REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-ACT-CON-2021/00131

In the matter between:

TWENTY TWELVE INVESTMENTS CC **PLAINTIFF**

and

WALDHEIM CONSTRUCTION AND INSTALLATIONS CC **DEFENDANT**

Neutral citation: *Twenty Twelve Investments CC v Waldheim Construction and Installations CC* (HC-MD-CIV-ACT-CON-2021/00131) [2024] NAHCMD 35 (6 February 2024)

Coram: SIBEYA J
Heard: **8, 10 and 11 August, and 6 October 2023**
Delivered: **6 February 2024**

Flynote: Contract – Oral agreement – Agreement to sell and deliver Gypsum (G5) sand for payment upon delivery of the plaintiff's invoices – Defendant claims that the agreement was for payment for G5 sand on compacted volumes and only after verification of the quantities by the land surveyor – He who alleges must prove – Silence where a person has a legal duty to speak may be inferred as assertion – The approach to mutually destructive versions restated – Court found the plaintiff's witness credible whilst the defendant's witness is found not to be credible – Court

found that the plaintiff's evidence is, on the balance of probabilities, highly probable and the defendant's evidence is on the same scale highly improbable – Plaintiff's claim succeeds.

Summary: The plaintiff instituted action against the defendant for payment of alleged outstanding payment for delivery of the Gypsum (G5) sand sold and delivered to the defendant's construction site in terms of the oral agreement between the parties. The defendant denied liability and contended that the parties agreed that the G5 sand was to be delivered in compacted volumes, and the payment for the G5 sand was only to be effected upon being verified by the land surveyor. The defendant denied indebtedness to the plaintiff.

The parties locked horns on whether or not the terms of the oral agreement was set out by the plaintiff or the defendant.

Held: that where the probabilities do not resolve the matter, regard can be had to credibility of witnesses in order to find in favour of one party or the other.

Held that: when a witness' evidence is left unchallenged in cross-examination particularly by a legal practitioner, the party that called the witness is entitled to assume, in the absence of a notice to the contrary, that such witness' evidence is accepted as correct.

Held further that: the written order dated 19 August 2020, was backdated and its content caused dissatisfaction to the plaintiff, resulting in the plaintiff immediately calling for a meeting to address the content.

Held: that noting of the contents of a recordial of the meeting that was sent to the defendant for confirmation without rectification by the defendant resulted in silence being inferred as acceptance by the defendant as it had a duty to speak.

Held that: the plaintiff's witnesses were found to be credible while the defendant's witness was found not to be credible as his evidence was marred with self-inconsistencies, contradiction with other witnesses and established facts.

Held further that: after considering the totality of the evidence, it is clear that the plaintiff proved its claim.

ORDER

The court grants judgment in favour of the plaintiff against the defendant in the following terms:

1. The defendant must pay to the plaintiff the amount of N$329 000.

2. Interest on the aforementioned amount at the rate of 20% per annum calculated from 6 February 2024 to date of full and final payment.

2. Costs of suit.

3. The matter is regarded as finalised and removed from the roll.

JUDGMENT

SIBEYA J:

Introduction

[1] This is a contractual dispute where the parties entered into an oral agreement for the plaintiff to sell and deliver Gypsum (G5) sand to the defendant, which plaintiff claims was not fully paid for the sand sold and delivered. The plaintiff, consequently, claims payment of the outstanding amount of N$329 000 plus interest at the rate of 20% per annum from date of payment to date of final payment and costs.

[2] The defendant, on the contrary, resists the claim and contends that it paid for the sand purchased, and, therefore, calls for the dismissal of the plaintiff's claim with costs.

The parties and their representation

[3] The plaintiff is Twenty Twelve Investment CC, a close corporation duly registered as such in terms of the laws of the Republic of Namibia, with its principal place of business situated at No. 42 Ceasar Street Martin Street, Narraville, Walvis Bay.

[4] The defendant is Waldheim Construction and Installations CC, a close corporation duly registered as such in terms of the laws of the Republic of Namibia, with its principal place of business situated at No. 52 Berlin Street, Otjomuise, Windhoek.

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

[6] The plaintiff is represented by Mr F Pretorius while the defendant was during the trial represented by Ms V Jakob and subsequently by Mr N Mhata.

Background

[7] In August 2020, the plaintiff duly represented by Mr Richard Brinkmann and the defendant duly represented by Mr Waldheim Vihayo entered into an oral agreement whereby the plaintiff would sell and deliver sand to the defendant at the defendant's Engen Construction site situated at Erf No. 5232, Walvis Bay, Extension 14 (the construction site).

[8] The plaintiff delivered G5 sand to the defendant. The parties are at loggerheads on the quantity of G5 sand that the plaintiff had to deliver and whether the G5 sand delivered by the plaintiff was in full compliance with their agreement. The defendant contends that it paid for the G5 sand delivered, and therefore, litigation was conceived and ensued.

The pleadings

[9] The plaintiff alleges, in the particulars of claim, that, the parties expressly, impliedly or tacitly, agreed in early August 2020, that it would sell and deliver 5000 G5 sand to the defendant at the construction site at an amount of N$100 (excluding VAT) per cubic meter. The plaintiff further claims that the parties agreed that the defendant would pay a deposit amount of N$50 000 and pay the invoices upon receipt.

[10] The plaintiff claims that it complied with the agreement and delivered 5000 cubic meters of the G5 sand to the construction site and further an additional 1500 cubic meters at no extra cost. The plaintiff also claims that after delivering the majority of the sand, the parties convened meeting on 15 September 2020. At the meeting, the defendant confirmed to the plaintiff that it will pay an amount of N$400 000 to the plaintiff whilst an amount of N$100 000 will be withheld as retention. On 16 September 2020, the defendant confirmed the said payment structure in an email.

[11] The plaintiff issued an invoice to the defendant in the amount of N$525 000, despite which the defendant only paid an amount of N$196 000, leaving an outstanding amount of N$329 000. It is this claim amount that forms the subject of this matter.

