

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 343/2013

In the matter between

ALFRED NDABENI

PLAINTIFF

And

GODFREY NANDU

DEFENDANT

Neutral citation: Ndabeni v Nandu (I 343/2013) [2015] NAHCMD 110 (11 May 2015)

Coram: Masuku, AJ

Heard: 05 and 06 March, 2015; 07 April, 2015

Delivered: 11 May 2015

Flynote: Law of contract – Breach of contract. Law of Evidence – failure to put the case to the opposing party in cross examination and the consequences thereof. A lay litigant is not exempted from putting his case to the opposite party. How the court should resolve factual disputes in trials.

Summary: The plaintiff alleged that he and the defendant entered into an agreement to form a close corporation to do business in the wood industry. The plaintiff, allegedly in pursuance of the oral agreement bought machinery which was used by the defendant and he refused to return same. The defendant denied any oral agreement and testified that he merely stored the machines for the plaintiff and later used same with the plaintiff's permission. Held an oral agreement was established and that the defendant did not fulfil his part of the bargain and kept the machinery against the plaintiff's will. He was ordered to pay the amount proved, being the amount paid for the machines and other ancillary costs.

JUDGMENT

MASUKU, AJ:

Introduction

[1] In this action the plaintiff prays for an order declaring the oral agreement entered into between the plaintiff and the defendant cancelled; payment of an amount of N\$ 286 440, 85, interest thereon at the rate of 20% per annum from the date of judgment to the date of final payment and costs of suit.

Common cause issues

[2] The facts giving rise to this claim are fairly common cause and they acuminate to this: The plaintiff and the defendant are Namibian citizens who very much acquainted with each other and they actually hail from the same village in the Caprivi Province and they grew up together. Furthermore, they are neighbours in Windhoek where their respective families reside. The plaintiff is

currently employed by the Southern African Development Community (SADC), and is based in Gaborone, Botswana. He visits home from time to time.

[3] The defendant, on the other hand, is a business man who is in the timber business and runs a company called Namibia Solid Wood Supplies CC. He had previously served in the Correctional Services but resigned from government and started running a business in the timber industry as aforesaid. It would appear that in 2009, the plaintiff visited the defendant in the latter's home. The plaintiff had developed an interest in the timber business which the defendant was doing and wanted to set up his own outfit to do the same type of business. His dreams of following that vision disappeared when he was in 2009, employed by SADC as aforesaid.

[4] It is common cause that the plaintiff sought advice from the defendant regarding the machinery that was needed to do the job and with which the defendant was very much acquainted. It is common cause that as a result of negotiations between the two parties, the plaintiff, on the defendant's advice sought quotations and eventually imported certain machinery from the Republic of South Africa. It is common cause that he paid for the purchase price, transportation costs and ancillary costs, including value added tax on the said items.

[5] When the items were delivered, the plaintiff was away at work in Botswana. That is not all. The defendant also proceeded to arrange for the transportation of the machinery and the storage of same. It is also not in dispute that the machinery was for the entire period in the care and possession of the defendant. Furthermore, it is not in dispute that the defendant, in exercising control over the machinery, even took same and handed possession over to third parties without the knowledge or consent of the plaintiff. During the trial, it was established that part of one of the equipment which was in the defendant's possession, was to and kept in Zambia in the hands of a person totally unknown to the plaintiff. Possession of same, it is common cause, was handed over by the defendant.

[6] Another issue not in dispute is the amount that the plaintiff paid for the equipment. It is common cause that both equipment was sourced from different suppliers in South Africa, as aforesaid. One, referred to as a Portable Mill, serial number 2571, was sourced from Nukor Sawmilling (Pty) Ltd. Payment for this machine was made by the plaintiff in the amount of R 128 934. This is evidenced by the exhibit "B", which was entered by consent. The payment of this money to the supplier, is evidenced by an electronic fund transfer from the plaintiff's account and it is dated 27 September 2010. It is marked exhibit "C". The other supplier is Gearing Moss Supplies (Pty) Ltd whose *pro forma* invoice quoted the supply of Saw King Circular Resaw with accessories at the amount of R82 269, 24, including VAT. Payment of the said amount is also evidenced by an electronic fund transfer certificate of even date, marked exhibit "D". It reflects the name of the plaintiff as the holder of the account from which the said amount was drawn. In addition to this, it is clear that the plaintiff also paid for the transportation of the goods. I shall revert to the issue of the amount at the appropriate juncture.

