

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

JUDGMENT

Case No: HC NLD-CIV-ACT-CON-2018/00166

In the matter between:

CHW TRADING ENTERPRICES CC

PLAINTIFF

and

OCTAGON CONSTRUCTION CC

DEFENDANT

Neutral citation: CHW Trading Enterprices CC v Octagon Construction CC (HC NLD-CIV-ACT-CON-2018/00166) [2020] NAHCNLD 06 (21 January 2020)

Coram: NAMWEYA AJ

Heard: 09 – 11 October 2019

Delivered: 21 January 2020

Flynote: Practice – Trial – Absolution from the instance at the close of plaintiff case – When to be granted – Plaintiff must lead admissible evidence on which a court, applying its mind reasonably to the evidence, could or might find for the plaintiff – It requires the court to consider the evidence not *in vacuo* – Court to consider the admissible evidence.

Summary: In practice when absolution from the instance at the close of plaintiff case is to be granted. Plaintiff must lead admissible evidence on which a court, applying its mind reasonably to the evidence, could or might find for the plaintiff. – It requires the court to consider the evidence not *in vacuo* but to consider the admissible evidence in relation to the pleadings and to the requirements of the law applicable to the particular case.

Held: Considering the evidence and the law applicable to the case court concluded that the evidence existed where the court could not find for the plaintiff.

ORDER

1. The application for the order of the absolution from the instance is granted;
2. Plaintiff to pay costs of the defendant on the scale of one instructing and one instructed counsel.

JUDGMENT

NAMWEYA AJ:

INTRODUCTION

[1] The Plaintiff is *CHW Trading Enterprises CC* a close corporation duly registered and incorporated in terms of the Close Corporation Act 26 of 1988, with registration number CC/2008/2347 and with registered address and main place of business, situated at Erf 3788, Kahumba Kandola Street, Ongwediva, Oshana Region, Republic of Namibia.

[2] The Defendant is Octagon Construction CC, a close corporation duly registered and incorporated in terms of the Close Corporation Act 26 of 1988, with registration number CC/2010/3575 and with registered address and main place of business, situated 111 Johan Albrecht Street, Windhoek North, Windhoek, Republic of Namibia, with a branch office at Ongwediva, Erf 0007, Augusto Taanyanda Street, Oshana Region, Republic of Namibia

[3] The claim and counterclaim in this matter arose from a partnership agreement concluded by plaintiff and defendant

Background:

[4] The case before me was set down for trial for the period 9 to 11 October 2019. After hearing the evidence of the plaintiff the defendant has applied for absolution from the instance, of which the plaintiff opposed.

The Law

[5] In *Claude Neon Lights (SA) Ltd v Daniel*¹ the Court of Appeal held that, when absolution from the instance is sought at the end of the plaintiff's case, the test to be applied 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. This test has been approved and applied in a line of cases by this Court and the Supreme Court.² In *Tutalen Peter Reinholdt Shiimi v Mutual and Federal Insurance Company of Namibia*³ Frank, AJ said-

'...I do not at this stage have to decide whether he has established a *prima facie* case in the sense that I would have to if the defendant had also closed its case (which it did not do). At this stage I take the evidence produced on behalf of the plaintiff at face value and decide

¹ 1976 (4) SA 403 (A).

² See *Bidoli v Ellistron t/a Ellistron Truck & Plant* 2002 NR 451 (HC); *Absolut Corporate Services (Pty) Ltd v Tsumeb Municipal Council and Another* 2008 (1) NR 372 (HC) *Stier v Henke* 2012 (1) NR 370 (SC) at 373 para [4]; *Aluminium City CC v Scandia Kitchens & Joinery (Pty) Ltd* 2007 (2) NR 494 (HC) at 496 [12]; *Lofty Eaton v Grey Security Services Namibia (Pty) Ltd* 2005 NR 297 (HC) at 302 C – E.

³ An unreported judgment of this Court case No. (P) I 2269/07.

whether based thereon if “there is evidence upon which a reasonable man might find for the plaintiff.’

[6] Levy, J said⁴ “the phrase 'applying its mind reasonably' requires the Court not to consider the evidence in *vacuo* but to consider the admissible evidence in relation to the pleadings and in relation to the requirements of the law applicable to the particular case.”

