

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

CASE NO: HC-MD-CIV-ACT-CON-2020/02870

In the matter between:

NAMIBIA TRUCK & COMPONENTS CC

PLAINTIFF

and

FRITZONIA TRANSPORT CC

DEFENDANT

Neutral Citation: *Namibia Truck & Components CC v Fritzonja Transport CC* (HC-MD-CIV-ACT-CON-2020/02870) [2021] NAHCMD 570 (02 December 2021)

CORAM: Prinsloo J

Heard: 14, 15, 16 June & 25 August 2021

Delivered: 02 December 2021

Flynote: Evidence – In civil proceeding – Where court is faced with two mutually destructive versions of facts – Approach to determination of dispute of facts – Court to apply its mind not only to the merits and demerits of the two sets of versions but also to their probabilities – It is so applying its mind that court would be justified in deciding which version to reject and which to accept.

Summary: The plaintiff issued summons on 20 July 2020 against the defendant for monies due and owing in respect of mechanical services rendered to the defendant at the latter's special instance and request. The services included maintenance and repair to the busses of the defendant as well as providing of parts to the defendant in respect of the defendant's busses. The plaintiff issued 27 invoices to the defendant in the amount of N\$ 337 970.26. It is the plaintiff's case that it was a material term of the parties' agreement that the defendant would pay the invoices within 30 days from date of invoice alternatively within a reasonable time. The defendant made payments on 29 June 2019 and 4 October 2019 in respect 5 different invoices to the total amount of N\$ 30 084.68. The plaintiff pleaded that no further payments were made apart from the N\$ 30 084.68 and as a result the defendant is liable for payment to the plaintiff in the amount of N\$ 307 885.51 as well as interest at a rate of 20% per annum as well as cost of suit.

The defendant does not place the existence of an agreement in terms of which the plaintiff would maintain and repair the defendant's vehicles in dispute but denies that the repairs were done in a workmanlike manner, with efficiency and due care and skill. The defendant further denies any knowledge of the 27 invoices on which the plaintiff is basing its claim and further denies that it signed any job cards for the particular repairs and in the instances where repairs were done the defendant pleads that the invoices were paid in full.

The defendant also instituted a counterclaim against the plaintiff. The counterclaim consist of four claims. The defendant pleads that the plaintiff breached this agreement by failing to repair the said vehicle in a workmanlike manner resulting in the defendant being unable to do its transport services and consequently suffered a loss of income from its transport services in respect of FToppNA in the amount of N\$ 480 000 for the period November 2019 to May 2020 and a loss of income in the amount of N\$ 560 000 in respect of Topp3NA.

The plaintiff conceded that it agreed to the repair of the busses with the registration number FToppNA and Topp3NA however pleads that it is entitled to remuneration in respect of the labour and the parts fitted to the busses and therefore the plaintiff has a right of retention of the respective busses until payment has been made. The plaintiff denies any knowledge of the regarding loss of income suffered by the defendant and denies the allegations that it breached the agreement between the parties.

Held that the proper approach is for the court to apply its mind not only to the merits and demerits of the two mutually destructive versions but also their probabilities and it is only after so applying its mind that the court would be justified in reaching the conclusion as to which opinion to accept and which to reject.

Held that – failure to call an important witness for a party elicits an adverse inference.

ORDER

1. The Defendant is ordered to pay the Plaintiff the sum of N\$ 40 000.
2. The Defendant is ordered to pay interest a *tempore morae* at the rate of 20% per annum from 08 February 2020 to date of final payment.
3. The Defendant's counterclaim claim 1 and 2 are hereby dismissed.
4. The Plaintiff is ordered to release the Defendant's vehicles with registration numbers FToppNA and Topp3NA upon the payment of the N\$ 40 000.
5. Each party to pay their own costs.
6. The matter is regarded as finalised and removed from the roll.

JUDGMENT

PRINSLOO J:

Introduction

[1] The parties before me are Namibia Truck & Components CC with its registered address in Lafrenz, Windhoek and Fritsonia Transport CC with its registered address in Okahandja.

[2] The plaintiff is in the business of automotive repairs and is a fairly new business that was started by its members, Messrs Jano van Wyk and Marvin Tsamaseb in 2019.

[3] The defendant is a transport company that owns a number of Iveco busses for the transport of personnel of different companies from Okahandja to Windhoek and back. The defendant's sole member is Ms Antonia Topp, who operated the business with the assistance of her husband.

[4] The members of the plaintiff and Ms Topp have a business relationship that dates back to the time when Messrs van Wyk and Tsamaseb were still employed with Africa Commercial Vehicles and Ms Topp was a longstanding customer of the said business.

[5] When Messrs van Wyk and Tsamaseb started their own business Ms Topp was encouraged to bring her business over to the plaintiff, which she did.

Pleadings

[6] The plaintiff issued summons on 20 July 2020 against the defendant for monies due and payable in respect of mechanical services rendered to the defendant at the latter's special instance and request. The services included maintenance and repair to the defendant's busses and providing parts to the defendant in respect of the said busses. The plaintiff issued 27 invoices to the defendant amounting to N\$ 337 970.26.

[7] It is the plaintiff's case that it was a material term of the parties' agreement that the defendant would pay the invoices within 30 days from the date of invoice alternatively within a reasonable time. The defendant made payments on 29 June 2019 and 4 October 2019 in respect of 5 different invoices to the total amount of N\$ 30 084.68. The plaintiff pleaded that the defendant made no further payments apart from the N\$ 30 084.68. As a result, the defendant is liable for payment in the amount of N\$ 307 885.51 as in addition thereto interest at a rate of 20% per annum as well as cost of suit.

