REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1283/2011

In the matter between:

DAVID NKWANGA MONDO **PLAINTIFF**

and

SPECIOZA MONDO **DEFENDANT**

Neutral citation: *Mondo v Mondo* (I 1283/2011) [2013] NAHCMD 332 (14 November 2013)

Coram: PARKER AJ
Heard: **1 July 2013; 5 July 2013; 3 October 2013**
Delivered: **14 November 2013**

Flynote: Contract – Valid contract – Consideration not a requirement for contract to be valid and enforceable – Court held that a good cause of action in contract can be founded on a promise made seriously and deliberately and with the intention that a lawful obligation should be established and it has a good reason which is not immoral or forbidden – Court finding that the oral agreement concluded between the plaintiff and the defendant is valid and enforceable.

Flynote: Contract – Novation – Plaintiff claimed an oral agreement entered into between the parties novated the parties' obligations under a judgment of the court and a judgment of the Windhoek maintenance court – Court held that the onus was on the plaintiff to establish that the obligations imposed by the two judgments were novated by the oral agreement.

Summary: Contract – Valid contract – Court accepted evidence supporting plaintiff's case that the plaintiff and the defendant entered into a valid and enforceable contract – Two judgments ensued from the dissolution by the court of the parties' marriage – The judgments were delivered by the court and the Windhoek maintenance court – Thereafter the parties entered into an oral agreement to achieve cessation of unremitting hostilities between the parties that was deleterious to the parties and the children of the family – On the pleadings and the evidence the court held that the oral agreement is a valid and enforceable contract.

Summary: Contract – Novation – Plaintiff claimed an oral agreement entered into between the parties novated the parties' obligations under a judgment of the court and a judgment of the Windhoek maintenance court – Court held that the oral agreement was valid – On the pleadings and the evidence the court found that the parties' intention was clear that their obligations under the two judgments be novated by their oral agreement – Court concluded that the plaintiff has discharged the onus cast on him to establish that obligations imposed by the two judgments were novated by the oral agreement – Accordingly the court gave judgment for the plaintiff.

ORDER

(a) Judgment is for the plaintiff.

(b) It is declared that the plaintiff's obligations set out in the order made by the court on 24 February 2004 (under Case No. I 1738/2002) and the obligations set out in the order of the Windhoek maintenance court (under Case No. A 1192/2002) have been novated by the oral agreement concluded between the plaintiff and the defendant in or about March 2008.

(c) The various disputes between the parties have accordingly been settled on the terms set out in para 9 of the amended Particulars of Claim.

(d) There is no obligation upon the plaintiff to pay past accrued maintenance, future maintenance or any spousal maintenance to the defendant.

(e) There is no order as to costs.

JUDGMENT

PARKER AJ:

[1] It would be stating the obvious to say that the dispute between the plaintiff and the defendant has been haunting – in the real sense of the word – the court and the lower courts, ie the magistrates' courts (in Grootfontein and Windhoek), for about a decade. The present proceeding is but the latest in a distressfully long line of proceedings in the court and the magistrates' court. Indeed, in a judgment delivered by my Brother Silungwe AJ on 23 July 2008 in an earlier proceeding the learned judge spoke of the matter as having 'had a long and chequered acrimonious history' ('the 23 July 2008 judgment').

[2] In the court the genesis of the matter lies in proceedings in which the parties' marriage was dissolved by the court on 24 February 2004. I append, hereunder, the entire order ('the 24 February 2004 order') that my Sister Gibson J made in a judgment ('the 24 February 2004 judgment'):

> '1. That the bonds of marriage subsisting between Plaintiff and Defendant be and are hereby dissolved.
>
> 2. That the Plaintiff pay maintenance in respect of the Defendant in the amount of N$2 000,00 per month until her death or she remarries, which ever occurs first, commencing with the month following the month after he has been employed.

3. That the custody and control of the two minor children, namely Rachel and Charles born of the marriage is hereby awarded to the Plaintiff, subject to Defendant's right of reasonable access as per annexure "A".