The evidence

[7] In support of his claim the plaintiff gave *viva voce* evidence and called Erastus Shihafeleni Simon who proceeded to testify as follows;

[8] That he acts on behalf of the above-stated plaintiff in this matter, he is a major male person, the main member of the plaintiff and duly authorized to act in his capacity on behalf of the plaintiff. AD CLAIM 1 and 2, on 10 July 2015 the plaintiff and defendant concluded a partnership agreement pursuant to a tender awarded by the Roads Authority of Namibia under Contract No.: RC/DC-CR/01-2014 after plaintiff was appointed by defendant as an emerging sub-contractor. Under the said agreement plaintiff was required to execute labour based works in terms of the tender project.

[9] As per the terms of the agreement the project had a duration period of 18 months, however due to unforeseen circumstances such as vis major and funds not being paid on time, they had to let go of some labourers, thus they could not execute the project on time.

[10] The project commenced roughly around September 2015 and they were working on site DR3683 Uukwiyuushona-Omuntele, Oshana -Oshikoto Region, Republic of Namibia, he stated.

[11] He indicated that during January 2016 of the project he did not have an excavator, compactor or a grader to start the work. Therefore plaintiff entered into an oral agreement with defendant whereby plaintiff would lease defendant's excavator, compactor and grater for a period of five months January 2016 to May 2016.

⁴ *Supra* footnote 1 at 453.

[12] He reiterated that defendant complied with the agreement and leased the excavator, compactor and grader to plaintiff. Defendant issued the following invoices to plaintiff totaling N\$139,271.37 made up as follows: (a) Invoice dated 18 November 2016 N\$ 626.45 (b) Invoice dated 25 October 2016 N\$42,802.63 (c) Invoice dated 27 July 2016 N\$52,413.21

[13] All invoices were settled by plaintiff during 2016. Plaintiff's witness strongly believed that when plaintiff could not settle any of above invoices timeously, defendant deducted the said amounts from plaintiff's payment certificates.

[14] During end of May 2016 date uncertain, the aforesaid agreement lapsed and plaintiff did not renew it. Henceforth I concluded another lease agreement with two other companies to complete the works on the project. Regardless of the above stated, plaintiff complied with the material terms and conditions of the partnership agreement and issued out all payment certificates to defendant for payment to plaintiff.

[15] All payment certificates issued were generated by my foreman one Mr Robert Amunjela who was responsible for calculating the quantities of the work done monthly on the project, which he would then submit to the engineers (Element Engineers) for issuance and completeness. Despite some certificates not being paid on timeously and in terms of the agreement by defendant, plaintiff proceeded with the works on the project.

[16] Witness elucidate that Plaintiff completed all works as per the payment certificates issued. All payment certificates were due and payable after a period of 30 days.

[17] He pointed out that defendant only made full of payment certificates number 1, 2, 3, 4, 5, 6, 7, 8, 9,10, 11, 12, 13, 14, 15, 20, 21 and partly made of payment certificates numbers 18 and 19.

[18] The witness stressed that he enquired from defendant as to why they were failing to pay all payment certificates in full and when will they settle the outstanding payment certificates numbers 16 and 17.

[19] Defendant sent the witness an email dated 18 July 2017 indicating a total amount of N\$559,578.24 for losses and damages occasioned to their trucks as a

result of the accident that occurred on site DR 3683 between defendant's Man Water truck (N186-146W) (which has been written off), the Man-Tipper truck (N145-100W) that was sent for repairs and plaintiff's Power Star Tipper truck (N 135-135 SH).

[20] In addition, attached to the email was a tax invoice with the assessment of how the claim for losses and damages was assessed by defendant and further indicating how defendant deducted from plaintiff's payment certificates numbers 16, 17, 18 and 19 for the losses and damages for the two trucks.

[21] The above email meant that the aforesaid amount of N\$559,578.24 was set off against payment certificates numbers 16, 17, 18 and 19 payable to plaintiff.

