

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case No.: HC-MD-CIV-ACT-CON-2021/02282

In the matter between:

SAMUEL SHIKALE

PLAINTIFF

and

MARSON SHARPLEY

DEFENDANT

Neutral citation: *Shikale v Sharpley* (HC-MD-CIV-ACT-CON-2021/02282) [2022]
NAHCMD 551 (13 October 2022)

Coram: SIBEYA J

Heard: 12, 13, 14, 15 and 28 September 2022

Judgment: 13 October 2022

Flynote: Contract – Acknowledgement of debt – Based on an acknowledgement of debt following goods paid for but not delivered – Defendant claims that the acknowledgment of debt signed under coercive circumstances (duress) for being threatened with arrest – The party alleging duress must prove such duress on the balance of probabilities – The approach to mutually destructive versions restated – Court found that the plaintiff's evidence is, on the balance of probabilities, highly

probable and the defendant's evidence is on the same scale highly improbable – Court found that the duress was not proven – Plaintiff's claim succeeds.

Summary: The plaintiff claim is based on acknowledgement of debt. The plaintiff sought the supply of N95 face masks and paid amounts of N\$99 736.80 and N\$9 999.80 to Ms Ankambo's bank account in the United Kingdom. Ms Ankambo was introduced to the plaintiff by the defendant. The defendant assured the plaintiff that Ms Ankambo is his business partner and the plaintiff will receive the N95 face masks paid for. The face masks were never delivered and the plaintiff demanded the refund. Ms Ankambo repaid him an amount of N\$53 414.83.

Plaintiff demanded the outstanding amount and the defendant signed an acknowledgement of debt for the amount of N\$40 000 to be paid on or before 1 July 2020. The said amount was not paid and the plaintiff instituted this action based on the acknowledgment of debt. The defendant denies liability on the basis that he was coerced to sign the acknowledgement of debt (duress) after the police officers threatened him with arrest if he does not so sign. Evidence was led by both parties.

Held that – Where a defendant claims that he signed an acknowledgement of debt under coercive circumstances (duress), he or she bears the burden to prove such coercive circumstances (duress) on a balance of probabilities.

Held further that – Where the probabilities do not resolve the matter, the court can resort to the credibility of witnesses in order to find in favour of the one or the other party. This includes considering the candour and demeanour of witnesses, self-contradiction, contradicting an established fact or contradiction with the evidence of other witnesses who are supposed to present the same version as him or her.

Held further that – It was established that the defendant was a business partner or associate of Ms Ankambo and they failed to deliver the face masks ordered and paid for by the plaintiff and that the defendant signed an acknowledgement of debt on reduced and negotiated amount that he could afford.

Held further that – The defendant failed to prove that he signed the acknowledgment of debt under coercive circumstances (duress) and is therefore liable to the plaintiff. The plaintiff's claim succeeds.

ORDER

1. The defendant must pay to the plaintiff the amount of N\$40 000.
 2. Interest on the aforementioned amount at the rate of 20% per annum calculated from 1 July 2020 to date of full and final payment.
 3. Costs of suit including costs of one instructing and one instructed legal practitioner.
 4. The matter is removed from the roll and regarded as finalised.
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JUDGMENT

SIBEYA J:

Introduction

[1] COVID-19 rained havoc in this country and the world over. At its early days of inception little was known about what COVID-19 entails. Precautionary measures were thrown around, some appearing to be reasonable while others not. What was widely endorsed is the effectiveness of wearing face masks in order to curb the spread of Covid-19 which face masks were thus required on a grand scale. It is the intended supply of the face masks that forms the center stage of this matter.

[2] The plaintiff claims payment in the amount of N\$40 000 plus interest at the rate of 20% per annum calculated from 1 July 2020 and costs from the defendant for repayment of his money following non-delivery of the face masks.

The parties and their representation

[3] The plaintiff is Mr Samuel Shikale, an adult male businessman residing in Windhoek. He shall be referred to as such.

[4] The defendant is Mr Marson Sharlpey, an adult male businessman residing in Windhoek. He shall be referred to as such.

[5] Where reference is made to the plaintiff and the defendant jointly, they shall be referred to as the parties.

[6] The plaintiff is represented by Mr T Kasita while the defendant is represented by Mr S Mbudje.

Background

[7] In April 2020, the plaintiff sought the supply of N95 face masks. He met the defendant who is alleged to have informed him that he has a partner, Ms Selma Ankambo who is based in the United Kingdom and who is able to supply the required face masks. The defendant is alleged to have assured the plaintiff of the legitimacy of the business transaction.

[8] The plaintiff paid an amount of N\$99 736.80 and N\$9 999.80 to Ms Ankambo but received no face masks. He, later demanded repayment of the money. Ms Ankambo paid back an amount of N\$53 414.83 and stated that the remainder of the money will be paid by the defendant.

