

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

JUDGMENT

PRACTICE DIRECTION 61

Case Title: ARCETYPE PROJECT CONSULTANTS CLOSE CORPORATION // PONDOLA WOMEN TRADING CC & 4 OTHERS	Case No: HC-MD-CIV-ACT-CON-2022/01972
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: PARKER, AJ	Heard on: 19 SEPTEMBER 2023
	Delivered on: 1 NOVEMBER 2023
Neutral citation <i>Arcetype Project Consultants Close Corporation // Pondola Women Trading CC</i> (HC-MD-CIV-ACT-CON-2022/01972) [2023] NAHCMD 690 (1 November 2023)	
Order:	
1. Absolution from the instance is granted with costs. 2. The matter is finalised and removed from the roll.	
Reasons:	
PARKER AJ: [1] After the close of the plaintiff's case, the defendants launched an application for absolution from the instance. Mr Lochner represents the plaintiff, and Mr Tjombe represents the defendants.	

[2] The test for absolution from the instance has been settled by the authorities. The principles and approaches have been followed in several cases. They were approved by the Supreme Court in *Stier and Another v Henke* where the Supreme Court stated:

[4] At 92F-G, Harms JA in *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA) referred to the formulation of the test to be applied by a trial court when absolution is applied at the end of an appellant's (a plaintiff's) case as appears in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409 G-H:

“ . . . 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 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, or 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).)”

“Harms JA went on to explain 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 (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G-38A; *Schmidt Bewysreg* 4 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 interest of justice....”¹

[3] Additionally, in *Dannecker v Leopard Tours Car & Camping Hire CC* Damaseb JP stated as follows on the test of absolution from the instance at the close of plaintiff's case:

¹ *Stier and Another v Henke* 2012 (1) NR 370 (SC).

'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?'

[26] The following considerations (which I shall call 'the Damaseb 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.

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.²

[4] Another important principle which the court determining an absolution application should consider is this. The clause 'applying its mind reasonably', used by Harms JA in *Neon Lights (SA) Ltd*³ requires the court not to consider the evidence *in vacuo* but to consider the

² *Dannecker v Leopard Tours Car & Camping Hire CC* [2015] NAHCMD 30 (20 February 2015).

³ *Neon Lights (SA) Ltd*, see para 2 above.

evidence in relation to the pleadings and in relation to the requirements of the law applicable to the case.⁴

[5] It is important to note that the first defendant is a close corporation, and the second to the fifth defendants are its members. I shall refer to them as the member defendants. The plaintiff's claim is based on the interpretation and application of s 64, alternatively s 65, of the Close Corporation Act 26 of 1988 ('the CCA'), that is, the law applicable in these proceedings.⁵ The interpretation and application of those provisions is therefore called for.

[6] The charge is that the member defendants 'carried on the business of the first defendant and in a manner that was grossly negligent and/or reckless'. Therefore, the plaintiff claims, those defendants should be declared jointly and severally liable for a (the) judgment obtained against the first defendant'.

[7] It need hardly saying that the plaintiff bears the burden of proving that which they have alleged,⁶ that is, that the member defendants carried out the business of the first defendant grossly negligently and recklessly or grossly negligently or recklessly. Thus, the plaintiff can succeed only if it discharged the onus cast on it. The question that arises for determination is therefore this: What proof has the plaintiff placed before the court in its attempt to prove the aforementioned allegation? Before I consider that question, I shall examine the interpretation and application of s 64(1) and s 65 of the CCA.

[8] Mr Lochner submitted that s 64(1) of CCA 'is based on s 424 of the Companies Act 61 of 1973'. This Act does not exist on our statute books. The Act was repealed by the Companies Act 28 of 2004 ('the CA'). It is therefore safer to compare the provisions of the CCA with the provisions of the CA.

[9] Section 64(1) of the CCA compares substantially with s 430(1) of the CA; except that the charge of 'gross negligence' is absent from s 430(1) of the CA. Both Acts provide the charge of recklessness.

[10] The three key elements under s 64(1) of the CCA relevant to the instant proceeding are:

⁴*Bidoli v Ellistron t/a Ellistron Truck & Plaintiff* 2002 NR 451 at 453G.