[22] In elucidation of the accident referred to the above, witness states that on 27 May 2017 whilst on site DR3683, Uukwiyushona- omuntele a motor vehicle collision took place between defendant's Man water truck (N 186-495 W), defendant's ManTipper truck (N145-100 W) and plaintiff's Power Star Tipper truck (N 135-135 SH). As result of the accident, defendant unilaterally set off the alleged damages suffered as a result of the collision against payments due to plaintiff for work done in terms of the project.

[23] Witness testified further that he communicated with defendant in respect of the quotations obtained for losses and damages to defendant's Man Tipper Truck and was informed that plaintiff is liable to pay for all those losses and damages incurred on both defendant's trucks.

[24] The witness stated that he kept on demanding that defendant pays the outstanding payment certificates, but was informed that the money due to plaintiff was used for paying for the damages occasioned on defendant's trucks.

[25] On occasion usually every 20th day of each month all parties to the project held a meeting for all parties to give progress on the project. During one specific meeting held on 27 July 2017, he addressed the issue of non-payment by defendant and defendant was instructed by Mr Andy Kotze to settle plaintiff's outstanding payment certificates. However, until date, no payment was released to plaintiff.

Ad claim 2

[26] During 28 April 2018, plaintiff and defendant concluded a partly written and partly oral agreement whereby defendant would lease three trucks from plaintiff namely:

(a) Power-Star Tipper Truck with Registration No.: N 135-135SH;

(b) Power-Star Tipper Truck with Registration No.: N 134-134SH; and

(c) Power-Star Water Truck with Registration No.: N 139-139SH.

[27] Plaintiff complied with his obligation and leased the trucks to defendant. Plaintiff presented invoices to defendant namely:

(a) Invoice dated 30 March 2016 N\$ 24,495.00;

(b) Invoice dated 30 April 2016 N\$ 54,441.00;

(c) Invoice dated 30 June 2016 N\$ 84,007.50;

(d) Invoice dated 30 July 2016 N\$ 70,173.00;

(e) Invoice dated 30 April 2017 N\$ 32,200.00;

(f) Invoice dated 31 May 2017 N\$107,870.00; and

(g) Invoice dated 30 June 2017 N\$ 47,696.25.

[28] Defendant only settled invoices dated 30 March 2016, 30 April 2016 and 30 June 2016. The invoices dated 30 July 2016, 30 April 2017, 31 May 2017 and 30 June 2017 remain unpaid. All invoices were payable after a period of 30 days upon presentation by plaintiff to defendant.

[29] All the aforesaid invoices are made up of the hourly rate defendant leased plaintiff's trucks and the number of days the defendant leased the trucks in a month which was all calculated promptly. All these details are on the invoices which appear on my discovery affidavit.

[30] Upon my enquiry as to why defendant was failing to settle the outstanding invoices, defendant replied that as a result of the accident (referred to in paragraph 19) that took place between plaintiff's Power-Star Tipper Truck and defendant's Man Trucks, defendant is not liable to settle the outstanding invoices as defendant's

trucks were damaged from the accident and plaintiff is liable to settle the total losses and damages occasioned on the defendant's trucks.

[31] The witness informed the defendant that their actions were wrongful and defendant had no basis whatsoever to set off any amount claimed against what is owed to plaintiff for completing his work in terms of the project and in terms of the agreement referred to in paragraphs 26 and 27 above.

[32] He further proceeded to inform defendant that the lease agreement for the three trucks was a separate agreement from the one under Contract No.: RC/DC-CR/01- 2014 and further he indicated that these were two different contracts and both contracts had different terms and conditions, thus the conduct of the defendant is wrongful. The defendant has to date still refused to settle my invoices in respect of the lease agreement.

[33] Regarding the aspect of the insurance as per the Partnership Agreement, same provides that plaintiff being the SME contractor, would arrange his own insurance for tools, equipment and any transport used in execution of his part of the project and same clause does not make reference for plaintiff to indemnify defendant in respect of any insurance claims; which is what defendant has unilaterally done.

[34] Defendant's insurance claim for losses and damages against plaintiff is therefore wrongful and without merit and defendant remains liable to plaintiff for work done under Contract No.: RC/DC-CR/01-2014 and in terms of the lease agreement.

