



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

Case No: HC-MD-CIV-ACT-CON-2017/00121

In the matter between:

WINDHOEK RENOVATIONS CC

PLAINTIFF

and

SOUTHERN AFRICA CIVILS CC

DEFENDANT

Neutral citation: *Windhoek Renovation CC v Southern Africa Civils CC* (HC-MD-CIV-ACT-CON-2017/00121) [2019] NAHCMD 153 (17 May 2019)

Coram: USIKU, J

Heard on: 23 April 2018, 06 September 2018 and 21 January 2019

Delivered: 17 May 2019

Flynote: Law of contract – Agreement of letting and hiring of machinery – Court’s approach when faced with two mutually destructive versions.

Summary: The plaintiff hired certain machinery to the defendant in terms of an agreement. The defendant failed or refused to pay the outstanding amount in respect of

the machinery – Hire services. The court held the defendant liable for payment of the outstanding amount.

ORDER

- a) Judgment is hereby granted in favour of the plaintiff against the defendant, in the following terms:
- i) payment in the amount of N\$ 1,504,576.75;
 - ii) interest on the aforesaid amount at the rate of 20% per annum calculated from the date of judgment to the date of final payment;
 - iii) costs of suit, such costs to include costs occasioned by the appointment of one instructing and one instructed legal practitioner.
- b) The matter is removed from the roll and regarded finalized.
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JUDGMENT

USIKU J:

Introduction

[1] In the present action the plaintiff prays for judgment against the defendant in the following terms:

1. Payment in the amount N\$ 1,504,576.75;
2. Interest on the outstanding balance from time to time a *tempore morae* at the rate of 20% per annum.
3. Costs of suit.
4. Further or alternative relief'

[2] The plaintiff's claim is based on an alleged contract between the plaintiff and the defendant in terms of which the plaintiff hired certain machinery to the defendant, and that the defendant failed or refused to pay for the services rendered. The defendant

had entered appearance to defend and claims that it has paid for all services rendered and denies liability to pay the plaintiff.

The plaintiff's version

[3] In support of its claim, the plaintiff called three witnesses namely Johan Van Wyk (Mr Van Wyk), Alfeus Kamara (Mr Kamara) and Erica Fourie (Ms Fourie).

[4] The gist of Mr Van Wyk's testimony is that on or about 26 March 2015 the defendant (represented by Mr Lazarus Emvula (Mr Emvula)) requested a quotation from the plaintiff (represented by Mr Van Wyk) for certain machinery hire services in respect of a site situated at Karibib. Thereafter, the plaintiff leased the required machinery to the defendant during the period of August 2015 to June 2016. The defendant has paid for some of the services rendered in respect of the leased machinery. However, the defendant failed to pay some of the invoices in respect of the aforesaid services. The amount still outstanding is N\$ 1,504,576.75.

[5] Mr Kamara testified that he is employed by the plaintiff as a machinery operator. He related that he operated the leased machinery hired by the defendant at the Karibib site during the period in question. At all relevant times, he, representing the plaintiff, together with certain John Khoeseb (and sometimes Mr Kameeta), representing the defendant, signed job-cards at the commencement and at the end of each work day evidencing the type of services rendered as well as hours worked. Such job-cards were given in evidence as exhibits during the trial. Mr Kamara further testified that a Liebherr R944 machinery was one of the machinery he operated during 2016, for the benefit of the defendant as evidenced in the relevant job cards.

[6] Ms Fourie, to a large extent corroborated the version of Mr Van Wyk on the issues such as the correctness of the invoices and the amount outstanding which is due, owing and payable by the defendant.

[7] At the conclusion of the plaintiff's case, the defendant applied for absolution from the instance. The court, after hearing both parties, dismissed the application for absolution from the instance with costs.

The defendant's version

[8] The defendant called one witness, Lazarus Emvula (Mr Emvula). In his evidence Mr Emvula testified that the defendant did not order for and did not receive the services of the rental of machinery named Liebherr R944 during 2016. He related that the defendant has settled in full the relevant invoices in respect of the machinery it hired. Mr Emvula further deposed that it was standard practice and agreement between the plaintiff and the defendant that the defendant would not lease or hire any machinery without a written order. In 2016 the defendant did not request for the hiring of a Liebherr R944 nor did it receive such services.

