



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2512/2013

In the matter between:

HANS IVO LUHL

PLAINTIFF

and

SOLSQUARE ENERGY (PTY) LIMITED

DEFENDANT

Neutral citation: *Luhl v Solsquare Energy (Pty) Limited* (I2512/2013) [2019]
NAHCMD 259 (29 July 2019)

Coram: Unengu, AJ

Heard: 05 March 2019

Delivered: 29 July 2019

Flynote: Civil Practice – Plaintiff suing defendant for damages – Confirmation of contract – Court granting the plaintiff the relief claimed in the claim with costs – Counterclaim dismissed with costs.

Summary: During August 2010, negotiations took place between the plaintiff and the representatives of the defendant about the sale of a wind turbine Kestrel 5 Kilowatt horizontal. The plaintiff was presented with a quotation attached to the plaintiff's claim as annexure "A" by Mr von Gossler on behalf of the defendant, accepted and signed by plaintiff on 9 August 2010. But because the plaintiff was not provided with a written guarantee against wind damage and protection against lightning, the plaintiff cancelled the agreement and is claiming a refund of the deposit he paid to the defendant and other expenses he incurred in preparation of the installation of the wind turbine with costs. Meanwhile, the defendant also filed a counter-claim against the plaintiff claiming from him damages suffered as a result of the cancellation of the agreement with costs. In conclusion, the court granted judgment in favour of the plaintiff and dismissed the counter-claim of the defendant with costs.

Held – that the plaintiff has managed to prove his claim on a balance of probabilities' and that the probabilities favour him with regard to the defence of the counter-claim.

Held further – that the defendant was sluggish and remiss in defending the plaintiff's claim and has failed to deal with the allegations in the counter-claim specifically, in particular the quantum.

ORDER

- a) The cancellation of annexure "A" (Exhibit "E") is confirmed.
- b) Payment of the amount of N\$75 000.
- c) Payment of the amount of N\$5 000.
- d) Interest on the aforesaid amount at the prime rate plus 15% from date of payment of the N\$75 000 until date before service of summons.
- e) Interest on the aforesaid amount at the rate of 20% per *annum* from date of service of the summons to date of final payment.
- f) Costs of suit which costs to include costs of one instructing and one instructed counsel.
- g) The counterclaim is dismissed with costs, which costs to include costs of one instructing and one instructed counsel.

JUDGMENT

UNENGU, AJ

Introduction:

[1] The plaintiff, Mr Hans Ivo Luhl issued combined summons against Solsquare Energy (Pty) Limited, the defendant and prayed for a judgment against the defendant in the following terms:

'Ad main claim and first and second alternative claims:

1. Confirmation of the cancellation of annexure "A".
2. Payment in the amount of N\$75 000.
3. Payment in the amount of N\$5 000.

Ad third alternative claim:

4. Payment in the amount of N\$75 000.

Ad all claims:

5. Interest on the aforesaid amount at the prime rate plus 1% from date of payment of the N\$75 000 until date before service of summons.
6. Interest on the aforesaid amount at the rate of 20% per annum from date of service of the summons to date of final payment.
7. Cost of suit.
8. Further or alternative relief.'

[2] Here below is "Annexure A" referred to in para 1 of the relief claimed:

Quotation Estimate		
Solquare Energy (Pty) Ltd. Unit 3 Rosch Industrial Park 38Newcastle Str. Northern Industrial PO Box 90997 Windhoek, Namibia Phone: +264 61 21 1675 Fax: + 264 61 61 0309 E-mail: joring@solsquare.com Internet: http://www.solsquare.com	Customer Information: Hans Ivo Luhl Lodge 1 x 5 kW Wind turbine 2.4 kW Hybrid system Windhoek Namibia	Deliver to:

