NOT REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 2187/2010

In the matter between:

UNIQUE CATERERS & TENTS CC **PLAINTIFF**

And

LLEWELLYN ANTHONY T/A SIRKEL MOTORS AND RECREATIONAL VEHICLE CENTRE **DEFENDANT**

Neutral citation: *Unique Caterers and Tents CC v Anthony* (I 2187-2910) [2014] NAHCMD 364 (27 November 2014)

Coram: VAN NIEKERK J

Heard: 6 – 8 February 2012

Delivered: 27 November 2014

Flynote: **Contract** – Purchase and sale – Claim for cancellation and restitution of purchase price – Where seller has expressly given warranty that *merx* is fit for purpose for which it is sold, there is no basis on which reliance can be placed on a *naturale* of the contract to same effect, except in the alternative – If intention is to rely on such an implied term, it must be pleaded since the relief sought will depend on it, failing which it is not open to plaintiff to rely on *actio redhibitoria.*

ORDER

The plaintiff's claim is dismissed with costs.

JUDGMENT

VAN NIEKERK J:

The pleadings and the issues to be resolved

[1] This is an action for an order confirming the cancellation of an agreement of purchase and sale of a 2009 model Foton Forland truck concluded between the plaintiff, as purchaser, and the defendant, as seller, on 29 July 2009; for repayment of the purchase price of N$154 997-00, plus *mora* interest thereon with effect from 16 June 2010, alternatively from date of judgment until date of payment; and costs of suit.

[2] The particulars of claim, as amended, allege that it was an express, alternatively implied, oral term of the agreement that the defendant warranted the truck against latent defects and that it was an express oral term of the contract that the truck was sold as new and functional. Further written terms were agreed upon as set out in annexure "A" to the amended particulars of claim. The plaintiff further alleges that, after delivery of the truck, the plaintiff experienced severe problems with the truck, which was defective, alternatively malfunctioning. The plaintiff returned the truck to the defendant during May 2010 (as stated in the further particulars). It is further alleged that the "defendant sold the truck containing a latent defect, alternatively a serious malfunction which the defendant failed or neglected to inform the plaintiff of"; that the plaintiff cancelled the agreement in writing on or about 8 June 2010; that the plaintiff demanded repayment of the purchase price by 16 June 2010, but that, despite demand, the defendant has not done so.

[3] In further particulars the plaintiff it alleges that it took delivery of the truck on or about 30 July 2009 and that on this date the plaintiff experienced severe problems with the truck. In response to a request to specify fully and precisely the nature and extent of each and every latent defect and serious malfunction, the plaintiff replies as follows: the plaintiff's driver experienced problems with the gear transmission when operating the gear control lever; the truck had difficulties to drive and often could not drive at all once laden with any load; the truck leaked oil from its undercarriage and could not be operated smoothly or with ease throughout "its purchase period". The plaintiff further

pleads that it has no specific knowledge of truck mechanics, but maintains that the truck 'could not be loaded or driven properly, and was thus defective alternatively serious malfunctioning of its purposes (*sic*)'.

[4] In his plea the defendant pleads that the agreement of purchase and sale comprised only of the terms contained in annexure "A" to the plaintiff's amended particulars of claim, read with the written terms contained in the Motorsure policy no. 17198. All other terms relied on by the plaintiff are denied. The defendant specifically denies the allegation that he warranted the truck against latent defects. While admitting that it was an express term that the truck sold was new, the defendant denies the allegation that the truck was expressly sold as a functioning truck. Save for admitting that the plaintiff paid the purchase price, the defendant denies that the plaintiff complied with all its obligations.

[5] The defendant further admits that the plaintiff took delivery of the truck on 30 July 2009; that minor "repairs" were done to the truck on 2 October 2009 in Tsumeb at a cost of N$4 470, of which the defendant contributed N$2000; that during October 2009 the plaintiff left the truck at the defendant's premises and that during November 2009 the plaintiff collected the truck; and that the plaintiff again left the truck at the defendant's premises on or about 8 June 2010. While admitting that the plaintiff gave notice of cancellation of the agreement, the defendant denies that the plaintiff was entitled to cancel the agreement. The defendant further admits written demand for repayment and refusal to comply, but denies that he is liable to the plaintiff.

