IN THE HIGH COURT OF NAMIBIA

CASE NO.: I 2803/2009

In the matter between:

FESTUS SHUKIFENI **PLAINTIFF**

And

TOW-IN-SPECIALIST CC **DEFENDANT**

CORAM: **UEITELE, AJ**

Heard on: 26, 28 & 29 October 2010

Delivered on: 25 January 2011

JUDGMENT

UEITELE, AJ.:

INTRODUCTION

[1] On 24 August 2009 the plaintiff instituted action against the defendant for the delivery of a motor vehicle which he claims belongs to him and which is in the possession of the defendant.

[2] The defendant opposed the plaintiff's claim and also instituted a counterclaim for damages in the amount of N$85 841-75 alleged to have been suffered by it by virtue of the plaintiff's breach of a written agreement.

THE PLEADINGS

[3] The plaintiff in his particulars of claim alleges that he was and is still the owner of a certain 1999 model Opel Astra with registration number N 35688 W. In its plea the defendant denies the allegation made by the plaintiff. It appears that the defendant denies that the plaintiff is the owner of a certain 1999 model Opel Astra motor vehicle with registration number N 35688 W ("the vehicle").

[4] THE PLAINTIFF FURTHER ALLEGES THAT THE DEFENDANT IS IN UNLAWFUL POSSESSION OF THE VEHICLE, WHICH, NOTWITHSTANDING DEMAND THE DEFENDANT FAILS TO RETURN. IN ITS PLEA TO THE PLAINTIFF'S ALLEGATION THE DEFENDANT SIMPLY REPLIES THAT IT HAS NO KNOWLEDGE OF THOSE ALLEGATIONS AND IT CANNOT ADMIT OR DENY THOSE ALLEGATIONS.

[5] The defendant, however, instituted a counter claim and in its counterclaim, the defendant amongst others claims that:

5.1. During August 2006 the plaintiff's motor vehicle was towed in by defendant for storage after being involved in a motor vehicle accident.

5.2. During August 2006, the plaintiff' and the defendant entered into a written agreement in terms of which defendant retained possession of the motor vehicle until such time as all amounts due and payable to defendant, including storage fees for the duration of its storage is paid in full.

5.3. It was a term of the agreement that if the motor vehicle is not claimed within three months, the defendant shall be entitled to sell the motor vehicle or any of its components for any price whatsoever and deduct the amount due and payable to it from the proceeds of such sale without prejudice to any of its rights.

5.4. Plaintiff failed to collect the motor vehicle within three months from date on which the motor vehicle was stored, or to reimburse the defendant. As a result of the plaintiff's unwillingness to collect the motor vehicle, the

defendant suffered damages in the amount of N$ 85 841-75 due to the fact that the motor vehicle was stored at the defendant's premises and the tow-in fees were not paid by the plaintiff.

[6] THE PLAINTIFF IN HIS PLEA TO THE COUNTER CLAIM DENIES THAT HE ENTERED INTO ANY AGREEMENT WITH THE DEFENDANT. THE PLAINTIFF'S BASIS OF DENYING THE EXISTENCE OF A WRITTEN AGREEMENT IS THAT ON THE DAY OF THE ACCIDENT AN EMPLOYEE OF THE DEFENDANT APPROACHED THE PLAINTIFF AND REQUESTED THE PLAINTIFF TO SIGN A DOCUMENT. THE EMPLOYEE NEVER EXPLAINED THE NATURE OF THE DOCUMENT NOR EXPLAINED THAT THE DOCUMENT CONSTITUTED AN AGREEMENT BETWEEN PLAINTIFF AND DEFENDANT. THE PLAINTIFF FURTHER PLEADED THAT WHEN HE SIGNED THE DOCUMENT, HE SIGNED IT ON THE UNDERSTANDING THAT HE WAS CONFIRMING HIS OWNERSHIP OF THE VEHICLE.

[7] Given the above dispute, I will briefly summarise the evidence as presented in court.

THE EVIDENCE

[8] The plaintiff testified that:

a) He is a businessman, he did not progress beyond primary school in his educational carrier, his language proficiency is Oshiwambo, Otjiherero, and a bit of Afrikaans.

b) On 14 April 2000, he purchased a motor vehicle, being an Opel Astra from Auas Delta for the amount of N$98 970-00. He submitted a receipt to bolster this allegation.

c) He is the registered owner of the vehicle and has since the year 2000 been paying the registration fees for the vehicle. He submitted the

motor vehicle licence and licence disc for the years 2006 to 2010 to bolster this allegation.

d) On 21 August 2006, his motor vehicle with registration number N 35688 W was involved in a motor vehicle accident. The person who drove the other vehicle to the accident admitted that he was responsible for the collision and a person who identified himself as the Manager of the driver of the other vehicle arrived at the scene and informed the plaintiff that he is employed by Builders Warehouse and that Builders Warehouse will take responsibility for the damages resulting from the accident.

