

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON APPLICATION FOR ABSOLUTION FROM THE INSTANCE

CASE NO: I 582/2010

In the matter between:

FISH ORANGE MINING CONSORTIUM (PTY) LTD

PLAINTIFF

and

GHANDY GERSON !GOASEB

FIRST DEFENDANT

JOSE N. SHIPEPE

SECOND DEFENDANT

EMINENT MINING HOLDING (PTY) LTD

THIRD DEFENDANT

MINISTER OF MINES AND ENERGY

FOURTH DEFENDANT

Neutral citation: *Fish Orange Mining Consortium (Pty) Ltd v !Goaseb*
(I 582/2010) [2018] NAHCMD 154 (8 June 2018)

CORAM: MASUKU J

Heard : 4, 5, 6, 7 September 2017 and 8 February 2018

Delivered: 8 June 2018

Flynote: Civil Procedure – application for absolution from the instance – Rules of Court - Rule 100 – principles governing the application discussed – requirement for absolution from the instance - whether or not the plaintiff set

out a *prima facie* case – Law of Evidence - whether failure to examine an expert who has filed his report results in the court attaching no value to the expert report – commercial value attached to the Exclusive Prospecting Licence – court's discretion on how the value of the EPL License is computed.

Summary: The plaintiff sued the defendants for payment of an amount of N\$ 5 Million. The amount claimed is in respect of the plaintiff sustaining damages as a result of the unlawful and wrongful transfer of a exclusive prospecting licence (E.P.L.) caused by the 1st and 2nd defendants to the 3rd defendant. At the close of the plaintiff's case, the 1st and 2nd defendants brought an application for absolution from the instance on the following grounds - first, the defendant submitted plaintiff failed to lead admissible evidence of an expert to prove that the EPL has some commercial value which would in turn prove the amount of damages allegedly suffered by the plaintiff. The second point of argument related to the laws relating to the issue of extraction of minerals and that the plaintiff did not have the licence to mine and remove the minerals for sale.

Held: That the plaintiff had led evidence to suggest that the transfer of the licence by the said defendants was unlawful.

Held further: That the plaintiff did place evidence before court by an expert regarding the value of the E.P.L. (subject to certain safeguards) and that the court was not entitled to disregard that evidence merely because the said expert was not examined, considering that his report was admitted by the consent of the parties.

Held: That the E.P.L. does have some commercial value and it is the duty of the court, subject to hearing the evidence of the defendants, that has to decide what damages, if any, had been proved by the plaintiff.

Held further that: The awarding of damages is primarily the duty of the court and not that of the expert witness.

Held: That the plaintiff had succeeded to meet the threshold of absolution from the instance, namely that it had adduced evidence upon which a court acting reasonably may find for the plaintiff.

The application for absolution from the instance was thus refused with costs and the defendants were ordered to open their defence.

ORDER

1. The application for absolution from the instance is hereby dismissed.
2. The First and Second Defendants are ordered to pay the costs thereof jointly and severally, the one paying and the other being absolved, consequent upon the employment of one instructing and one instructed Counsel.
3. The matter is postponed to 21 June 2018 at 08:30 for setting dates for continuation of the trial.

RULING

MASUKU J:

Introduction

[1] At the close of the case for the plaintiff, the defendant moved an application from the instance, alleging that for reasons to be adverted below, the plaintiff had failed to make a case requiring the defendants to be placed to their defence.

[2] In this ruling, the court will undertake, to the extent necessary, the evidence led, together with the argument by both parties and come to a decision whether the defendants are correct in their application.

Background

[3] By combined summons dated 26 February 2010 the plaintiff, a company, duly incorporated in accordance with the company laws of this Republic, sued the defendants for payment of an amount of N\$ 5 Million. This amount was claimed in respect of allegations that the plaintiff sustained damages for pure economic loss, caused by the unlawful and wrongful transfer of a exclusive prospecting licence, hereafter referred to as the 'EPL' from it to the 3rd defendant, Eminent Mining Holding (Pty) Ltd. I should pertinently mention that no relief whatsoever, was sought against the Minister of Mines and Energy.

