REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case Number: (I) 1104/2014

In the matter between:

SANUMO JOAQUIM CESAR CIRILO **PLAINTIFF**

And

IAN COPLEY T/A WELDING WORKS & RENOVATIONS **DEFENDANT**

Neutral citation: *Cirilo v Ian Copley ta Welding Works and Renovations (I 1104-2014) [2016] NAHCMD 160 (6 June 2016)*

CORAM: MASUKU J.

Heard: 21 – 22 September 2015 and 2 December 2015

Delivered: 6 June 2016

Flynote: LAW OF CONTRACT – breach of contract – principle of election – damages for breach of contract. EVIDENCE – the duty of counsel to put client's case to

opposing witness in cross-examination and result of failure to do so. Contradiction of witnesses' evidence on issues not material and how it is to be dealt with.

Summary: The plaintiff and defendant entered into an oral contract for the provision of balustrades. The plaintiff paid the entire amount quoted but the defendant did not deliver the balustrades on time. Plaintiff sued for cancellation of the contract; restitution and damages. Defendant alleged there was no time frame set for delivery of the balustrades.

Held – the defendant, even if his version were to be believed, failed to deliver the balustrades within a reasonable time. *Held* – the defendant breached the contract by failing to deliver the balustrades on time and that the breach was material such that termination of the contract was condign.

Held further – that the damages suffered by the plaintiff as a result of having to provide for accommodation and travel was within proximately related to the contract and that damages were therefore payable to the plaintiff.

Held – that failure to put the defendant's case to the plaintiff's results in the court declaring that witness' evidence an afterthought. *Held further* – that the contradiction in witnesses' evidence does not necessarily mean the evidence must be discarded if the contradictions are on issues that are not material.

Prayers for termination of the contract, restitution and damages granted together with interest and costs.

ORDER

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1. In respect of claim 1, an order for the cancellation of the contract is hereby granted.

2. The defendant is ordered to restore to the plaintiff the amount of N$ 142,000, together with interest on the aforesaid sum at the rate of 20% a *tempore morae* to date of payment.
3. The parties are to meet and debate the amount due in respect of claim 2 and report to the court within 10 days from the date hereof.
4. Should there be items in dispute between the parties, these shall be identified and particularised and the court shall make a ruling thereon and thereafter pronounce the final quantum of damages due.
5. The defendant is ordered to pay the costs of the action.

JUDGMENT

MASUKU J.;

Introduction

[1] This judgment is in respect of two claims lodged by the plaintiff against the defendant, which claims emanate from a verbal agreement entered into between the plaintiff and the defendant during July 2013. In terms thereof, the defendant agreed to manufacture and deliver to the plaintiff aluminium stainless steel balustrades which were to be utilised in the construction of the plaintiff's house for the recorded cost of N$ 142, 000.

[2] The first claim is for the cancellation of the agreement and restitution of an amount of N$ 142, 000, allegedly for breach of the agreement by the defendant. The second claim, is for payment of an amount of N$ 30, 200, being in respect of damages allegedly suffered by the plaintiff as a result of travel and accommodation costs allegedly incurred by the plaintiff in travelling to and from Angola to Namibia.

The parties

[3] The plaintiff is an adult male of Angolan extraction, who happened to visit this Republic from time to time. His residence is described as Lubango-Angola, Baizzo de Lage, in the Republic of Angola. The defendant, on the other hand is a major businessman who runs an outfit known as Ian Welding Works and Renovations in Windhoek.

Common cause issues

[4] From a reading of the pleadings, the pre-trial order and the evidence subsequently led, the following issues are common cause:

(1) The plaintiff paid to the defendant an amount of N$50 000 as a deposit for the work to be commenced;
(2) The plaintiff followed up on that payment with a further payment of N$ 92 000.00;
(3) The defendant did the work but the plaintiff did not take delivery of same and that the defendant tenders delivery of the balustrades.

Issues in contention

[5] It is apparent from the plea that the defendant, whilst admitting the agreement, denies that a deposit of N$50, 000.00 was agreed upon. He avers that the entire amount of N$ 142.000.00 was payable before the work was to be commenced. Furthermore, the defendant avers that the balustrades were to be collected by the plaintiff from Windhoek and were not to be delivered by the defendant to the plaintiff in Angola as alleged by the plaintiff. Furthermore, the defendant states that the plaintiff did

at some stage attempt to take delivery of the balustrades but was hamstrung by the transport he had provided being too small to carry same.

