REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 2227/2012

In the matter between:

1.1.1.1. **METJE & ZIEGLER LTD t/a M&Z COMMERCIAL**
1.1.1.2. **VEHICLES**
PLAINTIFF

and

MLN JUNIOR TRUCKING CC **FIRST DEFENDANT**
TITUS NAKUUMBA **SECOND DEFENDANT**

Neutral citation: Metje & Ziegler Ltd t/a M&Z Commercial Vehicles v MLN Junior Trucking cc & Another (I 2227/2012) [2013] NAHCMD 191 (10 July 2013)

Coram: SMUTS, J
Heard: 25-28 June 2013, 3 July 2013
Delivered: 10 July 2013

Flynote: Action for services rendered and parts supplied. Defendants contested that the services and parts had been at the special instance and

request of the first defendant. After hearing evidence, it was established on a balance of probabilities that the services and parts had been specially requested by the first defendant. Defendants accordingly liable.

ORDER

(a) Payment of the sum of N$224,797.56;

(b) Costs of suit;

(c) Interest at the legal rate from the date of service of the summons to date of final payment.

(d) The costs above include those consequent upon the engagement of one instructing and one instructed counsel.

JUDGMENT

SMUTS, J

(b) At issue in this trial action is whether repairs and services performed by the plaintiff upon vehicles operated by the first defendant were at the special instance and request of the first defendant, so as to render the defendants liable for those charges.

(c)

(d) This issue arises for determination in the following way. The plaintiff is an authorised dealership and conducts services and repairs to certain brands of commercial vehicles. The first defendant is a transporting concern, with a fleet of commercial vehicles. The second defendant is its sole member and principal.

(e) The second defendant, acting on behalf of the first defendant, signed a

credit application form for a credit limit of N$40,000.00 so that services and repairs to vehicles performed by the plaintiff could be done on credit – and not for cash. The second defendant was required to sign a deed of suretyship in respect of the first defendant's liability to the plaintiff. He is sought to be held liable on that basis.

The pleadings

(f) The plaintiff's claim is in respect of services rendered and parts delivered to the defendant in the amount of N$224,797,56, performed during February 2012 to June 2012. It is alleged that the services rendered and parts supplied were at the special request of the first defendant.

(g)

(h) The defendants deny the basis for the claim and amplified their denial by stating that the first defendant's fleet manager, Mr JK Lorenzo, did not make special requests to the plaintiff for the services and parts in the sum of N$224,797,56. They further state that their credit limit was fixed at N$40,000.00 and that this would not have been exceeded without a further agreement in writing to that effect. At the conclusion of the evidence and during oral argument, Mr M Ntinda who appeared on behalf of the defendants, correctly accepted that the defendants would be liable for the amounts even if they exceeded the credit limit if it could be shown that the underlying services and parts had been at the instance of the defendants.

The evidence

(i) The plaintiff called a number of witnesses to prove its claim. It called the first defendant's erstwhile fleet manager, Mr Lorenzo. He testified that during the relevant period, he had been the fleet manager of the first defendant and that it fell within the scope of his employment to make arrangements for the servicing of the fleet of commercial vehicles operated by the first defendant. He stated that it was his responsibility to ensure that the vehicles were serviced at the correct service intervals, as required in terms of the warranties of the respective vehicles. He testified that when scheduling the services, he did so on

each occasion after first consulting with the second defendant, who was the first defendant's principal. He stated that it was however within his authority to schedule the services and book the vehicles in for service. But, given the hands-on nature of the second defendant's manner of operating the first defendant, he would first consult him on each occasion. When the vehicles needed to be serviced, he then instructed Ms F Beukes, the administrator of the first defendant to complete and forward the necessary order form for the services in question and forward it to the plaintiff. For the large part, his evidence was not disturbed during cross-examination.

(j) Mr Lorenzo stated that his employment with the first defendant terminated shortly after June 2012 when the vehicles had, according to him, been repossessed by the owner of the vehicles. He pointed out that the first defendant had obtained several vehicles through a lease from the Namibia Procurement Agency and that this concern had towards the end of June or July 2012 repossessed several of the vehicles being operated by the first defendant. Mr Lorenzo said that his employment then became redundant and his services were then terminated.