[6] For purposes of trial the parties agreed on the following issues as being not in dispute: (i) the parties' citation and their standing; (ii) that there was consensus between the them in relation to the thing sold; (iii) the purchase price; (iv) that the truck was delivered on 30 July 2009 and that the plaintiff left the truck at the defendant's premises on 8 June 2009; and (v) that the plaintiff addressed a letter of demand to the defendant.

[7] During the pre-trial procedures the parties agreed that the only issue of law to be resolved is whether the plaintiff is entitled to cancel the agreement and claim restitution.

[8] The issues of fact to be resolved during the trial were agreed to be: (i) whether the vehicle had latent defects at the time of the purchase; (ii) if so, whether such defects substantially impaired the utility or effectiveness of the vehicle to such an extent that the plaintiff is entitled to reject the truck; and (iii) what were the terms of the warranty given by the defendant.

[9] At the start of the trial Mr *Kamanja*, who appears on behalf of the plaintiff, indicated that the plaintiff's expert witness has failed to make his appearance for a reason which was not disclosed to the Court and that the plaintiff would no longer proceed on the basis that the truck had any latent defects, but would merely seek to prove the case on the alternative basis, namely that it was an express terms of the contract that the truck was sold as functional and that it suffered from a serious malfunction such as entitled the plaintiff to cancel the contract.

[10] I now turn to the evidence presented by the parties, which evidence I shall summarise with the focus on those parts of the testimony which are relevant to the issues to be resolved.

<u>The evidence presented by the plaintiff</u>

(i) Saima Shaanika

[11] Ms Shaanika testified that the plaintiff is a close corporation involved in catering and the hiring out of tents, chairs, tables, crockery and other items associated with presenting functions. She is the plaintiff's employee responsible for the day to day operation and administration of the close corporation. The plaintiff's headquarters is in Windhoek, while it has a branch at Ondangwa and an agent in Oshakati. The plaintiff rents out these items mostly in Windhoek and the Northern Regions. In the course of its business the plaintiff must transport its tents, furniture and other items to and fro between Windhoek and the Northern Regions by truck. As the tents are often quite large and heavy, larger trucks are needed to perform this function. The roads travelled on are tarred, gravel and sand.

[12] Ms Shaanika represented the plaintiff when the agreement for the purchase of the truck in this case was concluded on 29 July 2009. She was present when the truck was delivered the next day. The truck was taken to the plaintiff's warehouse in Windhoek and loaded with tents, chairs and tables. It departed for the North at about 17h00. The intention was to deliver some items at Ondangwa and some at Oshakati. At Otjiwarongo the driver, Mr Katambu, called Ms Shaanika and made a certain report. As this particular driver was not called as a witness the contents of the report must be struck from the record and ignored. However, during cross-examination defendant's counsel dealt with the contents of the report and to this extent the evidence about such contents is admissible. The report was that the truck "was not pulling well". Ms Shaanika instructed the driver to continue with the truck to Oshakati. After the driver made a further report to her from Oshakati, she instructed him to park the truck and to return with it to Windhoek at a later stage.

[13] About two weeks later during the middle of August 2009 on the return journey the driver again contacted her from Tsumeb and made a report. Defendant's counsel also dealt with the contents of this report and in fact invited the witness to divulge more details about the report. These were to the effect that the truck could not go further, that it was "grounded" and that the fuel tank emptied very quickly. Ms Shaanika then called the defendant's office. She was told to send the truck to a competent garage in Tsumeb to be repaired. The truck was taken to the premises of Lasertech Mobile Truck Alignment Services CC (the business of the plaintiff's intended expert witness) where it stayed for some time until it was repaired. The truck was released shortly after 26 September 2009 into the care of the plaintiff's driver, who took the truck to Windhoek.

[14] Ms Shaanika sent the truck to the defendant's premises with complaints based on reports given by the driver about the return journey. However, as she needed the truck to make deliveries, she had it collected and sent another driver, the plaintiff's second and last witness, Mr Kwedhi, during about October or November 2009 to the North with a load of tents and furniture. Mr Kwedhi reported to her from Otjiwarongo that the truck was giving problems. She instructed him to continue his journey, but about 40 km

outside Otjiwarongo he reported that he could not go further as the truck was leaking diesel. She then sent three busses to transport the items on the truck to their destinations. The truck was driven back to Windhoek at a speed of about 20 – 30kph. As I understand it, this evidence is based on what Mr Kwedhi reported to her.