[6] According to the pre-trial order, the only issue for the court's determination is whether or not the defendant did, as alleged by the plaintiff, commit a breach of the oral agreement. The following main issues untie the Gordian Knot: whether or not the parties agreed to the defendant having to deliver the balustrades before 31 July 2013; whether or not the plaintiff failed to take delivery of the balustrades by virtue of having a small truck to collect same and when the defendant tendered delivery of the balustrades.

The evidence

[7] The plaintiff testified and called one witness. The plaintiff's evidence, simply put, was that during July 2013, entered into an oral agreement with the defendant in Windhoek for the manufacture and delivery of the balustrades. He testified that the balustrades were for the completion of his house in Angola and that he met the defendant after a recommendation for his good work. He met the defendant for the first time in the company of his wife and his witness Mr. John Baptista.

[8] To this end, he testified, he paid for the air ticket of one of the defendant's employees to fly to Angola to measure the relevant parts of the building in order to ascertain the extent of the balustrades required for the house. The plaintiff testified further that the defendant informed him that the work would take about a month to complete from the date of payment of the deposit and would be completed by the end of August 2013. When he did not receive feedback about the completion of the balustrades, it is the plaintiff's evidence that he waited until September 2013 to call the defendant to make enquiries about the completion of the project. The defendant told him at some stage that he was in Botswana and had moved there. He promised to call the plaintiff but never did.

[9] By October 2013, the defendant had still not called to confirm the completion of the project. The plaintiff took the initiative and called the defendant several times without any response. This then prompted the plaintiff to send a short text message to the defendant informing the latter that he would be coming to Windhoek in December 2013. The defendant informed him that his firm would be closed by then and would re-open for business on 16 January the following year. It is the plaintiff's evidence that he thereupon agreed to come in January 2014.

[10] On arrival at the defendant's premises in January, the defendant apologized for not having been able to finish the work and requested one more week. He informed the plaintiff that he had undergone an operation that affected his ability to complete the work on time. This reason was appealing and accepted by the plaintiff. In February 2014, he further testified, the defendant started avoiding the plaintiff. He did not answer nor return the plaintiff's calls. This prompted the plaintiff, on a number of occasions, to attend at the defendant's place but did not find him there. The defendant's employees would tell him that the defendant had been there but was not available or would be reported to be in meetings. When available, he would tell the plaintiff that the balustrades were not yet ready and that he would inform the plaintiff when they were ready for collection.

[11] Worried about the 'lack of transparency' of the defendant, the plaintiff testified that he then asked Mr. Baptista to find him a lawyer to take the issue forward. Correspondence with the plaintiff's lawyers started, eventually culminating in the current proceedings he further testified. It was his evidence that because of the defendant's failure to comply with his undertakings regarding the balustrades, he had to travel to Windhoek about six to seven times between July 2013 and May 2014. During these visits, he testified, he had to find accommodation in hotels and for which he paid personally and he produced receipts of the expenditure for the said visits. That was the extent of the plaintiff's testimony in chief.

[12] In cross-examination, it was put to the plaintiff that his evidence that the work was to be done by end of August 2012 was incorrect for the reason that the plaintiff did not then have the measurements of the balustrades to enable the defendant to start manufacturing same. It was the plaintiff's evidence that the defendant had informed him that he would finish the work within 30 days of the payment of the deposit. The deposit, he testified, was paid on 17 July 2013. He further testified that when he brought the balance of the money on 12 August 2013, the defendant promised that he would have finished the work by the end of August 2013.

[13] The plaintiff's attention was drawn to the terms set out in the defendant's quotation which state that a deposit of 50% of the total price was required. The plaintiff stated that the defendant agreed to start the work upon him paying N$50 000 which he did. The plaintiff testified that although he did not understand English very well, Mr. Baptista, who is conversant in the English language informed him that the defendant had agreed to start the work on payment of the deposit of N$50 000.00 and that he did not recall the plaintiff informing him that the manufacturing would only commence once half the amount of the entire contract had been settled.

