

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2016/02264

In the matter between:

STANDARD BANK NAMIBIA LIMITED PLAINTIFF

and

WERNEL NGHILIFAVALI NGASHIKUAO

DEFENDANT

Neutral Citation: *Standard Bank Namibia Limited v Ngashikuo* (HC-MD-CIV-ACT-CON-2016/02264) [2018] NAHCMD 282 (4 September 2018)

CORAM: PRINSLOO J

Heard: 18-20 June 2018 and 02 July 2018

Delivered: 04 September 2018

Reasons: 13 September 2018

Flynotes: Contracts – Interpretation – Taking into account text and context as well as knowledge of contracting parties at conclusion of contract – Background evidence not permissible and not needed to interpret unambiguous contracts.

Summary: Plaintiff and defendant signed an instalment sales agreement in terms whereof the Defendant purchased a 2010 Nissan Navara 2.5 Diesel, with engine number YD25196099T and chassis number MNTVCUD40 Z002443. The total amount payable by defendant for the said vehicle was N\$ 235 309.68, including VAT, which was payable in 54 monthly instalments. The first instalment was due 1 January 2014. By June 2014, the Plaintiff failed to pay its monthly instalments and became in arrears with the plaintiff. The plaintiff sent out a letter of demand, and despite demand, the defendant remained in breach. As a result the plaintiff cancelled the agreement and sold the car on auction and subsequently brought this action before court seeking the outstanding amounts.

The defendant opposed the action on grounds that, firstly, there was an insurance agreement between the parties, the defendant insured the vehicle against risk or loss, damage, destruction or mechanical breakdown under a Motorite insurance plan and paid the applicable insurance premiums to the plaintiff together with or inclusive of the monthly instalments. When the vehicle experienced severe mechanical problems in June 2014, the plaintiff failed or neglected to effect payment despite the fact that the defendant's monthly instalments and premiums on the Motorite plan was fully paid up. Plaintiff was therefore unduly enriched by defendant's continued payment of the monthly instalment and/or the insurance premiums as per the Motorite plan. Secondly, that clause 12.2.2 of the agreement entitled the plaintiff to retain all monies paid by the defendant to it, the defendant plead in that such a term is in contravention with section 6(1)(g) of the Credit Agreement Act. Thirdly that defendant did not receive the letter of demand as he moved from that address, and thirdly that Mr. Christian, who testified on behalf of the plaintiff, was not present at the time of the signing and conclusion of the credit agreement.

Court held: There is no dispute that the instalment sale agreement was validly entered into between the parties and sure enough, no argument arises from that. I tend to regard that the instalment sale agreement and the Motorite plan are two separate agreements. In all fairness, an insurance policy is but a necessity for both parties to cover for eventualities and mitigate losses in specific circumstances, however, it is not an obligation carried by the seller but the purchaser.

Held further: The deeming provision concerning registered post is triggered when the notice is sent. This is so whether the *domicilium* address is occupied or in use or not. It effectively means that, it is valid delivery whether or not the party receives it.

Held further: The defendant's conduct by failing to make monthly instalment payments in terms of the agreement between the parties amount to a clear breach of contract. Court is satisfied that the failure to pay any one of the instalments on due date was to be regarded by the parties as a sufficiently serious breach of the agreement as to accelerate payment of the full amount due under the agreement and, hence, such a default must surely have been intended to be a material breach of the contract thereby paving the way for the plaintiff, in compliance with the default procedures (particularly by giving notice of its intention to cancel), to cancel the agreement. The defendant was not entitled to withhold any payment to the plaintiff on the grounds pleaded. The insurance agreement was not between the plaintiff and the defendant and the plaintiff had no obligation to effect and/or pay for mechanical repairs to the vehicle by virtue of the insurance policy pleaded.

ORDER

Judgment is granted in favor of the Plaintiff against the Defendant in the following terms:

- a) Payment in the sum of N\$ 168 526.66;

- b) Interest at a rate of 10.75% per annum as from 18 June 2016 until date of final payment;
- c) Cancellation of agreement is confirmed;
- d) Cost of one instruction and one instructed counsel.

JUDGMENT

PRINSLOO J:

The parties

[1] The plaintiff is Standard Bank Namibia Limited, a company with limited liability, duly incorporated in terms of the company laws of the Republic of Namibia and registered as a banking institution in terms of the Banking Institutions Act, Act 2 of 1998.