Analysis

[9] In this matter, the plaintiff relies for its claim on a partly written and partly oral agreement entered into between the plaintiff (represented by Mr Van Wyk) and the defendant (represented by Mr Emvula). According to the plaintiff, the written parts of the agreement comprises of; a letter from defendant requesting hire of certain equipment for hire ("Annexure A"), certain quotations, invoices representing the amount outstanding ("Annexure B"), certain job cards ("Annexures C and D"). These annexures are attached to the plaintiff's particulars of claim. The oral part of the agreement comprises the hiring of machinery by the plaintiff to the defendant by way of oral orders as well as some payment arrangements allegedly agreed to between the parties.

[10] The defendant admits the written part of the agreement¹. However the defendant claims that the parties also agreed that orders for machinery hire shall be in writing.

¹ Para 2.2 of the defendant's plea.

[11] The onus is on the plaintiff to prove on the balance of probabilities that it hired machinery to the defendant in terms of their agreement and that the defendant failed or refused to pay for such service.

[12] In this matter, the court is faced with two different versions, namely the version of the plaintiff and the version of the defendant. This court has to deal with the two mutually destructive versions. Both counsel for the plaintiff and for the defendant cited authorities on the approach that the court has to follow in a situation as this. Counsel for the plaintiff cited *Sakusheka and Another v Minister of Home Affairs 2009 (2) NR 524 (HC)*. Counsel for the defendant cited *National Employers Mutual General Insurance Association v Gany 1931 AD 187 at 199*. In *National Employers v Jager 1984(4) SA 437 at 440-G*, the court concisely formulated the approach to be taken when a court is faced with two mutually destructive versions, as follows:

‘It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff’s allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff’s case any more than they do the defendant’s, the plaintiff can only succeed if the court nevertheless believe him and is satisfied that his evidence is true and the defendant’s version is false.’

[13] I agree with the approach formulated above and I am of the view that it should be followed in this case.

[14] I shall first deal with the issue of the partly written and partly oral agreement in terms of which the Liebherr R944 machinery was allegedly hired by the defendant. Mr Van Wyk testified that the parties agreed orally during 2016 for the hire of the Liebherr 944 to the defendant. According to Mr Van Wyk, at times the defendant, represented by Mr Emvula, would request some machinery via telephone call and the machinery was then availed to the defendant. On this score Mr Kamara who operated the Liebherr R944 during the period in question, confirmed having personally operated the machinery in question at the defendant's Karibib site. There is also documentary evidence in the form of job-cards, which according to the evidence, are counter-signed by a representative of the defendant, verifying the correctness of the information appearing thereon.

[15] The aforesaid evidence is to be weighed against that of the defendant. I must underline that nobody else other than Mr Emvula testified that the services in question were not rendered. Mr Emvula's version on this aspect is not credible when weighed against the testimony of Mr Kamara who was present at the Karibib site and actually operated the machinery in question.

[16] The defendant alleged an agreement entered into by the parties that all orders for equipment shall be in writing. However, the defendant did not lead evidence as to when, where and how (whether oral/written) such agreement was concluded. Furthermore, the 'written order' defence of the defendant does not appear in the pre-trial defence as an issue in dispute for determination by the court at trial and should therefore not be available to the defendant.

[17] When I consider all the evidence both oral and documentary, I am satisfied on the preponderance of probabilities that the version of the plaintiff is true and acceptable and that the version of the defendant is false or mistaken and falls to be rejected. I am convinced that there was an agreement in terms of which the plaintiff hired the machinery, including the Liebherr R944, to the defendant at the defendant's request.

The defendant failed or refused to pay for the service rendered. Such payment is due, owing and payable by the defendant to the plaintiff.

[18] In the result I make the following order:

- a) Judgment is hereby granted in favour of the plaintiff against the defendant, in the following terms:
 - i) payment in the amount of N\$ 1,504,576.75;
 - ii) interest on the aforesaid amount at the rate of 20% per annum calculated from the date of judgment to the date of final payment;
 - iii) costs of suit, such costs to include costs occasioned by the appointment of one instructing and one instructed legal practitioner.

- b) The matter is removed from the roll and regarded finalized

B Usiku
Judge

APPEARANCES

PLAINTIFF:

C Van Der Westhuizen
Instructed by Dr Weder, Kauta & Hoveka,
Windhoek

DEFENDANTS:

N Mhata
Of Sisa Namandje and Co Inc, Windhoek