REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGEMENT

"Not Reportable"

CASE NO. I 1415/2008

In the matter between:

NABEEL FRESH PRODUCE CC **PLAINTIFF**

and

XXX TRUCKING CC **DEFENDANT**

Neutral citation: *Nabeel Fresh Produce CC v XXX Trucking CC (I 1415/2008)*

[2012] NAHCMD (21 August 2012)

CORAM*:* DAMASEB, JP

HEARD: 20 – 21 FEBRUARY 2012; 2 – 3 APRIL 2012

DELIVERED: 21 August 2012

Summary: Claim for payment of purchase price of a truck – defendant denying that a valid contract was concluded as it chose not to exercise the option to purchase based on alleged non-fulfillment by plaintiff of a warranty that truck was under one year manufacturer's guarantee – Court finding that probabilities favor plaintiff's version that, in breach of agreement, defendant failed to perform and thus liable to pay the difference between purchase price and the amount at which truck sold to a third party – Although proceeding under contract, plaintiff claiming interest on the purchase price 'from date of judgment to date of payment' – Court holding plaintiff must be held to his election as that was the case defendant had to meet – Costs awarded to include only one counsel as matter not so complex as to have justified employment of instructed counsel.

ORDER

Judgment granted in favour of the plaintiff in the amount of N$115 000 with interest at the rate of 20% per annum, calculated from the date of judgment to the date of payment; with costs of suit to include only one counsel.

JUDGMENT

DAMASEB JP: [1] The plaintiff Close Corporation instituted action against the defendant Close Corporation for payment of an amount of N$ 130 000 and interest thereon at the rate 20% per annum, 'calculated from date of judgment to date of payment'. The plaintiff seeks as damages what it claims to be the difference between the agreed purchase price and the amount at which it eventually sold a Scania truck to a third party following an alleged breach by the defendant to purchase the truck.

[2] It is common cause that the parties entered into an oral agreement in terms of which the defendant had obtained an option to purchase from the plaintiff a Scania 480 HP Truck (hereafter 'the truck'). The only additional terms that are undisputed are the following:

(a) That the plaintiff was to give delivery of the truck to the defendant before the end of June 2007;

(b) That the defendant would take possession of the truck and test-drive it before exercising the option to purchase it.

Plaintiff's pleaded case

[3] The rest of the terms are in dispute. The plaintiff alleges that the following were the additional terms:

(a) that the defendant would upon taking possession of the truck test-drive it from Walvis Bay to the north of Namibia and back, before 'finally deciding to exercise the option to purchase the truck';

(b) that upon the defendant exercising the option to buy, the truck would be sold voetstoots and without any warranties either expressed, implied or otherwise;

(c) that the purchase price was N$750 000 and would exclude VAT, but that at the defendant's request, the purchase price was reduced to N$735 000;

(d) that the purchase price was payable by a one off payment via bank transfer.

[4] The plaintiff pleads further that defendant, on or about 4 June 2007 and at Windhoek, after test driving the truck as agreed and whilst the option was in 'full force and effect' duly exercised the option by orally notifying the plaintiff that he was purchasing the truck and that thereupon a binding agreement came into existence between the plaintiff and the defendant. That the plaintiff on 11 June 2007 demanded payment of the full purchase price on or before end of June 2007. The defendant on 19 July 2007, complaining that the truck was overheating, returned it to Scania premises. On 23 August 2007, the plaintiff tendered delivery of the truck against payment of the purchase price of N$ 750 000 but on 17 September 2007 the defendant repudiated the agreement by refusing to accept delivery thereof. The plaintiff accepted the repudiation, cancelled the agreement as a result of the repudiation and seeks damages representing the difference between the agreed purchase price of N$ 750 000 and the amount of N$ 620 000 at which he sold the truck to a third party.

The plea

[5] The defendant denies the additional terms stated in paras [3] and [4] above. It pleads that the additional terms were the following:

(a) that it would test-drive the truck for 'approximately a month';

(b) that the plaintiff warranted to it that there was still a manufacturer's guarantee in place on the truck by Scania Trucks Namibia, for a period of one year which would inure for the defendant's benefit;

(c) that the defendant would only purchase the truck after its representative had test-driven the truck for a period of approximately one month, and the defendant was satisfied as to the mechanical soundness of the truck.

