Reportable

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-DEL-2019/00029

In the matter between:

NARDI S.P.A **PLAINTIFF**

and

BAUMANN & MEIER WORKSHIP CC **DEFENDANT**

Neutral citation: *Nardi S.P.A v Bauman & Meier Workshop CC* (HC-MD-CIV-ACT-DEL 2019/00029) [2021] 426 NAHCMD (4 June 2021)

CORAM: Ndauendapo, J
Heard: **1 February 2021**
Delivered: **3 September 2021**
Reasons: **28 September 2021**

Fly note: Contract-Breach of-Failure or refusal by defendant to pay monies due to plaintiff-Prescription raised-On the merits, denial of the agreement-Acknowledgement of debt interrupted prescription-Evidence adduced by plaintiff of the existence and terms of the agreement-Plaintiff proved its case.

Summary: The plaintiff instituted an action against the defendant claiming an amount of Euro 24 150 for three pieces of agricultural equipment that the defendant sold on behalf of the plaintiff and failed and or refused to pay the monies over to the plaintiff.

The plaintiff and defendant entered into three different partly written and partly oral agreements on three different dates. In terms of these agreements the plaintiff, an Italian based company, would sell agricultural equipment to the defendant, a Namibian based close corporation, and the defendant would then sell the equipment in Namibia. In terms of the third agreement, which is the relevant agreement for adjudication, the parties agreed that the unsold equipment would be returned to Italy by the defendant. However, those three pieces of equipment, were not returned to Italy and were sold by the defendant in Namibia and the monies were never paid over by the defendant to the plaintiff.

The plaintiff is suing for the payment of those monies which amount to Euro 24 150. The defendant raised a special plea of prescription, alleging that the claim has prescribed. On the merits, the defendant denied the terms of the agreement. Evidence was adduced on behalf of the plaintiff that indeed such an agreement was reached between the parties. The witnesses also testified that the defendant acknowledged that it sold the three pieces of agricultural equipment and promised to pay the monies over to the Plaintiff, but failed to do so.

Held that, prescription does not find application as it was interrupted by the defendant acknowledging being indebted to the plaintiff.

Held further, that indeed the parties entered into an agreement whereby the defendant agreed to return the unsold agricultural equipment to the plaintiff.

Held further, that the defendant admitted selling the three agricultural equipment, but failed to pay the monies over to the plaintiff.

Held further, that the plaintiff proved its case, on balance of probabilities, and judgment is granted in its favour.

ORDER

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1. The special plea is dismissed.
2. Judgement is granted in favour of the plaintiff in the amount of Euro 24 150.
3. Interest on the amount Euro 24 150 at the rate of 20% per annum from date of judgement to date of final payment.
4. Defendant is ordered to pay the costs of the plaintiff, such costs to include the costs of one instructing and one instructed counsel

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JUDGMENT

NDAUENDAPO, J

[1] Introduction

In this matter the plaintiff instituted an action against the defendant for breach of contract where the defendant sold agricultural equipment on behalf of the plaintiff and the defendant allegedly failed and or refused to pay over the monies to the plaintiff.

The parties

[2] The plaintiff is Nardi S.P.A a private Italian company duly registered and incorporated in terms of the company laws of the Republic of Italy with its principle place of business situated at Via Del Lavoro Number 24/26 06016 Selci Lama, Perugia, Republic of Italy.

[3] The defendant is Baumann & Meier Workshop CC a close corporation (with registration number CC/1994/0139) duly registered in terms of the close corporation laws of the Republic of Namibia with its principle place of business situated at number 8, Eider Street, Lafrenz, Windhoek, Namibia.

The Pleadings

Amended particulars of claim

[4] The plaintiff avers that "On or about 31 July 2012 and at Windhoek Republic of Namibia, the plaintiff and the defendant entered into a partly written, partly oral agreement of sale ("the first agreement"). The written portion of the first agreement is marked and attached hereto as annexure "A". In concluding the first agreement the plaintiff was duly represented by Richard Omene Albino and the defendant was duly represented by Heike Baumann at all material times.
All the express, alternatively implied, alternatively tacit terms of the first agreement were as follows:

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Defendant's plea on the merits of the amended particulars of claim

[6] '1. Ad Paragraph 1
Save for admitting the name of the Plaintiff, the remainder of the allegations are denied and Plaintiff is put to the proof thereof.

2. Ad Paragraph 2

The content hereof is admitted.

3. Ad Paragraph 3 & 4

'3.1 The contents of these paragraphs are denied and Plaintiff is put to the proof thereof.

3.2 In particular Defendant denies that:

3.2.1 It entered into an agreement of sale with Plaintiff;

3.2.2 Purchased the goods / equipment set out in paragraph 4.1;

3.2.3 It agreed to be liable for payment of “F O B” fees to the Italian Port referred to in paragraph 4.2;

3.2.4 It was liable for any shipping expenses;

3.2.5 It agreed to effect payment of the invoice as claimed.

3.3 Defendant pleads that an oral agreement was entered into between Plaintiff and Defendant during 2012 in terms of which:

3.3.1 Plaintiff would ship its products to Namibia at its costs;

3.3.2 Defendant would pay the import VAT for and on behalf of Plaintiff and Plaintiff would reimburse Defendant in the event that Defendant was unable to claim such import VAT back from the Receiver of Revenue.

3.3.3 Defendant would display Plaintiff’s products at any other agricultural shows and Farmer’s days;

3.3.4 Defendant would be reimbursed by Plaintiff for any expenses incurred by Defendant in regard to the above;

3.3.5 Defendant would pay over to Plaintiff any monies received from any purchaser for any of the products sold;

3 3.3.6 Plaintiff would carry the risk of any loss or damage to the products sent to Namibia and would be liable for any insurance in this regard;

3.3.7 Defendant would hold the products on consignment for and on behalf of Plaintiff;

3.4 Defendant pleads further that in terms of the agreement:

3.4.1 Plaintiff shipped the products reflected in annexure “A” of Defendant’s affidavit opposing summary judgment to Namibia.

3.4.2 Defendant paid import VAT on the value of the equipment in an amount of N$ 137 330, 53 to Namibian Customs and Excise upon arrival of the products in Namibia on 17 September 2012.

3.4.3 Defendant paid an amount of N$ 13 987,25 to Savion Del Bene Namibia (Pty) Ltd in respect of clearing charges to clear the goods in the port of Walvis Bay;

3.4.4 Defendant would deduct the amount paid on behalf of Plaintiff from the proceeds of any sale of equipment on behalf of Plaintiff.

3.4.5 Defendant sold 1 X Nardi Offset Disc 24 FCIMG/61 to H W Heiser on 26 November 2012 on behalf of Plaintiff for N$ 83 478,26 exclusive of VAT.

3.4.6 Defendant sold 1 X Nardi Fast 350 + DHS/RF Implement to Klawer Jas Dairies on 3 December 2012 on behalf of Plaintiff for N$290 000,00 exclusive of VAT.

