NOT REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 4202/2009

In the matter:

OSWALD DENTLINGER t/a O DENTLINGER BUILDERS **PLAINTIFF**

and

W WELLMANN t/a WW CONSTRUCTION **DEFENDANT**

Neutral citation: *Dentlinger ta O Dentlinger Builders v Wellmann ta WW Construction* (I 4202-2009) [2014] NAHCMD 166 (27 May 2014)

Coram: **VAN NIEKERK J**

Heard: 30 January 2012; 1, 2, 3 February 2012
Delivered: 27 May 2014

Flynote: Action for payment of rental of equipment in term of lease agreement, for holding over and for return of equipment, alternatively for payment of the replacement value of the equipment – Plaintiff not entitled to

claim replacement value as if new – Actual value of equipment not proved - Absolution from the instance granted in this part of claim – Plaintiff did not prove that equipment lettable during period equipment held over – Defendant did not in fact have use of equipment – Plaintiff not succeeding on claim for holding over – Plaintiff succeeding on claim for rental and for return of equipment.

ORDER

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1. There shall be judgment for the plaintiff against the defendant for:

    1.1 Payment of N$60 000 for the rental of one hydraulic mixer for a period of 60 days.

    1.2 Payment of N$42 000 for the rental of one concrete dumper for a period of 60 days.

    1.3 Interest on the aforesaid amounts at the rate of 20% per annum from the date of judgment to the date of payment.

    1.4 Return of the hydraulic mixer and concrete dumper.

    1.5 Costs of suit.

2. The plaintiff shall pay the costs of the defendant's application for absolution from the instance in respect of claim 4 of the plaintiff's particulars of claim.

3. The defendant's counterclaim is dismissed with costs.

JUDGMENT

VAN NIEKERK, J:

The pleadings and some common cause facts

[1] In this matter it is common cause:

1. that the parties are the sons of two sisters and thus closely related;

2. that the parties entered into an oral agreement during September 2008;

3. (on the pleadings) that the material terms of the agreement were:

   3.1 that the plaintiff would let to the defendant, who would hire from the plaintiff, a hydraulic concrete mixer at N$1 000 per day;

   3.2 that the plaintiff would let to the defendant, who would hire from the plaintiff, a concrete dumper at N$700 per day;

   3.3 the equipment had to be in working condition;

   3.4 that the defendant would collect the equipment from the plaintiff's farm, Farm Awaseb, in the district of Rehoboth;

   3.5 that the defendant would return the equipment to the plaintiff after he had finished using these items;

   3.6 that the defendant would pay the plaintiff on the date he returns the equipment to the plaintiff;

4. the equipment was collected by the defendant's father on behalf of the defendant from Farm Awaseb on 19 September 2008;

5. during December 2008 and January 2009 the plaintiff's wife contacted the defendant for the equipment to be returned, but that the defendant did not do so;

6. that the defendant did not pay the agreed rental in respect of the equipment.

[2] The defendant alleges in his plea that it was also a material term of the contract that the dumper could operate in four-wheel drive, i.e. 4 x 4. This allegation is not

repeated in his counterclaim, but the plaintiff pleaded that 'the 4 x 4 Dumpcur [i.e. dumper]' was tested in the presence of the defendant's father and was found to be fully functional and in good working order. I think it must be inferred that the plaintiff intended hereby to admit that the dumper was a 4 x 4.

[3] The defendant further alleges that the equipment was not in working condition and that the plaintiff failed to comply with a further undertaking to rectify the problem. He pleads that he did not return the equipment because he suffered damages as a result of the fact that it was not in working condition. He further pleads that he is entitled to refuse payment of the rental amount because the equipment was not in working order.

[4] The plaintiff instituted a claim for the rental of the mixer and the dumper at a total amount of N$328 000 for a period of 193 days and for the return of these items, alternatively for the replacement value of the mixer, being N$150 000, and of the dumper, being N$75 000. Interest and costs of suit also form part of the claim. During the trial the replacement values were amended to N$295 000 for the mixer and N$320 000 for the dumper.