[9] The defendant subsequently confirmed in writing that he will pay an amount of N\$40 000 to the plaintiff. The confirmation reads as follows:

'This is to confirm that I will pay the amount to Sam of N\$40 000-00 on or before 01 July 2020

MARSON WARREN SHARPLEY

(SIGNED) 10/06/2020'

[10] The defendant did not pay the amount and stated that he made such commitment under duress. This is the subject of the litigation.

[11] During the trial, the plaintiff testified and called one witness, in pursuit of his claim. The defendant, in turn, testified and led evidence of one witness in order to foil the plaintiff's claim.

The pre-trial order

[12] The parties' joint pre-trial report which was made an order of court on 14 April 2022, by agreement, set out the following issues for determination:

- (a) Whether or not the plaintiff made any payment to the defendant;
- (b) Whether or not the defendant and Ms Ankambo are business partners;
- (c) Whether or not the defendant received a commission of N\$40 000 from Ms Ankambo;
- (d) Whether or not the defendant was coerced into signing the confirmation or acknowledgment of debt or that the defendant signed under duress;
- (e) Whether or not the plaintiff independently verified the genuineness of Ms Ankambo's business operations prior to making the payment;
- (f) Whether or not the defendant misrepresented facts to the plaintiff which induced him to transact with Ms Ankambo;
- (g) Whether or not there was a legal basis to the defendant to undertake to repay the plaintiff the amount claimed;

(h) Whether or not liability can be imputed on the defendant for breach by Ms Ankambo.

[13] The following constitutes agreed facts between the parties:

(a) That the defendant signed the confirmation or acknowledgement of debt on 10 June 2020;

(b) That the said confirmation or acknowledgement was signed in the office of the Station Commander of Windhoek Central Police Station.

Plaintiff's evidence

[14] The plaintiff testified, *inter alia*, that he is a businessman who was in need of N95 face masks during April 2020. He was introduced to the defendant by Mr Richard Goagoseb. The plaintiff brought a sample of the N95 face masks that he required to the meeting with the defendant. The defendant in turn introduced himself to the plaintiff as a supplier of the masks. The defendant also said that he has a partner, Ms Selma Ankambo who is based in the United Kingdom. The plaintiff gave a sample of the face mask to the defendant.

[15] The plaintiff testified further that Ms Ankambo forwarded an invoice to the defendant which the defendant in turn sent to the plaintiff. The invoice was issued under the name of SAS Medical Supplies Europe.

[16] The defendant created a WhatsApp group where the three of them (the defendant, the plaintiff and Ms Ankambo) communicated together at the same time. I shall refer to them as members of the WhatsApp group. Ms Ankambo undertook to send the face masks required after the full payment of the purchase price.

[17] Concerned about sending his money abroad before receiving the face masks, the plaintiff raised his apprehensions with the defendant. The defendant assured the plaintiff that Ms Ankambo is his long-time business partner, and without a doubt, he will receive the face masks paid for. Ms Ankambo and the defendant introduced themselves to the plaintiff as business partners. The defendant also pointed out his house to the plaintiff which added to calm the plaintiff's nerves. The defendant also

informed the plaintiff that if he does not receive the goods paid for he can return to the defendant, so the plaintiff testified.

[18] On 23 April 2020, the plaintiff paid the amount of N\$99 736.80 and a further amount of N\$9 999.80 into the bank account of Ms Ankambo held in the United Kingdom.

[19] The plaintiff produced a transcript of the above-mentioned WhatsApp group communication into evidence. The WhatsApp group communication shows that on 11 May 2020, the plaintiff complained of delayed delivery of the face masks. Ms Ankambo responded on the group (where the defendant was a member) that the payment was also delayed and she called for patience and understanding. She then said that: 'Alternative.../Mr. Marson will fully refund ...' Reference to Mr Marson is made to the defendant.

[20] The face masks were never delivered. After a certain period of time the plaintiff demanded repayment from Ms Ankambo and the defendant. The plaintiff testified that on 1 June 2020, he received a refund payment of N\$53 414.83 from Ms Ankambo. The remainder of the amount was to be paid by the defendant.

[21] The plaintiff testified that he laid a criminal charge against the defendant with the Namibian Police at Windhoek Central Police Station. On 10 June 2020, the plaintiff approached Deputy Commissioner Muyambango (Comm. Muyambango), the Station Commander of Windhoek Central Police Station, for assistance to call the defendant and try to resolve their dispute and have his money paid back to him. Comm. Muyambango requested the defendant to attend to the police station.

[22] Upon the arrival of the defendant, a meeting was convened in the office of the Station Commander. Present at the meeting was Comm. Muyambango, Warrant Officer Awala Nestor (W/O Nestor), the plaintiff, the defendant and the defendant's life partner, Ms Ally Angula. The plaintiff testified further that it was during the said meeting where the defendant agreed to pay to the plaintiff the amount of N\$40 000 and reduced such commitment to writing in the form of an acknowledgement of debt.

