REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2352/2012

In the matter between:

ALOISIUS NEPOLO
T/A DOUBLE POWER TECHNICAL SERVICES **PLAINTIFF**

And

BURGERS EQUIPMENT AND SPARES OKAHANDJA CC **DEFENDANT**

Neutral citation: *Nepolo v Burgers Equipment and Spares Okahandja CC* (I 2352/2012) [2015] NAHCMD 53 (12 March 2015)

Coram: PARKER AJ

Heard: **21 – 25 July 2014; 17 September 2014; 26 – 27 January 2015; 12 February 2015**

Delivered: **12 March 2015**

Flynote: Contract – Breach of contract – Misrepresentation – Plaintiff entered into contract of sale of backhoe loader – Defendant represented that the made-in-China loader was brand-new and of high quality and durable – Court held that a statement as to the quality and condition of goods sold in a contract of sale by a seller who is a dealer in the goods should be held to be a term of the contract and he or she warrants that the goods shall be merchantable – Defendant had repaired the loader and made modifications to certain parts of the loader in defendant's workplace in order to cure serious overheating of engine of loader before delivering

loader to plaintiff – Court found that loader had latent defect and was unmerchantable – Court concluded that there had been misrepresentation of aspects which go to the root of the contract and the loader was unmerchantable – Court found that the plaintiff was entitled to cancel the contract and sue for restitution.

Summary: Contract – Breach of contract – Misrepresentation – Plaintiff entered into contract of sale of backhoe loader – Defendant represented that the made-in-China loader was brand new and of high quality and durable – The loader was fit to be operated for some five months only when it had clocked about 1500 operational hours due to persistent and continual overheating of the engine – Court found that no amount of cleaning of the radiator of the loader by the plaintiff and no amount of repairs and replacement of parts and reconditioning of the engine of the loader by the defendant would ex post facto make the loader fit for the purpose or purposes for which a loader of its kind is commonly bought – Court found that the loader had latent defect and was unmerchantable – Court found further that representations made to the plaintiff about the loader being brand new and of high quality and durable were misrepresentations that were material because they went to the root of the contract – Plaintiff was therefore entitled to cancel the contract and sue for restitution.

ORDER

(a) Judgment is granted in favour of the plaintiff with regard to claim 1 and claim 2 to the extent indicated in paras (b) and (c) of this order.

(b) As respects claim 1, the plaintiff must return the backhoe loader to the defendant, and within 14 days of return of the loader to the defendant, the defendant must pay N$390 666 to the plaintiff, plus interest at the rate of 20 per cent per annum, calculated from 6 August 2012 to the date of full and final payment.

(c) As respects claim 2, the defendant must pay N$25 133 to the plaintiff, plus interest at the rate of 20 per cent per annum, calculated from 6 August 2012 to the date of full and final payment.

(d) The defendant must pay the plaintiff's costs, including costs of one instructing counsel and one instructed counsel.

JUDGMENT

PARKER AJ:

[1] This matter concerns a contract of sale of goods, to wit, a backhoe loader ('the loader') concluded by the plaintiff ('the buyer') and the defendant '(the seller'). The purchase price is N$586 000. As to claim 1, after the plaintiff has put forth certain factual allegations, the plaintiff alleges therefrom that, as to claim 1 in the particulars of claim, the defendant breached the contract on the following basis -

> '(a) Misrepresenting to plaintiff that the machine was of a high quality, durable and guaranteed for 12 months or 1500 hours and that it was suitable for the purpose it was purchased for.
>
> (b) Failing to provide back-up service using manufacturer approved parts.
>
> (c) Failing to come and to repair the machine and refusing to take any telephone calls from the plaintiff.
>
> (d) Doing modifications without any modification bulletin or manufacturer's approval.'

[2] The plaintiff avers, therefore, that as a direct result of the defendant's breach the plaintiff has suffered damages. The plaintiff contends further that as a direct result of the said breach the plaintiff duly cancelled the agreement, and in the

alternatively, the plaintiff says that he 'cancels same (ie the agreement) herewith and reclaims the amount of N$586 000 (being the purchase price) paid by him (ie the plaintiff)) to the defendant'. As to claim 2, the plaintiff repeats those factual allegations and avers that the 'plaintiff had to arrange for a replacement machine'; and 'as a direct result of the defendant's breach, the plaintiff suffered damages to the tune of N$323 200' which the plaintiff factorizes under paras 18.3.1 to 18.3.6 of the particulars of claim.

