REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON ABSOLUTION

Case No.: HC-MD-CIV-ACT-CON-2018/04238

In the matter between:

NAMIBIA ELECTRICAL SERVICES CC **PLAINTIFF**

and

PD THERON & ASSOCIATES **1ST DEFENDANT**
ANDRIES VAN VUUREN **2ND DEFENDANT**
ANDREW CORBETT **3RD DEFENDANT**

Neutral citation: *Namibia Electrical Services CC v PD Theron & Associates (*HC-MD-CIV-ACT-CON-2018/04238) [2021] NAHCMD 230 (11 May 2021)

Coram: SIBEYA J
Heard: **1 - 3 February and 18 March 2021**
Delivered: **11 May 2021**
Reasons: **14 May 2021**

Flynote: Practice - Absolution from the instance – Plaintiff instituted a contractual claim for damages based on legal professional negligence – Test for absolution from the instance revisited – Absolution should be granted where it is apparent from the merits that proceeding further with the trial will amount to a waste of time, as the plaintiff did not prove a case on which the court may find in his or her favour – The court should however be slow to grant absolution, as doing so shuts the plaintiff's case without hearing the defendant's side of the story – Case made out on a prima facie basis that the first defendant did not carry out the plaintiff's instructions or

mandate and therefore, liability may follow as a result – Absolution from the instance refused.

Summary: Plaintiff sued the first defendant for negligence for not carrying out its instructions or mandate. Plaintiff led evidence which showed that the first defendant acted contrary to its instructions. Plaintiff established that it had a dispute with the City of Windhoek derived from delay penalties charged for alleged delay in completing the project, which penalties it disputed. It then approached the first defendant to assist in reversing the penalties in order for its invoices to be paid in full. The instructions or mandate was for the first defendant to follow the dispute resolution procedure set out in the FIDIC contract for adjudication and arbitration.

Evidence showed on a *prima facie* basis that the first defendant did not follow the instructions as it did not invoke the procedure stipulated in the FIDIC contract. The first defendant, together with other defendants, did not set in motion the process of appointing the DAB (Dispute Adjudication Board), instead they sought to institute action in the High Court. The particulars of claim drafted were of no use to the plaintiff. The services rendered were not compatible with the instructions or mandate. Plaintiff had to engage another lawyer who successfully followed the terms of the FIDIC contract. *Prima facie*, the first defendant did not exercise a degree of care, knowledge and skill expected of a lawyer, which caused damages to plaintiff, for which the first defendant may be found to be liable. Application for absolution from the instance is refused. Costs follow the event.

ORDER

---

1. The application for absolution from the instance is refused.
2. The first defendant must pay the plaintiff's costs of opposing the application for absolution from the instance, subject to rule 32(11).
3. The matter is postponed to 18 May 2021 for allocation of dates for continuation of trial.

RULING

SIBEYA J:

[1] This matter revolves around a claim emanating from payment for legal services which allegedly turned out to be of no use to the plaintiff. It is alleged that the plaintiff suffered damages as result and is entitled to be paid back the money paid in legal fees.

[2] The plaintiff is Namibia Electrical Services CC, a close corporation with registration number CC/99/291, duly incorporated in terms of the Close Corporation Act 26 of 1998 and has its registered business address as 33 Jordan Street, Pioneerspark, Windhoek.

[3] The first defendant is PD Theron & Associates, a law firm and partnership of legal practitioners, duly registered in terms of applicable laws of the Republic of Namibia, with its business address situated at C/O Armstrong and Noble Street, Old Power Station Building, Shop 50, 2nd Floor, Windhoek. The first defendant is hereinafter referred to as “the defendant” considering the fact that the action between the plaintiff and the second and third defendant was settled and finalized between the parties. Where it becomes necessary to refer to all the defendants, I will refer to them as such.

