

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

HC-MD-CIV-ACT-CON-2021/01024

In the matter between:

RUBEN KOORTZEN

PLAINTIFF

and

ERIC STEPHANUS

DEFENDANT

Neutral citation: *Koortzen v Stephanus* (HC-MD-CIV-ACT-CON-2021/01024)
[2023] NAHCMD 159 (30 March 2023)

Coram: MILLER AJ

Heard: 9 – 13 May 2022; 4 – 5, 14 & 29 July 2022; 17 October 2022; 14
November 2022

Delivered: 31 March 2023

Flynote: Civil Practice – Action – factual disputes – burden of proof on a balance of probabilities – The defendant denies that he purchased 440 head of sheep from the plaintiff. He alleges that he purchased 144 sheep for the amount of N\$144 000 and instead of payment being effected in cash, the plaintiff would lease a portion of a land which belongs to the defendant at N\$12 000 per month for a year which would make up for the amount of N\$144 000 – Plaintiff bears the onus of establishing his claim on a balance of probabilities and the same would apply to the defendant's

counterclaim. Court finding the plaintiff to be a reliable witness and his version to be more probable and rejects the defendant's evidence as false.

Summary: The plaintiff instituted action against the defendant claiming the amount of N\$440 000 with interest at the rate of 20% per annum and an order whereby the defendant returns the water pump systems in working condition, alternatively, payment in the amount of N\$125 545, 50 with interest at the rate of 20% per annum and costs of suit. The second claim became settled between the parties. Defendant denies that he purchased 440 head of sheep from the plaintiff, he alleges that he purchased 144 sheep for the amount of N\$144 000. Payment would not be effected in cash instead the plaintiff would lease a portion of a land which belongs to the defendant at N\$12 000 per month for a year which would constitute the payment of N\$144 000. The defendant filed a counterclaim alleging that there was a further lease agreement in terms whereof the portion of land was leased for a period of five years, commencing on 1 February 2017. The plaintiff alleges that the agreement never came into force as the defendant had to secure a loan in the amount of N\$440 000 and since no loan was granted, the agreement remained suspended and never took any effect. The court held that, the plaintiff bears the onus to establish his claim on a balance of probabilities and the same applies to defendant's counterclaim. The court held that, the plaintiff is a reliable and honest witness and his version of events remained in accordance with what happened in the pleadings. The court further held that, the version of the defendant is a highly improbable one due to substantial and material contradictions between his evidence and what is contained in the pleadings.

ORDER

1. The defendant is ordered to pay to the plaintiff the sum of N\$440 000.
2. Interest on the aforesaid amount shall accrue at the rate of 20% per annum calculated from 10 February 2017 until the date of final payment.
3. The counterclaim is dismissed.

4. The defendant shall pay the costs of the action.
5. The matter is finalized and removed from the roll.

JUDGMENT

[1] The plaintiff instituted action against the defendant in which he claims the following relief:

‘1. Claim one:

1.1 Payment in the amount of N\$440 000-00;

1.2 Interest on the aforesaid amount at the rate of 20% per annum calculated from 10 February 2021 until date of final payment;

2. Claim two:

2.1 An order in terms whereof the Defendant is to return the water pump systems in working condition, alternatively, payment in the amount of N\$125,545-5;

2.2 In the event that the Defendant does not return the water pump systems in a working condition or at all, interest on the aforesaid amount at a rate of 20% per annum calculated from 10 February 2021 until date of final payment;

3. Ad all claims

3.1 Costs of suit;

3.2 Further and/or alternative relief.’

[2] There is no longer any need to consider claim 2. That portion of the action became settled between the parties, in the interim, leaving only claim 1 to be adjudicated.

[3] In an amended plea, the defendant denies that he purchased 440 head of sheep from the plaintiff. Instead, he alleges that the plaintiff bought 144 sheep from one Kevin Stephanus. Once purchased, these sheep were sold by plaintiff to the defendant at a price of N\$144 000. Payment would not be effected in cash. Instead the plaintiff would lease a portion of land which belongs to the defendant at N\$12 000 per month for a period of one year, which would then constitute the payment of N\$144 000.