[3] Thus, the plaintiff claims in relation to claim 1 (a) payment of the amount of N$586 000, (b) interest on the aforesaid amount at *tempora morae* at the rate of 20% per annum as from 15 January 2012 to date of final payment; and in relation to claim 2, (c) payment of the amount of N$323 200; (d) interest on the aforesaid amount *tempora morae* at the rate of 20% per annum as from 15 January 2012 to date of final payment, as well as costs and further and alternative relief, or further or alternative relief.

[4] The defendant's defence consists of the following:

> '4.1 Each and every allegation in this paragraph is denied as if specifically repeated herein and traversed. The defendant pleads that the agreement was partly oral and partly written.
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> 4.2 The defendant pleads that the written part of the agreement between the parties consisted of:
>
> 4.2.1 A written agreement of sale dated 9 September 2012 signed by Jan Harms Burger on behalf of the defendant and signed by the Plaintiff personally. A copy of the agreement is attached as annexure "A".
>
> 4.2.2 A written warranty registration dated 12 September 2011 signed by the plaintiff personally and by Mr Jan Harms Burger on behalf of the defendant. A copy is attached as annexure "B".

4.2.3 The quote by the Defendant dated 6 September 2011, a copy of which is attached hereto as annexure “C”.’

Furthermore, the defendant pleads that the ‘oral express, alternatively implied alternatively tacit part of the agreement was that the terms of the agreement would include the content of annexures “A”, “B” and “C”; and that the plaintiff would diligently perform routine maintenance such as regular cleaning of the air filter.

[5] Thus, the defendant denies that the defendant breached the agreement. The defendant denies further that any damage suffered by the plaintiff was a result of the alleged breach. The defendant denies further that the plaintiff cancelled the agreement, but notes the plaintiff’s attempt to cancel the agreement by means of the summons, but, the defendant avers that the plaintiff is not entitled to cancel the agreement. The defendant, therefore, urges the court to dismiss the plaintiff’s claims with costs.

[6] On the evidence, I make the following factual findings whose significance will become apparent in due course. First, the contract was partly written and partly oral. The written part of the contract consists of an Agreement of Sale, entered into by the parties on 9 September 2011, a Warranty Registration, dated 12 September 2011, and a quote, dated 6 September 2011. They are marked as ‘A’, ‘B’ and ‘C’ and annexed to the defendant’s plea. Second, the defendant is a dealer in loaders and it sold the loader in the course of its business. Third, I accept submission by Mr Rukoro, counsel for the defendant, that the defendant held itself out to be an expert seller of machinery, equipment and spares and other products associated with, or related to, the kind of goods the defendant sold to the plaintiff. Fourth, and it is not disputed, the loader was sold as brand new, as opposed to second-hand or pre-used. Fifth, the defendant warranted that the loader had clocked only 37.2 operating hours when the defendant delivered the loader to the plaintiff on 12 September 2011. Keeping the aforegoing factual findings in view, I proceed to the next level of the enquiry.

[7] A statement as to the quality and condition of goods sold in a contract of sale by a seller who is a dealer in goods should be held to be a term of the contract. (*Dick Bentley (Productions) Ltd v Harold Smith (Motors) Ltd* [1965] All ER 65) And in that regard, such seller warrants that the quality and the condition of the goods shall be merchantable, in the sense that it is fit for the purpose or purposes for which the goods were bought. See GRJ Hackwill, *Mackeurtan's Sale of Goods in South Africa*, 5 ed (1985), p 50. Thus, these are pertinent questions that arise for consideration in the instant proceeding: (a) whether the seller sold the loader in the course of its business, and (b) whether the loader was fit for its purpose or purposes. Answers to these questions are relevant in the determination of the plaintiff's claim 1.

[8] In the instant case, I have found previously that the defendant sold the loader in the course of its business; and, as a matter of law, the defendant warranted the merchantability of the loader, that is, that it was fit for its purpose or purposes. Of course, it cannot be said that goods are unmerchantable merely because they are not fit for one particular purpose. It follows that the defendant's denial that it knew, as the plaintiff avers, that the purpose for which the plaintiff bought the loader was for the construction of a server reticulation system is irrelevant. The purpose for which the plaintiff bought the loader is the digging and hoeing of trenches in construction works. And the defendant knew that. Of course, the seller – as manufacturer or dealer – undertakes no more than that the goods supplied are sound and that they are no worse and no better than others of their kind; but, a priori, there is the overriding obligation on a seller to be responsible for all latent defects in the goods sold which would render them unfit for the purpose or purposes for which goods of that kind are commonly bought, particularly where the goods are sold as brand new. There can, therefore, be no doubt that if, for instance, a new car – as opposed to second hand or pre-used – was sold with a defective clutch, the car would be properly said to be unmerchantable, as being unfit for the purpose or purposes for which it was bought; but the same cannot be said if the car were sold as a second-hand or pre-used motor vehicle.