[23] The plaintiff further testified that although the outstanding amount exceeded N\$40 000, the defendant negotiated to pay the amount of N\$40 000 on the terms set out in the acknowledgement of debt.

[24] The plaintiff said further that the defendant failed to pay the above-mentioned amount and that culminated in these proceedings.

[25] During cross-examination, Mr Mbudje asked the plaintiff if he ever paid money to the defendant. The plaintiff responded that he paid to the defendant's partner, Ms Ankambo, after the defendant instructed him to make the payment.

[26] Mr Mbudje put to the plaintiff that the defendant signed the confirmation of payment under duress following threats of his immediate arrest by the police officers, if he does not sign. The plaintiff disputed the version and said that the defendant was not threatened. The plaintiff disputed and said that there were no threats as the parties even made jokes and the defendant went on to speak about his reputation. The plaintiff was asked if Comm. Muyambango was his friend or not, to which he said that they were not friends and Comm. Muyambango was unknown to him before.

[27] Mr Mbudje further put to the plaintiff that he moved towards Ms Ally Angula in a manner that appeared to be that he intended to attack her. The plaintiff disputed this allegation and said that it would be crazy of him to do so in front of the police officers.

[28] The plaintiff then called W/O Nestor who testified, *inter alia*, that he is a Warrant Officer in the Namibian Police stationed at Windhoek Central Police Station. He is an operations commander and is also a community service officer.

[29] W/O Nestor testified further that the plaintiff is not his friend or relative. On 10 June 2020, he was present in the office of Comm. Muyambango together with the plaintiff, the defendant and Ms Ally Angula, where Comm. Muyambango mediated in the dispute between the plaintiff and defendant. The plaintiff, who had laid a criminal charge against the defendant before, said that the defendant advised him to purchase face masks from Ms Ankambo, which masks were not delivered. Comm. Muyambango advised the defendant to pay back the money and the defendant agreed. The defendant said that he will pay such money in the manner that he wrote down on a piece of paper.

[30] W/O Nestor testified that the pastor (referring to the defendant) was not forced or coerced into committing to pay the plaintiff in writing.

[31] W/O Nestor produced a copy of his text messages. In one such text message sent to the defendant, W/O Nestor said: 'Ok but remember that you make an agreement with this man Sam for payment, which was supposed to be done on the 10th July and this man is just on top of me at my office.' The defendant responded on 11 August 2020 at 09:59AM with a text of his own that: 'Good morning W/O ... We will sort something out for Sam this week.'¹

[32] Mr Mbudje questioned W/O Nestor in cross-examination why the police were involved in debt collection and not just to arrest the defendant. W/O Nestor stated that the functions of the police are not just to arrest but also to educate the public. At times the police end up cautioning the members of the public. W/O Nestor said further that, together with Comm. Muyambango, they listened to the version of the defendant during the meeting and the defendant said that: 'I will sort out Mr Shikale not because I did wrong but because I introduced him to the lady.'

[33] It was put to W/O Nestor that the defendant was threatened with arrest if he did not sign the commitment to pay while at the same time the plaintiff moved towards Ms Ally Angula in attempt to assault her in the presence of the police officers who remained idle. W/O Nestor disputed the assertion and said that the defendant was not threatened with arrest. He also said that Ms Angula only said to the plaintiff that he was lying whereby the plaintiff denied the allegation. All that occurred were exchange of words during which the police intervened to stop such exchange.

[34] Mr Mbudje referred to a text message that W/O Nestor sent to the defendant on 11 August 2020 at 10:06AM that: 'ok pls because this (*sic*) guys they want to pick you up' and said that W/O Nestor threatened to arrest the defendant if does not pay the plaintiff. W/O Nestor denied ever threatening the defendant with arrest and said further that by 'pick you up' he meant that the police could pick him up to get his statement and forward the case docket to the Prosecutor-General for decision. He explained further that a suspect could be picked up in order to be charged, depending on the merits of the matter.

¹ Exhibit "H".

Defendants' evidence

[35] The defendant took the stand and testified, *inter alia*, that during 2020 he approached the Executive Director of the Ministry of Health and Social Services with the intention to supply the said Ministry with personal protective equipment. He met the plaintiff at the gate of the Ministry, where he was introduced to the plaintiff. The plaintiff intended to acquire face masks. He testified that he had a contact in the United Kingdom by the name of Ms Ankambo who could provide the face masks as she was also in the process to procure the same face masks for a certain foundation in Namibia.

[36] The defendant testified further that his role was merely to link the plaintiff to Ms Ankambo as he dealt with her before regarding several clients from other countries. For his role, the defendant, was to receive a referral fee from the plaintiff and Mr Goagoseb upon receiving the consignment. The plaintiff excluded Mr Goagoseb from the business arrangement, so the defendant stated.