[4] The plaintiff alleges that the defendants failed to carry out his instructions as the work carried out was not in line with his instructions. The work carried out was therefore not of any use to the plaintiff. The defendant is alleged to have lacked the necessary skills and knowledge. The defendant further did not carry out the instructions in a professional manner and without negligence, so the particulars of claim alleged, consequently, the defendant is liable to pay for damages suffered by the plaintiff. The damages are alleged to be N$ 57 677.03.

[5] As the per the particulars of claim, on or about 11 February 2015, the plaintiff represented by Mr. Plamen Petrov, orally instructed the defendant, duly represented by Mr. Marco Schurz, to render legal services to the plaintiff. The instruction for legal

services required was to assist the plaintiff to set in motion the adjudication process in terms of the FIDIC (1st edition 1999) contract concluded between the plaintiff and the Municipal Council of Windhoek and to proceed to finality. In essence, the plaintiff required legal assistance to set aside the penalties imposed on it by the City of Windhoek, which caused financial hardships. The defendant accepted the instruction.

[6] The defendant appointed the second and third defendants to assist in providing legal services allegedly at the backdrop of the complexity of the matter. The plaintiff allegedly accepted such appointment on the advice of the defendant. The plaintiff alleges that whereas the defendant did not follow the FIDIC contract, it failed to advise the plaintiff on the risks and consequences of the advices on procedures suggested.

[7] The defendant disputes the plaintiff's claim and pleads that the plaintiff's initial instructions were to use all means necessary to bring the City of Windhoek to adjudication, arbitration or mediation of the dispute. Plaintiff later changed its instructions and stated that summons be issued against the City of Windhoek for penalties which the City was not entitled to charge. The defendant further raised a special plea of prescription, where it stated the plaintiff's claim has prescribed. The defendant did not canvass the special plea in evidence, neither did it pursue same in written or oral arguments during the hearing of an application for absolution from the instance. I will thus not dwell into the propriety of the special plea of prescription, save to state that it appears to be misplaced.

[8] In the pre-trial memorandum which was made an order of court on 28 July 2020 (varied), the parties set out the following as facts not in dispute, thus constituting agreed facts:

'3.3 On or about 11 February 2015 and at Windhoek, plaintiff duly represented by Plamen Petrov orally instructed first defendant, duly represented by Mr. Marco Schurz, to provide legal services to the plaintiff.

3.4 On 11 February 2015 plaintiff provided first defendant with the documents relating to the dispute with the Council of the Municipality of Windhoek on project M.64/2011.

3.5 On 12 February 2015 at Windhoek Marco Schurz, who at the time was an employee of the first defendant, acting within the course and scope of his employment, or the risk created by such employment, duly accepted the instructions on behalf of the first defendant.

3.6 On or about 19 February 2015 first defendant orally appointed the second defendant as counsel for the provision of the legal services to the plaintiff.

3.7 On 8 April 2015 first defendant and/or second defendant orally appointed third defendant as counsel for the provision of the legal services to the plaintiff.

3.8 Plaintiff accepted the appointments of second and third defendants as counsel, for the provisions of the legal services, based on the advice of the first defendant that their appointment was necessary given the "complexity" of the case.

3.9 It was an express, alternatively implied, in the further alternative tacit term of the agreement between plaintiff and defendants, that defendants would perform legal services in a proper professional manner, without negligence and would exercise the skill, adequate knowledge and diligence expected of an average practicing legal practitioner in executing the instructions.

3.10 Plaintiff provided defendant with the necessary instructions to execute the mandate, and paid for services rendered.

3.11 Plaintiff made the following payments to first defendant:

3.11.1 12 February 2015 – N$50 000.00;
3.11.2 7 July 2015 – N$25 933.28;
3.11.3 1 September 2015 – N$ 1 265.00;
3.11.4 23 October 2015 – N$28 175.00;
3.11.5 05 November 2015 – N$4 830.00.

… The amount of N$52 526.25 was paid to second and third defendants.

3.12. First defendant issued invoices to plaintiff in the amount of N$57 677, which invoices have been paid by plaintiff.