Date: 10
August 2010Quote No.
02010-0386f

Pos.	No.	Description	Quantity	Unit Price	Discount %
			Amount		
<hr/>					
	1.	PV electric system 220v Solar system 2.4 kW			
1.2		SolatireDirect PV Pannels (245 W)	1	NAD 5 390.00	NAD
			53 900.00		
1.3		Phonix Multi plus Inverter 24/5000/125 A	1	NAD 23 595.00	NAD
			23 595.00		
1.4		Quotback charge controller (90 A)	1	NAD 7 744.00	NAD
			7 744.00		
1.5		Armed conection cable	150	NAD 98.01	NAD
			14 701.50		
1.6		Ops2 1000 Ah turbular deep cycle 2V Battery	12	NAD 5 808.50	NAD
			69 696.00		
1.7		Battery monitor BMS-6002 (9-90V)	2	NAD 544.50	NAD
			1 089.00		
1.8		Cable	200	NAD 240.20	NAD
			4 840.00		
1.9		Timer for friges	1	NAD 1 028.50	NAD
			1 028.50		
<hr/>					
Sub-Total				NAD 176 594.00	
<hr/>					
2.		Windcharge			
2.1		Kestrel horizontal axes 5 kW turbine with control	1		NAD
			89 318.25		
<hr/>					
Sub-Total				NAD 89 318.25	
<hr/>					
3.		Labour and parts			
3.2		Installation of Solar panels	1	NAD 6 800.00	NAD
			6 800.00		
3.3		Installation of wind turbine with tower	1	NAD 12 000.00	NAD
			12 000.00		
3.4		Set up of Batteries with controler	1	NAD 3 400.00	NAD
			3 400.00		
3.5		Sep up of wind turbine controller and connection	1	NAD 3 200.00	NAD
			3 200.00		
3.6		Transport of Labour and parts	1	NAD 28.00	NAD
			4 480.00		
3.7		Out of station allowance	1	NAD 1 200.00	NAD
			12 000.00		
<hr/>					
Sub-Total				NAD 41 880.00	
<hr/>					
				Total NAD:	<u>NAD</u>
				307 792.25	
				VAT 15%	<u>NAD</u>
				46 168.84	
				Total NAD, inc. VAT:	<u>NAD</u>
				353 961.09	

Condition of payment: 50% on order, 50% on delivery.

Delivery terms: EX-works Windhoek

Quote valid for 30 days. Accepted (signed by Hans Ivo Luhl) Date 09-08-2010 E&OE

We reserve the right to change the system components*****

[3] Annexure "A" forms part of the amended particulars of claim and appears to be the hub on which the claim revolves, therefore, for purpose of my judgment, I will quote paras 3 to 30 *in extenso* and use the contents of these paras as the background because most of the claims the plaintiff wants the court to grant him are founded on the said paragraphs 3 to 30.

Background:

[4] Ad main claim:

4.1 During or about August 2010 the Plaintiff was desirous of purchasing a 5kW Wind Turbine and Batteries with Inverter Installation ("*the equipment*") from the Defendant, provided that the equipment would be sold under guarantee against wind and lightning damage, which guarantee would be provided in writing.

4.2 On or about 10 August 2010 the Defendant presented the Plaintiff with a quotation for the equipment (annexure "A" hereto) and the Defendant, duly represented by Mr Joring Von Gossler, with the intention of inducing the Plaintiff to purchase the equipment would indeed be sold with written guarantees against wind and lightning damage.

4.3 Relying on the truth of the aforesaid representation, which was material to the purchase of the equipment, the Plaintiff accepted annexure "A", constituting the written portion of the partly oral and partly written agreement between the parties and to pay in partial performance of the terms reflected in annexure "A" to the Defendant, a deposit in the amount of N\$75 000 during or about September 2010. It was a material express, alternatively implied, in the further alternative tacit terms of the agreement as afore pleaded that the equipment will be covered by and subject to guarantees against wind and lightning damage.

4.4 During or about January 2011 it came to Plaintiff's knowledge that the aforesaid representation by the Defendant was false in that the equipment could not

be sold to the Plaintiff with the aforesaid guarantee against wind and lightning damage.

4.5 As a result of the aforesaid misrepresentation, the Plaintiff cancelled annexure "A", alternatively hereby cancels annexure "A". In the premises, the plaintiff is entitled to restitution of the amount of N\$75 000 and the Defendant is indebted or liable to the Plaintiff in that amount. Plaintiff also expended an amount of N\$ 5 00 for purpose of constructing a foundation for the equipment, which, as a result of the aforesaid misrepresentation and subsequent cancellation, Plaintiff herewith claims from Defendant and which cost were within the contemplation of the parties.

[5] And first alternative claim:

5.1 During or about August 2010, the plaintiff was desirous of purchasing a 5kW Wind Turbine and Batteries with Inverter Installation (*"the equipment"*) from the Defendant, provided that the equipment would be sold under guarantee against wind and lightning damage, which guarantee would be provided in writing.

5.2 On or about 10 August 2010, the Defendant presented Plaintiff with a quotation for the equipment (annexure "A" hereto) and the Defendant, duly represented by Mr Joring von Gossler, represented to the Plaintiff that the equipment would indeed be sold with written guarantee against wind and lightning damage.

5.3 The aforesaid representation was material and was intended to induce the Plaintiff to accept annexure "A", constituting the written portion of the partly oral and partly written agreement between the parties and to pay in partial performance of the terms reflected in annexure "A" to the Defendant a deposit of the amount N\$75 000. It was a material express, alternatively implied, in the further alternative tacit, terms of the agreement as afore pleaded that the equipment will be covered by and subject to guarantees against wind and lightning damage.

