

NOT REPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT

Case No: I 2177/2010

In the matter:

**SWAKOP BODY WORKS CC**

**PLAINTIFF**

And

**KARL STUMPFE**

**DEFENDANT**

**Neutral citation:** *Swakop Body Works CC v Stumpfe* (I 2177-2010) [2015] NAHCMD 1  
(20 January 2015)

**Coram:** VAN NIEKERK J

**Heard:** 24, 25, 26, 27, 28 September 2012; 26 November 2012

**Delivered:** 20 January 2015

**Flynote:** Contract – Plaintiff claiming for payment of balance of contract price for services rendered and material supplied – Plaintiff failing to prove that it complied with its obligations in that it was proved that plaintiff failed to perform the services according to agreed specifications and in a proper and workmanlike manner – Judgment entered for defendant – Defendant's counterclaim for negative *interesse* – No allegation or evidence that contract cancelled – Method of computing claim incorrect – At close of trial defendant moving instead for restitution of part of contract price paid as alternative relief – Relief refused as no such case made out in pleadings or in evidence – Absolution from the instance ordered in respect of counterclaim.

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### **ORDER**

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1. In respect of the plaintiff's claim there shall be judgment for the defendant with costs, such costs to include the costs of one instructing and one instructed counsel.
  2. In respect of the counterclaim there shall be absolution from the instance with costs.
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### **JUDGMENT**

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VAN NIEKERK, J:

[1] The plaintiff is a close corporation doing business as a panel beater and motor vehicle converter at Swakopmund. It instituted action against the defendant for

payment of N\$32 890.00 (plus interest and costs), being the being the balance in respect of services rendered in terms of an agreement.

[2] The defendant in turn instituted a counterclaim against the plaintiff for payment of N\$80 700 (plus interest and costs) for damages incurred as a result of the plaintiff's alleged breach of contract.

[3] During pre-trial case management proceedings the following facts were agreed not to be in dispute:

- 2.1 Plaintiff is SWAKOP BODY WORKS CC, a close corporation duly registered in terms of the applicable legislation in the Republic of Namibia having [its] main place of business at No. 3 Watt Street Industrial Area, Swakopmund, Republic of Namibia.
- 2.2 Defendant is KARL STUMPFE, an adult male professional hunter residing at 21 Schlettwein Street, Pionierspark, Windhoek, Republic of Namibia.
- 2.3 That on or about 27 April 2009 and at Swakopmund Plaintiff whilst duly represented by Mr. Johannes Jacobus Theron and Defendant who acted personally, entered into a verbal agreement the material expressed, alternatively implied, alternatively tacit, terms of which were *inter alia* as follows:
  - 2.3.1 Plaintiff undertook to convert a single cab Toyota Landcruiser pick-up vehicle of the Defendant:
    - 2.3.1.1 to a double-cab,
    - 2.3.1.2 in accordance with a written quotation provided by Plaintiff to Defendant dated 21 April 2008, a copy of which is attached to the Plaintiff's Declaration as annexure A.
  - 2.3.2 Defendant undertook to pay Plaintiff an amount of N\$65 780.00 which included VAT of N\$8 580.00 for the work and material necessary to convert the pick-up in accordance with what was specified in the quotation and to effect such payment as follows: -

- 2.3.2.1 50% - namely N\$32 890.00, on date of acceptance of the quotation and effective date of the agreement namely 27 April 2009;
  - 2.3.2.2 40% - namely N\$26 317.00, on completion of the conversion assignment, and;
  - 2.3.2.3 10% - namely N\$6 578.00, one week after receipt of the vehicle by the Defendant.
- 2.3.4 The Plaintiff undertook to effect the agreed upon conversion in a proper, professional and workmanlike manner.
- 2.3.5 The Plaintiff undertook to effect and complete the conversion within a reasonable period of time, and to, after the completion of same, redeliver the defendant's vehicle back to him.'

[4] The parties further agreed that the following were the issues of fact to be resolved:

#### **1.1 MAIN CLAIM**

- 1.1.1 It should be determined whether or not ...Plaintiff has complied with all its obligations in terms of the agreement and in particular whether Plaintiff has:
  - a. Converted the vehicle in a proper, professional and workmanlike manner; and
  - b. Converted the vehicle in accordance with the agreement between the parties.
  - c. Complied with its obligations in terms of the agreement.
- 1.1.2 It should be determined whether Defendant [is] in breach of the agreement.
- 1.1.3 It should be determined whether or not the balance in an amount of N\$32 890.00 (or any other amount) is payable by the Defendant to the Plaintiff.

