

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: I 116/2013

In the matter between:

ECLIPSE INVESTMENTS (PTY) LTD

PLAINTIFF

and

AUTO TECH TRUCK & COACH CC

DEFENDANT

Neutral citation: *Eclipse Investments (Pty) Ltd v Auto Tech Truck & Coach CC* (I 116/2013) [2017] NAHCNLD 57 (26 June 2017).

Coram: CHEDA J

Heard: 16.03.2017; 17.03.2017

Delivered: 26 June 2017

Flynote: The test for absolution from the instance is 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. It is not should, nor ought. This remedy being a drastic measure should be granted sparingly and only when the occasion arises. The court should only order it in the interest of justice.

Summary: Plaintiff and defendant entered into a sale agreement which was partly written and partly oral. Defendant terminated it which plaintiff accepted. However final payment of the truck which was to be purchased by plaintiff was outstanding. Plaintiff alleged that it was depended on defendant keeping the agreement alive. At the end of plaintiff's case, defendant applied for an absolution from the instance. The application was dismissed as plaintiff had established a *prima facie* case which necessitated defendant to give his side of the story.

ORDER

1. The application for absolution from the instance is dismissed;
2. Defendant is ordered to pay the costs of this application; and
3. The trial shall proceed accordingly.

JUDGMENT

CHEDA J:

[1] Plaintiff issued out summons against defendant for the sum of N\$94 747-17 plus interest *tempore morae* at 20% per annum from the date of judgment to date of final payment. Plaintiff and defendant are business entities, are registered companies and carry out their respective businesses in Tsumeb.

[2] During the month of August 2012 the parties entered into a partially written and partially oral agreement. Plaintiff was represented by Edgar da Fonseca while defendant was represented by Rainer Arangies. The material terms and conditions of the agreement were that:

- a) plaintiff was to purchase a Hino Truck from defendant for N\$189 700 inclusive of Value Added Tax and finance charges;

- b) plaintiff would pay a deposit of N\$30 000 towards the purchase price of the said truck;
- c) that the proceeds of a cleaning contract entered into between Waterlily Investments Ten CC and plaintiff would be utilized on a monthly basis to defray the purchase price of the truck; and that
- d) defendant would repair the Hino Truck and deliver same to plaintiff after repairing it.

[3] It was plaintiff's evidence that it defrayed the costs of the truck by paying a total of N\$94 747-17 by way of utilization of the proceeds emanating from the Waterlily contract as agreed.

[4] On the 22 March 2013, defendant unilaterally terminated the said agreement and changed the terms of agreement by demanding payment in the sum of N\$278 000. Plaintiff accepted the termination, but, not the new price of the truck. In turn, plaintiff demanded its refund in the sum of N\$94 747-17 from defendant.

[5] Defendant in its plea denied owing plaintiff the amount of N\$94 747-17. It denied that the purchase price of the truck was N\$189 700, but, that the purchase price was N\$180 000 exclusive of finance charges and Value Added Tax as well as licence fees. In addition, thereto, it denied that plaintiff would take possession of the vehicle after paying a deposit.

[6] It further denied that plaintiff complied with the material terms of the agreement and specifically denied that plaintiff paid a deposit of N\$30 000. It further averred that plaintiff is in breach of the agreement by not paying the balance of N\$174 257 which was inclusive of the Value Added Tax, licence fees and finance charges.

[7] Plaintiff through Mr. Edgar Da Fonseca gave evidence. His evidence was that he and Arangies have known each other for a long time and have previously done business together. He maintained that Mr. Arangies unilaterally cancelled the agreement and the cancellation rendered him unable to pay for the truck. Mrs. Da Fonseca also gave evidence in support of her husband. It was her evidence that

indeed plaintiff entered into an agreement with defendant for the purchase of a truck on the terms and conditions stipulated above.

[8] Mr. Fonseca produced documentary evidence pertaining to the contract. A letter of termination of the said contract together with other supporting documents were also produced in court. This is the evidence which has been submitted by plaintiff.

[9] At the close of plaintiff's case, defendant applied for an absolution from the instances. The basis of its application is that plaintiff has failed to establish a *prima facie* case against defendant and therefore defendant has no case to answer at this stage.

