

NOT REPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-CON-2018/04964

In the matter between:

KAMBWA TRADING CC

PLAINTIFF

and

ONAMAGONGWA TRADING ENTERPRISES

FIRST DEFENDANT

MARTYN HAROLD IPINGE

SECOND DEFENDANT

Neutral citation: *Kambwa Trading CC v Onamagongwa Trading Enterprises* (HC-MD-CIV-ACT-CON-2018/04964) [2020] NAHCMD 335 (6 August 2020)

Coram: UNENGU, AJ

Heard: 16 June 2020

Delivered: 06 August 2020

Flynote: Judgment and Orders – Claim for damages – Plaintiff alleging a partly oral and a partly written lease agreement between it and the defendants – Lease agreement – Leasing a grader and operator to the defendants – The plaintiff complied with its obligations – Meanwhile, the defendants had failed to honour or are refusing to honour the agreement.

Summary: The plaintiff and the defendants had entered into a partly oral and a partly written lease agreement where they have agreed that the plaintiff would lease to the defendants his grader and operator at an hourly rate costs. It was further agreed that the plaintiff would also advance cash to the defendants for fuel and salaries for employees. Materials used in the construction were paid for by the Roads Authority while the costs for the hire of the grader and the operator to be paid by the defendants.

The defendants failed to pay the plaintiff the costs for the hire of grader and the operator despite the demands for payment from the plaintiff. When sued for the money owed to the plaintiff, the defendants denied owing the plaintiff money and alleged that the grader and operator were leased to the defendants at no costs or that the money the plaintiff was claiming, is money for the trailer sold to the plaintiff by defendants. Meanwhile, the court refused to accept the version of the defendants and accepted that of the plaintiff and *held* that the witness for the defendants was poor in his testimony and that he lied to the court.

Held further: that the plaintiff has managed to discharge its onus on a balance of probabilities and such should be granted judgment as claimed in the particulars of claim.

ORDER

In the result, judgment is granted in favour of the plaintiff in the following terms:

- (i) Payment in the amount of N\$ 616 858 .88 by the defendants, jointly and severally the one pays the other to be absolved;

- (ii) Interest at the rate of 20% per annum from date of summons to date of final payment;
- (iii) Costs of suite including costs of one counsel.

JUDGMENT

UNENGU, AJ:

Background

[1] The plaintiff in the matter is Kambwa Trading CC, while the defendants are Onamagongwa Trading Enterprises and Martyn Harold Ipinge, sued as first and second defendant respectively. The plaintiff is suing the defendants for money owed to it for the lease of its grader and operator to the defendants plus money for fuel and operations loaned to the defendants. The defendants are refusing or have failed to pay the plaintiff the money owed to it.

Pleadings

[2] In its particulars of claim, the plaintiff in para 5 thereof is alleging that on or about December 2014, at Okahao, the parties entered into a partly oral and a partly written lease agreement for the hire of a grader and an operator of a heavy duty machine. During the negotiations of the agreement, the plaintiff was represented by David Sheehama David and the first defendant by Mr Martyn Herold Ipinge in his capacity as the sole member of the Enterprises.

[3] The plaintiff has further claimed that the tacit and implied terms of the oral part of the agreement were that the plaintiff agreed to provide the first defendant with the equipment on or about 8 July 2015; that the plaintiff shall pay the first defendant monies

for fuel for the movement of the equipment which will be paid back to the plaintiff by the first defendant upon issuance of invoices by the plaintiff; that the agreed hiring rate shall be N\$750 per hour for the grader and N\$ 180 per hour for the operator.

[4] Further tacit and or implied terms of the oral agreement are that payment shall be determined on actual clock hours worked by the equipment by both the plaintiff and the first defendant and that the plaintiff would issue the first defendant invoices or instalments for the services rendered which are payable within 30 days from date of issuance.

[5] The plaintiff claims in the particulars of claim that it complied with its obligations in terms of the agreement and that as a result thereof, the first defendant as at 16 November 2018 , was indebted to the plaintiff in the amount of N\$ 616 858.88. The plaintiff further alleges that despite that the second defendant undertook to pay the outstanding amount within a reasonable time, both the first and the second defendant have failed to pay. Wherefore, the plaintiff is now claiming from the defendants payment in the amount of N\$ 616 858. 88 jointly and severally the one paying, the other to be absolved; interest at the rate of 20 percent per annum from date of summons to date of final payment; costs of suit; and or alternative relief.