#### **1.2 COUNTERCLAIM**

- 1.2.1 It should be determined whether Plaintiff has failed to affect the conversion of Defendant's vehicle in a proper, professional and workmanlike manner.
- 1.2.2 If the Defendant failed to effect the conversion of Defendant's vehicle in a proper, professional and workmanlike manner, did he fail to comply with his obligations to the extent that it could be repaired and/or rectified or required the total redoing thereof.
- 1.2.3 It should be determined whether Plaintiff has failed to effect and complete the conversion of the Defendant's vehicle within a reasonable period of time.
- 1.2.4 The Court should determine whether Defendant has returned his vehicle to Plaintiff on two separate occasions for purposes of rectifying/correcting improper and/or incomplete work or whether further and/or altered work was done by agreement between the parties on such occasions.
- 1.2.5 It should be determined whether Defendant was subsequently compelled to approach a third party in order to correct Plaintiff's substandard work and/or to complete the conversion of the vehicle.
- 1.2.6 It should be determined, if it is held that the work was substandard and/or incomplete, whether the costs of correcting such amounted to the amounts claimed by Defendant and/or any other amounts and whether the amounts allegedly incurred were fair and reasonable or not.'

#### Evidence presented by the plaintiff

##### *Jakobus Johannes Theron*

[5] He is the sole member of the plaintiff. Before the plaintiff's incorporation Mr Theron already did business as a tour bus builder. Since 1994 he started doing panel beating work as well. From 2006 he became involved in the conversion of single cab Land Cruiser vehicles into double cabs.

[6] During April 2009 the parties discussed the idea of converting a single cab vehicle for the defendant. On 21 April 2009 the plaintiff provided a quotation (No. 12600) to the

defendant for the work to be done (Exh "A"). In the quotation the plaintiff sets out a description of the work to be done, namely the single cab Land Cruiser would be converted to a double cab; the front seat would remain the same; a bench would be installed at the back; the carpeting and roof lining would be done in the plaintiff's standard manner; the seat covers would be made from 'ripstop' material; the size of the load box would be 1450; the colour would remain as is, the chassis and load box would be rubberised; side plates would be fitted in the load box; and the cavity and underbody would be treated. The plaintiff also undertook to install a locking system for the rear doors. All work carried a guarantee against faulty material and defective workmanship for a period of twelve months.

[7] The defendant accepted the quotation by email dated 27 April 2009 (Exh "B"; translation - Exh "Z(4)"). In this email he set out certain requirements as he wished the conversion to be done. He specified what he wanted by setting out those aspects of the plaintiffs' standard conversion which he accepted. These included all the aspects mentioned in the plaintiff's quotation, except the size of the load box. He also set out certain changes which were not in conformity with the plaintiff's standard conversion. I pause to note that although the pleadings of both parties indicate that the agreed work to be done was as was set out in the plaintiff's quotation (Exh "A"), and although this was also the basis of the agreed issues not in dispute, it became clear during the trial that it was in fact common cause that the agreed work to be done was as set out in Exh "A", as modified by Exh "B".

[8] Some of the non-standard changes were required to be 'like Meano'. It is common cause that M Meano and Sons ('Meano') is a business in South Africa which does, inter alia, Land Cruiser conversions. It is further common cause that the defendant previously had a conversion done by Meano and that both parties were familiar with Meano's work. In his email the defendant referred to changes that he wanted as in a photograph attached, but Mr Theron testified that he never received the photograph. The defendant gave details of those respects in which he desired something different to the plaintiff's standard conversion as follows:

- 'Back seat only the bottom seat must tilt up, to reach load bin under seat. (like Meano)
- Foot space for rear passengers must be even, without the raised section in the middle of the foot space as in you standard conversion. Again, like Meano (see photo). Even if you have to make the tank smaller, preferably don't fill up the whole floor, because then the rear passengers' feet will be raised too high. If you can, lower the seat by 50mm, as well as the floor to the level that yours is closest to seat, not behind front seat.
- You can omit the spare wheel holder on the load bin, since I am going to mount the tow bar with the spare wheel holders.'