The defendant denies that the sale of the truck was 'voetstoots' and without warranties, express or implied. It also denies that a valid and binding agreement of sale came into existence between the parties as the defendant elected not to exercise the option to purchase the truck.

[6] The following additional averments in the defendant's plea are very important:

(a) that defendant's Dudley Strauss complained to plaintiff's William Gilmore that the truck was overheating approximately 8 days after the defendant had taken 'delivery of the truck for purposes of test driving it';

(b) that thereupon plaintiff instructed defendant to take the truck to Scania Trucks Namibia (Pty) Ltd ('Scania') for necessary repairs and that plaintiff reconfirmed to defendant that the truck was still under manufacturer's guarantee with Scania; and

(c) that the defendant upon taking the truck to Scania as aforesaid, was advised by Scania that the truck was no longer under any guarantee by Scania and that, as a result, the defendant had to pay N$11,569.38 for such repairs. The plaintiff thereupon demanded payment of the full purchase price on or before end of June 2007;

(d) that although such demand was made, the defendant's Strauss informed Gilmore that on account of the truck overheating, the defendant had not yet decided whether or not to exercise the option to purchase and that it was agreed instead that the defendant would pay N$22 000 to plaintiff for the use of the truck during the month of June 2007, being the monthly installment payable by the plaintiff to its bank in respect of the installment sale agreement on the truck;

(e) that it was later agreed between the parties that the amount of N$22 000 would be increased to N$25 000 in light of the defendant's actual use of the truck for a period exceeding one month and that the payment of N$11,569.38 paid by defendant for the truck's repairs was partial payment of the amount of N$25 000;

(f) that during July 2007 the defendant brought it to plaintiff's attention that the truck was still overheating and was as a result returned to Scania where it was first collected and that thereupon defendant's Strauss had advised plaintiff's Gilmore that the defendant would, in view of the overheating, not exercise the option to purchase the truck;

(g) upon the plaintiff being so advised, the parties agreed that the amount of N$25 000 would be payable by the defendant to the plaintiff as compensation 'for the time and distance for which the truck was used by the defendant'.

Common cause facts

[7] It is common cause that the plaintiff's Gilmore delivered the truck to defendant's Strauss on or about end of May 2007. The truck was from that point on under Strauss's possession and control. He used the truck in the defendant's trucking business. It is common cause that the defendant is in the trucking business and transports goods for others for financial reward. From the moment Strauss took possession of the truck on behalf of the defendant and until he parted possession with it on 19 July 2007, the truck had travelled 24 000 km in furtherance of the defendant's trucking business from which the defendant derived an income. It is also common cause that after Strauss took possession of the truck it overheated and was taken in for repairs to Scania and that the defendant paid for those repairs to truck amounting to N$11,569.38.

[8] It is further common cause that the plaintiff sold the truck to a third party in November 2007 at a price of N$620 000. It is also common cause that the defendant, after taking delivery of the truck, deployed it in its commercial operations and registered 8000 km on it in less than 10 days whereafter the truck was taken to Scania for repairs for overheating. After those repairs, the defendant further deployed the truck in its commercial operations and registered a further 16 000 km on it. The defendant derived an income from the use of the truck in this way. It is undisputed that the plaintiff paid: (a) installments to the bank in respect of the truck and (b) accident insurance thereon for all the time it was in the possession of the defendant.

[9] Lastly, it is common cause that the principals (and sole members) of the two parties are both businessmen of long standing: Gilmore's business is the sale of fresh produce including ownership of trucks for the purpose of the business; while that of Strauss is long-haul transportation of goods for others for reward.

Plaintiff's evidence

Sole member William Gilmore

[10] Against the backdrop of the plaintiff's pleaded case that there was a binding agreement between the parties for the sale of the truck which was allegedly repudiated by the defendant, Gilmore, the principal of the plaintiff, testified that the defendant's Strauss approached him to sell the truck to the defendant. Gilmore testified that the truck had been serviced at a cost of N$12 000 before it was delivered to Strauss and that the plaintiff had paid a further sum of N$22 000 for the road-worthiness licence issued by the Namibia Transport Information System (NATIS) for the truck. According to Gilmore, on 4 June 2007, the defendant orally conveyed to him his decision to purchase the truck, thus consummating the sale. Gilmore thereupon sent an invoice for the purchase price to Strauss at the latter's request from which it was clear that VAT was excluded from the purchase price. Gilmore testified that he did not receive any

indication from Strauss that the invoice was not accepted. According to Gilmore, the invoice was asked for by Strauss to be used for the purpose of raising finance for the truck's purchase.