[14] It was further put to him that there was no agreement regarding when the work would be completed but the plaintiff testified that the defendant told him it would be within month of payment of the deposit and reasoned that he could not in good conscience leave such a substantial amount of money without any clear guarantees as when the work would be completed by the defendant.

[15] The plaintiff denied that the defendant had told him that he would need to place an order for the steel and which would take about four weeks before the work would commence. It was also his evidence that he went to the defendant's place of business on a number of occasions in both January and February 2013 and met some of the defendant's employees. On one of the occasions, he further testified he went to the defendant's premises with a truck to collect the consignment but the defendant told him

that it was not yet ready for collection. He asked the plaintiff to return the following week.

[16] When put to him that the truck he had brought was too small to carry the consignment, the plaintiff testified that the defendant informed him at the time that although the truck was small it could be able to carry same. When put to him that the defendant had tendered the balustrades from February 2014, the plaintiff testified that that was not true as the defendant told him at that stage that the work was not complete and it was at that very stage that the plaintiff decided he had had enough and referred the matter to his lawyers.

[17] In re-examination, the plaintiff reiterated that the agreement was for the consignment to be delivered within a month from the payment of the deposit. He also denied that there was no miscommunication between him and the defendant due to language barriers. He also reiterated that there was no agreement for him and the defendant to start the manufacture of the balustrades once 50% of the price was paid. It was his evidence that it was agreed that once he paid the N$ 50 000.00, the defendant would commence the work and the plaintiff could settle the difference later.

[18] Mr. Baptista, (PW2) the last witness for the plaintiff, largely confirmed the evidence of the plaintiff. In particular, he confirmed the agreement as narrated by the plaintiff in his evidence. He also confirmed that the defendant promised to start the work after the plaintiff had paid the deposit of N$ 50 000.00. PW2 also confirmed that they went to the defendant's place in January 2014 to collect the consignment. On arrival, they did not find the defendant at first but on return later, they found him and it was then that he informed them that he had undergone surgery. He undertook to finish the balustrades the following week, an undertaking he failed to keep.

[19] On this occasion, PW2 testified, the plaintiff had brought a truck to collect the consignment and as a result of the fact that the work had not been completed, they had to find a safe place to keep the truck and the Angolan Embassy in Windhoek offered

them space for this purpose. They then returned to Angola and when they returned to Windhoek, the defendant kept making excuses to the effect that although he had received the consignment of other clients, the plaintiff's had still not arrived. It was at this stage that the plaintiff opted to adopt the legal route to the matter.

[20] In cross-examination, PW2 largely confirmed the evidence of the plaintiff on material issues. He testified that although the plaintiff could not speak English fluently, he could communicate effectively on basic issues. He confirmed that the consignment was to be finished within a month of the payment of the N$ 50.000.00. On the issue of the quotation requiring payment of 50% of the quoted amount, it was the PW2's evidence that he did not explain that aspect to the plaintiff for the reason that the defendant had agreed that the plaintiff could pay the aforesaid amount of N$ 50.000 to enable the defendant to start the work on the balustrades.

[21] PW2 further confirmed that he was present on both occasions when payments to the defendant were made and that the work was to be completed within a month of the payment. He denied that the defendant had told them that it takes two to three weeks to order the material from South Africa before the work could begin in earnest. It was PW2's evidence that at the time the defendant tendered delivery of the consignment, it was around March 2014 and the matter had at that stage been already handed to the plaintiff's lawyers for further action. PW2 denied the suggestion that the defendant had tendered delivery of the document since February 2014 stating that it was around that time that the friction between the plaintiff and the defendant started and that it was at that time that the plaintiff instructed his lawyers to deal with the matter. Nothing of consequence arose in re-examination.

[22] The defendant was the sole witness. His evidence was to admit that an oral agreement was entered into for the manufacture of the balustrades. He testified that he met the plaintiff on 15 July 2013, at his premises and there gave the plaintiff a quotation. On 17 July, the plaintiff came and paid the amount of N$50 000.00 in cash. It was his evidence that only when he receives 50% of the amount quoted that he can place an

order for the material. He testified further that the 50% only covers the cost of the material, excluding labour and ancillary costs. He testified further that he did this out of the abundance of caution because some people come and place orders and then do not collect the material and he would then remain with the material and the costs for manufacturing same, including labour, unpaid. It was his evidence that the plaintiff was told of this arrangement upfront.