[12] The defendant, in its plea, contends contrariwise. It contends that the parties agreed that the plaintiff would fill a certain surveyed area on the construction site and quantity of the G5 sand was undetermined as the earthwork could require a varied amount. Although agreeing to the fixed rate of N$100 per cubic meter, the defendant avers that such amount was inclusive of VAT.

[13] The defendant further allege that the whole amount of G5 sand provided were to be verified by a land surveyor and the sand to be calculated in compacted amounts, and only thereafter would payment be made. Payment would, therefore, be based on the land surveyor’s report and the defendant paid on that basis. Upfront payment was required to be pre-arranged and the normal invoice date of 30 days and the final payment could apply at the discretion of the contractor (the defendant).

[14] The defendant contends that the plaintiff did not comply with the terms of the agreement, as it failed to fill the specified surveyed area of the site construction with compacted G5 sand. The defendant further stated that the parties agreed that the amount of the sand will be measured in terms of the compacted value yet the plaintiff failed to prove that measurements were carried out to justify the amount claimed.

[15] The defendant further states that it was impossible for the plaintiff to provide additional G5 sand at no extra cost when the plaintiff had not met the filling volumes on the construction site.

[16] In respect of the email communication, the defendant avers that, communication was sent to the plaintiff reiterating the following:

> '…the agreement between the parties is that all quantities would be verified by the land Surveyor before payment is made. That the defendant would confirm the volume of sand based on the report provided by the surveyor and would pay in accordance with that. Volumes of sand were then accordingly verified by the land surveyor and the Defendant paid in accordance with that.'

[17] The defendant admitted receipt of the invoice of N$525 000, but proceeded to state that after receipt of the report from the quantity surveyor, it paid the defendant in terms of the quantity surveyor's report. It further stated that it is not indebted to the plaintiff as the plaintiff failed to deliver the required filling volumes of the G5 sand and that the plaintiff was paid for the amount of sand delivered in accordance with the quantity surveyor's report.

The pre-trial order

[18] The parties' joint pre-trial report dated 12 April 2023, which was, by agreement, made an order of court on 13 April 2023, set out, *inter alia*, the following issues for determination:

a) Whether or not the parties agreed that the plaintiff would sell and deliver 5000 cubic meters of G5 sand to the defendant's construction site at a rate of N$100 (excluding or including Value Added Tax (VAT)) per cubic meter.

b) Whether or not the parties agreed that the defendant would pay for the G5 sand upon receipt of the plaintiff's invoice or only upon verification of the quantity of the sand by the land surveyor after calculating same in compacted amounts.

c) Whether or not the parties agreed that any upfront payment should be pre-arranged and the normal invoice date of 30 days may be applied at the discretion of the contractor.

d) Whether or not the plaintiff complied with all its obligations in terms of the agreement and delivered the required quantity of G5, or whether or not the plaintiff failed to fill the specified surveyed area with compacted G5 sand and provide proof of measurements carried out to justify the amount claimed.

e) Whether or not the parties agreed that payments will be based on the land surveyor's report and that the defendant duly paid on that basis.

f) Whether in addition to the 5000 cubic meters, the plaintiff, at the request and instance of the defendant, delivered an additional 1500 cubic meters of G5 sand to the defendant at no further charge, and whether or not this was possible when the plaintiff is alleged not to have filled the specified area concerned.

g) Whether or not the parties at the meeting of 15 September 2020, the defendant confirmed it will pay the amount of N$400 000 to the plaintiff, while N$100 000 will be withheld as a retention fee, and whether this was confirmed in an email by the defendant.

h) Whether or not the email communication confirmed the averment that the quantity of the sand ought to be verified by the land surveyor before payment is made and that the defendant would confirm the quantity of the sand based on the said report and pay in accordance hereof.

i) Whether or not the volume of sand was verified by the land surveyor and accordingly paid.

j) Whether or not the land surveyor found that the filling volumes were not met by the plaintiff, and whether or not the defendant is indebted to the plaintiff in the amount claimed.

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

(a) That during early August 2020, the plaintiff duly represented by Mr Richard Brinkmann and the defendant duly represented by Mr Waldheim Vihajo entered into an oral agreement in terms of which the plaintiff would sell and deliver sand to the defendant at the defendant's construction site;

(b) It was agreed that the defendant would pay to the plaintiff a deposit of N$50 000 which the defendant paid on 25 September 2020.

(c) The plaintiff issued an invoice to the defendant in the amount of N$525 000, and the defendant paid an amount of N$196 000 on 2 November 2020.

Evidence led

Plaintiff's evidence

Richard Brinkmann

[20] The plaintiff's first witness was Mr Richard Brinkmann. He testified, *inter alia*, that he has member's interest in the plaintiff. He testified that his brother's company Brinky's Transport was a contractor appointed by the defendant to attend to earthworks at the construction site. On the inquiry by Mr Lionel Pretorius, the site manager for the defendant, Mr Binkmann stated that the plaintiff is able to provide G5 sand to the defendant at the construction site.

[21] Mr Brinkmann testified further that in early August 2020, at a meeting with Mr Waldheim Vihajo, the defendant's representative, and in the presence of Mr Brian

Grimbeck and Mr Lioneli Pretorius, the parties orally agreed that the plaintiff will sell and deliver 5000 cubic meters G5 sand to the defendant at the construction site at the rate of N$100 (excluding VAT) per cubic meter. The contract price was N$500 000, excluding VAT. It was further agreed that the defendant would pay a deposit of N$50 000 to the plaintiff as soon as the plaintiff commenced with the work. He further testified that the parties agreed that payment by the defendant will be made upon receipt of the plaintiff's invoice.

