

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT

CASE NO. I 3445/2013

In the matter between:

ADELINO JOSE TEXEIRA

PLAINTIFF

and

4 FOURZ AUTOMOTIV CC

DEFENDANT

Neutral Citation: *Texeira v 4 Fourz Automotiv CC* (I 3244/2014) [2018]
NAHCMD 233 (6 August 2018)

CORAM: MASUKU J

Heard : 3 and 6 April 2018

Delivered: 6 August 2018

Flynote: Law of Contract – restitution of deposit following the termination of contract.

Summary: The plaintiff and the defendant entered into a contract for the repair by the defendant of the former's vehicle, following a car accident. The plaintiff claimed payment of N\$ 500 000 for the fair market value of a new vehicle in the light of the defendant's alleged failure to repair the vehicle, resulting in the plaintiff cancelling the agreement. This court, in an application

for absolution from the instance, granted the application, leaving open the plaintiff's claim for repayment of the deposit of N\$ 70 000.

Held – that there is a case that the defendant did some work on the plaintiff's vehicle and for which it is entitled to compensation by the plaintiff.

Held further – that on the undisputed evidence adduced, the defendant spent time on the vehicle which translates to a figure between the amounts of N\$ 25 000 and N\$ 35 000. The court, in its quest and best effort to do justice between the parties, in the absence of direct evidence, granted the defendant an amount of N\$ 30 000 and ordered the defendant to return to the plaintiff an amount of N\$ 40 000 to the plaintiff plus the vehicle in question.

ORDER

1. The plaintiff's claim for a refund succeeds to the extent that the defendant is ordered to return to the plaintiff an amount of N\$ 40 000, against delivery of the plaintiff's vehicle.
 2. The plaintiff is ordered to pay the costs of this action.
 3. The matter is removed from the roll and is regarded as finalised.
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JUDGMENT

MASUKU J:

Introduction

[1] In this action, the plaintiff, who hails from the People's Republic of Angola, sued the defendant for payment of an amount of N\$ 570 000, consisting of a deposit of N\$ 70 000 and N\$ 500 000 being the market value of a vehicle he delivered to the defendant for repairs but which the latter

allegedly failed to repair. As a result of the defendant's alleged failure to repair the said vehicle, the plaintiff cancelled the contract and claimed the amounts stated in this paragraph.

The history of the case

[2] The trial commenced and the plaintiff closed his case on 30 June 2017. On that day, the defendant indicated that it would move an application for absolution from the instance. The application was heard and a ruling on the said application was delivered by this court on 17 November 2017. In its ruling, the court granted the application for absolution in relation to the claim for the market value of the vehicle which was alleged to be N\$ 500 000 but concomitantly dismissed the application for absolution in respect of the claim for a refund of the deposit of N\$ 70 000 and costs.

[3] That being the case, it becomes as clear as noonday that the scope of the matters for determination is very narrow indeed. After reviewing the evidence, I can state with no fear of contradiction that there is very little contestation on the matter for determination.

[4] I say so for the reason that the parties are in agreement that the plaintiff did in fact pay the deposit claimed and the defendant admits receipt of same. The only question that has to be determined is whether the plaintiff is entitled to the return of said amount at all and if not the entire amount, how much he is entitled to. That is the issue I intend to examine in the paragraphs that follow.

Determination

[5] In this regard, as indicated above, there is no question about the fact of receipt of the said amount by the defendant. In terms of the evidence led and accepted, at the time the plaintiff left his vehicle with the defendant for repairs, he paid a deposit of N\$ 70 000. This amount, it is common cause, was, in

part, to enable the defendant to source parts for the repair works that needed to be done to restore the plaintiff's vehicle to its pristine pre-collision condition.

[6] It is clear from the evidence led that the defendant failed to get the parts required for the reason that same were not available locally but had to be sourced from Korea, which appears to be the country where the said vehicle was manufactured. This difficulty was conveyed to the plaintiff, who, after some time, decided to cancel the contract and to claim a fair market value of a new vehicle of the model he had left with the plaintiff for repair.

[7] It is also common cause that once the dispute between the parties went full throttle, the defendant, in a bid to diffuse tensions, offered to return the deposit to the plaintiff, together with the plaintiff's vehicle. The latter, however, refused to accept this proposal. He insisted on claiming the amount for a new vehicle, thus leading to the present proceedings.