[2] The defendant is Wernel Ngashikua, an adult male who resides in Otjiwarongo.

Background and pleadings

[3] On 22 November 2013 and at Walvis Bay, the defendant and Standard Bank entered into an instalment sales agreement ('the agreement') in terms whereof the Defendant purchased a 2010 Nissan Navara 2.5 Diesel ('the vehicle') with engine number YD25196099T and chassis number MNTVCUD40 Z002443.

[4] In terms of the agreement, the principal debt is made up as follows:

2.1 Cash price	N\$ 195 000.00
2.2 Add: total extras	N\$ 1 916.24.
2.3 Add: finance charges	N\$ 47 234.54

2.4 Add: Dentsure	N\$ 3 127.20
2.5 Add: Motorite	N\$ 7 532.70
2.4 Less: initial payment	<u>N\$ 19 500.00</u>
Total collectable	<u>N\$ 235 309.68</u>

[5] The total amount payable was therefore N\$ 235 309.68, including VAT, which was payable in 54 monthly instalments, with the first instalment which became due on 01 January 2014.

[6] In terms of the terms and conditions of the agreement:

6.1 Ownership in the 'goods' remains vested in the plaintiff until the defendant has discharged all his obligations in terms of the agreement;

6.2 The Defendant shall be liable to pay plaintiff's legal costs on a scale as between attorney and client arising from his failure to comply with any of the terms and conditions of the agreement;

6.3 Should the defendant commit any breach of the agreement, the plaintiff may at its election cancel the agreement, obtain possession of the goods and retain all monies paid by the defendant, subject upon plaintiff having given notice to the defendant.

6.4 After due demand, the plaintiff may cancel the agreement, obtain possession of the goods and recover from the defendant, as a genuine pre-estimate of liquidated damages, the difference between the total amount payable and the value of the goods at the date on which plaintiff obtains possession of said goods.

[7] It is the plaintiff's case that the defendant defaulted on his obligation to pay the premiums under the agreement since June 2014. Despite written demand on 09 June

2014 and 11 September 2014, the defendant failed to remedy the breach. The plaintiff further pleaded that the defendant's conduct amounted to a repudiation of the written agreement, which was so accepted by the plaintiff. Consequently the plaintiff repossessed the vehicle on 22 January 2015 and duly cancelled the agreement in writing on 24 February 2015.

[8] The motor vehicle was sold on auction on 16 March 2016 and as a result of the defendant's cancellation of the agreement, the plaintiff alleged that it suffered damages in the amount of N\$ 168 526.66 and seeks the following relief from this court:

- (a) Payment in the sum of N\$ 168 526.66;
- (b) Interest at 10.75% per annum as from 18 June 2018 until date of final payment;
- (c) Confirmation of the cancellation of the Agreement;
- (d) Cost of suit on the scale as between attorney own client;
- (e) Further and/or alternative relief.

[9] In his plea, the defendant admitted the conclusion of the agreement and the terms thereof. However, on the averment by the plaintiff that it shall be entitled to retain all monies paid by the defendant to the plaintiff, the defendant pleaded that such a terms in is in contravention with section 6(1)(g) of the Credit Agreements Act, Act 75 of 1980 ('the Act').

[10] In response to the allegation that the payment of the instalments was in arrears, the defendant admitted that he did not make monthly instalment payments from September 2014 but pleaded in amplification, that in terms of the agreement between the parties, the defendant insured the vehicle against risk or loss, damage, destruction or mechanical breakdown under a Motorite insurance plan and paid the applicable

insurance premiums to the plaintiff together with or inclusive of the monthly instalments. Then, when the vehicle experienced severe mechanical problems in June 2014, the plaintiff failed or neglected to effect payment despite the fact that the defendant's monthly instalments and premiums on the Motorite plan was fully paid up. Plaintiff was therefore unduly enriched by defendant's continued payment of the monthly instalment and/or the insurance premiums as per the Motorite plan.

[11] On the cancellation of the agreement, the defendant pleaded that the plaintiff unilaterally cancelled the agreement and took possession of the vehicle from the garage without his consent or a court order to that effect.

Evidence on behalf of the Plaintiff:

[12] The plaintiff intended to call two witnesses in this matter, namely Mr. Nolan William Christians, Manager: Rehabilitation and Recoveries of the plaintiff and Mr. Van Der Merwe, a Sworn Appraiser. However, during the course of the trial, the parties agreed Mr. van der Merwe's report and the valuation of the vehicle could be admitted into evidence by agreement. As a result the plaintiff proceeded to call only Mr. Christians to testify.