[37] He testified further that Ms Ankambo created a WhatsApp group where the members were the plaintiff, Ms Ankambo and the defendant. He also said that at some stage the plaintiff communicated directly to Ms Ankambo regarding the supply of the face masks. His involvement was, therefore, insignificant until later when he learnt that the plaintiff paid an amount in Namibian dollars equal to 4 659.73 pounds to Ms Ankambo. The proof of payment was posted on the WhatsApp group. The defendant testified that he was nowhere near the payment of the said amount.

[38] He testified further that due to his busy schedule he was not always available to follow the conversation on the WhatsApp group, but he did not doubt the ability of Ms Ankambo to supply the required face masks. It was his testimony further that he was informed by the plaintiff, that the plaintiff carried out an independent investigation prior to making the said payment and was satisfied with Ms Ankambo's business operations.

[39] The defendant said that about a month after making the payment without receiving the face masks, the plaintiff began to harass him about the delay of the supply of masks. The plaintiff cancelled the order and demanded a refund of the amount paid. Ms Ankambo paid a portion of the said amount to the plaintiff and plaintiff demanded the difference from the defendant for introducing him to Ms Ankambo.

[40] The defendant testified further that W/O Nestor, the accused's friend, called him to attend to Windhoek Police Station to answer to the charges laid by the plaintiff. Despite inquiring on the details of the charges and the case numbers, W/O Nestor did not provide such information to him. He proceeded to the police station accompanied by his life partner Ms Angula. At the police station they attended to the office of the Station Commander where the Station Commander was in the company of the plaintiff and W/O Nestor.

[41] The defendant testified further that in the office the atmosphere became hostile and the plaintiff demanded payment of N\$40 000. The Station Commander and W/O Nestor then intimidated the defendant and said that the defendant had a choice to either pay the money demanded or face incarceration as the plaintiff already opened a case against him. He testified further that at the same time the plaintiff threatened to slap Ms Angula in the presence of the police officers who sat idle. It was the defendant who stood up to stop the plaintiff from slapping Ms Angula, so he testified.

[42] The defendant said that he succumbed to the police's imminent threats to lock him up if he did not undertake to pay the money. He stated further that he signed the confirmation of indebtedness to the plaintiff out of coercion and intimidation as he was not liable to pay the plaintiff. He further said that he feared that if he did not sign the confirmation of indebtedness, he would be arrested together with his life partner, Ms Angula.

[43] The defendant, in evidence in chief, informed this court of his reputation that he is a retired diplomat who is a man of the cloth. He also has 18 businesses and has never been arrested. One of his businesses is MS Consultancy CC.

[44] During cross-examination, the defendant confirmed that he forwarded pictures of N95 face masks to the plaintiff from Ms Ankambo on 19 April 2020. He further

confirmed that on 21 April 2020, he forwarded the invoice from Ms Ankambo bearing the bank account details of SAS Medical Supplies Europe for payment of the face masks to the plaintiff. The said confirmations of sending pictures of the face masks and the invoice to the plaintiff were not expressed by the defendant at first question. It was only after Mr Kasita, in follow-up questions, made reference to the bundle of discovered documents and the exhibits that the defendant confirmed while also saying that he cannot dispute what is documented.

[45] Mr Kasita questioned the defendant whether he is the one who created the WhatsApp group to which he responded that he could not remember. When further questioned that Mr Goagoseb was not part of the WhatsApp group, the defendant said that he was not aware. Soon thereafter, the defendant confirmed that Mr Goagoseb was not part of the WhatsApp group.

[46] The defendant further confirmed during cross-examination that Ms Ankambo received payment from the plaintiff on 29 April 2020. Ms Ankambo confirmed receiving the payment on the WhatsApp group to which the defendant commented and said 'perfect'.

[47] Mr Kasita put to the defendant that he did not distance himself from the text message of 11 May 2020 posted on the WhatsApp group. In that text, Ms Ankambo responded to a query by the plaintiff who complained about the failure to supply of the face masks, where she stated that 'Let's also NOT forget that payment was also delayed... irrespective let's exercise some calm/patience/understanding on both sides. Alternative .../Mr. Marson will fully refund...'.

[48] The defendant answered that he just ignored the text. When pressed by Mr Kasita why he would just ignore the text when Ms Ankambo has stated that she or the defendant will refund the plaintiff, the defendant said that he did not answer as he saw no need to respond. He confirmed not to have protested against the said text by Ms Ankambo. He further confirmed that nowhere in the texts from the WhatsApp group did he protest against the suggestion by Ms Ankambo that he will refund the plaintiff.

[49] Mr Kasita questioned the defendant that he is part of the business of Ms Ankambo and did not just refer the plaintiff to Ms Ankambo. This he based on the defendant's reaction to a text of 11 May 2020 on the WhatsApp group where, Ms

Ankamo stated that the items were received and will be booked with DHL, to which the defendant reacted by texting that 'Thank you for having them ready Selma Ma'am. We apologize for delay Sam. It was clearly not on purpose or our deliberate fault'. To this, the defendant said he just apologised out of having very strong ethics. He reiterated that he was a diplomat representing the country at the United Nations and therefore has a high level of ethics.