[8] The defendant does not place the existence of the agreement in terms of which the plaintiff would maintain and repair the defendant's busses in dispute but denies that the repairs were done in a workmanlike manner, with efficiency and due care and skill.

[9] The defendant pleaded that it handed busses with the registration FToppNA and Topp3NA to the plaintiff for repairs during November 2019, which the plaintiff failed to repair to date.

[10] The defendant denies any knowledge of the 27 invoices on which the plaintiff's claim is founded and denies it signed any job cards for the particular repairs. In the instances where repairs were done, the defendant pleads that the invoices were paid in full.

[11] The defendant pleads that during June 2019, the parties agreed to ringfence the defendant's debt, which amounted to approximately N\$ 40 000 at the time. During this period, the defendant purchased an Iveco bus from the plaintiff at the cost of N\$ 250 000, which would be paid from June 2019 to October 2019. The defendant paid the total amount as per the agreement.

[12] In December 2019 the plaintiff alleged that the defendant owed the amount of N\$ 307 885.51 and suggested that the defendant return the Iveco bus (to the value of N\$ 250 00) whereafter the defendant would remain with a balance of N\$ 50 000 owing to

the plaintiff. The defendant, however, denies that it owed the plaintiff the amount claimed alternatively that the defendant owes the plaintiff the amount of N\$ 40 000, which is duly tendered to the plaintiff.

Counterclaim

[13] The defendant also instituted a counterclaim against the plaintiff. The counterclaim consists of four claims.

[14] The basis of the defendant's first and second claims against the plaintiff is that the defendant is in the transport industry and provided transportation services to employees of third parties between Okahandja and Windhoek. One such client was Meatco Namibia.

[15] During November 2019 the parties concluded an agreement that the plaintiff would effect repairs to the defendant's Iveco busses registration number FToppNA and Topp3NA and that said repairs would be completed in a workmanlike manner and efficiently and with due care and skill. In return, the defendant would pay the plaintiff for the services/repairs of the said vehicles.

[16] The defendant pleads that the plaintiff breached this agreement by failing to repair the said vehicle in a workmanlike manner resulting in the defendant being unable to do its transport services and consequently suffered a loss of income from its transport services in respect of FToppNA in the amount of N\$ 480 000 for the period November 2019 to May 2020 and a loss of income in the amount of N\$ 560 000 in respect of Topp3NA.

[17] The loss suffered was in respect of the defendant's Meatco Namibia contract from which the defendant would gain a monthly income of N\$ 80 000.

[18] The defendant's third and fourth claims relates to the defendant's busses FToppNA and Topp3NA which were delivered to the plaintiff during November 2019 for repairs and the plaintiff has been in unlawful possession of the busses since, alternatively that the plaintiff disposed of the busses without the knowledge of the defendant. The defendant claims delivery of the two busses, which is valued at N\$ 300 000 and N\$ 400 000 respectively.

Plea to counterclaim

[19] The plaintiff conceded that it agreed to repair the busses with the registration number FToppNA and Topp3NA. However, it pleads that it is entitled to remuneration in respect of the labour and the parts fitted to the busses. Therefore, the plaintiff has a right to retain the respective busses until the defendant has made payment.

[20] Plaintiff denies any knowledge of the loss of income suffered by the defendant and denies the allegations that it breached the agreement between the parties.

Pre-trial order

[21] In terms of the pre-trial order issued on 11 March 2020, the following are the issues of fact and law that are in dispute between the parties:

'1.1. Whether the defendant is indebted to the plaintiff for N\$ 307 885.51 as at 20 July 2020 as per the Particulars of Claim, or at all. Alternatively whether the Defendant is indebted to the Plaintiff in the amount of N\$ 40 000.

1.2. Whether the Plaintiff repaired the Defendant's vehicles as agreed or at all.

1.3 Whether the Plaintiff issued the invoices to the Defendant as annexed to the Particulars of Claim.

1.4 Whether invoices issued by the Plaintiff to the Defendant are payable within 30 days, if they were so issued.

1.5 Whether the repairs that were done to the vehicles were paid for in full.

1.6 Whether during June 2019 the Parties agreed to ringfence the Defendant's debt and whether the debt was around N\$ 40 000 at that stage.

1.7 Whether the Defendant is in the business of providing transport services between Windhoek and Okahandja and has an agreement to that effect by Meatco.

1.8 Whether the Defendant suffered a loss of N\$ 480 000 for loss of income.

1.9 Whether the Plaintiff and Defendant entered into an agreement as claimed by the Defendant during November 2019.

1.10 When delivery of FToppNA to the Plaintiff took place.

1.11 Whether the Plaintiff was in breach of the agreement as claimed by the Defendant.

1.12 The terms of the agreement as claimed by Defendant in respect of vehicle FToppNA.

1.13 Whether the parties entered into a verbal agreement during December 2019 as claimed by the Defendant.

1.14 The terms agreed to between Parties in respect of vehicle Topp3NA.

1.15 Whether the Plaintiff was in breach of the agreement as claimed by the Defendant.

1.16 Whether the Defendant suffered a loss of N\$ 520 000 for loss of income.

1.17 Whether FToppNA is valued at N\$ 300 000.

1.18 Whether Topp3NA is valued at N\$ 400 000.

1.2 Paragraph (2) 2.1 – 2.8 all issues of law to be resolved during the trial.

2.1 Whether the Defendant's duty to pay the Plaintiff is reciprocal to the Plaintiff having performed its obligations as agreed in a workmanlike and efficient manner and with due care and skill.