[9] In the instant case, it is common cause between the parties that the loader was sold as brand new. And the defendant guaranteed that the quality, durability and

performance of the loader was of such high standard that it would be prepared to extend the warranty to 4 000 operating hours after it had clocked 1500 operating hours, at an additional cost to the plaintiff.

[10] On the totality of the evidence I find that the loader was sold with a latent defect, that is, with a defective cooling system; hence the constant and persistent overheating of the engine of the loader, making it, in my judgement, unfit for the purpose for which the plaintiff bought the loader, that is, as I have said previously, for digging and hoeing of trenches in construction works. In this regard, one should not lose sight of the fact that the plaintiff did not buy the loader in order to drive it on the streets of Windhoek: The loader was bought for the purpose of digging and hoeing of trenches in Aussenkehr. And, I find that the plaintiff knew that: None of the defendant's witnesses testified that when they were sent to attend to the loader they had to enquire from the plaintiff where the site of his construction works were.

[11] The repairs and modification done to the loader by the defendant and the replacement of vital parts of the loader undertaken by the defendant before delivery of the loader to the plaintiff are important. They point indubitably to the reasonable conclusion that prior to 12 September 2011 ('date of delivery') when the defendant delivered the loader to the plaintiff the loader had a latent defective cooling system, as I have said previously. Take, for instance, the following facts which I accept. Prior to the delivery date the loader experienced a problem of overheating; and so, prior to that date, some modifications were done to the loader's radiator. All this was a failed attempt to correct the latent defect that the loader carried. I do not, therefore, have any good reason to reject evidence on behalf of the plaintiff that the loader had a latent defect.

[12] As a result of the latent defect in the loader, the loader was beset with continual and persistent mechanical problems which the defendant attempted to solve. On 13 September 2011, barely two days after delivery date the loader started to overheat and the problem was reported to the defendant. Thus, after the plaintiff operated the loader for some 14 hours after the delivery date the engine of the loader overheated and oil leaked from its cooler. The defendant sent a technician,

with a new oil cooler to the site. The technician replaced the cooler on or about 23 September 2011. After the installation of the oil cooler, oil leaked past an O-ring 'which somehow' had been damaged. The O-ring was replaced. All this was done on 23 September 2011, that is, barely 11 days after the delivery date, as aforesaid. All this did not solve the problem of overheating. The defendant's answer was to perform a 250-hour service on the loader when 303 operating hours were on the clock.

[13] Furthermore, in November 2011 the new cooler which had been installed in September 2011 was removed, and the original cooler, with supposedly improved and modified mountings, was installed. This did not improve matters; and so, on 13 December 2011 a modification was done to a suction flange of the hydraulic oil tank in accordance with instructions from Liu Gong, the Chinese manufacturers of the loader. Thereafter, on 6 January 2012 the oil cooler was replaced and a service performed. At that stage the loader had worked for 746 hours, which means that no 500 hour service was carried out on the loader. As at 13 January 2012 the engine of the loader was not serviceable: it ceased to be serviceable. The defendant's answer to these persistent problems was to commission Mr Bouwer, a defence witness and an automative engineering technician, to recondition the engine; significantly, it was done not at the request of the plaintiff. In any event, I fail to see any good reason – and Bouwer did not proffer any – why the reconditioned engine was not fully tested by Bouwer when it was installed in the loader. Bouwer tested the reconditioned engine on the floor of his workshop. Accordingly, I find that Bouwer was in no position to say that the problem of persistent overheating and leaking of oil were cured since he did not run the loader while the loader was in motion and while the loader was carrying out the purpose or purposes for which the loader was bought.

[14] Be that as it may, a new turbo was installed on 15 February 2012 but the problem of overheating stubbornly remained uncured. The defendant's answer was to reinstall the old turbo on 16 February 2012. The problem of overheating persisted. At this time the loader had clocked 774.4 operating hours. In the course of events, some repair work was done on 30 July 2012. The operating hours stood at 1041. The loader broke down completely and the plaintiff's evidence was that he was

forced to hire a replacement machine. This relates to claim 2, and I shall consider it in due course. The plaintiff has by his summons tendered the return of the machine against the return of the purchase price (claim 1). This should be taken into account in determining period of interest in the payment of any amounts by the defendant.