[4] The claim was defended by the defendants, culminating in a trial in which the plaintiff called a single witness Mr. Lourens Le Grange, to whom I shall refer as such or as 'PWI'. Another witness, who had been intimated to be called as an expert witness, ended up not adducing any oral evidence, although his expert report was handed in by the consent of the parties. His role was simply limited to handing up his expert report, which was received in evidence. He was therefor never examined by either party.

The plaintiff's evidence

[5] The plaintiff's sole witness, to whom I shall refer as PW1, as previously stated, testified as follows: He is the sole director of the plaintiff and also a 10% shareholder in the plaintiff. In 2005, he was approached by the 1st defendant who came up with a proposal to fund a diamond mining enterprise on the North bank of the Orange River. The 3rd defendant proposed in that regard that a new company be incorporated which will lease an EPL or a mining licence for a short period, after which the plaintiff would then apply for its own EPL in the event an a prospecting area becomes vacant.

[6] In this regard, a shelf company was purchased in 2005, bearing the name Bellissima Investment Twenty Seven (Pty) Ltd. The directors of the company were PW1 and the 1st defendant. Shareholders in the said company were the Henriette Trust, holding 85% of the shares, the 1st defendant with 5% and PW1 holding the balance of 10%. The name of the company was subsequently changed to Fish Orange Mining Consortium (Pty) Ltd, the plaintiff herein.

[7] It was PW1's further evidence that on 19 August 2001, the Henriette Trust concluded an agreement with Veralex Industries Ltd to carry out mining as a sub-contractor on Block 11, Sectors C and D under mining licence 130. PW1 represented the Trust and one Mr. Yury Naumov represented Veralex. The agreement was essentially to conduct exploration, mining, production and marketing of precious stones and minerals under licence ML 130 on Block 11, Sectors C and D. The plaintiff had to use its own funds to purchase equipment and to fund the operation, PW1 further testified.

[8] PW1 testified further that he went to South Africa where he bought all the necessary machinery and equipment for the activities and that the Trust provided the finance through loans to the Le Grange Family Trust to the plaintiff. He testified that the agreement between the plaintiff and Veralex was sanctioned by the 4th defendant's ministry in October 2005. Mining commenced and proceeded for about a period of two months until December 2005.

[9] It was PW1's evidence that the 1st defendant was appointed as a security officer and that all the operational expenses for the project, which amounted to N\$ 1, 442, 300, were funded by the Henriette Trust, including the 1st defendant's salary in his aforesaid capacity. In January 2006, the plaintiff then applied for an EPL for precious stones and base and rare minerals. This was in respect of an area extending to 20 000 ha.

[10] It was his further evidence that in around May 2006, the 1st defendant informed him that the Ministry of Mines and Energy required the BEE (Black

Economic Empowerment) component of the shareholding in the plaintiff to be increased. As a result, the 1st defendant's shareholding in the plaintiff was increased to by an additional 10% to 15% and the 2nd defendant was given 7%. PW1's shareholding was at 10%. After this restructuring of the shareholding in the plaintiff, the EPL was granted to the plaintiff on 22 May 2006, valid until 21 May 2009.

[11] In the course of time, operations became difficult because of the amount of money required. A decision to sell the shareholding in the plaintiff to an interested party was taken. In this regard, the 1st and 2nd defendants took the decision to give PW1 a power of attorney to sell their shareholding in the plaintiff for USD 800 000. An offer was received from an entity known as Namibia Mining Holdings for the amount of N\$ 5 840 000. An agreement for the sanctioning of the sale was reached with the Ministry but the purchaser failed to abide by the contract.