[5] The defendant instituted a counterclaim in which he relies on the rental agreement. He alleges that the agreement was breached by virtue of the fact that the items rented were not in proper working condition, which the plaintiff denies. The defendant alleges that he suffered damages as a result of the alleged breach, for which he claims payment in the amount of N$181 184, plus interest and costs. Details of the alleged damages are given. For the moment it suffices to state that they relate to expenses in respect of workers employed by the defendant and for transport in respect of the equipment. The plaintiff put the defendant to proof of these allegations.

<u>The plaintiff's witnesses</u>

The plaintiff

[6] The plaintiff was previously a builder, but then turned to farming. He testified that the defendant knew he had the mixer and dumper and called him during September

2008 to arrange for the rental as he had a job to do at Aroab. The defendant indicated that he would use the equipment for about one to two months. The plaintiff confirmed the rental amount as pleaded. The parties arranged that the equipment be collected at the plaintiff's farm about three days later.

[7] In anticipation of the defendant's arrival, the plaintiff and his foreman travelled to the farm to service the equipment. This included changing the gearbox oil and the diesel filters and air filters of the equipment. When the service was completed the plaintiff called the defendant, who stated that his truck is being loaded with materials for the Aroab job. He undertook to call when the truck leaves Windhoek, which the defendant did.

[8] Later the defendant called to say that he could not personally collect the equipment, but that he would send his father. The defendant's father (Mr Wellmann Snr) arrived in a bakkie, followed by the truck and two trailers loaded with building material. The defendant's father stated that he came to collect the equipment and to see if everything is in order. The plaintiff had the mixer started to demonstrate how the mixer functioned. It was then loaded onto the truck. The dumper was also started and in the presence of Mr Wellmann Snr, the defendant's driver and assistant driver were shown how to operate the dumper. The dumper was then driven to the trailer and loaded. The truck thereafter left for Aroab.

[9] The plaintiff explained that the defendant was supposed to come to the farm himself for the parties to draw up and sign a written lease agreement when the equipment was collected, but as he sent his father instead, the agreement was not recorded in writing. However, as the defendant is a close relative, the plaintiff trusted him and let the equipment go without a written agreement.

[10] The plaintiff did not hear anything from the defendant for some time. After about three months the plaintiff tried to contact the defendant by phone in order to enquire about the return of the equipment, but did not succeed in speaking to him. He then asked his wife to contact the defendant. She reported that the defendant had stated that his truck was broken. The defendant never contacted him about anything, did not return the equipment and did not make payment. After several months the

plaintiff requested his wife to consult his lawyers, who later instituted action on his behalf.

[11] During cross-examination the plaintiff acknowledged that the equipment had previously been used for about eight years in Walvis Bay. However, he denied that the equipment became rusty as a result. He testified that he regularly maintained and serviced his equipment and covered it under tarpaulins while in use at Walvis Bay. Since he kept the equipment on his farm, he always stored it under roof cover in an open shed.

[12] When he was asked how they started the dumper, he stated that the dumper's 'starter', by which I understood him to mean the crank, was missing. The dumper therefore had to be towed for about 100 metres to start. However, they later found its crank. He denied Mr Wellmann Snr's anticipated testimony that the dumper's engine repeatedly died and that it was a struggle to start it. He also denied that the mixer's bucket was loose and loaded separately as there was not sufficient space on the truck.

[13] The plaintiff explained that he and the foreman demonstrated to Mr Wellmann Snr and to the defendant's driver and assistant driver how to operate the mixer with the bucket. He acknowledged that Mr Wellmann Snr stated that they should not show him, they should show the driver and his assistant. However, he said, Mr Wellmann Snr stood by.

[14] At first they merely started the dumper, but later, while it on the truck the plaintiff demonstrated the operation of the lever to lift the dumper's bucket and how to dump the contents of the bucket. He denied Mr Wellmann Snr's version that there was no demonstration of how the dumper worked.

[15] He further denied that the defendant called him a few days later to complain that the equipment was in poor condition, that the mixer's bucket does not lift when it has weight in it and that the dumper would not start. He also denied promising to attend to the complaints and to send someone to Aroab to fix the problems.