4. That the custody and control of the minor child, namely Christine, be awarded to the Defendant, subject to the Plaintiff's right of reasonable access as per Annexure "A".

5. That the Plaintiff pay all medical, dental, pharmaceutical (on doctor's prescriptions), surgical, hospital, orthodontic, ophthalmologic (including spectacles and/or contact lenses) expenses incurred in relation to the minor child Christine.

6. That the Plaintiff pay all tuition costs, including all Government school fees, pre-primary fees and crèche fees and extra-mural activity costs, books, stationery, and all ancillary fees, tertiary education fees and all university fees (should the child show an aptitude therefore and in so far as such expenses are not recovered by loans and/or bursaries) in relation to the minor child Christine.

7. That the joint estate be divided.'

[3] Thereafter; four years later in the 23 July 2008 judgment my Brother Silungwe confirmed a rule nisi that had been issued by the court on 28 January 2005 in which the custody and control of the minor child C M was awarded to the plaintiff. It is worth mentioning that three children were born of the marriage, namely, R M (born on 14 October 1987), C M (born on 16 March 1992) and C M (born on 12 May 1998). I set out, hereunder, the entire order made by Silungwe AJ ('the 23 July 2008 order'):

'1.1 The *Rule Nisi* of January 28, 2005, is confirmed.

1.2 For case of reference, the *Rule Nisi* referred to in 1.1 above is to the following effect:

Paragraph 4 of the final order of divorce granted on February 24, 2004, under Case No. I 1738/2002 is amended to read that custody and control of the minor child, namely C M, be awarded to the applicant (then plaintiff) Dr D M.

2. The respondent's right to reasonable access is subject to a psychological evaluation upon her and a recommendation thereon.

3. The questions of access and costs are reserved for argument to a date to be arranged with the Registrar of the Court.'

[4] The instant proceeding is the last dose of a display of unremitting acrimony between the parties that the parties have decided to dole out to the court. The material part of the plaintiff's amended particulars of claim which was further amended at the commencement of the trial is as follows:

'On 9 March 2008 and at Grootfontein, Republic of Namibia, the plaintiff and the defendant novated the obligations imposed by the judgment handed down between the parties by the High Court on 24 February 2004 (under case No. I 1738/2002), and the further judgment handed down by the Windhoek Maintenance Court (under case No. A 1192/2002) by entering into an oral agreement; alternatively, the plaintiff and the defendant, by agreement, abandoned the aforementioned judgments mentioned in (paras (5), (6), (7) and (8) of the particulars of claim), more particularly para (2) of the 24 February 2004 order and paras (26) and (27) of the order made by the learned magistrate at the magistrates' court for the District of Windhoek on 10 August 2007 under Case No. A 1192/2002 ("the Windhoek maintenance court order").'

[5] Thus, in the instant matter the relief that the plaintiff seeks is a declaratory order in the following terms, that is:

'1.1 An oral agreement, referred to in paragraphs 8 and 9 supra, novated the obligations imposed in terms of the judgment handed down between the parties by the High Court on 24 February 2004 and the further judgment handed down between the parties by the Windhoek Maintenance Court on 10 August 2007.

1.2 The various disputes between the parties have accordingly been settled on the terms set out in paragraph 9 of the amended Particulars of Claim.

1.3 There is no obligation upon the plaintiff to pay any past accrued maintenance, or future maintenance to the defendant.

1.4 Costs of suit.

1.5 Further and/or alternative relief.'

[6] The defendant's plea to the plaintiff's claim that there was entered into between the parties an oral agreement (referred to previously) is simply this: she 'denies that she entered into any oral agreement with the plaintiff' which would have the effect of novating the 24 February 2004 order and the Windhoek maintenance court order. She repeated the denial in her evidence during the trial.