2.2 Whether the Plaintiff breached the agreement by failing to repair the vehicles in a workmanlike manner.

2.3 Whether, if it is proven that the Defendant suffered a loss of N\$ 560,000.00 for loss of income then whether the Plaintiff is liable for the Defendants loss so incurred.

2.4 Whether, if it is proven that the Defendant suffered a further loss in the amount of N\$ 480 000 for loss of income then whether the Plaintiff is liable for the Defendants loss so incurred.

2.5 Whether or not the Plaintiff is entitled to retain possession of the vehicles FToppNA and Topp3NA until payment is affected.

2.6 Whether the plaintiff is obliged to restore possession of the aforesaid vehicles in light of the debtor and creditor lien that the plaintiff has to its disposal.

2.7 Whether the Plaintiff has been in unlawful possession of FToppNA since November 2019. Alternatively, whether the Plaintiff disposed of FToppNA and as a result is indebted to the Defendant in the amount of N\$ 300 000.

2.8 Whether the Plaintiff has been in unlawful possession of Topp3NA since November 2019. Alternatively, whether the Plaintiff disposed of Topp3NA and as a result is indebted to the Defendant for N\$ 300 000.00.'

[22] The following are common cause between the parties¹:

22.1 That plaintiff rendered services to the defendant at the latter's special instance and request. The services involved maintenance and repairs to FToppNA and Topp3NA busses of the defendant;

22.2 The plaintiff would perform its service in a workmanlike with due care and skill;

22.3 The defendant would pay the plaintiff for the services rendered;

22.4 The defendant made the payments as listed in paragraphs 6.1 to 6.5 of the particulars of claim;

22.5 The defendant admits the letter of demand.

22.6 The defendant purchased an Iveco bus from the plaintiff for an amount of N\$ 250 000, which the defendant paid in instalments.

22.7 The defendant failed to make payment of the demanded amount to the plaintiff and denies that it has an obligation to do so.

22.8 The plaintiff provides auto mechanic services.

22.9 The plaintiff admits refusing to restore possession of Topp3NA and FToppNA to the defendant.

Evidence adduced

On behalf of the plaintiff

¹Pre-trial order dated 11 March 2021. P 184.

[23] The two members of the plaintiff, Messrs van Wyk and Tsamaseb testified on behalf of the plaintiff, and their evidence can be summarised as follows:

[24] The witnesses had a longstanding business relationship with Ms Antonia Topp dating back to their employment with Africa Commercial Vehicles, and Mr Tsamaseb then recruited Ms Topp as a client for the plaintiff once they started their own business in 2019. The witnesses were thus aware that the defendant was in the transport business.

[25] The parties agreed that Ms Topp would send her busses for maintenance and repairs to the plaintiff and provide her with parts. The parties further agreed that once the plaintiff issues Ms Topp with the invoices, it would be paid within 30 days from the date of invoice, alternatively within a reasonable time.

Mr Van Wyk' testimony

[26] Mr Van Wyk testified that he is presently a 50% member of the plaintiff with Mr Tsamaseb. The latter owns the other 50% membership share in the plaintiff, which is registered as Janmar Investments CC and started trading under Namibia Truck & Components in 2019. He testified that he was personally involved in the transactions between the plaintiff and the defendant from the onset. He testified that during the period July 2019 and October 2019, the plaintiff rendered services to Ms Topp at her special instance and request. These services involved maintenance and repairs of her various vehicles (busses).

[27] Mr Van Wyk testified that two of the busses, with registration numbers FToppNA and Topp3NA, are still in the plaintiff's possession due to Ms Topp failing to pay her outstanding invoices issued to her together with her the job cards in respect of the work done to the vehicles. These invoices amount to N\$ 337 970.26. Mr Van Wyk testified that in terms of the agreement between the parties, the invoices were to be paid within 30 days invoice alternatively within a reasonable time.

[28] Mr Van Wyk testified that Ms Topp made certain payments prior to the demand of the balance due to the plaintiff. Mr Van Wyk testified that the FToppNA bus was towed to the plaintiff's premises, and when the bus was brought in, they commenced repairs on it. However, the plaintiff ceased to do further repairs in respect of the FToppNA bus at the beginning of November 2019, due to the continued failure by Ms Topp to pay the services rendered and parts provided to the defendant. Mr Van Wyk further testified that the purchasing price of the parts was a significant expense for the plaintiff, and the plaintiff could not proceed to spend funds when customers were not making payments.

[29] Mr Van Wyk confirmed that Ms Topp bought a bus (the 'Walvis Bay bus') from the plaintiff in June 2019 for an amount of N\$ 250 000, of which she paid a deposit and monthly payments of N\$ 56 666.66 towards the purchase price. Mr Van Wyk testified that because there were payments received in respect of the sale of the Walvis Bay bus, it took him a while to realise how far in arrears the defendant's account was for the services and repairs of the other busses.

[30] Mr Van Wyk confirmed that the parties agreed that Ms Topp would make payments in respect of the outstanding invoices for the other busses after she had paid the total purchase price for the Walvis Bay bus, of which the last payment was due in September 2019. Mr Van Wyk added that despite the agreement between the parties, Ms Topp did not make payments towards her outstanding invoices.