[13] Mr. Christians has 20 years' service with the plaintiff of which 17 years are with the Rehabilitation and Recoveries department. As indicated earlier Mr. Christians is the manager of the said department. During his evidence, Mr. Christians confirmed the background of how the instalment sales agreement came into existence between the parties.

[14] According to Mr. Williams the defendant defaulted on his monthly instalment payments since June 2014. On 09 June 2014 and 11 September 2014 the plaintiff in writing demanded that the defendant remedy his failure to pay the said instalments. Said letters of demand were sent under his hand, via registered mail to the defendant.

[15] Due to the continued breach of the defendant, the plaintiff repossessed the vehicle from a third party, Poolman Motors, on 22 January 2015. On 27 January 2015 the plaintiff obtained a valuation report from Mr D. van der Merwe of AUCOR and the vehicle was valued at N\$ 18 000.00. On the same date, the plaintiff directed a letter to the defendant informing him of the repossession as well as the provision of section 11 and 12 of the Act, affording the defendant 30 (thirty) days to pay the full settlement due by him to the plaintiff, failing which the vehicle was to be auctioned in terms of the agreement.

[16] The defendant failed to pay the amount and on 24 February the plaintiff in writing cancelled the agreement. Resultantly, the vehicle was sold on auction on 25 June 2015 for an amount of N\$ 50 000.00.

[17] Hereafter the plaintiff instituted action against the defendant for the outstanding amount as set out in the prayers.

[18] In respect of the contract of insurance, Mr. Christians denied that any contract of insurance exists between the plaintiff and the defendants. He stated that the policy in question is underwritten by Hollard Insurance Company of Namibia Limited, who is not a party to the current proceedings. During cross-examination it was put to Mr. Christians that the insurance policy does not exist. In this regard the witness responded that the fact that a copy of the Motorite Insurance plan was on the plaintiff's file does not mean that the policy did not exist.

[19] Mr. Christians stated that insofar as the defendant alleges that the insurer was obliged to pay for the repair of the vehicle and that the insurer failed to do so, has no bearing on the contract between the plaintiff and the defendant. On the issue of the Motorite Insurance plan, Mr. Christians testified that it is a product sold by the plaintiff and thereafter paid the money over to the relevant insurance company. Therefore if a client had any issues with the insurance plan the plaintiff can only refer and assist to a certain point, as the issue of a claim had to be resolved with the insurer and not the plaintiff.

[20] Mr. Christians denied that the defendant was entitled to cease the monthly instalments to the plaintiff. He stated that the alleged right to stop payment apparently emanates from a contract of insurance between the plaintiff and the defendant but denied that any insurance contract exists between the plaintiff and the defendant. He stated that the defendant had to continue making payment despite the fact that the vehicle broke down and emphatically denied that it amounted to a situation that the plaintiff was enriched.

Evidence on behalf of the Defendant

[21] The defendant erstwhile admits that he stopped making payments during the month of September 2014 but offers an explanation in that in terms of the credit agreement entered into between the parties, the defendant insured the vehicle against risk or loss, damage, destruction or mechanical breakdown under a Motorite insurance plan and paid all applicable premiums thereto to the plaintiff, inclusive of the monthly instalments. According to the defendant he had an agreement with plaintiff and not a third party insurance underwriter.

[22] The defendant further explains that on or about September/October 2014, the car experienced mechanical problems on route to Walvis Bay and as a result, the vehicle was towed to Poolman Motors, Okahandja. At Poolman Motors, the defendant was informed that there was damage to the engine of the vehicle. Defendant in turn informed the service provider that he has a Motorite Insurance which would cover the mechanical/engine damage and he furnished them with the Motorite policy number. After a few days, the defendant received a call from a Standard Bank employee informing him that the quotation from Poolman Motors was received and that it will be processed and that they will revert to the defendant through Poolman Motors.

[23] According to the defendant, a few months passed hereafter and during that time, he continued to make enquiries regarding the status of the vehicle. He further states

that he had attended to the plaintiff's head office and made personal enquiries regarding the status of his vehicle but was referred to Motorite for enquiries.

