued that the plaintiff testified that she does not know what a tacit agreement is yet her claim is based on an alleged tacit agreement. This contention, in my view can be deposed of with ease. It is indeed true that the plaintiff testified in cross-examination that she does not know what a tacit agreement is but she proceeded to state that after the written agreement lapsed on 31 August 2021, they discussed and agreed that the agreement should continue on the same terms as that of the written agreement. The defendants retained the vehicle in their possession and continued to make rental payment arrangements and indeed paid rental for the vehicle.

[29] I am of the considered opinion that emphasis should not be placed on the label but rather on the substance of the evidence led. I hold the *prima facie* view that although the plaintiff testified that she does not know what a tacit agreement is, she went on to testify about facts that suggests that there was a tacit agreement between the parties. Resultantly, I find on a *prima facie* basis that the defendants' argument that a tacit agreement was not established, lacks merit.

[30] Clause 11 of the agreement signed by the parties, which is not in dispute, read:

'11. OPTION TO BUY

The Renter has the option to buy the vehicle at the total cost of N$713,812.60VAT included and may pay it in installments of N$60,227.94 VAT included per month starting for 30 November 2020 till 31 August 2021, on or before every month end. Any default on payment by the Renter will entitle the owner to the interest on arrears at the rate of 10%. None payment of installment for more than 30 days periods will entitle the Owner to cancel the OPTION TO BUY and the Renter will on be refunded 75% of the total payments made in respect of the OPTION TO BUY.'

[31] The question that forms the center-stage of this matter is whether or not Stacks exercised the option to buy or not?

[32] Ms Shifotoka argued with all force and might that the plaintiff testified that Stacks exercised the option to purchase the vehicle at a meeting held on 16 September 2021, yet there was no meeting between the parties on 16 September 2021. It should be remembered that the plaintiff, in her testimony, corrected the date of the meeting to 22 September 2022.

[33] Ms Shifotoka took issue with the email of 16 November 2021, in that it emanated from Ms Irene and not Stacks where it was stated that '…We will from this month end make payment of N$23, 000 for the rental and the buy off installment we start next year February.' Ms Shifotoka contended that Stacks did not authorise the content of the email. The email from Ms Irene was sent from the email address of Mr Hoakhaob. The plaintiff testified that Ms Irene worked for Stacks, and the content of her email of 16 November 2021, was a continuation of the discussions and

agreement that she had with Mr Hoakhaob. I, therefore, find on a *prima facie* basis, that there is no merit in the argument that the content of the email of Ms Irene of 16 November 2021, was not authorised by Stacks.

Conclusion

[34] I am alive to the fact that I am not required at this stage of the proceedings to make conclusive findings and, therefore, I leave myself open to persuasion after considering the defendants' case and further arguments.

[35] In view of the findings and conclusions made hereinabove, I find that the plaintiff, *prima facie*, established that Stacks exercised the option to purchase the vehicle and undertook to pay the purchase price in monthly installments, which it failed to do. I am therefore, of the considered view that the plaintiff's evidence, at least on a *prima facie* basis, supports the relief sought. As a result, and on the strength of the remarks in *Dannecker supra*, absolution from the instance ought to be refused.

Costs

[36] It is an established principle of our law that costs follow the result. No reasons were advanced to depart from the said principle. The plaintiff succeeded to ward off the application for absolution from the instance, therefore deserves to be awarded costs.

Order

[37] In the premises, it is ordered that:

1. The defendants' application for absolution from the instance is refused.
2. The first and second defendants must, jointly and severally, the one paying the other to be absolved, pay the plaintiff's costs for opposing the application for absolution from the instance.
3. The matter is postponed to 27 June 2024 at 08h30 for allocation of dates for continuation of trial.

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O S SIBEYA

JUDGE

APPEARANCES

PLAINTIFF:	R Avila Of Metcalfe Beukes Attorneys, Windhoek.
DEFENDANTS:	E Shifotoka R Williams Attorneys, Walvis Bay