

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2019/05339

In the matter between:

RYNO LE ROUX GROVE

PLAINTIFF

and

JOHANNES AKAPANDI ENDJALA

FIRST DEFENDANT

PENEHAFO KWAAMUSHI ENDJALA N.O

SECOND DEFENDANT

Neutral citation: *Grove v Endjala* (HC-MD-CIV-ACT-CON-2019/05339) [2023]
NAHCMD 117 (14 March 2023)

Coram: ANGULA DJP

Heard: 19 October 2022

Delivered: 14 March 2023

Flynote: Contract – Action for damages – Based on an alleged breach of contract – Court found that the defendant breach the contract but the plaintiff failed to quantify and prove his *quantum*.

Summary: This matter concerns a claim for damages by the plaintiff against the defendant arising from a breach of an oral agreement.

In respect of the first main claim, the plaintiff in his amended particulars of claim, claims to have suffered damages in an amount of N\$3 434 625.60, being the loss of profits from harvesting firewood and producing charcoal for two years on the defendant's farm, Heliodor.

In the first alternative claim, the plaintiff claims he is the owner of the firewood (864 tons) and charcoal (216 tons) that was left behind when he was forced off farm Heliodor. The plaintiff claims that the defendant has disposed of the firewood and charcoal with the knowledge of the plaintiff's ownership alternatively allowed such firewood and charcoal or any number thereof to be removed without his consent. Thus, the plaintiff in the alternative claims damages in the amount of N\$1 566 000, being the market value of the firewood and charcoal.

Concerning the plaintiff's second alternative claim to the first main claim, the plaintiff pleads that there was second oral agreement between the parties in terms whereof it was agreed that the plaintiff would be entitled to collect from the defendant's farm Heliodor, the 864 tons of firewood and 216 tons of charcoal but as a result of the defendant's breach of that agreement the defendant suffered damages in the sum of N\$1 566 000, being the income the plaintiff would have earned.

In the third alternative claim, the plaintiff's claims N\$528 600, being the reasonable costs for the production of the said firewood and charcoal.

In respect of the second main claim, the plaintiff pleads that he is the owner of 103 kilns that he took to Heliodor. He is as such claiming the return of 103 kilns and failing which payment of the replacement value of such kilns at the rate of N\$2 400 per kiln. The plaintiff thus in total claims N\$247 200 in respect of this claim.

Held that: The plaintiff proved that the defendant breached the oral agreement concluded between the plaintiff and the defendant on or about 19 April 2019 at Tsumeb. Furthermore, that the defendant breached the subsequent oral agreement concluded between the plaintiff and the defendant on 17 August 2019 at the defendant's farm Heliodor.

Held further that: The defendant proved that the 103 kilns were in the defendant's possession and if not that the defendant disposed of it with the full knowledge of the plaintiff's ownership.

Held further that: The plaintiff failed to adduce satisfactory and reliable evidence to prove how the quantity of 864 tons of firewood and 216 tons left on the defendant's farm have been calculated and determined.

Held further that: The plaintiff failed to prove his projected income or quantum of N\$3.4 million he alleged he would have earned over the period of two years had the defendant not breached the agreement.

Held further that: A court cannot accept the bare statement of an expert witness that in his or her opinion, for instance the costs, are fair and reasonable. He or she is required to state the basis upon which his or her opinion is based. And that an expert's witness is required to present his or her reasoned conclusion based on certain facts or data, which are either common cause or established by his or her own evidence or that of some other competent witness. The expert witness for the plaintiff failed to satisfy these requirements.

Held, in respect of the first alternative claim that the plaintiff failed to prove the market value in respect of the firewood and charcoal in the sum of N\$1 566 000 in that the expert who testified was not qualified as an expert in the area of market value of firewood and charcoal.

Held, in respect of the second alternative claim for the sum of N\$1 566 000, for loss of 'income' the plaintiff would have earned from the sale of the firewood and charcoal, the plaintiff failed to prove such claim.

Held, in respect of the third alternative claim for payment of the sum of N\$528 600, being reasonable costs incurred by the plaintiff in producing 864 tons of firewood and 216 charcoal that the plaintiff failed to prove how the quantity of tons have been calculated and determined.

Held, in respect of the second claim, that the plaintiff proved that the kilns ought to be on the defendant's farm and should it not be on the farm it was disposed by the defendant with the knowledge of the plaintiff's ownership. Furthermore, that the plaintiff proved the replacement value of the 103 kilns at the time the claim arose being the sum of N\$247 200.

Accordingly, the court granted an order for the absolution from the instance in respect of the plaintiff's first claim as well as the three alternative claims. And in respect of the second claim that the plaintiff was entitled to the order prayed for

ORDER

1. Absolution from the instance is granted in respect of the plaintiff's first main claim as well as the three alternative claims.
2. The defendant is ordered to deliver the 103 kilns to the plaintiff within 30 days of this order, failing which payment of the sum of N\$247 200, being the replacement cost of the 103 kilns, alternatively payment of the sum of N\$2 400 being the replacement cost of each kiln not returned.
3. The defendant is to pay half of the plaintiff's costs on a party and party scale. Such costs to include the costs of one instructed and one instructing counsel.
4. The matter is removed from the roll and regarded as finalized.

JUDGMENT

ANGULA DJP:

Introduction

[1] This matter concerns a claim for damages by the plaintiff against the defendant arising from a breach of an oral agreement. The action was initially defended but unfortunately the defendant passed away during January 2022, shortly before the trial was due to commence. The deceased was, thereafter, substituted by the executor of his estate. The matter was set down for trial during the week commencing 17 October 2022.

[2] A few days before the trial was due to commence the court was informed by the legal practitioner acting on behalf of the executor, that the defence would be withdrawn so that the matter could proceed on an undefended basis. This was understandable for the reason that the oral agreements which forms the basis of this action as well as the alleged breaches were attributed to the defendant himself and without him, his plea could not be sustained without his oral evidence.

[3] When the matter was called on 17 October 2022, counsel for the defendant formally withdrew the defence and tendered costs of suit. Counsel was thereafter excused from further attending the proceedings. The trial proceeded with the plaintiff leading evidence to prove his case, particularly the alleged damages he suffered as a result of the defendant's breach of the agreements.

Parties and representation

[4] The plaintiff is Ryno Le Roux Grove, a major male business person. He is described in the summons as 'a firewood and charcoal trader'. He is residing in the town of Tsumeb, in the Republic of Namibia. He will be referred to as 'the plaintiff'.

[5] The defendant is Johannes Akapandi Endjala, a major male businessman, residing at Windhoek, in the Republic of Namibia. As mentioned above, he sadly passed away before the proceedings were about to commence. In order to maintain consistency with the pleadings, he will be referred to as 'the defendant', even though he has been substituted by the executor of his estate in these proceedings.

[6] In this judgment, where reference is made to both the plaintiff and the defendant jointly, they shall be referred to as 'the parties'.

[7] The plaintiff was represented by Mr Van Vuuren instructed by Etzold-Duvenhage.

Factual background

[8] The factual background which gave rise to these proceedings can be briefly summarised as follows: During April 2019 at Tsumeb, the plaintiff and the defendant entered into an oral agreement in terms whereof it was agreed that the plaintiff would harvest firewood and produce charcoal on the defendant's farm, Heliodor (hereinafter referred to as 'the farm').

[9] On or about July 2019, the plaintiff, after he had been issued with the necessary permits by the Ministry of Agriculture, Water and Forestry, took his workers and equipment to the defendant's farm and further took occupation of a portion of the farm and commenced with the harvesting works. Included in the equipment were 103 kilns which are used to burn charcoal. Thereafter, during early August 2019, the defendant informed the plaintiff to vacate his farm and to that effect he proceeded to change the locks of the gates of the farm. It would appear that the reason for the sudden termination of the agreement was the fact that the defendant believed that the plaintiff's employees were catching game on the farm with snares.