(k) The plaintiff also called Ms Beukes. She confirmed that she was administrator and safety officer in the employ of the first defendant during the relevant period. She confirmed that she had signed the order forms for the servicing of the first vehicles operated by the first defendant and had forwarded the order forms to the plaintiff. Ms Beukes stated that she did so on the instructions of both Mr Lorenzo who would first consult the second defendant. She identified the order forms in respect of the services and repairs in question which constituted the plaintiff's claim.

(l)

(m) Ms Beukes also pointed out that occasionally some of the order forms were filled in after the event when urgent action was required. This had for instance occurred in respect of a breakdown.

(n)

(o) The plaintiff also called Mr J. F. Oosthuizen, its customer consultant who had booked in and received the vehicles for services and completed the

necessary job cards, setting out the work which was to be performed on the vehicles in respect of each such service from 1 March 2012. He confirmed that, after the work had been done, he would check the actual work done against the job cards and confirmed that on each occasion the work had been performed satisfactorily.

(p)

(q) The plaintiff also called its workshop manager, Mr O. Kayer. He went through each job card and confirmed that the work on each occasion had been performed and that he would then cause the requisite invoice in respect of each of the services rendered, to be issued. He confirmed the correctness of the invoices in respect of all of the work which had been performed.

(r) The plaintiff also called its risk manager (of the group of companies), Mr E.N. Potgieter. He testified as to a meeting with the second defendant in late July 2012 concerning the account of the first defendant at the point when it had reached the amount claimed in the summons. He testified that he had approached the second defendant and set up a meeting with him at the first defendant's premises. He said that he pointed out the arrears amount of the account to the second defendant and had approached him with a view to securing the second defendant's commitment to urgently ensure that the first defendant's arrears account would be paid. He stated that the second defendant acknowledged the amount outstanding was payable and undertook to effect payment by the end of August 2012. When this had not occurred, Mr Potgieter handed the matter over to the plaintiff's lawyers.

(s)

(t) The plaintiff's dealer principal, Mr Sell, had earlier said in his testimony that when the first defendant's account exceeded the credit limit, which happened regularly during the period in question, he would contact the second defendant to confirm that the credit limit would be extended above the limit for the purpose of proceeding with the service or repairs which were needed. Due to the size of the vehicle fleet being operated by the first defendant, he considered that the credit limit was far too low and had no difficulty in agreeing to extend the limit from time to time as was required by the defendants. He stated that he would then contact the second defendant who would agree to the

further credit being extended to the first defendant on each occasion. He testified that when the amount had considerably exceeded the credit limit, he had approached the second defendant for payment by the first defendant. He stated that a cheque of the first defendant in the sum of N$64,035.15 had been provided by the second defendant to address the arrears in the account. This cheque was however returned unpaid and had been marked referred to drawer. Mr Sell further said that he then contacted the second defendant concerning the returned cheque and requested a payment from the second defendant. He said that the second defendant then paid this amount from one of his personal accounts and subsequently had also paid a further amount of N$56,000.00.

(u) The group financial manager, Mr H.S. Grobler, in his evidence stated that Mr Sell had been mistaken. He said that it was correct that the cheque had been returned unpaid but that the further payment which had been forthcoming from the second defendant from his personal account was the amount in the sum of N$56,000 and that there had not been a further repayment in respect of the returned cheque. He referred to the plaintiff's statement with reference to the first defendant's account and explained that the sum of N$64,035.15 had been debited to that account after the cheque had been returned. Had the second defendant made a further payment in that sum, it would then have been credited to the account. This had not occurred. He said that the only further payment which the first defendant had made at that time was in the sum of N$56,000.00 which was then credited to the first defendant's account. He thus explained that Mr Sell and Mr Potgieter had been mistaken as to this further payment and said that it had not in fact been made.