[12] In September 2007, a decision was taken to sell the shareholding in the plaintiff to the Henriette Trust. An agreement was then entered into between the Henriette Trust and an entity known as Ramador 105 (Pty) Ltd in terms of which the latter would purchase the shareholding of Henriette Trust in the plaintiff and an approval of this was obtained from the Ministry. This sale also did not see the light of day as the purchaser failed to deliver in terms of the agreement.

[13] The 1st defendant in February 2008 requested the original EPL from PW1, as he needed to see a new potential buyer, who was desirous of confirming the authenticity of the EPL. PW1 obliged and gave the EPL to the 1st defendant. It later transpired that the 1st and 2nd defendants took the EPL and caused same to be transferred to their own company, the 3rd defendant. The approval for this transfer was sought and obtained from the Ministry.

[14] PW1 further testified that he was unaware of the transfer and was only made alive thereto when he had to make payment for annual licence fees. A meeting was later held at which the 1st defendant was removed as directors of

the plaintiff. The EPL later lapsed because it was not renewed by the 3rd defendant into whose name it was transferred. That was the extent of PW1's evidence.

[15] Mr. Namandje, for the defendants cross-examined PW1 at length regarding his evidence. I am not required to traverse the entire terrain covered by Mr. Namandje in his lengthy and searching cross-examination of PW1. I do so for the reason that I do not need, at this stage, for reasons that will be apparent, as the judgment unfolds, make any credibility findings. I will only put what I can refer as propositions and instructions to PW1 on behalf of the defendants.

[16] In cross-examination, PW1 conceded that the EPL did not allow the plaintiff to remove and sell controlled minerals as a different licence for doing same was required. He conceded that the plaintiff had not at the stage of the transfer of the EPL applied for the mining licence, which would enable the plaintiff to remove controlled minerals. PW1 further conceded that the damages claimed by the plaintiff against the relevant defendants were based on the valuation of diamonds that would be extracted and sold, which are controlled minerals in terms of the relevant legislation.

Bases for absolution from the instance

[17] In his submissions, Mr. Namandje submitted that the plaintiff's claim should be shot down by an application for absolution from the instance at two different levels. Both levels, properly considered, relate to the argument that the plaintiff dismally failed to make a case for damages. This, it was submitted, was subject to the court finding that the plaintiff had in any event, made out a case for the alleged unlawful transfer of the licence by the 1st and 2nd defendants, which the said defendants hotly dispute.

[18] First, it was his submission that the plaintiff had failed to lead admissible evidence of an expert to prove that the EPL has some commercial value which would in turn prove the amount of damages allegedly suffered by

the plaintiff as a result of the transfer. It was, in this regard submitted that the court should grant absolution as no admissible was adduced in court regarding the damages claimed by the plaintiff. In this regard, the court was asked to take into account that the expert that had been intimated to be called did not adduce any evidence, thus dealing the plaintiff's case a shattering blow such that it could not withstand the application for absolution from the instance.

[19] The second leg of the argument relates to the legislative regime that applies in this Republic. In this regard, it was argued that when one has proper regard to Constitution of this Republic, together with laws promulgated that have a bearing on the issue of extraction of minerals, it is clear that the plaintiff has failed to prove the damages he seeks. In this regard, it was submitted that a cursory reading of the Constitution and the Minerals (Prospecting and Mining) Act,¹ the ownership of minerals to be found in relation to any land, vest in the State.

[20] In this connection, it was submitted, and forcefully so, that the plaintiff's EPL was merely confined to prospecting for minerals in terms of s. 68 of the Act and it did not have the licence to remove, sell and dispose of controlled minerals from the place where they were found. In this regard, it was argued that the amount of damages claimed by the plaintiff took into account the removal, sale and disposal of the controlled minerals, which was legally impossible for the plaintiff to do in view of the limited nature of the licence then held by the plaintiff.

[21] I now need to consider the sustainability of the argument advanced by Mr. Namandje. It is necessary though, before I do so, to first deal, albeit briefly with the law that appertains to applications for absolution from the instance as can be found in case law. I turn to do so presently.

Applications for absolution from the instance

¹ Act No. 33 of 1992.

