

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

**RULING ON APPLICATION FOR ABSOLUTION FROM THE INSTANCE**

Case No: I 3445/2014

In the matter between:

**ADELINO JOSE TEXEIRA**

**PLAINTIFF**

and

**4 FOURZ AUTOMOTIVE CC**

**DEFENDANT**

**Neutral Citation:** *Texeira v 4 Fourz Automotive CC* (I 3445/2014) [2017]  
NAHCMD 311 (1 November 2017)

**CORAM** : MASUKU J

**Heard** : 26 to 29 June 2017

**Delivered** : 1 November 2017

**Flynote** : Law Of Contract – remedies for breach of contract – difference between delictual and contractual damages. Practice – Application for absolution from the instance.

**Summary** : The plaintiff entered into an oral agreement with the defendant regarding the repair of his vehicle which had been involved in an accident. It was alleged that the vehicle was to be delivered to the plaintiff in a

good state of repair three months after the delivery of same to the defendant. The defendant failed to effect the repairs within the three month period, citing the unavailability of spare parts locally and the long time it took to source same from Korea. The plaintiff cancelled the contract and claimed the refund of the deposit paid of N\$ 70 000 and also claimed N\$ 500 000 being damages he allegedly suffered as a result of the alleged breach of contract. At the close of the case for the plaintiff, the defendant moved an application for absolution from the instance in respect of both claims recorded above.

*Held* – that the application for absolution from the instance in respect of the first claim should fail for the reason, that the evidence suggested that the defendant had done some work on the vehicle and for which it was entitled to be remunerated. In this regard, because the defendant also denied that time was of the essence and that the difficulty in sourcing parts was drawn to the plaintiff's part, the defendant should be called to its defence.

*Held* – that the application for absolution from the instance in relation to the claim for N\$ 500 000 for breach of contract should succeed. The court found that the plaintiff was not entitled to claim an amount equivalent to the value of a new car, but the damages he allegedly suffered as a result of the defendant's alleged breach of the contract.

*Held further* – that there is a distinction to be drawn between damages suffered in delictual matters and those suffered in contractual matters. In the latter, the claimant must prove a nexus between the breach and the damages claimed, which it was held the plaintiff failed to do.

In conclusion, the court refused the application for absolution from the instance in respect of the first claim and upheld same in respect of the second claim. There was no order as to costs in light of the partial success and failure by both parties. The trial was ordered to continue in respect of the first claim.

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## ORDER

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- a) The application for absolution from the instance is refused in Claim 1 and the defendant is called to its defence.
- b) The application for absolution from the instance in respect of Claim 2 is granted.
- c) There is no order as to costs.
- d) The matter is postponed to 2 November 2017 at 09h30 for the setting of dates for the continuation of the trial.

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## RULING

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### **MASUKU J:**

#### Introduction

[1] Presently serving before court for determination is an application for absolution from the instance, which was moved by the defendant at the close of the plaintiff's case.

#### The parties

[2] The plaintiff is an adult male of Angolan extraction. In the summons, he described himself as a resident of Erf 2077, Classens Street, Windhoek, Republic of Namibia.

[3] The defendant is 4Fourz Automotive CC, a close corporation duly registered and incorporated in terms of the Close Corporation Act<sup>1</sup> of this Republic. It has its place of business situate at 5<sup>th</sup> Floor, Alexander House, Independence Avenue, Windhoek, Republic of Namibia.

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<sup>1</sup> Close Corporation Act No. 26 of 1988.

The cause of action

[4] In this action, the plaintiff claims payment of an amount of N\$ 570 000, interest on the said amount at the rate of 20% and costs of suit. In his particulars of claim, as well as in his evidence, the plaintiff claimed that he and the defendant, the latter being represented by Mr. Abdullah Ismael, entered into an oral agreement on 26 March 2012, in Windhoek.

[5] In terms of the said agreement, as alleged by the plaintiff, the defendant undertook to repair the plaintiff's vehicle, which had been involved in an accident apparently in Angola. It was agreed that the costs of the repairs would be N\$ 140 000, and that the repairs would be effected and finalised within a period of three months from the date of the agreement. Furthermore, it was further averred, the defendant undertook to perform the works in a workmanlike manner and efficiently as well.

