REPUBLIC OF NAMIBIA NOT REPORTABLE

IN THE HIGH COURT OF NAMIBIA

JUDGMENT
Case no: I 1227/2008
In the matter between

MARTRAN (PTY) LTD **PLAINTIFF**

and

GN OOSTHUIZEN **DEFENDANT**

Neutral citation: *Martran (Pty) Ltd v Oosthuizen (I 1227/2008) [2013] NAHCMD 12 (23 January 2013)*

Coram: **Smuts, J**

Heard on: 28-30 May 2012, 17-18 September 2012, 11 October 2012

Delivered on: 23 January 2013

Flynote: Claims for breach of agreement to repair tipper trailer. Merits and quantum separated. Breaches established a balance of probabilities.

ORDER

The plaintiff has accordingly established that the defendant is liable to it in respect of both claims. The plaintiff is entitled to its legal costs in doing so. These costs include the costs of one instructed and one instructing counsel.

JUDGMENT

SMUTS, J

[1] This action comprises two claims against the defendant for the sums of N$148 491.00 and N$22 400 respectively. The claims are essentially for damages which arise from an alleged breach of contract between the parties in terms of which the defendant was to repair a Henred Fruehaus semi tipper trailer for the plaintiff.

[2] The trial was heard in two phases. Evidence was led on 28-30 May 2012 and the matter was postponed for further evidence on 17-18 September 2012. After the conclusion of evidence on 18 September 2012, counsel presented argument on 11 October 2012 and judgment was reserved. During counsel's submissions there were differences concerning the evidence given in the trial. I accordingly requested that the evidence be transcribed after the conclusion of argument. That transcript was however only completed in early December 2012.

The pleadings

[3] It is alleged in the particulars of claim that the plaintiff, represented by Mr JJ De Klerk, and the defendant entered into an agreement in terms of which the defendant would repair the plaintiff's tipper trailer ("the trailer"). It was an oral agreement. Most of the terms were common cause between the parties. These included that the repair should be completed within a reasonable time and effected in a workmanlike and efficient manner to the satisfaction of the plaintiff and that the plaintiff would pay the ordinary or reasonable costs of repairs for the work. The parties further agreed that the defendant and his employees had a duty to exercise care and skill and take all reasonable steps to ensure that the trailer would be safeguarded from loss or damage and had a duty to ensure that it would not be damaged and that no one would be entitled to use the trailer whilst it was being repaired and that the defendant and all his employees would not act negligently whilst the trailer was in the custody of the defendant. These terms are common cause.

[4] The extent of the repairs was an aspect in dispute between the parties. The plaintiff contended that the repairs were to remove rust from the load box or replace

rusty panels on the load box, repaint the trailer white and repair or replace the handle of the load box flap. The defendant however alleged that his mandate was to rebuild the trailer into a roadworthy condition for a prospective sale.

[5] It was further common cause on the pleadings that the defendant removed the trailer from the plaintiff's premises in November 2005 in order to effect these repairs. It was also common cause that the defendant returned the trailer to the plaintiff during November 2006. What occurred between those dates was both on the pleadings and in evidence in dispute between the parties.

[6] The plaintiff alleged in the particulars of claim that the trailer was damaged during April 2006 whilst in the custody and under the care of the defendant and that the defendant had failed to complete the repairs to the trailer and make good the resultant damage. The plaintiff further alleged that the defendant intentionally or negligently used the trailer for personal gain or allowed others to do so without the knowledge and consent of the plaintiff. The plaintiff further alleged that the defendant and his employees failed to exercise care and failed to take all reasonable steps to ensure that the trailer was safeguarded from any loss or damage whilst in the defendant's custody. The plaintiff further alleged that the trailer was damaged as a consequence and cancelled and agreement and demanded its return. Its first claim is for the reasonable costs of the damage sustained by trailer amounting to N$148, 491- 00.

[7] The defendant denied the breaches contended for and pleaded that the trailer's main rear swivel pin broke and the trailer fell on its side during testing. The defendant pleaded that he had repaired the damage to the side of the trailer as well as to the chassis and replaced pins and bushes. The defendant further contended that it was a term of the agreement that the defendant would test the trailer. He further pleaded that after completing the repairs, the parties would attempt to sell the trailer and deduct the costs of the repair from the purchase price and split the difference. If no acceptable offer was made for the trailer, the defendant pleaded that he would be entitled to purchase it from the plaintiff for N$45 000 including the tyres which had accompanied the trailer.