[22] Mr Brinkmann testified further that, subsequent to the conclusion of the agreement, the plaintiff commenced delivery of the G5 sand to the construction site on or about 20 August 2020. Several loads were transported to the construction site from 23 August to early September 2020. By 13 September 2020, the plaintiff had delivered 3555 cubic meters of G5 sand to the construction site. He testified further that, worried by the defendant's failure to pay the deposit of N$50 000 and to issue a written order to the plaintiff, a meeting was scheduled for 15 September 2020. On 14 September 2020 at 17:02 he received an email from Mr L Pretorius to which an order dated 19 August 2020, that he referred to as backdated, was attached.

[23] Mr Brinkmann testified further that the written order was at variance with the agreement as it provided for a rate of N$100 per unit contrary to the agreed rate that excludes VAT. The order further provided that the amount of gypsum is undisclosed while the parties had agreed that the plaintiff would deliver 5000 cubic meters of G5 sand. The order further incorrectly provided that the G5 sand had to be verified by a land surveyor and the quantities had to be calculated in compacted amounts. Mr Brinkmann testified that this was the first time that there was mention of the quantities being calculated in compacted amounts.

[24] It was his testimony further that, during the meeting of 15 September 2020, where in addition to Mr Vihajo, Mr L Pretorius and Mr G Brinkmann were also present, it was agreed that 20% of the quoted amount of N$500 000 excluding VAT totalling N$100 000 will be withheld by the defendant as retention monies. It was further agreed that the balance amount of N$400 000 excluding VAT would be paid by the defendant to the plaintiff for the G5 sand delivered to the defendant. The next day, 16 September 2020, Mr G Brinkmann sent an email to Mr Vihajo and Mr Pretorius confirming the content of the meeting held the previous day. On the same day, Mr Vihajo responded that he noted the content of the email.

[25] Mr Brinkmann testified that the plaintiff proceeded to deliver the remainder of the G5 sand at the construction site. On 25 September 2020, the defendant paid the deposit amount of N$50 000. By end of September 2020, the plaintiff had delivered 5020 cubic meters G5 sand at the construction site. On 25 September 2020, he sent an invoice of the amount of the total N$525 000 to the defendant for the G5 sand delivered. The amount was compounded as follows: N$100 excluding VAT per cubic meters multiplied by 5000 cubic meters equalling N$500 000; plus 15% VAT on N$500 000 amounting to N$75 000; less N$50 000 deposit paid, resulting in the outstanding balance of N$525 000. On 2 November 2020, the defendant paid an amount of N$196 000 to the defendant resulting in the outstanding balance of N$329 000.

[26] During cross-examination, it was put to Mr Brinkmann by Ms Jakob that the defendant could not have agreed to payment of the G5 sand at the rate of N$100 per cubic meters excluding VAT as some companies sold the sand at the amount of N$35 per cubic meter while others get the sand for free. Mr Brinkmann responded that even if one knows where the sand is, it takes truck loads for distance of about 20 to 25 kilometers to deliver to the construction site and with expensive fuel it is an expensive exercise. The suggestion in further cross-examination that payment of the sand was subject to the land surveyor verifying the quantity of the sand was disputed by Mr Brikmann.

[27] When questioned by Ms Jakob why he testified that the written order of 19 August 2020 was backdated, Mr Brinkmann stated that it is due to the fact that despite being dated 19 August 2020, it was only annexed to the email of 14 September 2020, following several previous requests for the written order without success. Mr Brinkmann further testified that the plaintiff rejected the order and proceeded on the agreed terms.

[28] Ms Jakob further put to Mr Brinkmann that when Mr Vihajo stated “noted with thanks. We revert you soon (sic)” he did not agree to the terms he was responding to. Mr Brinkmann responded that he considered such response as being in agreement, and besides, Mr Vihajo never returned to Mr Brinkmann. When questioned why the plaintiff delivered more G5 sand than was allegedly agreed, Mr

Brinkmann testified that it was out of goodwill and also to hopefully to be awarded similar in future.

[29] Mr Brinkmann was further questioned about the payment made by the defendant to the plaintiff regarding invoices dated 16 and 22 September 2020 for the amount of N$21 760 each totalling N$43 520, where he stated that such payments were for the grader, the loader and other equipment, but not for the delivery of the G5 sand. The grader, loader and other equipment were carrying out earthmoving function at the construction site. When questioned further about a document received into evidence titled “Volume calculation of Erf 5232, Walvis Bay Extension 14” with a fill volume of 3231 cubic meters, Mr Brinkmann testified that he only received such document when he received payment of N$196 000.

[30] Ms Jakob further put to Mr Brinkmann that the defendant paid to the plaintiff the following amount: N$21 760 x 2 plus N$50 000 and N$196 000 totaling N$289 520, and according to Ms Jakob, the defendant just discovered that it owes the plaintiff an amount of N$33 520 only. Mr Brinkmann disputed the said assertion.

Brian Grimbeck

[31] Mr Brian Grimbeck testified for the plaintiff, *inter alia*, that he is employed at Ricky’s Transport and in early August 2020, he attended a meeting with Mr Brinkmann, Mr Vihajo and Mr Pretorius, the site manager of the defendant. The terms on which the plaintiff was to deliver G5 sand to the defendant were discussed and agreed upon. These terms were that the plaintiff would deliver 5000 cubic meters of G5 sand to the construction site. There was no discussion that the sand would be compacted quantities. From 4 to 24 September 2020, he assisted the plaintiff to deliver G5 sand to the construction site and in total he delivered 1780 cubic meters of G5 sand.

[32] Ms Jakob put to Mr Grimbeck in cross-examination that the quantity surveyor had to verify the loads delivered, but Mr Grimbeck disagreed and testified that the standard practice is to work per load. Ms Jakob further questioned Mr Grimbeck that some of the trucks were not full of G5 sand, some were half full while at some of the recorded delivery dates no sand was delivered, Mr Grimbeck disputed the assertion.

Godhard Awa-Eiseb

[33] Mr Godhard Awa-Eiseb testified, *inter alia*, that he is employed by the plaintiff and during 20 to 24 September 2020, he transported G5 sand to the construction site and completed trip sheets to record the loads. In total he transported 97 loads of 15 cubic meters of G5 sand totalling 1455 cubic meters G5 sand.