The plaintiff's evidence

[7] I shall now very briefly outline the important aspects of the evidence of the two protagonists, as it were. The plaintiff's evidence is that around 2009, he approached the defendant and asked him to explain the business he was engaged in, the procedures for acquiring land and tree-cutting. He was inspired and decided to venture into the business but this dream was cut short by his employment by SADC as aforesaid. This development caused him to have a rethink and he decided abandon the project and informed the defendant accordingly. This then prompted the defendant to approach the plaintiff to talk about the business. In particular, the defendant told the plaintiff that he was experiencing difficulties in running his business because he only had one machine which broke down quite regularly and that he had no capital to run the business. The defendant then suggested that they go into partnership, a suggestion that was acceptable to the plaintiff. This was particularly the case because the plaintiff was leaving Namibia and could not run a business from his base in Botswana.

[8] As a result, the plaintiff further testified, the parties made an oral agreement to the effect that the plaintiff would venture into the business as soon as he got his pension from the government as he had resigned. It was agreed that they form a new company to run the business and of which they would each hold 50%. The defendant, as he was locally based, was to see to the registration of the new company. Furthermore, a new account would have to be opened and of which both of them would be signatories. It was the plaintiff's evidence that he was *au fait* with the registration of companies and he therefore gave the necessary documentation to the defendant to start the process of registering the company. Another aspect was that the plaintiff asked the defendant to embark on the process of obtaining quotations for the machines that would be required to run the business. Part of the oral agreement was that the defendant would run the business as the plaintiff was in Botswana and the two would meet from time to time to discuss the progress made by the business.

[9] It was also agreed that the plaintiff would buy two machines and the defendant would buy one. These machines were to be used in the operations of the business. In the process of time, and in terms of the agreement, the quotations were eventually received and they were in the defendant's name. The payment process was done by the plaintiff as recounted above, after the quotations were changed to reflect the plaintiff's name. The two machines purchased by the plaintiff from his pension were purchased and delivered in Katima Mulilo. It was the plaintiff's evidence that after delivery of the machinery, he expected production to start. On one of his visits, he made enquiries from the defendant as to how the business was progressing. In particular, he asked about the registration of the close corporation and the opening of the bank account, which had been agreed among the parties and the defendant informed him that he was making progress in that regard. It was the plaintiff's evidence that he called the defendant by telephone from time to time enquiring about the progress and the defendant was reassuring that everything was on course.

[10] The plaintiff testified that during one of his visits to Namibia, he met the defendant at Katima Mulilo and the defendant told him that he had made the

sale of the first consignment of wooden products and was waiting for the cheque. The plaintiff never saw the cheque until he had to return to Botswana. On a later date, he saw the defendant and asked about the money he had received and the defendant told him that he had bought a motor vehicle with the money. This prompted the plaintiff to enquire as to the ownership of the vehicle and that defendant had not told him about it earlier. The defendant had apparently registered the vehicle in his name. The defendant undertook to have the vehicle registered in the company's name seeing that the funds used to buy it belonged to the proposed company.

[11] As time went on, the plaintiff testified, he began having difficulties contacting the defendant and he gained the distinct impression that the defendant was avoiding him at all costs. He was only able to contact the defendant through the latter's wife. After two years, the plaintiff realized that there was no progress and this got him very frustrated. He took a decision to sell the machines and to mitigate his losses as it were. It was his evidence that he had already found a buyer for the machinery. He came to Katima Mulilo and spoke to the defendant's wife, who advised him that the defendant was at the village. The plaintiff eventually spoke to the defendant and told him that he had come to take the machines and that a buyer for same had been secured. The defendant told him, to his dismay, that the one machine was in Zambia, doing business there. The other machine was with a white man only known as Robert, who was involved in the same business. When the plaintiff found Robert in order to recover the machine, Robert refused to hand the machine over and showed him a written agreement he had entered into with the defendant regarding the said machinery. As a result, the plaintiff's efforts to receive the machines were frustrated. The defendant undertook, after this fruitless exercise that he would get the machines and the plaintiff would find them with him on his next return.