[16] It was put to the plaintiff that the defendant got a call during January 2009 in which the plaintiff threatened him. This the plaintiff denied. He said that the defendant called him after he had received the summons and said that the plaintiff should have asked him if he wanted money.

[17] It was put to the plaintiff that he knew in January 2009 where the equipment was as the defendant had allegedly informed Mrs Dentlinger that it was opposite Hochland Park next to the western bypass. However, the plaintiff stated that he was informed that the equipment was at the defendant's house in Hochland Park, but when they looked for it there, they could not see it.

[18] It was put to the plaintiff that the equipment was in such a poor condition that the defendant could not use it. The plaintiff answered that the defendant told Mrs Dentlinger that the equipment did work. However, he also stated that the bucket of mixer will not work if it is lifted off the rollers and suggested that perhaps the defendant's workers did not have the proper knowledge to operate the mixer.

Louisa Dentlinger

[19] She is the plaintiff's wife. She testified that during about December 2008 the plaintiff requested her to contact the defendant to enquire about the whereabouts of the equipment. She sent the defendant an sms, but received no reply. Early during January 2009 she met the defendant by chance in town. The defendant said that she must tell the plaintiff that he would bring back the equipment as soon as he could arrange transport as his truck was broken. He also told her that the equipment worked, but that it was not suited for the purpose for which he required it. The mixer was too weak to lift the required load, and the dumper was too weak to drive up the incline on which he wanted to use it.

[20] During middle January 2009 the plaintiff again asked her to send the defendant a message to enquire about the equipment and to say that, should the defendant not return the equipment, the plaintiff would be taking 'other steps'. She sent two messages in close succession. Two to three months later she again met the defendant by chance. He asked her why she sent such 'ugly' messages. She

replied that he is supposed to return the equipment. The defendant promised to do so as soon as he got hold of a truck. He informed her that the equipment was at his house in Hochland Park and that he would return it to the plaintiff's farm. He never did so.

[21] Later the plaintiff instructed her to take the matter up with a lawyer which she did during July 2009. The plaintiff's legal practitioners of record directed a letter of demand to the defendant which was handed in as Exhibit "A". After he received this letter, the defendant called the plaintiff. She had the impression that the defendant was very angry.

[22] Mrs Dentlinger testified that she knows the equipment as she is her husband's assistant. She saw the equipment about a week before the defendant called to arrange to hire the equipment. When she saw the equipment again where Mr Rittmann had discovered it sometime during 2009 next to the western by-pass it did not look like the same equipment because it was in such a poor condition. On 10 Jan 2012 she took certain photographs (Exh "B") of the equipment.

[23] During cross-examination of Mrs Dentlinger it was put to her that the defendant only received two of her three messages. She denied that the defendant told her during one of their meetings that he has left the equipment opposite Hochland Park next to western bypass. She stated that he said it was at his house in Hochland Park. She also admitted that she sent an sms during October 2008 saying that the defendant must return the equipment as her husband needs it, but denied that she referred to the equipment as 'scrap' or 'rubbish' (Afrikaans "rommel").

Ronald Joseph Dentlinger

[24] During 2008 he was employed as a foreman at the plaintiff's brick factory. The plaintiff took him to Farm Awaseb to service the mixer and dumper before the equipment would be rented out to the defendant. He also had to check if the equipment was in running order. He replaced the diesel, the filters and the oil.

[25] When Mr Wellmann Snr arrived, they started the mixer and showed him how it operates. The dumper's starter was missing, so they pull-started the dumper. Later

he drove the dumper onto the truck by means of a loading ramp. They loaded the mixer onto the truck. He confirmed that the equipment had been used at Walvis Bay some time before. He stated that the equipment on Exh “B” looks like the same equipment but it was then not in the condition evident from the photos.

Marco Rittmann

[26] Mr Rittmann knows both parties. From time to time he serviced the plaintiff’s equipment. He knew the equipment which was rented out to the defendant. Whenever he checked the equipment previously, it was in working condition. The equipment always kept under roof. I understood him to state that he last serviced the equipment in 2005 and 2007.

