REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON APPLICATION FOR ABSOLUTION FROM THE INSTANCE

CASE NO. I 160/2015

In the matter between:

SOLTEC CC **PLAINTIFF**

And

SWAKOPMUND SUPER SPAR **DEFENDANT**

Neutral citation: *Soltec CC v Swakopmund Super Spar (I 160-2015) [2016] NAHCMD 159 (3 June 2016)*

CORAM: MASUKU J

Heard: 11 March 2016
Delivered: 3 June 2016

Flynote: **CIVIL PROCEDURE –** Application for absolution from the instance – **LAW OF CONTRACT –** Consensus a*d idem* – proof of oral contract and requirements for *locatio condictio operis.*

Summary: The plaintiff claimed an amount of N$ 104, 086.82 allegedly due from the defendant arising out of an oral contract for provision of services. The law applicable to applications for absolution from the instance visited and *held that* – the court should not substitute its decision for that of a reasonable person; that an application from the instance can be granted where the plaintiff fails to prove all the elements of the claim or where the evidence led is so unreliable, vacillating or of so romancing a character that no court acting reasonably, may accept it; that applications for absolution should not be granted lightly, unless there are compelling reasons for doing so.

Held – that the contract between the parties was not one for purchase and sale of goods but one of provision of services, namely, the *locatio condictio operis. Held further* – that on the balance, the plaintiff had met the threshold requirements for the refusal of the application for absolution from the instance. Application dismissed with costs.

ORDER

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1. The application for absolution from the instance is refused.
2. The defendant is ordered to pay the costs of the application, being of one instructing and one instructed counsel.
3. The matter is postponed to 13 to 17 February 2017 at 10h00 for continuation of the trial.

RULING ON APPLICATION FOR ABSOLUTION FROM THE INSTANCE

MASUKU J.;

Introduction

[1] Serving for determination is an application for absolution from the instance moved by the defendant at the close of the plaintiff's case.

The parties and background

[2] The facts that give rise to the *lis* may briefly be summarized in the following manner: The plaintiff is a close corporation duly incorporated in terms of the Close Corporation Act. [1] Its principal place of business is situate in Windhoek. The defendant, on the other hand, is described as a firm or association as contemplated in terms of rule 42 of this court's rules and has its main place of business situate in Swakopmund in this Republic.

[3] The plaintiff's claim is for the payment of an amount of N$ 104, 086.82 which it claims the defendant, despite demand, refuses or neglects to pay to it. It is averred in the particulars of claim that on or about January 2013 and at Swakopmund, the parties entered into an oral agreement in terms of which the defendant was represented by Mr. Du Preez and the plaintiff was represented by Mr. Heinreich Steuber.

[4] It is further averred that the said oral contract, whose terms were express, alternatively tacit and further alternatively implied entailed the following terms:

(a) that the plaintiff would supply and install certain equipment to the defendant and render services to it at its (the defendant's) instance and request;

(b) that the goods supplied and the services rendered to the defendant by the plaintiff would be sold and charged to it at the plaintiff's ordinary and customary prices from time to time;

(c) that the defendant would pay all the amounts due to the plaintiff within 30 days from the date of invoice, alternatively, within a reasonable time ; and

(d) the plaintiff would continue being the owner of the goods until they were paid for in full by the defendant.

[5] In its plea, the defendant essentially denied liability for the amount claimed and averred that it had entered into a partly written and partly oral agreement with an outfit called Calyxo and which entity had engaged the plaintiff as its agent. It was averred further that the plaintiff would, on Calyxo's behalf and in a work-manlike fashion, provide

[1] Act No.26 of 1998.

and install for the defendant a solar electrical panel and that same would be installed in a working condition and would be suited for the purpose of installation. The defendant further averred that upon completion of the project, the defendant would pay Calyxo the amount set out in the written part of the agreement referred to earlier.