[8] I have read the heads of argument filed of record by Mr. Andima in this matter and they appear to me to totally miss the point. I say so for the reason that in them, he deals at length with the issue of the cancellation of the agreement by the plaintiff, an issue that does not appear to me to be of any real consequence in this matter, regard had to how the matter has developed, particularly considering the ruling on the application for absolution from the instance.

[9] In this regard, Mr. Texeira, also for his part, and quite understandably too, because he was acting in person, appeared to resurrect dead embers of the case and may not have understood the effect and impact of the ruling given by the court in its application for absolution from the instance. This, as I have said, is perfectly understandable from his disadvantaged position as a lay litigant.

[10] In his spirited argument, though misguided, as stated above, Mr. Texeira, severely objected to Mr. Andima's reliance on certain cases in support of his argument. These cases included *Eckleben v Mobile*

*Telecommunications Limited*¹ and *Namibia Breweries Limited v Serrao*.² His principal objection to the reliance by the defendant on these cases, was that the cases related to juristic persons yet he was a natural person and found this reliance disconcerting, because it amounted, so to speak, to comparing apples and oranges.

[11] The court attempted to explain to Mr. Texeira the whole doctrine of precedent, which applies in our jurisdiction but does not apply in civil jurisdictions. I can only hope that the explanation proffered to Mr. Texeira had the desired effect and that he will leave with at the least, a modicum of understanding how our legal system, where he chose to institute the proceedings, operates.

[12] In my view, as stated earlier in this judgment, the crisp question for determination, is whether the plaintiff is entitled to the return of his entire deposit and if not, how much he is entitled to? In answering this question, this court has at its disposal, only the evidence of the defendant's only witness Mr. Abdullah Mia Ismael. The paucity of evidence makes it difficult for the court to properly and fully deal with the matter at hand. Caught between the rock and a hard place, the court must make do with the best evidence at its disposal in its quest to do justice between the litigants, as imposed upon it by the Constitution of this Republic.

[13] It was Mr. Abdullah's evidence that once the plaintiff's motor vehicle was submitted to the defendant's garage for repairs, he did panel beating work on the vehicle. In this regard, it was his evidence that it was necessary to strip the vehicle apart in order to straighten the damaged parts. In this process, he further testified, it was necessary to remove the roof, which was damaged and to also remove some of the mechanical parts inside the vehicle.

[14] Mr. Ismael further testified that he straightened the roof of the vehicle and repaired it. He also testified about further work that he did in attending to the plaintiff's instructions up to the time the dispute arose. Regrettably, he

¹ (I 920/2012) [2016] NAHCMD 46 (9 March 2016).

² 2007 (1) NR 59 (HC).

testified further, the plaintiff would not understand his frustrations with the unavailable spare parts. It was his evidence that he charged the plaintiff per hour for the work done and in his estimation, the work he had done at the time the contract was terminated by the plaintiff amounted to between N\$ 25 000 and N\$ 35 000. This figure was not contested by the plaintiff, neither could he properly do so in view of his own client's evidence, namely Mr. Moses Tuhafeni, that the work done by the defendant, which the plaintiff criticised was necessary in the circumstances.

[15] I will not dwell much on the cross-examination of the defendant's witness. I do not do so for the reason that the plaintiff's cross-examination was aimed at matters that are not in contention for the purpose of dealing with the only remaining question on the table, namely, the return of the deposit. The plaintiff dwelt in cross-examination on his dealings and arguments with the defendant regarding whether stripping the vehicle formed part of repairing the vehicle, an issue answered in the affirmative by the plaintiff's own expert witness Mr. Moses Tuhafeni.

[16] I can only state that Mr. Ismael, for the defendant denied the allegations levelled at him that he failed to do the work required of him. It was his evidence that the plaintiff abused him physically by pushing him. That was not all. The plaintiff also insulted him, which resulted in him telling the plaintiff to take the vehicle away and that he would refund the plaintiff the entire amount he had paid as a deposit. It was also Mr. Ismael's evidence that the plaintiff's own expert had testified that the vehicle was a complete write-off and for that reason, required a lot of time and spare parts not readily available in Namibia.