[20] An absolution from the instance is a remedy which is available to a defendant who at the close of plaintiff's case is of the view that plaintiff has at that stage failed to establish a *prima facie* case against it. The test for absolution from the instance was clearly and authoritatively set out in the celebrated case of *Gordon Lloyd Page & Associates v Rivera* 2001 (1) SA 88 (SCA) at 92-93, where Harms JA remarked:

“[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H in these terms:

‘... (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 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 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T).’

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* 4th 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 interests of justice.”

[21] It is clear from the authorities that the court should be concerned with its own judgment and not that of any other court. In other words it interrogates its own assessment, furthermore, the absolution stage is not the time to make announcement of credibility, see *De Clerk No v SA Metal & Machinery (Pty) Ltd* [2001] (4) AR SA 27 (E) at 33-34.

[22] The question to be asked at this stage is that: is there evidence upon which the court ought to give judgement in favour of the plaintiff? This principle was founded in *Gascoyne v Paul & Hunter* 1917 TPD 170 and has been applied in many cases. It was applied with equal force in *De Clerk v ABSA Bank Ltd & others* 2003 (4) SA 315.

[23] In this jurisdiction I had occasion to deal with a similar situation where this principle was an issue. It was in the matter of *Gerhard Amadhila v Amwaandangi* (I 16/2014) [2017] (NAHCNLD delivered 08/05/2017) where I reasoned that in as much as this route was available to a party which is of the view that no prima facie case has been established by plaintiff, these courts are slow in granting such application as its consequence is to deprive the other party, the right to be heard. I still hold the same view that it should be granted sparingly.

[24] Plaintiff has established the existence of a contract whose fulfilment to a large extent depended on defendant’s performance. This aspect is disputed by defendant.

It is this aspect which among other terms is a catalyst in these proceedings. At this stage it remains for me to say whether the evidence before me as presented by plaintiff is the kind of evidence upon which a court, applying its mind reasonably to such evidence could or might find for it. It is certainly not “should or ought to.”

[25] Evidence led this far established the existence of a partly verbal and partly oral. The written agreement was not signed by the parties. There exists various correspondence which confirm some discussions between the parties. This, to me can only point to an establishment of a *prima facie* case for plaintiff. The existence of a contract between the parties shows that defendant has demonstratively proved a *prima facie* claim against defendant. Plaintiff has discharged that onus. Having done so the matter should be allowed to proceed to the next stage.

[26] Defendant is entitled to defend plaintiff's claim which defendant has always done. At this stage, the court is in the dark with regards to the circumstances surrounding this case. In order for the court to make a proper determination it should be presented with both sides of the story by oral evidence of the parties. Such knowledge cannot be acquired if both parties are not allowed to present their cases before the court in the circumstances.

[27] While absolution from the instance is a remedy available to a litigant and in *casu* defendant, it should be granted where plaintiff has failed to establish a *prima facie* case at the end of its case. At the same time, such remedy should not be granted willy-nilly as its final effect tends to shut out plaintiff's opportunity to cross examine defendant and defendant from giving evidence. It is a process where plaintiff's case is dismissed without testing defendant's defence where the need to do cries out loudly.

[28] In line with that, it should not be granted at the spur of the moment, see *Gerhard Amadhila v Amwaandangi* (*supra*) where I stated:

‘ [30] It will not be in the interest of justice to allow the trial to rumble on where it is objectively clear that there is no iota of evidence which can persuade the court at this stage to knee-jerk as it were, towards plaintiff's direction. However, the courts should

always be slow in shutting out legitimate proceedings at every stage whenever words “absolution from the instance” are mentioned. This, therefore calls for caution from the court. The words “absolution from the instance” should not be viewed as a mantra.’

[29] It will be in the interest of justice that both parties should be heard, so that the court can make a free and informed decision based on the facts as presented by the parties. It is perhaps also necessary for me to add that the court at this stage has not formed an opinion as to the requisite proof required in civil trials, but, allows the trial to continue in order to hear the other side, a must, as it is in accordance with the rules of natural justice.

[30] In the result the following is the order:

1. The application for absolution from the instance is dismissed;
2. Defendant is ordered to pay the costs of this application; and
3. The trial shall proceed accordingly.

M Cheda
Judge

APPEARANCES

APPELLANT: T. Shilemo
Of Inonge Mainga Attorneys, Ongwediva

RESPONDENT: J. Greyling
Of Greyling & Associates, Oshakati
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