

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: HC-MD-CIV-ACT-CON-2017/04606

In the matter between:

**JURIE LOUW BOOYSEN**

**FIRST PLAINTIFF**

**QUANTUM INVESTMENTS NUMBER TEN CC**

**SECOND PLAINTIFF**

**LIENKIE BOOYSEN**

**THIRD PLAINTIFF**

and

**QUANTUM INVESTMENTS 14 CC**

**FIRST DEFENDANT**

**KAREL JOHANNES VAN WYK**

**SECOND DEFENDANT**

**Neutral citation:** *Booyesen v Quantum Investments 14 CC* (HC-MD-CIV-ACT-CON-2017/04606) [2023] NAHCMD 444 (27 July 2023)

**Coram:** MILLER AJ

**Heard:** 22 – 24 March 2023; 15 – 16 May 2023; 8 June 2023

**Delivered:** 27 July 2023

**Flynote:** Civil law – Plaintiff bears the evidential burden to successfully prove a claim on a balance of probabilities – Where there are two mutually destructive versions, the plaintiff's claim can only succeed if the plaintiff satisfies the Court that his or her version is true, accurate and acceptable and the defendant's version is false and

falls to be rejected – Court not satisfied that plaintiffs proved their claim and Court favours the versions of the defendants and dismisses the plaintiff's claim.

**Summary:** In this matter, the third plaintiff is the sole member of the second plaintiff, Quantum Investment 10 CC. The second plaintiff provided shutter boards to the first plaintiff under his business JB Construction on the condition that payment will be made for the shutter boards when funds became available. A container full of shutter boards was delivered to the first plaintiff. The first plaintiff and second defendant, Mr van Wyk joined forces and started trading under the name of QK Construction. QK Construction was trading under Quantum Investments Number Ten CC awaiting the finalization of the acquisition process of the first defendant. The first defendant then used 860 new and already used shutter boards of second plaintiff.

The plaintiffs instituted action against the defendants claiming for payment in the amount of N\$751 525 with interest at the rate of 20% per annum for the shutter boards sold and delivered by the second plaintiff to the defendants, relying on an invoice dated 1 June 2015.

The defendants deny that there was any agreement between the second plaintiff and the defendants. Further, that the first defendant was a dormant entity at the time of the alleged agreement and that the invoice relied upon by the second plaintiff was forged and only disclosed to them at the time the action was instituted.

According to Mr Van Wyk, the new boards and already used boards were contributed to the first defendant by the first plaintiff as contribution for their new venture, Quantum Fourteen CC and the first plaintiff was also paid on his loan account for those contributions. However, Mr Booysen denies this and claims that the first defendant remains indebted to the second plaintiff.

*Held* that, the burden of proof rests on the plaintiffs and they would only be able to succeed in its claim if the plaintiffs are able to establish the claim on a balance of probabilities.

*Held* that, the probabilities in this matter favour the versions of the defendants and the plaintiffs did not discharge the onus resting upon them and dismisses the plaintiffs' claim with costs.

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### **ORDER**

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1. The plaintiffs' claim is dismissed with costs, which will include the costs of one instructing and one instructed counsel.
  2. The matter is finalised and removed from the roll.
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### **JUDGMENT**

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MILLER AJ:

#### Introduction

[1] The plaintiffs in this matter instituted action against the defendants on 6 December 2017.

[2] The initial particulars of claim were amended during the course of the proceedings. A reference thereto reveals that the second plaintiff (Quantum Investments Number Ten CC) alleges that the first defendant (Quantum Investments 14 CC) and/or the second defendant (Mr van Wyk) is indebted to it in the sum of N\$751 525, being the amount due and payable to it for building materials sold and delivered by the second plaintiff to the defendants in terms of a partly written and partly oral agreement. In support of its allegations, the second plaintiff refers to an invoice for the amount claimed which is dated 1 June 2015.

[3] The amended particulars of claim refer to various claims that the first plaintiff (Mr Booysen) alleges he had against the defendants arising from an alleged written agreement of sale of members interest in certain close corporations.

[4] Surprisingly and despite the allegations levelled against the defendants by the first plaintiff, the prayers being sought do not include any prayers by the first plaintiff against the defendants. The prayers being sought simply read as follows:

'WHEREFORE SECOND PLAINTIFF PRAY FOR AN ORDER IN THE FOLLWING TERMS AGAINST FIRST AND SECOND DEFENDANTS, JOINTLY AND SEVERALLY, THE ONE PAYING THE OTHER TO BE ABSOLVED:

AD CLAIM 1

1. Payment in the amount of N\$751,525,00 (SEVEN HUNDRED AND FIFTY ONE THOUSAND FIVE HUNDRED AND TWENTY FIVE NAMIBIA DOLLAR)
2. Interest on the aforestated amount at the rate of 20% per annum calculated from 30 June 2015 until date of final payment;
3. Costs;
4. Further or alternative relief.'