(v) The plaintiff also called Mr Elimringi Mtui of the procurement fund which provided financing for the acquisition by the first defendant of the vehicles in question. The form of financing was by way of lease. The fund as lessor required the first defendant as lessee to strictly adhere to the service intervals of the vehicles to ensure that the vehicle warranties would be honoured. Mr Mtui confirmed that he put pressure on the first defendant to book in the vehicles for services when they required services. He said that he communicated with both Mr Lorenzo as fleet manager and the second defendant. Mr Mtui said that he

had not himself taken any of the vehicles in for services.

(w) Mr Mtui also said that when the first defendant's account was in arrears, certain of the vehicles were retained by the plaintiff. He said that the first defendant at the instance of the second defendant eventually returned the vehicles to the fund as the first defendant had financial difficulties. He said that towards the end of the relationship with the first defendant, the fund had instructed certain services to the vehicles and that the fund had been invoiced for such services and paid for them.

(x) Mr Mtui confirmed that he at times contacted the plaintiff's service consultant, Mr Oosthuizen to request that services be performed on the vehicles and insisted that the services be done when vehicles were overdue for services. Mr Mtui also said that the fund had paid some amounts owed by the first defendant but could not recall the amounts.

(y) The only witness for the defendants was the second defendant. He confirmed that he is the sole member of the first defendant which is a transporting concern. He admitted that both Ms Beukes and Mr Lorenzo were in the first defendant's employ during the period in question. He however stated that both had been effectively dismissed as a consequence of placing orders for the servicing of vehicles without his agreement. He stated that the vehicles had during that period been serviced in Cape Town by a different authorised dealer. He said that these services were at a better price than those offered by the plaintiff. He said that the plaintiff wanted to solicit the first defendant's business and had used the procurement fund to put pressure on the first defendant's employees to book the vehicles in for services with the plaintiff. He accepted that a term of the lease agreements with the procurement fund was that the vehicles were to be serviced at the intervals required by the vehicle dealership and accepted that otherwise their warranties would not be honoured. He however denied that the services which form the subject of the plaintiff's claim had been at the instance of the first defendant.

(z) In cross-examination the second defendant was taken through each of

the several order forms completed for the services which formed the subject matter of the claim. The second defendant disputed that all of them, save for three, had been with his approval. He further stated that the services would need to be with his approval before the first defendant would be liable for them. He also stated in cross-examination that he had informed the plaintiff that Mr Lorenzo and Ms Beukes did not have authority to place orders for services. When he was pressed on this question, he could not provide any specific occasion when this had occurred and certainly accepted that he had not done so in writing. He could not explain why this had not been put to the plaintiff's witnesses. Nor could he explain why it had not been put to Mr Lorenzo and Ms Beukes that they had effectively been dismissed because they had scheduled services without his approval.

(aa) As to payment in respect of the cheque of N$64, 035, 15 which had been returned unpaid, he stated that he had effected the subsequent payment. When asked how this was done, he stated that it had been by way of a cheque from to a personal account after the first defendant's cheque had been returned. When asked why this had not been discovered, he was unable to provide an answer and stated that it would have been for his lawyers to have seen to that. He was referred to his discovery affidavit which did not include any references to bank statements or to used cheques.

(bb) The second defendant also admitted during cross-examination that he had authorised the extension of the credit limit from time to time but not to the extent claimed by the plaintiff. He denied that he had admitted to Mr Potgieter that he would pay the outstanding amount by the end of August 2012, although he confirmed that he had met with him and that the other items included in the discussion as stated by Mr Potgieter were correct.

(cc)

Analysis of evidence

(dd) Significantly, the defendants had not pleaded a lack of authority on the part of Mr Lorenzo and Ms Beukes in their defence to the claim. They had merely denied that the rendering of services and supplying of parts had been at

the instance of the first defendant. As I have indicated, they also denied that Mr Lorenzo had in fact placed the orders in question.

(ee)

(ff) The evidence of Mr Lorenzo and Ms Beukes on the placing of orders was to a large extent and certainly upon the key issues, not disturbed in cross-examination. It was not even put to them that they had been effectively dismissed as a consequence of placing orders without the second defendant's authority. They both struck me as reliable witnesses.