[7] As to the main relief sought by the plaintiff; the following issues must be determined as appears also in the pre-trial conference order, that is:

'(e) Whether the parties entered into an oral agreement in the terms contained in annexure "SM1" to the defendant's Plea and paragraph 9 of the plaintiff's particulars of claim.

(f) Whether the oral agreement alleged by the plaintiff novated the obligations imposed in terms of the judgment handed down between the parties by the High Court on 24 February 2004 and the further judgment handed down between the parties by the Windhoek Maintenance Court on 10 August 2007.'

[8] The two significant questions that must be answered are, accordingly, these: (a) Has the plaintiff, who relies on the oral agreement, proved the existence of the agreement, and if he has, what are the terms of the agreement? (b) If such oral agreement was entered into by the parties, is the agreement capable of novating the 24 February 2004 order and the Windhoek magistrates' court order, or in the alternative, has the agreement the effect that the parties have abandoned these judgments?

[9] Under question (a), I must determine whether the plaintiff has placed sufficient evidence before the court establishing the existence of an oral agreement and the

terms of the agreement. At the trial the plaintiff gave evidence and Dr Gure also gave evidence in support of the plaintiff's case. The plaintiff's in-chief-evidence which is basically a rehearsal of his witness statement (filed in terms of rule 37(12)*(c)(iv)* of the rules of court) is briefly as follows; and the first part of his evidenced repeats principally the 24 February 2004 order.

[10] In or about February 2008 the defendant approached Dr Gure and his wife Mrs Gure who were both friends of the plaintiff and defendant to mediate the dispute between the plaintiff and the defendant which continued unabated even after the final order of divorce had been granted by the court. The plaintiff's evidence is that he saw the prospect of a mediation to be a good idea since the acrimony that tore him and the defendant apart was also having a deleterious effect on the wellbeing and the proper upbringing of the children of the family. According to the plaintiff several meetings were, accordingly, held in February and March 2008 in the Gure residence in Grootfontein. The meetings were attended by the plaintiff, the defendant, Dr Gure and Mrs Gure. It is the plaintiff's testimony that during those meetings the plaintiff and the defendant agreed orally on various issues that had divided the plaintiff and the defendant. According to the plaintiff, the terms of the oral agreement are as set out in the amended particulars of claim.

[11] The plaintiff testified further that he took it upon himself to instruct his legal practitioners to reduce the oral agreement into writing, which his legal practitioners did. He gave copies of the agreement to Dr Gure and the defendant, but the defendant refused to sign the written agreement which, according to the plaintiff, reflected the terms of the oral agreement. The defendant gave no reasons then for her refusal to sign the written agreement.

[12] Mrs Gure had filed a witness summary in terms of the rules of court but she did not give oral evidence during the trial, and so I shall pass over Mrs Gure's witness summary. Although Dr Gure had not filed a witness summary, he gave oral evidence at the trial, and it is in material part as follows. He met the defendant in Windhoek in some 'boarding house' on several occasions. According to him, in his encounter with the defendant, the defendant complained to him about the behaviour

of the plaintiff whom Dr Gure knew in Grootfontein where Dr Gure also worked as an agriculturalist. The complaints, according to Dr Gure, centered primarily on the plaintiff's failure to maintain the defendant financially, particularly the plaintiff's failure to pay to the defendant spousal maintenance that the court had ordered.

[13] According to Dr Gure during his encounters with the defendant he gained the impression that there was a serious rift between the plaintiff and the defendant and that the parties' acrimonious relationship had the potential of destroying the proper upbringing and wellbeing of the parties' children. Indeed, at one point, according to Dr Gure, the defendant gave him to understand that she was in need of accommodation that would be better than her present accommodation at the time. Dr Gure took it upon himself to arrange accommodation in a house in Windhoek owned by Mr Vitali Ankama, the former Permanent Secretary: Ministry of Education. It is Dr Gure's further evidence that he did that out of the goodness of his heart and he also agreed to mediate in the dispute between the parties because he felt that the unremitting acrimony existing between the parties was having a harmful effect on the parties' children. He said his desire to mediate in the dispute was motivated also by the fact that he had been a child of suchlike acrimony and disunity between his parents and that he knew the harmful effect the parties' conduct and behaviour would have on their children, and so he felt he must attempt to mediate the parties' dispute and differences. Dr Gure confirms that to that end several meetings were held in his house in which the defendant and the plaintiff participated.