e) An employee of the defendant arrived at the scene of the accident, spoke to him in Otjiherero, and asked him whether he can tow away the damaged vehicle. The plaintiff accepted the offer, where after the employee asked him to sign a document, which he did. He also testified that he acceded to sign the document because he was under the impression that the party who collided against him will be responsible for the cost of repair and towing away of the vehicle.

f) After two or three months from the date that the accident occurred, he approached Builders Warehouse, as the party who had accepted responsibility to repair the vehicle and enquired from that party as to what progress has been made with respect to the repairs of the vehicle.

g) The person whom he met at Builders Warehouse pleaded ignorance about the accident and its (i.e. Builders Warehouse) liability towards the plaintiff.

h) The plaintiff then left Builders Warehouse and went to the premises of the defendant in search of his vehicle, when he arrived at the premises of the defendant, he informed the employees of the defendant whom he found there, that he was looking for his vehicle, the employees advised him to check around in the yard and if he identified the vehicle, he must go to the manager.

i) He looked around the yard and did not find the vehicle, so he approached the manager of the defendant, and gave a description of the vehicle and confirmed that he was looking for the vehicle. The manager informed him that the vehicle was already sold and if the plaintiff wanted his vehicle he had to pay N$49 500-00. Disappointed he left the defendant's offices and approached lawyers for them to assist him. These lawyers did nothing on his case for a long time. He accordingly left those lawyers and approached the current lawyers to assist him.

[9] In addition to his own testimony, the plaintiff called three other witnesses, a certain Mr. Mbwale, Ms. Liana van der Westhuizen and the plaintiff's wife, Ms. Kristofine Shukifeni.

[10] MR. MBWALE TESTIFIED THAT:

a) He was self-employed as a panel beater.

b) He had a standing agreement with the defendant that he would purchase from the defendant at an agreed and fixed price of N$5000-00 all the vehicles that have been stored at the defendant's premises for a period exceeding two years.

c) He bought (but he could not testify as to when he bought the vehicle) a green Opel Astra with registration number N 35688 W, from the defendant, and in terms of the standing agreement, he paid an amount of N$5000-00 and repaired the vehicle at a cost

of N$25 000-00.

d) Sometime after he bought and repaired the vehicle, Mr. Kritzinger approached him and requested him to return the vehicle, as the owner of

the vehicle wanted the vehicle back. He accordingly returned the vehicle to Mr. Kritzinger of Tow-in - Specialist.

[11] Ms. Liana van der Westhuizen testified that:

a) She is self-employed and the owner of a small firm which collects and verify information.

b) During May/June 2009 she received instructions from the law firm, Lorentz-Angula to investigate the whereabouts of a green Opel Astra, with a registration number that she said she left at her office.

c) Her investigation led her to discover that the vehicle was in the possession of the defendant.

[12] Ms. Kristofine Shukifeni testified that she is the wife of the plaintiff and that she was in the company of the plaintiff on the day of the accident and also on the day when he went to Tow-in-Specialist to enquire about her husband's vehicle. She basically corroborated the evidence given by the plaintiff.

[13] THE DEFENDANT CALLED TWO WITNESSES, A CERTAIN MR. JAN JACOBUS KRITZINGER AND MR. ERENFRIED KAZEKUNDJA: MR. KRITZINGER, AMONGST OTHERS TESTIFIED THAT:

a) He is the sole member and a one hundred percent owner of the member's interest in the defendant.

b) He met the plaintiff on two occasions and this was when plaintiff came to his office. He says that the first time that the plaintiff came to his office, it was approximately three or four months after the accident, when plaintiff came to enquire about the cost of towing and storing of the vehicle. The second time that the plaintiff came to his office was after the plaintiff had issued summons and on that occasion he refused to speak to plaintiff, because the matter was pending

before court.

c) He was not present at the scene of the accident and most likely became aware about the plaintiff's vehicle when a receipt was taken to his office.

d) The defendant and the plaintiff had concluded a written agreement and in terms of that written agreement, the defendant had the right to sell the vehicle if it was not claimed after three months. He handed up documents which were marked as Exhibits "F1" and "F2".

e) That the plaintiff breached the terms of the written agreement as he failed to claim the vehicle after the stipulated three months period and plaintiff also failed to make any payments with respect to the tow in and storage of the vehicle.

f)He sold the "wreck" of the vehicle for N$5000-00, to Jerry Mbwale, (he cannot recall the date on which he sold the vehicle, but it must have been two years after the vehicle was brought to the defendant's premises).

g) The vehicle is in the possession of the defendant, and that, in terms of the written agreement between the plaintiff and the defendant, it had attracted tow-in costs of N$400-00, removal costs of N$400-00 and storage fees of N$73 845-00 plus value added tax of N$11 196-75, which makes the total amount of N$85 841-75.

