REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no: HC-MD-CIV-ACT-CON-2019/01081

In the matter between:

REINFORCING STEEL CONTRACTORS NAMIBIA (PTY) LTD **PLAINTIFF**

and

NORTHERN STEEL CC **DEFENDANT**

Neutral citation: *Reinforcing Steel Contractors Namibia (Pty) Ltd v Northern Steel CC* (HC-MD-CIV-ACT-CON-2019/01081) 456 [2021] NAHCMD (5 October 2021)

Coram: PARKER, AJ
Heard: **21; 23 24 June 2021 and 27 July 2021**
Delivered: **5 October 2021**

Flynote: Contract – Written contract – Absence of non-variation clause – Variation valid.
Held, oral agreement to vary certain terms permissible where no non-variation clause exists binding the parties.

Summary: Contract – Written contract – Seller (plaintiff) and buyer (defendant) of goods making oral agreement to vary certain terms – Court finding such variation

valid in the absence of non-variation clause – Authorized representative of buyer making orders for purchase of goods orally by phone calls – Court finding such orders were properly made – Court finding further that delivery notes signed by the driver of motor vehicles sent by buyer (defendant) to collect goods from premises of seller (plaintiff) were prima facie proof in terms of the contract that goods were delivered to defendant – In the absence of sufficient and satisfactory rebuttal by defendant court finding defendant liable to pay for the goods – Consequently, court entering judgment for plaintiff for goods sold and delivered and not paid for.

ORDER

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1. Judgment for the plaintiff in the amount of N$ 949 588.67, plus interest at the rate of 12 per cent per annum from 13 March 2019 to date of full and final payment.
2. Defendant's counterclaim is dismissed.
3. Defendant shall pay plaintiff's costs on the scale as between party and party; and such costs shall include costs of one instructing counsel and one instructed counsel.
4. The matter is removed from the roll: the case is finalized.

JUDGMENT

PARKER AJ:

[1] Plaintiff claims against defendant for the balance outstanding on defendant's account for goods sold and delivered by plaintiff to defendant. The transaction is based on credit terms provided in a sale agreement concluded by the parties, including the duly completed 'Confidential Trade Credit Assessment Form'. The defendant claims in reconvention for the return of moneys defendant alleges were overpaid to plaintiff.

[2] Mr Jacobs represents plaintiff; and Mr Shakumu represents defendant. In support of its case, plaintiff relied on three witnesses, namely Mr Greg Alan Wise, Mr Erich Mbai, and Mr Absolom Muguta. The first two witnesses gave viva voce evidence. By agreement between the parties, Muguta's evidence was in the form of documentary evidence only. Defence witness is Mr Ananias Nakale.

[3] As I see it, the key to the determination of the instant matter lies primarily in the answering of certain questions of law relating to the interpretation of the sale agreement entered into between plaintiff and defendant, including the completed Confidential Trade Credit Assessment Form ('the Assessment Form'), and applying the interpretation to the facts of the case.

[4] As mentioned previously, the questions of law turn principally on the interpretation and application of certain provisions of the sale agreement, being the 'Standard Terms and Conditions of Sale of the Supplier' and the Assessment Form that were filed of record. I shall consider only those provisions that conduce to the determination of the instant matter; and in that event, I accept the submission by Mr Shakumu that those provisions are:

a) Clause 1.1 of the agreement;
b) Clause 1.6 of the agreement;
c) The acknowledgement respecting credit facilities in the assessment form;
d) The certificate of indebtness provisions.

I shall now consider paragraphs (a), (b), (c), and (d).

<u>Paragraph 4 (a): Clause 1.1 of the agreement</u>

[5] Clause 1.1 provides:

> 'No order addressed by the customer (i.e. purchaser) shall result in a contract between the seller and the customer until accepted by the seller in writing'.

[6] Mr Shakumu is so much enamoured with this provision. Indeed it is the talisman on which counsel hangs the fate of the defendant in defendant's rejection of plaintiff's claim as respects those invoices defendant has denied liability for.