[9] The defendant further indicated that he had already deposited 50% of the contract price; that he would be paying 40% of the balance on completion of the vehicle and suggested that he pays the last 10% a week after delivery. The plaintiff agreed with these suggestions and to do the conversion in the manner described by the defendant in Exh "B". The defendant then sent the Land Cruiser bakkie to Swakopmund for the plaintiff to do the conversion, which was completed during July 2009.

[10] The defendant sent a driver to collect the vehicle. With the driver the plaintiff sent its invoice and a statement, the latter of which indicated receipt of the 50% payment already done by the defendant.

[11] Shortly thereafter on 9 July 2009 the defendant sent Mr Theron an email (Exh "C") stating that he was very disappointed with the conversion and that the conversion was not at all as he had asked the plaintiff to do it. He complained that the back seat is so high that the head of a person of ordinary length touches the roof, while he had asked the plaintiff to lower the seat. He complained about the floor space being obstructed by a 'bump' while his request had been that the rear foot space should be level. He lastly complained that the back seat is so small that only two persons could sit there comfortably and not three as in the case of a Meano conversion's back seat. He also pointed out that he had not asked for the windows to be tinted. He concluded the email by inviting the plaintiff to let him know what it proposed to do to correct the problems.

[12] Mr Theron testified that he immediately contacted the defendant and offered to provide him with a vehicle that he could use while the plaintiff was working again on the defendant's vehicle. It is not quite clear from the evidence what was discussed or decided. However, the defendant sent a second email dated 27 July 2009 (Exh "G") in which he made two alternative proposals to the plaintiff. By way of summary they may be said to be that either the plaintiff should repair the defects within two weeks or keep the vehicle but pay the defendant a certain amount.

[13] Plaintiff did not accept the second proposal. On 8 August 2009 Mr Theron met the defendant in Windhoek, provided him with a vehicle to use in the meantime and took possession of the converted vehicle. They discussed the problems the defendant had with the work done. Mr Theron then returned to Swakopmund to attend to the defendant's vehicle. The plaintiff completed the work in about two weeks, but did not change the tinted windows about which the defendant had complained.

[14] Mr Theron then brought the vehicle back to Windhoek. He showed the defendant what had been done and gave him an invoice and statement. The defendant said that he would attend to it. The defendant did not comment on the work or state that he was dissatisfied with anything. However, he indicated that he would exercise his right to use the vehicle for a week as they had initially agreed and that he would then deposit the balance into the plaintiff's bank account. They parted ways.

[15] After this the plaintiff sent monthly statements to the defendant, who did not make payment. On 5 November 2009 the defendant again sent the plaintiff an email (Exh "L") in which he stated that the vehicle is cracking, and that he refuses to pay the outstanding amount. The defendant made certain proposals to the plaintiff about how they were to handle the matter. It is not necessary to set them out. Mr Theron then spoke to the defendant on the phone and they looked at possible alternatives. Eventually the defendant agreed to return the vehicle a second time in order for the problems to be fixed. The defendant sent an email dated 10 December 2009 to which certain documents were attached (Exh "M(1) – (4)"). It is not necessary to deal with all of the contents. Suffice it to state that in Exh "M(2) and (3)" the defendant set out a list of complaints. Exh "M(3)" contains a sketch of the back seat required by the defendant



with detailed measurements. Exh "M(3) and (4)" also contain a table setting out a comparison between the plaintiff's standard seat dimension and that of Meano and a table indicating the acceptable maximum and minimum variances for the dimensions of the seat to be installed.

[16] Mr Theron dealt with in detail with each of the complaints. The first complaint was that there was a crack on the vehicle's roof and on both back doors. The plaintiff opened up these cracks to check for structural damage, of which there was no sign. The cracks were then cleaned up to the bare metal, re-filled with body filler and painted. Mr Theron stated that it is common practice to use body filler in such conversions to make the body surface smooth before spray painting. He explained that a possible cause of the cracks could be that there was a problem with the mixing of body filler in humid conditions like in Swakopmund as the paint locks in moisture and then cracks later. In such cases the plaintiff repairs any cracks free of charge. Another possible cause could have been that too much hardener was put into the mixture.

[17] The second complaint was that the window frame rubbers were poorly finished off. These were replaced. The third complaint that the left back door leaked was rectified. The fourth complaint concerned some overspray on certain parts of the conversion, which was cleaned up.