[11] Gilmore testified about the several trips undertaken with the truck by the defendant across the country and beyond the borders. He confirmed that he was informed by the defendant's Strauss eight days after the truck's delivery that the truck was overheating. On Gilmore's advice, Strauss took the truck to Scania, who affected some repairs to the fan of the truck but could not complete the repairs because the truck was linked to an interlink loaded with defendant's cargo destined to South Africa. According to Gilmore, the purchase guarantee on the truck had expired by June or July 2007 as the truck had been bought in 2005. He testified that the truck was involved in an accident before delivery to the defendant, but that he had it repaired and had taken out for it an accident insurance which, at the time of the transaction with the defendant, was valid for one year.

[12] Gilmore testified that upon demand of payment of the full purchase price, Strauss told him that he was at that stage unable to pay the full purchase price by end June 2007 and would only be able to pay (as an initial installment) the amount of N$25 000 representing the monthly installment payable by the plaintiff to its bankers on the installment sale agreement whilst he was securing finance. No such payment was however made according to Gilmore, except an amount of N$13 000 which Strauss upon Gilmore's inquiry stated was the difference between N$25 000 and the cost for the repairs he had paid to Scania for the repair of the Scania when it first experienced overheating whilst under its possession. Gilmore insisted upon payment of the full amount without set off and returned the N$13 000 to the defendant.

[13] Gilmore confirmed that he had received from Strauss more complaints about the truck overheating, whereafter the defendant 'abandoned' the truck at Scania having driven 24 000 km with it and refused to pay the purchase price. According to Gilmore, the use of the truck in that way brought down its resale value.

[14] Gilmore testified in conclusion that he suffered damages, due to defendant's repudiation of the agreement, in the amount of N$130 000 being the difference between the purchase price of N$750 000 and the actual resale price of N$620 000 at which the plaintiff sold the truck to a third party. In the alternative, the plaintiff's pleaded case is that it was an implied term that the defendant, in case of repudiation of the agreement would return the truck to the plaintiff upon payment of a fair and reasonable compensation for the use of the truck.

Plaintiff's expert witness

[15] The plaintiff called Mr. Benjamin Johannes Groenewaldt as an expert witness on trucking business. Groenewaldt testified that around 2006, the rate in the trucking business chargeable to clients was N$ 7.65 per kilometer. He testified that on a load of 34 tons one would make an income of about N$27 000 with a truck and trailer on a trip to and back from Cape Town in 2006. Under cross-examination, Groenewalt was not prepared to concede that the rate chargeable would depend on the load that one carries as a trucker's expenses in respect of fuel remained the same regardless of the size of the load. He conceded however that the Horse without a trailer was financially meaningless just as a trailer without a Horse was economically meaningless – this in light of the common cause fact that the defendant received only the Horse and not a trailer from the plaintiff.

Defendant's evidence

Sole member Dudley Strauss

[16] Mr. Dudley David Strauss testified that he was the managing and sole member of the defendant, XXX Trucking CC. He testified that he met Gilmore in 2007 to discuss the sale of a truck that was then standing at the Scania premises. Strauss testified that in view of the fact that the truck had previously been involved in an accident, he insisted to test drive it for about a month for 'peace of mind' after which he would buy it if it was mechanically sound. The tenor of his evidence was that the plaintiff had accepted that the defendant might elect not to exercise the option to buy if the truck was not mechanically sound. Strauss testified that he and Gilmore agreed that the defendant would pay the amount of N$22 000.00 for the period that it was to test-drive the truck, representing the amount that the plaintiff paid in monthly installments to the bank towards the truck. Strauss further testified that Gilmore had warranted to him that the truck still enjoyed a one year manufacturer's guarantee by Scania and that the defendant, if it became the new owner, would own that guarantee.

[17] Strauss also testified that it was agreed that the defendant would test drive the truck in furtherance of its commercial operations. He testified that he, after taking delivery of the truck, personally drove with it on a business trip from Walvis Bay to the north of Namibia and thence to Cape Town and back to Windhoek. Thereafter his driver, one Roentgen, also known to Gilmore, then drove the truck for up to two trips to South Africa when the truck overheated. He then reported this much to Gilmore who then advised him to take the truck to Scania for repairs. When the repairs were done he was advised by Scania that the amount of N$11 569.38 was due for such repairs which he had to pay as, according to him, Scania told him that no guarantee existed in respect of the truck. According to Strauss, Gilmore then advised him that he would take care of the issue of the guarantee.