5.4 The Plaintiff, relying on the truth of the aforesaid representation, accepted the quotation (annexure "A") and paid the Defendant, during or about September 2010, a deposit in the amount of N\$75 000. The presentation was false in that the equipment could not be sold to the Plaintiff under the aforesaid guarantee against wind and

lightning damage. The Defendant was negligent in making the aforesaid representation as it did not make proper enquiry from the manufacturer as to the guarantees offered upon the sale of the equipment.

5.5 As a result of the aforesaid misrepresentation, the Plaintiff cancelled annexure "A", alternatively hereby cancels annexure "A". In the premises, that Plaintiff is entitled to restitution of the amount of N\$75 000 and the Defendant is indebted or liable to the Plaintiff in that amount.

[6] Ad second alternative claim:

6.1 During or about August 2010, the plaintiff was desirous of purchasing a 5kW Wind Turbine and Batteries with Inverter Installation (*"the equipment"*) from the Defendant, provided that the equipment would be sold under guarantee against wind and lightning damage, which guarantee would be provided in writing.

6.2 On or about 10 August 2010 the Defendant presented Plaintiff with a quotation for the equipment (annexure "A" hereto) and the defendant, duly represented by Mr Joring von Gossler, represented to the Plaintiff that the equipment would indeed be sold with written guarantees against wind and lightning damage.

6.3 The aforesaid representation was material and was intended to induce the Plaintiff to accept annexure "A", constituting the written portion of the partly oral and partly written agreement between the parties and to pay in partial performance of the terms reflected in annexure "A" to the Defendant a deposit in the amount of N\$75 000.

6.4 When making the aforesaid representation, the Defendant knew it to be false in that the Defendant knew that the equipment could not be sold with such guarantee. When making the aforesaid representation, the Defendant intended the Plaintiff to act thereon and to pay the Defendant a deposit in the amount of N\$75 000.

6.5 The said fraudulent misrepresentation induced the Plaintiff to sign and accept annexure "A" and to pay to the Defendant a deposit in the amount of N\$75 000. Had

the Plaintiff known that the equipment would not be sold with the aforesaid guarantee, the Plaintiff would not have accepted annexure "A".

6.6 As a result of the aforesaid misrepresentation the Plaintiff cancelled annexure "A", alternatively hereby cancels annexure "A".

6.7 In the premises the Plaintiff is entitled to restitution of the amount of N\$75 000 and the Defendant is indebted or liable to the Plaintiff in that amount.

[7] Ad third alternative claim:

7.1 During or about September 2010 the plaintiff paid to the Defendant an amount of N\$75 000. The aforesaid payment to the Defendant by the Plaintiff was not indebted to the Defendant in that amount, or any part thereof. The aforesaid enrichment was unjust and without cause. The aforesaid enrichment was at the expense of the Plaintiff and the Plaintiff was impoverished as a result thereof.

7.2 In the premises the Defendant is liable to the Plaintiff in the amount of N\$75 000 which amount, demand notwithstanding, the Defendant refuses or fails to pay to the Plaintiff.

Defendant's Plea and counter-claim:

[8] On 12 March 2015 the defendant, after further particulars to the amended particulars of the plaintiff's claim, filed a plea and counter-claim wherein the defendant prayed for an order confirming the plaintiff's repudiation of the agreement; payment in the amount of N\$240 886.62; interest on the aforesaid amount at a rate of 20% per annum from date of counter-claim, costs of suit inclusive of costs of one instructed and one instructing counsel and alternative relief.

The defendant's defence:

[9] The defendant's defence is succinctly summarised by counsel for the defendant in the written heads of argument as follows:

- a) The defendant denies the alleged misrepresentation and specifically denies that the equipment would be sold with a guarantee (written or otherwise) in respect to wind and lightning damage.
- b) The plaintiff essentially accepted the terms and conditions reflected in annexure "A".
- c) The plaintiff by only paying an amount of N\$75 000, only partially performed in terms of the agreement.
- d) It was the plaintiff ultimately who repudiated the agreement between the parties.

[10] Like other matters, this matter also went through the judicial case management processes. As a result, therefore, a joint proposed pre-trial order in terms of rule 26 (6) of the High Court Rules was filed by the parties on the 28 January 2018.

[11] In the pre-trial order so proposed, the parties identified a long range of issues of fact to be resolved during the trial. However, very few facts were agreed upon as facts not in dispute between them. These are obvious common facts between them for example, who are the parties in the matter, the type of turbine the plaintiff wanted to purchase from the defendant, annexure "A" which is the quotation the defendant presented to the plaintiff and accepted by him, the amount of N\$75 000 paid to the defendant by the plaintiff as a deposit on the purchase price of the turbine the plaintiff intended to buy from the defendant and the demand to pay back the N\$75 000.