[50] Mr Kasita questioned the defendant from another angle in order to demonstrate that the defendant was Ms Ankambo's business partner or associate. Mr Kasita referred to a text posted by the defendant on another WhatsApp group where the members on the group constituted of the defendant, Bianca (the defendant's niece) and Ms Ankambo where the defendant stated as follows:

'On MS CONSULTANCY LETTERHEAD

This is to confirm that, I Marson Sharpley, CEO of MS CONSULTANCY which is a company that trades internationally and based in Windhoek, know and work collaboratively with Ms Selma, owner of SAS Medical Supplies Europe which is duly registered in the United Kingdom.

SAS MEDICAL SUPPLIES is known for swift, professional and responsible supply of medical equipment and materials to both private companies such as mines and cement companies as well as the Government of Namibia and other Governments.

As MS CONSULTANCY, we are a *bona fide* agent for NAMCOR, Namibia's State Owned Petroleum utility and would recommend SAS MEDICAL SUPPLIES EUROPE to any serious potential client who might be looking for swift, reliable, professional an...'

[51] The defendant, in his testimony, reacted to the above statements by stating that Ms Ankambo and him, were business associates and they worked collaboratively.

[52] The defendant confirmed that he did not report the threats by the police officers despite acknowledging that he knew highly ranked government officials on a political basis. He further stated that they knew each other with the Police Regional Commander of the Khomas Region Comm. Shikongo (by then). When pressed on why he failed to report the said threats, he answered that he thought that it was a petty issue, because if he wanted to report the threats he would have done so.

[53] The defendant led the evidence of Ms Ally Angula. She testified, *inter alia*, that she is a life partner to the defendant. She said that she knew Ms Ankambo who provides medical supplies. She testified further that on 10 June 2020 she accompanied the defendant to the Windhoek Police Station. At the police station, the issue was payment of N\$40 000. She confirmed that the defendant did not voluntarily sign the acknowledgement of debt. He signed due to the threats emanating from the plaintiff who approached her in an attempt to physically assault her in the presence of the police, when she said that he was not telling the truth, while the police did nothing about the situation.

[54] She further testified the Station Commander threatened to arrest the defendant and herself, if the defendant did not sign the confirmation to repay the plaintiff and out of fear of arrest, the defendant so signed.

[55] In cross-examination, she confirmed that she was not involved in the business transaction between the plaintiff, the defendant and Ms Ankambo.

[56] When questioned that no threat of arrest on her was made, Ms Angula said that the police said that if no acknowledgment of debt is signed there will be an arrest carried out. It was her testimony that they concluded the acknowledgment of debt due to the threats.

Brief submissions by counsel

[57] Mr Kasita argued that on the evidence on record it should be found that the defendant is indebted to the plaintiff in the amount of N\$40 000. He argued further that the defendant failed to prove that he signed the acknowledgement of debt under duress and such failure attracts liability as per the said acknowledgment of debt.

[58] Mr Mbudje's arguments were a different kettle of fish. He argued that the defendant was threatened with immediate arrest if he did not sign the acknowledgement of debt. He further argued that the police had no role to play in a private dispute between the parties. When the court inquired from him whether one of the functions of the police, which is to maintain law and order, may include attempts by the police to resolve disputes between private persons, Mr Mbudje

argued that maintenance of law and order relates to riots not a dispute between two people.

[59] Mr Mbudje submitted further that it was not established that the defendant owed any money to the plaintiff and he could, therefore, not acknowledge the non-existent debt, hence he only signed the acknowledgement of debt under duress. He invited the court to dismiss the claim.

Burden of proof and the law

[60] It is well established that the plaintiff bears the burden to prove his claim on a balance of probabilities. Where a claim is premised on an acknowledgement of debt and the defendant attempts to resile from it on the basis that it was signed under duress, then the defendant bears the burden to prove such duress on a balance of probabilities.

[61] In *Broodryk v Smith N.O*² it was stated that for a party to set aside a contract on the basis of duress, he or she must prove the following:

- 'a) Actual violence or reasonable fear;
- b) The fear must be caused by the threat of some considerable evil to the party or his family;
- c) It must be threat of some considerable evil to the party or his family;
- d) The threat or intimidation must be *contra bonos mores*; and
- e) The moral pressure used must have caused damage.'

[62] Damaseb JP in *MB De Klerk & Associates v Eggerschweiler & Another*³ remarked as follows at para 51:

'If a proper case for duress is made out the agreement which resulted therefrom is voidable on the basis that there is no true consent cited in Kahn E, Contract and Mercantile Law through cases, at 147-148). The improper influence must have been the direct cause of entering into the transaction. The person alleging such duress bears the onus of proof. The pressure must be directed to the party, or to his/her family, must relate to an imminent injury

² *Broodryk v Smith N.O* 1942 TPD 47 at 51-52.