[27] Late in 2009 the plaintiff requested him to be on the lookout for the mixer and dumper. At some stage he saw the equipment next to the western bypass near the Road Construction Company’s storage camp. He informed the plaintiff. He could not recall when this was.

[28] During cross-examination he stated that he recognized the equipment because he used to service it. The plaintiff used to mark his equipment with name stickers. The dumper used to have stickers on both sides of loading box. At the time he found the equipment only the marks of the sticker were left. He could point nothing out on the photographs on Exh “B” as the marks were not visible on the photos. He recognised the mixer because it was more or less the same colour as the dumper and because he used to service it. It was put to him that the reason why he recognized the equipment is because it was in exactly the same condition as when he last saw it on the farm. He responded that the last time he saw the equipment it was in a very good condition, not in the poor and rusty condition as is visible on the photographs on Exh “B”.

[29] According to the plaintiff’s wife, Mr Rittmann found the equipment during 2009. I think it is improbable that it would still be in ‘exactly’ the same condition as it was when he last serviced it during 2005 and 2007.

Stefanus Jacobus Bosman

[30] Mr Bosman is the manager of Pupkewitz Volvo Construction Equipment. He drew up and presented a quotation for a new dumper and mixer (Exh “C”). According to him such equipment is made to last a lifetime. He has no experience to value second hand equipment of this nature. He did not value the plaintiff’s mixer and dumper. The quotation was not disputed.

The application for absolution from the instance

[31] After the plaintiff’s case was closed, the defendant brought an application for absolution from the instance in respect of the plaintiff’s claim for payment of the replacement value of the mixer and the dumper, i.e. in respect of claim 4. After argument was heard, the Court granted the application on 2 February 2012, reserved costs for determination at the end of the trial and indicated that reasons for this decision would be provided in the main judgment. These reasons now follow.

[32] Mr *van Vuuren* on behalf of the defendant submitted that the plaintiff cannot in law claim the value of new equipment. He submitted that the plaintiff’s claim sounds in delict and as such the plaintiff may, in principle, claim for the replacement or market value of the equipment calculated on the date on which his claim originates, i.e. on the date when the loss occurred. He submitted that the plaintiff’s amendment does not take the matter any further and that the plaintiff did not provide the necessary evidence to sustain his claim. The only evidence provided is that of Mr Bosman, which entails the price of new equipment as at the date of trial.

[33] Mr *Ueitele*, on the other hand, submitted that the plaintiff’s claim sounds in contract He referred to paragraph 5.6 of the particulars of claim in which the allegation is made that a material term of the contract is that the defendant would return the equipment after having used it. The defendant admits this allegation. He submitted that the plaintiff is entitled to the return of the equipment alternatively payment of its replacement value as new at the trial date.

[34] It seems to me that Mr *Ueitele* is correct that in this case claim 3, read with claim 4 is based on breach of contract. However, it is in my view also clear that there is no basis on which the plaintiff can claim payment of the value of new equipment. If this

were the case the plaintiff would be unjustly enriched. In *Manley van Niekerk (Pty) Ltd (now Video Sound Studios (Pty) Ltd) v Assegai Safaris and Film Productions (Pty) Ltd* 1977 (2) SA 416 (A) at 422H – 423A the following was said:

> 'In a case such as the present where the claim is brought *ex contractu* for the return of the leased article or its value, all that the lessor need allege is that he hired the article out, that the lessee was obliged to return it and that he failed to return the article or its value.'

[35] Clearly the value must be determined at the time the breach occurred. In the *Manley van Niekerk (Pty) Ltd* case the replacement value of the item, a camera, not returned on the date of breach was proved. The court was able to determine a percentage reduction in this value to cater for the depreciation in the value of the camera because of its age and to calculate the value of the camera at the date of breach. However, in the instant case there is no evidence about the age of the equipment. It is therefore not possible for the Court to estimate the value of the equipment at the date of breach. There is also no other evidence from which an estimation of the value can be made.

[36] The defendant's counsel submitted that absolution should not granted in respect of only one of several claims, especially not where the claim targeted by the plaintiff's application is an alternative claim. However, where the relevant claim is sufficiently distinct from the other relief claimed I do not think there can be objection if the issue is dealt with by way of an order for absolution (cf. *Ntombela v Minister of Police* 1985 (3) SA 571 (O)).

