



NOT REPORTABLE

CASE NO: SA 60/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

YEUQUAN HUANG

Appellant

and

PETRUS NEVONGA

First Respondent

CHRISTIAN IITOPE

Second Respondent

JINHAO INVESTMENT CLOSE CORPORATION

t/a SUPER FOODS

Third Respondent

Coram: SHIVUTE CJ, SMUTS JA and FRANK AJA

Heard: 2 July 2021

Delivered: 15 July 2021

Summary: In 2015, the appellant (hereinafter the plaintiff), and the first and second respondents (hereinafter the first and second defendants) entered into a written association agreement for the formation of the third respondent/defendant, a close corporation (the CC). Of importance to the appeal is clause 2.5 of the agreement which provides that the plaintiff would contribute N\$3 200 000 to the capital contribution, whilst the first and second defendants would jointly make a capital contribution of N\$4 800 000 to the CC. The parties agreed that the plaintiff

would make a total contribution of N\$4 800 000 which would include his capital contribution and a further sum of N\$1 600 000 as loan assistance to the first and second defendants. It was further agreed that first and second defendants would jointly repay the loan sum to the plaintiff within six months whereafter the sum would accumulate interest. In an action against the defendants, the plaintiff brought three claims including one for the repayment of the loans and an alternative claim for enrichment (per his amended particulars of claim). The defendants admitted to the agreement, but denied that the plaintiff made payments as provided in the agreement. Plaintiff sought to prove his case by testifying that he effected certain payments from certain bank accounts to that of the CC's. During his evidence-in-chief, plaintiff sought to hand in exhibits in the form of print-outs from banks confirming certain payment instructions in respect of the amounts claimed. The defendants objected to the admissibility of the documents in the absence of a banking official who generated them being called to testify to this. Defendants brought an application for absolution from the instance. In its decision, the court *a quo* found that the plaintiff failed to establish that he paid the amounts claimed for and granted absolution from the instance with costs.

On appeal, plaintiff abandoned claims 2 and 3 in his heads of argument. As the defendants placed payment of the loan amount in dispute, the plaintiff had the duty to adduce evidence of such payment (which was effected via bank transfers) in order to escape the consequence of absolution. Although plaintiff did not call or subpoena an official of the bank to testify so as to prove the making of those payments, the defendants had not disputed the discovered documents relied upon at case management stage under High Court rule 27(8). The documents were regarded as admissible and it was not open to the defendants' practitioner to object to their admissibility. These admissible documents together with the plaintiff's evidence were sufficient to avert absolution.

Held that, absolution should be granted sparingly and that the plaintiff had placed sufficient evidence before court to avoid absolution.

The appeal is upheld with costs.

APPEAL JUDGMENT

SMUTS JA (SHIVUTE CJ and FRANK AJA concurring):

[1] This appeal concerns the question of proving payment in an action based upon a loan. The High Court found that the appellant, as plaintiff, failed to do so and granted absolution at the close of his case. The plaintiff appeals against that ruling. The parties are referred to as plaintiff and defendants.

The pleadings

[2] The plaintiff and the first and second defendants in 2015 entered into a written association agreement for the formation of the third defendant close corporation (the CC). In terms of that agreement, the plaintiff would acquire and hold a 40 per cent member's interest in the CC with the first and second defendants each having 30 per cent.

[3] Of relevance to this appeal, is clause 2.5 of the agreement which provides that the plaintiff agreed to contribute N\$3 200 000 as his capital contribution to the CC whilst the first and second defendants would jointly contribute N\$4 800 000. The parties further agreed that the plaintiff would however make a total payment of the sum of N\$4 800 000 which included not only his own contribution of N\$3 200 000, but the further sum of N\$1 600 000 as loan assistance to the first and second defendants who would jointly repay that sum to the plaintiff. The plaintiff was thus in terms of the agreement to pay the sum of N\$1 600 000 to the CC on behalf of the defendants who agreed to repay this loan to the plaintiff within six months whereafter the sum would accumulate interest as specified.

[4] Claim 1 of the plaintiff's action is for the repayment of that loan together with interest.

[5] The plaintiff in claim 2 sought the repayment of the sum of N\$1 245 427,62 from the defendants on the ground that it was a capital over contribution on his part.

[6] Claim 3 is for the repayment of N\$300 000 which the plaintiff claims was loaned to the CC.

[7] The particulars of claim were amended to introduce enrichment claims in the alternative to each of these claims.

[8] Claims 2 and 3 are no longer relevant in this appeal as they have been abandoned in the plaintiff's heads of argument.

[9] In their plea, the defendants admit the agreement and its terms, but deny that the plaintiff made payment as provided for in the agreement and as alleged in claims 2 and 3. The defendants further pleaded that if it were to be found that the plaintiff made those payments to the CC, that these were not on behalf of the defendants. This despite the clear terms of the agreement to the contrary. The plaintiff did not however except to this untenable averment. This issue is not however relevant to this appeal as it concerns the proof of payment of the amounts to the CC.