[14] MR. ERENFRIED KAZEKUNDJA TESTIFIED THAT:

a) He is employed by the defendant for the past eight years.

b) He arrived at the scene of an accident involving a green Opel Astra and a truck. After the scene of the accident was cleared, he approached the driver of the Opel Astra, and informed the driver that the vehicle will not be able to

be driven from the scene as the windscreen and the front wheels were damaged. He offered the plaintiff three options namely: to tow the vehicle to plaintiff's house, to tow it to the defendant's premises, to just remove it from the road and place it on the side walk.

c) He thereafter advised the plaintiff that if the vehicle is taken to the defendant's premises, the first three days are free of charge, and from the fourth day the vehicle will attract storage cost. He then advised the plaintiff that plaintiff must attend to the defendant's offices so that, they discuss with the people at the office what must happen to the plaintiff's vehicle.

[15] WITH RESPECT TO EXHIBIT "F1" AND "F2" WHICH IS THE ALLEGED WRITTEN AGREEMENT BETWEEN THE PLAINTIFF AND THE DEFENDANT, THE WITNESS (I.E. MR. KAZEKUNDJA) TESTIFIED THAT WHEN HE APPROACHED THE PLAINTIFF, HE TICKED OFF ON THE FACE OF EXHIBIT "F1" THE ITEMS THAT WERE IN THE VEHICLE, AND ONCE THE PLAINTIFF HAD AGREED THAT THOSE ITEMS WERE IN THE VEHICLE, HE ASKED THE PLAINTIFF TO SIGN EXHIBIT "F1".

[16] In cross-examination this witness said he told the plaintiff the following:

a) That the company he works for is a break down specialists.

b) That if the car is broken down or damaged to the extent that it cannot move, he can help him to do one of three things, first is to remove the vehicle from the place where the collision occurred, so that it does not obstruct other traffic or is not a hazard to other road users; secondly, he can assist the plaintiff to tow the vehicle to where the plaintiff wants the vehicle to be; thirdly he can tow the vehicle to the defendant's premises, but if he tows the vehicle to the defendant's premises, then the plaintiff must within three days attend to the office of the defendant to discuss the terms and conditions of the towing and the storage of the vehicle. He testified that the conversation with the plaintiff was in

Afrikaans.

c) He did not draw the Plaintiff's attention to the terms and conditions which appear on Exhibit "F2", neither did he discuss the terms and conditions with the plaintiff, as those aspects are the domain of the people at the office (i.e. defendant's office).

[17] It is against the above summarised version of the evidence that I have to determine the claim and counterclaim of the plaintiff and the defendant.

THE LAW

[18] BADENHORST *ET AL* IN ***SILBERBERG AND SCHOEMAN'S LAW OF PROPERTY*** 5th Edition at page 93, argue that one of the characteristics of ownership which is emphasized is that: "ownership is a 'mother right' in the sense that it confers the most comprehensive control over a thing..." and at page 241 argues that "...it is still generally accepted that owners exercise and retain control over property, thereby justifying extensive protective measures when ownership or entitlements are infringed".

[19] There is a principle in our law that an owner cannot be deprived of their property against their will, this means that "an owner is entitled to recover property from any person who retains possession of it without the owner's consent." This principle was considered in the case of ***Chetty v Naidoo*** 1974 (3) SA 13.

[20] BADENHORST *ET AL (SUPRA)* AT PAGE 241 ARGUE THAT "AN OWNER WHO INSTITUTES A *REI VINDICATIO* TO RECOVER HIS OR HER PROPERTY IS REQUIRED TO ALLEGE AND PROVE:

a) that he or she is the owner of the thing;

b) that the thing was in the possession of the defendant at the commencement of the action; and

c) that the thing which is vindicated is still in existence and clearly identifiable."

[21] IN THE SOUTH AFRICAN CASE OF ***AKBAR V PATEL*** 1974 (4) SA 104, (A) TRENGOVE, J SAID THE FOLLOWING:

> "According to our law, where a plaintiffs claim for the recovery of possession or for ejectment is based on his ownership of the property involved, his cause of action is simply the fact of his ownership coupled with the fact that possession is held by the defendant. *(Graham v Ridley,* 1931 T.P.D. 476; *Krugersdorp Town Council v Fortuin,* 1965 (2) SA 335 (T) at p. 336 and the authorities there cited) "

[22] In ***Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty)*** 1999 (2) SA 986 (T) van der Westhuizen AJ said at page 996 -

"THE PLAINTIFFS CLAIM IS -IN THE FIRST PLACE - BASED UPON THE *REI VINDICATIO,* WHICH IS THE APPLICABLE ACTION AVAILABLE TO AN OWNER, WHO HAS BEEN DEPRIVED OF HIS OR HER PROPERTY AGAINST HIS OR HER WILL AND WHO WISHES TO RECOVER THE PROPERTY FROM ANY PERSON WHO RETAIN POSSESSION OF IT WITHOUT THE OWNER'S CONSENT...THE PLAINTIFF IN ORDER TO SUCCEED IS REQUIRED TO ALLEGE AND PROVE:

a) that he is the owner of the thing or items in issue; and
b) that the items were in the possession of the defendant at the commencement of the action."