[34] In cross-examination Ms Jakob put to Mr Awa-Eiseb that some of the loads delivered were not full. He disputed the assertion and stated further that he cannot drive a truck that is not filled with sand. He went on to state by comparison that even when he eat, he takes a full spoon. It was further put to him that the loads had to be confirmed by the land surveyor, which he further disputed. He testified that the defendant had placed a person at the construction site to confirm the load.

Evaristus Mukuve

[35] Mr Evaristus Mukuve testified, *inter alia*, that during 22 August to 24 September 2020, he delivered G5 sand on behalf of the plaintiff to the defendant's construction site. He transported 119 loads of 15 cubic meters of G5 sand amounting to a total of 1, 785 cubic meters of G5 sand. He completed a trip sheet for the delivery. When questioned in cross-examination by Ms Jakob that some of his loads were not full, he disputed and stated further that, when he would observe that a load is not full he would instruct the people who load fill up the whole truck.

Defendant's evidence

Waldheim Vihajo

[36] The defendant led the evidence of Mr Waldheim Vihajo as its sole witness. Mr Vihajo testified, *inter alia*, that he is the sole member of the defendant. He testified that in 2020, the plaintiff was contracted by Engen Namibia (Engen) to construct a service station at the construction site. During August 2020, the plaintiff represented by Mr Brinkmann and the witness representing the defendant entered into an oral agreement in terms whereof the plaintiff would fill a certain surveyed area on the

concerned Erf with G5 sand. The quantity of the required G5 sand was undisclosed as the earthwork may require a varied amount.

[37] Mr Vihajo testified further that the parties also agreed that the defendant would pay a deposit N$ 50 000 to the plaintiff for the supply and delivery of the G5 sand; that the price of the G5 sand was fixed at N$100 inclusive of VAT per cubic meters; that all amounts of the G5 sand were to be verified by a land surveyor and such G5 sand is to be calculated in compacted amounts; that payments will be made only after the land surveyor has verified all the quantities; and further that any upfront payments required to be pre-arranged. The normal invoice date of 30 days may apply at the discretion of the contractor and this may also apply to the final payment.

[38] Mr Vihajo testified further that shortly after the parties entered into the agreement, he forwarded a letter dated 19 August 2020 to the plaintiff, confirming the agreement reached. This is referred to hereinabove as the written order. Mr Vihajo testified that the plaintiff did not comply with the terms of the agreement, in that, it was agreed that the value will be measured in terms of the compacted value and the plaintiff did not provide records of such measurements; and on most days, the plaintiff did not deliver the G5 sand at all. Mr Vihajo testified that a certain Mr Christo Peterse, a land surveyor, determined that the volume required to fill the specified construction site was 7500 cubic meters of G5 sand. He further testified that the land surveyor's report noted that the construction site was filled with just over 3231 cubic meters of G5 sand. The land surveyor did not testify, therefor, his determination and findings was ruled as constituting inadmissible hearsay evidence. His report was received for the mere fact that there is a report but not for the correctness of the content thereof.

[39] Mr Vihajo disputed the evidence of Mr Brinkmann that the plaintiff delivered an additional 1500 cubic meters of G5 sand to the defendant at no extra cost, as the plaintiff had not met the required capacity. He, therefore, denied the claim that the defendant is indebted to the plaintiff. On 7 October 2020, he authored a letter to the plaintiff where he stated, *inter alia*, that the plaintiff had not met the filling of volumes of the G5 sand; that it was agreed that the quantities of the G5 sand would be verified by a land surveyor before payment is made; and that by 7 October 2020, the defendant had paid N$93 520 consisting of N$43 520 paid on the plaintiff's fuel account and N$50 000 paid as deposit. Mr Vihajo testified further that the defendant

also paid an amount of N$196 000 in accordance with the findings of the quantity surveyor's report.

[40] In cross-examination by Mr Pretorius for the plaintiff, Mr Vihajo testified that when the trial commenced on 7 August 2023, Mr L Pretorius, the site manager of the defendant who was present at the conclusion of the oral agreement between the parties, was present in court. Mr Pretorius put to Mr Vihajo that Mr Brinkmann provided earthmoving machines to the defendant at the construction site and Mr Vihajo confirmed and qualified that such machines were provided through Mr Brinkmann's brother to compact the sand. He testified further that the earthmoving machines were on the construction site before the delivery of the G5 sand.

[41] When questioned about the nature of the agreement, Mr Vihajo testified that the agreement between the parties was oral but in August 2020, and in front of everybody involved, at the house of Mr Brinkmann, he signed the written order.

[42] Mr Pretorius asked Mr Vihajo to explain his evidence where he stated that any upfront payment needs to be pre-arrangement and that the normal invoice date of 30 days may apply at the discretion of the contractor. Mr Vihajo testified that the said content does not apply to the agreement between the parties but it applied defendant's agreement with Engen.

[43] Mr Vihajo testified further that after the land surveyor verifies the quantities of the G5 sand and the payment, then the defendant would approach Engen, but the payment of the invoice of the plaintiff would be 30 days from date of confirmation by the land surveyor. In respect of the letter of 19 August 2020, Mr Vihajo testified that the letter (written order), although written on 19 August 2020, was sent to Mr Brinkmann on the day that he requested for it, with the date of 14 September 2020 depicted in the email. The letter was sent by the defendant's worker Mr L Pretorius.

[44] When questioned that he did not provide a timeline to Mr Brinkmann for the plaintiff to deliver G5 sand, Mr Vihajo testified that the parties agreed that the G5 should be delivered within three weeks of the agreement.