[6] The vehicle was accordingly delivered over to the defendant on 26 March 2012 for the repairs to be done on the vehicle. On the said date, the plaintiff, it is common cause, paid the amount of N\$ 70 000 as a deposit, as agreed by the parties. It is further averred by the plaintiff that the defendant failed or neglected to keep its part of the bargain, in that it failed to effect mechanical repairs and bodyworks necessary to restore the vehicle to its pristine condition within the period agreed between the parties. As a result of this alleged breach of the contract by the defendant, the plaintiff cancelled the agreement by letter dated 14 March 2013.

[7] In consequence, the plaintiff claims the amount of N\$ 570 000 consisting of N\$ 70 000, being a refund of the deposit paid by the plaintiff to the defendant and N\$ 500 000, being what the plaintiff avers is the fair market value of the vehicle at the date of cancellation of the oral agreement. The plaintiff, as is customary in such proceedings, also claims interest and costs of the suit.

[8] In its defence, as stated in the plea, the defendant admitted entering into the contract alleged, subject to the rider that the vehicle was to be

repaired within three months subject to the availability of the necessary body parts, which had to be imported from Korea. The defendant denied that it breached the contract and consequently denied being liable to the plaintiff for the amounts claimed or at all.

#### The approach to the evidence led

[9] The plaintiff testified and also called a witness, who was introduced to adduce expert testimony. In view of the nature of the application for absolution from the instance, which I will deal with in fuller detail as the ruling unfolds, I will briefly and to the necessary extent, chronicle the pertinent parts of the plaintiff's evidence, together with that of his expert witness. In this regard, crucial portions of the cross-examination of these two witnesses will be traversed as well.

#### The chronicle of evidence led

[10] The plaintiff, in his witness' statement, filed in terms of rule 92, stated that he is a male adult from Lubango, Angola (not from Claassens Street, Windhoek as alleged in the combined summons). It was his evidence that on 26 March 2012, at Windhoek, he entered into an oral agreement with the defendant, which was represented by a Mr. Ahmed. In terms of the said agreement, the defendant undertook to repair the plaintiff's motor vehicle, which had been involved in an accident for an amount of N\$ 140 000. The plaintiff undertook to pay the costs of the repairs in two tranches, being a deposit of N\$ 70 000 before the commencement of the work and the balance of another N\$ 70 000 upon receipt of the repaired vehicle.

[11] It was his evidence that the said vehicle was to be repaired and delivered to him within a period of three months from the date of the agreement and that the repair works were to be carried out in a workmanlike and efficient manner. The work to be done included: repairing damage to the vehicle; repairing damage to the engine; replacing all damaged body parts of the vehicle and spray-painting the vehicle.

[12] He testified further that he handed over the vehicle to the defendant on 26 March 2012 and paid the deposit as agreed. To his dismay, the defendant failed to repair the vehicle in terms of the agreement and when he came to inspect the vehicle, he found it dismantled in such a manner that repair of same was rendered impossible. He accordingly called upon the defendant to rectify its breach of the oral agreement, to no avail. This prompted the plaintiff to engage legal practitioners to act for him, namely, Nambahu Associates. After an exchange of letters between the parties' legal representatives, the plaintiff's legal practitioners proceeded to issue a terse letter dated 15 March 2013, cancelling the agreement 'with immediate effect.'<sup>2</sup>

[13] In cross-examination, it was put to the plaintiff that the defendant was not tasked with the repair of the engine, but to examine it. The plaintiff testified that the vehicle was a 2010 model and he did not know the number of kilometres on the odometer at the time the vehicle was submitted for repairs. He further testified, that he had driven the vehicle for about a year and a half before the accident and that he had bought the vehicle for US\$ 50 950, which is the equivalent of the amount of N\$ 500 000 claimed by the plaintiff in the second claim at the time the claim was instituted.