[37] The test to be applied in applications of this kind is well known. In *Bidoli v Ellistron t/a Ellistron Truck & Plant* 2002 NR 451 (HC) it was set out as follows (at 453D-F):

> 'In *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) the Court of Appeal held that when absolution from the instance is sought at the end of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff established what would finally be required to be established, but whether there is

> evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff.
>
> The phrase 'applying its mind reasonably' requires the Court not to consider the evidence *in vacuo* but to consider the admissible evidence in relation to the pleadings and in relation to the requirements of the law applicable to the particular case.'

(Approved in *Kaese v Schacht and Another* 2010 (1) NR 199 (SC) at 205C-E).

[38] For the reasons set out above, the evidence presented by the plaintiff in respect of claim 4 is not such that this Court, applying its mind reasonably, could or might find for the plaintiff.

[39] I now turn to a consideration of the defendant's witnesses and the rest of the plaintiff's claims.

The defendant's witnesses

The defendant

[40] The defendant is in the building construction and transport business. He became involved in a project to construct a sewerage dam near Aroab and hired the equipment from the plaintiff for this purpose. He sent his father to collect the equipment as he was already on the way to Aroab himself and could not attend to it. He testified that he was not aware that he had to enter into a written contract with the plaintiff.

[41] When the equipment was offloaded at Aroab he was shocked to see the condition in which it was. The dumper did not want to start even when it was pulled. The mixer started, but the bucket in which the sand and stones had to be placed was separate from the mixer. The hydraulic system was supposed to lift the bucket containing the mixture, but it could not lift the weight of the particular mixture that was required for the job.

[42] The defendant telephoned the plaintiff to complain about the condition of the equipment. He specifically mentioned that the equipment was rusty and that the dumper would not start. The plaintiff told him to pull-start the dumper, but the

defendant said they had already tried without success. The plaintiff then said that he would see if he could send someone to have a look at the equipment, but this person never arrived. The defendant then called a mechanic from Keetmanshoop to attend to the problems, but he could not fix the equipment.

[43] After a week had passed, the defendant called the plaintiff, but he did not answer his phone. The defendant testified that he began to panic because he had workers to pay and no work was being done. After about 14 days he managed to hire other equipment and the work commenced.

[44] The defendant set out details of the calculations of the wages he paid.

[45] Two weeks after the work started, the defendant called the plaintiff from Keetmanshoop. Again he did not answer his phone. The next day he called again and then the plaintiff answered. The defendant reminded the plaintiff that he did not send someone out to attend to the equipment and that he hired other equipment. The defendant told him that he had to pay for the transport of the equipment and his workers. The plaintiff put the phone down in his ear. The defendant returned to Aroab to continue with the work. I pause to note that this version was not put to the plaintiff when he testified.

[46] At some stage, Mrs Dentlinger sent him a message that he had to return the equipment. He did not hear from them again until 3 January 2009 when she again sent an sms asking when he would be returning the equipment. A few days later he met her in the mall. They chatted generally and he told her that the equipment had arrived and was opposite his house in Hochland Park. He also said that the plaintiff should call him because they previously had a discussion regarding the costs involved.

[47] The defendant did not hear anything from the plaintiff. After about three months he met Mrs Dentlinger again by chance. During this period the defendant had at some stage he received the plaintiff's letter of demand. He asked her why they sent the letter if her husband had not reverted to him as he had asked him to do (during

the previous conversation with Mrs Dentlinger). At some stage after this he received the summons in this case.

[48] The defendant did not testify regarding the transport costs he claims.

Walter Wellmann

[49] Mr Wellmann Snr confirmed that he went to Farm Awasab to oversee the loading of the equipment. He stated that the mixer was started and loaded. The dumper did not want to start. It had to be pulled-started. The engine then died. The plaintiff's foreman worked on it. Again it was pulled, where after it started and was then driven to the truck to be loaded, where it stood idling for some time. Thereafter it was loaded. He confirmed that the dumper had been stored under roof on the farm. He described the equipment as rusted and that he was doubtful about its condition. He confirmed that the working of the mixer was demonstrated to the defendant's driver and assistant driver. He stated that the mixer's bucket was loose and loaded separately. He waited until everything was loaded and he fastened the equipment. When the truck drove off to Aroab he returned to Rehoboth.