[45] In evidence in chief, the Mr Vihajo testified that 75 cubic meters of dune sand that was delivered by the plaintiff to the defendant was waste that the plaintiff was paid for by the municipality of Walvis Bay but the plaintiff included this amount in the

claim amount. When questioned in cross-examination by Mr Pretorius that he testified in his evidence in chief that the defendant is not indebted to the plaintiff while the defendant's legal practitioner stated to the plaintiff''s witness that the defendant owes the defendant an amount of N$33 580, Mr Vihajo responded that the defendant is indeed indebted to the plaintiff in the amount of N$33 580.

[46] In further cross-examination, Mr Vihajo was questioned about the letter dated 7 October 2020, which he wrote to Mr Brinkmann, where he stated that the volumes have been verified and they will settle on 4100 cubic meters as a loose volume. He testified that the volumes were verified by the land surveyor but the reference to 4100 cubic meters was a typing error, as the correct amount is 3231 cubic meters. When questioned further about the reference to loose volumes, he said that was also an error as the parties agreed on compacted volumes not loose volumes. In the letter of 7 October 2020, Mr Vihajo stated further that, an amount of N$250 000 will be paid to the plaintiff, on this score Mr Vihajo testified the amount of N$250 000 was expressed before the verification by the land surveyor.

Arguments in brief

[47] It was argued by Mr Pretorius that the defendant conceded that the plaintiff supplied G5 sand at the construction site, and further that the defendant paid for the said delivery but not fully. The defendant, therefore, conceded to be indebted to the plaintiff although the indebted amount is in dispute. He further argued that the plaintiff's version is clear and probable while the defendant' evidence is full of inconsistences and is highly improbable.

[48] He further argued that Mr Brinkmann was clear is his evidence that the parties agreed on the retention amount of N$100 000 until the defendant completes the delivery of the G5 sand. Mr Brinkmann verified the trips of the drivers and the fuel consumed by each truck. The witness called by the plaintiff corroborated the evidence of Mr Brinkmann, so it was argued. In respect of the evidence of Mr Vihajo, Mr Pretorius did not mince his words, he argued that Mr Vihayo's testimony was of such poor quality and irreconcilable that it ought to be found to be false and rejected accordingly. He called on the plaintiff's claim to be upheld with costs.

[49] Mr Mhata who appeared for the defendant at the tail-end of the proceedings was not to be outmuscled. He argued that the parties orally agreed that the plaintiff would fill a certain specified surveyed area with an undisclosed amount of G5 sand as the earthwork may require a varied amount. He further argued that evidence established that the amount of N$100 per cubic meter of the G5 sand was inclusive of VAT. He further argued that the quantity of the G5 sand provided was to be verified by a land surveyor and the amount was to be calculated in compacted amounts, and payment would only be effected after verification by the land surveyor.

[50] Mr Mhata further argued that after the parties entered into an oral agreement, the defendant followed up with a written order which contains contrary information to the alleged terms of the agreement alleged by the plaintiff. He argued further that the terms of the agreement alleged by the plaintiff are not clear, unequivocal and unambiguous, and therefore, on the strength of a decision of this court of *Petherbridge Law Chambers v CL de Jager & van Rooyen*,[1] the plaintiff failed to establish the clear terms of the alleged agreement. He argued further that, in the premises, the plaintiff failed to prove its claim on a balance of probabilities and its claim should be dismissed with costs.

Burden of proof and the law

[51] It is settled law that, the plaintiff bears the burden to prove its claim on a balance of probabilities.

[52] Our law is as clear as a bell on the established principle that, 'he who alleges must prove the allegation'. This position was authoritatively laid bare in an old decision of *Pillay v Krishna and Another*.[2] The Appellate Division found that our law requires that if a person claims something from another, such person must satisfy the court that he or she is entitled to it. The Appellate Division proceeded to state that where the person against whom the claim is made sets up a special defence, then he is regarded *quoad* that defence, as being the claimant, and for his or her defence to be upheld, he must satisfy the court that he or she is entitled to succeed on it.

---

[1] *Petherbridge Law Chambers v CL de Jager & van Rooyen* (I 1137/2016; I 1140/2016) [2019] NAHCMD 59 (11 March 2019).
[2] *Pillay v Krishna and Another* 1946 AD 946 at 951-2.

Analysis of evidence and submissions

[53] At the outset, I should lay bare the fact that I endorse the finding by Prinsloo J in the *Petherbridge law Chambers*' case *(supra)*[3] where she found that the terms of the agreement must be proven and the court must be satisfied that there was an agreement between the parties, and that the conduct of the parties was clear, unequivocal and unambiguous in agreeing to the terms of the contract, failing which a contract would not be proven.

[54] In the analysis of the facts of this matter, I keep in my mental spectacles, the need to determine whether an agreement was proven on the terms alleged as the point of departure.

[55] It is common cause between the parties, as agreed to in the pre-trial report that was made an order of court, that in early August 2020, the plaintiff represented by Mr Brinkmann, after being duly authorised thereto, and the defendant represented by Mr Vihajo, after being duly represented thereto, entered into an oral agreement in terms of which, the plaintiff would sell and deliver sand to the defendant at the defendant's Engen construction site at Erf 5232, Walvis Bay Extension 14, referred to herein as the construction site. The parties further agreed that the defendant would pay a deposit of N$50 000, which was paid on 25 September 2020. It is further common cause between the parties that the plaintiff issued an invoice to the defendant in the amount of N$525 000. The defendant paid an amount of N$190 000 on 2 November 2020.

[56] The parties, however, locked horns on the remainder of the alleged terms of the agreement. The parties tendered evidence that is mutually destructive on the remainder of the terms of the agreement, so much so that the two versions of the parties are irreconcilable, hence the need to asses same to determine whether there was ever a meeting of the mind on the alleged terms of the agreement.