[14] The plaintiff further testified that the defendant's representative with whom he dealt at the delivery of the vehicle, informed him that the parts would take a long time to arrive, as they had to be sourced from Korea. It was put to the plaintiff that from the pictures introduced by the plaintiff in evidence, it was plain that the defendant had done some repair work on the vehicle. This, the plaintiff vehemently denied, alleging that the vehicle looked more damaged after the repair alleged by the defendant than it was before. It was put to him that the vehicle needed to be dismantled first, before the repairs on the body of the vehicle could be effected and the plaintiff ultimately agreed to this proposition.

[15] It was the plaintiff's further evidence under cross-examination, that it seemed to him, when he came to see the vehicle and took the pictures, that the vehicle had been abandoned for a long time. The plaintiff was also asked

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<sup>2</sup> See Exhibit "A".

what the value of the vehicle was and he informed the court that he received a quote from a Hyundai dealer in Angola, in respect of a new 2013 3.8 V6, 4X4 model vehicle, which placed the cost of such vehicle at US\$ 50 950. It was put to the plaintiff that the defendant could not finish repairing the vehicle, because of the difficulty in sourcing the spare parts required for the vehicle and that the plaintiff was informed of this difficulty both in writing and orally.

[16] The plaintiff admitted this and stated that Mr. Abdullah told him three things that made him extremely unhappy. Firstly, that the parts were being sourced from Korea and that they were to come by boat. Second, that the person to whom the deposit had been paid had run away with the money and was in South Africa and lastly, that the parts were difficult to find. The plaintiff did admit, however, that the defendant requested to be afforded more time to try and finalise the works on the vehicle, but it was his evidence that he had already given the plaintiff more than ample time to finish the job, but it had failed, hence the proceedings he eventually instituted.

[17] Lastly, the plaintiff admitted that the defendant had offered to restore the plaintiff's vehicle to the state it was in when delivered to it and that the defendant would paint it and return the vehicle to the defendant, together with the deposit, but the plaintiff refused that offer, reasoning that the defendant would be unable to restore the vehicle to its condition when it was brought to the defendant for repairs. That was the extent of the material aspects of the plaintiff's evidence.

[18] The second witness for the plaintiff was Mr. Leonard Moses Tuhafeni. He testified that he did his training in panel beating in South Africa at Bellville Technical College in the year 2000. It was his evidence, however, that he had started the panel beating trade in 1998. It was his evidence that he had about 19 years' experience in panel beating.

[19] On the strength of his expertise and experience, he had been asked by Mr. Nambahu to prepare a quotation for the vehicle. It was his evidence that the vehicle had been totally dismantled when he saw it and his opinion was that the vehicle had been damaged beyond economic repair and he wrote a

letter to that effect. He opined that the vehicle was damaged beyond repair because it would cost more to repair it than its value at the time. He opined that the value of the vehicle was between N\$ 50 000 and N\$ 60 000, yet the costs of repairing same, would be approximately N\$ 250 000.

[20] Under cross-examination, Mr. Tuhafeni stated that it is normal practice to dismantle a vehicle when you have to carry out repairs on its body. He confirmed that in his estimation, the costs of repairing the vehicle would have been N\$ 250 000, based on the damage that was visible. It was his evidence that in some cases, there can be latent damage to the vehicle, which would not be readily visible to the naked eye and would only become apparent once the vehicle is looked at very closely with its component parts dismantled. He maintained the view that repairing the plaintiff's vehicle in the state it was in, would constitute more than 75% of its value, inevitably consigning it to being regarded as beyond economic repair.

[21] Mr. Tuhafeni also testified in cross-examination that the vehicle was not a locally available one, but was an import vehicle from Korea and it was left hand driven as well. This, he mentioned was significant for the reason that to obtain mechanical and body parts of these vehicles was like looking for streams of water in the desert, so to speak. In this wise, he testified that local dealers do not support such vehicles and accordingly do not stock spare mechanical or body parts. As a rule, he further testified, he did not repair these vehicles unless the owners provided the parts required.

[22] This witness also confirmed that obtaining parts from Korea took about three to four months, unless one had a reliable connection on the ground in Korea. It was his evidence that though he does not sell these types of vehicles, the reasonable market value of the plaintiff's vehicle would be estimated at about N\$ 20 000. That marked the end of his testimony. The plaintiff, thereafter, closed his case.