³ *MB De Klerk & Associates v Eggerschweiler & Another* 2014 (3) NR 609 (HC) para 51. See also: *Namibian Broadcasting Corporation v Kruger and Others* 2009 (1) NR 196 (SC) at 209A-B.

to be suffered by the party himself in person or in property. Additionally, it must be proved that the pressure was exercised unlawfully or *contra bonos mores*.’

[63] It is, therefore, apparent that the party alleging duress must prove it. The court should have regard to the nature of the alleged duress, the surrounding circumstances of the matter inclusive of the positions of the parties, their age, sex, any other relationship of the parties, the circumstances under which duress is said to have been perpetrated and the court should, in the exercise of its judicial discretion, determine whether fear is established. I, thus, consider the evidence led in order to determine whether the defendant signed the acknowledgement of debt under duress or not and whether or not the plaintiff has proven his claim.

Analysis of evidence and submissions

[64] The first question raised by the parties for determination is whether the plaintiff made any payment to the defendant and whether or not the defendant and Ms Ankambo are business partners.

[65] It is not in dispute that the payment was made to Ms Ankambo. The hotly disputed issue is whether the defendant and Ms Ankambo were business partners in the enterprise to supply the plaintiff with N95 face masks. The defendant’s evidence is that his role was only to connect the plaintiff to Ms Ankambo for the supply of the said face masks and the plaintiff was to pay him a referral commission for linking the two. The plaintiff persisted that the defendant was in business together with Ms Ankambo.

[66] It is common cause between the parties that:

- (a) On 19 April 2020, the defendant forwarded to the plaintiff photographs of the required face masks through WhatsApp;
- (b) On 21 April 2020, the defendant forwarded to the plaintiff an invoice bearing the bank account details of Ms Ankambo’s business SAS Medical Supplies Europe;

- (c) On 22 April 2020, the defendant added the plaintiff to a WhatsApp group which consisted of the defendant, Ms Ankambo and the plaintiff;
- (d) On 23 April 2020, the plaintiff paid the amount of N\$99 736.80 and N\$9 999.80 to Ms Ankambo's bank account in the name of SAS Medical Supplies Europe;
- (e) The plaintiff never received the N95 face masks paid for;
- (f) Ms Ankambo refunded the plaintiff the amount of N\$53 414.83 constituting a portion of the amount of N\$99 736.80 paid by the plaintiff leaving an outstanding amount of N\$46 321.97;
- (g) The defendant signed an acknowledgement of debt on 10 June 2020, for the amount of N\$40 000 payable on or before 01 July 2020;
- (h) The defendant owns a close corporation MS Consultancy.

[67] The evidence established that the plaintiff did not make any payment to the defendant, not even the alleged referral fee. The question that I find to be significant for determination is whether the defendant and Ms Ankambo were business partners or not.

[68] The plaintiff testified that the defendant informed him that he was a close business partner to Ms Ankambo and it was on the basis of that assurance that he paid his money to a foreign bank account of Ms Ankambo. It was proven that on 11 May 2020, when the plaintiff was agitated with the delay of the delivery of the face masks which he already paid for, Ms Ankambo posted a message on a their WhatsApp group where she called for calmness and patience and further said that in the alternative she/Mr Marson (the defendant) will fully refund. The defendant did not dispute or deny the liability imputed on him by Ms Ankambo despite being an active member on the WhasApp group.

[69] Faced with such damning statements which imputes liability on his part, the defendant said he just ignored it as he saw no need to respond to it. The defendant is a former diplomat at the United Nations, a man of cloth and a man with several businesses, as he testified. He repeatedly informed this court on how he observes

high standards of ethics. He portrayed himself before court as a person who will lay bare his reputation and character at any opportune moment for anyone to see and probably appreciate. He is thus expected, in my view, to voice out against injustices or wrong or false statements imputed on him. His failure to refute the statement posted on a group where the plaintiff is also a member, that alternatively the defendant will fully refund the plaintiff, in my view, cannot be an innocent ignorance.

[70] The defendant, further reacted to a statement posted on the WhatsApp group by Ms Ankambo on 11 May 2020 that the items were received and will be booked with DHL, and said 'Thank you for having them ready Selma Ma'am. We apologize for delay Sam. It was clearly not on purpose or our deliberate fault'. In the said statement, the defendant apologises to the plaintiff for the delay (not just the delay by Ms Ankambo but both Ms Ankambo and him) to deliver the face masks. The text suggests that the defendant was acting together with Ms Ankambo to supply the face masks to the plaintiff.

[71] The defendant further testified about a statement which he posted on another WhatsApp group where he was a member together with Bianca (his niece) and Ms Ankambo). In the text he confirms that his company MS CONSULTANCY work collaboratively with Ms Ankambo the owner of SAS Medical Supplies Europe which supply medical equipment and materials. The defendant was clear in his testimony that Ms Ankambo and him, were business associates who worked collaboratively.