[24] The defendant further submits that as a result of the plaintiff's non-payment for the repairs, the vehicle stood idle at the garage where repairs were affected and the defendant was denied use and enjoyment of the vehicle. The defendant submits that the plaintiff was unjustifiably enriched by the defendant's continued payment of the monthly instalments and/or the insurance premiums as per the Motorite plan.

[25] After a few months, the defendant said he got a phone call from the Asset Recovery section of Standard Bank informing him that as he was in default with his monthly payments that the vehicle will be repossessed. The defendant then approached the Standard Bank Head Office in order to discuss the matter but was informed that he was approximately N\$ 50 000 in arrears and should he fail to settle the arrears the vehicle will be repossessed by the Bank. According the defendant he was willing to make the payment provided Motorite paid for the fixing of the vehicle. Defendant then later learned that that the vehicle was removed from Poolman Motors and subsequently sold in an auction.

[26] With regards to the letter of demand, the defendant submits that he was never served with same, as it appears that the letter of demand was served on the postal address he made use of in Swakopmund, whilst still residing there. He apparently changed his postal address in 2016 to his address in Otjiwarongo.

[27] During cross-examination, the defendant confirmed that when the vehicle was towed to Poolman Garage he furnished them with the Motorite policy number which he apparently obtained from the offices of the plaintiff. He confirmed that he was referred to Motorite by employees of the plaintiff as well as by friends who bank with the plaintiff. He did however not complete a claim form to claim from Motorite. The defendant maintained that there was a misrepresentation by the plaintiff as he was paying for a product (the vehicle), which he had no benefit of.

[28] On this issue, the defendant stated that the misrepresentation was founded in the fact that the plaintiff indicated that the defendant will be covered in case of mechanical problems but failed to assist when the problems arose. The defendant however admitted that the issue of representation was not pleaded.

Argument on behalf of the Plaintiff:

[29] Mrs. Campbell submits that the agreement between the parties is an instalment sale agreement and consequently contains express terms agreed to between the parties. She is further of the view that the rule specifically applicable in this matter is the parol evidence rule, holding that when a contract has been reduced to writing, no evidence may be given of its terms except the document itself, nor may the contents of such document be contradicted, altered, added to or varied by oral evidence.¹

[30] Mrs. Campbell submits that even when the defendant submits that an instalment sale agreement, by virtue of the operation of the *contra proferentum rule*,² which is a rule of interpretation of contracts, be interpreted so as to include terms that are not reflected therein, i.e. the defendant's understanding that the plaintiff (as insurer) would insure the defendant (as the insured) against certain risks, is untenable. The plaintiff is further of the view that the *contra proferentum rule* does not find application in this matter as the written agreement entered into by the parties contain no ambiguous words or phrases capable of altering the express terms of the agreement. As a result, the plaintiff submits that no rule of interpretation of contracts can assist the defendant in its conclusion that the plaintiff insured the defendant against risk.

[31] Moreover, Mrs. Campbell submits that the written agreement contains a non-variation clause in terms whereof the plaintiff and the defendant expressly agreed that

¹ *Hugo v Council of Municipality of Grootfontein* 2015 (1) NR 73 (SC) at par 18.

² R H Christie. 2006. "The Law of Contract in South Africa" 5th Ed. Durban: LexisNexis Butterworths at pg. 224. Christie explains this rule to mean that if the wording of the contract is incurably ambiguous, its author should be the one to suffer because he had it in his power to make his meaning plain.

the written agreement is the entire agreement between the parties relating to the goods.³

[32] In this regard, she submits that the plaintiff was not obliged to effect and/or pay for mechanical repairs to the vehicle by virtue of the Motorite plan nor is its failure to do so a breach of the instalment sale agreement.

[33] With regards to the allegation that the defendant was entitled to withhold payments of the monthly instalments due, Mrs. Campbell referred this court to clause 3 of the written agreement which provides as follows:

'3.1 The purchaser shall pay seller the instalment (if any) and all subsequent instalments as set out in the Schedule, or as recalculated in terms of this agreement, upon dates provided, free of exchange and without any deduction or demand at seller's above-mentioned address....

3.2 Purchaser shall not defer or withhold the initial payment or any instalment or other money due all amounts payable pursuant hereof being collectively referred to as ("the payable") by reason of set-off counterclaim of whatsoever nature or however arising.'

[34] With the above cited clause, Mrs. Campbell submits that the defendant is not allowed to withhold payment of the monthly instalments to the plaintiff for reasons advanced by the defendant.