[10] Subsequent thereto on or about 19 August 2019, at the defendant's lodge situated on his farm, the parties met and orally agreed that the plaintiff would be allowed to remove his goods from the defendant's farm. According to the plaintiff, the goods consisted of 864 tons of firewood, 216 tons of charcoal and 103 kilns. However, when the plaintiff attempted to remove his said goods, the defendant refused him access to the farm.

[11] As a result of what transpired, the plaintiff instituted the present action against the defendant during December 2019.

Pleadings

[12] The plaintiff alleged in his amended particulars of claim that on or about 19 April 2019 at Tsumeb, the parties concluded an oral agreement valid for a period of

two years with an option to renew and that the agreement commenced during April 2019 alternatively May 2019. In terms of the said agreement, the plaintiff would cut trees and bushes, harvest, firewood and produce charcoal on the defendant's farm. The plaintiff's workers would be allowed to stay at a post identified by the defendant. They were, however, not allowed to set snares or slaughter wild game on the farm. It was further agreed that the plaintiff would obtain permits from the Ministry of Agriculture, Water and Forestry in terms of which the plaintiff would harvest firewood and produce charcoal, market and export it.

[13] It was further agreed that the plaintiff would become the owner of the woods or bushes that had been cut down, the firewood harvested as well as the charcoal produced on the farm. The plaintiff further pleaded that it was agreed that he would pay the defendant N\$5 000 per truckload of 36 tons of firewood and charcoal loaded, as a consideration.

[14] The plaintiff further alleged that it was in the contemplation of the parties that the plaintiff would derive income and make profit from the sale of the firewood and charcoal. Furthermore, that should the defendant breach or cancel the agreement, the plaintiff would suffer damages.

[15] The plaintiff pleaded further that between 3 August 2019 and 14 August 2019, the defendant wrongfully deprived him of his occupation and possession of the portion of the farm he was occupying by changing the locks of the farm's gates and thereby evicting him from the farm.

[16] The plaintiff further alleged that on or about 17 August 2019, after the said breach of the agreement by the defendant, the parties entered into another oral agreement in terms whereof it was agreed that the plaintiff would remove his goods from the farm consisting of: 864 tons of firewood harvested at a costs of N\$345 600 with a market value of N\$1 123 200; 216 tons of charcoal produced at a cost of N\$183 600 with market value of N\$442 800; and 103 kilns with the market value of N\$247 200.

[17] Subsequent to the conclusion of the oral agreement aforesaid and on or about 11 October 2019, the defendant breached the oral agreement by informing the plaintiff that he was no longer allowed to remove his said goods from the farm.

First main claim

[18] As a first main claim, the plaintiff alleged that as a result of the defendant's breach of the first oral agreement (which was concluded on 19 April 2019 at Tsumeb), he suffered damages, in the sum of N\$3 434 265.60, being loss of profit he allegedly suffered as a result of being prevented from harvesting firewood and producing charcoal for two years on the defendant's farm. The plaintiff attached to his particulars of claim Annexure 'A' demonstrating how the sum of N\$3 434 265.60 had been calculated and arrived at. Annexure 'A' was accepted into evidence as Exhibit RG13.

First alternative claim

[19] As a first alternative claim to the first main claim, the plaintiff pleaded that he is the owner of 864 tons of firewood and 216 tons of charcoal that was left behind when he was forced off the defendant's farm and which are in the possession of the defendant. The plaintiff further pleaded that the defendant fails and or refuses to restore possession of the said firewood and charcoal. The plaintiff further pleaded that the defendant has disposed of the firewood and charcoal with the knowledge of the plaintiff's ownership alternatively allowed such firewood and charcoal or any number thereof to be removed without the plaintiff's consent.

[20] The plaintiff alleged further that the reasonable market value of the said firewood and charcoal was N\$1 566 000 and demand notwithstanding, the defendant refused to restore the said firewood and charcoal to the plaintiff, alternatively to pay the plaintiff the sum of N\$1 566 000 being the combined market value of 864 tons of firewood and 216 tons of charcoal.

Second alternative claim

[21] Concerning the plaintiff's second alternative claim to the first main claim, the plaintiff pleads that subsequent to the termination of the first oral agreement by the defendant, the parties concluded a second oral agreement in terms whereof it was agreed that the plaintiff would be entitled to collect the 864 tons of firewood and 216 tons of charcoal but thereafter the defendant once again breached that agreement and as a result of the defendant's breach of that agreement the defendant suffered damages in the sum of N\$1 566 000 being the income the plaintiff would have earned.

Third alternative claim

[22] In the third alternative claim to the first main claim, the plaintiff claimed payment of the sum of N\$528 600 being the reasonable costs (production costs) he incurred to produce the firewood and the charcoal in question. It being alleged that the defendant has been unjustifiably enriched with the said amount of N\$528 600.

[23] The plaintiff therefore alleged that in the premises the defendant has been unjustifiably enriched in the amount of N\$528 600.

Second main claim

[24] The plaintiff second main claim is for payment of the sum of N\$247 200 being the reasonable market value of 103 kilns left on the defendant's farm when he was ordered by the defendant to vacate the farm, which the defendant failed or refused to restore to the possession of the plaintiff.

[25] That concludes the summary of the plaintiff's pleadings.

[26] As mentioned earlier, the defendant's plea was withdrawn shortly before the trial was due to commence. It is therefore unnecessary for me to set it out here. I deemed it as if it has never been filed up to the point it was withdrawn. This, in my view has a costs implication, which I will consider at the end of this judgment.

[27] Before dealing with the plaintiff's evidence, it necessary to record the facts the parties had agreed at the pre-trial conference, not to be in dispute. Those are: the

citations and particulars of the parties; that the parties had concluded an oral agreement for the harvesting of firewood and producing of charcoal; that the defendant had subsequently agreed to handover the plaintiff's equipment and to that effect had agreed on the date and location for the collection of the goods; that the defendant had changed the locks of the farm's gate; and that the court has jurisdiction to adjudicate their dispute. The rest of the allegations are in dispute including the damages the plaintiff alleged he suffered. I proceed to summarise the evidence led by and on behalf of the plaintiff.

Evidence by and on behalf of the plaintiff

[28] The plaintiff testified and also called other witnesses, one of them was presented as an expert witness in the firewood and charcoal business.

[29] The plaintiff testified that he has been in the charcoal producing industry since 2011. During April 2019, he was approached by the defendant who asked him to clear a portion of his farm, by harvesting firewood and producing charcoal. The defendant wanted to open up the farm to enable his tourists' guests to view the game on the farm. At that stage the plaintiff was producing charcoal on the adjacent farm called Obab.

[30] It was the plaintiff's evidence that on 19 April 2019, the defendant and him met at Wimpy restaurant at Tsumeb where they discussed the terms and conditions of the agreement. Thereafter, the plaintiff sent the defendant a draft agreement. A written and signed agreement was required by the department of Forestry before they could inspect the farm and thereafter issue the harvesting and the marketing permits. According to the plaintiff, he proceeded to obtain the permits and moved on to the defendant's farm with his workers and equipment. He and his workers were allowed to cut down as many trees and bushes as they could, however, they were not allowed to produce charcoal near the defendant's lodge as that would disturb the guests staying at the lodge.

[31] On Saturday, 27 July 2019, the plaintiff received a phone call from the defendant's assistant, a certain Rocco, who informed him that he discovered snares in the camp where his workers were staying. According to the plaintiff, he drove to

the farm to investigate the allegation. He met Rocco but the latter could not produce the snares. Rocco simply informed the plaintiff that the defendant had instructed him to inform the plaintiff that they must forthwith stop cutting firewood and burning charcoal. However, the plaintiff instructed his workers to continue with their works.

[32] The plaintiff further testified that on 9 August 2019, he drove to the defendant's farm. On the way he met Rocco with a bakkie loaded with his workers. Upon inquiry, Rocco informed him that he was taking the workers to Tsumeb as they were no longer allowed to be on the farm.

[33] According to the plaintiff, he thereafter met with the defendant on his farm on 17 August 2019. At that meeting they orally agreed that the plaintiff would remove all his kilns, charcoal and firewood from the farm. Following the conclusion of that agreement he proceeded to employ casual workers to help him with the packing of the charcoal and removing the firewood and kilns from farm. He stationed the casual workers at the adjacent farm, Obab. On two different occasions he went to the farm with his workers, however, on each occasion the farm gates were locked. Attempts to get hold of Rocco were futile.