[72] I find that based on the above-mentioned conclusions reached, that the defendant was a business associate to Ms Ankambo. They worked closely and collaboratively. I further find that said conclusions are consistent with the evidence of the plaintiff that the defendant assured him that Ms Ankambo was his business partner which resulted in settling his concerns about sending his money to a foreign country.

The alleged coercive circumstances prior to signing the acknowledgement of debt

[73] I must mention that the parties interchangeably referred to the acknowledgment of debt as such and as times as a commitment to payment. The plaintiff called the document an acknowledgement of debt in the pleadings and

evidence while the defendant, in his plea and evidence, called it a confirmation of payment. I will revert to this aspect as the judgment unfolds. Suffice to state, for the present purposes that the parties referred to the document in their pre-trial report as an acknowledgment of debt. I will also refer to it as an acknowledgment of debt.

[74] The evidence led by the plaintiff and the defendant is miles apart on the alleged duress. The said evidence is mutually destructive and can, therefore, not co-exist.

[75] The defendant and his life partner, Ms Angula, testified that on 10 June 2020 they were threatened with immediate arrest by the Station Commander in the presence of W/O Nestor if the defendant does not sign the acknowledgement of debt. They further claimed that the plaintiff approached Ms Angula in order to assault her only to be stopped by the defendant while the police officers sat idle.

[76] The plaintiff and W/O Nestor denied the alleged threats and further denied the allegation that the plaintiff approached Ms Angula in order to assault her. The plaintiff testified further that although the amount outstanding exceeded N\$40 000, the defendant negotiated and signed for the amount he could afford to pay on his terms.

[77] The Supreme Court of Appeal of South Africa in *SFW Group Ltd and Another v Martell Et Cie and Others*, remarked as follows regarding the approach to mutually destructive versions: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

⁴ *SFW Group Ltd and Another v Martell Et Cie and Others* 2003 (1) SA 11 (SCA) at page 14H – 15E.

version; (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. . .’

[78] It follows, therefore, that where the probabilities do not resolve the matter, the court can resort to the credibility of witnesses in order to find in favour of the one or the other party. In this process, the court will consider the candour and demeanour of witnesses, self-contradiction or contradiction of established facts or contradiction with the evidence of other witnesses present and who are expected to provide the same version of events.

[79] It is an established fact that Ms Angula was not a party to the business arrangement between the plaintiff, the defendant and Ms Ankambo for the acquisition of N95 face masks. It is a further established fact that Ms Angula was not a member of the aforesaid WhatsApp group which constituted of the plaintiff, the defendant and Ms Ankambo. It is also an established fact that only the defendant signed the acknowledgement of debt. It is a further established fact that no criminal case was registered against Ms Angula by the plaintiff as such matter was only registered against the defendant. The evidence does not even suggest of any crime that may have been committed by Ms Angula in presence of the police officers or anywhere else related to this matter that could warrant a possible arrest of Ms Angula. It is puzzling, therefore, to imagine any basis on which the police officers would threaten to arrest Ms Angula, as no such basis comes to the fore.

[80] The least that Ms Angula said at the meeting was that the plaintiff did not tell the truth or that the plaintiff lied. That is no basis for an arrest. Furthermore, whether or not the defendant signed the acknowledgement of debt, from the evidence on record, is of no consequence to Ms Angula. I find that it is improbable that Ms Angula was threatened with arrest.

[81] Two months after signing the acknowledgement of debt, the defendant in a text message sent to W/O Nestor on 11 August 2020 in response to an inquiry as to when will he make good his undertaking, he said: ‘Good morning W/O ... We will sort something out for Sam this week’.⁵ The defendant was as mute as a fish on the

⁵ Exhibit “H”.

allegations of threats of arrest. Nowhere in the text messages does he complain of the alleged threats.

[82] To the contrary, the plaintiff stated that there were no threats at the meeting and the defendant spoke about his reputation and even made jokes. Having observed the defendant in court state his credentials and character on several occasions on record without invitation, I am inclined to accept the version of the plaintiff that at the meeting of 10 June 2020, the defendant informed the persons of present of his reputation. This is not consistent with the allegation that the defendant was threatened with arrest.

[83] I find that had the defendant been threatened with arrest, he would have reported such threats to the higher authorities. His explanation for failure to report the alleged threat that he found the matter to be petty, flies in the face of his defence. If the threats were petty, then they would not have induced him to sign the acknowledgement of debt. In the premises the allegation that the defendant was threatened with immediate arrest is highly improbable and falls to be rejected.

[84] I further find that, no logical explanation was presented to court by the defendant why he signed the acknowledgement of debt to pay the plaintiff an amount of N\$40 000 while the outstanding amount was about N\$46 000. The explanation of the plaintiff, which I find probable is that, the defendant negotiated the amount which he could afford which resulted in the N\$40 000 payment on the terms that he signed for. I accept the version of the plaintiff in this regard. Having found as such, the fact that the defendant negotiated the reduced amount to be paid does not correlate with threats to sign an acknowledgement of debt. In my view, this is another aspect that supports the finding that the defendant was not threatened to sign the acknowledgement of debt.