[5] In their plea, the defendants deny the existence of any agreement between either of them and the second plaintiff. The defendants allege that at the time of the conclusion of the alleged agreement, the first defendant was a dormant entity with members who were not any of the defendants. The defendants allege that the invoice relied upon by the second plaintiff was forged which was only disclosed to them at the time the action was instituted. It was pleaded further that in any event, the second defendant cannot be held liable on the basis that he was or became at some stage a member of the first defendant.

[6] In due course, the managing judge in a pre-trial order issued on 30 September 2020, referred the matter to trial on the issues mentioned in paragraphs 1 and 2 of the pre-trial report. The relevant paragraphs read as follows:

'1. RULE 26(6)(a) – All issues of fact to be resolved during the trial

1.1 The business address of the 2<sup>nd</sup> Plaintiff.

- 1.2 Whether the 3<sup>rd</sup> Plaintiff is a member of the 2<sup>nd</sup> Plaintiff.
- 1.2 Whether the second plaintiff and first defendant entered into an agreement of sale during May/June 2015.
- 1.3 If it is found that an agreement of sale was concluded then it must be determined:
  - 1.3.1 what the terms of that agreement was;
  - 1.3.2 who represented the 2<sup>nd</sup> Plaintiff and the 2<sup>nd</sup> Defendant in the conclusion of the agreement;
  - 1.3.3 Whether Annexure B to the Amended particulars of claim formed the written part of the agreement;
  - 1.3.4 Whether the 2<sup>nd</sup> Plaintiff complied with its obligations in terms of the agreement;
  - 1.3.5 Whether the 2<sup>nd</sup> Defendant complied with its obligation in terms of the agreement, and more specifically whether it made payment of the invoice.
- 1.4 Whether or not the first defendant was a dormant shelf entity, with or without the first plaintiff and second defendant during May/June 2015.
- 1.5 When the 3<sup>rd</sup> Plaintiff became a member of the 2<sup>nd</sup> Plaintiff.
- 1.6 Whether or not the second plaintiff's invoice INV2015/06/01-1 in the amount of N\$751,525,00 dated 01 June 2015 is regarded as a true and authenticated, or whether it has been forged by the first plaintiff and/or the third plaintiff.
- 1.7 When the invoice was first provided to the first defendant.
- 1.8 Whether or not the first plaintiff's contribution towards the first defendant was the items referred to in the invoice and whether such value reflected in the first defendant's books of account under the first plaintiff's loan account.

1.9 Whether or not the value of the invoice was taken into consideration in relation to the amount which the second defendant had to pay the first plaintiff in terms of the written agreement.

1.10 Whether or not it was agreed on that the purchase price (as per the written agreement) included all claims that the first plaintiff have against the defendants.

1.11 Whether or not the first defendant is liable to compensate second plaintiff for the items referred to in the invoice.

1.12 Whether or not the first defendant is indebted to the second plaintiff.

1.13 Whether or not the second and third plaintiffs and the second defendant are parties to the written sale agreement.

2. RULE 26(6)(b) – All issues of law to be resolved during the trial

2.1 Whether the third plaintiff has the necessary locus standi and/or authority.

2.2 Whether the first and/or second defendant(s) is indebted to the second plaintiff in the amount of N\$751,525,00 as at 28 August 2018 as per the Amended Particulars of Claim, or at all.'

[7] The matter proceeded to trial before me on those issues. I heard the evidence of the first and third plaintiff, Mr van Wyk and that of Mr Blom.

#### Relevant factual content

[8] In order to place the issues raised in perspective, it is perhaps necessary to provide some factual context. I do so by way of summary:

8.1 The first and third plaintiff (Mr and Ms Booysen are husband and wife).

8.2 Ms Booysen is the sole member of the second plaintiff (Quantum Investments Number Ten CC).

8.3 Part of the business of the second plaintiff was to acquire inter alia, shutter boards used in building construction projects.

8.4 At some stage the first plaintiff conducted his own business as a building contractor under the name and style of JB Construction.

8.5 From time to time it seems that there existed an arrangement between the first and third plaintiffs in terms whereof shutter boards were made available to the first plaintiff as and when those were required during the course of his business operations as JB Construction. No specific terms of repayment were determined. It was more of an informal arrangement where payment would be made as and when money was available. Ms Booyesen testified that Mr Booyesen would pay for the boards he used. The remainder remained the property of second plaintiff.

8.6 As part and parcel of this arrangement, the second plaintiff delivered a shipping container fully loaded with shutter boards to the first plaintiff.