[23] The defendant further testified that the stainless steel ordered by the plaintiff takes much longer to prepare as it requires a longer time for welding, approximately two to three weeks. As a result, it takes about three months to finish the balustrades in the normal course. He testified further that he received the measurements in July after his workers went to Angola and only then did he place an order for the material needed from Mc Steel in Johannesburg or Durban, South Africa. The defendant accordingly denied that he told the plaintiff that he could finish the balustrades within a month from the placing of the order and payment of the initial deposit. He testified that if he agreed to tie himself to a period for delivery of an order, he had this reduced to writing.

[24] It was the defendant's further evidence that the plaintiff never told him that the work was urgent and that in any event, when his workers returned from Angola, they informed him that the work on the plaintiff's house had not been completed. He testified further that it was only after the plaintiff paid the balance that he had enough money to order stock. He was only able to start on the project once the measurements had been given to him. He testified that he received the measurements on 12 August 2013 and then took two and a half months to finish the job. He never indicated to the plaintiff when the work would be ready after the payment of the balance by the plaintiff.

[25] According to the defendant, he could not speak to the plaintiff on the phone to inform him of the progress for the reason that his number was not available on the local network. He only got to speak to the plaintiff around Christmas period in 2013. He was in Henties Bay and the plaintiff was in Angola. It was during this conversation that he informed the plaintiff that his business had closed down for the Christmas period and

that he would re-open mid-January the following year. It was his evidence that the plaintiff apologized for not being in touch with him and that this was due to the plaintiff having taken ill. The defendant then informed the plaintiff that the balustrades were almost finished but only needed to be polished. He advised the plaintiff to come at the end of January to collect the consignment. He also expressed that it was difficult to communicate with the plaintiff in English and had to repeat himself three or so times for them to sing from the same hymn book as it were. PW2, the plaintiff testified, made communication easy as he was fluent in English.

[26] The defendant testified that the plaintiff and PW2 did eventually come to collect the balustrades but they came in small truck which could not load the consignment. At that point, he testified, the balustrades were polished and ready for collection. The defendant denied that he had told the plaintiff that he had taken ill and further denied that he at any stage apologized nor did he at any stage seek an extension of time to deliver the balustrades after failing to meet the allege deadline. It was his evidence that on receipt of a letter from the plaintiff's lawyers, he went to speak to them and informed them that the balustrades were ready for collection. The defendant accordingly denied having breached the agreement. He contended that there was no reason for the cancellation of the agreement by the plaintiff in the circumstances. According to his version, he had tendered the balustrades from February 2014 and that these were still in his possession and ready for delivery to the plaintiff. Finally, the defendant denied liability for the damages claim launched by the plaintiff.

[27] In cross-examination, the defendant was taxed about the fact that his defence raised for the first time in his evidence that he could only start the work after payment of 50% of the amount quoted was never put previously in an affidavit in support of an application for rescission; in the plea and in the defendant's statement. He pointed out that this is what he told the plaintiff when he came to his office for the first time.

[28] Later in his evidence, the defendant stated that he normally required a 50% deposit but when he dealt with foreign nationals like the plaintiff, he then required the

full amount quoted. It was his evidence that he asked for a deposit from the plaintiff but he then paid the full amount. When pointed out that it had been put on his behalf that the plaintiff had to pay 50% and not the full amount, the defendant stated that that was correct but that he had specifically asked for the full amount from the plaintiff. He could not explain why the disparate treatment in respect of foreign nationals was not recorded in the quotation. All he could say was that he gave the quotation to the plaintiff and he paid a deposit and returned to pay the balance later.

