



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2465/2013

In the matter between:

**PETER HRANOV**

**PLAINTIFF**

and

**SIMON NEKWAYA**

**DEFENDANT**

**Neutral citation:** *Hranov v Nekwaya (I 2465/2013) [2017] NAHCMD 71 (10 March 2017)*

**Coram:** Miller AJ

**Heard:** 6<sup>th</sup> – 8<sup>th</sup> November 2015

**Delivered:** 10 March 2017

**Flynote:** Civil Practice – Law of Contracts and Agreements – Breach of Contract – Onus of Proof – Two conflicting versions of the parties – By balancing probabilities select a

conclusion which seems to be the more natural or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one – It is generally accepted in our law that the failure of a party to call a material witness may lead to an inference that the witness would not have supported the evidence of the defendant.

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### **ORDER**

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1. Judgment in favour of the plaintiff, in the amount of N\$50 000.00
2. The defendant is ordered to pay costs, including costs of one instructing and one instructed counsel.

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### **JUDGMENT**

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Miller, AJ:

Brief Facts

[1] The plaintiff claims payment from the defendant in the amount of N\$50 000,00, together with interest on the aforesaid amount at the rate of 20% per annum temporae morae to date of payment, which amount he allegedly paid over to the defendant.

[2] The following is common cause and undisputed as between the parties:

2.1. The parties entered into a written agreement, in terms of which the defendant agreed to lease certain immovable property situated in Ongwediva, Namibia.

2.2. The parties agreed on the amount of N\$50 000.00

2.3. The agreement was concluded on the 26<sup>th</sup> of October 2011 at the offices of the plaintiff.

2.4. The effective date and or commencement date would be the day on which the plaintiff occupied the property.

[3] The plaintiff alleges that he complied with all his obligations in terms of the agreement, in that he has lend and advanced the defendant N\$50 000.00 on 26 October 2011. The plaintiff alleges that the defendant, despite demand, failed to deliver the building to the plaintiff to enable the plaintiff to take occupation thereof for 3 months for free as agreed. Furthermore, it is contended that the defendant never informed the plaintiff that the property concerned was subject to a dispute of ownership and that he could not occupy the property straight away.

[4] Briefly, the plaintiff contends that on the 26<sup>th</sup> of October 2011, The defendant went to the plaintiff's place of business situated in Feld Street, Windhoek, where they concluded and signed the written agreement in which the plaintiff would advance the defendant N\$50 000.00. The plaintiff testified that he sent his daughter Renate Hranova, to collect the N\$50 000.00 from the safe and to give same to him, which he gave to the defendant and which the defendant counted the money in the plaintiff's presence. The plaintiff further testified that the defendant was accompanied by a gentleman unknown to him.

[5] The defendant in his plea denied that the plaintiff gave him N\$50 000.00 and that the plaintiff failed to pay the said amount after signature of the agreement and thereafter refused and neglected to pay same.

[6] The defendant further pleaded that the parties agreed that the said deposit would be paid by means of a cheque but the plaintiff did however not have his cheque book on him, consequently he advised that he would pay the amount by means of an electronic transfer in the designated bank account of the defendant. Defendant further submits that the plaintiff failed to settle the amount as agreed.

[7] The plaintiff however testified that, when the parties concluded the contract, the plaintiff wanted to give the defendant a cheque for the payment, but the defendant did not want a cheque as he informed the plaintiff that he needed to pay the money in Windhoek for a Court case.

[8] The only issue which falls for determination is whether in fact the plaintiff paid to the defendant the cash amount of N\$50 000.00 at his offices in Windhoek.

[9] In this regard, there are two conflicting versions and in dealing with different versions, giving rise to different probabilities, Damasab, AJA, as he then was, stated the following in the matter of ***M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz Megabuilt v Kurz***<sup>1</sup> -

*'[30] . . . Now it is trite law that, in general, in finding facts and making inferences in a civil case, the Court may go upon a mere preponderance of probability, even although it's so doing does not exclude every reasonable doubt . . . for, in finding facts or making inferences in a civil case, it seems to me that one may . . . by balancing probabilities select a conclusion which seems to be the more natural or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one.'*

[10] The plaintiff in his evidence stated that the defendant was accompanied by a third person, whose name he did not mention. The plaintiff's evidence was that he wanted to hand the defendant a cheque but the defendant insisted on receiving the amount in cash and the plaintiff then instructed his daughter Renate Hranova to fetch the cash in the safe, which he then handed over to the defendant.

[11] In support, he called both the daughter and Ms. Elizabeth Valomboleni as witnesses and who corroborated the evidence of the plaintiff.

[12] The defendant was the only witness to testify in his defence and stated that the plaintiff could not hand him a cheque because the plaintiff stated that he had forgotten his cheque book at home. On that basis, he denies that he ever received any payments from the plaintiff.

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<sup>1</sup> 2008 (2) NR 775 (SC)

[13] The defendant admits that he was accompanied by another person, a certain Mr. Mathew Mushimba, who he says was present during the discussions between him and the plaintiff, however Mr. Mushimba was never called to testify.

[14] The evidence of the plaintiff and his witnesses corroborate one another in all material respects. The evidence of the defendant, could easily have been supported by the evidence of Mr. Mushimba, which as I have indicated was not called as a witness.

[15] It is generally accepted in our law that the failure of a party to call a material witness may lead to an inference that the witness would not have supported the evidence of the defendant.

[16] The balance of probabilities favours the evidence of the plaintiff and his witnesses.

[17] I accordingly find that the plaintiff proved on a balance of probabilities that he had in fact paid the amount of N\$50 000.00 to the defendant. I therefore make the following orders:

17.1. Judgment in favour of the plaintiff, in the amount of N\$50 000.00

17.2. The defendant is ordered to pay costs, including costs of one instructing and one instructed counsel.

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PJ MILLER

APPEARANCES:

PLAINTIFF: B DE JAGER

INSTRUCTED BY: Fisher, Quarmby & Pfeifer, Windhoek

DEFENDANT: K.L. Naruses

OF:

Shikongo Law Chambers, Windhoek