[34] Thereafter he contacted the defendant and agreed to meet. They met at Wimpy restaurant on 11 October 2019. The defendant arrived with Rocco. The defendant there and then told him that he would not allow him to remove his kilns and other goods from the farm. The defendant accused the plaintiff's workers to have poached all his waterbuck on the farm. According to the plaintiff, he refused to accept the new terms dictated by the defendant. The defendant got angry and he and Rocco threatened to beat him up outside the restaurant. He then left the restaurant and decided to institute legal proceedings against the defendant.

[35] It was the plaintiff's further evidence that he left 864 tons of firewood on the defendant's farm that was not processed with a market value of about N\$1 123 200. In addition he left 216 tons of charcoal unpacked in bags, with the market value of N\$442 800. The combine value of the firewood and charcoal is N\$1 566 000. According to the plaintiff, the production cost of the said tons of firewood and charcoal was N\$528 600. The replacement costs of the 103 kilns is N\$247 200.

[36] In conclusion, the plaintiff testified that he would have produced about 3 528 tons of charcoal over the period of two years with the value of N\$7 232 400. The expenses would have been N\$3 798 134.40. He would have made a profit of N\$3 434 265.60 had the contract been implemented over the agreed two years period. That concludes the plaintiff's evidence. I move to the evidence of the next witness for the plaintiff.

Christiaan Jacobus Grobler

[37] Mr Grobler, was called as an expert witness for the plaintiff. He testified that he has been in the charcoal production business since 1999 and produced charcoal on different farms in the Oshikoto Region for a period of 21 years.

[38] Mr Grobler testified that he produced charcoal on farm Heliodor for a period of 18 months and knows the farm very well. It was his evidence that: Approximately 90 per cent of the trees on farm Heliodor consists of Mopanie trees and the other 10 per cent of trees consists of Acasia, Mushara and other bush types. It was his opinion that there is more than adequate raw material on farm Heliodor to easily sustain the harvesting of firewood and the production of charcoal for more than two years. The ratio of wood to charcoal is about three tons wood producing to one ton of charcoal. Each worker/charcoal burner is able to produce between three and a half tons to four tons of charcoal in a four week cycle. The same kiln could be used three times in a seven-day cycle and with 42 workers the production would yield approximately 147 tons of charcoal. Each worker/charcoal burner is able to chop down and produce around one ton of raw wood per day.

[39] In light of the above, Mr Grobler testified that, the total wage to the workers would be the sum of N\$850 per ton of charcoal. This includes the chopping, burning and packing that the workers do.

[40] It was further his testimony that the costs to replace a kiln in his opinion would be N\$2 400 per kiln. The plaintiff had 103 kilns on farm Heliodor and the replacement costs for 103 kilns would be an amount of N\$247 200.

[41] Mr Grobler continued to testify and expressed his opinion in respect of the market value of 864 tons of firewood produced and the costs of harvesting, being approximately N\$1 123 200 and N\$345 600, respectively.

[42] Mr Grobler further expressed his opinion in respect of the market value of 216 tons of charcoal produced and the cost of harvesting, being N\$442 800 and N\$183 600, respectively.

[43] He further testified that the market value of 864 tons of wood produced and the market value of the 216 tons of charcoal produced would amount to N\$1 566 000 and the reasonable costs of producing 864 tons of firewood and 216 tons of charcoal would be N\$529 200. That concludes the evidence by Mr Grobler.

Nocky Kaapehi

[44] Mr Kaapehi was subpoenaed by the plaintiff and testified that he is working for the Ministry of Agriculture, Water and Forestry, stationed at Otavi as a Forest Ranger and is well acquainted with the process of harvesting wood and producing charcoal.

[45] Mr Kaapehi testified that around July 2019, the plaintiff approached his office to obtain a permit for the harvesting firewood and producing charcoal at farm Heliodor. He conducted inspection on farm Heliodor to determine whether there was enough forest resources before issuing the plaintiff with the harvesting permit.

[46] He testified that, he spoke to the defendant about the consent letter which is a prerequisite to harvest at someone else's farm and all the documentation that would be required from the defendant, such as his identity document and the title deed evidencing his ownership of farm Heliodor.

[47] Mr Kaapehi further testified that the defendant agreed to drop off the requisite documents at his office. Upon receipt of the documents from the defendant, he issued the harvesting permits to the plaintiff after the latter made payments and had obtained the consent letter from the defendant.

[48] On a question, whether any transport permits had been issued to the plaintiff or the defendant for the transportation of the material produced from one place to another, Mr Kaapehi indicated that his office in Otavi did not issue any such permit.

[49] In conclusion, Mr Kaapehi testified that a harvesting permit grants the holder the right to harvest; that a marketing permit grants the holder the right to sell the products; and that transport permit grants the holder the right to transport and export permit grants the holder the right to transport to other countries. That concludes Mr Kaapehi's evidence.

Brown Gamiseb

[50] Mr Gamiseb testified that he resides at Etosha Road, Tsumeb and was in the employ of the plaintiff as foreman since February 2019 and resided at farm Obab during his time of employment with the plaintiff.

[51] It was his evidence that he and other workers were busy with work at farm Obab and at the end of the day, on their way back to Tsumeb with the plaintiff, before the gate of farm Obab, they met the defendant. The plaintiff and the defendant spoke whereafter, the plaintiff told him that the defendant wanted them to produce charcoal on his farm. The plaintiff agreed.

[52] Thereafter he gradually started taking workers to farm Heliodor until there were 50 workers altogether. However, on a question by the court, Mr Gamiseb, he changed and stated that there were only 42 documented workers.

[53] In respect of his functions, he testified that his functions entailed inspecting the farm; to ensure that the workers were cutting down the correct trees in line with the forestry guidelines; to make sure that the workers did not set traps for wildlife and they did not walk around in areas where they were not allowed. He further testified that he provided food and water to the workers.

[54] In response to the question by the court whether the workers worked every day, Mr Gamiseb responded that they work from Monday to Friday but sometimes they also worked on Saturdays and Sundays, if necessary.

[55] Mr Gamiseb testified that they were harvesting wood and producing charcoal at farm Heliodor for approximately three and a half months but he left during the fourth month and one, Mr Erastus !Hauseb took over from him as foreman.

[56] He testified that he left Heliodor before the disagreement between the plaintiff and the defendant begun. According to him, when he left the employment of the plaintiff, no wood or charcoal were collected and transported from farm Heliodor. That concludes Mr Gamiseb's evidence.

Erastus !Hauseb

[57] Mr !Hauseb testified that he was employed by the plaintiff. It was his testimony that, he was instructed by the plaintiff to get workers to pack the coal in bags at farm Heliodor so that the coal could be transported from the farm.

[58] When he got to farm Heliodor in August 2019, he was there with four workers with an aim to pack the coals onto trucks and be transported from farm Heliodor but when they arrived at the gate it was locked and they could not enter farm Heliodor.

[59] In conclusion, Mr !Hauseb testified that when he was at farm Heliodor to carry out inspections, he never spoke to Rocco and the defendant never complained to him about illegal hunting on his farm or any other problems he had with the workers. That concludes the summary of the evidence by Mr !Hauseb. I now proceed to consider counsel's submissions.

Submissions by counsel

[60] Mr. Van Vuuren submitted that an oral agreement was concluded between the parties in terms whereof the plaintiff would harvest and produce charcoal on the defendant's farm. Pursuant to the agreement the plaintiff produced firewood and charcoal for about three months. Thereafter, the defendant chased the plaintiff away from his farm. The firewood and charcoal were left on the farm after the plaintiff was chased away. As a result the plaintiff suffered a loss of profit that he would have earned over the agreed period of two years amounting to the sum of N\$3 343

256.60. In the event that something would have gone wrong with the execution of the agreement over the period of two years, the plaintiff made a contingency allowance of five per cent which brought the estimated profit to the sum of N\$3 072 645.60.

