

“ANNEXURE 11”
Practice Directive 61

IN THE HIGH COURT OF NAMIBIA

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| Case Title: DIETER MUELLER and SHINYA INVESTMENTS CC AND OTHERS | Case No: I 62/2016 |
| | Division of Court: MAIN DIVISION |
| Heard before TOMMASI J | Date of hearing: 27 September 2019 |
| | Delivered on: 5 March 2020 |
| | Reasons delivered on: 09 March 2020 |
| Neutral citation: <i>Mueller v Shinya Investments CC</i> (I 62/2016) [2020] NAHCMD 84 (09 March 2020) | |
| Results on merits: | |
| The order: Having heard MR SWANEPOEL on behalf of the Plaintiff and ADV BOESAK on behalf of the Defendant, and having read the documents filed of record: IT IS ORDERED THAT: <ol style="list-style-type: none">1. The application for absolution of the instance is dismissed;2. The second and third defendants are ordered to pay the costs thereof jointly and severally, the one paying and the other being absolved.3. The matter is postponed to 25 March 2020 to determine a date for continuation of trial. | |
| Reasons for orders: | |
| TOMMASI J, [1] The 2 nd and 3 rd Defendants herein applied for absolution of the instance at the end of the Plaintiff's case. | |

[2] The main points made by the defendants are (i) that the plaintiff has no locus standi in the present circumstances since the commission, if proven true in the matter, should have been due to and payable to the estate agency and not him personally. Furthermore, the rules of this honourable court provides for the filing of a sworn declaration in regards to a cession, but seemingly excludes circumstances where a legal practitioner is acting on behalf of the cessionary; (ii) that the plaintiff was not the effective cause of the sale insofar as it ultimately resulted in the offer to purchase that was accepted by second defendant on or about 07 October 2015 or subsequently; (iii) that two intervening acts occurred, which effectively dealt a death blow to the plaintiff's claim of commission, i.e. the lapse of the first deed of sale on 12 July 2015; and the fact that the second defendant was forced to make arrangements and plans for an auction of the farm on 08 October 2015; (iv) that the plaintiff failed to prove the claim for 8% of the purchase price as per the particulars of claim.

[3] Plaintiff responded as follows to the above issues: (i) that the issues now raised do not form part of the pre-trial order; (2) that the pleadings and the testimony of Daphne Swanepoel was that she was at all relevant times the holder of a valid fidelity fund certificate as in compliance with section 26 of the Estate Agents Act 112 of 1976. This evidence was not challenged or refuted; and in any event the case of *Noragent (Edms) Bpk v De Wet* 1985 (i) 263 (T) still finds application in Namibia and was applied in *Claud Bosch Architects CC V Auas Business Enterprises Number 123 (Pty) Ltd* 2018 (1) NR 155 (SC); (ii) that Daphne Swanepoel ceded her commission to the plaintiff and there is no prohibition in law, prohibiting her to cede her commission to another estate agent; (iii) that the evidence support a finding that there was an open mandate by both defendants which was never cancelled; they introduced the buyer to the defendants and referred the correspondence between the various parties involved in the sale which was ultimately concluded. (iv) that the mandate of the agent was not cancelled and the sellers were still keen on selling the property after the first agreement lapsed; and that the property was sold before the auction; (v) that sufficient evidence was adduced that the defendants agreed to pay commission of 6% on the selling price plus vat. This evidence was not refuted.

[3] In *Fish Orange Mining Consortium (Pty) Ltd v Goaseb And Others* 2018 (3) NR 632

(HC)) page 637- 638, para 25, Masuku J, stated as follow:

'With reference to case law, the following principles were extracted:

(a) (T)his application is akin to an application for a discharge at the end of the state's case for the prosecution in criminal trials ie in terms of s 174 of the Criminal Procedure Act — General Francois Olenga v Spranger, *infra* at 13 para 35;

(b) the standard to be applied, is whether the plaintiff, in the mind of B the court, has tendered evidence upon which a court, properly directed and applying its mind reasonably to such evidence, could or might, not should, find for the plaintiff — Stier and Another v Henke;

(c) the evidence adduced by the plaintiff should relate to all the elements of the claim, because in the absence of such evidence, no court could find for the plaintiff — Factcrown Limited v Namibian C Broadcasting Corporation;

(d) in dealing with such applications, the court does not normally evaluate the evidence adduced on behalf of the plaintiff by making credibility findings at this stage. The court assumes that the evidence adduced by the plaintiff is true and deals with the matter on that basis. If the evidence adduced by the plaintiff is, however, hopelessly poor, vacillating or of so romancing a character, the court may, in those circumstances, grant the application — General Francois Olenga v Erwin Spranger, and the authorities cited therein;

(e) the application for absolution from the instance should be granted sparingly. The court must generally speaking, be shy, frigid, or cautious in granting this application. But when the proper occasion arises, and in the interests of justice, the court should not hesitate to grant this application — Stier and General Francois Olenga v Spranger (*supra*).'

[4] I have considered the points raised by the defendants and I shall briefly deal with them. The lack of locus standi was raised for the first time in application for absolution and not recorded in the pre-trial order. The court could find for the plaintiff in light of this objection. Evidence has been adduced that: (i) a mandate has been given; (ii) the mandate was not cancelled; (iii) Plaintiff introduced the buyer to the sellers; and (iv) An agreement between the parties was concluded. The court could, without making credibility findings, conclude on the available evidence that the plaintiff was the effective cause of the sale. The two intervening acts are alleged by the defendants and the onus lies on the one who allege to prove the allegations. Evidence has been adduced that there was an agreement to pay commission and the court could find in favour of the plaintiff in this regard.

[5] In light of the above the following order is made:

1. The application for absolution of the instance is dismissed;
2. The second and third defendants are ordered to pay the costs thereof jointly and severally, the one paying and the other being absolved.
3. The matter is postponed to 25 March 2020 to determine a date for continuation of trial.

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| Judge's signature: | Note to the parties: |
| | Not applicable. |
| Counsel: | |
| Applicant | Respondent |
| Adv A W Boesak on instruction of Dr Weder, Kauta & Hoveka Inc Windhoek | P J Swanepoel of Philip Swanepoel Legal Practitioners Windhoek |