[14] Dr Gure corroborates the plaintiff's evidence that an oral agreement is the fruit that sprouted out of his mediating efforts at those meetings. He also corroborates the terms of the oral agreement referred to in para 4. Dr Gure added this significant piece of evidence, namely, that the parties were so happy with the outcome of the last meeting that the defendant genuflected before the plaintiff and the parties hugged each other.

[15] The defendant testified in her own defence, and called no one as witness to testify in support of her case. The defendant's in-chief-evidence is briefly as follows. There was only one meeting, not several meetings, held in the Gure residence at the

material time and attended by the defendant, the plaintiff and the Gures. And according to the defendant, the only item that was discussed and agreed at the material time was that the plaintiff shall give her N$150 000,00 as her 50 per cent share of the joint estate. Indeed, the defendant's position was taken up in refrain by her counsel, Ms Shifotoka, in her submission at the trial.

[16] In her cross-examination-evidence, the defendant conceded that that could not have been the only item discussed in the presence of the defendant, the plaintiff and Dr Gure and Mrs Gure. In her evidence she denied strenuously that the Gures were her friends; but the totality of the evidence debunks the defendant's position. The daughter of the parties', CM, was a friend to a child of the Gures' and so she used to sleep over in the Gure residence. The defendant had Dr Gure's telephone number and she phoned him occasionally: it matters not whether it was a landline telephone number or a mobile telephone number. She confided in Dr Gure about the plaintiff's maltreatment of her, particularly the plaintiff not supporting her financially. Dr Gure went out of his way to arrange accommodation in Windhoek for the defendant. The defendant requested Dr Gure to intercede with the plaintiff in order for the plaintiff to give her financial support that she badly needed: it matters not if she did so on only one occasion. The defendant requested Dr Gure to arrange a meeting between the defendant and the plaintiff: it matters tupence if it was only on one occasion.

[17] It is not common human experience for the defendant to pour out her tribulations to the Gures about something as personal and intimate as her troubled relationship with her former husband the plaintiff unless the Gures were her (a) Pastors, (b) family members, (c) legal representatives, (d) guardians or (e) friends. On the evidence the Gures are none of (a) to (d). Additionally, it is not common human experience for Dr Gure to go out of his way to look for and obtain accommodation in Windhoek for the defendant which the defendant accepted after the defendant had informed her of her desire to get better accommodation in Windhoek, unless Dr Gure was (a) a Pastor, (b) a family member (c) a guardian, (d) an estate agent or (e) a friend. And there is no evidence that Dr Gure is any of (a) to

(d). In my opinion, the probabilities are that Dr Gure was a friend in these two scenarios.

[18] I conclude that the defendant denies that the Gures were her friends because for her – as I see it – to admit that the Gures were her friends is to admit that Dr Gure agreed to mediate in the insalubrious differences and dispute that existed between the parties and that Dr Gure did so as a neutral and disinterested person, who has the interests of the parties, his friends, at heart.

[19] When asked by the court to point to any motive which in her view Dr Gure would have to travel 452 km from Grootfontein to Windhoek and back and subject himself under examination-in-chief, cross-examination and re-examination – under oath – in court proceedings and to lie to the court. The defendant could not point to any such motive that Dr Gure would have. Besides, the Gures are Nigerians and the parties are Ugandans. I do not see what diabolical interest Dr Gure would have – and none was established by the defendant – to come to court and lie to the court. The probabilities are that being foreigners in a foreign country in a small town and both Dr Gure and the plaintiff being professionals in their individual fields the Gures and the parties are friends. And I accept Dr Gure's evidence that his only interest in the matter was to assist friends settle their differences which were so unhealthy that it tended to have deleterious effect on not only the parties but also the children.