[61] As regards the first alternative claim to the first main claim, counsel submitted that the evidence placed before court proved that; the plaintiff has a *rei vindicatio* or an *actio exhibendum* against the defendant in that the plaintiff is the owner of the 864 tons of firewood and 216 tons of charcoal and the defendant was in possession thereof.

[62] Counsel pointed out that in order to succeed with the *rei vindicatio* the plaintiff must prove that he is the owner of the thing and that the defendant is in possession thereof.

[63] As an alternative to *rei vindicatio*, counsel submitted that the plaintiff may claim under *actio de exhibendum* – an action to compel a defendant to produce a property so as to establish that it is in the defendant's possession – and the plaintiff must prove that he was the owner of the property when it was alienated by the defendant; that the defendant's loss of possession was *mala fide*; and the plaintiff is entitled to claim damages resulting from the defendant's wrongful act.

[64] Counsel submitted further that the defendant has disposed the said firewood and charcoal with the knowledge that the plaintiff was the owner. Notwithstanding demand, the defendant failed to pay the plaintiff the sum of N\$1 566 000, being the reasonable combined market value of the 864 tons of firewood and 216 tons of charcoal.

[65] Concerning the plaintiff's second alternative claim, counsel submitted that there was a second oral agreement between the parties in terms whereof it was agreed that the plaintiff would be entitled to collect the 864 tons of firewood, 216 tons of charcoal, and 103 kilns from the defendant's farm. As a result of the defendant's breach of that agreement, the defendant suffered damages in the sum of N\$1 566 000 being the market value of the firewood and the charcoal. As a result, the defendant is liable to the plaintiff for the payment of the sum of N\$1 566 000.

[66] Counsel further submitted in respect of the third alternative claim to the first claim, that the defendant has been enriched with the sum of N\$528 600, being the reasonable cost incurred by the plaintiff to produce 864 tons of firewood and 216 charcoal.

[67] As regards the plaintiff's second claim, counsel submitted that the evidence proved that plaintiff's 103 kilns are in possession of the defendant. The reasonable market value of each kilns is N\$2 400. Accordingly, so the submission continued, the plaintiff is entitled to an order whereby the defendant is ordered to deliver the said kilns within ten days of that order, failing which the defendant is to pay plaintiff N\$2 400 per kiln not delivered.

The law

[68] It is trite law, to succeed with a claim for damages caused by a breach of contract, the plaintiff must allege and prove that (a) there has been a breach of contract by the defendant, (b) the plaintiff has suffered damages, as well as the exact extent of the damage, and (c) the damages were suffered as a direct result of the breach of contract. In other words, the *onus* is on the plaintiff to adduce sufficient evidence in order to prove on a balance of probabilities that the defendant committed the breach of the terms and conditions of the agreement. There must thus be a causal link between the breach and the damages claimed, in that the damage has actually been caused by the breach.¹

Application of the law to the facts

[69] I am satisfied that the evidence tendered by the plaintiff proved on a balance of probabilities that that the parties concluded an oral agreement on or about 19 April 2019 at Tsumeb in terms whereof, it was agreed that, the plaintiff would harvest firewood and produce charcoal on the defendant's farm, Heliodor.

[70] I am further satisfied that the evidence proved on a balance of probabilities that after the conclusion of the said oral agreement, the plaintiff commenced with the production of firewood and charcoal for about three and a half months and that

¹ A J Kerr. *The Principles of the Law of Contract* 6 ed at 739.

thereafter the defendant breached the agreement, by unlawfully evicting the plaintiff and his workers from the farm and by changing the locks of the farm's gates thereby denying the plaintiff access to the farm thereby breaching the oral agreement that was concluded between the parties on or about 19 April 2019.

[71] I am further satisfied that the plaintiff has proved on a balance of probabilities that on or about 17 August 2019 and at the defendant's lodge situated on farm Heliodor the plaintiff and the defendant concluded an oral agreement in terms whereof it was agreed that the defendant would allow the plaintiff to remove his firewood, charcoal and kilns from the defendant's farm Heliodor. Thereafter, the defendant, once again breached that agreement on or about 11 October 2019 at Tsumeb when he informed the plaintiff that the latter would no longer be allowed the plaintiff to remove his firewood, charcoal and kilns from his farm Heliodor.

[72] I am further satisfied that the plaintiff has proved that the kilns ought to be on the defendant's farm and should it not be on the farm it was disposed by the defendant with the knowledge of the plaintiff's ownership.

[73] I now turn to consider whether the plaintiff has managed to prove the damages he claimed. But before doing that, I have to consider the question raised immediately below.

Is the plaintiff entitled to claim damages from the defendant as a result of the defendant's breach of the 19 April 2019 agreement?

[74] Paragraph 12 of the plaintiff's particulars of claim states that on 17 August 2019 at the defendant's farm and on the same day the defendant terminated the oral agreement of 19 April 2019, the 'defendant orally agreed with the plaintiff (both acting in person) that the plaintiff may remove the following items from the farm.' The items in question were the firewood, charcoal and 103 kilns.

[75] In support of the allegations made in paragraph 12 of the particulars of claim the plaintiff testified as follows:

'I contacted Mr Endjala via WhatsApp to ask for a meeting to try to resolve the matter. He asked me to meet him on 17 August 2019 at the lodge. I refer to AnnexureRG8 hereto. We had a meeting on the lodge's 'stoep', he said I am a man of good character and that I please remove all my kilns, charcoal and wood from his farm Heliodor... We shook hands from the agreement and I left for Tsumeb.'

[76] In this regard paragraphs 20 and 21 of the plaintiff heads of argument states the following:

'20. On 17 August 2019, at the farm , defendant acting personally , orally, wrongfully, unlawfully, and in breach of the agreement [of 19 April 2019], and without lawful or just cause, repudiated and/or terminated the agreement with the plaintiff.

21. Thereafter the defendant orally agreed with the plaintiff (both acting in person) that the plaintiff may remove the following from the farm.'

[77] Again the goods agreed to be removed were the firewood, charcoal and 103 kilns.

[78] In view of the foregoing, it would appear to me that the parties reached a compromise agreement on 17 August 2019 which substituted the 19 April 2019 oral agreement. The latter had in any event already been breached by the defendant.

[79] While I was preparing this judgment, it occurred to me that the issue of whether the oral agreement reached between the parties on 17 August 2019 constituted a compromised agreement was not canvassed during the hearing or in the heads of argument filed on behalf of the plaintiff. It is trite that a compromise agreement is a new and independent agreement. It supersedes the original cause of action or the previous agreement.

[80] In view of the fact that the question was not addressed by Mr Van Vuuren, counsel for the plaintiff, in his written heads of argument or during oral submissions, my chambers sent a memorandum to counsel in which he was requested to address the issue of whether the oral agreement concluded by the parties on 17 August 2019 did not constitute a compromise agreement and, if so, what was its effect on the plaintiff's first main claim.

[81] Mr Van Vuuren, duly complied and filed a supplementary heads of argument. I wish to express my appreciation for his prompt attention to the matter.

[82] Counsel correctly pointed out that a compromise agreement must be pleaded in full and the party who is pleading that a compromise took place bears the onus to prove the conclusion of such compromise agreement. Counsel further correctly pointed out that in his plea the defendant denied the conclusion of the second agreement on 17 August 2019, which constituted a compromise agreement. I should immediately point out in this regard that the plea or defence was withdrawn and cannot for that reason be considered. The matter has to be decided on the plaintiff's papers.

[83] Counsel further correctly pointed out that the pre-trial order did not record the compromise agreement as an issue in dispute between the parties which required a determination by the court. The pre-trial order, however, recorded that 'the defendant had (subsequently) agreed to handover the plaintiff equipment and the parties had arranged the date and location for the collection (of the goods)'. That agreement, in my view, constituted a compromise. Counsel correctly pointed out that the issue of a compromised agreement was never addressed in pleadings or during evidence. That is why I felt it necessary to raise it with counsel in order to afford him an opportunity to address it, if so wished. In fact, in my view, the defendant should have filed an exception to the effect that the claim for damages based on the first agreement was inconsistent with the claim for damages based on the second agreement.