Application for absolution from the instance – the argument



[23] At the closure of the plaintiff's case, Mr. Andima, for the defendant, indicated that he wished to move an application for absolution from the instance. I took my time to explain to the plaintiff, unlettered as he was in law, what this meant. In this regard, I also requested Mr. Andima to reduce his application to writing in order to afford the plaintiff an opportunity to read and consider same and to prepare to make his argument. I found it eminently fair to deal with the application and have it argued before the plaintiff left for Angola, where he currently works and resides. This was to avoid him having to return to this country to argue the application and require him thereafter to return for the ruling at a later stage, as that would be inconvenient and costly to him as well.

[24] In argument, Mr. Andima submitted that the defendant's application for absolution from the instance ought to be upheld for the following reasons: First, he argued that the plaintiff had failed to prove that the amount of N\$ 70 000 had not been used to source the parts and to effecting the repairs such as were done on the vehicle at the termination of the agreement. Second, he submitted that the plaintiff admitted that time was not of the essence, considering the fact that the parts for the repair of the vehicle were not available locally and would take 3 to 4 months to obtain. It was accordingly argued, that the plaintiff has failed to show that the failure to repair the vehicle within a period of three months from the delivery of same to the defendant, constituted a material breach of the contract.

[25] In closing, Mr. Andima submitted that the plaintiff had also failed to prove the damages he sought in the amount of N\$ 500 000. In this regard, it was his contention that the plaintiff had failed to prove, by admissible evidence, the fair market value of the vehicle or its trade value to determine what damages he was entitled to, if any. He also pointed out that the plaintiff's own witness, Mr. Tuhafeni, had placed the reasonable market value of the vehicle at N\$ 20 000 and further testified that the said vehicle was beyond economic repair.

[26] The plaintiff, for his part, argued contrariwise and submitted that his vehicle was kept by the defendant for a long time without being repaired and that it was in fact in a worse condition than the state he had brought it to the defendant. He maintained that the agreement was for the defendant to effect repairs on the vehicle within the three months' period, which it evidently failed to do. For that reason, so the argument ran, the defendant was in breach of the oral agreement and was for that reason liable to the plaintiff as claimed, both for the return of the deposit and the damages claimed.

#### The law on absolution from the instance

[27] I will not seek or attempt to apply my paint to a blank canvass as it were. The issue relating to absolution from the instance is now well documented in judgments of our courts. In *Okorusu Fluorspar (Pty) Ltd v Tanaka Trading and Another*,<sup>3</sup> this court, in dealing with an application for absolution from the instance referred to *Gordon Lloyd Page and Associates v Rivera and Another*,<sup>4</sup> where Harms J.A. stated the principles applicable to the application in the following terms:

'This implies that a plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution from the instance because without such evidence, no court could find for the plaintiff. . . . As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be reasonable one . . . The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is evidence upon which a reasonable man might find for the plaintiff . . . – a test which had its origin in jury trials when the "reasonable man" was a reasonable member of the jury . . . Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court.'

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<sup>3</sup> *Okorusu Fluorspar (Pty) Ltd v Tanaka Trading and Another* (I 2055/2013) [2016] NAHCMD 16 (5 February 2016).

<sup>4</sup> *Gordon Lloyd Page and Associates v Rivera and Another* 2001 (1) SA 88 (SCA) at 93.

[28] This formulation of the law, has been accepted with approval by our Supreme Court in *Stier and Another v Henke*.<sup>5</sup> On the other hand, in *Factcrown Ltd v Namibia Broadcasting Corporation*,<sup>6</sup> the Supreme Court, in dealing with this very question of the application reasoned as follows:

‘This implies that a plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff’.

[29] The task facing the court at this juncture, is to determine by reference to the principles articulated above, whether on the evidence adduced by the plaintiff, it can be said that a court, reasonably directed may and not ought to find for the plaintiff. It is to that very question that I now proceed.