[8] The plaintiff's second claim was in respect of the removal of eight tyres by the defendant when the trailer was removed for the purpose of the repairs in November 2005. The plaintiff claimed N$22 400 in respect of the reasonable replacement cost of those tyres. The defendant admitted that eight tyres of the plaintiff were utilised for the removal of the trailer from the plaintiff's premises. The defendant further pleaded that the trailer was returned with those eight tyres and denied the liability in that sum to the plaintiff.

[9] In the course of the pre-trial proceedings, the parties agreed that the merits of the matter (liability) be separated from the question of quantum of the claims.

The evidence

[10] The parties narrowed the issues in dispute in the course of case management. The plaintiff's ownership of the trailer and its capacity were admitted. But certain of the terms of the agreement (outlined above) and what transpired after the collection of the trailer until its return remained in issue.

[11] The plaintiff called five witnesses. Its principal and sole shareholder, Mr JJ De Klerk gave evidence for the plaintiff together with two of its employees, Ms Jonker and Kahuika. Two further witnesses gave evidence under subpoena. They were Mr R. Stramis and Mr C.M.C. Miranda. The defendant testified and called two other witnesses namely an employee Mr Mukeshe and an erstwhile business partner of the defendant, Mr Johan Silver.

[12] In his evidence, Mr De Klerk testified as to the terms of the agreement as pleaded in the particulars of claim. He testified that he did not anticipate that the repairs would take any longer than two months and that the trailer would then have been returned. He also testified that the defendant was indebted to the plaintiff pursuant to their ongoing contractual relationship between the parties with regard to the repairing of

items by the defendant and the supplying of parts and like by the plaintiff to the defendant. Mr De Klerk testified that the plaintiff would have given credit to the defendant for the reasonable cost of repair which would then be set off against the money owed by the defendant to the plaintiff. He testified that he had not consented to the removal of the eight tyres, forming the subject matter of the second claim. These had been removed from buses belonging to the plaintiff also parked on the plot Bergheim where the trailer was located prior to its removal.

[13] The plaintiff further testified that the defendant had stated that the trailer would be removed and taken to the Okorusu mine where the repairs would be effected on behalf of the defendant by a person who owed the defendant a favour. The plaintiff agreed to this arrangement. Mr De Klerk stated that the trailer would be returned once the repairs were completed. Mr De Klerk estimated that the cost of repairs would be in region of N$10 000. He denied there was any arrangement or agreement between the parties to sell the trailer or that the defendant had any option to buy it at the price contended for in the plea or at all. He also denied that he had given permission for the use of the trailer.

[14] Mr De Klerk further testified that on a business trip to the Okorusu Mine in May 2006 he had come across the trailer in a damaged condition in the workshop of the mine and was informed by a Mr Ronald Stramis that the latter was attending to repair the trailer. Mr De Klerk said that the trailer was seriously damaged at the time with the chassis bent and the hydrolic hoist was missing from the trailer. He said that the trailer had at that point been painted white as had been agreed between the parties. He said that he then proceeded to make a number of enquiries concerning the use of the trailer and established from a Mr Miranda senior and Mr Miranda junior, the principals of Windhoek Transport Services CC that the trailer had been used to transport manganese at a mine at Otjizondu from February to April 2006. He also established that this had been done for reward by the defendant.

[15] Mr De Klerk gave evidence that he had made a number of attempts to contact the defendant during the period following February 2006 and was eventually able to arrange a meeting with him during October 2006 when he demanded the return of the trailer. It was then returned in early November 2006 to the plaintiff.

[16] Mr De Klerk inspected the trailer upon its return and found that the chassis of the trailer was still bent, the hydrolic hoist was still missing, the air brake booster was missing and all brake pipes had been cut. He further found that the trailer was fitted with only four tyres instead of eight and that the four tyres in question were in a poor state of repair with no tread remaining on them. The plaintiff subsequently instituted the action. Mr De Klerk's evidence was for the large part unshaken during cross-examination.

[17] Mr Jonker gave evidence concerning the agreement between the parties. He is an employee of the plaintiff and testified that he was present during November 2005 at the plaintiff's workshop when Mr De Klerk and the defendant reached the agreement for the repairs to the trailer. For the large part, he confirmed the evidence of Mr De Klerk concerning the extent of the repairs and the condition of the trailer. He also testified as to the condition of the trailer upon its return in November 2006. He said that he inspected it and also found that the chassis was bent and that the trailer only had four tyres which were unfit for use. He further testified that the hydrolic hoist was missing and that the trailer's airbrake booster was missing and that all brake pipes were cut.