[23] For the defendant to successfully resist a *rei vindicatio* action, he must allege and prove some right to hold possession. In ***Chetty v Naidoo*** *(supra)* Jansen JA said at page 20B-D.

> "It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner, unless he is vested with some right enforceable against the owner (e.g., a right of retention or a contractual right). The owner, in instituting *a rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res* - the *onus* being on the defendant to allege and establish any right to continue to hold against the owner (cf. *Jeena v Minister of Lands*, 1955 (2) SA 380 (AD) at pp. 382E, 383)."

[24] Since the defendant has pleaded that it is in possession of the vehicle by virtue of a written agreement between it and the plaintiff, I will briefly survey the requirements of an agreement. A contract is often defined merely as an agreement made with the intention of creating an obligation or obligations. (See ***LAWSA*** Vol 5 at paragraph 124; Lubbe Gerhardt and Christina Murray "***Contract Cases and Material Commentary***" 3rd Edition observes that: "A contract is a type of agreement. For a contract to be valid, therefore, the parties should intend to establish a mutual obligation and express this occurrence of intention in an outwardly perceptible form by means of declaration of will. South African Law
traditionally regards a contract as consisting of an offer and its acceptance ".

[25] Van der Merwe, van Huyssteen, Reinecke; and Lubbe; ***Contract: General Principles*** 2nd Edition, argue that "one must then assume that an agreement will be a contract if the parties intend to create an obligation or obligations and if in addition, the agreement complies with all other requirements which the law sets for the creation of obligations by agreement (such as contractual capacity of the parties, possibly of performance, legality of the agreement and prescribed formalities).

APPLICATION OF THE LAW TO THE FACTS

[26] From what I have said in paragraphs 18-25 of this judgment, I accept the law in Namibia to be same as in South Africa, (see ***Shimuadi v Shirungu*** 1990 (3) SA 344 (SWA), that "an owner who institutes a *rei vindicatio* to recover his or her property is required to allege and prove that he or she is

the owner of the thing and that the thing which is vindicated is still in the possession of the defendant at the commencement of the action".

[27] The evidence which was placed before me by plaintiff and which has not been contradicted by the defendant is that the plaintiff bought an Opel Astra on 14 April 2000 from Auas Delta and registered that vehicle in his name and the vehicle has since that date to the date of trial been so registered in his name. Mr. Kritzinger, on behalf of the defendant admitted that the Opel Astra was as on the date of trial in the possession of the defendant.

[28] I AM OF THE VIEW THAT THE PLAINTIFF HAS IN HIS PARTICULARS OF CLAIM SET OUT THE ESSENTIAL ALLEGATIONS NECESSARY TO SUSTAIN A CLAIM OF *REI VINDICATIO,* FOUNDED ON HIS OWNERSHIP OF THE VEHICLE. THE ONLY ASPECT THAT I NOW NEED TO DEAL WITH IS WHETHER THE DEFENDANT HAS DISCHARGED THE ONUS WHICH RESTS ON IT TO PROVE THAT IT IS VESTED WITH SOME RIGHT WHICH IS ENFORCEABLE AGAINST THE PLAINTIFF TO HOLD ON TO THE VEHICLE.

[29] The Defendant in its plea to the plaintiff's claim simply denied that the plaintiff is the owner of the vehicle and that it (i.e. Defendant) is in possession of the vehicle. In view of my finding that the plaintiff is the owner of the vehicle and that the defendant is in possession of the vehicle, the denial by the defendant is dismissed.

[30] The defendant instituted a counter claim in terms of which it *inter alia* alleges, that;

a) During August 2006, plaintiff's motor vehicle being an Opel Astra with registration number N 35688 W was towed in by Defendant for storage after being involved in a motor vehicle accident.

b) During August 2006 plaintiff and defendant entered into a written agreement in terms of which defendant retained possession of the motor vehicle, until such time as all the amounts due and payable to the defendant, including storage for the duration of the storage is paid in full. The defendant then annexed a document marked as Annexure "A" to prove the existence of the written agreement. Annexure "A" to the pleadings is the same document that was handed in as Exhibit F1 and F2 in evidence. The plaintiff denies that he entered into the alleged agreement.

[31] Since the defendant bears the onus of proving that it has a right to possess the vehicle, I will now turn to the evidence it placed before me to see whether it has discharged that onus.