[12] Two to three months later, the situation had not improved. The plaintiff could still not get the machines back. He went to Robert to get the machine but the latter informed the plaintiff that the defendant came to collect the machine together with his business partner. It was the plaintiff's evidence that he got exasperated over this issue and that marked the last time they communicated

with the defendant over the machines. He then took the decision to recover the money from the defendant in lieu of the machines. Lastly, the plaintiff testified that had there been no agreement between them, he would not have purchased the said machinery. It was his evidence that he engaged in the business and bought the machinery out of the trust he had reposed in the defendant, a man he had known for a very long time. It was his evidence that he received no money at all from the business and professed ignorance of where the said machines were at the time he adduced his evidence.

[13] In cross examination, the plaintiff, who acted for himself denied ever entering into the oral agreement with the plaintiff. He made a lot of play on the fact that the defendant did not know the exact date on which he came into the country in July 2009, and during which time the latter claimed the oral agreement was concluded. He insisted on seeing the plaintiff's passport reflecting the date on which he would have come into Namibia. It was put to the plaintiff that the defendant was already running his own company in 2010 and had all the machines he needed for his business. In response, the plaintiff indicated that the defendant had told him that he had only one machine which could cut down trees but could not level them. The defendant also told him that his machine was small and that it was breaking down very often. When put to him that his machine could also make planks and blocks, the plaintiff said he could not answer that question as he is not an expert but relied on what the defendant had told him at the time. He denied that they had agreed that the defendant would only assist in securing the machinery and then leave the plaintiff to do his business with the defendant playing no part.

[14] The defendant also denied that an agreement was made to register a new close corporation. He asked if the plaintiff had signed the founding statement and the plaintiff testified that the defendant was supposed to prepare the documents and then hand same over to the plaintiff for his signature. He proceeded to deny that he bought a vehicle, but the plaintiff maintained his story. The defendant put to the plaintiff that his claim did not tally with the receipts he had submitted in evidence and this the plaintiff admitted, reasoning that this was because there was a certain receipt that was inadvertently omitted. Asked as to

why he could not simply sell the machines as he was the owner, rather than claim the money, it was the plaintiff's evidence that he could not sell the machines as they had been in the defendant's possession for the last five years and when he wanted to retrieve them, the defendant frustrated his efforts to do so. Finally, he was asked what if he would relinquish ownership of the machines if judgment was granted in his favour. His response was that he was no longer interested in the machines.

The defendant's evidence

[15] In his evidence, adduced under oath, the defendant testified that he ran a company called Namibia Solid Wood Supplies CC, which he registered in 2009 after resigning from his employment with the Ministry of Safety and Security. It was his evidence that in November/December 2009, he got a call from the plaintiff announcing his presence in Katima Mulilo. The plaintiff also wanted to go the defendant's business to see what was happening as the plaintiff had an interest in it. On arrival at the business site, he saw the timber that had been cut and announced his intention to engage in a similar business. He stated that he would use his pension to start the business. The plaintiff then asked where he could procure the machinery and the type that would be suitable for the business venture. Later, the plaintiff called the defendant and told him that his interest in the business had grown in leaps and bounds and that he wanted to buy his own machinery. He asked for the details of the suppliers of the machinery. He also asked the defendant to assist with securing quotations, which the defendant gladly did.

[16] In about November/October 2010, he received a call from a person at the plaintiff's plot and asked him to come and assist in off-loading some machinery. On arrival, the defendant states that he found that the machine was very big and needed a fork lift or a chain block to off-load. He then went to secure a chain block and proceeded to a tree where they off-loaded the machine. This was at a place in Mupani, which the defendant had rented. It was his evidence that the machine was off-loaded there because the plaintiff did not have a tree in his yard where the machine could be off loaded. About two weeks later, he further

testified, he received a call from the same man and he asked for assistance to off-load another machine. This time, the defendant asked for a fork lift from another gentleman and the machine was off-loaded onto a van and the defendant took it to his young brother's house for storage and safe-keeping.