3.4.7 Defendant retained the amount of N$ 151 317, 78 in respect of monies disbursed for and on behalf of Plaintiff.

4. Ad Paragraph 5 & 6

4.1 Save for denying the terms of payment, the content hereof is admitted.
4.2 Defendant denies that it is liable for any payment as claimed or at all, as pleaded in Defendant's special plea filed simultaneously herewith.

5. Ad Paragraph 7, 8 & 6

5.1 The content hereof is denied and Plaintiff is put to the proof thereof.
5.2 In particular Defendant denies that it entered into an agreement with Plaintiff on 6 April 2016;
5.3 Defendant pleads that:
5.3.1 It was approached by Plaintiff's agents who requested delivery of the unsold equipment;
5.3.2 It agreed to release the unsold equipment to Plaintiff and/or its agents for re-export to Italy;
5.3.3 It agreed to provide an invoice solely for customs purposes to Plaintiff's agents, which it did;
5.3.4 The goods and/or equipment referred to in paragraph 8.1 was collected from Defendant by Plaintiff's agents during March 2017;

6. Ad Paragraph 9

This is denied and Plaintiff is put to the proof thereof.

7. Ad Paragraph 10 & 11
7.1 The content hereof is denied and Plaintiff is put to the proof thereof.
7.2 In particular, Defendant denies that:
7.2.1 It breached any agreement as alleged or at all;
7.2.2 It had any obligation to ship or refund any equipment to Plaintiff;
7.2.3 It is liable to pay any amount to Plaintiff as claimed or at al)'.

Replication

[7] The plaintiff replicated to the defendant's special plea and pleaded as follows;

Ad Special Plea

'1 This is denied. In amplification of the denial, the plaintiff pleads that the plaintiff and defendant entered into an agreement on or about 6 April 2016 in terms of which the defendants set off monies owing to the plaintiff by way of delivery and return of certain of the equipment set out in the agreement, the terms of which have been set out in the amended particulars of claim. The agreement was a further agreement to the 31 July 2012 agreement relied upon by the plaintiff.

1.1 The plaintiff pleads that on or about 27 July 2017 the defendant directed an email to the plaintiff, by means of which the defendant acknowledged the debt owed to the plaintiff.

1.2 The plaintiff further pleads that on or about 29 September 2017 the defendant acknowledged the debt owed to the plaintiff by way of an email addressed to the plaintiff.

2. The plaintiff pleads that the special plea amounts to an attempt by the defendant to approbate and reprobate. By way of the plea to the merits the defendant pleads that any payments due to the plaintiff from the defendant would only be paid over to the plaintiff once monies had been received from prospective purchasers of the equipment. The plaintiff pleads that the defendant is not entitled at law to approbate and reprobate as the defendant attempts to do by way of the special plea. The special plea is in direct conflict with the plea on the merits.

3. The plaintiff pleads that the plaintiff's claim against the defendant is not prescribed in the circumstances. In any event the manner in which the claim of prescription has been pleaded is such that prescription may not be raised or relied upon'.

Merits

[8] '4. The plaintiff denies each and every allegation in the defendant's plea, unless admitted, as if set out and traversed *seriatim*.

Ad paragraph 3.3

5. This is denied. The alleged oral agreement has not been properly pleaded, in that the parties who entered into the agreement have not been disclosed nor has the place where the agreement was reached been disclosed. The plaintiff pleads that in the absence of those particulars, the claim advanced is vague. The plaintiff denies that the alleged oral agreement relied upon by the defendant was entered into in 2012 or at any other time by the plaintiff and the defendant. The defendant is put to the strict proof of the existence of the oral agreement pleaded in the defendant's plea.

5.1 The plaintiff denies the alleged terms of the oral agreement relied upon by the defendant and puts the defendant to the strict proof thereof.

Ad paragraph 3.4

6. The plaintiff denies that it had an obligation to pay import VAT and clearing charges to the defendant or on behalf of the defendant or that the defendant was authorised by any agreement to deduct such costs form the monies due to the plaintiff.

6.1 The plaintiff denies that there was ever any agreement authorising the defendants to deduct any amount as alleged. The plaintiff pleads that in terms of the agreement between the parties the payments to the plaintiff from the defendant were due in the manner pleaded in terms of the amended particulars of claim.

7. Plaintiff joins issue with defendant in respect of the other allegations contained in the defendant's plea. Wherefore the plaintiff prays that the claim be granted with costs of one instructing and one instructed counsel.'

The issues

[9] The pre-trial order in terms of Rule 26(4) and 26(6) stated the following issues of fact to be resolved (the relevant part for adjudication).

'1.12. Whether the parties entered into a partly written oral agreement on 6 April 2016 at Windhoek represented by Richard Omene Albino and Heike Baumann respectively;

1.13. Whether in terms of agreement of 6 April 2016 the plaintiff was entitled to be paid the sum of Euro 32,000.00 by the defendant;

1.14. Whether the defendant breached the terms of the agreements of sale entered into between the plaintiff and the defendant dated 31 July 2012, 18 December 2012 and 6 April 2016 respectively;

1.15. Whether the defendant is indebted to the plaintiff in the sum of Euro 32,000.00 with the effect from 7 April 2016'.

All issues of law to be resolved during the trial

[10] '2.1 whether the claim of prescription raised by the defendant has been properly pleaded by the way of the defendant's special plea;

2.2. In the event that prescription is properly pleaded; whether prescription was interrupted by way of the emails emanating from the defendant directed to the plaintiff dated 27 July 2017 and 29 September 2017 respectively;

2.3. Whether the special plea amount to approbating and reprobating on the part of the defendant;

2.4. Whether the plaintiff's claim as pleaded in the particulars of claim is prescribed.'

<u>The plaintiff's case</u>

[11] **Mr Mazzardo** testified that during June 2012, he was the sales director of the Plaintiff. He instructed Mr Omene Albino, who was employed by the Plaintiff as its export area manager for Southern Africa, to take care of the business relationship between the Plaintiff and the Defendant at the inception of the business relationship.

However, Mr Albino always worked under his supervision and needed his approval for business decisions.

[12] He testified that he agreed with Mr Uwe Baumann and Mr Bernt Meier, on behalf of the Defendant, that the list of machinery (equipment) to be sold to the Defendant and also the terms of the sale. The agreement for the sale of the machines between the plaintiff and the Defendant was reached during June 2012 by Mr Richard Omene Albino and Mr Uwe Baumann. The terms of the agreement were captured in the invoice that was sent to the Defendant by the Plaintiff.

[13] He testified that that the Plaintiff shipped the equipment to the Defendant. He attached hereto (to the witness statement) the invoice issued by the Plaintiff to the Defendant in respect of the equipment marked exhibit “A”. The total value of the equipment was in the sum of Euro 81,710.00. In addition, he testified that the Defendant was liable to refund the Plaintiff free on-board fees in the sum of Euro 1950.00 as well as shipping expenses in the sum of Euro 6279.00. No payment whatsoever was due to the Defendant from the Plaintiff in terms of the agreement.