Matheus Albertus Morkel

[50] Mr Morkel testified about a quotation he had given to the defendant. This evidence was presented to provide a basis for the defendant's claim for damages.

[51] After the defendant's case was closed, the plaintiff called a further witness, Mr von Ludwiger, to certain rebut evidence which arose during cross-examination of the defendant. On the view I take of the matter it is not necessary to deal with this evidence.

Evaluation of the evidence

[52] Counsel for both parties were in agreement that two mutually destructive versions had been placed before the Court. The approach to be adopted in such circumstances is that set out in the well known passages in *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440D-441A; *Stellenbosch Farmers' Winery Group Ltd v Martell et Cie* 2003 (1) SA 11 (SCA) at 14I-15E (See *U*

v Minister of Education, Sports and Culture and Another 2006 (1) NR 168 (HC); *Sakusheka and Another v Minister of Home Affairs* 2009 (2) NR 524 (HC); *Absolute Logistics (Pty) Ltd v Elite Security Services CC* (Case No. I 1497/2008); *Kruger v Naboto* (Case No. I 2693/2006 – judgm. del. 29 May 2009); *Namene v Mhani and another* (I 2543-2010) [2013] NAHCMD 92 (5 April 2013)).

[53] The plaintiff generally made a good impression on me. He gave his testimony in a straight forward manner. Although he became upset at times with the version of the defendant being put to him during cross-examination, I had the impression that his reaction was true disgust and irritation with what he, at times, called "blatant lies". Without really being pressed by the defendant's counsel, he was prepared to make the concession that, if he did wrong the defendant by causing him damages, he would make payment. He seemed to me to be honest and fair in his version of events. I do think, though, that he was inclined to exaggerate the 'perfect' condition of his equipment.

[54] Mrs Dentlinger also made a good impression on me. From her evidence one clearly realized that the parties are related and that, on a certain level, there were no "hard feelings" as she put it. The impression I had from both her husband and herself was that it was just a question that an agreement was an agreement and they expected it to be fairly honoured. I have no quarrel with that.

[55] Although there were contradictions between their versions, as defendant's counsel understandably emphasized, I do not regard them as material. These concerned minor issues e.g. about whether the plaintiff asked her to call the defendant or to sms him; whether any one of them went past the defendant's house to look for the equipment; whether the plaintiff asked Mr Rittmann to look for the equipment.

[56] Mr Dentlinger, the foreman, and Mr Rittmann also generally made a favourable impression on me.

[57] The defendant, on the other hand, generally made an unfavourable impression on me. He seemed glib and there was something sly about him. His version is

riddled with contradictions and improbabilities and I tend to agree with Mr *Ueitele's* charge that he 'concocted' his evidence in some respects. There is however nothing unfavourable that I can state about Mr Wellmann Snr's demeanour in the witness box.

[58] The first issue to be mentioned about the defendant's version is that while the plaintiff was in the witness box, the defendant gave instructions to his counsel that he never informed the plaintiff that he would need the equipment for a period of 1 – 2 months. The plaintiff was confronted with these instructions or the equivalent thereof on more than one occasion during cross-examination which instructions the plaintiff firmly denied. Yet, when the defendant gave evidence in chief, he suddenly testified of his own accord that when the plaintiff asked him during their negotiations for how long he would need the equipment, he indicated that he would need it for 1½ - 2 months. When he was cross-examined on this issue, the defendant untruthfully professed to have given instructions on a different issue. Later he said that he could not remember that he gave such instructions and when pressed, denied outright that he had given such instructions.