[7] First and foremost, the provisions of clause 1.1 are not entrenched by a non-variation clause as is the case with clause 1.2. If the provisions of clause 1.1 were entrenched by a non-variation clause as is the case with clause 1.2, then any oral variation thereof could not be given effect to, unless consented to by the parties in writing.(Dale Hutchison (Ed) and Chris-James Pretorius (Ed) *The Law of Contract in South Africa* 2nd ed (2012) at 168). It follows that as a matter of law, the parties, in the absence of an entrenched non-variation clause, were at liberty to vary the provisions of clause 1.1 orally or by conduct, which, on the evidence, I find on a balance of probability, they did. The conduct of the parties leaves no reasonable doubt as to the parties' intention of surrendering their right in clause 1.1 of the agreement. In my view, plaintiff has established that, with defendant's full knowledge of the right it has under clause 1.1, defendant decided to abandon it by conduct which was plainly inconsistent with an intention to enforce clause 1.1. (See *Laws v Rutherfund* 1924 AD 264 at 263.)

[8] It follows that defendant's evidence relying on only the words of the provisions of clause 1.1 to refuse to make payment for goods that were ordered not by purchase orders or emails but phone calls is rejected by the court for reasons that follow and based on the principles discussed above.

[9] Mr Grey Alan Wise (plaintiff's witness) testified that on diverse occasions orders were placed by defendant, particularly by Mr Erich Mbai (plaintiff witness), whom he dealt with mostly. At the relevant time Mbai held 33 per cent members' interest in the defendant. The other members were Annanias Nakale (defendant witness) and Mr Haimbili Etutunga. It is worth noting that the undisputed evidence is that at the relevant time, Mbai was in control of the day-to-day operations of the defendant, and he carried out the operations on full-time basis, unlike Nakale and Etutunga who were fully employed somewhere. They came to defendant's premises

in Ondangwa occasionally to discuss, for example, commercial strategies and policy matters.

[10] Mbai's uncontradicted testimony is that 'when I arrived, I placed orders differently', that is to say, he did not use purchase orders all the time to order goods from plaintiff: He ordered goods through emails, purchase orders and phone calls. He testified further that at times he called Wise to place orders. Mbai's testimony was in response to Mr Shakumu's suggestion to Mbai in Mbai's cross-examination-evidence that 'no order was made before delivery, unless the order was in writing'. Indeed, counsel was merely parroting the provisions of clause 1.1 of the agreement. Mbai's evidence corroborates, in perfect sync, with Wise's testimony on methods used by the defendant to make orders.

[11] This point carries great weight and carries with it unimpeachable credibility because: (a) Mbai at one point in time was the person in charge of the day-to-day operations of the defendant, as aforesaid; and so, in my view, he must know. (b) Mbai made the orders in the absence of Nakale and Etutunga. (c) Mbai is aware that since he is still a member of the defendant, he, together with the other members of the defendant, is liable for the debts of the defendant; and so, I find that Mbai testified against his own interest. (d) And, *a fortiori,* Mbai's evidence on that issue stood unchallenged – that is unchallenged by sufficient, satisfactory and credible evidence – at the close of plaintiff's case.

Paragraph 4 (b): Clause 1.6 of the agreement

[12] Defendant's second defence is built on clause 1.6 of the agreement. Clause 1.6 provides in material part (i.e. the first sentence thereof):

> 'Any delivery note (copy or original) signed by or on behalf of the customer and held by the seller shall be prima facie proof that delivery was made to the customer and the onus shall be on the customer to prove the contrary….'

[13] On the true construction of these provisions of clause 1.6, I hold that all plaintiff need to prove to a prima facie degree is that delivery was made, as Mr

Jacobs submitted; and that a delivery note signed by, or on behalf of, the defendant is held by plaintiff; and that would call for rebuttal by the defendant. (See *Shikale NO Universal Distributors of Nevada South Africa (Pty) Ltd and Others* 2015 (4) NR 1065 (SC).) For the meaning of proof to a prima facie degree, see, e.g. *Premier Construction CC v Chairperson of the Tender Board Committee of Namibia Power Cooperation Board of Directors and Others* 2014 (4) NR 1002 (HC) para 11. I now proceed to consider the other relevant provisions of clause 1.6 of the agreement.