[12] It was further agreed by the parties that the purchase price of the turbine was N\$353 961.09 of which 50 per cent thereof the plaintiff was obliged to pay to the defendant upon ordering the turbine and the other 50 per cent of the purchase price upon delivery of the turbine in Windhoek.

[13] The parties further agreed that it was a varied or amended term of the agreement between parties that the defendant would include a promotional

reference to the plaintiff's lodge when the defendant, in respect to its products, used any picture of the plaintiff's wind turbine as promotional aid and that the plaintiff would take all the necessary steps to enable the defendant to deliver, install and commission the equipment.

[14] It is also not in dispute between the parties that the plaintiff initially and expressly requested that the turbine be sourced and delivered as a matter of urgency by air freight to Windhoek, even though it would be more expensive than by sea delivery.

[15] Similarly, it is also not in dispute in terms of the amended agreement that several site visits to the lodge of the plaintiff where the installation would take place, were conducted to prepare and plan for the installation of the turbine. However, I am not too sure whether the equipment (turbine) sourced or caused to be sourced, ordered, paid for and delivered to Windhoek per air freight by the defendant on 21 January 2011 was the correct equipment the plaintiff requested and wanted to buy from the defendant. This will become more clear in the judgment.

[16] As pointed out before, issues to be resolved during the trial per the pre-trial order are voluminous, therefore, I will not regurgitate them paragraph by paragraph as they appear in the order. However, I will deal with some issues therein later in the judgment, if necessary to do so.

Plaintiff's evidence

[17] Mr Hans Ivo Luhl, the plaintiff in the matter, testified as a single witness on his behalf. This he did by reading into the record of proceedings a prepared written witness statement as provided for in rule 93 of the High Court Rules.

[18] Mr Luhl testified that the defendant and him were engaged in negotiations with each other regarding a new generation wind turbine the defendant would want to introduce and sell to him.

[19] During such negotiations, the defendant was represented by Messrs Ingo Lange and Joring von Gossler. He said that the defendant, through Messrs Ingo

Lange and von Gossler, was desirous to introduce a new generation wind turbine to Namibia and have it tested in Namibia. On the other hand, he was also eager to generate electricity on his farm at his lodge in an eco-friendly manner and for the defendant through that to gain promotion from such wind turbine by advertising and installation thereof.

[20] According to him, and as a result of such negotiations, the defendant presented to him a quotation, annexure "A", which he had attached to the amended particulars of claim, constituting part of the written agreement they had concluded.

[21] It is further the plaintiff's testimony that according to annexure "A" which he had accepted, the defendant sold to him a Kestrel Horizontal axes 5kW wind turbine and controller, which the defendant during the negotiations presented to him to be a new wind turbine on the market which was capable of withstanding wind damage. Further that the defendant will provide him with a written guarantee against wind damage, in case the mast and turbine are blown over.

[22] The plaintiff further testified that because of the representations made to him by Mr Lange and Mr von Gossler during the negotiations, he accepted and signed annexure "A" (the quotation) on 9 August 2010 and paid the defendant a deposit in the amount of N\$75 000.

[23] The plaintiff's testimony was amplified by various emails exchanged between him and the representatives of the defendant. The emails so exchanged between the parties were handed up in court as exhibits and now form part of the record.

The Defendant's evidence

[24] The defendant called two witnesses to testify on its behalf. They are Dr Deetlof Wilhelm von Oertzen who testified as an expert and Mr Joring von Gossler. Both Dr von Oertzen and von Gossler prepared written witness statements which they read into the record and formed their evidence in chief.¹

¹ Rule 93(1)-(4).

Joring von Gossler's evidence:

[25] Mr von Gossler testified amongst others that he worked previously for the defendant as an engineer and was aware that on or about 9 June 2010 the plaintiff approached Mr Ingo Lange to provide him with a quotation for a renewable energy solution in the wind and solar sector.

[26] He testified that he visited the lodge of the plaintiff on behalf of the defendant and on 10 August 2010, provided the plaintiff with a quotation which combined wind and solar salutation at a cost of N\$356 000.

[27] On 24 August 2010, he conducted a second visit to the plaintiff's lodge, travelling 170 kilometres for further inspection to determine and assess the location for the installation of the turbine. After assessing the plaintiff's need, the witness suggested that a CT5000 vertical axle 5kW wind turbine with a controller, tower and brake would be the most advanced wind turbine to purchase. According to the witness, the plaintiff confirmed that he wanted this CT5000 vertical 5kW wind turbine.