[15] Ms Shaanika again returned the truck to the defendant's premises with a complaint. She was later informed that the truck was taken to a garage. At a later stage she sent a driver to collect the truck, but it continued to give problems. It could not undertake any trips. Eventually Ms Shaanika ordered the driver to return it to the defendant's premises, where it remained since 8 June 2010. She explained to the defendant's representative that the truck cannot perform the function for which it was intended, that the plaintiff was losing money by failing to make deliveries on time and that the truck must be taken back. The representative refused, but she instructed that the truck be left there.

[16] Ms Shaanika testified that she informed the defendant's representative at the time of the purchase that the truck must be new because she did not want to be spending time sending the truck to and fro for repairs and that it should only be necessary to take the truck to the garage for its routine services. She explained that she did not want truck problems as these would also cause delays in the plaintiff's deliveries.

[17] According to her, the representative assured her that she would experience no problems with the truck and referred her to another customer who had earlier bought several similar trucks from the defendant and who had no problems with these trucks.

[18] She testified that she was given a warranty for one year in respect of the truck, but she was not sure what it entailed.

[19] During cross-examination she admitted that she did not properly read the booklet which sets out the warranty. However, it became evident that it is common cause that the warranty is called a Motorsure warranty for mechanical breakdown underwritten by an insurer and that its costs are included in the purchase price. The terms of the

warranty specify, inter alia, that the truck should undergo its required services every 5 000 kilometres.

[20] Ms Shaanika stated that she was responsible to arrange that the plaintiff's vehicles go for their services at the right time. She testified that she did not send the truck for any services, though, because it had not travelled the required number of kilometres. However, she was under the impression that the truck was in fact serviced twice because it was suggested by the defendant's representative (as I understand it) that this might be the solution for its problems. She was under the impression that the truck might have been serviced the time it was giving problems in Tsumeb and later when it came back to Windhoek, but she was not sure.

[21] During re-examination Ms Shaanika appeared to be surer of her facts and testified that she was given to understand that Lasertech would service the truck. (Indeed, this much was confirmed by the defendant's expert witness later on when he interpreted and commented upon the Lasertech invoice). Lasertech's invoice which is contained in the parties' joint bundle of documents was shown to her during cross-examination, but she had never seen if before, although she did confirm that the plaintiff paid an amount (N$404.00) towards the work done, while the insurer in respect of the Motorsure guarantee and the defendant each paid N$2000.00. The contents of the invoice were taken up with Ms Shaanika. I shall deal with the contents in more detail later in this judgment.

[22] During cross-examination it became clear that Ms Shaanika at no stage knew what the odometer reading of the truck was. She did not check it when she took delivery of the truck, but testified that she expected it "to have few kilometres". Based on the distance travelled by the truck between Windhoek and the North and back to Tsumeb, she estimated that by the time the truck was worked on by Lasertech, it had a reading of about 1000 kilometres. To her surprise she was presented with information on Lasertech's invoice to the effect that the reading was 9 162 kilometres. While this figure was not expressly admitted, it was not disputed either.

[23] Objectively seen, this reading is indeed unexpected, as Ms Shaanika testified that her instruction to Mr Katambu was that the truck should be parked during the two week period in August 2009 that it remained in the North before he was supposed to return it to Windhoek. She testified that it was her understanding that the truck was stationary while the driver was waiting for her to make arrangements "to get this truck with problems to come back to Windhoek."

[24] The impression I have of this evidence is that Ms Shaanika was not always informed of what was really happening with the truck. Her descriptions throughout conveyed that the truck was virtually useless, but it is clear that during the two week period that the truck was supposed to be stationary because of "problems", it travelled a distance between 7 000 and 8 000 kilometres.

[25] What is also clear is that by the time the truck reached Tsumeb, it was just about due for its second service. There is no evidence that up to this stage the truck had been serviced. This is not surprising, because Ms Shaanika, whose responsibility it was to arrange the services, appears to have been blissfully unware that the truck had been used for such a considerable distance. It is therefore no wonder that by the time the truck reached Lasertech, it was in need of a service as appears from the invoice and, as Ms Shaanika testified, was indeed suggested to her by the representative of either the defendant or Lasertech.