[6] It is the defendant's further averral that it paid the amount due to Calyxo for the services rendered and that it is not indebted to the plaintiff in the amount claimed or at all. The defendant, as it is entitled, also filed a counter claim against the plaintiff for payment of an amount of N$ 66, 412.50, which it claims was due to it as a result of the plaintiff, during the installation process using the defendant's fork lift in terms of an oral agreement. In this regard, it was averred that the parties agreed that the plaintiff would pay the defendant an amount of N$375.00 per hour for the use of the said forklift upon presentation of an invoice by the defendant. It is claimed that the plaintiff used the forklift for a total of 154 hours but had refused to honour its obligations when called upon to pay. This counterclaim, it must of necessity be mentioned, was abandoned by the defendant at the commencement of the trial.

[7] The plaintiff, in proof of its case, called Mr. Steuber as its sole witness. At the end of his evidence, and after a lengthy bout of searching cross-examination, the plaintiff closed its case. This prompted the defendant's counsel to move an application for absolution from the instance, which application was vigorously opposed by the plaintiff. It is with the sustainability of that application that this ruling is concerned.

The law on absolution from the instance

[8] The application for absolution from the instance is provided for in rule 100 (1) and it is couched in the following terms:

'At the close of the case for the plaintiff the defendant may apply for absolution from the instance in which case the -

(a) defendant or his legal representative may address the court;

(b) plaintiff or his or her legal representative may address the court;

(c) defendant or his or her legal representative may thereafter reply to any matter arising out of the address of the plaintiff or his or her legal practitioner'.

Needless to say, the above procedure was followed by the parties and the court during the hearing of this application.

[9] The import of the foregoing provision has been the subject of a number of judgments in this jurisdiction and in which the standard applied in South Africa, as adumbrated in case law has been adopted almost line, hook and sinker and regarded as applicable in this jurisdiction as well. In *Stier and Another v Henke,*[2] Mtambanengwe AJA adopted the standard applied in *Claude Neon Lights (SA) Ltd v Daniels*[3]and said:

'At 92F Harms JA in *Gordon Lloyd Page and 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 case as appears in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 at 409 H-D

"When absolution from the instance is sought at the close of the 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) 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).

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 from the instance 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-39 A; *Schmidt Bewyreg 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 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

[2] 2012 (1) NR 370 (SC).
[3] 1976 (4) SA 403 at 409 G-H-D.

which a reasonable man might find for the plaintiff. (*Gascoyne (**loc cit**))* – a test which has 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. . .'

[10] In *Factcrown Ltd v Namibia Broadcasting Corporation,*[4] the Supreme Court held as follows on the subject, having summarized the import from the *Claude Neon* case (*supra*):

'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.'

[11] There appears to be a consensus on the law applicable as counsel on both sides largely relied on the same cases and formulated the applicable standard in similar fashion. It is in the application of the standard set out that the parties come to different conclusions however. It is in that regard that the court should review the evidence led and decide whether the application is meritorious or not.

[12] Before doing so, however, it is fitting to make a few points that in my view emerge from the above excerpts. The first is that the court should apply its own standard in deciding whether or not to grant absolution and should not, in this regard, rely on the standard or perception by some other 'reasonable person'. There is no need for the court to substitute its decision and judgment in such applications for that of another phantom individual. It must be borne in mind that in some cases, the issues for determination are complex such that even an educated person may have difficulty deciding on what is reasonable in the circumstances. The court should for that reason not abdicate the responsibility of deciding the live issue by making reference to a

[4] 2014 (2) NR 447 (SC) at para 72.

reasonable person when it has the wherewithal to decide that critical issue, it being fully involved and is *au fait* with the nooks and crannies of the case.

[13] Second, in dealing with such applications, it is incumbent upon the court to establish whether all the elements of the claim have been covered by the plaintiff's evidence. It follows naturally that should the plaintiff's evidence not cover or deal with essential elements of the claim that, without more, should found a proper basis to uphold an application for absolution from the instance.