[18] The fifth problem was that the back doors did not open far enough. It became common cause during the trial that the plaintiff welds on the hinges to the back doors, whereas Meano uses bolt on hinges. Although the plaintiff did some rectification to the hinges, the defendant remained dissatisfied with this aspect of the conversion, although it had not been included in his initial instructions.

[19] The sixth problem was that there was a general rattling of the back seat and back doors. Mr Theron acknowledged this and said that the upholstery was removed and the insides were panelled with foam to stop any rattling. The seventh problem was that the work and spray painting was generally finished off poorly. Mr Theron looked into this problem and ordered that the paint work be polished, touched up and polished again.

[20] Further problems were that the backseat was still unsatisfactory. The complaint was stated as follows (Exh "M(3)"): 'Problematic to open/swing seat forward, due to sharp corners on the opening mechanism (*sic*)'; 'Dimensions of rear seat still not what was asked for'; 'Still problems with the foot space of rear passengers'; 'Rear passengers sit on two very uncomfortable flat metal bars'.

[21] In Exh "M(2)" the defendant gave the following specific instructions:

- '2) The dimensions of the new seat will be provided and must open and close like the Meano conversion's back seat. The dimensions for the storage space under the seat must also be more or less the same.
- 3) To change the legroom for the back seat so that it will be comfortable to sit there for long periods of time.
- 4) To also repair any defects that have not been pointed out but that may be picked up during the repair of the vehicle.'

[22] Mr Theron acknowledged that the back seat was very uncomfortable because of the flat metal bars used in its construction and that he had never inspected it before. Mr Theron further explained in detail what the plaintiff did to carry out the instructions of the defendant, but it is clear from his explanation that there was not full compliance, *inter alia* because of the manner in which the plaintiff constructed the fuel lines, which were laid inside the cabin. I pause to note that during later evidence it became very clear that the plaintiff's refusal to follow the defendant's instruction given during the acceptance of the quotation to make the fuel tank smaller, also caused complications, leading thereto that the floor space was never as the defendant ordered it to be.

[23] In a later email dated 7 January 2010 (Exh "O") the defendant also complained that when the vehicle was driven at an angle down a slope, the back wheel on the side to which the vehicle is tilted, touches the bodywork, which makes it unsuitable to use except on level surfaces. The plaintiff took measures to fix this, but the problem was never completely solved, as was pointed out in later evidence.

[24] When the plaintiff finished the work, Mr Theron arranged to meet the defendant in Windhoek with the vehicle on 19 February 2010. They were unable to meet personally and Mr Theron left the vehicle in the care of a third party. Some evidence was led about how the defendant obtained possession of the vehicle again. In this regard the evidence of a second witness, Mr F Smith was led. As the agreed issues required to be resolved do not include this issue, it is not necessary to deal with this evidence.

[25] The defendant and Mr Theron met again on Monday, 22 February 2010 to discuss, *inter alia*, the work done by the plaintiff. Mr Theron said if there is any problem defendant must call him so that they could sort it out. The defendant left and he never heard from him again until May 2010. During this period the plaintiff sent monthly statements to the defendant, which remained unpaid.

[26] On 24 May 2010 the defendant emailed the defendant again (Exh "W") and stated that the vehicle has begun to crack seriously and that this is the most serious problem he has with the vehicle. The email is a mixture of negative remarks about the plaintiff's workmanship, proposals, threats of legal action and exposure in the press and an invitation to make alternative arrangements. This elicited a response by the plaintiff's legal practitioners of record (Exh "X"), followed by the issue of summons in this matter.

[27] Mr Theron testified that the plaintiff tried its best to meet all the defendant's requests and that it complied with its obligations. I tendered to rectify any problems at meeting in Feb 2010 but no complaints until Exh W on 24 May 2010.

[28] During cross-examination Mr Theron made several important concessions to which I shall return at a later stage. Although he initially disputed that the defendant tried to contact him by telephone during the period February – May 2010, he conceded later that this might have occurred.

[29] The plaintiff called another witness, Mr F Smith, whose evidence need not be considered any longer as it does not directly relate to the issues now in dispute and as its value on issues of the defendant's credibility tended to fade in the light of certain evidence given by Mr Theron.

### Evidence presented by the defendant

[30] Because of travel arrangements, the defendant was given leave to present the evidence of his expert witness first.