[31] Mr Van Wyk testified that during November 2019, all the necessary repairs in Topp3NA were completed by the plaintiff, and the bus was ready for collection. The bus was, however, not collected by Ms Topp because she could not pay the outstanding invoices. As a result, he and Mr Tsamaseb requested Ms Topp to attend a meeting at the plaintiff's premises for the parties to discuss and arrange a payment plan. This meeting was unsuccessful as Ms Topp made no payment offer. Mr Van Wyk testified

that because the parties could not reach an agreement during the meeting, all work on the busses ceased until the payment issue was resolved.

[32] Mr Van Wyk testified that during December 2019, he requested the plaintiff's driver, Mr Timo, to deliver the account statement and invoices to Ms Topp in Okahandja. She, however, refused to sign the plaintiff's delivery book. Hereafter, a demand letter was sent to Ms Topp and delivered via the Deputy Sheriff.

[33] Mr Van Wyk testified that after the Deputy Sherrif delivered the letter of demand to Ms Topp, the Topp3NA bus remained on their premises for another five months. On Saturday, 2 May 2020, Ms Topp phoned him and informed him that she wanted to make payment and collect Topp3NA. The witness testified that he then called their legal practitioner, who advised him that Ms Topp has to pay the outstanding balance in respect of Topp3NA and sign an acknowledgement of debt for the rest of the monies due, and only then may she remove the Topp3NA bus. Ms Topp only showed up the following Monday, unannounced, to collect the bus but had not signed the acknowledgement of debt. Ms Topp insisted on entering the workshop, but he and Mr Tamaseb refused her entry to the workshop as it is limited to the staff members of the plaintiff. This refusal did not find favour with Ms Topp, and she proceeded to phone her husband, instructing him to bring the police to the plaintiff's premises, which he did.

[35] Mr Van Wyk testified that due to them not receiving an acknowledgement of debt provided to her, they did not know she was coming, and therefore the bus was not assembled when she showed up. Mr Van Wyk testified that they had taken out the fan hub installed in the bus because it was expensive, and they needed to install it in the vehicle of paying client. This course of action was necessary to cover the plaintiff's running costs. On Ms Topp's insistence, Mr van Wyk took her and the police to the busses where she took pictures. Hereafter the police explained to Ms Topp to make payment on the outstanding invoices. The parties agreed that the bus would be re-assembled and the fan hub reinstalled, and the busses would be ready for collection on the following Wednesday. Ms Topp again failed to make payment.

[36] Mr Van Wyk testified that on 13 May 2020, Ms Topp's legal practitioners of record, Kangueehi & Kavendjii Inc. addressed a letter to the plaintiff's legal practitioner wherein the defendant denied any liability and any outstanding amount due to the plaintiff. Mr Van Wyk testified that the plaintiff is entitled to remuneration for the labour and the parts in respect of the services rendered and the repairs done to the vehicles as set out in the invoices and job cards.

[37] During cross-examination, it was put to Mr Van Wyk why certain job cards introduced in evidence had not been signed for, making it difficult for anybody to determine whatever it is that the plaintiff has claimed to have done was done. Mr Van Wyk was unable to provide an answer to the question.

[38] When asked regarding the issues Topp3NA had when it came to the plaintiff's workshop, Mr Van Wyk testified that Mr Tsamaseb is the one that dealt with invoicing, and he was unable to comment on it.

Mr Tsamaseb's evidence

[39] Mr Tsamaseb's evidence in chief is very similar to that of the first witness for the plaintiff, Mr Van Wyk, and as a result and for purposes of this judgment, I do not intend to repeat the same.

[40] Under cross-examination, Mr Tsamaseb confirmed that Topp3NA is currently in a running condition, whereas FToppNA was not in a running state.

[41] When asked about his recollection when they provided the defendant with the invoices, Ms Tsamaseb indicated that Ms Topp never really came to collect the invoices because she lived in Okahandja. As such, most of the invoices were given to the drivers when they collected the vehicle because most of the busses used to go back to

Okahandja. Therefore, in some instances, the plaintiff handed invoices to the drivers, and in some other cases, Ms Topp would collect the invoices personally.

[42] On a question from the court regarding his role in the plaintiff, Mr Tsamaseb indicated that his position has mostly to do with the operations and parts (the service and order thereof) and confirmed that he is not a mechanic.

On behalf of the defendant

[43] Ms Topp, who is the defendant's sole member, testified on behalf of the defendant. Ms Topp testified that the defendant has been in the transport industry since its inception, and in the main, provides transport to employees of third parties/entities.

[44] In essence, Ms Topp confirmed that she had known Messrs van Wyk and Tsamaseb for a couple of years now as they were previously employed by Iveco, the company that would service her busses from time to time. Ms Topp testified that around May to June 2019, Mr Tsamaseb phoned her and informed her that he and Mr Van Wyk started their own business and suggested that she bring her vehicles to the plaintiff for the occasional repairs, parts and services.

[44] Ms Topp confirmed that the parties entered into a verbal agreement on the terms as testified by the plaintiff's witnesses. Ms Topp also confirmed the sale agreement of the Walvis Bay bus between the plaintiff and the defendant and the payment terms thereof. Ms Topp further confirmed the ringfence agreement in respect of the defendants account for repairs to the other busses until she finished paying off the Walvis Bay bus.

[45] Ms Topp testified that at the time of the ringfencing agreement, she was verbally informed that the defendants' outstanding account with the plaintiff amounted to about N\$ 40 000. Ms Topp further confirmed the payments she made towards the Walvis Bay bus (which is not in dispute).

[46] Ms Topp testified that during November/ early December, she went to the plaintiff's premises intending to settle the debt the defendant owed the plaintiff before the purchase of the Walvis Bay bus, and that is when she was informed that the defendant's account was in arrears of over N\$ 300 000.