[26] In further testimony Ms Shaanika estimated that by the time the truck was finally returned to the defendant's premises in May 2010, the odometer reading was about 10 000 kilometres, but she could not dispute the defendant's instruction to counsel (later confirmed in evidence) that the reading was in fact 15 764 kilometres.

(ii) Johannes Pandu Kwedhi

[27] The witness is a qualified truck driver who holds a licence since 2006. He drove the truck between October and November 2009 from Windhoek to the North to take tents and chairs to Ondangwa. He left Windhoek at 18:00. About 40 kilometres from Otjiwarongo the truck started giving signs of problems. He called Ms Shaanika on his

cell phone and reported that there was change in sound of vehicle. In Otjiwarongo he filled the fuel tank, which was empty, and proceeded. About 40 kilometres outside Otjiwarongo he noticed that the fuel gauge indicated that the tank was close to empty. He also noticed the smell of diesel. He stopped to look at engine and noticed that diesel fuel was dripping out from certain hole where a small device was broken. As it was already 2h00 he did not want to disturb Ms Shaanika at that time. He slept next to the road and called her at 6h00. She stated that she would send other vehicles to collect the cargo. Later one bus came and some of the tents were transferred to it. Mr Kwedhi managed to drive truck back to Otjiwarongo where the rest of the cargo was loaded over onto two other busses. He stayed over at Otjiwarongo. The next day he fixed the leak, refuelled the tank and returned to Windhoek at 40kph.

[28] The only other time he drove the truck was before this incident when he tested it during October 2009. The truck could not reach a speed of 80kph. During cross-examination it was established that the test drive took place in the presence of one of the defendant's employees. The truck was collected from defendant's premises. They tested it on the Brakwater road. The defendant's employee drove the truck on the way back to the defendant's premises, where it was left. The truck could not go faster than 70kph. It was put by counsel for the defendant that the truck reached a speed of 95kph, which was denied. As the defendant did not produce evidence to back up the instruction, Mr Kwedhi's answer must be accepted.

[29] After the plaintiff's case was closed, the defendant applied for absolution from the instance, which was refused.

<u>The defendant's case</u>

[30] The defendant presented evidence by only one witness.

(i) *Hendrik Johan Carstens*

[31] This witness presented expert evidence. He is the owner of Caslou Auto Repairs, which does motor mechanical repairs. He is a qualified diesel mechanic and has been practicing as a motor vehicle mechanic since 1977.

[32] During June 2010 he received the plaintiff's truck to inspect. He detected a leak in the fuel pump. The pump was removed and sent to Windhoek Fuel Injection Repairs (WFI Repairs) to strip, repair and calibrate the pump, where after it was returned and he fitted the pump back into the truck. He then test drove the truck for about 20 kilometres. It was running and pulling well with no further problems.

[33] He testified about the job card completed in respect of the work done. On it is recorded that the truck's odometer reading on receipt was 15 764 kilometres. WFI Repairs charged him N$1 100-55 for their work. Caslou Auto Repairs rendered a total invoice to the defendant in the amount of N$3 342-95, which was paid. Mr Carstens described the problem of a leaking fuel pump as a small problem.

[34] The invoice rendered by Lasertech was shown to the witness. The instruction on the invoice was recorded as "attend to misfire". He concluded from the details supplied thereon that the truck, *inter alia*, received some kind of service. The invoice further indicated that labour was charged to remove and replace the cylinder head; to dismantle and assemble the cylinder head; to clean and reseal the valves. He deducted from the fact that the valves were cleaned that inside the cylinder head there was oil sludge as a result of the truck not having been serviced regularly. He explained that if the oil is not replaced at service intervals as it should be, the oil becomes thick and dirty. It could result in the valves not functioning properly, thereby causing the engine to misfire.

[35] The witness concluded that the overall impression of the work done was not that anything had been broken, but that it was a cleaning and adjusting job. He further explained that when a vehicle is serviced, the valves must sometimes be adjusted by resetting them otherwise this could lead to the engine misfiring.