[15] It flies in the teeth of common human experience that the loader, sold as brand new and as a machine of high quality and durable underwent some repairs and modifications to solve a problem of overheating before the delivery date and continued to undergo, after the delivery date, major repairs, replacement of parts and eventual reconditioning of the its engine after the loader had been operated for barely five months at which time it had clocked less than 1500 operating hours. In this regard, it must be remembered that common human experience is an important factor in the assessment of evidence. See *Bosch v State* [2001] 1BLR (Court of Appeal), cited with approval in *State v Mannel Alberto Da Silva* Case No. CC 15/2005 (Unreported).

[16] Based on the aforegoing, I respectfully reject argument by Mr Barnard, counsel for the defendant, that the plaintiff 'did not adduce any evidence by an expert that the machine (the loader) was not of high quality, durable and suitable for the digging of saver reticulation'.

[17] The aforegoing factual findings and conclusions thereanent point inevitably to the following reasonable holdings. The defendant represented to the plaintiff that the defendant was selling to the plaintiff a brand new loader of high quality and durable which were false. Furthermore, the defendant breached its warranty – by operation of law – that the loader was merchantable. And, in my opinion, a seller who has held himself or herself up as an expert seller of machinery, equipment and spares and other products associated with or related to the kind of goods that the defendant sold to the plaintiff would know that if the fact that the made-in-China loader had been repaired and certain parts had been modified by the seller in his workshop in Namibia had been disclosed to the plaintiff, the plaintiff, who had been told he was buying a brand new made-in-China loader, would not have entered into the contract. Doubtless, the representations were material: they went to the root of the contract for

they played a major role in inducing the plaintiff to enter into the contract. Putting the misrepresentation and the fact that the loader was not merchantable together, I conclude that the breaches to the contract by the defendant were material, entitling the plaintiff to cancel the agreement.

[18] The plaintiff claims cancellation of the contract and restitution by recovering the amount of N$586 000 that he parted with, being the purchase price that he paid to the defendant (claim 1). I shall make appropriate adjustments to any compensation due to the plaintiff that is just and fair and reasonable on the facts and in the circumstances of the case. The plaintiff claims return of the N$586 000 paid as purchase price of the loader and has tendered return of the loader to the defendant.

[19] I accept Mr Barnard's submission, supported by *Mbekele v Standard Bank of Namibia* 2011 (2) NR 411, that where the object received by the innocent party has deteriorated, evidence should be led on the reason for the deterioration in value and extent to which the value of the thing has deteriorated 'in order for the court to be able to make a monetary award to compensate for the loss in value'. But, in the instant proceeding, it is not simply the case where the thing sold has deteriorated while in the possession of the innocent party. I have found previously that the loader was not merchantable: it had latent defect when it was sold and delivered to the plaintiff.

[20] *Feinstein v Niggli and Another* 1981 (2) SA 684 (A) at 698E-H (cited with approval by Ueitele AJ in *Mbekele v Standard Bank Namibia* 2011 (2) NR 411 at 425F-G) tells us that 'the deterioration in condition or the depreciation in value of the subject-matter of the contract while in the representee's possession will usually not preclude *restituo* if that occurred in the ordinary course of events, or through its being used in the normal way as contemplated by the parties, or through some inherent defect or weakness in the subject matter'. The evidence is clear that the plaintiff operated the loader for some five months and the loader ceased to be serviceable; and it has remained so, as I have found previously.

[21] Mr Barnard argues further that the actual state and condition of the machine is not known; and it is not known to what extent the defendant should compensate the defendant 'for the poor state of the machine (the loader)'. Counsel continues, 'The court is not placed in a position to be able to determine what equitable adjustment is to be made and what order to grant'. I respectfully accept Mr Barnard's submission, albeit not in its entirety. It must be remembered that equitable considerations apply to the remedy of restitution. I think there is enough in the evidence to enable the court to make an order that is reasonable, just and fair in the circumstances of the case as remedy. The plaintiff should recover a fair part of what he parted with.

[22] I proceed to consider claim 2 which is as set out in para 18 of the particulars of claim; and the starting point of determination of the damages should be these principles. A plaintiff who desires to claim damages flowing from such breach of contract should allege and prove the damage that he or she avers he or she suffered and the quantum thereof. See, *Kalipi Ngelenge v Anton E Van Schalkwyk* 2010 (2) NR 406. In this regard Mr Rukoro submits that the evidence placed before the court places the court in a position to assess the quantum of damages. Mr Barnard, for the defendant, submits the opposite way, and says that the plaintiff did not adduce all the evidence available and the best evidence available and that the court should not assist the plaintiff by doing an estimate of damages. Counsel urges the court to dismiss claim 2.