[18] Mr Kahuika was the plaintiff's site foreman at Plot Bergheim where the trailer was stored. His evidence was confined to the condition of the trailer when it was initially removed by the defendant and concerning the eight tyres which were removed at the time from other vehicles of the plaintiff located at that site.

[19] Mr Stramis gave evidence under subpoena. He was employed at the Okorusu Mine as a boiler maker during 2005 and 2006. Mr Johan Silver was his supervisor at the time. Mr Stramis testified that during about June 2006 he was approached by Mr Silver to repair the trailer. He said that Mr Silver had informed him that the trailer had fallen

over and was broken and that he should repair it. He testified that the tailgate and the boom were broken, an axle was broken and that the chassis was damaged as well as the hydrolic hoist. He further testified that when he was instructed to effect these repairs in about June 2006, it was the first time that he had seen the trailer at the Okorusu Mine. He was requested to effect these repairs by Mr Silver and did so at the Okorusu Mine. But Mr Silver had not paid him for these repairs. He further testified that the trailer was removed over a weekend prior to the completion of the repairs and that he had not been present when it was removed. The material components of his testimony were not placed in issue.

[20] The plaintiff also called Mr C. M. C Miranda. He also gave evidence under subpoena. He testified that he is the operational manager of Windhoek Transport Services cc and also 50% owner of that concern. He gave evidence that there was an agreement between his concern and Red Pepper Enterprises in which the defendant was a principal. He had been approached by the defendant in that capacity relating to work which Windhoek Transport Services CC was performing for a manganese mine at Otjizondu. The defendant had approached him and offered to act as a subcontractor for the transportation of manganese from the mine and stated that he would do so with a blue henred trailer and would do so in conjunction with Mr Johan Silver who was the owner of the truck which would pull that trailer. This was then agreed to.

[21] Mr Miranda further testified that, pursuant to this agreement which had run from February 2006 until April 2006, various payments have been made by Windhoek Transport Services CC to Red Pepper Enterprises for services thus rendered. He testified that the relationship between the parties was terminated on 28 April 2006 when the blue trailer utilised by Red Pepper Enterprises was damaged. He was not present when the damage had occurred but stated that an accident had occurred at the mine with the trailer falling over whilst it was tipping. The trailer could then no longer transport manganese and the contractual relationship between Windhoek Transport CC and Red Pepper Enterprises was then terminated as a consequence. He also testified that he approached the defendant before terminating the agreement to enquire whether there

was any other trailer available to take the place of the damaged trailer. He testified that the defendant had answered in the negative. Once this was established, the contract was terminated.

[22] There were two aspects to his evidence which were materially put in issue. It was firstly put to him that there was a second trailer working on the site, also blue in colour, on behalf of Red Pepper Enterprises. He denied knowledge of that. It was also put to him that the trailer in question was damaged in November or December 2005 and not during 2006. Mr Miranda's response to this was emphatic. He stated that the damage had occurred in April 2006 and was the precipitating factor for the cancellation of the agreement. He further testified that the defendant and Mr Silver had approached him at the mine in 2006 and not in 2005. He further stated Red Pepper Enterprises started work only in February 2006 and not in 2005 after this had been expressly put to him. This also accorded with his evidence on the payments made to Red Pepper Enterprises.

[23] He further testified as to payments which had been made by Windhoek Transport Services CC in February, March and April to Red Pepper Enterprises. These amounted to some N$25 000. Those payments were not placed in issue at all.

[24] The defendant stated, when asked about to the agreement with the plaintiff, that he was under the impression that he would be able to buy the trailer if he and the plaintiff had not sold it. He did not state that this had been a term of the agreement between the parties, as it had been contended in his plea. He later in re-examination stated that there was however an agreement to that effect. He had also in cross-examination testified that this had been discussed on a few occasions between himself and Mr De Klerk on behalf of the plaintiff but did not refer to it having been a term of the agreement until re-examination. He confirmed that the trailer was removed in November/December 2005. He stated that the repairs would be effected at the Okorusu Mine and that his business associate, Mr Silver, would attend to those repairs.

[25] The defendant's evidence was further that the trailer together with the hydrolic hoist would need to be tested as a tipper. For this reason he had caused the trailer to be taken to the Purity Manganese mine near the Otjizondu for testing. He testified that it was during the testing of the trailer during November/December 2005 that it had fallen and become damaged. He testified that the evidence of other witnesses to the contrary was incorrect and was adamant that the damage had occurred in December 2005.