[84] In any event, on further reflection and with regard to the plaintiff's claim in respect of the plaintiff's damages based on the first main claim, as it will become apparent later in this judgment, it became unnecessary to decide the issue whether the second agreement concluded on 17 August 2019 superseded the first agreement of 19 April 2019 and thus constituted a compromised agreement or not, within the meaning of the applicable legal principles.

Discussion – Quantum

[85] Before I proceed to analyse the damages claimed by the plaintiff, I consider it apposite at this juncture to make a general observation concerning the heavy task which rests on a litigant to prove damages. As pointed out elsewhere in this judgment, the plaintiff bears the onus to prove his or her damages on a balance of probabilities.

[86] It is notoriously difficult to quantify damages. However, difficulty, in itself, does not preclude quantification of damages. A well-formulated and supported quantifications of damages would assist the court in its assessment of damages. The overriding requirement is to assist the court by adducing well supported, rounded evidence based on commercial reality by applying accepted practices and approaches. Not only do the methodologies applied need to be reasonable, but the overall figures also need to be reasonable.

[87] When it comes to the assessment of the alleged damages suffered by a plaintiff it has been held that where damages can be assessed with mathematical precision, the plaintiff is expected to adduce sufficient evidence to prove such damages. However, where that cannot be done, the plaintiff would be expected to adduce evidence as available to him or her in order to quantify his or her damages. In this regard, reference is made to the often-quoted passage from the judgment in *Herman v Shapiro & Co*² quoted with approval in *Esso Standard SA v Katz*³. The court expressed itself as follows:

'Whether or not a plaintiff should be non-suited depends on whether he has adduced all the evidence reasonably available to him at the trial and is a problem which has engaged the attention of the Courts from time to time. Thus in *Hersman v Shapiro & Co* 1926 TPD 367 at 379 STRATFORD J is reported as stating:

"Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in

² *Herman v Shapiro & Co* 1926 TPD 379.

³ *Esso Standard SA v Katz* 1981 (1) SA 964 (A) at 970 E-G.

giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based upon it.” ’

[88] Keeping those legal principles in mind, I now proceed to scrutinise the plaintiff’s evidence placed before court to prove the alleged damages he has suffered.

[89] I should interpose here to point out that both the plaintiff and Mr Grobler used some accepted terms in the accounting or financial sphere, indiscriminately and interchangeably without having regard to their accounting or financial meanings. Those terms are for instance: market value; replacement value; income; and profit. This made it very difficult for the court to comprehend what the evidence intends to convey.

[90] In order to assist the reader to follow, I deemed it necessary to briefly explain the traditional meanings of some of those terms. ‘Replacement value’ has been defined to mean the value of costs to replace loss or damaged property with a similar new item. Such costs do not include any depreciation factor. The term ‘market value’ on the other hand refers to the asset’s monetary value in the current market. The value is dependent on how much buyers in the market are prepared to pay for that asset during that time. The market value is also driven by the demand and supply.

[91] It has been held in this regard that in order to determine the market value of a particular property, a valuer should have regard to various factors in order to determine what a notional willing buyer would probably pay to a willing seller in the open market.⁴

[92] The terms ‘income’ and ‘profit’ have the same meaning. They both refer to the amount of residual earnings that a business generate after all revenue and expenses have been recorded.⁵ In basic terms of accounting the term ‘income’ means the sale

⁴ *City of Johannesburg v Chairman, Valuation Appeal Board and Another* 2014 (4) SA 10 (SCA) par 23.

⁵ <https://www.accountingtools.com>.

of value of goods and or services that have been supplied to a customer. On the other hand the term 'expenses' means the value of all the assets that have been used up to obtain the income. For instance, the term 'gross profit' denotes the excess sales over the costs of goods sold during the accounting period. 'Net profit' on the other hand connotes what is left of the gross profit after all the expenses have been deducted.⁶

[93] That having been pointed out, I now proceed to consider whether the plaintiff proved the quantum in respect of his first main claim.

Did the plaintiff prove quantum in respect of the first main claim

[94] As mentioned earlier, in his amended particulars of claim, the plaintiff claimed to have suffered damages in an amount of N\$3 434 625.60, being the loss of profit which he would have earned over the agreed period of two years from harvesting firewood and producing charcoal on the defendant's farm, had the defendant not breach the oral agreement concluded between the parties on 19 April 2019 at Tsumeb. In computation of his damages, the plaintiff prepared and attached Annexure 'A' which is an Income, Expense and Profit Calculation, which has been copied from the particulars of claim and pasted below:

'Annexure 'A'

Income, Expenses and Profit Calculation:

42 employees generate 3.5 tons coal per month each	147 tons coal p/month
147 ton coal / 36 ton per truck load	4,08 truckloads per month
4 truckloads x 36 ton	147 tons coal
147 ton x N\$ 2,050.00 per ton	N\$ 301,350.00 p/month
N\$ 301,350.00 x 12 months	N\$ 3,616,200.00 per year
N\$ 3,616,200 x 2 years	N\$ 7,232,400.00

- 147 ton coal per month
- 4,08 truckloads per month
- 36 ton per truck load

⁶ Franklin Woods & Donald MacDonald: Business Accounting, South African Edition at page 37.

Expense of harvesting firewood and coal:

<u>Expenses:</u>		<u>Total:</u>
Payment to employees	147 tons x N\$ 850 p/ton	N\$ 124,950.00
Export permits	4.08 permits x N\$320.00	N\$ 1,305.00
Diesel 400L	400L diesel x N\$11.50 P/L	N\$ 4,600.00
Payment due to J.A Enjala per load	4.08 truck-loads x N\$5000.00	N\$ 20,400.00
Salary payable to tractor driver	N\$ 2 500.00 of tractor p/month	N\$ 2,500.00
Repairs & Maintenance	N\$3,000.00 p/month	N\$ 3,000.00
Bags for coal	N\$1,500.00p/month	N\$ 1,500.00
TOTAL EXPENSES MONTHLY:		N\$ 158,255.60

Total expenses for a period of two years:

N\$ 158,255.60 x 24 months = N\$ 3,798,134.40

Total profit:

N\$ 7,232,400.00 – N\$ 3,798,134.40 = N\$ 3,434,265.60'

[95] Annexure 'A' was admitted in evidence as Exhibit RG13. The figures set out in Annexure 'A' appear to be estimates. However, according to the evidence, the plaintiff's workers were on the defendant's farm for three and a half months during which period they harvested firewood and produced charcoal. Yet no evidence in the form of actual number of tons of firewood harvested and tons of charcoal produced have been adduced. Neither evidence of the actual costs incurred during that period was placed before court. It is difficult to accept that no record of the actual costs was kept. In my opinion, had the actual numbers been tendered in evidence, it would have formed a reliable basis to extrapolate the quantity of tons harvested and produced as well as expenses incurred, over the agreed period of two years. This would also have applied to the actual profit the plaintiff would have earned.

[96] There is no explanation why the total actual wages paid to the workers over the period of three and a half months could not be produced. For instance, under the expenses column the item 'Payment to employees', why was the actual costs incurred during the three and a half months not produced? The plaintiff testified that

the loss he suffered consisted of wages he paid to the workers and food he bought for them. Such expenses could for instance be obtained from the plaintiff's bank statements, if no records were kept. In my judgment, this is the evidence which should reasonably be available to the plaintiff.

[97] I would have expected the foreman to have maintained a written manual wage payment record of some sort. In my view, it would have been humanly impossible for the foreman to have managed the 'pay-roll' of 42 workers without maintaining a written record. How else was it possible for the foreman to have been able to know and remember which worker has been paid and which worker has not been paid in respect of their productions? I think it is fair to assume that the foreman received monies in cash from the plaintiff in order to pay the workers. In that regard the foreman had in turn to account to the plaintiff in respect of money paid as wages to each worker. In my view, that system could not be maintained without a record being kept. That is the record which ought to have been placed before court. Could the workers have been paid without a record of the actual tons they have produced, being maintained? I do not think so.