[4] In a counterclaim, the defendant alleges that there was a further lease agreement in terms whereof the portion of land was leased for a period of five years, commencing on 1 February 2017.

[5] In a plea to the counterclaim, the plaintiff alleges that the later agreement would only come into effect once the defendant was able to secure a loan in the sum of N\$440 000 being the purchase price of the sheep the defendant bought. Since no loan was granted, the agreement remained suspended and never took any effect.

[6] At the trial I heard the evidence of the plaintiff and that of Mr Johan Marais who was called as a witness by the plaintiff.

[7] The defendant testified and called Mr Kevin Stephanus as a witness.

[8] It will by now be apparent that the disputes between the parties are and remain factual disputes in essence. By and large the respective versions are irreconcilable.

[9] First and foremost, I bear in mind that as far as the plaintiff's claim is concerned, he bears the onus to establish his claim on a balance of probabilities. As far as the counterclaim is concerned the defendant bears the onus.

[10] The correct approach to resolve factual disputes of the kind is formulated by Nienaber JA in the matter of *SFW Group Limited and Another v Martell Et Cie and Others*¹. The relevant passage at paragraphs 14H – 15E reads as follows:

¹ *SFW Group Limited and Another v Martell Et Cie and Others* 2003 (1) SA 11 (SCA).

'The technique generally employed by our courts in resolving factual disputes of this nature may conveniently be summarized 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 variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour; (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (vi) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra-curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events...'

This approach was adopted and followed by the Namibian Courts in a number of judgments, inter alia, that of Masuku AJ (as he then was) in *Ndabeni v Nandu*²

[11] I found the plaintiff to be a reliable witness. His evidence rings true and is consistent with the probabilities of the case. He was in my view candid and honest in answering the various questions put to him. His version of the events remains consistent and is in accordance with what appears in the pleadings.

[12] His evidence is substantially supported by the evidence of Mr Marais. Mr Marais is a bank official. His testimony is that the defendant approached him and requested a loan in the sum of N\$440 000. He testified that he rejected the request immediately because he did not regard the defendant to be credit worthy. During cross-examination it was suggested to him that Mr Koortzen is a friend of his. He readily admitted that he knew Mr Koortzen and had had past business dealing with him. He admitted that there exist no documents such as a loan application, nor was the normal procedure followed in respect of the procuring of the loan. In context, nothing turns on that. It is apparent that the defendant made a verbal request for a loan which he rejected forthwith. Thus, so I understood his evidence, the need for a formal application became redundant.

² *Ndabeni v Nandu* (I 343/2013) NAHCMD 110 (11 May 2015).

[13] The version of the defendant as to the events at the relevant time is and remains a highly improbable one. This is especially the case as to how he claims the transactions occurred. Moreover, these are substantial and material contradictions between his evidence and what is contained in the pleadings. He was vague and evasive on a number of issues. I found him to be an unsatisfactory witness who tried to tailor his evidence to suit his case.

[14] Mr Kevin Stephanus was called to bolster the version presented by the defendant. I bear in mind that the witness statement he filed was filed after he had been present in court and has listened to the evidence of the defendant. That substantially affects the credibility and the reliability of his evidence. His evidence on how the transactions took place is likewise highly improbable.

[15] On the totality of the evidence, the probabilities and the circumstances of the matter. I conclude that the evidence of the plaintiff can safely be accepted and that of the defendant stands to be rejected as false.

[16] I will accordingly make the following orders:

1. The defendant is ordered to pay to the plaintiff the sum of N\$440 000.
2. Interest on the aforesaid amount shall accrue at the rate of 20% per annum calculated from 10 February 2017 until the date of final payment.
3. The counterclaim is dismissed.
4. The defendant shall pay the costs of the action.
5. The matter is finalized and removed from the roll.

K MILLER
Judge

APPEARANCES

PLAINTIFF: F Pretorius
Of Francois Erasmus & Partners, Windhoek

DEFENDANT: W Boesak
Instructed by Engelbrecht Attorneys, Windhoek