[47] Ms Topp testified that Mr Tsamaseb was not willing to accept the N\$ 50 000 that she intended to pay as it was too little and that he would only accept a minimum payment of N\$ 200 000 because it was almost Christmas and the plaintiff had to pay bonuses to its employees. As a result of the refusal by Mr Tsamaseb, she decided to leave. Ms Topp further testified that she was neither provided with invoices (the 27 disputed invoices were only provided to her once the dispute between the parties arose) nor was she provided with any job cards to sign for any work to be done on her vehicles.

[48] In respect of the Topp3NA bus, Ms Topp testified that the plaintiff attended to the repairs of this vehicle during October 2019. Within less than a month, the bus was on its way to Okahandja from Windhoek with Meatco employees but broke down along the road. Ms Topp testified that the breakdown was due to an injector that was not properly fitted after the last repair and was thus loose. Ms Topp testified that she believed this to be true because of the plaintiff's job card 502, which indicates "attend to injectors to be removed".

[49] Ms Topp further testified that during April 2020, she informed Mr Van Wyk that she needed the Topp3NA bus, and he informed her that the repairs were complete and that the defendant had to settle the amount of N\$ 63 561.04 in respect of invoice 20475 before the plaintiff could release the vehicle. Mr Van Wyk then referred her to the plaintiff's legal practitioner regarding the payment. When she called the plaintiff's legal practitioner, who informed her that the vehicle's repairs were complete and the plaintiff awaited payment.

[50] Ms Topp testified, following the conversation with the plaintiff's legal practitioner, she went to the plaintiff's premises on 2 May 2020 to pay the N\$ 63 561.04, but Mr Van Wyk told her that she could only collect the vehicle on Friday, 8 May 2020. Ms Topp testified she could not understand why the vehicle could not be released immediately, especially since she was informed that the repairs were effected and given the invoice. She recalled Mr Van Wyk telling her that the vehicle was still dirty and they could not release a dirty vehicle.

[51] Ms Topp testified that she then requested to see both busses, ie. Topp3NA and FToppNA. Mr Van Wyk then refused to allow her into the workshop because it was supposedly hazardous, which she found odd because she entered the workshop on previous occasions without issues. She then called the police for assistance. She was then allowed to enter the workshop to see the busses.

[52] Ms Topp testified she could not believe the state the busses were in- especially Topp3NA for which payment was demanded. She then decided to take pictures of the busses as evidence of their condition. Upon inquiry about the vehicles' state, Mr Tsamaseb informed her that they removed some parts of the vehicles and sold them to paying clients. She inquired whether those parts were deducted from the invoices issued. However, Mr Tsamaseb did not answer her.

[53] Ms Topp testified that it was clear to her that the plaintiff did not repair the bus in a workmanlike and efficient manner, if at all. She testified that she received a letter from the plaintiff's legal practitioner indicating "you agreed to pay the outstanding amount, in full, upon which our client agreed to deliver the bus to you by Friday, 8 May 2020, in a clean and good working condition". Ms Topp testified that, to her understanding, the vehicle should have been in good working condition when the invoice was issued.

[54] Regarding the FToppNA vehicle, Ms Topp testified that this vehicle was serviced by the plaintiff during October 2019 but was only in working condition for about a week

before it broke down. She returned the vehicle to the plaintiff to fix it properly. However, the vehicle is still not in a driving condition and is still in the plaintiff's possession. Ms Topp testified that every time she would ask about the vehicle, she would be given various excuses by Mr Tsamaseb. Only after the case went to lawyers did the members of the plaintiff change their tune and started saying that all work ceased because of unpaid invoices.

[55] Ms Topp testified that the members of the plaintiff were aware that the defendant required Topp3NA and FToppNA for its transportation services and that failure to repair and deliver the vehicles would result in a loss of income for the defendant. Ms Topp testified that due to the plaintiff's breach by not fixing the two vehicles in a workmanlike manner and efficiently or at all, the defendant had suffered a loss of income because it could not carry out the transport services of the employees of Meatco. As a result, her agreement with Meatco was terminated end of June 2020.

[56] Ms Topp testified that the defendant would usually earn about N\$ 80 000 per month from the Meatco contract in respect of Topp3NA, and owing to the plaintiff's breach, the defendant could not perform in terms of the agreement and suffered a total loss of income of N\$ 480 000 (from December 2019 to May 2020) and N\$ 560 000 (from November 2019 to May 2020) in respect of FToppNA. Ms Topp concluded and testified that had the plaintiff complied with the terms of the agreement and fixed the vehicles properly, the defendant would not have suffered the losses as mentioned above.

[57] During cross-examination, Ms Topp testified that she had vehicle repairs experience. According to her, no repairs were done on Topp3NA because after the vehicle was released, it drove a distance from Windhoek Okahandja roadblock, where it broke down. The plaintiff's mechanic had to attend to the vehicle it broke down, and this mechanic was apparently of the view that the fault lies with the plaintiff.

[58] During cross-examination, Ms Topp testified that she lost the Meatco contract as a result of the delay by the plaintiff in repairing the two busses in question. The delay caused her to rent two other vehicles to comply with her contractual obligations with Meatco. However, the employees of Meatco complained because they were either late for work or were picked up late from work. Ironically the person who rented the two additional vehicles to her 'stole' the Meatco contract away. Ms Topp could not provide the cancellation of the Meatco contract.