[98] The same question applies to the expenses incurred for diesel over the period of three and a half months. No invoices or receipts have been discovered and placed before court in respect of the expenses for the purchase of diesel. The plaintiff testified that he spent N\$4 600 per month in respect of diesel. It is inconceivable that no records exist for the purchase of the diesel. It is a notorious fact that all filling stations in Namibia issue receipts at the fuel pump upon purchase of diesel or petrol. No explanation was given why no such receipts were tendered in evidence.

[99] The fact that records were kept appears from Mr Gamiseb, the foreman, in response to a question how certain was he that there were 42 workers on the project, he responded that:

'I have to go through the documents, the books My Lord to see and before I left that farm my Lord I went to check in the books My Lord, in which the food item and the equipment were issued. So I went check how many people were still on the farm as employees.'

[100] From that piece of evidence it is clear that some sort of records were kept by the foreman. There was an obligation on the plaintiff to have placed such records before court as evidence to prove his damages. There is no explanation why such records were not discovered and placed before court.

[101] Furthermore, it appears from Mr Gamiseb's evidence that records were kept in respect of food given to the workers as well as the equipment issued to the workers. In this connection, the plaintiff also testified that he supplied food and water to the workers.

[102] The plaintiff's claim for compensation of the costs associated with the production costs of firewood and charcoal includes the costs for providing food to his workers. I think that it is fair to assume that such food was bought from places such as Agra, Metro or from other similar well-known outlets selling food stuff in bulk. In this regard no receipts were discovered and placed before court as proof that the plaintiff indeed bought food stuff for his workers which expenses formed part of his production costs which he is claiming.

[103] As regards the expense items: 'Payment due to JA Endjala per load', my understanding of the evidence is that the amount of N\$5 000 was supposed to be paid to the defendant, as a consideration, per 4.08 tons truck load of firewood or charcoal loaded and transported from the defendant's farm. It is common cause that no firewood or charcoal was taken from the farm. There is also no evidence that such amount was ever paid to the defendant. In the circumstance it would appear to me that the amount of N\$5 000 (N\$20 400) distorts the total figure of expenses in the sum of N\$158 255.60. In my view, this has ripple effect on the total production costs claimed as an alternative claim.

[104] The next listed expenses is the 'Repair & Maintenance' in the sum of N\$3 000 per month. This appears to me to be a mere budgeted amount. I say so for the reason that there is no evidence that any equipment, tractor or vehicle was repaired during period the plaintiff was working on the farm. This amount cannot therefore be an actual amount expended on repairs and maintenance of equipment. It cannot therefore be allowed or taken into account.

[105] With respect the expense for 'Bags for Coal' in the sum of N\$1 500 per month, my understanding of the evidence is, again, that the coal were never packed. The plaintiff testified that after the second agreement was concluded on 17 August 2019 in terms whereof it was agreed that he could remove his goods including charcoal from the defendant's farm, additional workers were recruited and stationed at farm Obab, they were supposed to go to the farm to pack the charcoal in bags. The plaintiff's workers were, however, denied access to the farm on a number occasions as the gates were locked. It would appear to me, therefore, that the bags intended to pack charcoal remained in the possession of the plaintiff. The plaintiff can still use such bags at another project. For that reason, it follows thus in my opinion, that the plaintiff cannot claim the expenses for buying the bags intended to pack charcoal as a wasted expense from the defendant.

[106] The plaintiff testified that he has been in the business of producing charcoal for eleven years. In my view, he could have placed before court records of income and expenditure from previous similar projects he had undertaken in order to demonstrate to the court that his current figures are not unrealistic. On his own evidence he had just finished a similar project at the adjacent farm, Obab. He could have used those fresh figures as a basis for his assumptions. Such comparative evidence would have placed the alleged income and expenses in the present matter into perspective and certainly avoid sending the court into a wild goose chase in assessing the plaintiff's damages.

[107] I find it difficult to accept that a project of such nature, undertaken by the plaintiff which was expected to yield over N\$3 million in profit, had no records or no proper books of account were kept. How would the plaintiff for instance have accounted his taxable income tax to the Commissioner for Inland Revenue about the profit earned from the project given the fact that no proper books of account were kept.

[108] As has been pointed out earlier in this judgment, a court is not bound to award monetary damages in the case where evidence is available to the plaintiff which he or she has not produced; in those circumstances the court is justified in giving and does give, absolution from the instance.

[109] The figures or numbers on the income column of Annexure 'A' are predicated on the 42 workers and what each would have produced per month. The assumption is made that each worker would have generated or produced three and a half tons of coal per month. No further evidence was placed before court to demonstrate that the workers indeed performed in accordance with that assumption. In my view, it cannot be realistic to expect that all 42 employees performed at the same capacity level. It is fair to say, based on human experiences and logic that people's output differ from person to person. I therefore find the evidence relating to the number of tons of firewood and charcoal produced, to be unsatisfactory and unreliable.

[110] I should also observe in this regard that the plaintiff's assumptions did not take into account some of the major macro-economic factors, such as inflation and interest rate movement, whether up or down, during the execution of the project. More importantly, the second year of execution of the project would have been 2020, which, as we all know, had a depressive effect on the economic activities, due to the devastating Covid-19 pandemic. In my view, those are weighty considerations which should have been factored into the assumptions.

[111] The plaintiff testified that the selling price for charcoal per ton is N\$2 050 and that the market value of the 216 ton of charcoal is N\$442 800. The plaintiff did not adduce evidence of an expert to prove the 'market value' of the charcoal. Neither was evidence adduced of sale figures of charcoal from previous sales he had conducted in order to prove that his claim that the selling price of N\$2 050 was based on actual figures. This court cannot simply accept his say so without more.

[112] Furthermore, no evidence was adduced as to where the plaintiff had sold his products in the past, whether locally or whether he exports all his products to other countries. In this regard, the plaintiff mentioned in his evidence that he does not pay for the transport and that 'the buyers for pays for all transport for and all that and there is insurance on all the tractors as well, that goes out. That goes, that is leaving for our export (indistinct) in South Africa.' It would appear from this piece of evidence that the products were exported to South Africa. No evidence was adduced of how the 'market value' of charcoal was determined either in South Africa or in Namibia. The 'market value' was simply a bald statement by the plaintiff. That is not acceptable to the court.

[113] As regards the 864 tons of firewood, he testified that its 'market value' is N\$1 123 200. Again no expert evidence was adduced how such market value had been determined. In my view, Mr Grobler was not qualified to testify as an expert in determining the market value of firewood or charcoal. He is a mere producer but not a valuer or economist who assesses the market value of firewood and charcoal. Accordingly, to the extent Mr Grobler's evidence professes to be expert evidence with regard to the market value of firewood and charcoal, such evidence is rejected.

[114] Before I conclude with the items listed in Annexure 'A', I should mention that only one expense where, it would appear, the plaintiff sought that it was necessary to produce proof thereof, is the expenses he incurred in paying for the harvesting and exporting permits in the total sum of N\$1 305. He attached the receipts in respect of those expenses. In my opinion, this demonstrates that the plaintiff was aware that he had to produce, in evidence all the receipts and all documents in his possession, pertaining to the project, to prove his quantum.

[115] This brings me to the evidence of the expert witness, Mr Grobler. It appears to me that the purpose of the expert evidence was to confirm the correctness and the reasonableness of the calculation of the damages allegedly suffered by the plaintiff based on Annexure 'A'. Before considering his evidence, I deem it apposite at this junction to briefly set out the legal principles applicable when expert evidence is assessed. The principles were neatly summarised by the South African Supreme Court of Appeal in *PriceWaterhouseCoopers Inc & Others*⁷.

'[97] Opinion evidence is admissible 'when the Court can receive "appreciable help" from that witness on the particular issue'.⁸ That will be when:

"... by reason of their special knowledge and skill, they are better qualified to draw inferences than the trier of fact. There are some subjects upon which the court is usually quite incapable of forming an opinion unassisted, and others upon

⁷ *PriceWaterhouseCoopers Inc & Others v National Potato Co-operative Ltd & Another* (451/12) [2015] ZASCA 2 (4 March 2015)

⁸ *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (AD) at 616H. This statement is derived from *Wigmore on Principles of Evidence* (3 ed) Vol VII para 1923.

which it could come to some sort of independent conclusion, but the help of an expert would be useful.”⁹

[116] As to the nature of an expert’s opinion, in the same case, Wessels JA said:¹⁰

‘... an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.’