3.13 On 21 October 2015 second and third defendant withdrew as counsel from the case.

3.14 On 3 November 2015 plaintiff terminated the mandate of the first defendant.

3.15 On 19 October 2018 plaintiff instituted the present action against the defendants.

3.16 The case against the second and third defendants has been settled.

3.17 Plaintiff proceeds with his claim against first defendant for the refund of the legal fees paid to first defendant in the amount of N$57 677.03.

3.18 The parties admit all letters, emails written and text messages sent to each other and documents prepared by second and third defendants.

3.19 The FIDIC contract (1st edition 1999) applied to the dispute between plaintiff and the City of Windhoek relating to project M.64/2011.

3.20 The dispute resolution mechanism prescribed by FIDIC is adjudication and arbitration.

3.21 Plaintiff's claim against the defendant is a debt as defined by the Prescription Act, 68 of 1969.'

[9] The parties further proceeded to list the following issues of fact and law to be resolved during the trial:

Issues of fact:

'1.1 What were the instructions given by plaintiff to first defendant when it accepted the mandate on 11 February 2015?

1.2. Was the work done by the first defendant in line with the mandate or instructions or both the mandate and the instructions given?

1.3 Was the mandate executed by defendant?

1.4 Did the plaintiff change its instructions to first defendant, to the effect that summons against the City of Windhoek should be issued to recover delay damages?

Issues of law:

2.1 Did the first defendant fail to carry out plaintiff's instructions and/or their mandate?

2.2 Did first defendant lack the necessary skills and knowledge to execute plaintiff's instructions and its mandate?

2.3 Is plaintiff entitled to recover the legal expenses paid to first defendant, on the basis that the services rendered are wholly useless to the plaintiff?

2.4 When did plaintiff's claim against the defendant arise?

2.5 Has plaintiff's claim against the defendant prescribed?'

[10] Mr Petrov was the sole witness for the plaintiff and he was cross-examined at length by the defendant's legal practitioner, Ms. Garbers-Kirsten.

[11] At the close of the plaintiff's case, the defendant applied for the absolution from the instance. Ms. Garbers-Kirsten submitted that the plaintiff failed to lead evidence which could *prima facie* satisfy the elements of the claim.

[12] This court in *Manja v Government of the Republic of Namibia and Others*[1] cited with approval a passage by Damaseb JP in *Dannecker v Leopard Tours Car & Camping Hire CC*[2] where the legal principles applicable to absolution from the instance were discussed as follows:

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

[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 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?'

[1] *Manja v Government of the Republic of Namibia and Others* (HC-MD-CIV-ACT-DEL-2019/02299) [2020] NAHCMD para 7.
[2] *Dannecker v Leopard Tours Car & Camping Hire CC* (I 2909/2006) [2015] NAHCMD 30 (20 February 2015).

[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'

[13] I accept that the plaintiff is required to make out a *prima facie* case regarding all the elements of the claim, as in the absence of such evidence, the court will not find in favour of the plaintiff.[3]

[14] During the assessment of the evidence led for the plaintiff at this stage, it is an established principle that, 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 incurably and inherently improbable, there is good reason to accept such evidence as true, after all that is the only evidence available.

[15] Mr. Petrov was questioned extensively on the nature of the mandate provided to the defendant. Mr. Petrov testified that the plaintiff had a project M.64/2011 with the City of Windhoek, which plaintiff intended to complete successfully. The City of Windhoek imposed delay penalties on the plaintiff, which plaintiff disputed. It is

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

against this background that Mr. Petrov approached Mr. Schurz for legal assistance through the prescribed procedure.

[16] Mr. Petrov testified that his instruction to Mr. Schurz was to follow the procedure stipulated for resolving disputes in the FIDIC (*Federation Internationale des Ingenieus-Counseils*) contract to reverse the delay penalties imposed by the City of Windhoek. The prescribed procedure is adjudication and arbitration. This was aimed at ensuring that the invoices submitted by the plaintiff to the City of Windhoek are paid in full, and this was necessary for the sustenance of the project. The delay penalties imposed amounted to N$6 762 361.31.