[14] He further testified that the equipment which is listed on the invoice from the Plaintiff to the Defendant was shipped from Italy to Namibia and received by the Defendant. He attached hereto a copy of the bill of lading marked exhibit “B”. He also attached hereto the packing list which confirms the specific items shipped to the Defendant by the Plaintiff, by way of sea freight marked exhibits “**C1”** and “D respectively.

[15] He further testified that in terms of the agreement between the Plaintiff and the Defendant, the Defendant would be responsible for the insurance of the goods. In this regard he referred to an advice of dispatch from the Plaintiff to the Defendant which confirms the term of the agreement related to the insurance of the goods. The advice of dispatch was admitted into evidence and marked exhibit “E”.

[16] He testified that the total amount owing in respect of the equipment supplied by the Plaintiff and duly received by the Defendant as per the 31 July 2012 invoice sent to the Defendant was in the sum of Euro 89,939.00.

[17] He further testified that it was made clear since the beginning to all the parties involved that the machines would be shipped under a form of payment of bank transfer at 1-year form Invoice date, alternatively payment was due to the plaintiff from the defendant immediately upon the sale of the machine/s by the defendant whichever event occurred earlier. He testified that not once did Mr Uwe Baumann, Mr. Bernt Meier, who are both members of the defendant, denied this form of payment in all written or verbal communication they had.

[18] He testified that he and Mr Albino visited the defendant's workshop in Namibia, on two separate occasions, during October 2012 and June 2014. He and Mr. Richard Omene Albino represented the plaintiff whilst Mr Uwe Baumann, Mr. Bernt Meier and Mrs Heike Baumann represented the defendant. The parties discussed the overview of the Namibia market situation, the defendant's stock of Nardi machines and the future perspective with regards to the sale of Nardi machines in Namibia. During the June 2014 visit, he testified that the pending payment of the invoice was discussed.

[19] During the visit of June 2014, he asked Mr Uwe Baumann and Mr. Bernt Meier to proceed to settle the payment overdue since it was almost a year overdue.

Both Mr Uwe Baumann and Mr. Bernt Meier informed him that due to a severe drought the farming business was in a crisis and they could not make payment since the machines were all in their stock and had not been sold. However, they informed him that the Defendant had performed some demo tests in the field to attract customers.

He testified that it was than agreed to extend the payment date until the end of 2014, with the calculation of the relative due interest on the outstanding amount, which was due and payable in terms of the agreement to the plaintiff.

[20] Since then, he called Mr. Uwe Baumann on a regular basis asking how the Defendant's business was doing and if he had managed to sell the machines in stock. He does not recall the exact dates when he made these telephone calls to the defendant's representative. However, he testified that he telephonically spoke to Mr.

Uwe Baumann on a number of occasions over the years pursuing the outstanding payment which was due to the Plaintiff from the Defendant.

Mr. Uwe Baumann always claimed that the farming industry was doing badly in Namibia and that no machines had been sold by the Defendant.

[21] He kept calling Mr. Baumann asking when the Defendant would make payment. Mr. Uwe Baumann always acknowledged the debt due to the Plaintiff and asked him to wait as he may have found a customer in Angola, then it was in Zambia and then in Ghana. Every time it was a different customer from a different Country.

This situation continued till 6th April 2016 when he wrote an email to Mr. Uwe Baumann asking them to return the goods in their stock and that they will deduct that amount from the outstanding invoice. A copy of the email he sent to the Defendant's representatives was admitted into evidence as exhibit "E". In the same email he asked Mr Uwe Baumann and Mr Bernt Meier if any machine was sold in the meantime, but they never replied to this question.

[22] He testified that it was agreed that all the unsold machinery would be returned to Italy (to the Plaintiff) by the Defendant. He testified that only after having loaded the container, at the expense of the Plaintiff, in Namibia, did they come to know that some machines were not loaded. When he asked Mr Uwe Baumann over the phone why those machines were missing, he said that the Defendant had sold them in Namibia. He never mentioned this fact to him before, in any one of all the several calls that they had over the years. He testified that he made the telephone call immediately after he had received an email from Mrs Heike Baumann on 27 July 2017 at 17: 04. The reason why he made the telephone call was that this was the first time the Plaintiff had been notified by the Defendant's representatives that not all the machines had been returned by the Defendant to the Plaintiff. He required an explanation as to why there was nondisclosure that three machines had been sold and demanded that the monies due in respect of those three machines and the outstanding balance be paid immediately. He was advised during that telephone conversation that the Defendant would transfer the outstanding balance to the Plaintiff including the monies in respect of the three machines that had been sold by the Defendant during the course of the following week.

No payment was received and all that took place where emails forwarded by the defendant's representatives requesting the plaintiff's bank details. He testified that to date no payment from the Defendant to the Plaintiff in respect of the three machines sold by the Defendant and the outstanding balance has taken place.

[23] He testified that he received an official communication regarding the sale of the machinery by email from Mrs Heike Baumann dated 27th July 2017. The email he received on 27 July 2017 was admitted into evidence as exhibit "F". The email itself does not expressly state that the machines that were not sent back to the Plaintiff had been sold by the Defendant already. The email only indicated that the equipment was still in Namibia.

There was further email correspondence exchanged between him and Mrs Heike Baumann on behalf of the Defendant. On 29 September 2017 he dispatched an email (Exh "G"). He stated in the email that the first time he became aware of the sale by the Defendant of the three machines that were not shipped as per the agreement between the plaintiff and the defendant was after the Plaintiff had requested that all the unsold goods be returned to Italy.

[24] He testified that, this email was responded to on 29 September 2017 and the defendant admitted selling the equipment. A copy of this email was admitted into evidence as exhibit "H". He testified that the defendant did not and has not to date paid the plaintiff any monies in respect of those three machines which the Defendant admitted selling to its clients on dates unknown and undisclosed to the Plaintiff.

[25] He testified that the value of those three machines in terms of the invoice issued on 31 July 2012 is in the total sum of Euro 24,227.00. This amount is to date unpaid by the Defendant to the Plaintiff and remains outstanding and due from the defendant to the Plaintiff.

Since they received the aforesaid email correspondence, they have been asking via email that the payment of the remaining balance for the machines sold in Namibia, plus the interest due on that amount be paid by the defendant to the plaintiff.

[26] He testified how the amount owed to plaintiff by the defendant was calculated and arrived at, as follows:

Description	**Amount Euro**
31 July 2012 invoice	89,939.00
18 December 2012 invoice	719.00
Total	**90,658.00**
less 6 April 2016 invoice from defendant	58,658.00
less three machines sold by the defendant	24,227.00
Balance unaccounted	7776.00
Total due owing to plaintiff	**32 003.00** ‘

[27] **Mr Richard Omene Albino** testified that he worked as export area manager for Southern Africa for the Plaintiff, up until April 2016. He had been directly taking care of all operations and communications between the plaintiff and the defendant since the beginning of the business relationship between the two parties in 2012, under the supervision of Mr. Mazzardo Virgilio, who was at that time a Sales Director of Nardi SPA.