[29] Further pressed, the defendant testified that he did not have any agreement with the plaintiff regarding when the work would be completed. All he told the plaintiff, he informed the court, was that the work would be completed within two to three months. When further probed on the fact that he only saw the plaintiff six months after payment had been made, the defendant reasoned that he never saw the plaintiff until February and that at some stage, the plaintiff advised him that he had fallen ill. He stated that he finished the work in December having started it in September. The work only needed polishing in December. When put to him that the plaintiff contacted the defendant about progress of the work as the plaintiff was worried, it was the defendant's evidence that the plaintiff never called him and that if he did, his office would have told him. He denied that the plaintiff ever called him on his mobile phone as testified for the plaintiff.

[30] The defendant was further taxed about the alleged collection of the balustrades by the plaintiff. He confirmed that the saw the plaintiff in February 2014 when the plaintiff came but did not see the balance of the balustrades as they had been taken for polishing. It was put to him that that evidence was at variance with the contents of his affidavit[1] and the defendant did not come forth with a clear and acceptable explanation. He was asked whether he had proof of the calls or text messages to the plaintiff and he stated that he did not but could source them. It was further put to the defendant that contents of his affidavit at para 36 to the effect that in June they had not seen the balustrades and were unaware if same existed and the defendant stated that he understood the doubt in the plaintiff's mind but invited them to come and see the

[1] Para 20.

consignment. That was the extent of the defendant's evidence and after which he closed his case. Nothing of consequence arose from the re-examination,

Analysis of the evidence

[31] In my view, the plaintiff and his witness adduced their evidence matter-of-factly. They were largely unhinged by cross-examination and they stuck to their respective versions, which I must necessarily point out were largely consistent, like a postage stamp to an envelope. Although there were some inconsistencies in their evidence, these were relatively minor and did not in any way serve to detract from the cogency and truthfulness of their evidence. It has been pointed out that when witnesses' evidence dovetail in every respect, there may well be a suspicion that they have been coached as to what to say. The inconsistencies in this case were relatively minor and the court is entitled to rely on the evidence of the plaintiff and his witness on the material issues.

[32] In the Botswana Court of Appeal case of *Pheto v S,*[2] Lord Weir made the following lapidary remarks regarding the issue of inconsistency in witnesses' evidence:

> 'There may be very few cases in which testimonies differing with each other on point of detail are not found. Where this happens, it does not necessarily reflect on the reliability of the witnesses in question. Witnesses who honestly endeavor to tell the truth as they recall, often differ on point of detail. It is only where such differences relate to vital points in proving a case that they may become of importance.'

The above quotation, which I adopt, puts paid any argument that may be advanced to the effect that there were some contradictions and inconsistencies in the plaintiff's case as these were not, in my view material as to turn the direction of the trial one way or the other.

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[2] [2006] B.L.R. 105 at 108.

[33] Furthermore, the evidence of the plaintiff and his witness appears to have had support from objective facts and which correspondingly served to cast doubt on the truthfulness of the version put up by the defendant. One issue that readily comes to mind in this regard, relates to the issue of the plaintiff's version that the defendant had not, by April 2014 provided the balustrades. It must be recalled that the defendant's version was that the balustrades were ready by February 2014 but there is nothing to indicate that this was the case. To buttress the plaintiff's case is the time when he decided to engage his lawyers and this time appears to reinforce the truth of the plaintiff's case on the probabilities.

[34] The evidence of the defendant was a horse of a different colour. In my view, there were serious contradictions between his evidence given under oath in court and contents of affidavits that he had filed earlier in respect of an application for rescission of judgment. Furthermore, there were issues about which he testified in his evidence and which were not put to the plaintiff in cross-examination although they were important and viewed with hindsight would have constituted a pivotal part of his defence. One glaring example of these include the allegation that he informed the plaintiff that because he was a foreign national, he was required to pay 50% of the deposit of the total price of the quotation. This evidence was not put to the plaintiff and his witness; was not in the defendant's witness statement and only surfaced for the first time and conveniently so, after the plaintiff had finished adducing his evidence and when he could no longer be called to explain or clarify this aspect.

[35] In this regard, the law is very clear. A party is duty bound to put its case to its opponent through counsel, or if unrepresented, by questions personally posed, in cross-examination. Failure to do so may have the devastating consequence of that party's evidence, which only emerges when that party takes the witness' stand, to be regarded as an afterthought.