[32] THE DEFENDANT'S VERSION OF HOW THE AGREEMENT WAS FORMED IS BASED ON THE EVIDENCE OF MR. KAZEKUNDJA. I DO NOT INTEND TO REPEAT HIS EVIDENCE HERE. I WILL HIGHLIGHT THE ASPECTS WHICH I CONSIDER RELEVANT TO THE RESOLUTION OF THIS DISPUTE. MR. KAZEKUNDJA TESTIFIED THAT HE GOT TO THE SCENE OF THE ACCIDENT, AND OBSERVED THAT AN OPEL ASTRA AND A TRUCK WERE INVOLVED IN A COLLISION. AFTER THE AREA OF THE COLLISION WAS CLEARED, HE APPROACHED THE DRIVER (THE PLAINTIFF) OF THE OPEL ASTRA AND INFORMED HIM THAT HIS VEHICLE WAS DAMAGED TO THE EXTENT THAT IT WOULD NOT MOVE BY ITSELF. SO HE INDICATED TO THE PLAINTIFF THAT HE (THE PLAINTIFF) HAD THREE CHOICES NAMELY: TO HAVE THE VEHICLE TOWED TO HIS HOUSE OR TO THE DEFENDANT'S PREMISES OR SIMPLY TO HAVE THE VEHICLE REMOVED FROM THE ROAD AND PLACED ON THE SIDE-WALK. THE PLAINTIFF'S REPLY WAS TO THE EFFECT THAT HE IS NOT THE ONE WHO CAUSED THE ACCIDENT, HE WAS BUMPED, SO THE PEOPLE WHO BUMPED HIM (THE PEOPLE FROM BUILDER'S WAREHOUSE) MUST TAKE RESPONSIBILITY. MR. KAZEKUNDJA FURTHER TESTIFIED THAT, HE ADVISED THE PLAINTIFF THAT IF THE VEHICLE WAS TAKEN TO THEIR PREMISES, FOR THE

FIRST THREE DAYS THAT THE VEHICLE IS STORED THERE, IT WILL BE STORED FREE OF CHARGE, AND THAT THE PLAINTIFF MUST GO THERE WITHIN THE FIRST THREE DAYS TO MAKE ARRANGEMENTS FOR THE PEOPLE WHO MUST REPAIR THE VEHICLE TO COLLECT THE VEHICLE FROM DEFENDANT'S PREMISES. I NEED TO STATE THAT THIS VERSION OF THE DEFENDANT WAS NOT PUT TO THE PLAINTIFF FOR THE PLAINTIFF TO COMMENT THEREON.

[33] He further testified that after informing the plaintiff he took his book, ticked off all the items that were in the vehicle and he then asked the plaintiff to sign the document to signify that he is giving authority for the vehicle to be towed away. In cross-examination, Mr. Kazekundja said that he spoke to the plaintiff in Afrikaans, and he explained to him the basic things, which are that he ticked off the items that were in the vehicle, he informed the plaintiff that the vehicle will be stored free of charge for the first three days, and that the plaintiff must go to the defendant's premises to negotiate the terms and conditions on which the vehicle will be stored for longer than three days. He was asked whether he did explain the terms and conditions as they appear on Exhibit "F2". His reply was that it is not within his jurisdiction to explain the terms and conditions, the obligation and the duty to explain the terms and conditions is for the people at the office. He emphasized that his responsibility was to tow the vehicle to the premises of the defendant once advised by the owner of a vehicle to do so.

[34] MR. KRITZINGER'S EVIDENCE IS THAT HE WAS NOT AT THE SCENE OF THE ACCIDENT, AND HE ONLY GOT TO KNOW ABOUT THE VEHICLE WHEN THE RECEIPT WAS TAKEN TO HIM. HE FURTHER TESTIFIED THAT EXHIBIT "F1" AND F2' (WHICH IS THE SAME DOCUMENT AS ANNEXED TO DEFENDANT'S PLEA AS ANNEXURE "A" SIGNIFIES THE AGREEMENT BETWEEN THE PARTIES. HE FURTHER TESTIFIED THAT TWO OR THREE MONTHS AFTER THE ACCIDENT THE PLAINTIFF CAME TO HIS OFFICE AND HE EXPLAINED THE TERMS AND CONDITIONS OF THE STORAGE OF VEHICLE TO

THE PLAINTIFF.

[35] The above survey of the evidence reveals only one conflict of fact arising from the directly contradictory evidence of the plaintiff and defendant namely whether: Mr. Kritzinger discussed the terms and conditions of the storage of the vehicle with the plaintiff. That conflict can be disposed of briefly. The plaintiff testified that two or three months after the accident, he went to the premises of the defendant, to reclaim his vehicle, at the office of the defendant he met Mr. Kritzinger who informed him that, the vehicle was sold and if he wants to reclaim his vehicle, he must pay the amount of N$49 500-00. (I pause here to observe that this piece of evidence was not challenged in cross-examination). He then further testified that from there, he left the offices of the Defendant and enlisted the services of legal practitioners who did not actually help him.