Pre-trial procedures and case management

[10] The parties filed a pre-trial report which was made an order of court. The issues to be resolved were essentially those in dispute on the pleadings relating to the plaintiff's and defendants' performance in terms of the agreement. Under the heading 'list of exhibits', the parties stated that they had discovered and that any party intending to make a supplementary discovery was to do so by 20 June 2019, three months ahead of the trial date. The plaintiff and third defendant discovered prior to the pre-trial report. Surprisingly first and second defendants had not done so. In accordance with the pre-trial order, the plaintiff filed a supplementary discovery affidavit on 20 June 2019. No further status hearings were conducted in the course of judicial case management (JCM).

Evidence

[11] The plaintiff testified that he effected certain payments from his own bank account and that of Jack's Trading CC, owned and controlled by him, to the CC. During his evidence-in-chief he sought to hand in exhibits in the form of print-outs from the banks confirming certain payment instructions in respect of the amounts referred to in those documents. These payment instructions were not all uniform as they were effected by two different banks. Some were entitled 'notification of payment' and indicated that a specified sum had been paid from either the plaintiff's own banking account or that of Jack's Trading CC in which he said he held the entire membership. The recipient was identified as the CC. Those were issued by First National Bank. There were also items headed 'Funds transfer contract input'. These were issued by Nedbank and indicated that sums were transferred from the plaintiff's Jack's Trading CC's account to the CC's banking account.

[12] During the trial, counsel for the defendants objected to the admissibility of these documents in the absence of the banking officials who generated the documents being called. The trial judge admitted the documents and ruled that the parties could later address him on the weight to be attached to those documents.

[13] In support of claim 2, the plaintiff testified that at a meeting of the CC at which he and the first and second defendants were present, the accountant of the CC reported that he (the plaintiff) had made the capital overpayment claimed and that the first and second defendants agreed to pay back their *pro rata* portion to the plaintiff. This was claimed to be contained in a transcript of the meeting. The plaintiff, who was present at that meeting, confirmed the correctness of the transcribed minutes and sought to hand in the minutes as an exhibit. Despite this, the defendants' counsel objected on the grounds of hearsay and the court incorrectly upheld this misplaced objection, citing the fact that the document was unsigned.

[14] The plaintiff also testified that his business associate made certain payments to the CC on behalf of the plaintiff from an account in her own name and handed in print-outs generated by First National Bank in support of the payments contended for. These print-outs were in similar form to the First National Bank print-outs tendered by the plaintiff but indicated that the sums in question had been debited from her account and credited to the CC's First National Bank account.

[15] The plaintiff thereafter closed his case and the defendants sought absolution from the instance on the ground that the plaintiff had failed to establish payment of the sums in question.

The approach of the High Court

[16] The court granted absolution from the instance with costs. It did so because it found that the plaintiff had not established that he had paid the amount of N\$4,8 million in support of claim 1 to the CC.

[17] Absolution was also granted in respect of claims 2 and 3. The reasons for granting absolution in respect of claims 2 and 3 are not relevant as the plaintiff has only taken issue in his heads of argument filed on his behalf with the absolution granted in respect of claim 1.

Submissions of the parties

[18] Counsel for the plaintiff contended that bank print-outs of payment instructions or notifications handed in by the plaintiff and his assistant constituted proof of payment of those sums. Counsel referred to rule 28(7) of the rules of the High Court and pointed out that the defendants had not disputed the discovered documents during case management and that they were admissible under rule 28(7) as a consequence. Plaintiff's counsel also referred to rule 95 and the effect of a notice to admit documents being given resulting in a party being considered to have admitted those documents after being called upon in that notice to admit such documents. That rule is not applicable as the plaintiff had not given the

defendants notice to admit documents in accordance with rule 95 and form 21. Counsel however argued that in JCM practice, the effect of a notice under rule 95 is visited upon documents discovered where no objection is made under rule 28(7). Defendants' counsel confirmed this to be the state of JCM practice.

[19] The defendants' counsel argued that in the face of the denial of payment to the CC by the plaintiff, it was incumbent upon him to prove payment of the amounts in question. It was contended that the bank print-outs did not establish payment and that the High Court was justified in granting absolution.

The test for absolution

[20] The well established test for absolution was confirmed by this court to be:

“. . . (W)hen 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, 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).)”¹

Both parties to this appeal accepted that this encapsulates the test for absolution.

Application of that test

[21] The defendants placed in issue that the plaintiff had made the payment to the CC as claimed in the amended particulars of claim. During cross-examination, it emerged that there were two banking accounts in the name of the CC – one held

¹ *Stier & another v Henke* 2012 (1) NR 370 (SC) para 4 quoting from *Gordon Lloyd Page & Associates v Rivera & another* 2001 (1) SA 88 (A) and *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409 G-H.

with First National Bank and the other with Nedbank. It was also put to the plaintiff that he had the sole control over the CC's account held with Nedbank.