Paragraph 4 (d): Clause 1.6 of the agreement

[14] Clause 1.6 provides in material part (i.e. the last two sentences thereof):

'The customer agrees that the amount due and payable to the seller shall be determined and proven by a certificate issued by the seller and signed on its behalf and duly authorized person. Such certificate shall be binding and shall be prima facie proof of the indebtness of the customer.'

[15] According to these provisions of clause 1.6 of the agreement, any certificate of indebtness properly signed and issued by defendant is ripe for payment by defendant; and it stands as prima facie proof of indebtness; and that would call for rebuttal by defendant. The last defence mounted by the defendant concerns the limit of the credit facilities that plaintiff extended to defendant.

Paragraph 4 (c): The acknowledgement provision in the Confidential Trade Assessment Form

[16] The acknowledgement provision in material part provides:

'I/We acknowledge that credit facilities granted by the supplier shall be as to the *sole* discretion of the supplier as to the nature, duration and *extent thereof*…., [Italicized for emphasis]

[17] On the true construction of these provisions, I hold that the nature, duration and extent of the credit facilities lie in the sole discretion of plaintiff, and so, plaintiff was entitled to exercise its discretion without reference to, and without consultation

with, the defendant. The only reasonable qualification are: (a) that defendant should be aware, or should reasonably be aware, of any increase or decrease in the credit facilities determined by plaintiff, and if there was an increase, that defendant made use of the increased credit facilities; and (b) the increase in the credit facility should not amount to extortionate credit bargain. (P S Atiya *The Sale of Goods* 5th ed (1975) at 346).

[18] Mr Wise testified that the credit facilities extended to defendant stood at N$ 600 000 initially. But in the course events, Mbai informed Wise that plaintiff could 'supply more'. I understand that to mean plaintiff could supply more goods to defendant on enhanced credit facilities. Plaintiff obliged because of 'the good payment history' that stood in defendant's favour. Thus, Mbai's uncontested evidence is that when he was the managing member of the defendant, the credit facilities enjoyed by defendant were between N$ 700 000 and N$ 800 000. Furthermore, defendant has not established that the credit facility amounted to extortionate credit bargain. (*PS Atiya The sale of Goods* loc cit)

<u>The interpretation of the relevant provisions of the agreement and the Assessment Form (discussed in paragraphs 5-17) and its application to the facts of the case</u>

[19] The first point to make is that, as I have intimated previously, defendant relies principally on the wrong interpretation of the aforementioned provisions of the agreement and the Assessment Form to reject plaintiff's claim and to build its claim in reconvention.

[20] On the evidence, I find that plaintiff's claim and defendant's counterclaim relate to 11 transactions. And I note that, according to the Pre-Trial Order (in paragraph 3.4.7 thereof), the only delivery notes which are in dispute are:

(a) N 1603-24,
(b) N 1603-35,
(c) N 1604-11,
(d) N 1604-15,
(e) N 1703-85, and

(f) N 1712-11.

[21] It follows irrefragably that it is those delivery notes that are relevant in the instant proceedings. (See *Stuurman v Mutual and Federal Insurance Company of Namibia Ltd* 2009 (1) NR 331 (SC) *para 21*.)

[22] The defendant relies on three defences based on the sale agreement and the confidential trade credit assessment form, namely that: (a) every order must be in writing; (b) there must always be delivery notes signed by, or on behalf of, the defendant; and (c) the trade credit line (i.e. the credit facilities) is curbed and is set at a certain amount (ie N$ 600 000) and can only be exceeded on request in writing.

[23] As to defence (a); I have demonstrated previously that the interpretation of clause 1.1 and the conduct of the parties of the sale agreement do not support defendant's averment and position. Second, as to defence (b); I find that what the parties agreed is that a delivery note signed by or on behalf of the defendant is prima facie proof that delivery was made to the defendant; and in that event, the defendant bears the onus of proving the contrary. Third, as respects defence (c); the parties agreed that plaintiff was at liberty and in its discretion to extend the level of the credit facilities, and, in my view, the only reasonable qualification is that where the plaintiff increased the credit facilities, the defendant was made aware of the increase, and it made use of such increase.

[24] Thus, keeping in my mental spectacle the enquiry and conclusions above, together with the pleadings, the Pre-Trial Order, the evidence and concessions and admissions on both sides of the suit, I make the following findings on the law and on the facts as respects the claim and the counterclaim.