[14] Last, the court should ordinarily be slow to grant an application for absolution and should only do so 'sparingly'. However, if the facts indubitably show that it is a proper case to grant same, the court should not feel inhibited in granting same, particularly where the interests of justice so require. The last observation makes sense to me for the reason that it does not make economic and legal sense to keep a defendant in harness in a trial and compel him to tender evidence, together with that of his or her witnesses, as the case may be, when it is apparent at the close of the other plaintiff's case that no reasonable court, acting carefully, may require the said defendant to adduce evidence in rebuttal, either because the evidence led is so poor, vacillating or of so romancing a character or fails to deal with the *essentiale* of the claim under consideration. The court should therefore avoid compelling a defendant at a great cost, to flog what is clearly a horse that kicked the bucket at the end of the plaintiff's case, so to speak.

The relevant principles of the law of contract

[15] It is clear from the averrals contained in the pleading that the plaintiff relies for relief on an oral agreement. Proving the existence of an agreement is not always a walk in the park as it were as this involves having to prove an offer and acceptance, which may in some cases not be clear cut issues to prove. The difficulty sometimes encountered can be gleaned from the morass of cases that are reported on the subject. I however, choose to deal for starters with what a contract is, which will eventually lead to an understanding and determination of the critical issues in contention.

[16] In *National Cold Storage, a Division of Matador Enterprise (Pty) Ltd v Namibia Poultry Industries (Pty) Ltd* [5] this court pronounced itself on this issue in the following terms:

'A contract is often defined as an agreement made between two or more parties with the intention of creating an obligation or obligations. In order to decide whether a contract exists, one looks first for the agreement by consent of the two or more parties. Professor Christie opines that the most common and normally the most helpful technique for ascertaining whether there has been an agreement, true or based on quasi-mutual assent, is to look for an offer and acceptance.

> [15] Professor Christie further argues that a person is said to make an offer when he puts forward a proposal with the intention that by its mere acceptance, without more, a contract should be formed. In the matter of *Wasmuth v Jacobs* Levy J said:
> "It is fundamental to the nature of any offer that it should be certain and definite in its terms. It must be firm, that is, made with the intention that when it is accepted, it will bind the offeror'.
> [16] It thus follows that for a contract to come into existence the offer must be accepted. In the matter of *Boerne v Harris* Schreiner JA said that for an acceptance to be effective it must be clear and unequivocal or unambiguous. One aspect of the rule that acceptance must be clear and unequivocal or unambiguous is that acceptance must exactly correspond with the offer. This principle has been stated as follows by Nestadt J in the matter of *JRM Furniture Holdings v Cowlin* –
> "acceptance must be absolute, unconditional and identical with the offer. Failing this, there is no consensus and therefore no contract. (Wessels Law of Contract in South Africa 2nd ed vol I para 165 *et seq.*) Wille Principles of South African Law 7th ed at 310 states the principle thus:
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> > 'The person to whom the offer is made can only convert it into a contract by accepting, as they stand, the terms offered; he cannot vary them by omitting or altering any of the terms or by adding proposals of his own. It follows that if the acceptance is not unconditional but is coupled with some variation or modification of the terms offered no contract is constituted.'

[5] 2015 (3) NR 844 (HC) at para [14] – [19].

[17] Mr. Jones, Counsel for the defendant argued that the claim in the instant matter was one for sale and purchase of goods. In this regard, he further submitted, a plaintiff, in order to obtain a favourable judgment, should allege and prove an agreement, the *merx* and the purchase price or *pretium.*[6] In his spirited address, he argued, in support of the application for absolution, that the plaintiff had failed to prove the agreement it averred in the pleadings. He contended further that the plaintiff failed to also show that there was consensus between the parties to the contract alleged and further failed to prove the quantum. It was his further argument that the plaintiff had failed to lead evidence to deal with all the elements of the claim, namely, one for goods sold and delivered. For that reason, he urged the court to grant the application for absolution with costs.

[18] Ms. Campbell, for the plaintiff's argument, was a different kettle of fish altogether. In the first place, she attacked the characterisation of the claim by Mr. Jones as captured above. In her submission, it was incorrect to characterize the claim as one for purchase and sale, the label attached to it by Mr. Jones. In her submission, the claim was what is in law referred to as the *locatio conductio operis,* which when simplified, means a contract for letting and hiring of work. In this regard, if Ms. Campbell is correct in her characterization, it would mean that the plaintiff is the *locator* and the defendant, the c*onductor*.