[36] In *Alfred Ndabeni v Godfrey Nandu*[3], this court cited with approval the celebrated judgment of Claassen J in this court in *Small v Smith*[4] where the learned Judge said:

'It is, in my opinion, elementary and standard practice for a party to put to each opposing 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 later argue that that he must be disbelieved. Once a witness' 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.' See also *The President of the Republic of South Africa v The President of the South African Rugby Football Union.*[5]

[37] In the premises, I am of the view that the matters which were not put to the plaintiff and his witness can properly be regarded as an afterthought. There were also issues in respect of which the version put to the plaintiff and his witness was at variance with the evidence subsequently adduced by the defendant when he took the witness box. These, may not in my view be given credence and fall to be rejected, thus dismantling the defendant's case in this regard to smithereens.

Findings of Fact

[38] At this juncture, I find it appropriate, having reviewed the evidence, to make findings of fact that will result in the resolution of the key issues in dispute. As was stated above, the plaintiff and his witness were largely witnesses of truth and were consistent and corroborative of each other in material aspects. The defendant was not impressive as a witness and left many issues unanswered. I therefore find for a fact that

[3] (I 343/2013) [2015] NAHCMD 110 (11 May 2015).
[4] 1954 (3) SA (SWA) at 438 E-F.
[5] 2001 (1) SA 1 (CC) at p. 36-37.

the defendant's version that the plaintiff was to pay the full amount of the quotation before the work could commence is false. The true position, from the evidence, is that the plaintiff was asked to pay the deposit of N$50 000 and was led to believe at that stage that the work had commenced. The defendant's version to the contrary, is for reasons advanced earlier, declared false and not worthy of any credit.

[39] The problematic issue relates to the date by which performance was to be effected. The plaintiff pleaded and testified that it was at the end of August 2013, a date denied by the defendant. I should add that PW2 was also emphatic in confirming the plaintiff's version in this regard. I am of the view that even if the plaintiff were correct, the evidence points to the fact that the time for delivery was extended by consent. I am of the view that in the circumstances, and I find this for a fact, the defendant did not deliver the balustrades on time, even on his own version. I say so because his evidence was to the effect that he could finalise the balustrades within two and a half months from the payment of the amount required.

[40] In the instant case, the amount was paid in full by 12 August 2013. In this regard, it would mean that the defendant should have finished the balustrades and delivered them at the latest by November 2013. This he did not do. He testified, and which was not put to the plaintiff that there was no urgency alleged regarding the balustrades and that his employee told him that the work at the plaintiff's house was not finished, thus suggesting that he could take his time. This evidence I reject as an afterthought and also consider that the plaintiff could not pay such a huge amount and bear the expenses of flying the defendant's employee to Angola without any date of completion of work being agreed upon.

[41] In any event, authority is legion that where no time for performance is mentioned, it must be understood that it is implied that performance must be rendered within a reasonable time or on demand.[6]I reject the defendant's position and find for a fact that the parties agreed on an extension of time and that on his own version, the defendant

[6] Kerr, Principles of the Law of Contract, 4th ed. Butterworths, 1989 at p. 392.

should have delivered the balustrades by November 2013 which he evidently failed to do.

[42] The defendant also testified that he had the balustrades ready for collection by January 2014 and this I reject as false. I find for a fact that that could not have been the position because the plaintiff's evidence, which was not effectively explained was that he had tried calling the defendant on many occasions but the latter would be told he was in meetings and never returned calls. This suggested that the defendant was, even before December, aware of his obligations to the plaintiff and that he had delayed in delivering the balustrades and had to avoid taking the plaintiff's calls. This evidence was not successfully challenged. I accordingly find and hold this for a fact.

[43] Furthermore, the plaintiff's evidence, which ties in neatly with the probabilities, is that the balustrades were not ready even in January 2014, or even February 2014. The evidence of the plaintiff, which remains effectively uncontradicted, is that he went to the defendant's premises and the balustrades were not ready, culminating in the letter of demand dated 14 February 2014. He testified that even in April and June when he called at the defendant's premises with his legal practitioners the balustrades were still not there. I find for a fact and hold that it is untrue that the balustrades were ready for collection and tendered by the defendant as from February 2014.[7] It is consequently clear and I find for a fact that the defendant failed to comply with the extended time period during which the delivery of the balustrades was to be delivered, even on his own version.