[36] THE DEFENDANT ON THE OTHER HAND (THROUGH) MR. KRITZINGER TESTIFIED THAT THREE OR FOUR MONTHS AFTER THE ACCIDENT, THE PLAINTIFF ARRIVED AT THE DEFENDANT'S PREMISES AND THERE HE WAS INFORMED ABOUT THE TERMS AND CONDITIONS OF THE STORAGE OF THE VEHICLE; AND PLAINTIFF LEFT WITHOUT SAYING ANYTHING. (I MUST AGAIN PAUSE HERE TO OBSERVE THAT THIS PIECE OF EVIDENCE WAS NOT PUT TO THE PLAINTIFF FOR HIM TO DEAL WITH). HOW WILL THESE TWO MUTUALLY DESTRUCTIVE VERSIONS OF EVIDENCE BE APPROACHED?

[37] In the South African case of ***National Employers General Insurance v Jagers:*** 1984 (4) SA 437, Eksteen A.J.P said, that where there are two mutually destructive versions the Plaintiff can only succeed:

> "....if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected, in deciding whether that evidence is true or not the court will weigh up and test the

Respondent's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the Respondent's then the court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the Respondent's case anymore than they do defendant's, the Respondent can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false ."

The above proposition was approved by the Supreme Court of Namibia in the unreported Judgment of ***Motor Vehicle Accidents Fund v Kulubone***

[38] I AM OF THE VIEW THAT THE PLAINTIFF'S VERSION THAT THEY DID NOT DISCUSS THE TERMS AND CONDITIONS CONTAINED IN EXHIBIT "F2" IS, ON A PREPONDERANCE OF PROBABILITIES, TRUE AND ACCURATE AND THEREFORE ACCEPTABLE, AND THAT THE OTHER VERSION ADVANCED ON BEHALF OF THE DEFENDANT IS FALSE OR MISTAKEN AND FALLS TO BE REJECTED. I SAY SO FOR THE FOLLOWING TWO REASONS:

(a) First, the defendant himself testified that the plaintiff visited him on two occasions, the first occasions was shortly (i.e. three or four months) after the accident and the second occasion was after the plaintiff had issued summons. On the second occasion no discussion took place. Mr. Jerry Mbwale, who is an independent witness, testified that after he purchased the vehicle from defendant, Mr. Kritzinger called him and requested him to return the vehicle, because the owner of the vehicle wanted his vehicle back. So it is thus probable that on
the visit of the plaintiff to defendant's premises, he expressed his desire to have his vehicle back, rather than a discussion of the terms and conditions contained in the alleged agreement.

(b) Second, I have observed above that the version of Mr. Kritzinger was never put to the plaintiff for the plaintiff to deal with that aspect. In the matter of ***Navachab Gold Mine v Izaaks*** 1996 NR 79 at 85 B-C Hannah J, quoting with approval from Claasen J in ***Small v Smith*** 1954 (3) SA 434 (SWA) at 438 E-F, said the following:

"Quite apart from the foregoing, two of the incidents relied on were never put to any of the

employer's witnesses in order to give the employer an opportunity to answer the allegations. As was said by Claasen J in Small v Smith 1954 (3) SA 434 (SWA) at 438 E-F:

'IT IS, IN MY OPINION, ELEMENTARY AND STANDARD PRACTICE FOR A PARTY TO PUT TO EACH OPPOSING WITNESS SO MUCH OF HIS OWN CASE OR DEFENCE AS CONCERNS THAT WITNESS AND IF NEED BE TO INFORM HIM, IF HE HAS NOT BEEN GIVEN NOTICE THEREOF, THAT OTHER WITNESSES WILL CONTRADICT HIM, SO AS TO GIVE HIM FAIR WARNING AND AN OPPORTUNITY OF EXPLAINING THE CONTRADICTION AND DEFENDING HIS OWN CHARACTER."

And at 88 B-C:

"The rule that an opposing party must put his case to other party's witnesses in respect of matters which are not common cause is not to be found in formal rules of court but is, as I have already pointed out, based on considerations of ***fundamental fairness*** and a court should be slow to reject a witness' evidence on such matters where it has not been challenged and the witness has not been given opportunity to deal with the conflicting version which the opposing party's witnesses give in due course." {My emphasis}

[39] IT IS TRITE LAW THAT THE BASIS OF CONTRACT IS ***CONSENSUS,*** THAT IS, THE ACTUAL MEETING OF THE MINDS OF THE CONTRACTING PARTIES, OR THE REASONABLE BELIEF BY ONE OF THE CONTRACTING PARTIES THAT THERE IS CONSENSUS. THE EVIDENCE OF THE TWO PROTAGONISTS, THE PLAINTIFF AND KAZEKUNDJA RELATE TO THE SUBJECTIVE PERCEPTIONS AND INTENTION OF EACH OF THEM. THE PLAINTIFF TESTIFIED THAT WHEN HE SIGNED THE DOCUMENT EXHIBIT "F1", HE DID SO UNDER THE IMPRESSION THAT HE WAS ONLY GIVING PERMISSION FOR HIS VEHICLE TO BE TOWED AWAY. MR. KAZEKUNDJA APPEARS TO CONFIRM THAT WHEN HE SIGNED THE DOCUMENT, IT WAS ONLY TO EVIDENCE THAT HE AND THE PLAINTIFF AGREED, THAT THE ITEMS TICKED OFF ON EXHIBIT "F1" WERE IN THE VEHICLE AND THAT HE WAS AUTHORISED TO TOW THE VEHICLE TO THE DEFENDANT'S PREMISES. IT IS PROBABLE TOO THAT KAZEKUNDJA ALSO EXPECTED BUILDER'S WAREHOUSE TO BE RESPONSIBLE FOR THE COST, BECAUSE ON THE FACE OF EXHIBIT "F1", MR. KAZEKUNDJA INSERTED THE WORDS BUILDER'S WAREHOUSE AND IN CROSS-EXAMINATION HE TESTIFIED THAT HE INSERTED THE WORDS BECAUSE THE PLAINTIFF SAID THAT THE PEOPLE WHO BUMPED HIM MUST BE RESPONSIBLE FOR THE COSTS OF REPAIRS AND TOWING AWAY OF THE VEHICLE.