[22] As the defendants placed payment in issue, the plaintiff had a duty to adduce evidence of payment of the amounts in question in order to escape the consequence of absolution.

[23] The plaintiff had made use of his own banking account and that of Jack's Trading CC, solely owned by him, and his business associate's bank account in order to make his payments under the agreement and as alleged. Payment was thus effected by these banks via bank transfers. Officials of the banks in question would ordinarily be required to testify in order to prove that those payments were made. The plaintiff did not however call such witnesses nor subpoena them to give evidence of those payments. Inexplicably, the plaintiff's practitioner failed to compel discovery of the CC's bank accounts which may also have established that such payments had been received by the CC. Even though the third defendant had discovered (and surprisingly not the first and second defendants), he seemed unaware that he could call for the delivery of the third defendant's bank statements and accounting records under rule 28(8) and (9) of the High Court Rules in the face of the palpable inadequacy of the third defendant's discovery.

[24] Despite this, had the plaintiff done enough to avoid absolution bearing in mind that absolution should only sparingly be granted, as was stated by Harms JA in *Gordon Lloyd Page* approved by this court in *Stier*.² Plaintiff's counsel forcefully contended that, in the wake of rule 28(7) and JCM practice, his client had met the

² Para 4.

low threshold to avoid absolution in respect of claim 1 as the payment print-outs from his own banking account and that of Jack's Trading CC in respect of payment instructions given by him exceeded the amount he was contractually bound to inject into the CC under clause 2.5 of this agreement. The plaintiff also testified that his payment instructions were to credit either of the two banking accounts held by the CC. The documents also reflected that the CC was the designated beneficiary of the payment instructions. The plaintiff testified that the banks in question gave effect to his instructions set out in the documents.

[25] Rule 28(7) of the High Court rules provides:

'(7) When the parties prepare a case management report referred to in rule 24 for the purpose of the case management conference –

- (a) the discovery affidavit referred to in subrule (4) must form part of such report;
- (b) unless a document, analogue or digital recording listed under subrule (4)(a) is specifically disputed for whatever reason, it must be regarded as admissible without further proof, but not that the contents thereof are true;
- (c) if the admissibility of a document, analogue or digital recording referred to in subrule (4) is disputed, the party disputing it must briefly state the basis for the dispute in the report.'

[26] Sub-rule 28(4)(a) sets out the documents to be discovered in possession of a party where no objection to produce is raised.

[27] The bank print-outs relied upon were discovered by the plaintiff. Whilst these are in terms of sub-rule 28(7)(b) to be regarded as admissible without further proof, the contents would still need to be established under this sub-rule. It was

thus not open to the defendants' counsel to object to the admissibility of the documents, as he did during the trial, having not disputed their admissibility during case management. The parties to the appeal accepted as a practice which has evolved in JCM that where a party has not disputed a document it would have the effective status of documents where a notice to admit had been given under rule 95.

[28] Given the overriding objective of the High Court Rules based upon JCM to 'facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively', it is understandable that the proof of documents should be facilitated which are not disputed.

[29] In view of both parties' understanding of the practice contended for and the import of rule 28(7) and the evidence presented, absolution in this matter should not have been granted. Once the documents are not disputed, they are regarded as admissible. In view of the plaintiff's evidence of his payment instructions from his own and Jack's Trading CC's banking accounts, reflected in those documents in favour of the CC, it would appear that the plaintiff has provided *prima facie* evidence of payment in respect of claim 1 to avert absolution. I do however point out that the practice as understood by both counsel is not compatible with the rules, as currently formulated. Whilst discovered documents not disputed are to be regarded as admissible without further proof, if parties seek to rely upon the truth of their contents, they would need to be proven in the ordinary course. The way for litigants to avoid providing that proof when intending to rely upon the contents of documentary evidence is to make use of rule 95 read with Form 21 to give notice

to the other party to admit those documents which will result in those documents being proved at trial without the need to call witnesses to prove them.

Costs

[30] In the order of the High Court which accompanied the written reasons given by the court, the plaintiff was ordered to pay costs on a punitive scale, as between legal practitioner and own client. No reasons were given for this extraordinary costs order. Defendants' counsel pointed out to us that no such order was sought at the time. There is also no basis on the record for a special order of costs, let alone one on this very punitive scale. It would seem to have been made mistakenly and would, even if the appeal were to have been dismissed, require correction. But that does not arise, given that absolution should not have been granted.

[31] The following order is made:

1. The appeal is upheld with costs which include the costs of one instructing and one instructed legal practitioner.
2. The order of High Court is set aside and replaced with the following:

'Absolution from the instance is refused with costs.'

3. The matter is remitted to the High Court for further case management consistent with this judgment and order.

SMUTS JA

SHIVUTE CJ

FRANK AJA

APPEARANCES

APPELLANT:

T Chibwana

Instructed by Appolos Shimakeleni
Lawyers, Windhoek

RESPONDENT:

K Amoomo

Of Kadhila Amoomo Legal
Practitioners, Windhoek