[85] It is alleged that the plaintiff approached Ms Angula in order to assault or slap her only to be stopped by the defendant in full view of the Station Commander and W/O Nestor, who did nothing about the situation. Police officers are duty-bound to protect persons and properties and it is highly unlikely that the Station Commander and another high ranked officer in the name of W/O Nestor would observe an offence being committed and turn a blind eye to it. What is more is that the

defendant who said that he is reputable and appeared to be well aware of his rights never reported the inaction of the police to the higher authorities notwithstanding the fact that he knew the Regional Commander of Khomas Region Comm. Shikongo (by then) under whose supervision the said two officers fell. I find the allegations that the plaintiff approached Ms Angula on order to assault her in the presence of the said police officers who sat idle, highly improbable and falls to be rejected.

[86] The defendant struck me as not a credible witness. During his testimony, he would provide an answer only to change once reference is made to a document. I also observed the defendant at pain to impress this court about his reputation his character and his say so that he is a man of high ethical values. Ms Angula's testimony, on other hand, is of little value to this matter. She was an outsider for the better part of the transaction acquire face masks save for the meeting of 10 June 2020. At the meeting she claimed to have been threatened with arrest when she did not come any closer to commit any crime. Ms Angula further she was threatened with arrest together with the defendant if they did not sign the acknowledgement of debt. It is evidence that only the defendant signed the acknowledgment of debt while she did not sign, yet she was never arrested. Ms Angula was also not a credible witness.

[87] The plaintiff testified in forthright manner and I found him to be a credible witness who only sought to recover his money. The plaintiff's explanation that the defendant negotiated the reduction of the amount to what he could afford is reasonable. If there defendant was threatened, why was he not threatened to acknowledge payment of the full outstanding amount? I am of the view that the allegations of threats are afterthoughts. W/O Nestor was also a credible witness.

[88] I find on the evidence that the defendant failed to prove that he signed the acknowledgement of debt under duress. In my view, the acknowledgment of debt stands as a contract between the parties for the purposes set out therein.

[89] As I approach the finishing line of this judgment, I turn to consider whether the acknowledgement of debt in question constitutes an admission of the debt or not. Nowhere in the said acknowledgment of debt does the defendant say that he acknowledges that he owes the plaintiff any amount of money. To the contrary, the

defendant confirms that he will pay the plaintiff the amount of N\$40 000 on or before 01 July 2020. It appears from the pre-trial order that the parties formulated their questions by referring to the said document as an acknowledgement of debt.

[90] In any event, when regard is had to the totality of the evidence presented, it is apparent that:

- (a) The defendant was a business partner or associate of Ms Ankambo and they worked closely together;
- (b) The defendant assured the plaintiff that he worked together with Ms Ankambo;
- (c) The defendant apologised to the plaintiff, on his behalf and on behalf of Ms Ankambo, for the delay to supply the face masks to the plaintiff;
- (d) Ms Ankambo stated that the defendant will refund the plaintiff to which the defendant did not protest;
- (e) The defendant was not paid referral fee by the plaintiff- and the referral fee features nowhere in the documentary evidence produced in court, and to the opposite, the defendant was a business partner or associate with Ms Ankambo and these established facts leads to an inevitable conclusion, that the defendant was a business partner or associate of Ms Ankambo to supply the face masks to the plaintiff, which the plaintiff ordered and paid for. Ms Ankambo and the defendant, therefore, failed to ensure delivery of the N95 face masks to the plaintiff. The further result, in my view, is unavoidable that the defendant is liable to refund the plaintiff as per the acknowledgement of debt.

Conclusion

[91] After considering the rest of the evidence led, I find that the version of the plaintiff and his witness highly probable. In the same vein, I find the version of the defendant and his witness where such evidence is at variance with that of the plaintiff and his witness to be improbable and falls to be rejected.

[92] Considering the findings and conclusions reached hereinabove, I find that that the plaintiff has proven his claim and he is, therefore, entitled to the relief sought.

Costs

[93] It is trite law that costs follow the result. I have not been provided with reasons why I should depart from this principle, nor could I find any such reasons on the record. Consequently, the plaintiff is awarded costs.

Order

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

1. The defendant must pay to the plaintiff the amount of N\$40 000.
2. Interest on the aforementioned amount at the rate of 20% per annum calculated from 1 July 2020 to date of full and final payment.
3. Costs of suit including costs of one instructing and one instructed legal practitioner.
4. The matter is removed from the roll and regarded as finalised.

O S Sibeya
Judge

APPEARANCES:

PLAINTIFF:

T Kasita
Instructed by BD Basson Inc,
Windhoek

DEFENDANT:

S Mbudje
Of Mbudje and Co Inc,
Windhoek