[18] After the repairs, Strauss testified, he caused the truck to undertake several trips to South Africa in furtherance of the defendant's trucking business, and on 19 July 2007,

after it experienced further heating problems, left it at Scania and informed Gilmore that he did so and that the defendant would not exercise the option to buy the truck. When Gilmore expressed dissatisfaction with the fact the defendant would not proceed with the sale, Strauss said he went to see Gilmore and it was then agreed that he would pay N$25 000.00 for the period that the defendant used the truck. According to Strauss , the parties then agreed that the defendant pay to the plaintiff the amount of N$22 000.00 for the actual use of the truck whereto the defendant added an amount of N$3000.00 to compensate for the additional use beyond the one-month test-drive. He said he was entitled to deduct from that amount the costs of repair which defendant paid. He proceeded to deduct the amount of N$11 569, 38 which the defendant paid to Scania and paid over the difference of N$13 000 which plaintiff's Gilmore refused to accept.

[19] In cross-examination, Strauss conceded that the defendant had travelled with the truck on its business for an additional 16 000 km after the first repairs effected to the truck and that the defendant generated income using the truck. He also conceded that he had known at that stage that there was no manufacturer's guarantee on the truck with Scania as he had been told as much by a representative of Scania. He could not dispute under cross-examination that just before the defendant took possession of the truck on behalf of the defendant, the plaintiff had it serviced at a cost of N$12 000 and had paid to NATIS N$20 000 for its road-worthiness licence. Gilmore conceded that when he took delivery of the truck he was told by Gilmore that the truck had been involved in an accident; that it was a second-hand truck and had been bought in 2005. He also conceded that the industry practice was that a new truck enjoyed a manufacturer's guarantee of two years or 300 000 km, but added that it was also possible for the owner to extend such guarantee upon payment. He accepted, however, that if the latter were to be the case there would be written proof of such extension which he never asked for or had seen.

[20] The court enquired of Strauss why he did not call off the deal after he discovered that the truck was over heating and that no manufacturer's guarantee was in existence. He answered that he could not call off the deal at that time because he had a good purchase price deal and that the plaintiff assured him that he would 'fix' everything to his satisfaction

Issues of fact and law in dispute

[21] The parties' counsel prepared a joint pre-trial order that sets out the facts in dispute and the question of law that is to be resolved. The only issue that falls to be decided is whether there was a valid and binding contract between the plaintiff and the defendant. A party alleging a contract must prove its terms either explicit or implied.[1] Proving the terms of a contract entails proof of the anterior question of whether both parties had the requisite *animus contrahendi.*[2]

The probabilities considered

[22] This being a civil case, the test I must apply is, for example, stated in *Sakusheka v Minister of Home Affairs*[3] - where the Court held that where two versions are mutually destructive, the plaintiff can only succeed if he establishes on a balance of probabilities that his version is accurate and acceptable and the defendant's false and liable to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the parties' allegations against the general probabilities. If the probabilities favour the plaintiff's version, he must succeed. In *Ocean Accident and Guarantee Corporation Ltd v Koch*[4] Holmes JA stated the following:

> '…in finding facts or making inferences in a civil case , it seems to me that one may… by balancing probabilities select a conclusion which seems to be the more natural, or

[1] *Mc Williams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (AD) at 4A-B.
[2] *Africa Solar (Pty) Ltd v DivWatt (Pty) Ltd* 2002 (4) SA 681 (SCA) at 698B-C.
[3] 2009 (2) NR 524 (HC) at 540I – 541B.
[4] 1963 (4) SA 147 (AD) at 159C-D.

> plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one. I need hardly hard that “plausible’’ is not here used in its bad sense of “specious”, but in the connotation which is conveyed by words such as acceptable, credible, suitable.’

[23] The defendant used the truck quite extensively in furtherance of its business operation without commensurate recompense to the plaintiff and while knowing, on its version, that the truck was overheating and did not have a guarantee. At the first time that the truck overheated and had to be taken to Scania for repair, the defendant became aware, if it was not already so aware as alleged, that the truck was not under a manufacturer’s guarantee. Instead of returning the truck because of the absence of a term it insists was an express term of the agreement, it not only retained the truck but used it in furtherance of its business.