[36] During cross-examination it was established that the problem with the fuel pump will cause a lack of power and loss of fuel. The witness further stated that it is not expected that a new vehicle which has not been driven for a considerable time would misfire and needing work on the cylinder head, but he qualified this statement by adding that it is not expected if the vehicle is serviced properly.

[37] Upon questions by the Court the witness explained that if a truck misfires, there will be lack of power because not all cylinders are firing and that one can hear it when the engine is running.

[38] This concluded the case for the defendant.

Submissions and evaluation

[39] Mr *Kamanja* pointed to the fact that, when required to fill in on the proposal for the Motorsure warranty what the odometer reading was in kilometres, the defendant's representative merely wrote "new". He submitted that it was required of the defendant to present evidence of the actual kilometre reading, which was not done. He asked the Court to accept Mr Shaanika's evidence that the plaintiff used the truck for only about 1 000 kilometres before it had to be worked on by Lasertech. He further submitted that it was "highly probable" that the odometer reading was 7 000 or 8 000 kilometres when the truck left Windhoek on its first trip on the day it was delivered.

[40] I do not agree with counsel's submissions on this aspect. It is the plaintiff's case that the truck was giving problems from day while it was still brand new. The plaintiff's case is not based on a misrepresentation by the defendant and or on an allegation that the truck was in fact not new. The plaintiff's case was presented on the basis that the truck, despite being new, suffered from serious malfunction. To the extent that the odometer reading it is relevant to support this case, the onus is on the plaintiff to prove the reading.

[41] The truck being new, it is in my view inherently highly improbable that the odometer reading stood at 7 000 – 8 000 kilometres when delivery was taken. A truck having

such a high reading can hardly be described as new. Even if it had travelled some kilometres, which is not unlikely, it is highly improbable that the defendant would have taken the chance to sell the truck as new when the odometer reading was between 7 000 – 8 000 kilometres and plain to see for anyone who bothered to look at it.

[42] On the available evidence the probabilities are, as Mr *Slabber* for the defendant demonstrated during cross-examination, that the truck was used over a distance of 7 000 – 8 000 kilometres in the North between the time it travelled there on its first trip until it was worked on by Lasertech.

[43] It is also clear that after it left Lasertech the truck was still used by the plaintiff over a distance of about 6 600 kilometres before it was finally returned to the defendant in June 2010.

[44] Taking his cue from certain submissions made on behalf of the defendant during the application for absolution from the instance at the close of the plaintiff's case, Mr *Kamanja*, in effect, submitted at the close of the defendant's case that it is open to the plaintiff to rely at this stage on an implied term, being one of the *naturalia* of a contract of purchase and sale namely, that the seller warrants that the *merx* is fit for the purpose for which it is sold. When asked by the Court where this allegation is made in the amended particulars of claim, counsel relied on paragraph 5.2, as amplified by the further particulars, which makes the allegation that that it was an express oral term of the agreement that the truck was "functional". While acknowledging that the plaintiff has abandoned any reliance on allegations with respect to any latent defect and proof thereof, counsel submitted that the term is an "express implied term". This is, of course, a contradiction in terms, as counsel appeared to realize upon enquiry by the Court, because counsel then submitted that the said term usually implied by law is in this case expressly agreed upon.

[45] This submission is problematic even if the Court assumes, without deciding, in the circumstances of this case, that "functional" means the same as "fit for the purpose for which it is sold". Where the seller has expressly given a warranty that the truck is fit for

the purpose for which it is sold, there is no basis on which reliance can be placed on a *naturale* of the contract to the same effect, except in the alternative (see generally *Minister van Landbou-Tegniese Dienste v Scholtz* 1971 (3) SA 188 (A)). If the intention is to rely on such an implied term, it must be pleaded since the relief sought will depend on it (*Minister van Landbou-Tegniese Dienste v Scholtz* (*supra*); Harms, *Amler's Precedents of Pleading* (7th ed) at p112), which was not done in this case. It is submitted, although perhaps in a slightly different context.

[46] Furthermore, it is common cause that the written agreement of sale and invoice (annexure "A") specifies that the sale of the truck occurs subject to the written agreement and certain conditions of sale, one of which is that the agreement is not "qualified by any understandings, agreements, warrants or representations, verbal or written other than those specified in this Agreement of Sale". This in itself excludes reliance on any oral terms as to attributes of the truck.