[35] In light of the above, the defendant has no basis in law to withhold payment of the payment certificates and payment of the outstanding invoices in respect of the leased trucks. Therefore plaintiff's claim should succeed and the defendant be ordered to pay plaintiff claim as appears in the prayers in the particulars of claim.

Evaluation of evidence

[36] At this stage, the court is required to determine whether it should or should not grant the application for absolution from the instance. Arriving at that, it need not decide whether plaintiff has established a *prima facie* case but rather to determine as earlier indicated in *Claude Neon Lights (SA) Ltd v Daniel* supra, determine 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. It must be noted that I do not at this stage have to decide whether plaintiff has established a *prima facie* case in the sense that I would have to if the defendant had also closed its case (which it did not do). At this stage I take the evidence produced on behalf of the plaintiff at face value and have to decide whether based thereon if “there is evidence upon which a reasonable man might find for the plaintiff.’

[37] The issues in this matter revolve around set off on the invoices presented to defendant. It appears to this court that the defendant did not dispute owing the amounts as claimed but it was arguing that because of the damage the plaintiff caused to the defendant certain amounts were set off. The parties have entered into a contractual agreement the terms of which were that each party had to keep insurance on the tools in their possession. It also appears that the plaintiff had leased a truck from the defendant which truck was involved in an accident for which defendant suffered a loss. Plaintiff had not insured the truck at the time of the accident as such the defendant contends that plaintiff was in breach of the contract and as a result the insurance could not pay the amount of the collision. This results to the defendant to set off certain amounts resulting from the damage caused by the accident.

[38] The court is therefore tasked to determine the legality or permissibility or validity of the set off. It was argued on behalf of the defendant that set off given the circumstances of this case was valid. The amount of the damage was assessed by the insurance and thereby became liquid. Same amounts are the ones which the defendant set off against the invoices presented by the plaintiff to the defendant.

[39] Ms Mungaviri who argued on behalf of the plaintiff did not dispute the legality or validity of the set off but rather argued whether the event leading to set off warranted or rendered the set off legal. The basis of her argument being that plaintiff did not agree that the plaintiff suffered a loss. It was established though through cross-examination that as a result of the plaintiff not having kept insurance of the tools; in this case the truck leased to the plaintiff by the defendant, the insurance could not compensate the defendant for the loss suffered on account of the damages to the truck. What the plaintiff did not dispute is that the plaintiff did not insure the truck he leased from the defendant as per terms of their contractual agreement. There is also no dispute that as a result of the collision defendant suffered a loss. It was further not

disputed that plaintiff did not keep the truck he so leased from the defendant on insurance as per their agreement. The above undisputed circumstances which put the set off in motion in my view, reciprocal debt was ascertained and thereby renders the set off legal or valid.

[40] In cross-examination Mr Muhongo was able to show through a bundle of discovery how certain amount was set off by the defendant and was also able to show how the figures in the payment certificates were balancing with the amounts so set off. Plaintiff also testified that certain amounts were paid by the defendant but could not tell for which invoice. This evidence is suggestive of the inability of the plaintiff to prove his claim.

[41] The reciprocal debts having been ascertained and the amounts in the payment certificates having balanced with the amounts set off and having applied my mind reasonably, that is, having considered the evidence not *in vacuo* but taking into account the admissible evidence in relation to the pleadings and in relation to the requirements of the law applicable to the case, I hold that court might not find for the plaintiff in her claims. I am mindful that a court ought to be cautious in granting an order of absolution from the instance at the close of the plaintiff case, unless that occasion arises. (See *Coertzen v Neves Legal Practitioners* (I 3398/2010) NAHCMD 283 (14 October 2013)).

[42] Based on the foregoing reasoning and conclusions, I hold that the occasion arose in the instant case to grant the order of absolution from the instance. Consequently, in the exercise of my discretion the application for an order granting absolution from the instance is granted in the following terms;

1. The application for the order of the absolution from the instance is granted;
2. Plaintiff to pay costs of the defendant on the scale of one instructing and one instructed counsel.

M Namweya
Acting Judge

APPEARANCES

PLAINTIFF : Ms G Mugaviri
Of Mugaviri Attorneys, Oshakati

DEFENDANT: Mr T Muhongo (with him S Aingura)
Instructed by Sisa Namandje & Co., Windhoek