[117] Courts in this and other jurisdictions have experienced problems with expert witnesses, sometimes unflatteringly described as ‘hired guns’. In *The Ikarian Reefer*¹¹, Cresswell J set out certain duties that an expert witness should observe when giving evidence.

‘The duties and responsibilities of expert witnesses in civil cases include the following:

1. Expert evidence presented to the Court should be and should be seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise ... An expert witness in the High Court should never assume the role of advocate.
3. An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinion.
4. An expert witness should make it clear when a particular question or issue falls outside his expertise.’

⁹ *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH* 1976 (3) SA 352 (A) at 370G-H.

¹⁰ *Ikarian Reefer* at 371F-H.

¹¹ *National Justice Compania Naviera SA v Prudential Assurance Co Ltd ('The Ikarian Reefer')* [1993] 2 Lloyd's Rep 68 [QB (Com Ct)] at 81 – 82. Approved in *Pasquale Della Gatta, MV; MV Filippo Lembo; Imperial Marine Co v Deiulemar Compagnia Di Navigazione Spa* 2012 (1) SA 58 (SCA) para 27, fn 12 and *Schneider NO and Another v AA and Another* 2010 (5) SA 203 (WCC) at 211E-I.

These principles echo the point made by Diemont JA in *Stock*¹² that:

“An expert ... must be made to understand that he is there to assist the Court. If he is to be helpful he must be neutral. The evidence of such a witness is of little value where he, or she, is partisan and consistently asserts the cause of the party who calls him. I may add that when it comes to assessing the credibility of such a witness, this Court can test his reasoning and is accordingly to that extent in as good a position as the trial Court was.”

[99] Lastly when dealing with the approach to an expert witness I have found helpful the following passage from the judgment of Justice Marie St-Pierre in *Widdrington*:¹³

“Legal principles and tools to assess credibility and reliability

[326] Before any weight can be given to an expert’s opinion, the facts upon which the opinion is based must be found to exist.

[327] As long as there is some admissible evidence on which the expert’s testimony is based it cannot be ignored; but it follows that the more an expert relies on facts not in evidence, the weight given to his opinion will diminish.

[328] An opinion based on facts not in evidence has no value for the Court.

[329] With respect to its probative value, the testimony of an expert is considered in the same manner as the testimony of an ordinary witness. The Court is not bound by the expert witness’s opinion.

[330] An expert witness’s objectivity and the credibility of his opinions may be called into question, namely, where he or she:

- accepts to perform his or her mandate in a restricted manner;
- presents a product influenced as to form or content by the exigencies of litigation;
- shows a lack of independence or a bias;

¹² *Stock v Stock* 1981 (3) SA 1280 (A) at 1296 E-G. See also *Jacobs and Another v Transnet Ltd t/a Metrorail and Another* 2015 (1) SA 139 (SCA) para 15.

¹³ *Supra*, fn 5. The judgment is one for the clarity of which I can only express admiration. It was upheld on appeal on all major issues. *Wightman v. Widdrington (Succession de)* 2013 QCCA 1187 (CanLII). An application for leave to appeal to the Supreme Court of Canada was dismissed. *Elliot C. Wightman, et al. v. Estate of Peter N. Widdrington*, 2014 CanLII 341 (SCC).

- has an interest in the outcome of the litigation, either because of a relationship with the party that retained his or her services or otherwise;
- advocates the position of the party that retained his or her services; or
- selectively examines only the evidence that supports his or her conclusions or accepts to examine only the evidence provided by the party that retained his or her services.” ’

[118] Mr Grobler testified that he did not attend at the defendant's farm to carry out an independent assessment of the tons of firewood and charcoal in particular its quantity and quality. It would appear that he relied on the information supplied to him by the plaintiff. However, there was also no evidence by plaintiff that he measured or counted the quantity of the firewood and charcoal left on farm Heliodor. There is no evidence that the plaintiff provided Mr Grobler with any other data or information other than the cold Annexure 'A'. This means that Mr Grobler did not assess whether the estimated number of tons were possible reasonable correct. It is to be noted in this regard, that despite the absence of direct evidence how the amount of tons of firewood and charcoal were determined, the number of tons are precise and appears not to be estimates. In the light of this consideration, I found the substratum upon which the expert evidence by Mr Grobler is based with regard to the number of tons of firewood and charcoal to be wobbly and as a result, unreliable. I have already demonstrated the unreliability of the expenses listed in Annexure 'A'.

[119] A further factor which have a diminishing effect on the probative value of Mr Grobler as an expert witness is that, quite apart from his experience in the charcoal industry, he is not much of an independent witness. I say this for the reason that he testified that the plaintiff 'is actually a family, he is married to my niece.' In my view, his close relationship to the plaintiff compromised his objectivity and independence and thus diminished the probative value of his expert evidence. It is against the background of those reservations that I proceed to consider his evidence.

[120] As it appears from the legal principles outline above, when an expert opinion is based on factual evidence of another witness, the value of that expert's opinion will largely depend on the reliability of the evidential matter upon which the opinion is based. Should such basis be found to be unreliable little or no value can be attached to such expert opinion.

[121] As pointed out earlier, Mr Grobler did not have an independent knowledge about the quantity of the firewood and charcoal on the defendant's farm as well as the alleged expenses. He relied for his opinion on the plaintiff's evidence in particular the calculation on Annexure 'A'. In this regard, I earlier found the plaintiff's evidence as to the quantity of the firewood and charcoal on the defendant's farm to be unreliable which in turn has a negative effect on the amount of damages claimed.

[122] It is trite that a court cannot accept the bare statement of an expert witness that in his or her opinion, for instance the costs, are fair and reasonable. He or she is required to state the basis upon which his or her opinion is based. He or she should for instance state that because of his or her experience and knowledge or the facts or data his or her opinion is this or that. In this regard it has been held that an expert's opinion represent his or her reasoned conclusion based on certain facts or data, which are either common cause or established by his or her own evidence or that of some other competent witness.¹⁴ Mr Grobler's evidence did not comply with those principles as it will be demonstrated from the excerpts of his evidence quoted immediately below.

[123] Mr Grobler testified as follows with reference to Annexure 'A':

'In my opinion 864 tons of wood produced (indistinct) market value as [of] firewood is an N\$1 232 200:

The cost of harvesting 864 tanks (tons) of wood would be in my opinion an amount to approximately three and forty-thousand six hundred Namibian Dollars (N\$340 506-00).

You can continue, paragraph 8. --- In my opinion 260 tanks of charcoal would have the market, market value of four hundred and forty-two thousand eight hundred Namibian

¹⁴ *Coopers (South Africa) (PTY) Ltd v Deutsche Gesellschaft Fürschädlingsbekämpfung MBH* 1976 (3) SA 352 (a).

Dollars (N\$442 800-00) and in my opinion the cost of one hundred and eighty three thousand six hundred Namibian Dollars (N\$183 600-00), is the cost, yes to produce 216 tanks of charcoal is reasonable.

Yes, paragraph 9. --- In my opinion considering the above reasonable values, the market value of the 564 tanks of wood produced and the market value of the 216 ranks of charcoal produced would amount to N\$1 566 000-00) Namibian dollars.

Yes, you can continue. --- In my opinion, the reasonable costs of producing 864 tanks of wood and 216 tanks [tons] of charcoal, would be five hundred and twenty nine thousand two hundred Namibian dollars (N\$529 200-00). I further considered Annexure A to the amendment particulars of claim and in opinion the values reflect therein are market related and reasonable. In my opinion, had Mr Grove produced charcoal from farm Heliodor for 2 years, he would have made a profit of about three million (N\$3 434 265-60) Namibian dollars.

Yes, you can (indistinct) --- I honestly believe that the facts (indistinct) here is true.