[6] Even though the particulars of claim seem to have been drawn up with some particularity upon which the defendants could rely for their defence and to answer them, the plea thereto is vague and is sluggishly drafted. Two defendants were sued but it would seem to suggest that only one defendant tendered a plea and it is not indicated who between the first and second defendant has pleaded. Under para titled "PLEA", the content read as follows: 'The defendant pleads as follows to the Plaintiff's particulars of claim dated the 30th November 2018.' It is clear that the sentence has been couched in a singular form and cannot be said that the plea tendered is a plea for both the first and second defendant.

[7] In terms of rule 46 (2) of the Rules of Court, every plea must deal with each and every allegations made by the plaintiff in his or particulars of claim; clearly state which allegations by the plaintiff are admitted; and clearly and concisely state all material facts on which the defendant relies on as defence or answer to the plaintiff's claim.

[8] In this matter though, as it appears from the plea filed against the particulars of claim of the plaintiff, it is vague because it is not known who between the two defendants pleaded to the particulars of the plaintiff's claim. It is the duty and an obligation of the defendant or defendants in terms rule 46 (2) to state clearly and concisely all material facts on which they rely with regard their defence and answer to the claim of the plaintiff. In addition thereto, every plea must deal with each and every allegations made by the plaintiff in his or her particulars of claim.

[9] The parties were represented by Ms Janke and Mr Awaseb. Ms Janke acted on behalf of the plaintiff while Mr Awaseb represented the defendants.

[10] During the trial, Mr David Sheehama David testified on behalf of the plaintiff. He read into record his written statement prepared beforehand for purposes of the trial and was the only witness to testify for the plaintiff. He testified that he leased to the defendants his grader heavy duty machine and its operator for use at a road construction site which the defendants secured from the Roads Authority against payment at an hourly rate indicated above. According to him, the lease agreement was entered into between the plaintiff and the first defendant represented by a certain Mr Salomo because the grader of second defendant which was used on the site, had a breakdown. The agreement happened at the instance and request of the second defendant to finish the remaining piece of road still to be graded.

[11] He testified further that apart from the lease of the grader and the operator, the defendants also borrowed cash from him for fuel and salaries of the employees. He said that the Roads Authority paid him for the materials bought and used at the construction

site while the costs for use of the grader and the operator were a responsibility for the defendants.

[12] It is further his testimony that the operations of the first defendant ceased on 16 November 2018, at the time when the first defendant was indebted to the plaintiff in the sum of N\$ 616,858. 88 which the second defendant orally agreed to pay jointly and severally with the first defendant. However, despite such an agreement and undertaking, the second defendant had failed or refused to pay the indebted amount.

[13] As already indicated, Mr Ipinge, the second defendant, testified alone for the defendants. He denied entering into the lease agreement with the plaintiff to hire the equipment as claimed in the particulars of claim. According to him, Mr Salomo approached Mr David with intention to hire the equipment. He said that Mr David agreed to avail the grader and the operator to first defendant at no costs because, he graciously opined that the first defendant offered him subcontracting work, therefore, he decided not to charge the first defendant. Despite his testimony that the equipment was hired to him at no costs, Mr Ipinge testified that he paid for the costs of the operator in the amount of N\$ 4000. In any event, it does not make sense to say that the grader and operator were leased at no costs when he was not present at the time Mr David and Mr Salomo negotiated the lease.

[14] Mr Ipinge further testified that in addition to the amount paid to the operator, he also paid the plaintiff the following amounts and more, namely 40 000 to George on 8 November 2015; N\$ 40 000 to George again on 5 December 2015; N\$ 50 000 in cash handed over or paid to Kambwa at the premises of the first defendant; N\$ 20 000 payment by means of electronic fund transfer on 7 December 2018 and N\$ 30 000 on the 12 October 2018.

[15] This evidence is also inconsistent and contradictory to his testimony when he testified that Mr David agreed to hire the grader and operator at no costs to the first defendant as a sign of gratuitous for offering the plaintiff subcontracting work.

[16] Similarly, the testimony is contrary to his version during cross examination by Ms Janke when he again changed his story that the money given to him by Mr David, the plaintiff's witness, was for the payment of the trailer he has sold to the plaintiff and the witness David. The sale of the trailer was never pleaded. It was mentioned for the first time during cross examination despite the fact that it was denied that plaintiff ever loaned money to the defendants for fuel and salaries of the employees.