[28] This evidence is in stark contrast with the evidence of the plaintiff with regard to the type of the turbine he wanted to be installed at his lodge. The plaintiff wanted to buy from defendant a Kestrel horizontal axle 5kW wind turbine with a controller. It is also the wind turbine type the defendant quoted for him on 9 August 2010 by quotation Q2010-0386F, including a combined wind and solar solution at a cost of N\$356 000 on which the plaintiff paid a deposit of N\$75 000 on 15 August 2010.

[29] It is further Mr. von Gossler's evidence that the plaintiff contacted him on 4 February 2011 and told him that he had accepted the last quotation Q2010-386H, that is the quotation for a CT5000 vertical axles 5kW wind turbine with a controller tower and brake which was drawn up after his visit to the plaintiff's lodge on 24 August 2011, contrary to his suggestion in his reply on 5 August 2010 when he pointed out in exhibit "C" that Kestrel wind turbines from Spain have the advantage of engineering support.

[30] Nowhere in the further correspondence exchanged between the witness and the plaintiff could be established that the plaintiff has changed his mind from Kestrel wind turbine to a CT5000 wind turbine system as testified to by Mr. von Gossler.

[31] In cross-examination, Mr. von Gossler conceded amongst others, that he did not only visit the plaintiff's lodge for work but also the neighbouring farm where he performed other duties during the same trip. Therefore, he suggested that the cost for the trip be divided in half each between the plaintiff and the plaintiff's neighbour on whose lodge he had worked.

[32] In the same vein, Mr. von Gossler has conceded again during cross-examination that not only the CT5000 turbine was ordered and delivered to Windhoek, but also a CT1000 wind turbine which turbine was later donated to NIMT College in Arandis. The costs for the CT1000 was also included in the counter-claim. Mr. von Gossler could not provide a reasonable and acceptable explanation why the defendant decided to charge the plaintiff for costs of the CT1000 turbine and for the kilometers driven to his neighbour's farm.

Deetlof Wilhelm von Oertzen:

[33] The defendant called Dr von Oertzen as an expert witness. The question that Dr von Oertzen is qualified and able to provide this court with expert opinion on issues of the matter at hand is of no doubt, if regard is had to his qualifications and experience in the renewable energy sector. He is not only a member of the Renewable Energy Industry Association of Namibia which comprises of suppliers, installers and consultants but also a co-owner and a director of the specialist consulting firm VO Consulting which conceptualizes, analyses and manages projects in the energy environment and radiation sector.

[34] In his written witness statement, Dr von Oertzen testified that he considered the pleadings in the matter to come to the conclusion he arrived. He also had regard to the plaintiff's witness statement dated 19 August 2015 and a bundle of the defendant's discovered documents.

[35] He said that he was able to provide an opinion on what the industry norm is in the renewable energy sector in Namibia in respect to guarantees or warranties of a wind turbine against wind and or lightning damage. In this matter though, he specifically referred to a Kestrel horizontal axle wind energy turbine of 5kW with a controller quoted for in annexure "A" to the amended particulars of claim of plaintiff.

[36] The system, according to him, has a certain amount of in-built protection which, if the power generated exceeds maximum specific levels, then the control system will automatically dump the excess power to protect the charge controller and the battery system from being overloaded.

[37] On the issue of lightning damage, Dr von Oertzen stated amongst others that when an installer such as the defendant erects a wind turbine like the one in issue, a lightning protection system would be attached to it which would be grounded and if lightning were to hit the lightning protection system like a purposes built-lightning conductor, the lightning bolt would run to the ground.

[38] It is clear from the witness statement of Dr von Oertzen that he was talking about a guarantee of warranty provided by a manufacturer of a wind turbine providing protection against *vis major* which the plaintiff did not request from the defendant. The guarantee the plaintiff wanted the defendant to provide him is the guarantee to cover damage sustained to the tower caused by wind or the blowing of such tower by wind. This, according to the plaintiff, was part of the negotiations between him and the representative of the defendant, which was not denied by the defendant.

[39] Dr von Oertzen also testified about the difference between the Kestrel 5kW wind turbine and the erection of the CT5000. According to him, the two turbines are structurally and mechanically different from one another, that the base plate of a Kestrel differs from that of the CT 5000 and the costs involved differ also. He further testified that it was strange that the defendant did not include the costs for the foundation in the quotation because, according to him, it is specialized work which the plaintiff could not do but should be done by a supplier or by an independent contractor appointed by the defendant.

Submissions

[40] Both Mr Mouton, counsel for the plaintiff and Mr Jones for the defendant, filed written heads of argument which they augmented with oral submissions. In his written heads of argument, Mr Mouton in the introduction, set out the plaintiff's claim, the defendant's plea to the plaintiff's claim and the counter-claim followed by the evaluation of the evidence presented in the trial. In essence, what is contained in the introduction is a recap of the pleadings and therefore will not be elaborated on further.