[17] It was submitted for the defendant that the plaintiff changed its instructions to the defendant and authorized the issuing of summons. It was further put to Mr. Petrov that his instructions kept changing even to the effect that the defendants could do anything for as long the desired results are achieved.

[18] Mr. Petrov testified that his mandate to Mr. Schurz was to bring the City of Windhoek to the adjudication process and to establish a DAB (Dispute Adjudication Board) which would adjudicate the dispute. Mr. Petrov testified that his instructions to Mr. Schurz were to pursue adjudication. He, however, stated further that other suggested routes to be followed for dispute resolution including issuing of summons were on the advice of the defendants.

[19] Considering, as agreed to between the parties, that the FIDIC contract applied to the dispute between the plaintiff and the City of Windhoek and that the dispute resolution process prescribed, is adjudication and arbitration, such FIDIC contract should be a point of departure, unless if the parties agreed otherwise. The instructions of the plaintiff are therefore *in tandem* with the provisions of the FIDIC contract. There is persuasion in the contention by Mr. Marcus, who appears for the plaintiff, that the question that begs for an answer is, why was the procedure that was stipulated in the FIDIC contract not followed as per the instructions. Mr. Petrov testified that the DAB adjudication route is after all, cost effective.

[20] It was further submitted by Mr. Marcus that instituting action proceedings in the High Court could have been short-lived, as same would have been hit with a

special plea of being in a wrong form. Ms. Gabers-Kirsten disagreed and counter-submitted that the draft particulars of claim included an alternative claim for delayed damages based on the Conventional Penalties Act 15 of 1962 in order to circumvent a successful special plea being raised.

[21] It was further submitted on behalf of the defendant that the particulars of claim for action to be instituted in the High Court were drafted and provided to plaintiff. Plaintiff ignored such particulars of claim, consulted Mr. Brandt and then engaged in the DAB process set out in the FIDIC. The defendant contends that the action in the High Court had good prospects of success, therefore the decision by the plaintiff not to pursue the said action, was out of choice. This renders the claim premature as the defendants rendered the required service, so it was argued.

[22] The argument of the prospects of success in the High Court action or lack thereof, enticing as it may be, is not ripe for decision. Suffice to say after accepting that the dispute resolution is governed by the FIDIC contract, there must be good grounds why such prescribed procedure is not followed. The only dispute resolution procedure stipulated in the FIDIC contract is adjudication by DAB. The evidence led established on a *prima facie* basis that the instructions were to resolve the dispute through the prescribed procedure in the FIDIC contract.

[23] It should be pointed out that Mr. Petrov testified that the process to issue summons, was on the advice of the defendants as the best approach, which he acceded to. The advice was further that if the action is defended, then it would be referred for court-connected mediation. This statement struck me as implying that action was to be instituted in the hope that it will be mediated upon by a court-connected mediator. If this is correct, then it leaves a bitter taste, as actions should be instituted when the merits thereof reveal reasonable prospects of success. Cases should not just be registered in the hope of mediation. Court-connected mediation is not an autonomous institution, but it is a dispute resolution mechanism with limited resources, available to the court, which the court may or may not utilize in a particular matter. Court-connected mediation should be applied for on merit.

[24] It was submitted on behalf of the defendant that there were several meetings between the defendants and Mr. Petrov where strategies were discussed, and that

there was also a mediation meeting attended by the third defendant. The letters arranging the said meeting and agenda items were drafted by the defendant. What is however apparent on the face of the submission, is *prima facie* the fact that such meeting was not a DAB meeting as per the FIDIC contract. The plaintiff referred to this meeting as not having achieved any results.

[25] The plaintiff led evidence strikingly establishing, *inter alia*, on a *prima facie* basis that:

a) The defendant did not ascertain whether the dispute was capable of being resolved by DAB;

b) The defendant did not ascertain the complex nature or otherwise of the DAB route.