He testified that he personally prepared the offer and related proforma on the basis of the list of selected machines and terms of sales agreed between Mr. Uwe Baumann, Mr. Bernt Meier and Mr. Virgilio Mazzardo. This was during 2012. The specific machines (equipment) that were sold to the Defendant by the plaintiff as well as the prices agreed by the plaintiff and the Defendant for the sale and purchase of those machines are set out in the invoice which was dispatched by the Plaintiff and delivered to the Defendant. That invoice was admitted into evidence as exhibit “A”. He testified that he, representing the Plaintiff, reached an oral agreement during June 2012 with Mr. Uwe Baumann, representing the Defendant, in respect of the sale of the machines, and the invoice issued by the Plaintiff to the Defendant captured the terms of the oral agreement entered into during or about June 2012.

[28] He testified that it was clearly stated in the proforma invoice that the machines would be shipped under a form of payment of bank transfer at 1 year from invoice date or alternatively; payment was immediately due from the Defendant to the Plaintiff on the date when the equipment was sold by the Defendant, whichever date was earlier. He testified that the equipment listed and specified in exhibit “A” was duly delivered in good order to the Defendant. He testified that in terms of the agreement there was no payment whatsoever due from the plaintiff to the defendant either by way of refund or set off. He testified that the parties never agreed that the plaintiff would refund or set off any amount or payment made by the Defendant in respect of the machines to any other party or entity.

[29] He testified that he personally visited Namibia, and in particular visited the Defendant’s business premises on at least 4 (four) separate occasions. These visits took place during October 2012, March 2013, June 2014, and January 2015. During the first two visits, he had been supporting the Defendant in promoting the machines both at a local trade fair and also in organizing some demonstrations in the field. Several customers showed interest in purchasing the machines at the local trade fair that he attended as well as the field demonstrations that he was a part of organizing, especially on the “Combined Cultivator FAST 350+DSH/RF”, on the “Trailed disc harrows model 24 FCIMG/61” and on the “Mounted reversible three-disc plough Model ZTD 70”. This was during October 2012 and March 2013 respectively.

[30] He testified that when he visited the defendant in June 2014, he asked Mr. Uwe Baumann and Mr. Bernt Meier, the Defendant’s representatives, to proceed to settle the payment since the invoice was long overdue. They replied from Mr. Uwe Baumann and Mr. Bernt Meier was that due to a severe drought the farming business was in a crisis and they could not still make the payment since the machines were all in their stock, even though they had performed some demo tests in the field to attract customers. He testified that he was made to understand that the Defendant had failed to sell any of the equipment sold to it by the Plaintiff and none of the equipment had been sold to any third party.

Following the June 2014 meeting, he communicated to the representatives of the Defendant that Mr. Virgilio Mazzardo, his superior had on behalf of the Plaintiff, agreed to extend the payment date to the end of 2014, on condition that the Defendant would pay interest to the plaintiff.

[[31] He testified that during the following visit of January 2015, he again asked the Defendant's representatives to pay the outstanding invoice since even the agreed extension on payment terms was now overdue. He specifically asked Mr. Uwe Baumann to immediately pay the outstanding invoice without any further delays. Again, Mr. Uwe Baumann told him that the Defendant could not manage to sell the machines and he said he will try to sell the machines outside Namibia or in some other neighbouring countries in order to try to pay the outstanding Invoice.

[32] He testified since 2012 he had called Mr. Uwe Baumann telephonically on a regular basis asking how the business was going and whether the defendant had managed to sell the machines in their stock, and the communication with Mr. Uwe Baumann has always been difficult as he never replied to emails, but only answered the phone after several attempts. He testified that at no point prior to April 2016 was he notified by any of the Defendant's representatives that any equipment sold to the defendant by the plaintiff on 31 July 2012 as well as on 18 December 2012 had been sold to any person.

Parol evidence rule objection raised by defendant

[33] The defendant raised an objection to the evidence of the witnesses of the plaintiff where in paragraph 5 of the witness statement (of Mazzardo) it was stated…'the invoice issued by the plaintiff to the defendant captured the terms of the oral agreement entered into during or about June 2012'. In paragraph 10 of Mazzardo witness statement it is stated that: 'alternatively payment was due to the Plaintiff from defendant immediately upon the sale of the machines'. The alternative payment was another term which was contrary to the terms captured in paragraph 5 i.e. terms captured in the invoice and should be disallowed.'

[34] Furthermore, according to counsel for defendant, the following too would have to be disregarded in order to allow the piece of objectionable evidence –

‘(a) The averment by plaintiff that all the express, alternatively implied, alternatively tacit terms of the agreement are as follows (par. 4 of the Amended POC, Bundle “A”, page 4)
(b) The evidence of Virgilian Mazzardo at paragraph 5 of his witness statement to the effect that the terms of the agreement were captured in the invoice that was sent to the Defendant by the Plaintiff.
(c) Can it then, despite the above, be said that the plaintiff does not rely on Annexure “A” (the invoice) as the sole integrated written memorial in respect of the first agreement?
(d) What the plaintiff in fact tells us is that Annexure “A” reflects terms of the written agreement, and incorporated therein are the terms of the oral agreement. That much must be accepted on plaintiff’s own evidence.
(e) Given the aforesaid (according to counsel), is the evidence objected to in respect of the witnesses testifying about a further term of the first agreement permissible, on trite authority? It stands to be excluded, unless any of the recognized exceptions apply. In this case no exception finds application. The objection stands to be allowed and the particular piece of evidence disallowed, according to counsel.

Submissions by plaintiff on the parol evidence rule objection

[35] Counsel argued, that as a starting point, the objection ignores the contention by the plaintiff that the agreement was both oral and written and ignores the evidence led to the effect that the payment was either one year of the date of invoice or alternatively it would become due once the goods had been sold by the defendant whichever date was earlier.

[36] Counsel argued, that the objection by the defendant ignores the defendant’s own plea in respect of the case that is pleaded on behalf of the defendant to the effect that payment would be due from the defendant to the plaintiff once the goods

had been sold. Counsel submitted that in the circumstances the objection should not be upheld on the facts.

[37] Counsel further argued, that the first element that is required for the parol evidence rule to be applied is absent in the present circumstances. In this regard there must be a clause or provision in the agreement in question to the effect that the agreement records the entire agreement between the parties and no further variations would be accepted. In this regard Counsel made reference to the decision of this court in *First National Bank of Namibia Ltd v Ben-Tovim*[1] where the court set out the essentials when the parol evidence rule is sought to be relied upon by a party.