[35] On the alleged non-compliance by the plaintiff with the Act, Mrs. Campbell submitted that the Act is not applicable to the written agreement between the parties and therefor the defendant's attack levelled against the provisions of the agreement is without merit.

[36] Mrs. Campbell also addressed the issue of the alleged unlawful possession argument, and argued that the plaintiff was entitled to obtain possession of the vehicle in the event of a breach. She submits that at the time when possession of the vehicle

³ Clause 18 of the written agreement.

was obtained, the vehicle itself was in the possession of a third party, Poolman Motors, who at the time exercised a lien over the vehicle. The plaintiff had to then pay certain amounts to Poolman Motors to obtain possession of the vehicle. In this regard, she submits that the plaintiff did not dispossess the defendant at all.

[37] In dealing with the defendant's denial that he had not received a letter of demand from the plaintiff, Mrs. Campbell submits that in terms of clause 15⁴ of the written agreement, any notice addressed and set by pre-paid registered post to purchaser's domicilium shall be deemed to have been received by the purchaser on the third day of the date of posting, and therefore submits that the defendant's allegation that it did not receive a letter of demand is but a bare denial.

[38] Mrs. Campbell argued that the plaintiff made out a case on a balance of probabilities and that this court should therefor find in favour of the plaintiff and reject the defence of the defendant.

Argument on behalf of the Defendant

[39] Mr. Kadhila argued that the defendant's case is captured in the defendant's plea as contained in par 5.1 to 5.4. This contains the answer of the defendant's offer to the plaintiff's claim. While the defendant admits that he stopped making payment in September 2014, the defendant offers the explanation in terms of the Credit Agreement between the parties. The defendant insured the vehicle against risk or loss, damage, destruction or mechanical breakdown under a Motorite Insurance plan and paid all the applicable insurance premiums to the plaintiff together with or inclusive of his monthly instalments.

⁴ '15. Domicilium

Purchaser chooses domicilium citand ("domicilium") for all purposes at Purchaser's abovementioned address. Purchaser may change its domicilium address by written notice delivered by hand or send by registered post to Seller. Any notice addressed and send by pre-paid registered post to Purchaser's domicilium shall be conclusively deemed to have been received by Purchaser on the third day after the date of posting, or if delivered by hand on date of delivery.

[40] It is the defendant's case that when the vehicle experienced mechanical problems the defendant informed the plaintiff to effect payment to the garage for the repairs to be done but the plaintiff failed to do so in spite of defendant's instalment and premiums on the Motorite plan being fully paid up.

[41] Mr. Kadhila raised the issue that Mr. Christian, who testified on behalf of the plaintiff, was not present at the time of the signing and conclusion of the credit agreement and the plaintiff failed to call Ms. De Koe who was involved at the time of the conclusion of the credit agreement. He submitted that it was important that she was called in view of the disputed version of the defendant that he did not enter in to a separate agreement with other insurance entities.

[42] Mr. Kadhila also took issue with documents referred to by Mr. Christians, of which he was apparently not the author. The documents referred to was as follows:

- (a) All the letter addressed from the plaintiff to the defendant;
- (b) Statement indicating how the outstanding balance was computed;
- (c) The undated Standard Motorite policy;
- (d) Letter from Poolman Motors (Pty) Ltd to plaintiff;
- (e) Quotation from Poolman Motors to Motorite.

[43] Mr. Kadhila argued that these documents amount to inadmissible hearsay evidence.

[44] Mr. Kadhila further took issue with the evidence of Mr. Christians where he stated that:

- (a) Motorite is a policy belonging to Hollard Insurance;

- (b) That payments were made to Motorite;
- (c) That there was an alternative agreement between the Defendant and Motorite.

[45] In this regard, it was also argued that these statements would constitute inadmissible hearsay evidence.

[46] In closing it was submitted that the defence of the defendant is a good one on the basis of doing justice between man and man as well as on the following basis:

- a) Standard Bank, on the version of Mr. Christians as a witness for the plaintiff, sold the insurance package to the defendant.
- b) Some insurance premiums were deducted from the defendant's account by Standard Bank.
- c) There is no admissible evidence that any other party other than Standard Bank had the duty to insure the vehicle.

The applicable legal principles and evaluation of the evidence:

[47] Single witnesses testified in respect of the plaintiff and defendant's cases. Mr. Christians made a favourable impression as a witness. His evidence does not contain any inherent improbabilities.