[19] I am of the considered view that it is necessary for the court to come to a view on the correct characterization of the contract in this case. I say so for the reason that for a decision to be made whether the plaintiff has led evidence to support its case, and therefore whether an application for absolution from the instance should hold, it may well turn on the question whither of the protagonists is correct in the characterization of the claim. It will be clear that the elements to be proved in relation to each of the types of claim are different.

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[6] 2012 (1) NR 370 (SC).

[20] The elements to be proved if the claim, as submitted by Mr. Jones, is for purchase and sale, have been adverted to in para [17] above. Those applicable, if the claim is found to be for a *locatio,* as submitted by Ms. Campbell, are three-fold, namely

(a) the work to be performed;

(b) the remuneration payable; and

(c) the time for performance. [7]

[21] Because the elements of the two types of claims differ, it will be important to consider the evidence briefly and decide whether a case has been made for the claim, depending on whither of the two the court finds is the correct characterization of the claim in the circumstances.

[22] What cannot be denied from both allegations in the pleadings and the evidence adduced thus far is that the plaintiff was requested to provide tie-in services which entailed the supply and installation of circuit –breakers and what is called a switch gear and which had to be housed in a cabinet that the plaintiff had provided in its premises. From the evidence, it was stated that the cabinet that was then available and had been earmarked for housing the said circuit-breakers and the switch gear was found to be unsuitable as it did not have enough space to accommodate the new additions.

[23] I am of the view, regard had to the nature of the contract and the allegations contained in the pleadings, considered *in tandem w*ith the evidence not disputed with regard to the nature of the work to be done, that the contract was not one for the sale and purchase of goods. It was rather a contract for the rendering of services and supply and installation of equipment. In view of the foregoing, I am of the considered view that Ms. Campbell is correct in her characterization of the nature of the claim. Correspondingly, I am not in agreement with Mr. Jones on his characterisation of the claim and hence the elements he forcefully submitted should be proved in order for the plaintiff to succeed in its claim.

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[7] *Sifris* ***NNO*** *v Vermeulen Broers* 1974 (2) SA 218 (T); Daniels, Beck's Theory of Pleadings in Civil Actions, 6th ed at p. 341 – 433.

[24] The next question is to consider the plaintiff's evidence and determine whether it did make sufficient allegations regarding the three elements of the *locatio* as stated above. From the evidence adduced by Mr. Steuber, he was clear on the nature and the extent of the work which he was to perform for the defendant and this is stated in para [22] above, namely the provision of tie-in services, which involved supply and installation of circuit-breakers and a switch gear.

[25] I will not close my eyes to the nature of the questions posed to the plaintiff on behalf of the defendant to the effect that the defendant was not aware of the full nature and import of the work done by the plaintiff as it is of a highly technical nature. In this regard, it was put that the defendant denied its liability to pay the invoice because there was no meeting of the minds regarding the scope of the work to be done.

[26] I am of the view that the court cannot, at this juncture be placed in a position to deal with the evidence in a conclusive manner without hearing the full version of the defendant, not only as put in cross-examination. It must be recalled that what the court should consider in applications for absolution from the instance is whether there is evidence adduced by a plaintiff which *prima facie* establishes a claim which the defendant would be called upon to answer.

[27] I am of the view that in relation to this first element, the plaintiff's evidence was clear that he explained to Mr. Du Preez Sr. about the nature of the work to be done when it was discovered that additional space would have to be found for housing the circuit-breaker and the switch gear. In my view, this sets out a sufficient basis for the defendant to place its version before court for the court to decide, after all the evidence is in, whether the plaintiff has established its claim on a balance of probabilities.