[20] I also accept Dr Gure's evidence that he did not want the children of the parties to go through what he went through as a child growing up in a house that was divided by differences that existed between his own parents. What is more, he testified that what touched his heart most was a distressful but meaningful statement that he heard CM make to the effect that she wished she lived in a house where the parents were together. In sum, I conclude that Dr Gure had nothing to gain by lying, and his evidence corroborates in material respects the evidence of the plaintiff respecting the existence of the oral agreement and the terms of the agreement.

[21] On the totality of the evidence I find that Dr Gure was candid and forthright and forthcoming with his answers to questions asked of him; neither did he

prevaricate. I found him to be a credible witness. As I have mentioned previously he had nothing to gain by lying. I cannot say the same for the defendant. She was evasive and gave different versions about the same matters that are important in these proceedings, only admitting in the end she had been wrong when confronted with proof of those matters. Indeed, these conflicting versions were also fed to the court on oath in previous proceedings.

[22] The result is inevitably that in my finding the defendant spoke untruths and was evasive, and she gave me the distinct impression that she was putting forth different versions of the same relevant matter in order to conceal the truth. In sum, she did prevaricate. For instance, I cannot accept the defendant's evidence that at a meeting held under the auspices of the Gures, the only item discussed was the plaintiff agreeing to give her N$150 000,00 as her 50 per cent share of the joint estate. It is more probable than not that the defendant would most certainly have demanded to know how the plaintiff arrived at the amount of N$300 000,00 as the total value of the joint estate. She would have most certainly demanded to be shown the inventory of the joint estate and its value.

[23] It is my view that the defendants' lone position is this. She says she would not have entered into such oral agreement because if she did she would have 'lost everything' and gained nothing from such agreement. The defendant's challenge has no merit. It is my view that the oral agreement was made seriously and deliberately and with the intention that a lawful obligation should be established, and it has a ground reason which is not immoral or forbidden. (See *Conradie v Rossouw* 1919 AD 279.) I find that the ground or reason for entering into the agreement is to attain cessation of hostilities between the parties which were injurious not only to the parties but also the children, as I have said previously, and, therefore, the agreement is to ensure the wellbeing and proper upbringing of the children which is the duty of every parent towards his or her children, including the plaintiff and the defendant.

[24] In any case, it is not correct for the defendant to say that she gains nothing from the oral agreement, as Mr Corbett submitted. The defendant stands to gain the following:

(a) The defendant is released from her parental duty to pay maintenance (including past accrued maintenance) in respect of CM who is under the care and control of the plaintiff.

(b) The plaintiff is to forbear his right to appeal against the 24 February 2004 order.

(c) The plaintiff is to withdraw the criminal charges of trespassing and malicious damage to property laid against the defendant at Grootfontein magistrates' court under case number CR 111/2007.

(d) The plaintiff is to withdraw a criminal charge of abduction laid against the defendant under case number CR 72/10/05 and CR 64/01/05.

(e) The plaintiff is take steps to withdraw all maintenance matters lodged against the defendant at the Grootfontein magistrates' court.

(f) Any other pending criminal and civil matters between the parties are to be discontinued.

(g) The plaintiff would assist, where possible, the defendant in her training needs of a business or vocation in order for her to start a new life.

(h) The plaintiff would pay a cash amount of N$40 000,00 to the defendant as capital to help her to start a new life.

(i) The plaintiff would purchase for the defendant an airline ticket to Uganda.

(j) The estate liability of N$321 000,00 for which the plaintiff and the defendant were jointly liable, would be settled entirely by the plaintiff, and the defendant would be absolved from any liability in regard thereto.