[17] When the plaintiff arrived from Botswana in November/December, the defendant asked him to remove the machines from where they had been kept and the plaintiff promised to do so when he found the time. He never removed them. In December 2011, the plaintiff called him to his house and they went into a spare bedroom where the plaintiff requested the defendant to make use of the machinery as he resides in Botswana. The defendant refused this offer as he had no place from which he could operate the machines. It was the defendant's further evidence that the defendant told him that he was struggling to open a bank account because banks demanded a physical address. No agreement could be reached on the machines between the two men. In February 2011, the plaintiff returned and insisted that the defendant should use the machines and stated that he could offer the defendant premises from which he could operate and to this end he wrote a letter to the bank to open a bank account using the plaintiff's property as the physical address. It was the defendant's evidence that he was unable to use the premises because the bank further demanded other details like water bills etc.

[18] Around May/June, the defendant's machine broke down and he called the plaintiff and requested permission to use the latter's machines. An agreement was reached in this regard and the defendant was to give half of the amount he received from a truck load of timber to the plaintiff. A misadventure however, befell the defendant when his load was confiscated by the forestry people, together with the machinery. This was as a result, he testified, of permit issues, a story the plaintiff totally refused to buy. The defendant testified further that in December 2011, the plaintiff called him and told him he wanted to sell the machines. The defendant was at the village at this time and he advised the defendant that the machines had been confiscated at the time. Later, he told the plaintiff that the machinery was at his brother's house and available for collection and the plaintiff found it there. What was absent, he testified, were the rails

which were in Zambia. The plaintiff then proceeded to Robert's house and called the plaintiff and told him he had discovered that the defendant had an agreement with the said Robert. The plaintiff then left for Botswana.

[19] The defendant testified further that during the Easter weekend in 2012, the plaintiff again came. The defendant was in Zambia then. The plaintiff asked about the machines when the defendant was on his way from Zambia and was just 20 kilometres from the Namibian border and asked about the machines. It is the defendant's evidence that he told the plaintiff that he was on his way. He however failed to see the plaintiff because he had a breakdown. He testified that the following day, he tried to call the plaintiff but did not get any response and because the plaintiff never called him, he never bothered to call the plaintiff again. It was the defendant's further evidence that the plaintiff called his wife in May and stated that the plaintiff had called her complaining about the machines. He then called the plaintiff and told him that he would call the plaintiff two days later. Two days later, the plaintiff called the defendant's wife again and when the plaintiff intimated he wanted to talk to the plaintiff, he would have none of that. He instead threatened to take legal action against the defendant. Indeed, the summons followed.

[20] In cross examination, the defendant was taxed as to why he did not put crucial parts of his evidence to the plaintiff when he was on the witness' stand. A few issues in this regard were raised. He was asked for how long the machines were with Kobus and he stated that it was since May 2012. It was his evidence that there was no communication with the plaintiff that the machines were being given to Kobus. It was also pointed out to the defendant that he made many decisions regarding the machines without consulting the plaintiff who was the owner, thus indicating that he had the power to deal with the machines because there was an agreement between the parties regarding the machines. This was vehemently denied by the defendant, claiming that he made a mistake by not informing the plaintiff regarding his dealings with the machines. It was put to the defendant that his version to the effect that he asked the plaintiff to collect his machines was false as it was never put to him whilst he was on the witness' stand. This the defendant denied.

[21] A few other issues were put to the defendant which he denied and these included (a) that the plaintiff allowed the plaintiff to use his place to conduct the business because he understood there was an agreement between the parties; (b) that he even wrote a letter to the bank in relation to the opening of an account because an agreement was in place; (c) that he bought the machines because the defendant, an expert was present and would run the business (d) that the plaintiff trusted the defendant to run the business whilst he was out in Botswana; (e) that the defendant took advantage of the plaintiff's absence and his sparse knowledge about the business to his detriment.