[24] Strauss’s evidence was that the defendant had a pre-approval of N$1000 000 from its bankers at the time that he negotiated the purchase of the truck from the plaintiff. According to Strauss, he had, during the negotiation, been warranted by Gilmore that there was a one year guarantee by Scania in respect of the truck. Being the shrewd businessman his evidence suggests he was, he however negotiated and obtained Gilmore’s agreement to test-drive the truck for a period of one month on payment of an amount of N$22 000 as compensation to the plaintiff for the period of test-driving the truck. That is where the problem begins: there is no explanation by Strauss what was to happen to this N$22 000 if he proceeded to exercise the option to buy the truck. Was it to be deducted from the purchase price? He does not say so. The second problem is the failure on his part, as a diligent paterfamilias, to obtain more information about the alleged guarantee or to demand to see the document evidencing the existence of the guarantee as allegedly warranted to him by Gilmore.

[25] Based on the concession he made as to the industry practice, it must have been obvious to Strauss, given his awareness of the date (2005) of the truck's purchase that no manufacturer's guarantee existed on the truck or was, at best for him, close to expiry. Yet he did not inquire into it or, if that is what he assumed the case was, to demand to see the written document extending the guarantee. The other implausibility in Strauss' version is the inherent contradiction in his composite version of the existence of a guarantee and the need to test drive the truck for a period which, he conceded, was relatively too long: He was unable to offer a plausible explanation or a business rational for an arrangement whereby he would be allowed to test-drive the truck for a month accepting that, in any event, there existed a manufacturer's warranty of its mechanical soundness for a period of one year which he was prepared to accept as sufficient for the purpose of concluding the transaction.

[26] Perhaps the most telling consideration against the defendant is the fact that Strauss caused the truck to de deployed in the defendant's commercial operations while, according to him, it had mechanical problems (i.e. the overheating) and he was aware that the warranty allegedly made to him by Gilmore of a year's guarantee by Scania was a lie. To this must be added the concession by Strauss that the scenario as described by him did not make much business sense. It suffices to quote the following questions and answers under cross-examination:

> 'Q. Mr Boesak: I just put it to you he paid N$12 000 for the service and he paid about N$20 000 for the licence, when he gave you the truck, now does it seem reasonable that he only wanted a monthly installment of N$25 000 after you used the truck for a month?
>
> A. Strauss: No sir, but I was not the owner of the truck.'

[27] It bears mention that it was put to Gilmore under cross-examination that the version of Strauss will be that after the truck was repaired by Scania at the instance of the defendant it had only undertaken two trips to South Africa whereafter it was left at Scania. Mr Boesak for the plaintiff pointed out that that version was a lie as Strauss had

conceded under cross-examination that the truck had in fact undertaken six separate trips to South Africa in furtherance of the defendant's commercial interests, registering a total of 16 000 km on the truck. The demonstrably false version of Strauss undermines his version that it was agreed between the parties that the defendant's use of the truck for over a month was limited to a corresponding obligation to pay only the plaintiff's monthly installment obligation to the bank and that it was unrelated to its exercise of the option to purchase the truck. Against this false version must be considered the fact that it has not been shown that the plaintiff's Gilmore presented any false evidence to the court. Although Mr Barnard for the defendant sought to catalogue what he referred to as many contradictions in Gilmore's testimony, he could not point me to any falsehoods in the critical allegations of Gilmore as regards the terms of the agreement.

[28] For the defendant's version to prevail I have to find that the plaintiff had agreed that the defendant would have the use of the truck and make an income from it while:

(a) the plaintiff paid the installment thereon to the bank;

(b) the plaintiff paid accident insurance for the truck and carried the risk of loss in respect of the truck;

(c) the plaintiff had accepted to allow his truck to run up thousands of kilometers in furtherance of another man's business, with the resultant reduction in its market (or resale) value.