[41] With regard to the evidence presented during the trial, Mr Mouton discussed the evidence presented by all witnesses in more detail. He discussed the oral negotiations between Messrs Ingo Lange, von Gossler and the plaintiff which led to the signing of the quotation (annexure "A") and the payment of the N\$75000 as a deposit for the Kestrel 5kW wind turbine. He also discussed issues raised in the email correspondences exchanged between the plaintiff and Mr von Gossler in particular.

[42] In para 36 of his heads, Mr Mouton argues that on 9 August 2011 per exhibit "CC" the defendant undertook to repay the deposit of the plaintiff minus their expenses and input, but later reneged on the undertaking without a legitimate explanation. Instead, it delivered a plea against the claim of the plaintiff.

[43] In conclusion, Mr Mouton submitted that the plaintiff proved that the defendant undertook to provide a written guarantee against wind damage, a guarantee against the blowing over of the wind turbine which the defendant provided. He submits further that the defendant also failed to provide the plaintiff with lightning protection which the expert witness Dr von Oertzen said that it should have been part of the quotation.

[44] He argued further that the counterclaim should be disregarded on the ground that the amounts related to it are of a CT5000 and CT1000 while Dr von Oertzen's testimony related to annexure "A" and the Kestrel 5kW wind turbine.

[45] Meanwhile, Mr Jones, counsel for the defendant, also filed extensive written heads of argument for consideration by the court to persuade it to find in favour of the defendant with regard to its counterclaim and to dismiss the plaintiff's claim.

[46] In his written heads of argument, Mr Jones started off by giving an overview of the plaintiff's case; pointing out how the main and the alternative claims have been premised and thereafter highlighting what he considered as the salient allegations the plaintiff had made in his particulars of claim. These facts, Mr Jones copied from the particulars of claim of the plaintiff's case.

[47] After stating the salient allegations in plaintiff's particulars of claim, counsel disclosed the defendant's defence to the plaintiff's claim which I have already set out above in the judgment followed by the counterclaim.

[48] According to Mr Jones, the court will have to determine if any misrepresentation was made by the defendant; secondly whether or not the defendant in actual fact, at all material times, complied with and/or tendered full compliance with the agreement between the parties but despite this, the plaintiff in turn refused to accept the performance and in so doing, repudiated the agreement. Lastly, he argued that in the event the court finding for the defendant, the quantification of the defendant's damages must be done by the court.

[49] Mr Jones, with reference to legal principles and to case law, further discussed the requirements of the pleadings in our legal system, the elements of misrepresentation; the principle of enrichment, breach of contract and concluded with damages. In addition, counsel discussed under what circumstances it could be said that a breach of a contract has occurred. In other words, the requirements for breach of a contract.

[50] Counsel in his heads of argument also discussed damages, arguing, amongst others, that the plaintiff has a duty to take reasonable steps to mitigate damages suffered as a result of the breach of a contract.

Analysis of evidence

[51] It is apparent from the evidence as a whole, including documentary evidence in the form of email correspondences as well as other documents submitted in court, that the defendant during 2010 presented a product, namely a new wind turbine which probably was on the market and which wind turbine was capable of withstanding wind damage. This happened during the discussions initially between the plaintiff, Mr Ingo Lange, a director of the defendant and later Mr. von Gossler.

[52] It is also clear from the evidence that as a result of this discussions, the plaintiff was persuaded and became interested in buying the wind turbine from the defendant but attached certain conditions to the purchase. He insisted that the defendant provide him with a written guarantee against wind damage and protection of his properties against lightning.

[53] Further, it is the evidence and is common cause between the parties that as a result of the discussions, annexure "A" to the amended particulars of claim of the plaintiff was presented on behalf of the defendant to the plaintiff which the plaintiff signed on 9 August 2010 and paid to the defendant a deposit in an amount of N\$75 000 as asked by the defendant. Annexure "A", a copy thereof was introduced and received into the record of proceedings as exhibit "E".

[54] In para 2 of the exhibit "E", it is indicated a Kestrel horizontal axes 5kW wind turbine with controller with a price of N\$89 318-25.

[55] Furthermore, it is the evidence that after the exchange of so many email correspondences between the plaintiff and the defendant; after Mr von Gossler has visited the plaintiff's lodge on 20 October 2010, another quotation for a CT5000 wind turbine was delivered to the plaintiff by the defendant.