Counsel further argued that the parol evidence rule does not apply where a partly written and partly oral agreement is concluded, in this regard counsel relied on the *First National Bank of Namibia ltd versus Ben-Tovim*

Relying on Johnson v Leal[2] counsel further argued that the first essential which the defendant cannot pass is to prove and establish that the pro forma invoice is the exclusive memorial of the agreement between the parties and the objection must be dismissed.

Ruling on the Parol evidence rule objection

[38] In *Johnston v Leal, supra* the court at 944 B-C held that:

'Furthermore, in my view, an instructive and relevant analogy is provided by cases of what is termed a "partial integration". Where a written contract is not intended by the parties to be exclusive memorial of the whole of their agreement but merely to record portion of the agreed transaction, leaving the remainder as an oral agreement, then the integration rule prevent the admission of extrinsic evidence to contradict or vary the written portion, it does not preclude proof of the additional or supplemental oral agreement'.

[1] *First National Bank of Namibia Ltd v Ben-Tovim* [2016] NAHCMD 196 (7/07/16).
[2] *Johnson v Leal* 1980 (3) SA 927 (A) at 944B-C.

In this case, the plaintiff clearly pleaded that the third agreement was partly in writing and partly oral and the terms of the written agreement were captured in Annexure "C" and what the witnesses testified about were the terms of the written agreement as well as the oral agreement and the evidence of the oral agreement did not seek to contradict or vary the written portion, but to add or supplement the written agreement and that is allowed as per the authority of *Johnston*. In addition, only the witnesses for the plaintiff testified and therefore their evidence about the partly written and partly oral agreement remained unchallenged. For all those reasons the objection is overruled.

[39] The defendant did not call any witness and closed its case.

Defendant's special plea (prescription) considered

[40] The special plea has been couched in the following terms:

'*In limine,* Defendant pleads that any amount which may be found to be due to Plaintiff by Defendant, which is denied, has prescribed in that a period of three years has passed since the due date of payment. Wherefore Defendant prays for judgment against Plaintiff with costs, such costs to include the costs of one instructing and one instructed legal practitioner.'

Submissions by plaintiff on special plea

[41] Counsel for the plaintiff relying on *Yannakou v Apollo Club*[3], argued firstly, that where a party seeks to rely upon a statutory provision, the statute and the specific statutory provision relied upon must be expressly pleaded and not merely raised in argument for the first time.

[42] The plea does not make any reference to prescription arising from the Prescription Act and on this basis alone the special plea of prescription should fail.

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[3] *Yannakou v Apollo Club* 1974 (1) SA 614 (A)

[43] Secondly, counsel submitted that even if they are wrong the plea of prescription fails on the undisputed facts and as they have indicated the facts they point to and place reliance upon are facts emanating directly from the defendant.

[44] Counsel argued that the defendant by way of email correspondence, exhibit F, notified the plaintiff on 27 July 2017 that the following equipment had stayed in Namibia:

1.1	Combined cultivator preparator fast mod, 350+DHS/RF	15050 €
1.2	Trailed offset disc Harrow Model 24 FCIMG/61	6190 €
1.3	Mounted reversible three-disc plough Model ZTD 70	2910 €
	Total value 24 150 €	

[45] The defendant again by way of email on 29 September 2017, exhibit “H”, then notified the plaintiff that the three pieces of equipment which remained in Namibia had been sold. Counsel argued that if prescription is to run it can only run from the date when knowledge of the debt arises. Accepting the defendant’s version as accurate, that is the version arising from the email correspondence they have referred to and which have been admitted as evidence, prescription would only have started to run from 29 September 2017.

[46] The combined summons was issued in January 2019 at that stage three years had not yet elapsed and therefore prescription as a matter of fact cannot find application on the facts.

Defendant’s submissions on special plea

[47] Counsel submitted that meetings and discussions held by parties in resolving disputes do not interrupt prescription. Counsel submitted that a court may permit prescription to be raised at any stage of the proceedings. The proper way to raise

prescription is by way of a special plea, and the defendant raising prescription bears the onus to prove that the debt has been extinguished by prescription. A plaintiff replicating to such a plea of prescription bears the onus to prove either delay or interruption of prescription[4].

[48] Counsel argued that the facts from which a debt arises are the facts which a creditor need to prove in order to establish liability of the debtor. The debt arises from Annexure "A", only now in a reduced off-set amount. The 2017 email creates no new debt.

[49] Counsel further argued that a constrained interpretation in *Yannakou v Apollo Club* was rejected in *Namibia Bunker Services (Pty) Ltd v ETS Katanga Futur*[5]. All that is required is that facts be clearly pleaded so that it is justified to draw the conclusion that the statutory provision applies, and that is how plaintiff understood the *in limine* objection, hence its replication that prescription was interrupted. The plaintiff now contends that its claim has not prescribed, for two reasons: First, the alternative payment basis sought to be introduced through evidence, and secondly that the specific section of the Prescription Act was not expressly pleaded. But those submissions can safely be disregarded. In any event, even if the alternative form of payment is accepted it remains meaningless because rectification of the first agreement was not sought.

[50] Counsel argued that the answer set up to the prescription defence in the replication is one of an alleged acknowledgement of debt which interrupted prescription.

The 2017 emails do not, as a matter of law, constitute an acknowledgment of debt capable of interrupting prescription. Importantly, by replicating an interruption to the prescription defence the plaintiff did no more than concede that the debt arises from the 2012 Annexure "A" invoice. The evidence on extension of the payment terms to April 2014 is also irrelevant: A corresponding amendment of the terms of the first

[4] (Christie's Law of Contract in South Africa, 7th edition, page 580, and the authorities referred there).
[5] *Namibia Bunker Services (Pty) Ltd v ETS Katanga Futur* (A393-2009 A425-2009) [2014] NAHCMD 197 (23 June 2014).

agreement was not sought, which in any event would be subject to a claim for rectification of the agreement. Counsel further argued that, if the 2017 emails do constitute an acknowledgment of debt then it is inconsequential as the debt, on the terms of the first agreement, became due and payable 31 July 2013, and on plaintiff's own version the case was issued only in January 2019. By 01 August 2016 the claim arising from the invoice prescribed.

Ruling on the special plea

[51] In *Yannakou*, supra, the court held that where a party seeks to rely upon a statutory provision, the statue and the specific provision relied upon must be expressly pleaded. In Wasmuth v Jacobs the court held that: *"A defense, whether it is contained in a plea or on affidavit, must be sufficiently clearly stated to enable the other litigants as well as the court, to be appraised of the defense*[6]*".* In casu, the plaintiff does not specifically refer to the prescription Act or any provisions of the Act. Most importantly, the defendant bears the onus to prove that the debt has been extinguished by prescription[7]. The defendant did not call any witness and therefore did not adduce any evidence to prove that the debt has been extinguished by prescription. On that score alone the special plea must fail.