The law and application thereof to the facts

[44] According to the learned author, Christie[8] failure to perform a contractual obligation within a stipulated time frame attracts the concept of *mora.* In this regard, the elements to be satisfied are the following:

(a) there must be an obligation that is enforceable;

[7] B22 in the index of pleadings.
[8] The Law of Contract in South Africa, 7th ed. P. 522.

(b) by a person;
(c) performance must be due; and
(d) the debtor must be aware of the nature of the performance required of him or her and the fact that it is due.

[45] I am of the view that all the above elements are, from the evidence adduced fully met. It is clear from the evidence that the defendant did not perform its part of the bargain within the stipulated time nor within a reasonable time.

[46] It is clear that the plaintiff has applied for cancellation of the agreement. According to the learned author Kerr[9], cancellation of an agreement should ordinarily follow a major breach of a contract. He quotes Prof. Harker at the foot of page 703, who states the following:

'Where the aggrieved party claims rescission of the contract it is usually said that he has elected to terminate, cancel, determine, or put to an end the contract, which conveys the notion that the effect of the remedy is to nullify the contract. To say that rescission terminates or cancels the contract is reality, however, is nothing more than a short-hand expression for describing what happens to the contractual relationship between the parties, which though generally true is strictly speaking inaccurate. Where the aggrieved party, in the event of a material breach, rescinds, he makes use of a right which the legal order affords him to withdraw from the contractual relation: thus he makes manifest an intention not to receive the performance or further performance of the party in default and an intention not to perform or further perform his own obligations under the contract. In other words, he may be said to put an end to the primary obligations of the parties to perform in term of the contract. The contract itself, however, is not determined on his election to rescind.'

[47] I am of the considered view that there is no controversy regarding the fact that the breach in terms of performance by the defendant in this matter was major and therefore entitles the plaintiff as a matter of law, to determine the contract, a right he elected to exercise. The failure to perform on time would clearly have had grave

[9] The Principles of the Law of Contract, 6th ed. Lexis Nexis, 202 at p. 703.

consequences where as in a building, the finishing frills are not provided on time considering that the plaintiff took the trouble to come to this country to seek these special skills. I have no doubt in the circumstances that a case for cancellation of the agreement has been made.

[48] The plaintiff referred the court to *Van der Spuy and Another v Malpage*[10] where the court stated the questions to be asked in cases where a termination of the contract is sought. The learned Judge stated the following at paragraph 21:

> 'Essentially, the enquiry in this case is firstly, to determine whether the defendant was in breach of a material term of the contract; and if so, whether the breach was so serious that it is fair to allow the plaintiffs to cancel the contract and undo all the consequences. If the answer to these questions are (*sic*) in the affirmative the plaintiffs are entitled to the cancel the contract. In such event, they are entitled to the restitution and return of all that they have paid under the contract against delivery of the trailer."

[49] It will be apparent from my findings in the previous paragraphs that the only answer that can be returned in this regard is in the affirmative. There is no doubt that the defendant was in breach of a material term of the agreement for the reason that he did not deliver the balustrades on time, and in any event, not within a reasonable time after the agreement was entered into. Second, there can be no doubt that the breach of the agreement in this matter was serious. The plaintiff testified that he needed the balustrades to complete and to some extent, decorate his house, so to speak and he could not wait for the defendant to take his time when he needed to finish his house. The plaintiff could not be held on tenterhooks for months on end as the defendant ducked and dived.

[50] I am, in the same vein, of the view that it is fair to allow for a cancellation of the contract as the time within which the contract had to be finalized was inordinate. It would serve no purpose and be unfair, at this stage, to hold the plaintiff to the contract some three or so years after the contract was entered into. The defendant is the one

[10] 2005 (2) All SA 635 at p. 647 para *c*; 2005 JDR 0663 (N) (per Alkema A.J.).

who failed to keep his part of the bargain as the plaintiff performed and gave the defendant the wherewithal to perform his part of the bargain but the latter failed to do so and tried to remain out of reach in order to avoid contact from the plaintiff for some time.