[56] According to Dr von Oertzen, these two turbines differ markedly from each other. The Kestrel turbine is more advanced in the wind energy industry than CT5000, which operates vertically instead of horizontally which the plaintiff was desirous to acquire. The plaintiff was also presented with a manufacturer's guarantee instead of the written guarantee against wind damage and protection

against lightning as requested by the plaintiff, upon various demands through email correspondences to provide him with a written guarantee against wind damage as verbally agreed on during the initial discussions. That being so, the plaintiff withdrew from or cancelled the agreement and demanded a refund of his deposit paid plus an amount of N\$5000 for expenses incurred by him for the casting of the foundation in preparation of the installation of the turbine.

[57] According to the expert witness Dr von Oertzen's testimony, the defendant was required or in his opinion, the quotation (annexure "A") was supposed to include the costs for labour. According to Dr von Oertzen, the casting of the foundation for the installation was supposed to be done by the defendant self or a contractor with special knowledge in construction appointed by the defendant. Further, it is also apparent from the evidence that the parties are in agreement and admitted by the defendant that annexure "A" to the amended particulars of claim of the plaintiff, is the written part of the agreement accepted and signed by the plaintiff on 9 August 2010; that the negotiations preceding the signing of annexure "A" form the oral agreement constituting the first portion of the agreement between them and the N\$75 000 paid by the plaintiff to the defendant in partial performance of his obligations arising from the agreement. However, what the defendant has denied is the misrepresentation allegedly made to the plaintiff and the written guarantee against wind damage and the protection against lightning.

Misrepresentation

[58] It trite law that there is a difference between a representation, a puffing and a term of a contract. Puffing is termed as a mere invitation to do business with no binding effect. In this case though, the negotiations that took place between the parties before the signing of annexure "A", were serious statements and parties intended them to have a binding effect. The consequence of such negotiations is that a binding verbal agreement came into existence.

[59] In *Small v Smith*,² Claasen J said the following:

² 1954 (3) SA 434 (SWA) 436.

'(a) statements of commendation or puffing have no binding effect. The same applies in general to expressions of opinion or estimations as to quantity or quality (Digest 19.2022.3).

(b) A statement by the seller not falling under (a) may either be a representation inducing the contract or it may be one which becomes a term of the contract. A statement which merely induces a contract is one which the parties did not intend to become a term of the contract (*Wright v Pandell*, 1949 (2) SA 279 (c) and *Wessels*, paras. 1015 and 4456).

(c) a statement made seriously and deliberately during the negotiations of a verbal contract becomes a term of contract, if the parties by mutual intention either expressed or implied intended it to be a term of the contract.'

[60] As pointed out, the plaintiff, Mr Ingo Lange and later Mr von Gossler, were engaged in negotiations for the sale of a Kestrel 5kW wind turbine – which, the plaintiff would be provided with a written guarantee against wind damage and protection against lightning.

[61] Failure to indicate to the plaintiff at the time of the negotiations by Messrs Lange or von Gossler that the Kestrel 5kW wind turbine could not be guaranteed against the risks of wind and lightning damage, is a misrepresentation which induced the plaintiff to accept annexure "A" and pay the deposit of N\$75 000.

[62] Defendant failed to call Mr Lange as a witness who could have refuted the allegations of the written guarantee against wind damage and of the protection against lightning. It follows therefore, that the defendant's denial of the misrepresentation is without substance and merit and therefore, rejected.

[63] Similarly, the failure to inform the plaintiff during the negotiations that the Kestrel 5kW with horizontal rotation could be replaced with a CT5000 vertical one; the advantages and the disadvantages of each of these equipment and the price of each, in my view, is another misrepresentation which contributed to the acceptance of the offer made in annexure "A". Mr Lange or Mr Eins, (the director) being important witnesses to the defendant's defence and counterclaim if called, could have assisted the court as to why the defendant already at the negotiations stage,

offered to sell to the plaintiff the Kestrel 5kW before the visit to the lodge of the plaintiff without suggesting an alternative of CT5000 in the event it turned out that the Kestrel was not suitable and left it to the plaintiff to choose between the two equipment.

[64] In any event, Mr Luhl in his evidence-in-chief and during cross-examination made it very clear that he preferred a turbine which rotated horizontally, therefore, the question of him accepting a CT5000 which rotates vertically was zero. This attitude by plaintiff was made clear in the negotiations and in the emails to the defendant when the defendant, amongst others, was told that he (plaintiff) was not prepared to go ahead with the transaction if a written guarantee and protection against lightning were not provided.

[65] The allegations by defendant that the terms of the agreement between the parties were as pleaded in paras 4.1 to 4.8 of the counterclaim and the contention that the insistence by the plaintiff to be provided with a written guarantee against wind damage as an afterthought, are not supported by the evidence as a whole.