[57] The approach to mutually destructive versions was set out in a decision of the Supreme Court of Appeal of South Africa in *SFW Group Ltd and Another v Martell Et*

[3] *Petherbridge law Chambers*' case *(supra) paras 64-65.*

Cie and Others, [4] a decision that is celebrated in our jurisdiction where the Supreme Court of Appeal remarked that:

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

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

[59] As alluded to hereinabove, in early August, Mr Brinkmann and Mr Vihajo met while representing the parties and concluded an oral agreement for the sale and delivery of G5 sand at the construction site. It was the testimony of Mr Brinkmann that without being provided with a written order, the plaintiff commenced to deliver the G5 sand at the construction site. He further testified that on several occasions he repeatedly requested the defendant to provide the written order. This version of Mr Brinkmann was not disputed by the defendant in cross-examination. It was only during the cross-examination of Mr Vihajo that he testified that Mr Brinkmann requested for the written order once and it was provided to him.

[60] The evidence of Mr Brinkmann regarding several requests for a written order is crucial as Mr Brinkmann testified that the plaintiff commenced delivering G5 sand

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

at the construction site on 20 August 2020 without a written order which he received from the defendant only on 14 September 2020. Mr Brinkmann testified further that had the written order been provided to the plaintiff before delivery of the G5 sand, the plaintiff would not have delivered the said sand. Mr Vihajo testified that he forwarded the written order dated 19 August 2020 to the plaintiff shortly after the parties entered into an oral agreement.

[61] The dissatisfactory nature of the written order dated 19 August 2020, but only received on 14 September 2020, led to the convening of a meeting by the parties on 15 September 2020. Mr Vihajo proffers no plausible explanation for only sending the written order dated 19 August 2020 to the plaintiff on 14 September 2020. It is vital, in my view, to consider the effect of the defendant's failure to challenge the plaintiff's version that it commenced to deliver the G5 sand at the defendant's construction site on 20 August 2020 while continuing to request for the written order on several occasions, despite the defendant being represented by counsel.

[62] *Hoff JA* in *Namdeb (Pty) Ltd v Gaseb*[5] remarked as follows regarding a party's failure to challenge the version of the opposing witness:

'It is trite law that a party who calls a witness is entitled to assume that such a witness's evidence has been accepted as correct if it has not been challenged in cross-examination. In *Small v Smith* 1954 (3) SA 434 (S.W.A) at 438E-G the following was said in respect of this aspect:

> ''It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved. Once a witness's evidence on a point in dispute has been deliberately left unchallenged in cross-examination and particularly by a legal practitioner, the party calling that witness is normally entitled to assume in the absence of a notice to the contrary that the witness's testimony is accepted as correct.

[5] *Namdeb (Pty) Ltd v Gaseb* (SA 66/2016) [2019] NASC (9 October 2019) at para 61.

> . . . unless the testimony is so manifestly absurd, fantastic or of so romancing a character that no reasonable person can attach any credence to it whatsoever.'"[6]

[63] I find that the failure by the defendant to challenge the version of Mr Brinkmann that the plaintiff commenced to deliver G5 sand at the construction site on 20 August 2020, on the terms of the oral agreement supports the plaintiff's version. Equally the failure to challenge Mr Brinkmann's version that he requested for the written order on several occasions, on the basis of the *Namdeb* matter *(supra)* supports the version of the plaintiff.

[64] Upon receipt of the written order dated 19 August 2020, on 14 September 2020, the plaintiff convened with the defendant on 15 September 2020. Mr Vihajo later testified that he signed the 19 August 2020 written order at a meeting of 14 September 2020. The written order sent to the plaintiff was however, not signed. I find that the inconsistencies in the evidence of the defendant regarding the time when the written order was sent to the plaintiff supports the version that the plaintiff commenced to deliver G5 sand without the written order and further that the plaintiff requested for the written order from the plaintiff on several occasions.

[65] I will return to the written order as judgment unfolds.

[66] It was the testimony of Mr Brinkmann that the parties agreed that the plaintiff would deliver 5000 cubic meters at the rate of N$100 per cubic meter excluding VAT, to the defendant, and the defendant would pay a deposit of N$50 000 deposit and pay for the delivery of the G5 sand upon receipt of the invoice from the plaintiff.

[67] The defendant on the other hand contended that the agreement was for the delivery of an undisclosed quantity of compacted sand. The defendant was adamant that the volume of sand to be delivered had to be compacted, contrary to the version of the plaintiff, and payment would only be made after verification by the land surveyor. In a letter dated 7 October 2020, written by Mr Vihajo and addressed to Mr Brinkmann, Mr vihajo stated that 'the volumes have been verified by the land surveyor and we shall settle on 4100 cubes as a loose volume.'

---

[6] See also *President of the Republic of South Africa & others v South Africa Rugby Football Union and others* 2000 (1) SA 1 CC at 36J-38B – 'cross-examination not only constituted a right; it also imposed certain obligations'.

[68] When Mr Vihajo was questioned in cross-examination, why he stated in the letter of 7 October 2020, that he shall settle loose volume, he testified that the reference to loose volume was a mistake as it should have referred to compacted volume. I am of the opinion that the explanation constitutes a lame excuse to duck the reality of the fact that the delivery of the sand was in respect of loose sand. The letter of 7 October 2020, further supports the version of the plaintiff.

[69] The evidence of Mr Brinkmann that the parties agreed to sell and delivery of 5000 cubic meters G5 sand was corroborated by Mr Grimbeck who confirmed that the plaintiff and the defendant agreed, in his presence, that the plaintiff would deliver 5000 Cubic meters G5 sand to the defendant's construction site. Mr Grimbeck's testimony about the terms of the agreement to deliver 5000 cubic meters G5 sand was not challenged by the defendant.

[70] It is the defendant's case that payment would only be made subsequent to land surveyor verifying the quantity and issuing a report. The plaintiff's case is that the agreement was payment of the sand upon presenting the invoice. Mr Vihajo testified vaguely that some of the truck loads were half full, this was disputed by the plaintiff's witnesses. The assertion of that payment was only with the verification of the land surveyor is inconsistent with the content of the letter of 7 October 2020 of Mr Vihajo. In the said letter, Mr Vihajo stated that:

> 'It was agreed as per signed document that all quantities would be verified by the land surveyor before payment is made. We have thus far paid an amount on (sic) N$90 000 to you … Further the volumes have been verified and we will settle on 4100 cubes (sic) as a loose volume. Less the amount paid we will pay N$250 000 by nest week Monday.'