#### Application of the law to the facts

##### *The first claim*

[30] As indicated, Mr. Andima argued that in relation to the first claim, the defendant was not in any way in breach of the contract as the time for the delivery of the vehicle was dependent on the sourcing of the spare parts from Korea. There is also evidence, although the plaintiff sought to argue to the contrary, that the vehicle was dismantled and he found it in a state worse than he had delivered it to the defendant.

[31] The plaintiff’s own witness however testified that the dismantling of the vehicle was a necessary evil, if I may call it that, in eventually effecting the necessary repairs to the vehicle in question. In any event, the plaintiff, himself admitted under cross-examination that the tearing apart of the vehicle was necessary for the repairs to be done to the vehicle in question. It becomes clear that the plaintiff refused to take the vehicle back when tendered because he claimed it was impossible for any mechanic to restore it to the condition in which it was before delivery to the defendant.

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<sup>5</sup> *Stier and Another v Henke* 2012 (1) NR 370 (SC).

<sup>6</sup> *Factcrown Ltd v Namibia Broadcasting Corporation* 2014 (2) NR (SC) at para 72.

[32] In this regard, I am of the view that the application for absolution from the instance in relation to the claim for return of the refund should fail. I say so for the reason that from the plaintiff's case, it is alleged that the vehicle was to be repaired and handed over to the plaintiff within a specified period. The defendant has raised a version that serves to contradict the plaintiff's version regarding the period agreed for the repairs and this is an issue that must, in my view, be submitted to a full hearing, by ordering the defendant to place their evidence before court to determine whence the probabilities lie.

[33] Furthermore, it seems to me that with the plaintiff having terminated the agreement for breach, which is an issue to be determined at the end of the entire case, there is no gainsaying that the defendant did some work on the vehicle and this is consistent with the plaintiff's expert witness' evidence, namely that the vehicle was indeed dismantled in order to effect the repairs. In this regard, I am of the considered view that it would be improper and precipitate to allow the plaintiff's claim for a return of the deposit. The defendant should in all fairness give a breakdown of the work it did and the number of hours it spent on the vehicle and from which it can later be determined on the evidence, how much money of the deposit is due to the plaintiff, if any.

[34] Another issue that should not sink into oblivion is that of the time for performance. According to the learned author R. H. Christie,<sup>7</sup> the question whether time is of the essence in performance in terms of a contract, is not one of law, but a question of fact. In this regard, the only time it would be possible to decide whether the defendant was in breach of the contract by failing to perform on time, would be at the end of the entire case and to hear the version that was put by the defendant to the plaintiff. In this regard, I am of the considered view that the application for absolution from the instance in relation to the first claim, namely for repayment of the deposit of N\$ 70 000, paid by the plaintiff to the defendant, must fail and it is so ordered. The defendant must be called to its defence therefor.

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<sup>7</sup> R H Christie *The Law of Contract in South Africa*, 5<sup>th</sup> ed, Lexis Nexis, 2006 p. 507.

*The second claim*

[35] I now turn to the second claim for the payment of damages in the amount of N\$ 500 000, which it is claimed by the plaintiff, is the market value of the plaintiff's motor vehicle. In this regard, it is necessary to go back to the basics. In this very connection, the learned author Christie (*op cit*),<sup>8</sup> states the following:

'Any investigation of damages for breach of contract must logically start with an enquiry into whether the damages were caused by the breach.'

In other words, what we need to enquire into in this case, and at this juncture, is whether the damages of N\$ 500 000 claimed by the plaintiff from the defendant were caused by the defendant's alleged breach of the contract. In other words, there must be a nexus between the breach on the one hand, and the damages claimed by the innocent party, on the other.

[36] In dealing with this issue, the learned author Christie says the following about the applicable principles:<sup>9</sup>

'These principles call for a two-stage inquiry, first into factual causation and then into legal causation. To establish factual causation it must be shown that the breach was the *causa sine qua non* of the loss. This quaint Latin phrase is best understood by applying the but-for test: would the plaintiff have suffered the loss but for the defendant's breach?'

[37] Further down the page, the learned author makes the following important observation:

'This proof of a causal link on the balance of probabilities must be distinguished from the quantification of damages for being deprived of a chance, which is a matter of estimation.