#### *Desmond Meano*

[31] Mr Meano has been involved for 44 years with several other siblings in a longstanding family business, M Meano and Sons (also 'Meano') located in Krugersdorp, South Africa. Meano is in the business of motor body building, also referred to as coach builders. In 1972 the business began converting mainly Land Cruisers from single cab to double cab and station wagons. From about 4-5 years before he testified Meano completed about 8 conversions per month. For such conversion to be operated on South African roads it must conform to certain standards set by the South African Bureau of Standards ('SABS'). The designs and material used must pass stringent SABS tests, mostly to determine whether the vehicles would withstand certain stresses in case of accidents, before Meano would use these in its work. Mr Meano was mostly involved in the design process and the testing, but also did quotations, customer relations and certain work on the floor.

[32] He first met the defendant in about 2006 or 2007 when Meano did a conversion for him. During 2010 the defendant brought the vehicle converted by the plaintiff to him for inspection.

[33] Mr Meano identified several problems which he set out in his report. These were set out as follows in his report (Exh "FF") as being (i) that it seemed as if there was insufficient framework on the extension part of the cab which would compromise the safety of the bodywork of the cab; (ii) the rear door hinges were welded into the framework and not bolted on, which would make it impossible to set or reset them when necessary; (iii) there was an excessive amount of body filler,  $\pm$  5mm on each rear door which would result in cracking to the body filler and the paint; (iv) the rear seat was very uncomfortable as the passenger's head would push into the roof lining and as the seat was very small and uncomfortable; (v) there was a very large crack appearing on the

roof, which was an indication of stress due to a weakness in the structure; (vi) there were also several cracks appearing on the rear doors and panels at the joints.

[34] During testimony Mr Meano set out these problems, but also mentioned several others. After an objection by the plaintiff's counsel the Court eventually made a ruling to the effect that in the presentation of his evidence Mr Meano was confined to problems and opinions mentioned in his report (except, of course, during cross-examination where evidence about other problems or opinions was elicited).

[35] Mr Meano testified that the defendant initially requested Meano to repair the vehicle, but that it was too expensive to alter something someone else had built. He recommended to the defendant to cut off the existing double cab extension and to build the double cab from scratch according to the Meano standards and method. He testified that it was better and easier to cut off what was done and to start from scratch, using the design, production method and materials normally used by Meano than to build onto something someone else has built and to try to rectify it. He also stated that by building the conversion from scratch Meano would be able to give its usual guarantee for the work done. Meano quoted the sum of R55 000, excluding 14% VAT to do the work. The defendant accepted the quotation and the work was done as recommended.

[36] Mr Meano explained several of the problems he had identified with reference to a series of photographs (Exh "EE"). He explained that the Meano floor is lower than the floor of the plaintiff's conversion, allowing for more foot room and for relaxation of the passengers' legs more. This is achieved by removing a section of the fuel tank and dropping the floor down lower. This involves cutting and re-welding the fuel tank. He testified that Meano typically does not experience problems with leaking tanks as a result of this procedure because the welded fuel tank is properly tested and pressurised.

[37] He expressed the opinion that the plaintiff's conversion was not completed in a proper and workmanlike manner.

[38] In my view Mr *Olivier*, who appeared on behalf of the plaintiff, succeeded in demonstrating during cross-examination of Mr Meano that probably he was not

sufficiently qualified to express an opinion about the structural resilience of the plaintiff's conversion, which affects the reliability of the opinion in relation to the first problem identified in Mr Meano's report (see item (i) in para. [33] *supra*). As a result I also prefer not to accept the opinion expressed that the large crack in the roof is an indication of stress due to a weakness in the structure (see item (v) in para [33] *supra*). However, I find that Mr Meano's expertise in relation to whether the plaintiff's conversion was completed in a proper and workmanlike manner was sufficiently established. In this regard I pause to note that Mr *Olivier's* contention during cross-examination that the witness was not an expert at all was not persisted with during argument and I think wisely so.

*The defendant*

[39] Much of the plaintiff's evidence was not disputed or contradicted by the defendant in evidence, or was essentially the same as that given by the defendant. Bearing this in mind, as well as what became common cause as the trial progressed, I shall not deal with the defendant's evidence in the same detail, but rather highlight certain aspects.

[40] The defendant explained that he is a professional hunter and wanted the conversion done because many of his clients are older or are accompanied by their spouses. He therefore wanted the back seat and the floor space to be spacious and comfortable, especially because they would often also do some sightseeing which required travelling for considerable distances between the airport and the various hunting spots.