Okay, before you continue. Just a correction. At paragraph 9, the second sentence, that should be 864 (inaudible) typical (indistinct) error that is in there (indistinct) --- Okay, is (indistinct) alright. It should be 864 not 564.' (Underlining provided for emphasis)

[124] I provided the underlining of the term 'market value' to underscore my finding I made earlier in this judgment that Mr Grobler was not qualified to testify about the market value of the firewood and charcoal. He did not professed to be a valuer or market economist in the market area of firewood and charcoal. His evidence in this regard is therefore rejected.

[125] It is to be noted that Mr Grobler failed to state the facts or basis upon his opinion in respect of various amounts of market values and production costs were based. I found the evidence of Mr Grobler to be of less value and unhelpful as he merely parroted the contents of Annexure 'A'. He did not perform an independent calculation or evaluation of facts or available data. As earlier observed, he did not ask to be provided with actual numbers of tons of firewood harvested and charcoal produced over the three and a half months as well as corresponding costs incurred over that period.

[126] In the light of the considerations, findings and conclusions made hereinbefore, I am not satisfied that the plaintiff has proven on a balance of probabilities the amount of damages he alleged he has suffered as a result of defendant's breach of contract in respect of the first main claim. Accordingly, an order for absolution from instance stands to be made in respect of this claim. I turn to consider whether the plaintiff did manage to prove any of the three alternative claims.

[127] The quantum of damages claimed in respect of the three alternative claims were to a large extent dependent on proof of the line items listed in Annexure 'A' regarding the income and expenditure in respect of the first main claim.

[128] In respect of the first alternative claim in the sum of N\$1 566 000 being the combined market value (N\$1 123 200 00 in respect 864 tons of firewood and N\$ 442 800 in respect of 216 tons of charcoal) of the firewood and charcoal, I have found, in the context of the first main claim, that the plaintiff have failed to prove such market value. Accordingly, this claim cannot succeed for lack of evidence.

[129] The second alternative claim is for also for the sum of N\$1 566 000 but this one has been framed as damages representing the 'income' the plaintiff would have from the sale of the firewood and charcoal. In my view, this claim clearly demonstrates how the plaintiff conflated the terms 'market value' and 'income'. I earlier in this judgment tried to explain the meaning of these terms. A proper application of these terms would in practice yield different results. In any event, I have already found, in the context of the first main claim that the plaintiff failed to prove his 'loss of profit' which in accounting terms is more or less the same as 'income' save that an amount representing income might be higher than the amount representing profit. For instance, if income means gross income. Net income means net profit. It follows thus that the plaintiff have equally failed to prove the quantum in respect of this claim.

[130] The third alternative claim is for payment of the sum of N\$528 600, being reasonable costs incurred by the plaintiff in producing 864 tons of firewood and 216 charcoal. I have already found that in the context of the first main claim that the plaintiff failed prove how the amount of tons have been calculated and determined. I have equally found that the plaintiff failed to quantify and prove the alleged expenses

he incurred in producing the said tons of firewood and charcoal. It follows thus the same findings befalls on this claim. I move to consider the plaintiff's second claim.

[131] It is to be recalled that the plaintiff's second claim is for the delivery of the 103 kilns left of the defendant's farm which the defendant fails and/or refuses to restore possession thereof to the plaintiff failing which payment of the replacement value of the each kiln not returned.

[132] I have already found that the defendant breached the second agreement concluded by the parties on 17 August 2019 in terms whereof the plaintiff would have removed his goods including his 103 kilns. It is thus not in dispute that the 103 kilns were left at the defendant's farm.

[133] The plaintiff testified that the replacement value of 103 kilns is N\$247 200. Mr Grobler testified that the replacement cost per unit during 2019, when the claim arose, was N\$2 400. His evidence was corroborated by the expert evidence of Mr Grobler in this regard. However, according to Mr Grobler, the current replacement cost of kiln would be around N\$3 000. I accept the evidence by Mr Grobler regarding the replacement costs of a kiln. I do so for the reason that he provided a basis for his estimate. He testified in this connection that he himself manufactures kilns even though his kilns are not the same as those used by the plaintiff. He testified about the different diameter of the iron sheet used as well as the necessary length required to produce a kiln. He further mentioned that there is a workshop in Tsumeb which also manufactures and sells kilns to charcoal producers. In this regard, I am constrained to observe in passing that, if the plaintiff was diligent enough he could have obtained a quotation from that workshop which is situated in his town. For those reasons, I am satisfied with his expert evidence relating to the replacement costs of the kilns.

[134] I am therefore satisfied that the plaintiff has proved his second claim and is entitled to an order for the return of his 103 kilns, failing which to payment of the sum of N\$247 200 being the replacement cost of the 103 kilns.

Conclusion

[135] In sum and in conclusion, I have found that, in respect of the plaintiff's first main claim and three alternative claims as well as the second claim that the plaintiff proved that the defendant breached both the first and second oral agreements concluded between the parties. The first agreement being for the harvesting and producing of firewood and charcoal on the defendant's farm. The second agreement was to the effect that, following the breach of the first agreement, it was agreed between the parties that the plaintiff would be allowed to remove his firewood and charcoal as well as kilns from the defendant's farm. Subsequent thereto the defendant refused the plaintiff access to his farm thereby breaching the second agreement.

[136] As regards the damages suffered by the plaintiff as a result of the breach of the agreements, I found that the plaintiff failed to prove the quantum amount arising from the breach of the agreements.

[137] In respect of the replacement value of 103 kilns of the plaintiff left on the defendant's farm, I have found that the plaintiff has proved that the kilns ought to be on the defendant's farm and should it not be on the farm it was disposed by the defendant with the knowledge of the plaintiff's ownership. I have also found that the plaintiff proved the replacement of the kilns at the time the claim arose. I therefore satisfied that the plaintiff is entitled to an order for the return of his kilns failing which payment of the replacement value of his kilns.

Costs

[138] The defence was withdrawn before the plaintiff commenced to lead evidence to prove his damages. The plaintiff was in law obliged to lead evidence to prove his quantum in respect of the first main claim and the three alternative claims and not because of opposition by the defendant. He was unsuccessful in proving the quantum in respect of his first main claim including his three alternative claims. Accordingly, an order for absolution from the instance is to be issued.

[139] In the respect of the second claim, the plaintiff was successful and is as a result entitled to an order for the return of his 103 kilns failing which payment of the replacement costs of the kilns being the sum of N\$247 200.

[140] In my view, most of the time and efforts was expended to prove the main first claim which was also substantial compared to the second claim. Accordingly, I am of the considered view that the plaintiff is only entitled to an order of costs against the defendant after the defence was withdrawn proportionate to the value of the second claim. The rationale behind this is that it would not be fair nor reasonable to saddle the defendant with all the costs occasioned by the whole trial given the fact that the plaintiff only succeeded proportionately.

[141] Accordingly in the exercise of my discretion, I am of the view an order in terms whereof the defendant is ordered to pay half of the plaintiff costs would be fair and reasonable. In my view the defendant could have avoided the payment of costs or at very least mitigated the burden of costs by tendering the return of the kilns, should it still be in his possession. In view of the fact that he failed to do so, he must bear the consequence.

Order

[142] In the premises, I make the following order:

1. Absolution from the instance is granted in respect of the plaintiff's first main claim as well as the three alternative claims.
2. The defendant is ordered to deliver the 103 kilns to the plaintiff within 30 days of this order, failing which payment of the sum of N\$247 200, being the replacement cost of the 103 kilns, alternatively payment of the sum of N\$2 400 being the replacement cost of each kiln not returned.
3. The defendant is to pay half of the plaintiff's costs on a party and party scale. Such costs to include the costs of one instructed and one instructing counsel.
4. The matter is removed from the roll and regarded as finalized.

H ANGULA
Deputy Judge-President

APPEARANCES:

PLAINTIFF:

A S VAN VUUREN

Instructed by Etzold-Duvenhage, Windhoek

DEFENDANTS:

No appearance

Sisa Namandje & Co. Inc., Windhoek