[22] Applications for absolution, which is what I will call them from this point, 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.’

[23] The rule-maker, unfortunately, did not set out the principles that are to apply in applications from the instance. In that regard, the court has to rely on written judgments, in order to determine the principles, which shall thereafter be applied. In this regard, there is a plethora of case law that deals with this matter and cases that readily come to mind include *Factcrown Limited v Namibia Broadcasting Corporation*²; *Stier v Henke*³; *Aluminium City CC v Scandia Kitchens & Joinery (Pty) Ltd*⁴; *Lofty Eaton v Grey Security Services of Namibia (Pty) Ltd*⁵ and *Bidoli v Ellistron t/a Ellistron Truck and Plant*.⁶

[24] Counsel on both sides do not appear to quibble at all about the applicable principles as the relevant case law is clear and I shall state it below. The disparity may just be on the actual application of the principles to the facts. One of the classic judgments on this issue, and which is cited in this jurisdiction, with reckless abandon, as it were, is *Gordon Lloyd Page & Associates v Rivera and Another*,⁷ where Harms JA commented as follows regarding an application for absolution:

² Case No. SA 35/2011.

³ 2012 (1) NR 370 (SC) at 373.

⁴ 2007 (2) NR 494 (HC).

⁵ 2005 NR 297 (HC).

⁶ 2002 NR 451 (HC) at 453D-F.

⁷ 2001 (1) SA 88 (SCA) at 92H-93A.

‘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 . . . 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.’

[25] In *Ramirez v Frans and Others*,⁸ this court dealt with the application and the principles applicable. With reference to case law, the following principles were extracted:

‘(a) this application is akin to an application for a discharge at the end of the case for the prosecution in criminal trials i.e. in terms of s. 174 (4) of the Criminal Procedure Act – *Olenga v Spranger*.

(b) the standard to be applied, is whether the plaintiff, in the mind of 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 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 – *Olenga v Spranger*;

(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 v Henke* and *Olenga v Spranger*.’

⁸ (I 1968/2015) [2017] NAHCMD 341 (29 September 2017).

[26] I will, in dealing with this application, apply the principles stated in the immediately preceding paragraphs or so many of them that may be applicable in this particular case.

Application of the law to the facts

[27] In his submissions, Mr. Namandje argued that without admitting it, the plaintiff predicated its claim on the wrongful transfer of the licence, which founds the claim for damages. There was argument, and it would appear to me, on first principles, that the claim to that extent was *prima facie* established, with all the requisites.

[28] The only major question that has to be determined, in respect of both arguments raised on the defendant's behalf, is whether if a plaintiff establishes a claim for damages, by meeting all the requirements of the action, it should nonetheless be non-suited by having its claim defeated by an application for summary judgment. Put differently, would the court be correct in finding that the court may not find for the plaintiff only because there is no evidence that calculates the amount of damages to the cent?

[29] In the first instance, it has been correctly submitted on behalf of the plaintiff that the parties in this matter, and this is common cause, attempted to sell the E.P.L. on two occasions and the price assessed for same, was in the region of N\$ 5 million or even a bit more. In this regard, I am of the considered view that with the work that was put into obtaining the E.P.L., including the feasibility study, geological report and environmental impact assessment and management plan, provisions of water and other relevant matters, it can be said without fear of contradiction, that the E.P.L., notwithstanding that it cannot, at the moment, enable the holder to do actual mining and remove the minerals and sell and dispose of them, is, however, of some commercial value.

[30] That being the case, it would seem to me that it would be the high watermark of injustice for the court, where the plaintiff has, otherwise made a

prima facie case that it is entitled to some damages, to then grant an application for absolution for the reason that the damages have not been calculated. The court should assess the damages as far as it can and even where an expert is required to assist the court, ultimately, the decision of the amount of damages to be awarded is a matter for the court and not that of the expert witness.