8.7 The first plaintiff took possession of the container and its load, which he removed to some of the building sites he was engaged in at the time. The container containing the boards eventually ended up at a building site in the area of Windhoek.

8.8 During this time, the first plaintiff met the second defendant at a club. Pursuant to some discussions between the two of them, they decided to join forces. To that end they set about the acquisition of the first defendant, which at the time was a dormant shelf close corporation.

8.9 In the interim and while the process of acquiring the first defendant and the necessary changes in membership were ongoing, the first plaintiff and the second defendant traded under the guise of the second plaintiff, under the name and style of QK Construction.

8.10 The container with some shutter boards was collected from Windhoek and moved to building sites at the coastal areas.

8.11 Ultimately 860 new boards and 80 used boards were later in possession of and used by the first defendant.

8.12 The invoice dated 1 June 2015 which I referred to was not prepared on that date but at a much later stage. Ms Booysen testified that on that date (1 June 2015), QK Construction was still trading under Quantum Investments Number Ten CC and it would not make sense to invoice itself as it were.

[9] The facts I referred to in paragraph 8 above were essentially common cause.

[10] The factual disputes which arose at the trial were the following:

10.1 Mr and Ms Booysen testified that the invoice dated 15 June 2015, once it was generated, was presented to Mr Booysen and the second defendant. According to their testimony, it was acknowledged that the first defendant was indeed indebted to the second plaintiff in the amount claimed. Payment was not forthcoming and there were discussions to come to some arrangement to pay the amount due in instalments and at a later stage. This was mainly due to cash flow constraints attributed to some extent to losses suffered in an event called the Namib Kusfees.

10.2 Mr van Wyk in his testimony flatly contradicts the evidence of Mr and Ms Booysen. According to him, he was hardly ever at the offices of the first defendant. He states that Mr Booysen was mainly responsible for the office work while he, Mr van Wyk, attended to the various building sites.

10.3 There is a sharp dispute of facts as to how the first defendant came to be in possession of the container and the remaining shutter boards. According to Mr van Wyk, the container and the boards were contributed to the first defendant by Mr Booysen as part and parcel of his contribution to the new venture, Quantum Fourteen CC. Mr van Wyk testifies that the first plaintiff was repaid from time to time as part and parcel of his loan account. Mr Booysen denies this evidence and claims that the first defendant remains indebted to the second plaintiff.



## The Approach to Disputes of fact

[11] As a starting point, I bear in mind that the burden of proof rests upon the plaintiff and more particularly, the second plaintiff. It will only succeed in its claim if it is able to establish the claims on a balance of probabilities. In the matter of *Burgers Equipment and Spares Chehandje cc v Aloisius Nepela t/a Power Technical Services*<sup>1</sup>, the Supreme Court of Namibia cited with approval a passage from *National Employers' General Insurance Co Ltd v Jagers*<sup>2</sup> which reads as follows:

'It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as is the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendants' version is false.'

[12] Other factors that play a role in active findings in credibility, reliability and the probabilities were pointed out in *Sakusheka and Another v Minister of Home Affairs*,<sup>3</sup>

[13] None of the witnesses who were called can be said to be subject to any adverse finding as far as their credibility is generally concerned. There are no material contradictions or inconsistencies in the evidence of any of the material witnesses, save for the fact that there does not appear to have been any agreement between the second plaintiff and the first defendant prior to the latter taking

<sup>1</sup> *Burgers Equipment and Spares Chehandje CC v Aloisius Nepela t/a Power Technical Services* SA 9/2015.

<sup>2</sup> *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 A.

<sup>3</sup> *Sakusheka and Another v Minister of Home Affairs* 2009 (2) NR 524 (HC).

possession of the shutter boards. This allegation in the pleadings is not supported by the evidence. Instead the evidence tendered on behalf of the plaintiff establish no more than an *ex post facto* acknowledgment of liability. Ms Booyesen only became aware of the true state of affairs sometime after the first defendant acquired the shutter boards.

[14] As to what led the first plaintiff to transfer the boards to the possession of the first defendant, the probabilities in my view favour the versions of the defendants. If the relevant parties had contemplated that the first defendant would purchase the shutter boards, the probabilities are that they would have entered into negotiations regarding, inter alia, quantities and price. That did not happen. At best for the plaintiffs, the probabilities do not favour the one party more than the other.

[15] In the result, I find that the plaintiffs did not discharge the onus resting upon them.

[16] I make the following orders:

1. The plaintiffs' claim is dismissed with costs, which will include the costs of one instructing and one instructed counsel.
2. The matter is finalised and removed from the roll.

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PJ MILLER  
Acting Judge

APPEARANCES

3<sup>RD</sup> PLAINTIFF:

L Booyesen (In Person)

DEFENDANTS:

T Wylie

Instructed by Lubbe & Saaiman Incorporated,  
Windhoek