Claim 1, para 18.3.1 in the particulars of claim

[23] The plaintiff claims N$14 000 which he avers he paid for oil as a result of excessive oil leakage referred to previously. There is no evidence as to the quantity, or even approximate quantity, of oil that leaked. And since the plaintiff could buy oil from only authorized dealers, it would have been easy for the plaintiff to have submitted receipts from the authorized dealer or dealers from whom the plaintiff bought the fuel. The receipts which the plaintiff produced are not made to the plaintiff. In the absence of any cogent evidence as to why that is the case, it would be unreasonable and unsatisfactory to accept those receipts. This claim, therefore, stands to be rejected.

Claim 1, para 18.3.2 in the particulars of claim

[24] The plaintiff claims N$250 000 in respect of a replacement machine he hired when the loader could not be operated. The plaintiff avers that the rate payable for hiring the machine is the ‘customary rate, alternatively the fair and reasonable cost’. The court is left without the benefit of relevant unexpert evidence or expert evidence to support the plaintiff claim that the rate paid was customary to the industry or reasonable. What is worse; even in his witness statement, the plaintiff merely repeats what he states in the particulars of claim. That cannot be evidence. This claim, too, should be rejected.

Claim 1, para 18.3.3 in the particulars of claim

[25] The plaintiff claims N$19 250 in respect of fuel for travelling from the site to Keetmanshoop and back. Mr Barnard submits that no factual basis was laid for the amount of this claim, and concludes that the amount was not proven. I cannot dismiss this claim in its entirety. If I accept, as I do, that this exercise took place, the court is entitled to order an amount the court considers to be fair and reasonable. This present claim does not stand in the same light as the claim under para 8.3.2 because in that claim the plaintiff relies on a practice that is customary in the industry. In that event it would be reasonable and proper that he brought evidence that supported his contention, but he did not. It is on a parity of reasoning that the claim under para 8.3.1, too, was rejected. Evidence should have been brought regarding the quantity, or at least an estimation of the quantity, of oil that leaked. Besides, the receipts that the plaintiff produced were not made up to the plaintiff. It is, accordingly, my view that only two-thirds of this amount should be allowed. I, therefore, allow an amount of N$12 833, which I consider to be fair and reasonable.

Claim 18.3.4 in the particulars of claim

[26] The plaintiff claims N$4 000 for courier costs. This claim is rejected. The invoices discovered indicate that work was done for New Phase Trading CC, and not the plaintiff.

Claim 18.3.5 in the particulars of claim

[27] The plaintiff claims N$20 000 as expenses incurred when the plaintiff searched for a replacement machine. No cogent evidence to explain what was made up of this amount. It would be unsafe and unsatisfactory to allow this claim or any part of it.

Claim 18.3.6 in the particulars of claim

[28] The plaintiff claims N$15 950 for transport costs that were incurred when he transported the cooler from Okahandja to Aussenkehr. It is Mr Barnard's submission that the plaintiff is not entitled to this amount. I do not agree. Based on the reasoning in relation to claim 18.3.3, I shall allow two-thirds of this amount, too, which I consider to be reasonable and fair; and it comes to N$12 300.

[29] In the result, I make the following order:

(a) Judgment is granted in favour of the plaintiff with regard to claim 1 and claim 2 to the extent indicated in paras (b) and (c) of this order.

(b) As respects claim 1, the plaintiff must return the backhoe loader to the defendant, and within 14 days of return of the loader to the defendant, the defendant must pay N$390 666 to the plaintiff, plus interest at the rate of 20 per cent per annum, calculated from 6 August 2012 to the date of full and final payment.

(c) As respects claim 2, the defendant must pay N$25 133 to the plaintiff, plus interest at the rate of 20 per cent per annum, calculated from 6 August 2012 to the date of full and final payment.

(d) The defendant must pay the plaintiff's costs, including costs of one instructing counsel and one instructed counsel.

C Parker

Acting Judge

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APPEARANCES

PLAINTIFF :	S Rukoro Instructed by Sisa Namandje & Co. Inc., Windhoek
DEFENDANT:	P C I Barnard Instructed by Du Pisani Legal Practitioners, Windhoek