[41] At the first informal meeting with Mr Theron to discuss the possibility to convert his brand new single cab Land Cruiser, he had the latter vehicle there as well as his older Meano conversion. He had also previously tried out the back seat of the plaintiff's standard conversion and found it uncomfortable. He also did not like the fact that the floor was not level. He was therefore able to indicate clearly to Mr Theron what he wanted in respect of the back seat and floor.

[42] Mr Theron explained to him that the reason his floor is like that is because he does not want to cut the front fuel tank and reduce it in size. The defendant told him that he

does not mind losing 10 litre fuel capacity and that he would prefer that to an uncomfortable arrangement for his passengers' feet. Mr Theron also stated that he had experienced problems with leaking fuel tanks because they had been cut. However, the defendant told Mr Theron that he had the Meano conversion for three years and never had a diesel leak, except on the back tank, which was an 'after market' tank. He showed Mr Theron the back seat arrangement in the Meano and asked him if he could do it exactly like that, to which Mr Theron replied that he would make a plan.

[43] The defendant confirmed that the agreement between the parties was contained in Exh "A" and "B". He stated that he was extremely disappointed with the work done by the plaintiff on the first occasion and that he conveyed his views in a phone call and email (Exh "C") to Mr Theron and also reminded him of his specific instructions. The latter was very apologetic and said that he must have forgotten that the defendant wanted the vehicle that way. He said that the defendant should send back the vehicle so that he could fix the problems.

[44] The defendant confirmed Mr Theron's evidence about the various exchanges of correspondence and vehicles. When the plaintiff delivered the vehicle on the second occasion, Mr Theron said that the defendant should drive the vehicle for a month or so to see if he likes it and that they could then discuss the matter. He remained unhappy with the manner the conversion was done, specifically because of the back seat and floor, which never conformed to his specifications. He used the vehicle on and off during hunting trips, but it was never his primary hunting vehicle, apparently because of the problems he emphasised throughout.

[45] On 5 November 2009 he sent the email (Exh "L") in which he informed the plaintiff that the vehicle was cracking and that he definitely would not be paying the outstanding amount. Mr Theron telephoned the defendant and they had long talk during which the defendant conveyed his dissatisfaction. Mr Theron eventually convinced him to return vehicle for the third time to fix all the main problems that the defendant had from the start and to fix the cracks that were then developing. At a later stage the defendant also requested the plaintiff to attend to the problem of the wheels touching the bodywork when the vehicle was driven at an angle down a slope.

[46] The defendant was still dissatisfied with the conversion after it had been worked on for the third time. He confirmed that he met Mr Theron on 22 February 2010 to discuss the matter. They then agreed that the defendant would try to sell the vehicle for N\$400 000 through a second vehicle dealer and deduct the balance owed to the plaintiff from the purchase price and pay the plaintiff. If the vehicle was sold for a lower amount, then something less would be paid to the plaintiff. However, the defendant did not manage to sell the vehicle and the agreement fell away because it could not be fulfilled.

[47] By May 2010 the vehicle had begun to develop serious cracks and the paint showed 'marbling' in patches all over the roof. During the intervening period the defendant tried to speak to Mr Theron a few times on the phone about the matter, but there was no answer. Eventually he got hold of Mr Theron and asked what he intends to do with vehicle which was 'falling apart' at that stage. He said the defendant should speak to his lawyer. The defendant then decided to write the email of 24 May 2010 (Exh "W").

[48] During May 2010 the defendant took the vehicle for inspection by Mr Meano and received the latter's report and quotation. At a later stage he returned the vehicle to Meano to have it re-converted.

[49] The defendant gave testimony in respect of his counterclaim to which I shall return later

[50] During cross-examination the defendant acknowledged that the plaintiff lowered the back seat during each of the occasions that it worked on the vehicle, but stated that it remained too high for the defendant's purposes. He also acknowledged that he did receive some not insignificant economical gain by using the vehicle as he did.

[51] The plaintiff's counsel took issue, *inter alia*, with the amounts claimed by the defendant and with the manner in which the defendant computed his damages. It was put to the latter that he should have deducted the unpaid balance of the contract price. The defendant's attitude was that it is for the Court to decide. He also stated that his complaint is to some extent about the sub-standard work done by the plaintiff, but mainly because the plaintiff never completed the conversion.