[48] The evidence by the defendant raised a few issues as there are clearly inconsistent with his plea. In the defendant's plea, he indicated that his vehicle had mechanical difficulty in June 2014 and was towed in for repairs. In his evidence under oath the defendant stated that this incident happened September/October 2014. In his plea the defendant stated that he stopped payment around September 2014 whereas in

his evidence under oath he stated that after months of the vehicle standing idle at Poolman Motor he stopped the payment.

[49] At first glance this does not appear to be material inconsistencies, however, if one bear in mind that Mr. Christian testified that the defendant defaulted on his payment for June 2014 already and the first letter of demand was issued on 09 June 2014 then the defendant's reason for stopping payment becomes questionable.

[50] The letter of Poolman Motors directed to Motorite informing it of the potential repairs to the vehicle of the defendant is dated 09 October 2014 and refers to the date of tow-in as 06 October 2014. This is in line with the defendant's evidence under oath. From these dates it is then evident that by October 2014 the defendant was in arrears for a few months already as the letters of demand requesting the defendant to correct his default was already dated 09 June 2014 and 14 September 2014. It is important to note that this evidence was left unchallenged.

[51] The only issue raised in this regard was that the evidence of the witness in this regard was hearsay evidence, which I will deal with hereunder.

[52] It was also put Mr. Christians during cross-examination that the Motorite Insurance policy does not exist, however the defendant acknowledged under cross-examination that he furnished Poolman Motors with the policy number, which is clear indication that the policy indeed exists.

[53] What is interesting in respect of the evidence of the defendant is that on his own version indicates that he was advised to take the issue of the repairs to his vehicle in terms of the policy up with Motorite, the underwriters of the policy, not only by the employees of the plaintiff but also by friends that bank with the plaintiff. However, the defendant did not follow the advice, in spite of his vehicle being out of commission for months. This explanation of the defendant makes no sense what so ever. One gets the distinct impression that the technical defence raised by the defendant in respect of the Motorite Insurance Policy and the plaintiff's alleged failure to perform in terms of the

said policy came as an afterthought to draw the attention away from his material prior non-compliance with the instalment sale agreement.

Alleged contravention of the Credit Agreement Act:

[54] A lot of issues raised with the witness fell by the way, if one have regard to the argument on behalf of the defendant. For example, the issues raised in respect of the Credit agreement was not taken any further.

[55] An issue that was raised in the plea of the defendant is that the clause⁵ in the agreement that entitled the plaintiff to retain all monies paid by the defendant to the it, the defendant plead in that such a term is in contravention with section 6(1)(g) of the Credit Agreement Act.⁶

[56] This issue was not taken any further in evidence or in argument by the defendant. In all probability it is because defendant realised that the agreement *in casu* is not subject to the Credit Agreement Act. Currently such an agreement would be subject to the Act following the amendment that came into effect on 1 August 2016.⁷ Prior to this date the provisions of the Credit Agreement Act only applied to credit transactions in terms of which the cash price was N\$ 100 000 or less.⁸ The plea of the defendant in this regard therefor has no merit.

⁵ Clause 12.2.2 of the agreement: '....Seller shall be entitled to retain (and pending receipt of payment of such damages, shall not be obliged to tender) all or any allowance and/or credits granted and all or any monies paid by Purchaser to Seller in terms hereof as security for the due payment of any damages or other payables to which Seller from whatsoever cause arising; or....

12.2.3 cancel this agreement, obtain possession of the goods and retain as a penalty all monies paid by Purchaser and all allowances and/or credit granted by Seller to Purchaser....'

⁶ (1) A credit agreement or any other agreement or document shall not contain a provision having the effect that-

(g) the credit receiver agrees to forfeit any moneys paid by him in terms of a credit agreement or any claim in respect of the goods or service in question if he fails to comply with any term of the credit agreement before such goods are delivered or such service is rendered to him;

⁷ The amendments as contained in the Credit Agreement Amendment Act 3 of 2016 (the Amendment Act)

⁸ Under Notice AG 67 of 27 May 1981 (the 1981 Notice), the provisions of the Credit Agreements Act only applied to credit transactions in terms of which the cash price was N\$100,000 or less. The Amendment Act has withdrawn the 1981 Notice in its entirety, including the provisions limiting the cash price to N\$100,000 or less.