Submissions

On behalf of the plaintiff

[59] Counsel for plaintiff submits that it is the plaintiff's case that payment of the invoices was due within 30 days of invoice alternatively within a reasonable time and that it is the defendant's plea that payment is not due since the plaintiff failed to perform the work in a workmanlike and efficient manner with due and skill, is without merit. Counsel submits that the plaintiff's claim is based on the *locatio conductio operis*, which is a contract in terms of which one party has to produce a completed piece of work for the other.

[60] Counsel submits that the ordinary rules relating to the pleading of contracts apply. The contract has three basic terms, namely:

- a) the work must be performed;
- b) the remuneration payable; and
- c) time for performance.

[61] Counsel submits that it is usually implied (tacit) terms of the contract that the contractor will use materials that are suitable for the purpose of the works and will perform work in a proper and workmanlike fashion. Therefore the contractor must allege and prove:

- a) that remuneration was payable in terms of the contract; and

b) the amount of the remuneration payable.

[62] Counsel further submits that the plaintiff must allege and prove that everything was done that had to be done in terms of the contract on which the plaintiff sues (performance). A contractor who delivered the work and material in accordance with the contract is entitled to recover the contract sum, despite late performance. Counsel submits that a contractor may recover payment even if performance was incomplete or defective. The Court may in its discretion, grant the contractor a reduced contract price.

[63] Counsel submits that it is trite that the incidences of the burden of proof are a matter of substantive law. In this instance, the principle applies that he who relies on a contract must prove the existence and its terms. Therefore the plaintiff bears the onus to convince this Court on a balance of probabilities that the contract exists and what its terms are.

[64] Counsel submits that Ms Topp testified that the prices were unreasonable but further conceded that she is not in a position to determine whether the tariffs and prices charged by the plaintiff were in fact reasonable. Counsel submits that Ms Topp conceded further that there was no specific agreement with regard to when the repairs must be finished, other than it must be done efficiently.

[65] Counsel submits that it is telling that Ms Topp admits that as at June/July 2019, she was indebted to the plaintiff in the amount of N\$ 40 000, which amounts she admits is due and owing and that such amount does not form part of the amount and/or invoices disputed by the defendant, based on alleged poor workmanship and that she acknowledges, without reservation or conditions, that the defendant must pay this amount to the plaintiff.

[66] Counsel submits that the defendant, as a party who asserts that the work was not done in a workmanlike and efficient manner, has the onus to prove this since this constitutes a positive allegation aimed at refuting the plaintiff's claim. Counsel submits

that the defendant, for the first time, complained that the work was not done in a workmanlike and efficient manner in her plea, and never before. Still, the defendant continued to send her vehicles to the plaintiff for repairs from June to November 2019.

[67] Counsel submits that the defendant has failed to prove that the work was not done in a workmanlike and efficient manner. No evidence has been put up in support of this defence. Counsel submits to the contrary the plaintiff proved the defendant undertook possession of the repaired vehicles and continued to use the vehicles thereafter, without any complaint about the work being substandard. Accordingly, the defendant had the vehicles' benefit, use, and enjoyment after the plaintiff repaired them. As such, the plaintiff's version that the work was performed in a workmanlike and efficient manner must be accepted by this court.

[68] In respect of the counterclaims, Counsel submits that the plaintiff exercises a debtor- and- creditor lien over the FToppNA and Topp3NA vehicles of the defendant. Counsel further submits that the plaintiff's action of retaining the said vehicles as security for payment is lawful, and no adverse consequences (such as a claim for damages) can follow. As such, the counterclaims to return the vehicles and those for damages must fail on this basis.

On behalf of the defendant

[69] Counsel for the defendant submits that the idea between the parties was that the plaintiff would give the defendant a credit facility and that the plaintiff would repair the defendant's vehicles at the instance of the defendant. The defendant would pay for the repairs as invoiced by the plaintiff within 30 days. Counsel submits that the provisio was obviously that the repairs should have been carried out as expected.

[70] Counsel submits that the agreement between the parties is undisputed. As such, the defendant owed the plaintiff the amount of N\$ 40 000 (credit facility) when the parties entered into the sale of the Walvis Bay bus. Counsel submits that the defendant

offers and has, since the inception of the action, offered to settle the amount of N\$ 40 000 (which is not disputed between the parties).

[71] Counsel submits that in order for this Court to hold in the plaintiff's favour, the plaintiff must prove the following:

71.1 that the said statement is a true reflection of repairs done and/or parts, and services rendered to the defendant at the defendant's special instance and request;

71.2 that the invoices contained on pages 196 to 226 are a true reflection of work done on the defendant's vehicle and at the defendant's special instance and request.

71.3 the plaintiff would have to prove that the job cards contained on pages 233-242 are a true reflection of requests by or on behalf of the defendant for repairs and services on the defendant's vehicles.

[72] Counsel submits the invoices in question were not properly attested to and were disputed by the defendant's witness, Ms Topp. Counsel submits that the job cards have also been disputed on the basis that the defendant's witness does not know the people contained therein and were not signed and dated and that the witness was unequivocal in saying that instructions for repairs would either come from her or her husband.

[73] Counsel submits that the defendant defended the action based on the principle of the *exceptio no adimpleti contractus* and the absence of a lien. The contract between the parties is reciprocal in nature. Counsel submits that not all work done was as per the defendant's instructions; therefore, the defendant correctly refused to pay, citing poor workmanship and breach of contract.

[74] Counsel submits that the defendant, in an attempt to mitigate its loss, rented vehicles from a third party to carry on its business. Counsel submits that the defendant's witness testified that she gave instructions to the plaintiff to repair the acceleration problem on the vehicle bearing registration number FToppNA and the valve-injecting problem on the vehicle bearing registration number Topp3NA. The plaintiff instead attended to additional work not sanctioned by the defendant, and the different job cards evidence this upon inspection of the vehicles.