(gg)

(hh) The plaintiff's employees who testified were also generally reliable witnesses and for the large part, their evidence was also not disturbed in cross-examination. The only real discrepancy between themselves which arose in the evidence, was with reference to payment of the cheque in the sum of N$64,035, 15. Mr Sell, the dealer principal and the group risk manager both testified that this sum had been paid by the second defendant from his personal account after the first defendant's cheque in that amount had been referred to drawer. But the evidence by the financial manager that they were both mistaken on this issue was in my view convincing and was consistent with the financial records of the plaintiff. It was also understandable that they could have been mistaken as the second defendant did make a payment from a personal account shortly afterwards in the sum of N$56 000. In this regard, I also take into account that the defendants had failed to discover any proof of payment. Nor was this pleaded as a defence. The defendants attracted an onus in proving their payment if this was to be raised as a defence. It was thus for the defendants to discover documentation which would be used to establish that defence. It was also in any event incumbent upon the defendants to discover documentation relevant to the claim. No documentation had been discovered in support of a payment of N$64,035, 15. The reason for this would appear to me to be that there had been no such further payment as was alleged by the second defendant in evidence and was mistakenly referred to by Mr Sell and Mr Potgieter.

(ii) I reach this conclusion on the basis of the plaintiff's financial manager's testimony was supported by the plaintiff's financial documentation and given the

incidence of the onus. It also accords with the probabilities, despite the contradictory recollection of Messrs Sell and Potgieter.

(jj) The second defendant was in my view an unsatisfactory witness. He was evasive in his answers on crucial aspects. Furthermore, no proof of any payment was referred to in the defendants' defence or any documentation discovered in support of such a contention.

(kk) I further found that the evidence of the plaintiff concerning the orders which had been given for the services on behalf of the first defendant is to be accepted. Although the composition of plaintiff's claim was put entirely in issue on the pleadings, the evidence concerning the fact that the work had in fact been done and that the invoices had been generated in respect of that work and were at the rates charged by the plaintiff, were not essentially placed in issue. Ultimately the only issue between the parties, as I have said at the outset, was whether the orders had in fact been made by the first defendant.

(ll)

(mm) Although this issue turns upon the credibility of Mr Lorenzo and Ms Beukes together with the further evidence of the actual services and the discussions which had occurred between Mr Sell and second defendant, I find that the evidence is overwhelmingly to the effect that the orders had in fact been placed by the first defendant. The first (and second) defendants had after all had made certain payments in respect of the very services which the second defendant disputes. I also take into account that there were three services that the second defendant did not dispute had been placed on behalf of the first defendant and that the payments made were not earmarked for them. But the evidence concerning the ordering of those services was on all fours with all the other orders which had been placed. The second defendant was not able to explain the basis upon which those three orders, which he did not dispute, had been placed. Yet he disputed all the other orders. This, together with the payments against the account – which were not specified with reference to only certain invoices – and the failure on the part of the second defendant to adduce any evidence of countermanding of the authority of Mr Lorenzo and Ms Beukes to place orders further demonstrates on the balance of probabilities that the

plaintiff established that the orders for the services and parts were at the instance of the first defendant.

Conclusion

(nn)

(oo) I accordingly find that the plaintiff's claim against the defendants should succeed. Having thus found that the first defendant is liable to the plaintiff in respect of the services set out in the account, rendered by the plaintiff of N$224 797, 56, it follows that the second defendant is liable to the plaintiff as surety in the full amount of the first defendant's liability.

(pp) There is accordingly judgment in favour of the plaintiff against the first and second defendants, jointly and severally, the one paying the other to be absolved in the following terms:

(e) Payment of the sum of N$224,797, 56;

(f) Costs of suit;

(g) Interest at the legal rate from the date of service of the summons to date of final payment.

(h) The costs above include those consequent upon the engagement of one instructing and one instructed counsel.

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DF SMUTS

Judge

APPEARANCES

PLAINTIFF:	J. P. R. Jones Instructed by Engling, Stritter & Partners
FIRST AND SECOND DEFENDANTS:	M. Ntinda Instructed by Sisa Namandje & Co. Inc.