[66] No proof was provided that exhibit "AAA" (Quotation Q2010-0386F) replaced annexure "A" and that the plaintiff abandoned annexure "A" and accepted exhibit "AAA" instead. The opposite, however, is apparent from the plaintiff's evidence asking the defendant not to proceed with implementing the agreement on 6 December 2010 per exhibit "L". A written guarantee as requested has not been given.

[67] In his testimony, Mr von Gossler again stooped low and betrayed the defendant's version by conceding in cross - examination that the amount claimed by the defendant in the counterclaim in respect of transport, included kilometer costs to and from the neighbouring lodge. No acceptable explanation was given why the defendant would want the plaintiff to also pay the neighbour's debt. To compound matters, Mr von Gossler once again caved in cross- examination and disclosed that the two turbines were bought by the defendant from Spain, packed and transported by one air freight to Windhoek. One such turbine is a small CT1000 donated to NIMT College at Arandis by the defendant. The price and all costs involved for this small turbine, so it appears, have been included in the counterclaim.

[68] The question is why would the plaintiff be saddled with costs of an item the defendant bought for somebody else? At the end of his heads of argument, Mr Jones on behalf of the defendant, requested the court, if found in favour of the defendant, to quantify the amount to be awarded to the defendant. That request cannot be granted. The defendant has an onus to prove its counterclaim and the quantum on a balance of probabilities. I take the view that the counterclaim was either badly drafted or drafted in this fashion with the purpose to mislead or confuse the other party and the court.

[69] Rule 45 (5) of the High Court Rules provides as follows:

'(5) Every pleading must be divided into paragraphs, which must be consecutively numerically numbered and must contain a clear and concise statement of the material facts on which the pleader relies for his or her claim, defence or answer to any pleading, with sufficient particularity to enable the opposite party to reply and in particular set out---

- (a) the nature of the claim, including the cause of action; or
- (b) the nature of the defence; and
- (c) such particulars of any claim, defence or any other matter pleaded by the party as are necessary to enable the opposite party to identify the case that the pleading requires him or her to meet.'

[70] In subrule (6) the following is provided:

'Every allegation in the particulars of claim or counterclaim must be dealt with specifically and not evasively or vaguely.'

[71] Meanwhile, subrule (9) provides that a plaintiff suing for damages, as is in the present matter, must set them out in such a manner as will enable the defendant reasonably to assess the quantum thereof. This applies also to the defendant who has filed a counterclaim.

[72] Similarly, in *Imprefed (Pty) Ltd v National Transport Commission*,³ the court when dealing with general principles applicable to pleadings said this:

³ 1993(3) SA 94(A) at 107.

'At the outset it need hardly be stressed that "The whole purpose of pleadings is to bring clearly to the notice of the court and the parties to an action the issues upon which reliance is to be placed" (*Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081(SR) at 1082).'

[73] It follows therefore that if regard is had to legal principles cited above, the counterclaim by including amounts having no bearing on the issues in dispute between the defendant and the plaintiff, has failed to meet the fundamental requirements of pleadings in general, therefore being vague if not evasive. The consequence of such a failure is that the defendant failed to prove an important allegation of the counterclaim, namely the quantum. It was difficult for the plaintiff to reasonably assess the quantum of the counterclaim.

Conclusion

[74] Having regard to the evidence in the matter as a whole, the written heads of argument filed of record, supplemented by oral submissions and the legal principles referred to herein, I come to the conclusion that the plaintiff has managed to prove his claim (main claim) on a balance of probabilities. I am also satisfied that overall, the probabilities with regard his defence to the counterclaim favour him. Meanwhile, the defendant was sluggish and remiss in defending the plaintiff's claim and has failed to deal with the allegations in his counterclaim specifically, in particular with regard to the quantum. It is not the function of the court to calculate the quantum the defendant wants the plaintiff to pay it or correct defects in the pleadings on behalf of a litigant.

[75] Consequently, the following order is made:

- a) The cancellation of annexure "A" (Exhibit "E") is confirmed.
- b) Payment of the amount of N\$75 000.
- c) Payment of the amount of N\$5 000.
- d) Interest on the aforesaid amount at the prime rate plus 15% from date of payment of the N\$75 000 until date before service of summons.
- e) Interest on the aforesaid amount at the rate of 20% per *annum* from date of service of the summons to date of final payment.

- f) Costs of suit which costs to include costs of one instructing and one instructed counsel.
- g) The counterclaim is dismissed with costs, which costs to include costs of one instructing and one instructed counsel.

E P UNENGU
Acting Judge

APPEARANCES:

PLAINTIFF: C Mouton
Instructed by Mueller Legal Practitioners, Windhoek

DEFENDANT: J P Jones
Instructed by Engling, Stritter & Partners, Windhoek