⁵*Bidoli v Ellistron t/a Ellistron Truck & Plaintiff* footnote 4 loc cit.

⁶*Pillay v Krishna* 1946 AD 946.

- (a) knowingly a party to the carrying on of the business in the manner prohibited by s 64(1);
- (b) any business of the corporation being carried on recklessly;
- (c) with gross negligence.

[11] The onus is upon the party alleging recklessness or gross negligence to so prove, and being civil proceedings, to establish the necessary facts on a balance of probabilities. The crucial phrase in s 64(1) is: a person is knowingly a party to the carrying on of the business in the prohibited manner. The adverb 'knowingly' means having knowledge of the facts from which the conclusion is properly to be drawn that the business of the corporation was or has been carried on recklessly; it does not entail knowledge of the legal consequences of those facts. It follows that 'knowingly' does not necessarily mean consciousness. Thus, being a party to the conduct of the corporation's business does not have to involve the taking of positive steps in the carrying on of the business; it may be enough to support or concur in the conduct of the business. Therefore, Mr Tjombe's submission that the 'plaintiff advanced no further evidence regarding the individual member' cannot be sustained.

[12] Be that as it may, it is important to signalize the crucial point that recklessness is not lightly to be found; but where facts are within the exclusive knowledge of one party, his or her failure to give an explanation for his or her conduct may weigh very heavily against him or her.⁷

[13] It has been said that –

'Ordinarily, if a company while carrying on its business incurs debts at a time when to the knowledge of its directors there is no reasonable prospect of the creditors' ever receiving payment, there is a carrying on of its business with intent to defraud those creditors.'⁸

[14] This principle does not apply in the instant matter because the plaintiff does not base its case on the charge of carrying on the business of the first defendant 'with intent to defraud any person or for any fraudulent purpose'. That being the case, Mr Lochner's submission that the member defendants 'knew that they could not pay any invoice that would be presented to

⁷ *Kamushinda and Others v President of the Republic of Namibia and Others* 2020 (4) NR 1058 (HC) para 82.

⁸ *Ibid* para 83.

them in respect of the preparatory work was done' turns on nothing. That *may* – I emphasise 'may' – prove fraudulent conduct, but not reckless or grossly negligent conduct without more, within the meaning of s 64(1) of the CCA.

[15] It should be said in capitalities and emphasised that the piercing of the veil of incorporation under s 65 of the CCA, as the plaintiff seeks in the alternative, ought to be resorted to with caution. It may be resorted to where special circumstances existed. Thus, s 65 prescribes only one ground, namely, that the incorporation, or any use, of that corporation constitutes a gross abuse of the juristic personality of the corporation as a separate entity. The reason for the caution is this: To say that a company or other corporation sustains a separate persona and yet in the same breath to argue that in substance the person who carries out its business is the company or other corporation is an attempt to have it both ways, which cannot be allowed.⁹

[16] There should therefore be sufficient and satisfactory evidence, tending to establish that the conduct of the members of the corporation amounted to a gross abuse of the juristic personality of the corporation as a separate entity, within the meaning of s 65 of the CCA.

[17] If the truth be told, from the written submission of Mr Lochner, I see that the talisman on which counsel hangs the plaintiff's attempt to prove reckless conduct or grossly negligent conduct under s 64(1) of the CCA or gross abuse of the juristic personality of the first defendant as a separate entity under s 65 is the following catchy statement:

'23. I submit, that any reasonable businessman in the shoes of the members of the first defendants, would have ensured, after the conclusion of the agreement between the first defendant and the plaintiff, that the plaintiff does not commence his work, and the first defendant not incurring any liability, until such time as the members were certain that any such debts would be payable, alternatively until such time as they have ensured that finance would be granted to the first defendant.'

[18] Like all talismans, this talisman, too, is illusive, as I demonstrate. The evidence does not account for any charge under s 64(1) or s 65 of the CCA. The following facts, which I accept and having probative value, debunk any attempt to prove any prohibited conduct under s 64(1) or s 65 of the CCA and to resist absolution.