[31] In her written argument, Ms. Bassingthwaighte referred the court to a judgment of the Supreme Court in *Minister of Finance v Benson Craig (Pty) Ltd*,⁹ where Smuts JA, reasoned as follows¹⁰:

'In this regard, counsel for the defendant referred to several passages in decided cases dealing with the onus which rests on the plaintiff to adduce evidence in proof of the damage which he claims to have suffered including the following passage in the judgment of GALGUT J in *Enslin v Meyer* 1960 (4) SA (T) at 523 and 524:

"Nevertheless where there is evidence that damage is caused a court will make some assessment on the material before it even if the damage cannot be computed exactly (see *Turkstra Ltd v Richards* 1926 TPD 276). A plaintiff is, however, expected to lead evidence which will enable an accurate assessment to be made if such evidence is available . . . In *Lazarus v Rand Steam Laundries (1946) (Pty) Ltd* 1952 (3) SA 49 (T) at 51 DE VILLIERS J quoted with approval the following passage from *Hersman v Shapiro & Co* 1926 TPD 367 at 379:

"Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate, but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case where the evidence is available to the plaintiff, which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damage suffered, still, if it is the

⁹ SA 10/2016 (Unreported judgment of the Supreme Court).

¹⁰ *Ibid* at p. 14 para 33.

best evidence available, the Court must use it and arrive at a conclusion based on it.”

[32] In the instant case, the plaintiff did file an expert report of the damages, which is the best evidence available to it and I am of the considered view that the court should make use of that report to best it can to come to what it considers as the damages that will be available to the plaintiff, that is after the defendants have adduced their evidence and they are not able to dislodge the plaintiff's claim as to liability. This report was handed in by the consent of the parties as exhibit 'FF' and it was agreed that it would form part of the evidence. In that regard, the expert, it was further agreed, would not be called upon to testify in relation thereto.

[33] In having regard to the expert report, the court will be wary that the calculation made by the expert included the a valuation of the mineral deposits, which as stated earlier may have to be closely scrutinised in view of the legislative regime referred to earlier in the judgment. Also forming part of the consideration of the damages, depending on what the evidence the defendants adduce, may be the portion of the expert report, which states that, 'The work that was done and completed for EPL-3484 as highlighted above, added significant value to the EPL, because the mineral reserves have been calculated and quantified, and proven to exist, and an application could be brought for a Mining License.'

[34] I interpose to mention however, that during research on this matter, my attention was drawn to the judgment in *Metals Australia v Amatukuwa*¹¹ in which an issue of compromise fell for determination before the Supreme Court. Although the matter turned on that point, what is clear from reading same is that two E.P.Ls were central to the dispute and they had been sold to the applicant by the 1st respondent for US\$ 20 000. It would also appear that the deposits available in the areas falling within the licenced areas had a bearing on the value and consequently the price for which the E.P.L.s were sold. To this extent, I am fortified that all things being equal, an E.P.L. does

¹¹ 2011 (1) NR 262 (SC).

have commercial value, which neatly ties in with Ms. Bassingthwaighte's submissions in this matter.

Conclusion

[35] 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*,¹² 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.'

In view of the discussion that precedes this part of the judgment, it is the considered view of this court that the necessary threshold has been reached by the plaintiff in this matter and in that regard, the 1st and 2nd defendants should be called to their defence.

Order

[36] In the premises, I am of the considered view that the following order is condign:

1. The application for absolution from the instance is refused.
2. The First and the Second Defendants are ordered to pay the costs of this application jointly and severally, the one paying and the other being absolved, consequent upon the employment of one instructing and one instructed counsel.
3. The matter is postponed to 21 June 2018 at 08:30 for the setting dates for continuation of the trial.

¹² 2003 (4) SA 315 (SCA) at 321A.

T S Masuku
Judge

APPEARANCE:

PLAINTIFF: N Bassingthwaighte

instructed by Koep & Partners, Windhoek

DEFENDANTS:

S Namandje

of Sisa Namandje & Co Inc., Windhoek