[52] Another reason why the special plea cannot succeed is that in terms of section 14 of the prescription Act, 68 of 1969, the running of prescription is interrupted by an express or tacit acknowledgment of liability by the debtor. On the 27 July 2017 the defendant acknowledged that the three pieces of equipment which are the subject matter of the third agreement had remained in Namibia. On 27 July 2017 the defendant notified the plaintiff that those three pieces of equipment had been sold on behalf of the plaintiff and the plaintiff was not paid any monies in respect of those three pieces of equipment. Mr Mazzardo, on behalf of the Plaintiff, testified that after he received an email from Mrs. Baumann, on behalf of defendant, acknowledging that machines were sold, called her and she acknowledged that the monies for the three pieces of equipment would be transferred to the plaintiff the following week. That, in my respectful view, amounted to a tacit acknowledgment of

[6] *(Wasmuth v Jacobs* 1987(3) SA 629 of 634 G-H).
[7] (Christie's Law of Contract in SA 7ed at 580).

indebtedness by the defendant to the plaintiff that interrupted prescription and prescription started to run from that date. The combined summons was issued in January 2019 and by that time the three years' period had not yet elapsed and the plea of prescription cannot succeed.

Plaintiff's written submissions on the merits

[53] Counsel argued that the plaintiff's action against the defendant specifically relates to three pieces of equipment only. Which the defendant failed to ship or refund, namely, the claim in relation to those three pieces of equipment is set out in the particulars of claim as follows:

'10.2 Combined cultivator preparator fast mod, 350+DHS/RF 15050 €

1.2 Trailed offset disc Harrow Model 24 FCIMG/61 6190 €

1.3 Mounted reversible three-disc plough Model ZTD 70 2910 €

Total 24 150 €

Email correspondence dated 27 July 2017 is attached hereto as "D".

10.3 The defendant failed, alternatively refused, to pay an amount of **€ 24 150** to the plaintiff which amount is owing, due and payable to the plaintiff under the third agreement.'

[54] Counsel argued that the evidence led on behalf of the plaintiff by the witness Virgilio Mazzardo was to the effect that the first time he became aware of the fact that the three pieces of equipment that form the basis of the present claim were not shipped back to Italy by the defendant was when he received an email, exhibit "F", from Heike Baumann written on behalf of the defendant in an email dated 27 July 2017 is the following:

'**The following units stayed in Namibia**:

Combined Cultivator 350+DHS/RF = Value Euro 15050 – as per above mentioned invoice.
Trailed offset Disc Harrow Model 24 FCIMG/61 = Value 6190 – as per above mentioned invoice.
Mounted reversible three-disc plough Model ZTD 70 = Value 2910 – as per above mentioned invoice (the three machines/equipment).

Total value of goods which stayed in Namibia = Euro 24 150'.

Heike Baumann on behalf of the defendant then further said the following:

> "The goods have been in Namibia for 5 years and we were not able to sell them."' (my emphasis)

Counsel further argued that on 29 September 2017 Mazzardo on behalf of the plaintiff testified to sending an email, exhibit "G", to the defendant. In the email he stated as follows:

> 'Moreover, I never had notice of the fact that you sold those 3 machines till the moment. We had requested to ship all the goods back to Italy……'

The email of 29 September 2017 was sent in response to exhibit H which is an email sent by Heike Baumann on behalf of the defendant to the plaintiff on 29 September 2017. In particular, the crucial portion of that email reads as follows:

> 'The three items which remained in Namibia, had to be sold for the landed cost price to be able to enter the market and create some interest in the products. The circumstances of a three-year draught in Namibia was not very favorable for us as the famers did not buy any equipment, not even from the well-known brands in Namibia'. (Emphasis)

[55] Counsel further argued that the defendant by way of that same email, exhibit "H", then tendered a once off payment of Euro 8 500.00 to the plaintiff in respect of the three machines it identified as having stayed behind in Namibia after April 2016.

Counsel submitted that the present dispute relates to the payment due from the defendant to the plaintiff for the three machines.

[56] Counsel argued that on 27 July 2017 the defendant by way of email communication to the plaintiff specified the value of the three machines. Heike Baumann indicated in the email on behalf of the defendant that the value of the three pieces of equipment is Euro 24 150.In addition, counsel submitted, that the value of the three machines is in addition found in the pro forma invoice sent by the plaintiff to the defendant, exhibit “A”.

[57] Counsel further argued that the defendant by way of its plea pleaded that it incurred clearing charges and paid import VAT in the total sum of NAD 151 317.78. The defendant further pleaded that it sold two pieces of equipment, namely,

(a) Nardi offset disc 24 FCIMG/61 to H W Heiser on 26 November 2012 on behalf of plaintiff for NAD 83 478.26 exclusive of VAT (b) Nardi fast 350 + DHS/RF Implement to Klawer Jas Dairies on 3 December 2012 on behalf of plaintiff for NAD 290 000.00 exclusive of VAT.”

[58] Counsel argued that it is evident from the plea that the defendant pleaded an entitlement to retain the total sum of NAD 151 317.78 in respect of monies disbursed for and on behalf of plaintiff. In the same vein the defendant admits on its own version having received the total sum of NAD 373 478.26 on behalf of plaintiff in respect of two machines. There is therefore a sum of NAD 222 160.48 that the defendant on its own pleaded version holds somewhere for and on behalf of the plaintiff. That is in respect of two machines and one machine namely a Mounted Reversible Three-Disc Plough Model ZTD 70 is not even accounted for even by way of the plea.

Defendant’s written submissions on the merits

[59] Counsel argued that the subject matter of the third agreement is the refundable equipment. The plaintiff avers at sub – paragraph 10.1 of its Amended

Particulars of Claim that the defendant returned the refundable equipment. Did that fact, on plaintiff's pleaded case, not discharge the obligations of defendant under the third agreement? It did, according to counsel. That is why the alleged failure at sub – paragraph 10.2 is irrelevant to a claim premised upon a breach of the third agreement.

[60] Counsel argued that, the plaintiff's true case in reality is that it sued for a balance remaining under a debt due since 31 July 2013. That claim has prescribed. Counsel submitted that it may even not be necessary for this court to determine the prescription challenge if the court accepts that on plaintiffs pleaded case the defendant complied with the third agreement (sub – paragraph 10.1) of the Amended Particulars of Claim. Cause of action – contractual breach, not enrichment.

[61] Counsel argued that the plaintiff avers that the defendant breached all three agreements and the breaches in respect of the first and second agreements relate to non-payment of the invoices marked Annexure "A" and "B" to the Amended POC.
The breach averred in respect of the third agreement relates to "the refundable equipment", which defendant complied with and returned on plaintiff's own case as pleaded (see par 8.2 and 10.1 of Amended POC). The allegation that the entitlement to receive the claim amount in terms of the third agreement is, with respect, absurd.

[62] Counsel argued that, all the averred breaches are pertinently denied in the defendant's plea (see par 7 of the Plea, page 21 of Bundle "A" – Pleadings). A special plea of prescription was specifically pleaded and raised *in limine*.