The plaintiff's claim

[25] It would seem plaintiff itself is unsure as to the total amount owed to it by defendant. In the particulars of claim, plaintiff claims a total amount of N$ 949 558. 67. And in his submission, Mr. Jacobs submits that judgement ought to be entered

for plaintiff in the amount of N$ 949 558. 67, and counsel indicates how he reached that amount. But I find that the constituent amounts put forth by Mr Jacobs totalled N$ 1 774 157. 05 not N$ 949 558. 67. At all events, I note that out of the amount of N$ 949 558. 67 claimed by plaintiff in the particulars of claim, defendant denies its indebtness to plaintiff in the amount of N$ 409 966.04. Mr Shakumu submitted that that amount is made up of: N$ 4887.50 (see Exhibit C.), N$ 313 479.65 (see Exhibit E2.), and N$ 91 598.89 (see Exhibit F2).

[26] The court accepts defendant's admission that it is indebted to plaintiff in the amount of N$ 539 592.63, being the difference between N$ 949 558. 67 and N$ 409 966.04, which, as I have found, defendant says it is not liable for. It follows that judgment should be entered for plaintiff in the amount of N$ 539 592.63. I now proceed to consider the disputed amount of N$ 409 966.04.

(a) N$ 4887.50 (See para 25 above.)

[27] The uncontested evidence is that whenever a driver of a hired transport collected the goods from plaintiff's premises, the invoice did not include transport charges. But when plaintiff's transport carried the ordered goods to defendant's yard, plaintiff charged defendant transport charges as respects delivery note N1604-11. It means that defendant collected the goods from plaintiff's premises or yard. The delivery note shows a signature, that is, the signature of the driver of the motor vehicle who was sent by defendant to collect the goods from plaintiff's yard, and the date of collection. In my view, it would be highly unfair and unreasonable to expect plaintiff to know whose signature is embossed on the delivery note. And it should be remembered, Mbai was at the material time not the managing member of defendant with regard to the instant delivery note. What is clear is that the purchase order in question was authorized by Nakale; and so, Nakale should know who he sent to collect the goods from plaintiff's premises. And it should be remembered, it is common cause between the parties that the parties have had, as at the relevant time, a cordial commercial relationship. The transaction under this and the other heads were not a one-off occurrence.

[28] Nakale did not testify that he did not send transport to collect the goods on the strength of the purchase order which he had authorized. What Nakale says as respects the instant delivery note and other relevant delivery notes is that they were signed by persons who are not in the employment of the defendant and unfamiliar to the defendant.

[29] But it is not the case of the plaintiff that all the drivers who went to collect goods from plaintiff's premises were in the employment of the defendant. Indeed the evidence is that at times defendant sent hired transport to collect the goods from plaintiff's premises, as I have found previously. Furthermore, clause 1.6 of the agreement does not provide that on top of a signature there should also be the name of the person who signed. I find that the delivery note concerned was signed and dated. Accordingly, in my judgement, I find that plaintiff has proved to a prima facie degree that that delivery was made to defendant; and that calls for a rebuttal, that is, it calls on defendant to prove the contrary. Defendant has not discharged the onus cast on it by clause 1.6 of the agreement. Thus, in the absence of a sufficient and satisfactory rebuttal by defendant (see para 13 above), I incline to hold that defendant's indebtedness under the present head has been proved.

(b) N$ 313 479.65 (See para 25 above.)

[30] At the outset, I make this important point. The principles I discussed previously and the conclusions reached with regard to item (a) N$ 4887.50 apply with equal force to the present head.

[31] The first point to make here is that as regards the instant transaction, Mbai was at the relevant time the managing member. Mbai's evidence given in categorical terms is that the goods in question 'were received while I was the managing member'. He testified that he recognized the signature as that of Ruben Wafele. Ruben Wafele, according to Nakale, was one of those authorized to receive ordered goods from plaintiff. The others were Mbai and Etutunga. It was put to Mbai during his cross-examination-evidence that the signature on the delivery note was not that of Wafele because, whenever Wafele signed, he wrote his full names. Not one iota of sufficient and credible evidence was placed before the court to support the

assertion made by Mr Shakumu from the Bar to contradict Mbai's testimony. Going upon a mere preponderance of probability (*M Pupkewitz and Sons (Pty) Ltd t/a Pupkewitz Megabuild v Kurtz* 2008 (2) NR 775 (SC) para 30) and recalling what I said previously in paragraph 11 above about the weight that I attach to Mbai's evidence, I find that Wafele received the order under the present head, as he was authorized to do, as aforesaid.