[51] It would be preposterous to order the plaintiff at this time to accept the balustrades as in all probability, the plaintiff will have finished his house. The defendant can mitigate his losses, if any, by selling these to other interested buyers. In view of the foregoing, I am of the firm view that it would be most appropriate, in the circumstances, to undo all the consequences of the contract. The defendant only has himself to blame for the termination of the contract.

[52] In *Singh v McCarthy Retail Ltd t/a McIntosh Motors,*[11] the court reasoned as follows in relation to termination of a contract where there is a major breach:

> 'The test, whether the innocent party is entitled to cancel the contract because of malperformance by the other, in the absence of *lex commisoria*, entails a value judgment by the Court. It is, essentially a balancing of competing interests – that of the innocent party claiming rescission and that of the party who committed the breach. The ultimate criterion must be one of treating both parties, under the circumstances, fairly, bearing in mind that rescission, rather than specific performance or damages, is the more radical remedy. Is the breach so serious that is fair to allow the innocent party to cancel the contract and undo all its consequences?'

I am of the view, for the reasons advanced earlier, that the value judgment requires that the contract be terminated in all the circumstances. It follows that the defendant should restore the money paid over by the plaintiff in the circumstances.

[53] I now turn to consider the second claim, namely the one relating damages allegedly incurred as a result of the defendant's delay in delivering the balustrades. In relation to this claim, the defendant, in his written submissions stated that the costs of travel and accommodation were for the plaintiff's own account. It was further submitted

[11] [2000] All SA 487; 2000 (4) SA 795 (SCA) para [15].

that these damages were in any event unproved and there was no evidence that any damages were suffered.

[54] The learned author Kerr (*supra*), at p. 737 states the following regarding damages claimed as a result of the breach of contract:

> 'Damages may be awarded to an aggrieved party who shows that he has suffered loss; that the breach of contract is the significant factor or cause in bringing about the loss; that the amount claimed and proved is either as agreed upon or as provided for in the residual rules; and that in appropriate cases the rules on notices relating to cancellation have been complied with The fact that a breach has occurred is not, in itself, sufficient to merit an award of damages. It must be shown, in addition, that the loss has been suffered.'

[55] At p. 739, the learned author deals with the issue of causation and posits that before an aggrieved party can claim damages for breach of contract, he must show that the breach is causally connected with that loss to an extent which is significant in law. This, the learned author suggests, as I understand, is both a factual and legal issue.[12]

[56] It is clear in the instant case, that the plaintiff incurred travelling and accommodation costs. Furthermore, it appears to me that the plaintiff also incurred expenses of paying one of the plaintiff's workers to travel to get the exact measurements of the balustrades needed for the plaintiff's house. That amount paid for hotel and travel expenses proved to have been a loss suffered by the plaintiff and from which he derived no benefit as a result of the defendant's breach of the contract.

[57] I am however of the view that counsel did not give the court the necessary assistance in the written submissions, to deal closely with the various documents filed in support of this claim. It would be dangerous for the court, in the absence of committed assistance, to cut the Gordian Knot. I therefore order counsel on both sides to deal with the receipts and other documents filed in support of this claim to confer and reach an agreement on those issues not contentious in line with the court's finding.

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[12] At p. 744.

[58] Should there be any items on which no agreement is reached, these shall be referred to the court for determination. It is at that stage that the court can be able to pronounce a quantum regarding the second claim. The parties are to do this within ten (10) court days from the date of this judgment, whereafter, depending on the outcome, the court may be perfectly placed to issue an order regarding the quantum of the damages proved by the plaintiff in respect of this claim.

Order

[59] In the premises, I issue the following order:

1. In respect of claim 1, an order for the cancellation of the contract is hereby granted.
2. The defendant is ordered to restore to the plaintiff the amount of N$ 142,000, together with interest on the aforesaid sum at the rate of 20% a *tempore morae* to date of payment.
3. The parties are to meet and debate the amount due in respect of claim 2 and report to the court within 10 days from the date hereof.
4. Should there be items in dispute between the parties, these shall be identified and particularised and the court shall make a ruling thereon and thereafter pronounce the final quantum of damages due.
5. The defendant is ordered to pay the costs of the action.

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T.S. Masuku

Judge