[71] Mr Vihajo confirmed in cross-examination that the defendant did not pay the amount of N$250 000 to the plaintiff. He explained that this was due to the fact that such amount was not verified by the land surveyor. This statement stands in total contrast to the letter of 7 October 2020, where Mr Vihajo states that the volumes have been verified. Despite the volumes not been verified, it appears that the defendant was prepared to pay the N$250 000 by the following Monday, which in my view is indicative of the position that payment did not require verification and a report by the land surveyor as alleged by the defendant and testified to by Mr Vihajo. Besides, it was the further evidence of Mr Vihajo that the plaintiff was aware of the

visible marks that would guide the filling at the construction site. In my opinion this supports the irrelevancy of the verification by the land surveyor as the filling marks would be visible.

[72] The defendant did not lead the evidence of the land surveyor to testify whether or not he verified the quantities of the sand delivered, whether he verified the amount of the sand delivered for payment to be effected. The land surveyor's report was received for what it is, a report, and not for the correctness of the averments set out in the report for that constitutes inadmissible hearsay evidence.

[73] Mr Vihajo testified in evidence in chief that the 75 cubic meters of dune sand delivered by the plaintiff to the defendant was waste that the plaintiff was paid for by the Municipality of Walvis Bay but and the parties agreed that this would not be included in the pricing, The plaintiff however charged for it. In cross-examination, Mr Vihajo conceded that the 75 cubic meters dune sand (waste) was not part of the invoice that forms the subject of the plaintiff's claim.

[74] When Mr Vihajo was confronted with invoice number 41/09[7] from the plaintiff to the defendant dated 30 September 2020 and discovered by him on behalf of the defendant as item number 6, which relate to removal of dune sand, Mr Vihajo testified that he had never seen the document.

[75] Reverting back to the written order, dated 19 August 2020. I find that the fact it was dated 19 August 2020, but was only sent to the plaintiff on 14 September 2020, despite being requested by the plaintiff on several occasions, supports the version that such letter was drafted in September and backdated to 19 August 2020. The said letter was sent to the plaintiff by Mr L Pretorius. Mr Brinkmann immediately reacted to the letter by convening a meeting the day after receipt of the letter (written order). The denial of Mr Vihajo that there were several requests for the written order by the plaintiff appears to be an attempt to justify the late delivery of the written order, and, in my considered view, constitutes an afterthought.

[76] The written order provided, *inter alia*, that the amount of gypsum is undisclosed, that the amounts are to be verified by a land surveyor and the gypsum is to be calculated in compacted amounts. Any upfront payments needs to be pre-

[7] Exhibit "G".

arranged and normal invoice date of 30 days may apply at the discretion of the contractor and this may also apply to the final payment.

[77] The aspect of the upfront payment which requires to be pre-arranged and the application of the normal invoice date of 30 days formed part of the plea of the defendant and was testified to by Mr Vihajo. In cross-examination, however, Mr Vihajo testified that this provision is not part of the agreement between the plaintiff and the defendant.

[78] In the plea, the defendant states that the plaintiff is not entitled to the amount or any other amount from the defendant. During cross-examination of Mr Brinkmann, it was put to him by Ms Jakob that the defendant is indebted to the plaintiff in the amount of N$33 580. When Mr Vihajo subsequently testified in stated in evidence in chief that the plaintiff is not entitled to the amount claimed or any other amount from the defendant. It was only in cross-examination and after it was put to him that Ms Jakob put to Mr Brinkmann that the defendant owes the plaintiff an amount of N$33 580, that Mr Vihajo conceded to the said debt.

[79] Mr Vihajo agreed to have co-authored the letter dated 3 November 2020 received into evidence. The letter provides, *inter alia*, for settling at 3100 cubic meters and further that the outstanding balance amount due to the plaintiff of N$200 000. The letter further provides that the proof of other payment and the report of the surveyor is attached. This is despite the allegation that the area had been surveyed and the exact volume known. When questioned further, Mr Vihajo testified that the figures on the letter do not deal with the G5 sand but deals with the equipment hire. He further testified that he has no knowledge why the proof of payment of N$196 000 and the surveyor's report were attached to the said letter.

[80] In respect of the amount of N$196 000 paid by the defendant to the plaintiff, Mr Vihajo testified that the said amount was paid after verification by the land surveyor. When Mr Vihajo was asked if he knew by the time that he paid the amount of N$196 000 that the defendant still owed the plaintiff money, he confidently responded that he was not aware. On a follow-up question, Mr Vihajo conceded that at the time of the payment on 2 November 2020, he was aware that the defendant still owed the plaintiff N$33 580. He explained that he did not pay the full amount due as he did not have sufficient funds.

[81] I find that it follows from the above paragraph that Mr Vihajo's evidence in chief as more clearly set out in paragraph 19 of his witness statement, that 'The defendant then made payment of N$196 000 which was in accordance with the findings with the findings of the quantity surveyor's report' is false.

[82] It deserves mention further that after the meeting that was convened on 15 September 2020, triggered by the written order dated 19 August 2020, the plaintiff's representative sent an email to the plaintiff. The plaintiff's representative on 16 September 2020, wrote to confirm the agreed terms at the meeting. Amongst the terms in the email were that: an amount of N$400 000 will be paid to the plaintiff for the gypsum and dune sand delivered. 20 percent of the quoted amount which is N$100 000 will be held back as retention money. On the same day, 16 September 2020, Mr Vihajo responded to the email that: 'Noted with thanks. We revert you soon *(sic)*'.

[83] When reference is made to 20 percent of the quoted amount being N$100 000, the calculation reveals that N$100 000 constitutes 20 percent of N$500 000. This position, in my considered view supports the version of the plaintiff that the agreement amount was N$500 000.