## Submissions and evaluation

### *The plaintiff's claim*

[52] I now turn to consider whether the plaintiff is entitled to payment of the balance of the contract price. The answer to this question depends on whether the plaintiff complied with its obligations in terms of the agreement between the parties. The agreement, as was explained in the judgment, turned out to be what was undertaken in the plaintiff's quotation (Exh "A"), read with the defendant's acceptance thereof as modified by the specific instructions set out in his email dated 27 April 2009 (Exh "B").

[53] From the available evidence it is very clear that the plaintiff did not perform the work in accordance with the defendant's specific instructions as set out in Exh "B". The vehicle was sent back to the plaintiff on two occasions for the defects pointed out by the defendant to be rectified. Although there was some improvement, the plaintiff never succeeded in complying with the defendant's instructions, because, it seems to me, these were not followed from the start and because the plaintiff insisted on keeping the fuel tank intact in spite of the defendant's clear instructions to the contrary. Afterwards it seems that the scope for rectification was limited.

[54] Mr Theron conceded that the seat remained too high and that the floor was never level or flat over the whole surface as the defendant had specifically and repeatedly instructed. Although the plaintiff initially disputed that the floor contained a slope (also referred to by the witnesses and counsel as a 'bump' or a 'hump') behind the front seats which lay at a 90 degree angle, the plaintiff's case being that it lay only at 45 degrees, Mr Theron conceded later during cross-examination that the angle was in fact 90 degrees. Counsel for the plaintiff attempted to repair the damage during re-examination, but in my view the explanation by the witness that he made the concession while being referred to a sketch drawn by hand and not to scale, is unconvincing. The reason is that the Court also on several occasions asked him to clarify his answer in order to make sure that he was indeed agreeing that the slope was 90 degrees, to which he answered in the affirmative.

[55] While I agree with the point made by the plaintiff's counsel that it was not so that the defendant had instructed the plaintiff to do the conversion 'exactly like the Meano' as was contended in evidence by the defendant and put in cross-examination to Mr Theron, it is very clear that the defendant had given specific instructions that the back seat and floor arrangement had to be like the Meano conversion. I accept the defendant's evidence that he had orally discussed these instructions already at the first meeting with Mr Theron before they were included in the agreement reached and subsequently repeated, further explained and emphasised.

[56] It seems to me that the defendant was not unjustified in his criticism of the plaintiff's approach when he complained in various emails and stated in evidence that the plaintiff converted the vehicle in the way it saw fit and not in accordance with the defendant's very clear instructions.

[57] However, I agree with the plaintiff's contention that the evidence does not establish that the defendant ever instructed the plaintiff to use 'bolt on' hinges and not 'weld on' hinges to the two back doors as was put to Mr Theron during cross-examination.

[58] Another issue to be determined is whether the work done was carried out in a proper and workmanlike manner. Mr *Small*, who appeared on behalf of the defendant, seized upon the evidence of Mr Theron who conceded in cross-examination that the conversion was not his 'best work' and submitted that one does not have to look further than this to decide the issue in favour of the defendant. I do not think it is quite as simple as this. The issue is not whether or not the plaintiff did its best work, but whether the work was properly done and according to a workmanlike manner. Nevertheless, it is so that this concession was made after the defendant's counsel had cross-examined Mr Theron on the series of photographs (Exh "EE") taken of the vehicle during July 2010 when the vehicle was being re-converted at the premises of M Meano and Sons. During this part of the cross-examination various defects, including poor paint work, major cracks to in the body filler and paint work, and excessive body filler and rust, were pointed out to and acknowledged by Mr Theron who had no satisfactory explanation to offer. Although the more serious cracking of the conversion only began to appear after the vehicle had been returned twice, the defendant had on previous occasions also

complained of cracks and other poor workmanship, which Mr Theron did not dispute and tried to rectify.

[59] Counsel for the plaintiff, in light of all the concessions made by the plaintiff's main witness and the lack of adequate explanation for some of the defects, understandably had difficulty advancing his client's case with any real conviction during argument, although he did not expressly concede the matter.

[60] The conclusion is unavoidable that, despite attempts at rectification and some improvements, the plaintiff did not comply with its obligations in terms of the agreement between the parties and is not entitled to payment of the balance of the contract price. Judgment should be entered for the defendant.

*The defendant's counterclaim*

[61] The counterclaim is based upon two breaches, namely (i) a failure to do the conversion in a proper and workmanlike manner; and (ii) a failure to effect and complete the conversion within a reasonable period of time. For the reasons set out above, I find that the defendant has proved the first breach on a balance of probabilities.