[26] The defendant confirmed that there had been an ongoing relationship between the plaintiff and himself in terms of which he had repaired other equipment for the plaintiff. He confirmed that the plaintiff, Mr De Klerk had demanded the return of the trailer and that he had returned it in November 2006. When returning the trailer, he said that he had provided the plaintiff with invoices for some of the other repair work which he had previously attended to. This had not however formed the subject matter of a counter claim as they went far back in time. He did not however provide an invoice in respect of the repairs to the trailer. Nor was there any counterclaim by the defendant in respect of any repairs to the trailer.

[27] The defendant confirmed that the hydrolic hoist was not returned to the plaintiff when the trailer was returned. He said that it been taken for repair. He disputed that the trailer was in the damaged state on return as testified by Mr De Klerk and Mr Jonker. The defendant also confirmed that he had a business relationship with Mr Silver and conducted Red Pepper Enterprises with him until Mr Silver's appointment as mine manager at Purity Manganese in the second half of 2006.

[28] The defendant's employee, Mr Mukeshe gave evidence concerning the collection of the trailer at the plaintiff's premises during 2005. He confirmed that eight of the plaintiff's tyres had been utilised in the removal of the trailer. He also testified that there had been rain water inside the load box of the trailer – presumably from recent rains - and that the trailer had sunk somewhat into the ground.

[29] The defendant also called Mr Silver to give evidence. As had also occurred with other witnesses who had not been subpoenaed, Mr Silva had deposed to an affidavit which comprised his evidence-in-chief. The affidavit was finalised shortly before the continuation of the trial in September and had been deposed on 11 September 2012. His evidence was given a week later. He confirmed that he was employed at Okorusu Mine and had agreed to attend the repairs on the trailer for the defendant. He also confirmed that he was a business associate with the defendant in Red Pepper Enterprises and that he had in May 2006 been appointed as the mine manager at Purity Manganese at Otjizondu and had later been appointed as mine manager of a different mine nearby known as the Otjizondu Mine.

[30] Mr Silver's affidavit being his evidence in chief however conflicted with his answers in cross-examination. In his affidavit, he stated that the damage to the trailer at the Purity Manganese mine had occurred in April 2006. During cross-examination he stated that this had however happened during November/December 2005. When asked for an explanation for this deviation, he stated that he could not recall the specific dates but had changed his mind on this issue during an adjournment on the preceding day upon which the defendant had completed his cross-examination. He stated that he had proceeded to a nearby cafe during the adjournment in the company of defendant and his other witness and that it was after that occasion that he had decided to change his version. Under cross-examination, he stated that this aspect had not been discussed at the time. Quite how it resulted in a change to his collection was not explained.

Analysis of evidence

[31] The evidence of Mr De Klerk on behalf of the plaintiff was for the large part unchallenged and not disturbed in cross-examination. When he was cross-examined as to the differences between the parties over the terms of the agreement, his testimony was in accordance with what had been pleaded and he consistently denied the defendant's version to the contrary concerning an option to purchase the trailer upon completion of the repairs. His evidence concerning his interaction with Mr Stramis as

well as Mr Miranda was confirmed by both of those independent witnesses. He also created a favourable impression. His evidence concerning the agreement as to the repair of the trailer would also have been consistent with the ongoing relationship between the parties which was to a large degree confirmed by the defendant, namely that there had been set off in the past. The agreement was also confirmed by Mr Jonker whose evidence was also unshaken by cross-examination.

[32] The defendant's evidence was at times at variance with his pleadings concerning the agreement. During cross-examination he referred to the "option to purchase" merely as an impression he had been under and not as a term or condition of contract. He had further stated that the issue had merely been discussed between himself and the plaintiff's Mr De Klerk, although in re-examination he had indicated that the issue had been agreed upon. I also found that the defendant was an unsatisfactory witness. His answers were at times evasive.

[33] Furthermore, I found that the defendant's evidence on the critical issue as to when the damage to the trailer had occurred, which he inevitably stated had been in November/December 2005, was not credible. This evidence of his was clearly contrary to the evidence of Mr Stramis who had said that the trailer had been damaged and brought to Okorusu in about June 2006. This was not contested. The defendant's evidence also conflicted with that of Mr Miranda as to the trailer having been damaged on 28 April 2006. This had been stated with reference to contemporaneous records of Windhoek Transport Services CC. Both Mr Stramis and Mr Miranda had no reason to give false testimony on this aspect. I found them both to be satisfactory witnesses. Furthermore, the evidence of Mr Stramis was hardly challenged in cross-examination.