[25] In any event, a person of legal capacity cannot be heard to say after having entered into a contract with his or her eyes open that he or she is not bound by the agreement simply because he or she does not gain much from the contract, unless she establishes that the contract is oppressive or unreasonable as against him or her, or for any good reason accepted by the law. The defendant has not established that as against her the contact is oppressive or unreasonable. Neither has she given any reason why she should not be bound by the agreement. On the contrary, as I have demonstrated in the preceding paragraph, the defendant gains substantially from the oral agreement. I hold that she is bound by the oral agreement which I have found to exist and which is valid and enforceable. If the terms of the agreement have, in her view, subsequently turned out not to be to her liking she has no one to blame but herself; and that does not entitle her to give untrue testimony to the court with the view to setting the agreement at nought.

[26] In Namibia –

> 'Now it is trite law that, in general, in finding facts and making inferences in a civil case, the Court may go upon a mere preponderance of probability, even though its so doing does not exclude every reasonable doubt .... for, in finding facts or making inferences in a civil case, it seems to me that the one may ... by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one.'

(*M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz Megabuilt v Kurz* 2008 (2) NR 775 at 790B–E)

[27] As I have found previously, the plaintiff's version as to the existence of the oral agreement entered into between the plaintiff and the defendant and the terms of that agreement is supported by the credible and corroborative evidence of Dr Gure. I, therefore, make the finding that the plaintiff's version is plausible and probably true, and the defendant's is not. Thus, having balanced the probabilities I think the plaintiff's version about the existence of the oral agreement and the terms of the agreement seem to be more plausible. Accordingly, I conclude that the plaintiff has proved on a balance of probabilities that the plaintiff and the defendant entered into

an oral agreement and the terms of the agreement are as set out in the amended particulars of claim.

[28] This leads me to the next level of the enquiry. Having found that there is a valid and enforceable oral agreement concluded between the plaintiff and the defendant, I now pass to consider the next question, that is, whether the oral agreement novated the obligations imposed by the 24 February 2004 order and the Windhoek maintenance court order (under case No. I 1192/2002), or alternatively whether in virtue of the oral agreement the parties abandoned the aforementioned 24 February 2004 judgment and the Windhoek maintenance court judgment, more particularly para 2 of the 24 February 2004 order and paras 26 and 27 of the Windhoek maintenance court order.

[29] Mr Corbett submitted that the oral agreement novated the parties' obligations under those orders or, in the alternative, in virtue of the oral agreement the parties abandoned those judgments, that is, they abandoned their rights or obligations under those judgments. Ms Shifotoka's submission is simply that the parties did not enter into any oral agreement (as contended by the plaintiff) and so the question of novation or abandonment simply does not arise. In sum, Ms Shifotoka submitted that there was never an agreement to start with. But I have found previously that there is in existence a valid and enforceable oral agreement concluded between the plaintiff and the defendant; and so my next logical port of call is the determination of this question: Did the oral agreement novate the aforementioned judgments?

[30] 'Novation means', so writes R H Christie in his authoritative work *The Law of Contract in South Africa* 5th ed (1996): p 449, 'replacing an existing obligation by a new one, the existing obligation being thereby discharged, but novation is not to be regarded as a form of payment. The main incentive to novate a contract in Roman law was to replace a contract which was difficult to enforce by one that was easier to enforce (a *stipulatio*) and, because Roman law would not permit the same debtor to promise the same thing twice to the same creditor, it followed that for a novation to be effective there had to be some material difference between the old and the new

contract. Thus, notion is described by Trengove AJP in *Swadif (Pty) v Dyke* 1978 (1) SA 928 (A) at 940 thus:

'*Novatio voluntaria*, voluntary novation, has its origin in contract. Novation, in this sense, is essentially a matter of intention and *consensus*. When parties novate they intend to replace a valid contract by another valid contract (Wessels, *Law of Contract* in SA, 2nd ed vol 2, paras 2370 – 2379; Caney, *Novation*, p 2; *Acacia Mines Ltd v Boshoff* 1958 (4) SA 330 (AD) at p 337; *Trust Bank of Africa Ltd v Dhooma* 1970 (3) SA 304 (N) at p 307).'