Analysis of the evidence

[22] As indicated above, there are a few issues that must be considered in this matter. Chief of these is that many issues about which the defendant testified and which were in sharp contrast with the plaintiff's version were not put to him. These include the allegation by the defendant that he asked the plaintiff to come and collect the machines; it was not disputed by the defendant that he was to attend to the registration of the business as testified by the former; that the defendant, would, as testified by the plaintiff, buy one machine, while the plaintiff would purchase two. In relation to these issues, which were never put to the plaintiff although they were important, the defendant was asked the following questions in scorching cross-examination according to my notes:

Q: It was necessary that you put these issues to the plaintiff that you asked him to take the machines.

A: I am a layman. I never studied law. I made a mistake.

Q: Another mistake?

A: I did not say this was a mistake.

Q: You did not put it to that to him because it was not true. You never asked him to collect the machines?

A: That is not true.

Q: I put it to you, if it was true that you told the plaintiff to collect the machinery, there is no reason why he would not have done so.

A: Why he did not do it, I do not know.

[23] In the old case of *Small v Smith*¹, Claassen J made the following lapidary remarks about the institution of cross-examination:

'It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him a fair warning and an opportunity of explaining and defending his character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved. Once a witness's evidence on a point in dispute has been deliberately left unchallenged in cross-examination and particularly by a legal practitioner, the party calling that witness is normally entitled to assume in the absence of notice to the contrary that the witness's testimony is accepted as correct. More particularly is this the case if the witness is corroborated by several others, unless the testimony is so manifestly absurd or of so romancing a character that no reasonable person can attach credence to it whatsoever.'

[24] This position has more recently been endorsed by the Constitutional Court of South Africa in *The President of the Republic of South Africa v The President of the South African Rugby Football Union*², where the court expressed itself on this issue in the following language:

'The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an

¹ 1954 (3) SA 433 (SWA) at 438 E-F.

² 2000 (1) SA 1 (CC) at p 36-37.

opportunity, while still in the witness-box of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn*³ and has been adopted and consistently followed by our courts.'

[25] In the instant case, a number of issues, some of which have been mentioned above, were not put to the plaintiff by the defendant, leaving the impression that they were not denied by the defendant. When he took the witness box, however, the defendant then adduced evidence at variance therewith suggesting that the plaintiff's evidence thereon was untrue. The defendant, as quoted from the notes above, pleaded that he is not an attorney and did not study law. This is eminently correct. It must be mentioned that during the trial, the court was acutely aware of the defendant's disadvantaged position and for that reason, explained to him throughout the trial, at various stages what was expected of him, including his rights. Before the plaintiff gave evidence, the court explained his rights to cross-examine the plaintiff, including raising issues that are in his view incorrect. Notwithstanding this, a plethora of issues, which were uncomplicated were testified to by the plaintiff and left unchallenged by the defendant in cross-examination, only for him to testify contrary to the evidence that was left unchallenged and totally unruffled in cross-examination.

[26] The fact that the defendant is a lay person at law cannot be overlooked but the fact of the matter is that these issues were known to the defendant, who, it is alleged, and proved, was dealing directly with the plaintiff. There was no intermediary at any stage thus suggesting that the defendant should, though being unlettered in law, have been able to challenge what was in his view wrong, erroneous or untrue evidence adduced by the plaintiff. It must be noted that the *dicta* above are not only applicable to lawyers, but must be respected and complied with by any person, including lay persons who represent themselves. That this is the case should be apparent from the *Small* case at page 438 F, where the court said, 'Once a witness's evidence on a point in

³ (1893 6 R 67 (HL)).

dispute has been deliberately left unchallenged in cross-examination and particularly by a legal practitioner . . .' This clearly means the rule will apply also lay persons but will be more rigorously applied in cases where cross-examination is conducted by a legal practitioner. Any disadvantage to the defendant in this case was ameliorated by the explanation given by the court to the defendant and that fact that viewed in perspective, the issues left unchallenged were not lofty ideas and legal philosophies beyond his comprehension. They were a plain rendition of what allegedly happened between the two protagonists and should have been a very easy thing for the defendant to challenge those issues testified to by the plaintiff which were in his view incorrect or inaccurate or downright false. The defendant struck me as a fairly intelligent man who knew what he was about. I accordingly hold against the defendant in this regard and hold that the items of evidence he attempted to introduce but which run counter to the plaintiff's unchallenged evidence, must be declared an afterthought as I hereby do.