If it cannot be shown that that the loss would not have occurred but for the breach, the plaintiff's claim for damages fails and the second stage of the inquiry does not

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<sup>8</sup> *Ibid* pp. 542 - 543.

<sup>9</sup> *Ibid* p. 543.

arise . . . Unlike damages for delict, damages for breach of contract are normally (and this word must be emphasised) not intended to recompense the innocent party for his loss, but to put him in a position he would have been if the contract had been properly performed.'

[38] Having regard to the plaintiff's particulars of claim, it does not seem that this important distinction between delictual and contractual damages was appreciated and considered in the drafting of the particulars of claim. As a result, there was confusion between the causal link and the quantification of the damages, namely, the nexus between the breach alleged and the amount claimed was not established. In this sense, what the plaintiff had to do was to prove the breach and then proceed to show that if the defendant had performed as it had to under the contract, he would not have sustained the particular damages claimed. Quantification of the damages resulting therefrom would then be a different issue and amount.

[39] In the instant case, the plaintiff seems to claim what are in essence delictual damages under the head of contractual damages, a course that is impermissible as the two types of damages, as stated above, cater for different types of scenarios and causes of action. The breach of the contract, if any, cannot just, by some inexplicable quantum leap, equate to the value of a new and later model of the plaintiff's vehicle. The plaintiff would have to prove the loss he incurred as a result of the breach and which he would not have, had the defendant performed in terms of the contract. On this leg, the plaintiff has not, in my considered view made a case and no court, properly directed, may find for him.

[40] I must mention a point I touched on earlier and it is this – the plaintiff, when offered the return of the vehicle in the same condition it was in when he delivered it to the defendant, together with the entire deposit, refused the offer. There was a further offer to spray paint the vehicle, all of which the plaintiff refused, reasoning that there was no mechanic who could be able to restore the vehicle to its pristine condition thereafter. There is no basis for this view and no expert was called to testify to this version. It seems this may have been a stratagem that suited the plaintiff and conduced to him claiming what

he thought or was advised, wrongly, as I have found, that he would be entitled on refusing the return of the vehicle to its value when he purchased.

[41] This position, it appears to me, was misplaced and finds no support in the law. I say so for the reason that in terms of the law of contract, a party who claims that the other contractant has breached the terms of the contract, has the following remedies – specific performance, cancellation of the contract and/or a claim for damages as a result of the breach of contract.<sup>10</sup> It is clear from the authorities that the innocent party may not, as the plaintiff has sought to do, claim damages that amount to the replacement of the subject of the contract by ordering payment of a new article.

[42] There is another issue in my view that merits attention and this is if it is held that the plaintiff did make out a case for damages as a result of the defendant's breach, which I have found is not the case. As indicated, the plaintiff wrongly claimed the 'replacement value' of the vehicle as the damages he allegedly incurred. In this regard, it must be mentioned that there was in any event no basis for the value of N\$ 500 000 he attached to the vehicle as the damages he suffered as a result of the breach.

[43] It must be pertinently mentioned that the alleged amount claimed, is not the value that is causally connected to defendant's alleged non-performance or its mal-performance in terms of the oral agreement alleged. It is, as stated earlier, the market value of a new 2013 model of the vehicle at cost price. This suggests that the plaintiff claims the replacement of the vehicle, inexorably pointing to the plaintiff claiming delictual damages based on an alleged wrongful conduct on the part of the defendant. Such a remedy, it must be mentioned, is one sounding in delict and not in contract, the basis of the plaintiff's claim as seen from the pleadings and the evidence adduced.

[44] According to plaintiff's evidence, the value he attached to the vehicle was not based on any expert testimony. In point of fact, his own expert testified that the vehicle was damaged beyond repairs and that he, the expert,

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<sup>10</sup> R H Christie *The Law of Contract in South Africa*, 5<sup>th</sup> ed, Lexis Nexis, 2006, Chapter 14 from p. 521.

would state the market value same at best for the plaintiff, at N\$ 20 000. In this regard, the plaintiff did not know or bring any admissible evidence regarding the quantum he claimed. On his own evidence, his vehicle was a 2010 model and there were no expert reports to show the value of the said vehicle at the time of the accident. Furthermore, the plaintiff did not even know the number of kilometres on the odometer of the vehicle, which can be factored in in arriving at the market value of the vehicle if that could be described properly as the damages arising from the defendant's breach of contract, which I have held is not the case.