[31] Furthermore; [W]hen parties novate (ie replace) they intend to replace a valid contract by another valid contract'. (*Swadif (Pty) Ltd v Dyke*, loc. cit.) But the rights and obligations need not be a contract. In the instant case, the rights and obligations that the parties intended to replace with the oral agreement are rights and obligations under the two aforementioned judgments. In *Desai v Inman & Co* 1971 (1) SA 43 (N) (referred to me by Mr Corbett) at 47G Harcourt J states: 'It was also common cause before us ... that there is nothing sacrosanct about a judgment obligation and that obligation under a judgment can be made the subject matter of a conventional delegation with as great facility as can be a contracted obligation'. In the instant case, I find that subsequent to the obtaining of the 24 February 2004 judgment and the Windhoek maintenance court judgment the parties entered into the oral agreement in such terms as to give rise to the inference that they intended that those judgments be novated. (See *Trust Bank of Africa Ltd v Dhooma* 1970 (3) SA 304 (N).)

[32] Thus, on the facts and on the authorities I conclude that a novation has taken place and the parties had replaced their rights and obligations under the two aforementioned judgments with the oral agreement.

[33] This conclusion leads me to a further level of the enquiry. The relief the plaintiff seeks is a declaratory order and is framed in the following terms:

'1.1 An oral agreement, referred to in paragraphs 8 and 9 supra, novated the obligations imposed in terms of the judgment handed down between the parties by the High Court on 24 February 2004 and the further judgment

handed down between the parties by the Windhoek Maintenance Court on 10 August 2007.

1.2 The various disputes between the parties have accordingly been settled on the terms set out in paragraph 9 of the amended Particulars of Claim.

1.3 There is no obligation upon the plaintiff to pay any past accrued maintenance, or future maintenance to the defendant.

1.4 Costs of suit.

1.5 Further and/or alternative relief.'

[34] The power of the court to grant declaratory orders is found in s 16 of the High Court Act, 1990 (Act No. 16 of 1990) which provides that the court has power –

'(d) ... in its *discretion*, and at the instance of any interested person, to enquire into and determine any *existing*, *future* or *contingent* right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination. (My emphasis)'

[35] On the evidence and taking into account the aforegoing reasoning and conclusions, I find that the plaintiff has proved his right to have the terms of the oral agreement (which I have found to be valid and enforceable) enforced. Accordingly, I should exercise my discretion in favour of granting the declaratory order sought in para 1 of the prayer in the plaintiff's amended particulars of claim.

[36] The dispute this court is called upon to adjudicate is not concerned with whether the parties have carried out their individual obligations under the oral agreement. Nevertheless, from the evidence it seems to me that both of them have not carried out all their obligations under the oral agreement. Thus, in the nature of this case and considering all the circumstances of the case, it is my view that it would be fair and reasonable that costs do not follow the event in the present proceeding: each party should pay his or her own costs.

[37] For all these reasons, I make the following order:

(a) Judgment is for the plaintiff.

(b) It is declared that the plaintiff's obligations set out in the order made by the court on 24 February 2004 (under Case No. I 1738/2002) and the obligations set out in the order of the Windhoek maintenance court (under Case No. A 1192/2002) have been novated by the oral agreement concluded between the plaintiff and the defendant in or about March 2008.

(c) The various disputes between the parties have accordingly been settled on the terms set out in para 9 of the amended Particulars of Claim.

(d) There is no obligation upon the plaintiff to pay past accrued maintenance, future maintenance or any spousal maintenance to the defendant.

(e) There is no order as to costs.

C Parker

Acting Judge

APPEARANCES

PLAINTIFF :	A W Corbett Instructed by Sisa Namandje & Co. Inc., Windhoek
DEFENDANT:	E S Shifotoka Of Conradie & Damaseb, Windhoek