[40] On this footing, I am of the view that plaintiff's intention was to authorise the towing away of his vehicle, while the defendant's intention through Mr. Kritzinger was to sign an agreement for the towing, and storage of the vehicle. The minds of the parties never met there was no consensus but dissensus.

[41] THE DEFENDANT THROUGH MR. KRITZINGER ATTEMPTED TO BRUSH THIS PLAIN TRUTH ASIDE BY SIMPLY CLINKING TO THE ALLEGED WRITTEN AGREEMENT. I AM OF THE VIEW THAT MR. KRITZINGER'S APPROACH IS MISPLACED, HE CANNOT DISREGARD THE PLAINTIFF'S SUBJECTIVE INTENTION. I ECHO THE WORDS OF BOTHA JA IN THE CASE OF ***STEYN V LSA MOTORS LTD*** 1994 (1) SA 49 AT PAGE 61 C-E WHERE HE SAID:

> "Where it is shown that the offeror's true intention differed from the expressed intention, the outward appearance of agreement flowing from the offeror's acceptance of the offer as it stands does not in itself or necessarily result in contractual liability. Nor is it in itself decisive that the offeror accepted the offer in reliance upon the offeror's implicit representation that the offer correctly reflected his intention. Remaining for consideration is the further and crucial question whether a reasonable man in the position of the offeree would have accepted the offer in the belief that it represented the true intention of the offeror, in accordance with the objective criterion formulated long ago in the classic dictum of Blackburn J in Smith v Hughes (1871) LR 6 QB 597 at 607.".

[42] IF I AM WRONG ON THAT FOOTING, I WILL LOOK AT WHAT THE JUDICIAL DECISIONS AND LEGAL WRITINGS ARE WITH REGARD TO PARTIES WHO SIGN AGREEMENTS. MORE THAN ONE HUNDRED YEARS AGO, INNES CJ SAID THE FOLLOWING IN ***BURGER V CENTRAL SOUTH AFRICAN RAILWAYS*** 1903 TS 571 AT 578:

> "It is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature."

[43] VARIOUS COURTS IN SOUTH AFRICA HAVE HELD THAT A PARTY TO A WRITTEN AGREEMENT ***MAY*** BE HELD BOUND TO THE PROVISIONS WHICH HAVE BEEN INCORPORATED THEREIN, IRRESPECTIVE OF WHETHER HE OR SHE HAS READ THEM OR NOT (WHICH PRINCIPLE HAS BEEN

ACCEPTED BY THIS COURT) 'THE *CAVEAT SUBSCRIPTOR* RULE'. (SEE, GENERALLY, ***GOEDHALS V MASSEY-HARRIS & CO*** 1939 EDL 314; ***BHIKHAGEE V SOUTHERN AVIATION (PTY) LTD*** 1949 (4) SA 105 (E); ***MATHOLE V D MOTHLE*** 1951 (1) SA 256 (T).

[44] Professor Christie in ***The Law of Contract in South Africa,*** 4th edition at page 200 with regard to the true juridical basis of the principle underlying what is termed the *caveat subscriptor* rule opines that "the *true basis of the principle is the doctrine of quasi-mutual assent, the question being simply whether the other party is reasonably entitled to assume that the signatory, by signing the document, was signifying his intention to be bound by it*" He goes on in the following terms:

> 'On the basis of quasi-mutual assent the cases in which it is clear (sometimes even to the other party) that the signatory has not read the document before signing are easily understood. "I have not read the document but I'm signing it because I'm prepared to be bound by it without reading it" is an attitude, whether expressed or implied, that entitles the other party to regard the document as binding.'