[17] Their version is that only the grader and the operator were leased to them at no costs but fuel and salaries of the employees were paid for by the defendants self. All these inconsistencies and contradictions in the testimony of Mr Ipinge were as a result of the ineptitude and tardiness of the legal practitioners of the defendants perpetrated during the preparation of the pleadings.

[18] As said before, the legal practitioners were sloppy and sluggish in everything done in preparation of the pleadings on behalf of the defendants. I doubt if attention was paid to what they were doing if regard is had to page 15 of the record of the bundle of the pleadings. What appears on that page does not make sense and is laughable. What has a prayer for a final order of divorce alternatively an order for the restitution of conjugal rights to do with a claim of damages in a civil action?

[19] These mistakes, in my view, caused Mr Ipinge to be a poor and untrustworthy witness in his testimony. I refuse to accept his version which is so replete with errors rendering it improbable and not plausible. Mr Ipinge was just telling the court lies which even a child cannot miss. To make matters worse, Mr Awaseb his legal representative also did not know what to do to assist his client.

[20] Mr Awaseb in his written heads of argument irresistibly attempted to persuade the court to accept what he termed 'even a blind person, to arrive at the conclusion that the plaintiff and their counsel engaged with a settled intention in an exercise of deliberately hoodwinking and misleading this Honorable court.' In as much Mr Awaseb is blaming or

accusing the plaintiff and its counsel, he in fact, is the culprit counsel, in my opinion, attempted hoodwinking the court into believing that his half-baked quack is the truth.

[21] In oral submissions, Mr Awaseb aggressively argued and urged the court to report counsel for the plaintiff to the Law Society of Namibia for what he thought she was misleading the court. Counsel also did not spare former legal practitioners of the defendants for defects in the papers filed on behalf of the defendants in the matter. The question is why did he not correct those mistakes after he took over the file? It came out during oral submissions that counsel is on record since May last year as the legal practitioner for the defendants but failed to detect and correct mistakes in the pleadings of the defendants and if necessary to apply for amendments in that regard. Shifting the blame to others at this stage of the proceedings will not absolve Mr Awaseb from the responsibility of the pathetic paperwork filed on behalf the defendants. His negligence will not avail his client as a legal practitioner, he is expected to familiarize himself with the rules.

[22] Be that as it may. On the other hand, Mr David was a truthful, credible and an honest witness. He was straightforward in answering questions put to him by both counsel even though he had a problem with the official language compared to Mr Ipinge who speaks good English. He told one story which is, that he entered into a partly written and partly oral lease agreement with the defendants for the lease of his grader heavy duty equipment with the operator at a costs. He said that in addition to the grader and operator, he also loaned to the defendants money for operational costs like fuel and salaries of employees. This version has not been contrasted by the defendants nor did he cave in during cross- examination.

[23] I have already indicated that it is improbable that a businessman, like Mr David would give his grader with an operator at no costs for the period it was used on the site to the defendants who he does not know well and who are his adversaries in the business of construction in the same region.

[24] That said, I am in agreement with Ms Janke, counsel for the plaintiff, quoting from E Metzger, that, in most instances litigants, such as the defendants in this matter, faced with irrefutable claims are apt to pounce on an imaginary element of the case and make it the basis of their verdict in the hopes of escaping liability.

[25] The Metzger quote above fits in with the definition of the defendants in this matter. They indeed failed to offer an acceptable excuse to the claim of the plaintiff to escape liability. The defendants also failed to prove any defence to the claim of the plaintiff. Therefore, and for reasons stated hereinbefore, I have come to the conclusion that the plaintiff has discharged his onus on a balance of probability and should be granted judgment in its favour as set out in the particulars of claim.

[26] In the result, judgment is granted in favour of the plaintiff in the following terms:

- (i) Payment in the amount of N\$ 616 858.88 by the defendants, jointly and severally the one pays the other to be absolved;
- (ii) Interest at the rate of 20% per annum from date of summons to date of final payment;
- (iii) Costs of suite including costs of one counsel.

EP UNENGU
Acting Judge

APPEARANCES:

PLANTIFF:

J Janke
Sisa Namandje & Co. Inc.
Windhoek

1 & 2 DEFENDANTS:

H Awaseb
Awaseb Law Chambers
Windhoek