[29] What are the probabilities that a businessman would enter into such a transaction involving a truck he had just previously serviced at a cost of N$12 000 and made road-worthy at a cost of N$ 20 000? It has been confirmed by Geier J in *Taapopi v Ndafediva*[5] that there is a strong probability against gratuitous giving away of one's property out of sheet philanthropy or gold old-fashioned benevolence: no one is presumed to throw away or squander his property; and I my add – especially to people

[5] Case No. I 866/2007 (unreported), delivered on 22 June 2012, paras 42 and 49.

with whom he has no special relationship. A conclusion that a person intended to add to the patrimony of another, at the expense of that person whose property advances to cause of the other, is not one a court will arrive at lightly, except on very strong and cogent evidence.

[30] Based on the probabilities, the defendant's version is not 'the more natural, or plausible conclusion' in view of the overwhelming probabilities pointing in the opposite direction. In my view, such an arrangement would amount to the plaintiff making a gift to the defendant. In our law, there is a presumption against donation. What are the probabilities that a businessman who has existing financial obligations in respect of a truck would allow it to be used by another for the latter's financial benefit without any commensurate benefit to him? I am satisfied, none!

[31] In my view, the conduct of the defendant corroborates the version of the plaintiff that (a) the defendant was to test drive the truck to the north and back and not for a month without any limit to the distance; (b) that the sale was voetstoots; (c) the defendant exercised the option to buy the truck on or about 4 June 2007 and; (d) the agreement between the parties was consummated at that point and the defendant was from that point under an obligation to perform and to pay the purchase price. The defendant's commercial use of the truck to South Africa knowing that, according to Strauss it still had defects that required repair is only reasonably explicable on the basis that the defendant had accepted that the truck was then its property. Strauss's false version about just how many trips the truck undertook to South Africa and the probabilities of the case favour the version of the plaintiff's Gilmore that the payment of the installment by the defendant in respect of the truck was a temporary arrangement in light of Strauss's promise that he was still arranging finance to pay the purchase price in full. The plaintiff's version that the only guarantee he told Strauss existed on the truck was one year's accident insurance, is more probable than the defendant's version that the guarantee warranted was a manufacturer's guarantee.

What was the purchase price?

[32] I come to the conclusion that the probabilities favour the version of the facts as pleaded and testified to by the plaintiff: that the defendant in breach of the agreement between the parties as alleged by the plaintiff, failed to pay the purchase price of the truck. The plaintiff is therefore entitled to payment of the difference between the agreed purchase price and the amount (N$620 000) at which the truck was sold to a third party. It has always been the plaintiff's case that although it had initially set the purchase price at N$750 000, at Strauss's request, it reduced the purchase price to N$735 000. I cannot see why the defendant's breach makes the situation any different. The plaintiff is thus only entitled to the reduced purchase price which it says was agreed between the parties. The difference between the agreed purchase price of N$735 000 and N$ 620 000 is N$115 000.

VAT not proved

[33] The plaintiff failed to prove his claim that the purchase price was to attract VAT. He did not even lead evidence that the plaintiff+ is registered for VAT - and if it was, that the defendant knew of that fact. A claim for VAT is not sustainable without proof of registration for VAT. None of the plaintiff's documents tendered in evidence as exhibits, and purporting to be on plaintiff's letterhead, bear a VAT number from which the conclusion can be drawn that the plaintiff is registered for VAT.

Interest

[34] Having found that the defendant was in breach of the agreement to pay the purchase price, the question that arises is from which date he was in mora. The plaintiff claims interest on the alleged purchase price 'at the rate of 20 % per annum calculated from the date of judgment to the date of payment'. The plaintiff has made a rather unconventional, if curious election when it comes to the prayer on interest. The plaintiff claims in contract yet claims interest 'from the date of judgment to date of payment' as if

this was a delictual claim. Interest in case of contract breach is claimable from date of mora. The plaintiff is bound by its election as that is the case the defendant had to meet.

Costs

[35] I am not satisfied that the case was of such complexity that it merited the employment of instructed counsel. The plaintiff called two witnesses while the defendant called only one witness. No complex legal issues arise. I will therefore not make an order to include the costs of instructed counsel.

The order

[36] I make the following order:

1. Judgment is granted for the plaintiff in the amount of N$115 000; with
2. Interest at the rate of 20% per annum calculated from the date of judgment to the date of payment ; and
3. Costs of suit, to include only one counsel.

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PT DAMASEB

JUDGE PRESIDENT

APPEARANCES

PLAINTIFF:	W Boesak Instructed by Tjitemisa & Associates
DEFENDANT:	P Barnard Instructed by Kirsten & Co Inc.