[26] It will be seen from the foregoing that the versions testified to by the two protagonists are irreconcilable, with the plaintiff alleging an oral agreement and the defendant totally denying the existence of same. The question is, how should the court approach the issues so as to make a finding on the disputed issues? In *SFW Group Ltd And Another v Martell Et Cie And Others*⁴ NienaberJA suggested the following formula, which has been adopted as applicable even in this jurisdiction in the case of *Life Office of Namibia Ltd v Amakali*⁵:

'The technique generally employed by our courts in resolving factual disputes of this nature may conveniently be summarized as follows. To come to a conclusion on the disputed issues, a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour; (ii) his bias, latent and

⁴ 2003 (1) SA 11 (SCA) at page 14H – 15E.

⁵ 2014 NR 1119 (LC) page 1129-1130.

blatant, (iii) internal contradictions in his evidence, (vi) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra-curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events ...'

[27] How did the two protagonists fare as witnesses? I can say without fear of contradiction, having seen and heard both witnesses that the plaintiff was very impressive as a witness. He was composed and rendered his evidence matter of factly. He was totally unruffled in cross-examination, save on the issue of the amount he claimed as there was a clear disparity between the invoices he tendered in evidence and the amount of his claim. On the whole, I was impressed by his performance as a witness and he was consistent and stuck to his version unwaveringly, like a postage stamp to an envelope. Where he did not recall an event, he was quick to point that out and never, at any stage sought to mislead the court in my assessment.

[28] As a witness, the defendant, was a horse of a different colour. He was evasive in some respects and when placed on the ropes by a barrage of question in cross-examination, he paused for some time, searching for answers as a way of escape from tight situations. I can provide two instances where this was evident under cross-examination. He was asked the following question by Mr Amoomo:

Q: When the machines came, you took a conscious decision to take them to two strangers the plaintiff does not know. You could not give these machines to these other persons without his permission?

A: . . . (A long pause ensued, after which the defendant asked the question, which he had heard and understood, to be repeated).

And later, the following question was put to him:

Q: I put it to you Sir, because of that plaintiff is justified in seeking

compensation and getting back his money for the purchase of the machines?

A: . . . (Long pause) I agree.

The defendant was not impressive as a witness and I could tell that he was not intimidated at all by the court atmosphere. He otherwise expressed himself very well both in adducing his evidence and in cross-examining the plaintiff. I would therefore not apportion his poor performance as a witness to stage fright. It is also worth noting that he worked for the Prison department and may have worked with or in the courts. He clearly overheated when pressed under cross-examination, thus not creating a favourable impression as a witness.

[29] Another issue I will place into the equation is that the general probabilities favour the plaintiff's version. As I will endeavour to show as well, some aspects of the defendant's version seemed to unwittingly corroborate the plaintiff's version. On the probabilities, it is not denied at all that the plaintiff and the defendant grew up together and knew each other very well. There is also no denying that the plaintiff approached the defendant and expressed interest in his business. The plaintiff testified that when they spoke, the defendant said he had a small machine and it broke down regularly. This was not denied. It is worth considering that the defendant took a very active role in the reception of the machines on delivery and storage of same. He never consulted or even asked or reported to the plaintiff about these issues. In respect of the second machine, it was the defendant's evidence that he secured a fork lift to off-load the machine. He did not talk to the plaintiff about this.