[59] The defendant's version is that he tested the equipment on the day after it arrived in Aroab. He then found that the mixer could not lift the bucket when loaded and that the dumper would not start. He was allegedly angry because of the condition of the equipment and telephoned the plaintiff to complain about it. The plaintiff allegedly said that 'he would see if he could send someone to have a look at the equipment', but he never did. I pause at this stage to note that it was categorically put to the plaintiff during cross-examination that 'you said you'll attend to it and send someone to Aroab to fix it', which the plaintiff vehemently denied. However, when it was the defendant's turn to testify, he suddenly changed his version to a more tentative undertaking by the plaintiff, namely that he would 'see' 'if' he 'could' send someone.

[60] The plaintiff denied firmly that the defendant ever phoned him with such a complaint. The defendant says that he called the plaintiff again after about a week had passed, but the plaintiff allegedly did not answer his phone. About two weeks

later he allegedly again phoned the plaintiff and told him that he hired other equipment. The first issue about this evidence is that the version that he spoke to the plaintiff two weeks later was never put to the plaintiff. As such it should be afforded no weight. Secondly, I find it highly improbable, if the defendant's version about the problems with the equipment is to be accepted, that he did not constantly try to get hold of the plaintiff to enquire about the person who would be coming to attend to the equipment. According to him the success of the building project was dependent on the equipment functioning properly. He emphasised during his testimony that because the plaintiff's equipment was not in proper order, his workers were sitting around for two weeks doing no work while he still had to pay them and he was in a state of panic. Yet he never again followed up the issue with the plaintiff by making enquiries when the person is expected to arrive. It is probable that a person in the defendant's position would have been in constant contact with the plaintiff.

[61] The defendant did not present any evidence to corroborate his version that he hired other equipment. If he really had done so, this is what one would have expected. In fact, he did not even mention from whom he hired the equipment.

[62] The defendant testified that he called in a mechanic from Keetmanshoop to come and fix the plaintiff's equipment, but that this person was unable to do so. Although he mentioned this person's name and the name of his business he did not call him as a witness or claim any expenses in relation to the services of this mechanic. The defendant's counsel submitted that it was not necessary to call this mechanic to testify as the testimony of the defendant and his father was sufficient. I do not agree. The defendant's father could not testify about what happened at Aroab. If the mechanic had really tried to fix the equipment, he would have been the ideal witness as he would be objective, independent and in all probability an expert. There was no indication that this person is not available. I agree with Mr *Ueitele* that the failure to call him as a witness raises more questions than answers.

[63] The defendant told the Court that he already took photographs of the equipment during November 2008 because he foresaw the likelihood of a court case ensuing

between the parties and he wanted to record the condition of the equipment. He only had these photographs developed much later to use at the trial. I find this evidence improbable. The defendant was in no hurry to make any contact with the plaintiff or to return the equipment as he was supposed to or to even inform the plaintiff where the equipment was. He did not strike me to have been intent upon making any effort to recoup his so-called damages from the plaintiff. He only instituted the counterclaim during 2010, three months after the plaintiff's summons was served. He never indicated to Mrs Dentlinger that he was dissatisfied with the condition as such of the equipment. He stated that the equipment was in working condition, but that it was not suitable for his purposes. He repeatedly undertook to return the equipment as soon as his truck was in running order or when he could arrange the transport. There was simply no reason for him to photograph the equipment during November 2008. I reject his evidence on this score. It is clear that he intended to use these photographs to portray the poor condition of the equipment as if it was such already during 2008. As was demonstrated during cross-examination of the defendant, there were no discernible differences of note between the condition of the equipment as apparent from the plaintiff's photographs taken during June 2012 and that of the condition as apparent on the defendant's photographs. I agree with counsel for the plaintiff's contention, which was denied by the defendant, that his photographs were probably also taken during 2012.

[64] The defendant's version is that he did not return the equipment because he had suffered damages and he wanted the plaintiff to come to him. According to him he kept saying to Mrs Dentlinger that her husband should call him. He made very little effort to contact the plaintiff. The defendant's attitude is arrogant and presumptuous. It makes a poor impression. What is more, he left the equipment exposed to the elements at a site at which, *prima facie*, he had no right to leave the equipment. Although I accept that the equipment did probably sustain rust damage while the plaintiff used it in Walvis Bay, the fact that it was left in these conditions most probably led to a more rapid deterioration of the equipment. Apart from the fact that the defendant was in breach of the lease agreement by failing to return the equipment, I take into consideration that the undisputed evidence is that he must

have passed the plaintiff's farm on the way back from Aroab and could very easily and with little effort have returned the equipment as he was supposed to. Instead he imposed upon the plaintiff by apparently expecting the latter to fetch the equipment in Windhoek and conveying it back to the farm.