[17] It was Mr. Ismael's evidence that once the plaintiff decided to cancel the agreement, he had no option but to stop work on the vehicle. He testified that had the plaintiff not interfered with his work, he would have finished the panel beating of the vehicle, as the body, suspension and engine were all damaged, requiring a lot of time to restore these to a pristine pre-accident condition.

[18] In view of the evidence led, there is no gainsaying that the plaintiff did some work on the vehicle. This is confirmed by the pictures that were admitted in evidence. I therefor find for a fact that the defendant did carry out some work on the vehicle. I also find for a fact that the defendant stopped doing the work on the vehicle upon the plaintiff cancelling the contract. Mr. Ismael's evidence on this aspect was not challenged and therefor remains unhinged.

[19] Mr. Ismael testified as to how much the work he did was worth and he was not questioned or challenged on that aspect. In this regard, I am of the considered view that the work the defendant did on the vehicle was of value and improved the condition of the vehicle and to the plaintiff's benefit. As a matter of law, the defendant is entitled to be compensated for its labour and which the plaintiff agreed to in terms of the agreement between the parties.

[20] In this regard, the defendant testified convincingly in my opinion, regard had to the time the work must have taken to repair the vehicle, that the amount due to him in relation to the work done up to the stoppage of the work, is between N\$ 25 000 and N\$ 35 000. This was not at all challenged as stated earlier. The defendant is an expert in this trade and his evidence of what must have been the reasonable amount to charge for the work done should be accepted, in my considered view, particularly there being no other available evidence, to the contrary.

[21] In the premises, I am of the considered view that in the absence of a full break down of the amount, in terms of hours and work actually done to the minute detail, it is left upon this court, on the best available evidence, to do justice between the parties in this matter. In doing so, it would be proper to strike a figure between the two figures given on behalf of the defendant's expert in evidence in this regard, being a figure that would be fair to both parties.

[22] Taking into account the evidence before me and doing the best I can in the circumstances in a quest to attain justice, I am of the considered view that it would be fair and reasonable to order that the defendant is entitled to retain an amount of the N\$ 30 000, against the return of the vehicle by the defendant to the plaintiff. The figure of N\$30 000 is between the two figures given in evidence and which remained uncontested by the plaintiff. In this regard, it then stands to reason that the defendant will have to refund the plaintiff N\$ 40 000 from the balance of N\$ 70 000 paid by the plaintiff to the defendant.

Return of plaintiff's vehicle

[23] It follows, in my view, that the plaintiff's first claim for payment of the N\$ 500 000 having been a casualty at absolution from the instance stage, that the plaintiff is, in the circumstances, entitled to the return of the motor vehicle, considering that the evidence suggests that it is in a better shape than it was on presentation to the defendant. This is so because the work done on it by the plaintiff was necessary to restore it to its pristine condition but for the plaintiff deciding to cancel the contract on the basis of doubtful advice as earlier mentioned.

Costs

[24] It is now a well-established principle that the determination of costs resides within the discretion of the court, and which discretion is to be exercised judicially. In this matter, it would appear to me that each party had a relative amount of success in this matter. On a mature consideration of the case though, I am of the considered view that had the plaintiff been properly advised, the matter would not have served before court as the defendant had offered to return the deposit and tendered the vehicle to the plaintiff, which would have rendered it unnecessary for the plaintiff to institute these proceedings. In this regard, it is well to also consider that the plaintiff's first claim was found to be totally misdirected.

[25] In view of the defendant's tender to return the vehicle, together with the deposit, juxtaposed with the plaintiff's refusal of the tender, which would have averted these proceedings, I am of the considered view that it would only be fair and reasonable that the plaintiff should be ordered to pay the costs of this action

Order

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

1. The plaintiff's claim for a refund succeeds to the extent that the defendant is ordered to return to the plaintiff an amount of N\$ 40 000, against delivery of the plaintiff's vehicle.
2. The plaintiff is ordered to pay the costs of this action.
3. The matter is removed from the roll and is regarded as finalised.

T S Masuku
Judge

APPEARANCE

PLAINTIFF: In person

DEFENDANT: T Andima
of Van der Merwe-Greeff Andima Inc., Windhoek