[30] Most importantly, the defendant took the machines and gave them over to third parties, as far as Zambia, without the knowledge and consent of the plaintiff. It was also established in evidence that the defendant even entered into private agreements with third parties regarding the use of the machines. These objective facts, in my view, point to an agreement having been reached for the defendant to run the business using the machines. This explains why the plaintiff wanted progress reports on the registration of the close corporation and the

money that was received after a cheque was received and a vehicle was bought. The defendant's explanations and denials of these issues were totally unconvincing and point inexorably to his story being false and deliberately concocted to run away from liability. The plaintiff could not have made up the story of the cheque and the defendant having bought a car. He was very emphatic and unmoved in cross-examination on this point and I believe him. The defendant's bare denials, in the face of the plaintiff's plausible and matter of fact evidence, were totally unconvincing.

[31] It is also clear, even from the defendant's own version that the plaintiff went out of his way to try and ensure that the company operational even though he was out in Botswana. According to the defendant, the plaintiff offered him his own property to use as the physical address for the purposes of opening a bank account. This evidence is very much consistent with the plaintiff's version that they were to establish the company and open a bank account in which they would both be signatories. It is also important to note that in his evidence in chief, the defendant testified that the plaintiff went even to the extent of offering his own plot for purposes of running the business. He even wrote a letter to the bank regarding the opening of the bank account.

[32] It is clear in this case that the plaintiff at some stage, sought to recover both machines from the defendant. In the plaintiff's testimony, this was two years after their purchase. It is also very clear that it was the defendant who frustrated the return of the machines. The machines were in the hands of the defendant for a period in the excess of five years. I do not accept his version that he did not use the machines during that period. The evidence is clear that he took the machines without the knowledge and permission of the plaintiff and as stated, gave them to third parties to use and even went to the extent, in his own evidence, of dismantling one of the machines and taking some of its component parts to Zambia.

[33] In view of the foregoing, I find for a fact that there was an oral agreement reached by the parties to establish a close corporation to deal in timber industry. The defendant was to attend to the registration of the company in which they

would have a 50% share-holding each, but never did so. I also find for a fact that the parties were to buy machines and have the business start running. The plaintiff did his part and for a long period asked the defendant to do his part which he did not do. I also find for a fact that the defendant used the machines bought by the plaintiff and parted possession thereof to third parties. In view of the machines having been in the defendant's possession for such a long time, coupled with his refusal to hand same over to the plaintiff, I am of the view that the plaintiff has made out a case for the relief he seeks.

[34] From the evidence, it is clear that the documents provided by the plaintiff in support of his claim do not reach the figure of N\$ 286 440, 85. That amount has simply not been proved. According to the plaintiff, there is a further document that was omitted. Mr Amoomo could not help but agree that the only amount proved by the plaintiff in this case is N\$ 256 223, 97, which is the amount I am minded, on the evidence before me, to order the defendant to pay. Failure to prove the entire amount claimed in the summons is not fatal and the court is at large to grant an amount that has been proved in evidence.⁶ He took the machines and used them as though they were his and as earlier stated, frustrated their return to the plaintiff who testified he had secured a buyer for the machines. The plaintiff did not even tender to return them once the letter of demand was issued.

[35] According to the learned author R. H. Christie⁷, "The obligations imposed by the terms of a contract are meant to be performed, and if they are not performed at all or performed late, or performed in the wrong manner, the party on whom the duty of performance lay (the debtor) is said to be in *mora*, and is the last case, to be guilty of positive malperformance'. In this case, the defendant simply did not perform his part of the bargain but abused the machinery that had been purchased for the use of the proposed company and it would appear that whatever monies he received were appropriated for his own use and benefit.

⁶See *S M Goldstein And Co. (Pty) Ltd v Gerber* 1979 (4) SA 938 (AD)

⁷The Law of Contract In South Africa, Butterworths, 3rd edition

[34] In the premises, I order the following:

- (a) That the oral agreement between the plaintiff and the defendant is declared to be cancelled;
- (b) The defendant is to pay the plaintiff the sum of N\$ 256 223, 97;
 - a) The defendant is to pay interest thereon at 20% per annum from date of judgment to date of payment; and
 - b) Costs of suit.

TS Masuku
Acting Judge

APPEARANCE

PLAINTIFF : K. Amomo
Instructed by Sisa Namandje & Co. Inc.

DEFENDANT: G Nandu
The defendant in person