[47] Annexure "A" further records that the purchase price of the vehicle includes a one year guarantee, which provides a warranty against mechanical breakdown. I agree with Mr *Slabber* that any common law warranty was replaced by the terms of annexure "A", read with the Motorsure guarantee. It is the terms contained in the written instruments which govern the contractual relationship between the parties. It follows, therefore, that the plaintiff did not prove the express oral term contended for.

[48] However, should this conclusion be wrong, I agree with counsel for the defendant's alternative submission that the only legal basis on which the plaintiff can seek confirmation of its cancellation of the agreement and restitution of the purchase price is by proving a breach of the terms of the agreement. This would include having to prove that the plaintiff's right to cancel the agreement has accrued because the breach is material, it being common cause that there is no *lex commissoria* in favour of the plaintiff.

[49] Counsel for the plaintiff emphasised all the problems described by Ms Shaanika as indicating that the plaintiff had problems with the truck from day one and that these were

ongoing until it was finally returned during June 2010. However, these submissions lose sight of the fact that much of what she stated on this score was based on inadmissible hearsay. Furthermore, it is not enough to just testify in general about “problems”. There must details given in admissible evidence about the specific problems in order for the court to determine whether the contract was breached in a material way.

[50] Although there was no first hand evidence about the repairs done by Lasertech, the parties accepted during the trial that the Lasertech invoice reflects what work was indeed done on the truck on its first return trip form the North during about August – September 2009. The admissible reports by the driver at the time indicated that the truck did not pull properly, that the fuel tank emptied quickly and that the vehicle eventually could not go further. Perhaps the fuel pump leak later identified by Mr Carstens was beginning to manifest. However, the instruction apparently given to Lasertech was that the truck misfired, which the defendant’s expert said could be linked to the truck not pulling properly. Firstly it is evident that the truck was serviced. This clearly was needed, because there is no evidence that the truck had been serviced before and the second service was just about due.

[51] On behalf of the plaintiff it was emphasised that the work was done on the cylinder head and the valves; that this work was “on the engine” and “in the engine” and the view was expressed that such work is not expected in the case of a new vehicle. As such, it was contended by Ms Shaanika and by counsel for the plaintiff, the nature of the work indicated serious malfunction. However, I do not think it is as simple as this. The only expert called on the matter is the defendant’s witness, whose overall impression of the invoice is that nothing had to be replaced or repaired but that it was a cleaning job, i.e. the cylinder head and valves had to be cleaned, which he linked directly to the presence of sludge in old and dirty oil as a result of the truck not having been serviced for some time. The other work on the valves he also linked to them not functioning properly, either because of the sludge or because of the service. On the available evidence the most probable cause of the misfiring problems and the lack of power experienced related to dirty oil, which is a direct result of the plaintiff not having had the truck

serviced at the intervals it should have done so. This quite clearly is not a breach of the express term of the agreement entitling the plaintiff to cancellation.

[52] The other non-expert admissible evidence indicates that the truck was not pulling properly, which meant that at times it could only go at very low speeds, and that it had a fuel leak. According to the only expert who testified, who is the defendant's witness, the truck had a leaking fuel pump, which affected the working of the fuel injectors. The expert witness described this as a 'small problem' which was repaired in June 2010 at a cost of N$3 342.95 (including VAT of about N$400 and fuel of N$200). The truck was tested over a distance of 20 kilometres. It was running and pulling well with no further problems. This evidence was not put in issue in any meaningful way and must therefore be accepted. According to the witness the leaking fuel pump and a resultant problem with the fuel injectors most probably lead thereto that the truck did not pull properly, which I accept, caused some disruption. I quite understand Ms Shaanika's exasperation, but I agree with counsel for the defendant that on the evidence the malfunction is not of such a nature that it gives rise to a cause for a material breach, bearing in mind that, once identified, the malfunction was repaired and, further, that the truck then ran properly without problems.

Order

[53] The result is that the plaintiff has not proved its case on a balance of probabilities. It follows that the plaintiff's claim is dismissed with costs.

__(Signed on original)_____

K van Niekerk

Judge

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APPEARANCE

For the plaintiff: Mr A E J Kamanja

of Sisa Namandje & Co Inc

For the defendant: Mr A Slabber

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of Dr Weder, Kauta & Hoveka