[84] It is apparent further from the evidence that despite the defendant stating that it will revert to the plaintiff, it never reverted. What then is to be made of the defendant's noting of the email and never reverting, in my view to correct any anomaly that may appear in the email?

[85] The defendant contends that the plaintiff failed to provide measurements to justify the amount claimed, yet Mr Vihajo testified that there was no duty on the plaintiff to have the construction area surveyed. The defendant's contention, therefore lacks merit.

[86] I further find that the email placed a duty on the defendant to speak if it was not in agreement with what was put to it as a recordial of the previous meeting and to ensure that the content of the email is rectified.

[87] Mtambanengwe AJA (as he then was) in *Strier v Henke,*[8] had occasion to discuss the effect of silence where there is duty to speak and remarked as follows at p. 374:

'Discussing the question of silence as acceptance, Christie, in the Law of Contract in South Africa 5 ed referred, at 66, to the principle that 'quiescence is not necessarily acquiescence', but went on to state:

"Silence may, however, amount to acceptance of an offer in circumstances which give rise to a "duty to speak" if the offeree is not prepared to accept the offer. Wessels in pars 270-271 has been taken by the courts as authoritative:

> But if there is a legal duty upon me to speak and I refrain from doing so, the court will presume that I asserted…. Thus, if a merchant writes to his constant correspondent that he will forward to him certain goods at a certain price unless he hears from him to the contrary, and the addressee received the letter but neglects to reply, the court may well consider that silence in such a case gives consent …. The course of dealing between such merchants will legitimately lead the offeror to conclude that his correspondent would reply in case he rejected the offer, and the court will infer that if the offeree had not intended to accept he would have answered that he did not want the goods.
>
> If, therefore, from the business relationship between the offeror and the offeree, the court finds that the circumstances are such that the offeree could reasonably and fairly be expected to reply, then it may infer that by remaining silent the offeree did in fact intend to accept.'"

[88] The above passage sets out the position of our law that where there is duty on a person to speak or where someone is reasonably and fairly expected to speak and provide a reply, his or her silence may be inferred that he or she intended to accept. At the backdrop of the *Steir* decision *(supra),* I find that it can be inferred in *casu* that the failure by the defendant to revert to the plaintiff's email as promised constitutes acceptance of the content of the concerned email.

[89] Damaseb AJA (as he then was) in *M Pupkewitz & Sons v (Pty) Ltd t/a Pupkewitz Megabuilt v Kurz,*[9] stated as follows on fact finding at 790:

---

[8] *Strier v Henke* 2012 (1) NR 370 (SC) 374D-F.
[9] *M Pupkewitz & Sons v (Pty) Ltd t/a Pupkewitz Megabuilt v Kurz* 2008 (2) NR 775 (SC) 790A-C.

‘In the words of Selke J in Govan v Skidmore 1952 (1) SA 732 (N) at 734A-D:
“Now it is trite law that, in general, in finding facts and making inferences in a civil case, the Court may go upon a mere preponderance of probability, even though its so doing does not exclude every reasonable doubt … for, in finding facts or making inferences in civil case, it seems to me that one may … by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion which amongst several conceivable ones, even though that conclusion be not the only reasonable one.”’

[90] In view of the fact that the evidence of Mr Brinkmann is corroborated by the other plaintiff’s witnesses and documents, as opposed to mere words of Mr Vihajo, it is not improbable. The findings made hereinabove including that the parties agreed, during early August 2020, that the plaintiff deliver G5 sand to the defendant’s construction site; that the defendant commenced to deliver G5 sand on 20 August 2020; that the defendant on several occasions requested for the written order from the defendant; that on 14 September 2020, the defendant sent a backdated order to the plaintiff which prompted the plaintiff’s immediate reaction to convene a meeting; that the email that recorded the content of the meeting, was sent to the defendant for confirmation and the defendant noted the email and stated that it will revert to which it never did; that the defendant stated that the agreement between the parties was that the G5 sand to be delivered should be in compacted volume while in a letter to the plaintiff, the defendant refers to loose volumes of sand; that the defendant states that payment for the sand delivered was agreed to be effected only after verification with the land surveyor, yet the defendant made other payments for the sand delivered without such verification, in my considered view support the terms of the agreement stipulated by the plaintiff.

[91] As I approach the home strech in this judgment, I find myself duty-bound to adress the credibility of the witneses who testfied. Mr Brinkmann was impressive in his testimonsy as testfied in a forthright manner, while being calm and his evidence was corrobarated by other witnesses and docuents and established facts. I find his evidence to be highly probable and reliable. The same cannot be said for Mr Vihajo. whose evidence was marred not only by contradictions from other witnesses, proven documents and established facts but was also full of self-contradictions. He hept flipfloppin in his evidence. I find that Mr Vihajo did not come closer to being a credible witness.

Conclusion

[92] After considering the evidence led in its totality, I find that the version of the plaintiff's witnesses is highly probable. In the premises, and in consideration of the conclusions and findings made hereinabove, this court finds the version of the plaintiff to be probably true and rejects that of the defendant as being highly improbable and unreliable where such evidence is at variance with that of the plaintiff's witnesses. In the premises the court finds that the plaintiff proved its claim against the defendant and is entitled to the relief sought.

Costs

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

Order

[94] In the result, it is ordered that the court grants judgment in favour of the plaintiff against the defendant in the following terms:

1. The defendant must pay to the plaintiff the amount of N$329 000.

2. Interest on the aforementioned amount at the rate of 20% per annum calculated from 6 February 2024 to date of full and final payment.

3. Costs of suit.

4. The matter is regarded as finalised and removed from the roll.

_____

O S Sibeya

Judge

APPEARANCES

PLAINTIFF:	F Pretorius Of Francois Erasmus and Partners, Windhoek
DEFENDANT:	N Mhata Of Nambili Mhata Legal Practitioners, Windhoek