[19] When the first defendant entered into the service agreement with the plaintiff, the first defendant had honest and justifiable belief that the project involved would be financed by the

⁹ *Ochberg v C.I.R.* [1931] AD 215 at 232, per Villiers CJ, approved in 2006 (1) NR 389 (HC).

Small and Medium Enterprises Bank ('the SME Bank').

[20] To argue that the faith the first defendant had in the SME Bank was misplaced is, with respect, fallacious and self serving. The SME Bank was established to give financial assistance to entities such as the first defendant.¹⁰ The faith the first defendant had in the SME Bank was their attitude and state of mind, and that cannot be disregarded.¹¹ Their faith was justified and beyond reproach.

[21] After the SME Bank went into liquidation and assumed the appellation the SME Bank (in liquidation), the first defendant made unsuccessful attempts to secure funding from alternative sources, eg Bank Windhoek and the Government Institutions Pensions Fund (GIPF).

[22] Furthermore, when the first defendant sold its only immovable property in a market overt, it used the proceeds thereof prudently and lawfully. It paid off its preferent debtors, ie Bank Windhoek, the mortgagee of the bond that was held over the property, and the Okahao local authority council in respect of municipality fees and charges. Part of the remaining amount went to the payment of lawyers' fees respecting the matter with Bank Windhoek. A tiny amount of N\$64.30 remained. It should be remembered, in a mixed economy as ours, referred to in article 98(1) of the Namibian Constitution, where market forces determine and control the price of goods and services, the member defendants cannot be faulted for the price they sold the property for in a market overt, as Mr Tjombe submitted.

[23] Furthermore, there was not a solitary shred of evidence, tending to establish that the member defendants appropriated a part of the proceeds from the sale of the immovable property for their personal benefit. Indeed, in his cross-examination-evidence, Mr Nashidengo, a plaintiff witness, conceded that the sale of the property did not amount to reckless or grossly negligent conduct. Accordingly, I also find that the acts of the member defendants cannot constitute a gross abuse of the juristic personality of the first defendant as a separate entity from the members.

[24] Consequently, I come to the ineluctable conclusion that the plaintiff has failed to persuade the court to a prima facie extent that the member defendants conducted themselves in a manner prohibited by s 64(1) of the CCA. The plaintiff has failed to establish a right,

¹⁰ See *Kamushinda and Others v President of the Republic of Namibia* footnote 7 para 5.

¹¹ *De Villiers v Axiz (Pty) Ltd* 2012 (1) NR 48 (SC) para 48.

within the meaning of s 16 of the High Court Act 16 of 1990, which the court ought to protect by a declaratory order, as sought in para 1 of the notice of motion. That being the case, no order can follow on para 1 consequentially.

[25] I am satisfied that the member defendants have given sufficient and satisfactory explanation concerning their failure to raise funds from the SME Bank and the sale of the immovable property and the disbursement of the proceeds from the sale, as required by law.¹²

[26] Based on these reasons, I find that the plaintiff has failed to surmount the bar set by the Supreme Court in *Stier and Another v Henke* which is that for the plaintiff to survive absolution, the plaintiff must make out a prima facie case upon which a court could or might find for the plaintiff. The result is that the plaintiff has not made out a prima facie case, requiring the member defendants to answer.¹³ The occasion has accordingly arisen to grant absolution in the interest of justice.¹⁴ The interpretation and application of the law applicable referred to in para 5 above favour the granting of absolution from the instance.

[27] In the result, I order as follows:

1. Absolution from the instance is granted with costs.
2. The matter is finalised and removed from the roll.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff	Defendants
L Lochner	N Tjombe

¹² *Kamushinda and Others v President of the Republic of Namibia* footnote 7 loc cit.

¹³ *Stier and Another v Henke* footnote 1.

¹⁴ *Erasmus v Gary Erhard Wiechmann and Fuel Injection Repairs & Spares* [2013] NAHCMD 214 (24 July 2013).

Instructed by Etzold-Duvenhage, Windhoek	Of Tjombe-Elago Inc., Windhoek
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