Delivery of the letters of demand:

[57] The issue of the delivery of the letter of demand. This court notes that no further arguments were advanced in this regard. It is however clear from the wording of clause 15⁹. The deeming provision concerning registered post is triggered when the notice is sent. This is so whether the *domicilium* address is occupied or in use or not. It effectively means that, it is valid delivery whether or not the party receives it. It has clearly been provided that the defendant may change his *domicilium citandi et executandi* by written notice to the plaintiff. If the defendant therefor no longer used the address but did not change it, he assumed the risk that delivery to that address might not come to his notice. The defendant can therefore not now cry foul if he did not change his *domicilium* address.

Alleged hearsay by Mr. Christians:

[58] Mr. Kadhila had issues with the fact that the employee who was engaged in concluding the agreement with the defendant was not called to testify, but if one have regard to the plea of the defendant it is clear that there is essentially no dispute regarding the terms of the agreement reached between the parties.

[59] During the trial as well as in the heads of argument issue was taken with the portions of the evidence of Mr. Christians as being hearsay evidence.

[60] According to Mr. Christian's evidence, he heads the Rehabilitation and Recovery Department. He testified that the file of the defendant is in his custody and he acquired personal knowledge of the status of the file and have had custody and control of the documents contained therein. Clearly he had access to the relevant bank record while performing his duties as Manager. It goes without saying that when Mr. Christians claims to be person acquainted with the fact and with reference to the defendant's account he must rely upon the bank records relevant to the account. On his instructions

⁹ Supra at footnote 5.

the letters of demand was issued to the defendant and he can attest to the fact that the letters of demand was properly send to the defendant.

[61] I do find it puzzling why the letters of demand was raised as an issue at all as it was clearly identified as an issue not in dispute between the parties in their pre-trial report. I am however satisfied that the letters were issued under the hand and on instructions of Mr. Christians and that it clearly does not constitute hearsay evidence.

[62] In respect of the letter and quotation from Poolman Motors Mr. Christians stated that he found copies thereof on the defendant's file and the standard Motorite Insurance policy was discovered as an example as to what such a policy would contain. These documents were presented to this court for what it purports to be and not for the truthfulness of its contents. In any event, there appears to be no issue with the documents.

Intention of the parties at the signing of the agreement:

[63] Mr. Kadhila addressed the issue of the intention of the parties at the conclusion of the agreement and also the interpretation of the agreement.

[64] Christie states that it is rather common knowledge (or at least it is hoped) that:¹⁰

'...a person who signs a contractual document thereby signifies his assent to the contents of the document, and if these subsequently turn out not to be to his liking, he has no one to blame but himself.'

[65] In *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC* 2015 (3) NR 733 (SC), the Supreme Court explored at length in respect of the proper approach to interpreting an agreement in that matter and made the following observations:

¹⁰ Christie. 2006. "The Law of Contract in South Africa" at pg. 174-175.

[23] Again this approach seems to comport with our understanding of the construction of meaning, that context is an important determinant of meaning. It also makes plain that interpretation is 'essentially one unitary exercise' in which both text and context, and in the case of the construction of contracts, at least, the knowledge that the contracting parties had at the time the contract was concluded, are relevant to construing the contract. This unitary approach to interpretation should be followed in Namibia. A word of caution should be noted. In accepting that the distinction between 'background circumstances' and 'surrounding circumstances' should be abandoned, courts should remember that the construction of a contract remains, as Harms JA emphasised in the KPMG case, 'a matter of law, and not of fact, and accordingly, interpretation is a matter for the court and not for witnesses'.

[24] The approach adopted here requires a court engaged upon the construction of a contract to assess the meaning, grammar and syntax of the words used, as well as to construe those words within their immediate textual context, as well as against the broader purpose and character of the document itself. Reliance on the broader context will thus not only be resorted to when the meaning of the words viewed in a narrow manner appears ambiguous. Consideration of the background and context will be an important part of all contractual interpretation.'