[45] Mr. Andima, in argument, referred the court to *Lazarus v Rand Steam Laundries*,<sup>11</sup> where the court, per De Villiers J, quoting with approval the sentiments expressed in *Hersman v Shapiro & Co*<sup>12</sup> reasoned as follows:

'There are cases where the assessment by the Court is very little more than an estimate, but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff, which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available is produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damage suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based on it.' See also *Quick Security Services CC V Grinaker LTA Namibia (Pty) Ltd*.<sup>13</sup>

[46] In the circumstances, I am of the considered view that even if it were to be held that the plaintiff suffered damages as a result of the alleged breach by the defendant, which I have found has not been made out as discussed above, I come to the conclusion that the evidence of the plaintiff's own expert

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<sup>11</sup> *Lazarus v Rand Steam Laundries* 1952 (3) SA 49 (T) p. 51.

<sup>12</sup> *Hersman v Shapiro & Co* 1926 AD 367 p. 379.

<sup>13</sup> *Goamub Quick Security Services CC v Grinaker LTA Namibia (Pty) Ltd* (I 167/2012) [2013] NAHCMD 190 (10 July 2013).



had the deleterious effect of plunging a dagger repeatedly into the heart of the plaintiff's case in relation to the claim for what is referred to as the fair market value of the plaintiff's vehicle. This effectively sounds the death knell to the plaintiff's claim 2 and in the circumstances, I find that the application for absolution from the instance made by the defendant is apposite and should be upheld.

[47] I must mention that from my analysis, it clear that Mr. Andima himself did not seem to appreciate the true character of the issues in relation to the second claim. He seemed to have accepted the dummy sold to him both in the pleadings and in evidence that the amount claimed could, if proved, be the damages suffered as a direct consequence of the breach of contract by the defendant.

### Conclusion

[48] In the premises, I am of the considered view that in respect of the first claim, the plaintiff has made a case that will call for the defendant to answer to the allegation of breach and the relief sought by the plaintiff in regard to the said claim. In relation to the second claim for damages, I am of the considered view that the application for absolution from the instance should be upheld firstly because the plaintiff has not, as should have been the case, led evidence of the nexus between the breach by the plaintiff and the damages allegedly suffered as claimed. Secondly, the quantum sought by the plaintiff is not supported by the expert witness he called and there is an attempt to substitute a claim, as it were, with a mere quantification of the alleged damages, without setting out a basis for the damages alleged.

### Costs

[49] According to the learned authors Herbstein & Van Winsen,<sup>14</sup> a defendant who is absolved from the instance should be regarded as being the successful party, in which case the plaintiff should be ordered to pay the defendant's costs, unless there are sound grounds why that should not be the case.

[50] In the instant case, the situation is what would be referred to as a draw in footballing parlance. I say this because the defendant succeeded in its application for absolution in respect of the second claim, but did not succeed in respect of the first claim. In the latter claim, the defendant was called to its defence. In the premises, it is clear that there was partial success and partial failure by both parties. The fair order to issue in the circumstances, in my considered view, is to make no order as to costs, which I hereby do.

#### Order

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

- a) The application for absolution from the instance is refused in Claim 1 and the defendant is called to its defence.
- b) The application for absolution from the instance in respect of Claim 2 is granted.
- c) There is no order as to costs.
- d) The matter is postponed to 2 November 2017 at 09h30 for the setting of dates for the continuation of the trial.

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TS MASUKU  
Judge

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<sup>14</sup> A C Cilliers, C Loots & H C Nel *The Civil Practice of the High Courts of South Africa* 5<sup>th</sup> ed, Juta, 2009 Vol 1, p. 925.

## APPEARANCES:

PLAINTIFF:

In Person, Windhoek

DEFENDANT:

T Andima

Of Van der Merwe-Greef Andima Inc.