[75] Counsel submits that for the plaintiff to claim payment and/or lien as it is claiming, it must prove to this Court that it did the work in the first place, besides the existence of invoices.

The applicable law

Two mutually destructive versions

[76] In *Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR 555 (HC) at 559D and from *National Employers' General Insurance Co. Ltd v Jagers* 1984 (4) SA 437 (E) at 440E it was held that:

'... the proper approach is for the court to apply its mind not only to the merits and demerits of the two mutually destructive versions but also their probabilities and it is only after so applying its mind that the court would be justified in reaching the conclusion as to which opinion to accept and which to reject. (See *Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR 555 at 559D.)

'...where the onus rests on the plaintiff and there are two mutually destructive stories he (the plaintiff) can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the version advanced by the defendant is therefore false or mistaken and falls to be rejected. (*National Employers' General Insurance Co. Ltd v Jagers* 1984 (4) SA 437 (E) at 440E)'

[78] In *Ndabeni v Nandu*² and *Life Office of Namibia v Amakali*,³ Masuku AJ (as he then was) was faced with two mutually destructive versions and quoted with approval the following from remarks from *SFW Group Ltd and Another v Martell Et Cie and Others*:⁴

‘The technique generally employed by our courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues, a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That, in turn, will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’ candour and demeanour; (ii) his bias, latent and blatant; (iii) internal contradictions in his evidence; (iv) external contradictions with what was pleaded or what was put on his behalf, or with established fact and his with his own extra-curial statements or actions; (v) the probability or improbability of particular aspects of his version; (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. . .’

Burden of prove

[79] The old latin maxim “*semper necessitas probandi incumbit ei qui agit*” matures like wine, as several jurisdictions the world over have endorsed the principle that “he who alleges must prove”. Therefore, the plaintiff bears the burden of proof of the allegations claimed to sustain his claim on a balance of probabilities.⁵

[80] The Supreme Court in *M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz Megabuild v Kurz* 2008 (2) NR 775 (SC) at 790B-E cited with approval the following passage from *Govan v Skidmore* 1952 (1) SA732 (N) at 734A – D:

² (I 343/2013) [2015] NAHCMD 110 (11 May 2015).

³ (LCA78/2013) [2014] NALCMD 17 (17 April 2014).

⁴ 2003 (1) SA 11 (SCA) at page 14H – 15E.

⁵ *National Employers Mutual General Insurance Association v Gany* 1931 AD 187; *Dannecker v Leopard Tours Car and Camping Hire CC* (I2909/2016) [2016] NAHCMD 381 (5 December 2016) at para 44-45.

'Now it is trite law that, in general, in finding facts and making inferences in a civil case, the Court may go upon a mere preponderance of probability, even although its so doing does not exclude every reasonable doubt ... for, in finding facts or making inferences in a civil case, it seems to me that one may ... by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one.'

Failure on both parties to call an expert witness

[81] In *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd*,⁶ the court said the following on failure to call a witness:

'The learned Judge a quo drew an inference adverse to the plaintiff from its failure to call Gerson as a witness, notwithstanding the fact that he was available and in a position to testify on the crucial issue in the case, ie what was discussed at the meeting which took place on 4 August 1972. Before this Court, it was submitted on the plaintiff's behalf that he had erred in doing so. We were referred to a number of authorities which set out the principles governing the question in issue. See, eg, *Elgin Fireclays Ltd v Webb* 1947 (4) SA 744 (A) in which WATERMEYER CJ stated (at 749, 750): "It is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial Court, this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him. (See Wigmore ss 285 and 286.) But the inference is only a proper one if the evidence is available and if it would elucidate the facts.' See also *Botes v Mclean* 2019 (4) NR 1070 (HC) para 143.

Analysis of the evidence

[82] Having considered the applicable legal principles, I now deal with the evidence before this court.

⁶ 1979 (1) SA 621 (A).

Evaluation of the respective witnesses' evidence

[83] From the onset I wish to point out that the witness statements of the plaintiff's witnesses was literally a copy and paste exercise and that is why there was no need to summarise the respective witnesses evidence in chief.

[84] Two witnesses testified on behalf of the plaintiff and one on behalf of the defendant and what was clear from their evidence is that the business relationship between the plaintiff and the defendant deteriorated substantially from 2019 that I am doubtful if these parties will do business with each other again in future.

[85] The unfortunate result of the broken down relationship is that none of the witnesses were willing to make any concessions in favour of the other, even if a concession was clearly the right thing to do.

[86] One such an example is that the fact that Ms Topp was adamant that no work was done to the plaintiff's vehicles even where it was clear that work was done, even if it was not to her satisfaction.

[87] On the part of the plaintiff's witnesses they were adamant that the defendant must have received the invoices in spite of the possibility that Ms Topp did not receive the invoices.

[88] The plaintiff's witnesses failed to impress this court with their evidence regarding their job card system and invoicing system. Ms Topp also did not impress as a witness. On her part she blamed all the misfortunes that happened in respect of her vehicles on the plaintiff, without expert evidence I must add. She went as far as blaming the loss of a contract on the plaintiff, in spite of the fact that it appears not to be the case.

[89] For some reason the plaintiff and defendant also found it prudent not to call any expert witnesses in support of their cases nor did they call on the court to conduct an inspection in loco, which might have been a useful exercise by putting the current conditions of the vehicles into context.

Did either party discharge the onus resting on them?