[34] When Mr Miranda was challenged on this aspect, he had unequivocally confirmed his version and made it clear that it was consistent with the contemporaneous records of Windhoek Transport Services CC, including the payments made to the defendant's business, Red Pepper Enterprises. These payments – made between February and April – were not disputed and together with the termination of the

agreement on 28 April 2006 were all consistent with the use of the trailer over that period and its damage having occurred on or about 26 April 2006 and not December 2005. Furthermore, Mr Silver had in his affidavit deposed to the damage having occurred in April 2006, at a time when the operations were conducted under his supervision. His affidavit was deposed to on 11 September 2012 but after completion of the defendant's evidence, his business associate, he inexplicably changed his version and said that the damage had occurred in November/December 2005. He only did so under cross-examination. He did not point out the change at the outset and instead confirmed his affidavit without qualification when giving his evidence in chief.

[35] The defendant and Mr Silver were at the critical and relevant time business associates and would appear to have operated Red Pepper Enterprises in partnership even though this aspect was surprisingly not canvassed in detail in cross-examination. But what did emerge was a business relationship between them and that their interests on the issue would have co-incided.

[36] On the other hand, the evidence of the independent witnesses of Mr Stramis and Mr Miranda to the contrary is in my view to be accepted. Their evidence would also be consistent with the plaintiff having difficulty in getting hold of the defendant and with the latter not apprising the plaintiff concerning the damage. (This aspect was also surprisingly not pursued in cross-examination, despite the term of the agreement that the defendant would take reasonable care to ensure damage to the trailer would not occur whilst under his custody.) It was left to the plaintiff's Mr De Klerk to establish this by chance.

[37] The defendant did not deny that Red Pepper Enterprises was engaged as a subcontractor for Windhoek Transporting Services CC and that he had received payments for the transportation of manganese at the Purity Manganese mine. He did not even deny that the trailer had been used at that mine but said that this had occurred in the course of testing in November/December 2005. He also did not challenge the terms of his conversations with Mr Miranda.

[38] I reject the defendant's evidence where it conflicts with that of Mr Miranda and the other plaintiff's witnesses. Mr Miranda's evidence was in most respects was not challenged and was consistent with the payment records which in turn were expressly not challenged of Windhoek Transport Services CC. Mr Stramis' evidence that he saw the damaged trailer for the first time in about June 2006 was entirely unchallenged. This in the context of his evidence as having been employed at the Okorusu Mine in both 2005 and 2006.

[39] I further take into account that the evidence of Mr Miranda as to the cancellation of the agreement with Red Pepper Enterprises and the basis for that cancellation was also largely unchallenged.

[40] Mr Silver said that the trailer was used for what he termed a few loads. He was vague and evasive as to the extent of that use. He was also vague and evasive when asked if the trailer's loads were weighed on the weigh bridge (for the purpose of determining payment for transportation of the ore). He was also an unsatisfactory witness. He deviated from his version on the crucial question as to when the damage had occurred after he realised it was at variance with that of his business associate, the defendant. On all the evidence and probabilities, I find that both Mr Silver and the defendant were untruthful on this aspect for the self serving reason to deny that the trailer had been used for gain when it was supposed to be repaired. This would have been in breach of the agreement with the plaintiff. It would thus follow that this breach was in my view established on a balance of probabilities.

[41] But it is in any event clear to me that another breach of the agreement was also established on a balance of probabilities. I accept that the trailer was returned in damaged state – with a bent chassis and its air brake booster missing, brake pipes cut and the hydrolic hoist missing. As I have already said, I reject the defendant's evidence where it is at variance with the plaintiff's witnesses. It is common cause that the parties agreed that the defendant had a duty to exercise care and skill with the repairs and take

all reasonable steps to ensure the trailer was safe guarded from damage. It was returned in a damaged state without its hydrolic hoist. The defendant failed to provide an account for the damage and the missing hoist which excluded a breach of this term of the agreement. The plaintiff had in my view the duty to do so once such damage was established. In failing to do so, it would follow that the plaintiff has established a breach of this term as well on a balance of probabilities.

[42] The plaintiff also established that the eight tyres were removed from other vehicles without the plaintiff's consent and that the trailer was returned with only four tyres which were unfit for use. It would follow that the second claim is also established.

[43] As agreed between the parties, the question of quantum is to stand over.

[44] The plaintiff has accordingly established that the defendant is liable to it in respect of both claims. The plaintiff is entitled to its legal costs in doing so. These costs include the costs of one instructed and one instructing counsel.

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DF SMUTS

Judge

APPEARANCE

PLAINTIFF:	C. J. Van Zyl Instructed by Delport Attorneys
DEFENDANT:	A.J.B. Small Instructed by Dr Weder, Kauta & Hoveka Inc.