[32] Accordingly, I conclude that plaintiff has proved the indebtness of defendant under the present head. I proceed to consider the last disputed amount.

(c) N$ 91 598.89 (See para 25 above.)

[33] Under the present head, too, I reiterate the point that the principles discussed previously and the conclusions reached with regard to item (a) N$ 4887.50 apply with equal force to the present head.

[34] Mbai testified that he did not recognize the signature but he said that it should be the signature of the driver of the motor vehicle that collected the goods from plaintiff's premises, because the date of the delivery note and the signature date on the delivery note are the same. I note that since plaintiff did not charge defendant for transport charges, and recalling what I said previously on such issue, I accept Mbai's evidence that the goods were collected by defendant from plaintiff's premises, and there is a signature of the driver of the motor vehicle that was used to collect the goods.

[35] What is more; Mbai testified further that he recalled the 'materials in (involved in) this particular delivery'. According to Mbai, defendant purchased the materials for the construction company Hillary Quiver Tree, a client (customer) of the defendant and that the defendant should have in its files the said order, the delivery note, the invoice involved and the payment therefor that Hillary Quiver Tree made.

[36] Mbai's evidence respecting this head stood unchallenged at the close of plaintiff's case. I find that Mbai's evidence is sufficient and satisfactory and so I

accept it. Accordingly, I conclude that plaintiff has proved the claim under the current head.

[37] The result is that in my judgement, plaintiff has proved its claim for N$ 4887.50, N$ 313 479.65 and N$ 91 598.89. The total is N$ 409 966.04. Taking into account defendant's aforementioned admission of its indebtedness to plaintiff in the amount of N$ 539 592.63 and the proved amount of N$ 409 966.04, I hold that the total indebtedness of defendant to plaintiff is N$ 949 558.67.

[38] Recalling what I said in paragraph 17 above about the limit of the credit facilities, I hold that the conclusion I have reached is unaffected by defendant's meritless challenge respecting the increase by plaintiff of the limit of the credit facilities that were extended to defendant. I find that defendant was aware of the increase, or should reasonably have been aware of it, and defendant made use of the increase; and it has not been established that the increase in the credit facilities amounted to extortionate bargain (see para 17 above). I now proceed to consider defendant's counterclaim.

Defendant's counterclaim

[39] In the pleadings, defendant's counterclaim is in the amount of N$ 2 245 246.57, representing, according to defendant an overpayment to plaintiff by defendant. Like plaintiff, defendant, too, is unsure as to the total amount it seeks in the claim in reconvention. The amount of N$ 2 245 246.57 has now come down to N$ 409 966.04, broken down into N$ 4887.50, N$ 313 479.65, and N$ 91598.89. It should be remembered, these are the selfsame amounts enquired into under the plaintiff's claim in convention, and I held that plaintiff has proved its claim. It follows inevitably that defendant's counterclaim should fail; and it fails.

[41] As to costs; I find that plaintiff' has not shown that the *Serrao* considerations (see *Namibia Breweries Limited v Serrao* 2007 (1) NR 49 (HC)) exist in this proceeding, justifying a punitive costs order; and so, I decline Mr Jacobs's invitation that I award such scale of costs.

[42] In the result, I order as follows:

1. Judgment for the plaintiff in the amount of N$ 949 588.67, plus interest at the rate of 12 per cent per annum from 13 March 2019 to date of full and final payment.

2. Defendant's counterclaim is dismissed.

3. Defendant shall pay plaintiff's costs on the scale as between party and party; and such costs shall include costs of one instructing counsel and one instructed counsel.

4. The matter is removed from the roll: the case is finalized.

C PARKER

Acting Judge

APPEARANCES:

PLAINTIFF:	J. Jacobs Instructed by Van der Merwe-Greeff-Andima Inc Windhoek
DEFENDANT	S.K Shakumu Of Kishi Shakumu & Co Inc Windhoek