Counsel argued that one searches in vain for a contractual obligation in the Amended Particulars of Claim to the effect that under the third agreement – "the parties agreed that the defendant will return the "unreturned equipment". The only averment alleged as constituting a term of the third agreement is that the parties agreed that the defendant will return the equipment identified at par. 8.1 of the Amended Particulars of Claim, and the plaintiff tells us that the defendant complied by shipping the "unreturned equipment".

[63] Counsel argued that the plaintiff strangely avers an alleged failure on the part of plaintiff (par. 10.2 of the Amended POC) without making any averment that such failure constituted a breach of a term of the third agreement (which in any event had to be specifically averred). We know the terms of the third agreement. The third agreement as averred demonstrates this undeniable fact: what the parties allegedly agreed upon (paras 7 – 8) has been shipped by defendant in discharge of its obligation (paras 8.2 and 10.1 of the Amended POC). Contrast the equipment averred as constituting the third agreement (sub – par 8.1) with the "unreturned equipment" (par. 10.2). One inevitably concludes that the unreturned equipment was not the subject matter of the third agreement … Rectification of the agreement was not sought.

[64] Counsel further argued that is there any basis upon which this court can find that the defendant breached the third agreement and is liable thereunder in circumstances where the plaintiff's own pleaded case unequivocally states defendant's compliance with the agreement? If the breach of the averred terms of the third agreement cannot be established, then the plaintiff simply cannot succeed.

[65] Counsel argued that in the pre-trial order the court is called upon to determine whether the defendant has breached the terms of the three agreements (par. 1.14 of the pre – trial minute, page 57 of the Trial Bundle marked "B"). Counsel argued that the court can only make such determination with reference to the 4 specific terms alleged in respect of each of the three agreements.

[66] Counsel argued that it was agreed that all the unsold machinery would be returned to Italy (to the Plaintiff) by the Defendant. Court can disregard this evidence as a claim for rectification of the third agreement is not an issue this Honorable Court is called upon to determine. The subject matter of the third agreement was specifically pleaded and limited to those items enumerated at sub – paragraphs 8.1.1 – 8.1.5 of the Amended Particulars of Claim. Plaintiff discovered in 2017 that three machines did not make its way to Italy from Namibia, and were admittedly sold by the defendant. Significance? None. This Honorable Court is not determining an enrichment claim, nor a claim based on fraudulent misrepresentation or the like. The

plaintiff asks this Honorable Court to determine whether the three agreements have been breached. Its terms are pleaded in the Amended Particulars of Claim.

[67] Counsel argued that by off-setting invoices he (Mazzardo) claims, qualified by an unaccounted amount of 7,776.00 euro, payment in the amount of 32,003 euro, constituted by discounting of reciprocal invoices. But he did say in evidence though that the plaintiff never owed the defendant anything. Off-setting logically arises from the invoice marked “A”, the 2012 invoice. Richard Omene Albino, effectively says: Look no further than the invoice marked Annexure “A” if you seek to determine the written and oral terms of the first agreement (Par 4 of his evidence). In essence, the defendant marketed the plaintiff’s products to customers, and the plaintiff rendered support in that regard. (par. 8 of his evidence). Significance? Can it on this evidence be said that the plaintiff proved the disputed sales agreement? The first witness bluntly declined to comment on the characterization of its relationship as that of supplier of equipment to a consignee (the defendant) as evidenced through the lawyers’ letters (pages 91 – 92, and 99 of Trial Bundle “D”).

[68] Counsel further argued that, a breach of contract at a very basic level, a party relying on breach of a contract must allege and prove its terms, and the eventual breach. Where the existence of the contract is disputed, it must prove that the contract exists. Knowledge of sale of the equipment on 29 September 2017 takes the plaintiff’s case no further. On its pleaded principal basis, the debt became due one year after issuance of invoice. An actionable debt arose one year from date of invoice (Annexure “A”), and 90 days from date of invoice (Annexure “B”). Defendant correctly pleaded that more than three years has passed since the debt arose.

[69] Counsel argued that the plaintiff’s claim amount undeniably arises from an alleged breach of agreements 1 (invoice “A”) and 2 (invoice “B”). That much is explicit from the Amended Particulars of Claim where breach of the first two agreements was alleged. The debt allegedly arising from the third agreement may amount to nothing but creative drafting aimed at circumventing the prescription effect on the claim. Nothing arises from an alleged breach of agreement number three because plaintiff pleads that defendant has complied therewith.

[70] Counsel submitted in conclusion that the plaintiff has failed to discharge the onus in proving that the claim amount constitutes a liability on the part of the defendant arising from a failed obligation in the third agreement. The admitted failure to have delivered the equipment does not superimpose a further contractual term in the third agreement. The plaintiff has demonstrably failed to prove that the defendant is liable for the claim amount premised upon breach of the third agreement. To the extent that a determination of breaches of the first and second agreements requires consideration, they submitted that even if breach is established it may be inconsequential as the plaintiff's case is that the obligation to pay arises from the third agreement, its terms having been pleaded by the plaintiff itself.

Can the plaintiff obtain an order for payment of Euro 32 000?

[71] Counsel for the plaintiff argued that the parties by way of the pre-trial order set out as one of the questions; whether the defendant is indebted to the plaintiff in the sum of Euro 32 000 with effect from 7 April 2016. Counsel argued that the claim in the particulars of claim was limited to the sum of Euro 24 150 in respect of the three machines namely;

a) Combined cultivator preparatory fast mod, 350+DHS/RF;
b) Trailed offset disc Harrow Model 24 FCIMG/61;
c) Mounted reversible three-disc plough Model ZTD 70.

[72] Counsel submitted that the parties by agreeing to the pre-trial order agreed for the court to consider not just the claim for Euro 24 150 but the higher claim for Euro 32 000. Evidence was led in respect of this higher claim and a breakdown of how this higher claim is arrived at was provided by way of Mr. Virgilio Mazzardo's evidence in chief where he testified as follows:

'I below, set out a breakdown of the defendant's indebtedness to the plaintiff'.

Description	Amount Euro

31 July 2012 invoice	89,939.00
18 December 2012	719.00
Total	**90,658.00**
Less 6 April 2016 invoice from defendant	58,658.00
Less three machines sold by the defendant	24,227.00
Balance unaccounted	7 776.00
Total due owing to plaintiff	**32 003.00**

[73] Counsel argued that this evidence was not disputed during cross-examination by the defendant and must therefore be accepted as accurate. In the circumstances, the defendant is indebted to the plaintiff as follows in respect of:

i) Combined cultivator preparatory fast mod, 350+DHS/RF, trailed offset disc Harrow Model FCIMG/61, Mounted reversible three-disc plough Model ZTD 70 total Euro 24 150.00.

ii) From the 31 July 2012 and 18 December 2012 invoices Euro 7 776.00.