[66] In *National Address Buro v South West African Broadcasting Corporation* 1991 NR 35 (HC) Levy J stated the following:

'Over the years several learned Judges have stated what they consider the fundamental rule of interpretation of contracts to be, but few, if any, have done so more succinctly than Greenberg JA did in *Worman v Hughes and Others* 1948 (3) SA 495 (A) at 505, when he said:

"It must be borne in mind that, in an action on a contract, the rule of interpretation is to ascertain, not what the parties' intention was, but what the language used in the contract means, ie what their intention was as expressed in the contract. As was said by Solomon J in *Van Pletzen v Henning* (1913 AD 82 at 89): "The intention of the parties must be gathered from their language, not from what either of them may have had in mind." '

[67] It would appear that the plaintiff and the underwriting company of the Motorite Insurance plan work in collaboration with one another, which one would assume is to

the benefit of both companies. I would tend to conceive that the instalment sale agreement and the Motorite plan are two separate agreements. It was the evidence of Mr. Christians that the sum due in respect of the insurance plan chosen by the client is paid over to the insurer in a lump sum, which amount is then recovered by the bank though monthly instalment payable by the client. But fact remains that the plaintiff is not an insurance company and the instalment sale agreement is not conditional to the conclusion of the Motorite plan. In all fairness, an insurance policy is but a necessity for both parties to cover for eventualities and mitigate losses in specific circumstances, however, it is not an obligation carried by the seller but the purchaser.

[68] Reviewing the wording in clause 8 of the instalment sale agreement, it provides that:

'8 Insurance

8.1 Purchaser shall immediately insure the goods with a registered insurer or through an intermediary both of Purchaser's choice and at all times keep the goods fully insured to the full amount of the selling price plus VAT.....

8.2 Purchaser shall punctually pay all insurance premiums and shall, on demand, produce written proof to Seller that the goods are insured and that all premiums due in terms of the policy have been timeously paid. Seller shall be entitled (but not obliged) to pay the insurance premium. . . . which may become due on the said insurance policy on behalf of Purchaser and the premiums . . . so paid shall be repayable to Seller by Purchaser on demand'

[69] Furthermore, in terms of clause 9 of the instalment sales agreement, it provides that:

' . . .if the goods are damaged, destroyed or lost, Purchaser shall:-

9.1 Immediately notify Seller in writing; and

9.2 Properly and timeously do everything necessary to procure payment to seller of compensation under any insurance policy, and

9.3 If so required by Seller, repair and reinstate the goods at Purchaser's cost; and continue to discharge all obligations on due date.'

[70] The agreement makes no reference to the short term insurance in question in this matter. Mr. Christians also repeatedly stated in his evidence that the insurance agreement stands separate from the instalment sale agreement as it is between the client and the insurance company, confirms that the Motorite Insurance policy was not a term of the agreement between the parties.

[71] Looking at the pleadings, there is no dispute that the instalment sale agreement was validly entered into between the parties and sure enough, no argument arises from that. What is in issue presently is the supposed insurance agreement in which the defendant is adamant is entered into between the plaintiff and himself and as a result of the alleged failure to make good the invoice of Pullman Motors in repairing the vehicle, the plaintiff is unjustifiably enriched through the premiums in which the defendant pays to the plaintiff together with monthly instalments on the vehicle.

[72] Having considered the evidence as a whole, the court cannot agree with the contentions of the defendant. The defendant's conduct by failing to make monthly instalment payments in terms of the agreement between the parties amount to a clear breach of contract. I am satisfied that the failure to pay any one of the instalments on due date was to be regarded by the parties as a sufficiently serious breach of the agreement as to accelerate payment of the full amount due under the agreement and, hence, such a default must surely have been intended to be a material breach of the contract thereby paving the way for the plaintiff, in compliance with the default procedures (particularly by giving notice of its intention to cancel), to cancel the agreement.

[73] The defendant was not entitled to withhold any payment to the plaintiff on the grounds pleaded. The insurance agreement was not between the plaintiff and the defendant and the plaintiff had no obligation to effect and/or pay for mechanical repairs to the vehicle by virtue of the insurance policy pleaded. The defendant cannot escape liability towards the plaintiff on any of the grounds pleaded.

[74] I am satisfied that the plaintiff has proven its case on a balance of probability and my order is therefor as follows:

Judgment is granted in favor of the Plaintiff against the Defendant in the following terms:

- a) Payment in the sum of N\$ 168 526.66;
- b) Interest at a rate of 10.75% per annum as from 18 June 2016 until date of final payment;
- c) Cancellation of agreement is confirmed;
- d) Cost of one instruction and one instructed counsel.

J S Prinsloo
Judge

APPERANCES:

PLAINTIFF:

Y Campbell (with her J Gaya)

instructed by Fisher, Quarmby & Pfeifer, Windhoek

DEFENDANT:

K Amoomo

of Kadhila Amoomo Legal Practitioners, Windhoek