[62] As far as the second breach is concerned, the defendant testified that he regarded the conversion as incomplete because his specific instructions were not followed. However, in my view it cannot be said that the conversion was incomplete in any sense of the word. In fact, the evidence shows that the conversion was completed within a reasonable time, although the defendant's instructions were not followed in all respects.

[63] The defendant's damages are alleged to be the costs of the conversion by M Meano and Sons as well as the costs of two return trips to Krugersdorp. In the defendant's heads of argument his counsel submitted that the defendant should be put back into the position he was as if he had never contracted with the plaintiff.

[64] During argument Mr *Olivier* launched an attack on several fronts against the counterclaim. Firstly he pointed out that Mr Meano conceded during evidence that his firm did not redo the plaintiff's work completely and furthermore, that certain parts could have been re-used in the conversion done by M Meano and Sons which would have

lowered the price charged by them. He also submitted that the only reason why these parts were not re-used was because they were not SABS approved, which was never a requirement in terms of the contract between the plaintiff and the defendant. Even if M Meano and Sons insisted on using their own parts, there was no reason why the plaintiff should pay for it. These submissions are, in my view, sound.

[65] Mr *Olivier* secondly contended that the defendant's damages were not properly proved. He submitted that there was no evidence of the distance travelled, but, more importantly, there was no evidence that the cost per kilometre claimed was fair and reasonable. The first part of counsel's criticism is, with respect, perhaps unjustified. The defendant did not expressly state the actual distance travelled, but dealt with it by referring to the allegations in the counterclaim, which specifies that each return trip was 1 500 kilometres. I think it is fair to say that there is *prima facie* evidence by the defendant of the distance travelled. However, I do agree with counsel's contention that there is no evidence on record that the costs per kilometre claimed were fair and reasonable.

[66] There was also no evidence that the price charged by M Meano and Sons for the conversion was fair and reasonable. Evidence that the costs were fair and reasonable requires opinion evidence by an expert. Although counsel for the defendant attempted to lead evidence to this effect by Mr Meano, counsel for the defendant objected thereto on the grounds that Mr Meano had never expressed this opinion in his report and that the plaintiff was therefore not informed that such evidence would be led. The objection having been upheld, and Mr *Olivier* having taken care not to elicit such evidence during cross-examination, the result is that the required evidence is not part of the record.

[67] The quantum of the defendant's damages, as well as the allegation that the costs incurred by the defendant were fair and reasonable, formed part of the factual issues in dispute. Without the necessary evidence the defendant cannot succeed on these issues.

[68] Mr *Olivier* lastly submitted that the general rule is that the sufferer of damages should be placed in the position in which he would have been had the contract been

properly performed, so far as this can be done by the payment of money and without undue hardship to the defaulting party. This is indeed so (see *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) 687). He submitted that the defendant did not pay the contract price in full, but in the calculation of his damages, departed from the assumption that he did. Counsel further submitted that the defendant should have deducted the balance of the contract price from his claim. I agree with these submissions. In any event, the defendant claimed a negative *interesse*, but never cancelled the contract.

[69] In response to these submissions, the defendant did not persist during argument with the claim to be placed in the position it would have been had the contract never been concluded. His counsel requested the Court to instead grant a restitution of the part payment made to the plaintiff.

[70] However, Mr *Olivier* submitted in response that this relief is at complete variance with the case made out by the defendant on the pleadings and which the plaintiff was required to meet. In any event, the necessary evidence for the relief moved has also not been led in full. He further submitted that the appropriate order in regard to the counterclaim would be one of absolution from the instance. In my view these submissions should be upheld, bearing in mind that the relief sought falls outside the ambit of further and/or alternative relief.

### Conclusion

[71] The result is that the following order is made:

1. In respect of the plaintiff's claim there shall be judgment for the defendant with costs, such costs to include the costs of one instructing and one instructed counsel.
2. In respect of the counterclaim there shall be absolution from the instance with costs.

\_\_\_\_(Signed on the original)\_\_\_\_\_

K van Niekerk

Judge

APPEARANCE

For the plaintiff:

Mr Jan H Olivier  
of Jan Olivier & Co.

Windhoek correspondents: Van der Merwe-Greeff Inc

For the defendant:

Adv AJB Small  
Instr. by Cronjé & Co