[74] The difficulty with counsel submissions on the Euro 32 003.00 is that it was not the claim amount in the amended particulars of claim. The amount in the amended particulars of claim was Euro 24 150, that was the amount the defendant was summoned for. No amendment was sought to increase the amount to Euro 32 003.00 and the parties are bound to what they have pleaded in the pleadings. The fact that the parties in the pre-trial order agreed that the court has to consider as one of the question whether the defendant is indebted to the plaintiff in Euro 32 003.00 and evidence was led in support of the amount of Euro 32 003.00 does not empower this court to, without an application to amend the particulars of claim, increase the amount to Euro 32 003.00. For those reasons the court will only consider the claim amount of Euro 24 150.

Analysis of the evidence

[75] The issue for determination relates mainly to the alleged third agreement entered into between the parties on 6 April 2016. The written terms of the agreement were captured in Annexure “C”. Annexure “C” is a tax invoice from the defendant to the plaintiff with the heading – **Re-Exportation of Agricultural Equipment to Genoa Italy** (dated 15 March 2017 and attached to the amended particulars of claim as “C”). On Annexure “C” the equipment to be returned to Italy by defendant are listed, including the 3 pieces of equipment which form the subject matter of the third agreement. In paragraph 10.2 of the amended POC, the plaintiff avers that those three pieces of equipment were not shipped back to it in Italy. The defendant denied breaching the agreement and denied that it had any obligation to ship or refund any equipment.

[76] The witnesses for the plaintiff testified that indeed there was such an agreement and the terms were captured in annexure “C”. There is no dispute that the 3 pieces of agricultural equipment were initially shipped from Italy by the plaintiff to the defendant as testified to by Mr. Mazzardo, for the plaintiff. He testified that:

> 6. ‘I am aware that the plaintiff shipped the equipment to the defendant. I attach hereto the invoice issued by the plaintiff to the defendant in respect of the equipment marked exhibit “A”. The total value of the equipment was in the sum of Euro 81,710.00. In addition, the defendant was liable to refund the plaintiff free on-board fees in the sum of Euro 1950.00 as well as shipping expenses in the sum of Euro 6279.00. No payment whatsoever was due to the defendant from the plaintiff in terms of the agreement.
>
> 7. I confirm that the equipment which is listed on the invoice from the plaintiff to the defendant was shipped from Italy to Namibia and received by the defendant. I attach hereto a copy of the bill of lading marked exhibit “B”. I also attach hereto the packing list which confirms the specific items shipped to the defendant by the plaintiff, by way of sea freight marked exhibits “C” and “4” respectively (witness statement).’

[77] Counsel for the plaintiff correctly submitted that in the circumstances there is no dispute that the value of the three pieces of equipment is in the sum of Euro 24 150. This is especially so given the fact that the defendant confirmed this value. It is also not disputed by the defendant that those three pieces of agricultural equipment were sold by the defendant, to that end Mr Mazzardo testified that: 'This situation continued till 7th April 2016 when he wrote an email to Mr. Uwe Baumann asking them to return the goods in their stock and that they deduct that amount from the outstanding invoice. He attached a copy of the email I sent to the defendant's representatives as exhibit "6". In the same email he asked Mr Uwe Baumann and Mr Bernt Meier if any machine was sold in the meantime, but they never replied to this question].

[78] He testified that it was agreed that all the unsold machinery would be returned to Italy (to the plaintiff) by the defendant. Only after having loaded the container, at the expense of the Plaintiff, in Namibia, did they come to know that some machines were not loaded. When he asked Mr Uwe Baumann over the phone why those machines were missing, he said that the defendant had sold them in Namibia. He never mentioned this fact to him before, in any one of all the several calls he made over the years. He testified that he made the telephone call immediately after he had received an email from Mrs Heike Baumann on 27 July 2017 at 17: 04. The reason why he made the telephone call was that this was the first time the plaintiff had been notified by the defendant's representatives that not all the machines had been returned by the defendant to the plaintiff. He required an explanation as to why there was non-disclosure that **three machines** had been sold and demanded that the monies due in respect of those three machines and the outstanding balance be paid immediately. He was advised during that telephone conversation that the defendant would transfer the outstanding balance to the plaintiff including the monies in respect of the three machines that had been sold by the defendant during the course of the following week. He testified that no payment was received and all that took place where emails forwarded by the defendant's representatives requesting the plaintiff's bank details. He testified that to date no payment from the defendant to the plaintiff in respect of the three machines sold by the defendant and the outstanding balance has taken place.

[79] He testified that there was further email correspondence exchanged between him and Mrs Heike Baumann on behalf of the defendant. On 29 September 2017 he sent an email. In that email he stated that the first time he became aware of the sale by the defendant of the three machines that were not shipped as per the agreement between the plaintiff and the defendant was after the plaintiff had requested that all the unsold goods be returned to Italy.

[80] He testified that this email was responded to on 29 September 2017 and the defendant admitted selling the equipment. A copy of this email admitted as exhibit “H”. He testified that the defendant did not and has not to date paid the plaintiff any monies in respect of those three machines which the defendant admitted selling to its clients on dates unknown and undisclosed to the plaintiff.

[81] The gist of that evidence was not challenged and no evidence was adduced by the defendant to contradict that evidence and court must accept that evidence to be correct and believable. As to the payment terms, Mr Albino, for the plaintiff, testified as follows: ‘the machines would be shipped under a form of payment of bank transfer at one year from invoice date or alternatively, payment was immediately due from the defendant to the plaintiff on date when the equipment was sold by the defendant, whichever date was earlier’.

[82] During cross examination by counsel for the defendant, it was not put to the witness that, that version was inaccurate or false. The court must therefore accept the version as correct.

[83] From the unchallenged oral and documentary evidence adduced on behalf of the plaintiff and the email correspondence, I fully agree with the submission by counsel for the plaintiff that the only factual findings that can be made is that :(a) that on 6 April 2016 an agreement was reached between the defendant and plaintiff to return the unsold agricultural equipment to Italy from Namibia (b) on 27 July 2017 the defendant notified the plaintiff that three equipment remained in Namibia (c) that the three pieces of equipment which remained in Namibia were thereafter sold by the defendant (d) and that the plaintiff was not paid any monies in respect of those three pieces of equipment.

For all those reasons, the court is satisfied that the plaintiff has proven its case on a balance of probabilities and is entitled to judgment in its favour.

The Order

1. The special plea is dismissed.
2. Judgement is granted in favor of the plaintiff in the amount of Euro 24 150.
3. Interest on the amount Euro 24 150 at the rate of 20% per annum from date of judgement to date of final payment.
4. Defendant is ordered to pay the costs of the plaintiff, such costs to include the costs of one instructing and one instructed counsel

_____

G N NDAUENDAPO

Judge

APPEARANCES:

FOR THE PLAINTIFF	Advocate Chibwana, Assisted by Mr. Reya Karuaihe Instructed by Koep and Partners
FOR THE DEFENDANT	Advocate Diedericks, (assisted by Mr. Piere Erasmus Instructed by Erasmus and Associates