[26] The FIDIC contract provides that disputes shall be adjudicated by a DAB.[4] If a DAB is not appointed, then a notice of dissatisfaction had to be issued to pave way for the appointment of a DAB.[5] It further explains the nature of disputes that can be resolved by a DAB as:

> '(of ay kind whatsoever arising) between the parties in connection with, or arising out of, the Sub-Contract or the execution of the Sub-Contract Works, including any dispute, as to any certificate, determination, instruction, opinion or valuation of the Contractor …'

[27] *Prima facie*, it is difficult to comprehend the alleged complexity of triggering a dispute resolution process through a FIDIC contract. It was further testified by Mr. Petrov in a similar manner that after terminating the mandate of the defendant, it came to his knowledge that no specialized legal knowledge and expertise was required to commence the DAB process.

[28] What special expertise then required the engagement of three lawyers on the matter, one may ask. A lawyer stands on an elevated podium compared to his client. Above all, the reason a client approaches a lawyer for legal services is with the appreciation and expectation in mind, that the lawyer possesses special knowledge

[4] Clause 20.2.
[5] Clause 20.3.

and skill to be exercised with a degree of care and honesty. Lawyers are therefore duty bound to investigate and explain the consequences of any decision or advice presented to the client, together with proposed strategies aligned to such decision or advice. A lawyer should further have the interest of the client at heart and avoid causing client unnecessary expenses or proceedings.

[29] It is evident that if the FIDIC contract was followed to the core, then it would be plain that arbitration could not arise without initially resorting to adjudication. The evidence of Mr. Petrov is that the defendant advised him of the court application to compel arbitration. This is contrary to the terms of the FIDIC contract. Mr. Petrov testified that the defendant could not explain the veracity, risks and prospects of success of the decisions suggested to the plaintiff, which is indicative of lack of knowledge and skill. This, despite accepting the instructions which gave rise to the expectation that the defendant was able to assist the plaintiff accordingly.

Conclusion

[30] It is apparent from the evidence in its totality, that the consideration of the instructions indicates that the defendant was instructed to resolve the dispute through the mechanisms outlined in the FIDIC contract, which entailed the appointment of DAB. The dispute resolution was to take the form of adjudication and arbitration. This was not followed by the defendant, but instead the defendant appointed the second and third defendants on the basis of the complexity of the matter. Plaintiff accepted such appointments on the advice of the defendant, a fact which is agreed to by the parties. This, notwithstanding the testimony and the finding that putting the DAB in motion appear, *prima facie*, not to be complex.

[31] It appears from the evidence that the instructions from the plaintiff were not carried out. The defendant appears to have continued to advise the plaintiff about strategies and approaches to be adopted, which plaintiff agreed to. Ultimately, the particulars of claim produced were not in line with the initial instructions of the plaintiff, to follow the FIDIC contract and such particulars of claim were not of any use to plaintiff.

[32] In the foregoing, it cannot be said that *prima facie*, the defendant exercised reasonable care, skill and knowledge, expected of a lawyer in executing the instructions of the plaintiff. In keeping with the principle that courts should be slow to grant absolution from the instance where the plaintiff has *prima facie* established its claim, I find that the failure to so perform, *prima facie*, results in negligence and liability for damages caused. In the result, I find that the plaintiff led evidence, on the basis of which a reasonable court acting carefully, might find in favour of the plaintiff. In a case of this nature, therefore an application for absolution from the instance cannot falls to be refused. There is no reason why costs should not follow the event.

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

1. The application for absolution from the instance is refused.
2. The first defendant must pay the plaintiff's costs of opposing the application for absolution from the instance subject to rule 32(11).
3. The matter is postponed to 18 May 2021 for allocation of dates for continuation of trial.

_____

O S SIBEYA

JUDGE

APPEARANCES:

PLAINTIFF:	N Marcus Of Nixon Marcus Public Law Office, Windhoek.
1ST DEFENDANT:	H Garbers-Kirsten Instructed by Viljoen & Associates, Windhoek