[28] The next element to be dealt with relates to the remuneration payable. On this issue, Mr. Jones harped with understandable monotony, submitting that because the plaintiff was not aware of how much the entire project of sourcing the material and supplying and installing same would cost, then there was no contract between the parties. It is true that Mr. Steuber testified that the revelation that the existing cabinet

previously identified for housing the said equipment was found to be unsuitable threw in a new dimension, namely the procurement of more material, whose quantity and cost could not then be ascertained. This resulted in the plaintiff, according to his evidence, stating what was an estimate, namely between N$ 70 000 and N$90 000. It was Mr. Steuber's evidence that Mr. Du Preez Sr., after this discussion told him to 'go ahead' and provide the said services.

[29] Ms. Campbell argued that the fact that no certain amount was agreed upon by the parties should not, without more, serve to non-suit the plaintiff. She argued that the fact that the estimate was endorsed by Mr. Du Preez Sr. was an indication that this was part of the tacit terms of the agreement *inter partes*. I agree entirely with Ms. Campbell's submission in this regard as being the correct statement of the law. In any event, even if I was to be incorrect on this score, it is important to note that authorities, to which the court was referred, state that where remuneration is not discussed at all, it is payable and it must, in those circumstances, be implied that it must be reasonable.

[30] The court was referred to an excerpt found in Norman, where the following appears:[8]

> 'Cases which occur in everyday experience seem to be at variance with the rule that the price must be certain. For example, goods are frequently ordered from a shop without enquiring the price, or a person enters a restaurant and orders a meal without enquiring what the meal will cost. In these cases there is a tacit agreement to pay whatever the goods are ordinarily sold for, or the price then being charged to others, or if the seller does not ordinarily deal in such goods, the current market price.'

[31] I am of the view that in view of the totality of the plaintiff's evidence, it is clear that he did not know how much material would be required for the tie-in services as this was still to be ascertained. Furthermore, it was his evidence that he did not at that stage know how long the work would take in order to give a precise quotation at that stage. He testified further that the work he was doing was the first of its kind and that he and Mr. Du Preez Sr. had a long-standing working relationship in terms of which he had

[8] Law of Purchase and Sale in South Africa, at p.44.

provided services to the latter and had charged ordinary and customary prices for the work done. In this regard, he testified, the defendant had always effected payment within a reasonable time and he envisaged that would be the case in respect of this transaction as well.

[32] I am of the considered view that in the premises, the plaintiff has alleged and testified to the existence of a tacit term regarding payment. It would be harsh in the extreme to non-suit the plaintiff in the circumstances for the reason that no definite price or remuneration was stated, given the entire matrix of the transaction, its peculiarity and the applicable law as quoted above. In my view, the plaintiff has made a case in this regard that would call for the defendant to present its defence, if so advised.

[33] The last requirement according to the authorities relates to the time for performance. This does not provide much scope for controversy as it was not raised as an issue, probably due to what I have found to have been a wrong characterization of the claim by the defendant. In my view, there was an agreement between the parties as to when the work would be done by the plaintiff. There is no allegation that the plaintiff did not do the work or that it was not done within an agreed time period. In this regard, I am of the view that the plaintiff stands on good ground.

[34] It must be recalled that absolution from the instance, the authorities say, should not be lightly granted if there is evidence relating to the elements of the claim that has been tendered to the court. In my considered view, such evidence has been tendered by the plaintiff and which evidence requires an answer from the defendant.

[34] Viewed in its entirety, the evidence by the plaintiff, which is of course denied in cross-examination by the defendant, was that the parties agreed to have the plaintiff carry out the tie-in services as alluded earlier and this, the plaintiff said was done when the parties discovered that the defendant's cabinet could not house both the switch gear and the circuit breakers. He was emphatic on this point. In cross-examination, and by reference to an email marked exhibit "D", the defendant denied the agreement and claimed that it heard about what it referred to as hidden costs only when demand was

made. In the circumstances, it is my view that there is some evidence though *prima facie* at this stage and upon which a court, acting carefully, may find for the plaintiff. It behooves the defendant, in the circumstances, to place its version before court.

[35] In the premises the following order issues:

4. The application for absolution from the instance is refused.
5. The defendant is ordered to pay the costs of the application, being of one instructing and one instructed counsel.
6. The matter is postponed to 13 to 17 February 2017 at 10h00 for continuation of the trial.

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T.S. Masuku

Judge