Claim in convention

[90] On the issue of burden of proof, I am not satisfied that either of the party discharged their onus. I say so for the following reasons. In respect to the plaintiffs claim, the invoices and job cards introduced to court were, in fact, not corresponding with each other. Most of them, if not all, were not signed for on behalf of the defendant, and Ms Topp disputed knowing the individuals who signed for the said job cards.

[91] Ms Topp testified that the plaintiff failed to provide her with the 27 invoices in question when the dispute between the parties arose. This appears to be a real possibility as the evidence of Mr Tsamaseb is that at times the invoices would be placed in the busses when the busses were collected or would be send with the driver of the vehicle. The plaintiff provided no proof confirming that these invoices reached Ms Topp.

[92] I am of the considered view that the informal arrangement as to the billing system between Ms Topp and Messrs Van Wyk and Tsamaseb was a recipe for disaster. In addition thereto there was no proper booking-in process of the vehicles in place when the plaintiff received a vehicle of the defendant for repairs in my view. The job cards presented to court had the absolute minimum information recorded on them by the plaintiff's service centre when a vehicle came in for repairs. I also found it difficult to reconcile the job cards presented to the court with the tax invoices issued to support the work done. One such instance is an invoice for the amount of N\$ 65 566, 57 for which Mr Van Wyk could not present the relevant job card, when requested to do so during cross-examination. This is just one example but in general Mr Van Wyk had difficulty to reconcile the job cards and invoices during cross-examination.

[93] Ms Topp testified that the work was invoiced in respect of the busses, which were not requested. Mr Van Wyk responded to this allegation during cross-examination that the plaintiff strives to be the best in the industry and therefore go the extra mile at

the inspection of the busses to determine the vehicle's issue. Mr Van Wyk testified that the service centre would phone the client and inform him or her what issues were detected, and once given the go-ahead by the client, the plaintiff would proceed to effect the repairs. The defendant's witness vehemently denied this, and she remained consistent in that aspect.

[94] I understood Mr van Wyk to say that Ms Topp would also give telephonic instructions regarding work that had to be done on some of the vehicles however on a question of the court whether these instruction were recorded he indicated that it was not.

[95] The result is therefore that the court cannot make any findings of which work was authorised to be done and which work was not and how can it be quantified.

[96] In the absence of the plaintiff calling an expert witness to determine whether what the plaintiff claimed to have done and invoiced for in respect of the busses was indeed done and in the absence of the plaintiff calling any of the defendants employees to confirm that the job cards are true reflection of what was done and invoiced for this court cannot find that that the plaintiff discharged the onus of proof resting on it.

[97] The defendant however conceded that an amount of N\$ 40 000 is due and payable to the plaintiff and tendered the amount during the current proceedings.

Claim in reconvention

[98] In respect of the defendant's counterclaim claims or claims in reconvention, the allegation is that the defendant's busses were not repaired in a workmanlike manner and efficiently. The defendant base this claim on the photographs she took as evidence to indicate the state of disrepair of the busses in question. These photographs are, unfortunately, of limited assistance. It is common cause that the two busses were partially disassembled to sell the new parts fitted to another client. The photographs are just that. The photographs of the busses and carry no weight in assisting the court to

find that the busses were not being attended to in a workmanlike manner or efficiently. This court cannot even find if the car parts that is lying on the floor as per the photographs belongs to the vehicles in question.

[99] On this aspect the defendant bore the onus to proof that the repairs were/are not done in a workmanlike and efficient manner. There was no timeframe agreed to between the parties as to when the repairs and maintenance of the said busses were to be concluded, to which the defendant's witness conceded. On this aspect the defendant failed to discharge the onus.

[100] The defendant's counterclaim in respect of the loss of income is based on the fact that the busses were not repaired in a workmanlike manner and efficiently. The defendant solely based this claim on the fact that it lost the Meacto contract because the plaintiff allegedly failed to repair the busses within a reasonable time. The reality is however that there was no disruption in the service that the defendant delivered to Meatco in transporting its employees. At most the defendant would have a claim for the rental of these vehicles as a result of the vehicles which were in the care of the plaintiff. This is however not the defendant's claim.

[101] On Ms Topp's own version her contract was 'poached' by the gentleman who rented the defendant the two vehicles. Ms Topp was further unable to provide proof of the notice of cancelation or termination of the Meatco contract. On this issue of loss of income the defendant failed to discharge the onus as required.

Conclusion

[102] From the discussion above it is clear that the party's evidence that there is a clear variance between their versions and I am not satisfied that either party managed to discharge their respective onus for reasons discussed.

[103] Having applied my applied my mind not only to the merits and demerits of the two mutually destructive versions but also their probabilities I make the following order:

1. The Defendant is ordered to pay the Plaintiff the sum of N\$ 40 000 (as tendered).
2. The Defendant is ordered to pay interest a *tempore morae* at the rate of 20% per annum from 08 February 2020 to date of final payment.
3. The Defendant's counterclaim claim 1 and 2 are hereby dismissed.
4. The Plaintiff is ordered to release the Defendant's vehicles with registration numbers FToppNA and Topp3NA upon the payment of the N\$ 40 000.
5. Each party to pay their own costs.
7. The matter is regarded finalised and removed from the roll.

JS PRINSLOO
JUDGE

APPEARANCES:

PLAINTIFF: ADV R LEWIES
 Instructed by Ellis Shilengudwa Inc.
 Windhoek

DEFENDANT: MR K KANGUEEHI
 Of Kangueehi & Kavendjii Inc.
 Windhoek