[45] I have above in paragraph 42 emphasised that a party to a written agreement ***may*** be held bound to the provisions of a contract whether he or she has read them or not. It implies that there are situations where a party to a written agreement ***will not*** be held bound by his signature to a contract. The instances where a party to a written agreement may not be so bound are where the other party knew that he had not read the contract, was not misled by the signature and only had himself to blame for the other's ignorance of the contents of the document. (See ***Van Wyk v Otten*** 1963 (1) SA 415 (O) at 418A - 419H; ***Payne v Minister of Transport*** 1995 (4) SA 153 (C) at 159G - 160I.). Innes CJ said the following in ***Burger v Central South African Railways***' case (supra):

> "There are, of course, grounds upon which [a party] may repudiate a document to which he had put his hand. But no such grounds have been shown to exist in the present case. Consider the circumstances under which this note was signed. Neither ***fraud nor misrepresentation*** has been alleged; nothing was said by any railway official which misled the signatory; the language of the

document was one which the consignor understood; no pressure of any kind was exercised. All that can be said is that the consignor did not choose to read what he was signing, and after he had signed did not know the particulars of the regulations by which he had agreed to abide. For the Court to hold upon these facts that the appellant is legally justified in repudiating his signature would be a decision involving far-reaching consequences and it would be a principle unsupported by any principle of our law. The mistake or error of the signatory in the present case was not such *justus error* as would entitle him to claim a restitution *in integrum* or as could be successfully pleaded as a defence to an action founded upon the written contract, and therefore it cannot be used for the purpose of attacking that contract when the railway seeks to rely upon it."

[46] IN ***GEORGE V FAIRMEAD*** (PTY) LTD 1958 (2) SA 465 (A) FAGAN C J SAID AT 471B-D:

"When can an error be said to be *justus* for the purpose of entitling a man to repudiate his apparent assent to a contractual term? As I read the decisions, our Courts, in applying the test, have taken into account the fact that there is another party involved and have considered his position. They have, in effect, said: Has the first party the one who is trying to resile been to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself? If his mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame and the first party is not bound.'"

[47] PROFESSOR CHRISTIE (OP *CIT* AT 206) APTLY MAKES THE POINT THUS:

"Does the reasonable man present for signature without reading (as opposed to signature after clause-by-clause discussion) a document containing terms which no reasonable man would expect to find therein? Or to put it another way, because it is a known fact of life that people habitually sign contracts without reading them only because they assume they do not contain unexpected terms, can it be said that the unwitting signatory of a contract which does contain unexpected terms has so conducted himself that a reasonable man would believe he was assenting to those unexpected terms? The answer to both questions must surely be no, and the ***caveat subscriptor*** rule should therefore not apply in these circumstances."

[48] IN THE PRESENT CASE THE PLAINTIFF WAS ASKED TO SIGN A FORM CONTAINED IN A BOOK WHICH MR. KAZEKUNDJA PUT BEFORE HIM. NO STEPS WHATSOEVER WERE TAKEN BY MR. KAZEKUNDJA TO BRING THE FAR-REACHING EXEMPTION CLAUSE CONTAINED THEREIN TO THE PLAINTIFF'S ATTENTION, IN FACT MR. KAZEKUNDJA HIMSELF DID NOT UNDERSTAND THOSE TERMS AND CONDITIONS. THE PLAINTIFF WAS BROUGHT UNDER THE IMPRESSION THAT HE WAS SIGNING THE DOCUMENT FOR THE LIMITED PURPOSE EXPLAINED TO HIM (I.E. TO TOW AWAY THE VEHICLE).

I AM ACCORDINGLY OF THE VIEW THAT THE PLAINTIFF WAS MISLED BY WHAT HE WAS TOLD, AS WELL AS BY THE DEFENDANT'S FAILURE TO DO ANYTHING TO DRAW HIS ATTENTION TO THE WIDER AMBIT OF THE AUTHORISATION. THERE WAS NO REASON FOR THE PLAINTIFF TO ANTICIPATE THAT HE WAS ENTERING INTO AN AGREEMENT CONTAINING EXEMPTION CLAUSES. IN MY JUDGMENT, THE DEFENDANT IS NOT ENTITLED TO ASSUME THAT THE PLAINTIFF, MERELY BY SIGNING THE DOCUMENT, WAS SIGNIFYING HIS INTENTION TO BE BOUND ALSO BY THE TERMS AND CONDITIONS CONTAINED IN THAT DOCUMENT.

[49] I have reached the conclusion that the defendant has failed to discharge the onus resting on it to prove that it has some right to hold on to the vehicle.

[50] IN THE RESULT I MAKE THE FOLLOWING ORDER:

1) The defendant is ordered to deliver to the plaintiff the motor vehicle, an Opel Astra with registration number N 35688 W, within seven (7) days from the day of this order.

2) With respect to the counter claim, the counterclaim fails and is dismissed.

3) Defendant is ordered to pay the cost of both the claim and counter claim.

UEITELE, AJ

ON BEHALF OF THE PLAINTIFF: Ms. S Nambinga

INSTRUCTED BY: Lorentz Angula Inc.

ON BEHALF OF THE DEFENDANT: Ms. F Schulz

INSTRUCTED BY: Frieda Schulz Attorneys