[65] The defendant presented certain extracts from an employee's time book (Exh "F(1) – (3)")) to the Court in support of his claim for damages in respect of the wages he allegedly had to pay his workers. These documents appear suspect. As he admitted during cross-examination, only Exh "F(1)" bears the date 2008. Although the documents are supposed to reflect days worked in September 2008, the information recorded incorrectly reflects that September has 31 days and the dates do not correspond with the calendar for September 2008. On Exh "F(1)" one can see that the "8" of "2008" was inserted later and on Exh "F(3)" the words "Des LONE + BONUS" (English: "Dec WAGES + BONUS") were changed to "Sep LONE + BONUS").

[66] On a conspectus of the evidence I am satisfied that the plaintiff proved that the equipment was in a working condition when he leased it to the defendant and that the defendant's version to the contrary should be rejected as false. In the premises the defendant's counterclaim cannot be upheld.

[67] The plaintiff's claim for the rental and for the holding over by the defendant is set out in the particulars of claim as a single claim for the rental of the mixer at N$1 000-00 for 193 days and a single claim for the rental of the dumper at N$700-00 for 193 days. Mr *van Vuuren* correctly pointed out that the plaintiff did not testify at all about the computation of his claim. He further submitted that in respect of the holding over the plaintiff should have alleged and presented evidence of the market rental value of the equipment for the period that the equipment was held over. This the plaintiff did not do. He also submitted that the most that the plaintiff would, in the circumstances, be entitled to is the agreed rental for two months.

[68] I am prepared to assume that, in the absence of evidence to the contrary, the rental value of the equipment is the rental paid under the lease (see *Sandown Park (Pty) Ltd v Hunter Your Wine & Spirit Merchant (Pty)* Ltd 1985 (1) SA 248 (W) at

260A-B). However, the plaintiff should also have proved, at least *prima facie,* that the equipment was in fact lettable during the period it was held over (*Sandown Park* case, *supra*). The plaintiff made no attempt to do so, nor is it clear on what how the period of 193 days is calculated. Furthermore, I think it must be accepted that the defendant did not in fact have the use of the equipment during the period. In all these circumstances I agree with defendant's counsel that the Court should not uphold the plaintiff's claim for holding over.

[69] Mr *Ueitele* submitted that the defendant had been placed in *mora* by the letter of demand and that *mora* interest should be awarded. However, the plaintiff did not claim this and no application for leave to amend was made. Interest shall therefore be awarded as claimed.

The costs of the application for absolution from the instance

[70] The defendant's counsel submitted that the order for costs should follow the result of the application, while the plaintiff's counsel suggested that it should be in the cause. However, I think the success of the application had the effect that the proceedings were shortened. In the result I think the defendant, having been successful, should be awarded his costs on this score.

Order

[71] In the result the following order is made:

1. There shall be judgment for the plaintiff against the defendant for:

    1.1 Payment of N$60 000 for the rental of one hydraulic mixer for a period of 60 days.

    1.2 Payment of N$42 000 for the rental of one concrete dumper for a period of 60 days.

    1.3 Interest on the aforesaid amounts at the rate of 20% per annum from the date of judgment to the date of payment.

    1.4 Return of the hydraulic mixer and concrete dumper.

1.5 Costs of suit.

2. The plaintiff shall pay the costs of the defendant's application for absolution from the instance in respect of claim 4 of the plaintiff's particulars of claim.

3. The defendant's counterclaim is dismissed with costs.

_____(Signed on original)_____

K van Niekerk

Judge

APPEARANCE

For the plaintiff: Mr SFI Ueitele

of Ueitele & Hans Legal Practitioners

For the defendant: Mr J van Vuuren

of Krüger, Van Vuuren & Co