EPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2022/04284

In the matter between:

DESIGN AND DÉCOR SOLUTIONS CC **PLAINTIFF**

and

JOTO INVESTMENTS CC **DEFENDANT**

Neutral Citation*: Design and Décor Solutions CC v Joto Investments CC* (HC-MD-CIV-ACT-CON-2022/04284) [2024] NAHCMD 90 (7 March 2024)

Coram: SIBEYA J
Heard: **2 and 3 October, and 6 November 2023**
Delivered: **7 March 2024**

Flynote: Civil procedure – Action – Agreement of sale – Mutually destructive versions – Inadmissible hearsay evidence – Failure to call a witness whose evidence is crucial – *Voetstoots*.

Summary: On 23 April 2021, the parties entered into a written agreement of sale where the plaintiff sold to the defendant a Volvo FM9, 1999, 15000 litre water truck ('the truck') and an Afrit 3 Axel 36 ton Lowbed trailer ('the trailer') for N$350 000 and N$380 000, respectively. The written agreement of sale shall be referred to as 'the agreement'. The defendant made part payment as a result of which the plaintiff claims the outstanding amount plus interest and collection commission.

The defendant has entered a counterclaim, in that the plaintiff misrepresented that the truck and trailer, although sold *voetstoots*, were in a condition to be used for the reason that it was purchased. The defendant contended that the plaintiff concealed the fact that the truck and trailer had some arrears at the Namibia Traffic Information System (Natis) and that it would not have entered into the agreement, had it known that the outstanding amount on the levies were so high.

Held: that the *voetstoots* clause does not cover the plaintiff's failure to sell the equipment to the defendant free of encumbrances as provided for in the agreement. The *voetstoots* clause does not further render shelter to the plaintiff where the plaintiff bore a duty to disclose material facts like the hefty outstanding levies and failed to do so.

Held that: when witnesses who play a pivotal role in a disputed transaction are not called to testify, one is allowed to ponder whether the facts before court are the true facts of the matter or the court is being taken on a joy ride.

Held further that: both parties were economical with the evidence that they presented to court. therefore both parties failed to prove their claims against one another, and their claims, therefore, falls to be dismissed.

ORDER

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1. The plaintiff's claim is dismissed.

2. The defendant's counterclaim is dismissed.

3. Each party must pay its own costs of suit.

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

JUDGMENT

SIBEYA J:

Introduction

[1] This is a defended action where the plaintiff instituted a claim and the defendant filed a counterclaim. Both claims are based on different forms of alleged breach of contract by the other party. The genesis of both the claim and counterclaim is an agreement of sale concluded between the parties that the plaintiff must sell a truck and a trailer to the defendant, which agreement is alleged to have been breached by both parties, *albeit* for different reasons. The court is, therefore, seized with the determination of the propriety of the claim and the counterclaim. Both the claim and the counterclaim are defended.

The parties and representation

[2] The plaintiff is Design and Décor Solutions CC, a close corporation duly registered in terms of the Close Corporations Act 26 of 1998 (the Close Corporations Act), with its principal place of business situated at c/o BD Basson Incorporated, 1 Hardy Street, Windhoek.

[3] The defendant is Joto Investments CC, a close corporation duly registered in terms of the Close Corporations Act, with its principal place of business situated at Ondangwa Sun Square Mall, Ondangwa.

[4] Where reference if made both the plaintiff and the defendant jointly, they shall be referred to as 'the parties'.

[5] The plaintiff is represented by Mr Comalie while the defendant is represented by Mr Shapumba.

Background

[6] On 23 April 2021, the parties entered into a written agreement of sale where the plaintiff sold to the defendant a Volvo FM9, 1999, 15000 litre water truck ('the truck') and an Afrit 3 Axel 36 ton Lowbed trailer ('the trailer') for N$350 000 and N$380 000, respectively. The written agreement of sale shall be referred to as 'the agreement'. The defendant made part payment as a result of which the plaintiff claims the outstanding amount plus interest and collection commission.

[7] The defendant, for its part, claims that the plaintiff made some misrepresentations regarding ownership of the truck and trailer and the related outstanding levies, to the extent that the defendant lodged a counterclaim against the plaintiff.

Pleadings

[8] As a result of the agreement of sale concluded between the parties, the defendant purchased the truck for the amount of N$350 000 and trailer for N$380 000 from the plaintiff. The purchase and sale of the truck and trailer, jointly referred to as 'the equipment', was made free and clear of any liens, claims, and encumbrances of any kind. The agreement further provided that the equipment was sold *voetstoots*.

[9] The defendant paid a total amount of N$613 000 *albeit* sparingly. The plaintiff, therefor, seeks the following relief:

'1. Declaring, summons constituting demand, cancellation of the agreement.
2. Payment of the amount of N$171 202,19.
3. Interest on the amount of N$171 202,19 at an interest rate of 20% per annum, calculated daily in arrears and capitalized monthly as from date of judgment until date of final payment.
4. Cost(s) at an attorney-own-client scale.
5. Further and/or alternative relief.'

[10] The defendant, for its part, claims that prior to the conclusion of the agreement, the plaintiff made representations that it owns the equipment, that it is capable of selling the equipment, and that despite being sold *voetstoots*, the equipment is in a working condition and suitable for the work that the defendant intended to use it for. The defendant further claimed that the plaintiff represented that the amount owed at Namibia Traffic Information System (Natis) for the truck and trailer is N$35 000 and N$15 000 respectively.

[11] The defendant further claims that the plaintiff misrepresented that the defendant will be entitled to the licence documentations of the truck and trailer upon payment of the purchase price. The defendant claims that the plaintiff misrepresented to the defendant as the trailer was not registered in its name; the trailer had outstanding licencing and registration fees at Natis of N$47 000 that were not paid from the year 2016; the truck had outstanding licensing and registration fees at Natis in the amount of

N$291 000 that were not paid from the year 2015. The defendant avers that the above outstanding levies existed well before the agreement was concluded.

[12] The defendant further claims that, before the agreement was concluded, the plaintiff knew that: the truck was broken and not in a working condition; the defendant will not be able to use the truck for what he purchased it for; and that the plaintiff will be forced to repair it or rent another truck for the same purpose. The defendant claims further that the entire water system of the truck had to be replaced at a cost of N$8000; the starting pump had to be replaced for N$4600; and the truck had no batteries, therefore, two batteries had to be purchased for N$4000. The repairs necessary to get the vehicles operational amounted to N$14 600.

[13] The defendant claims further that it had to hire another truck for a period of six months for N$55 000 per month, due to the urgency of the road maintenance tender that it was carrying out which was the purpose that the truck was purchased for. The defendant therefor claims damages in the amount of N$330 000.

[14] The defendant further claims that the plaintiff had a duty to disclose the above misrepresentations to the plaintiff prior to the conclusion of the agreement. The defendant avers that the said misrepresentation induced it to enter into the agreement which it would not have done if it was aware the aforesaid misrepresentation or material non-disclosure. The defendant state further that in the midst of making payments for the purchase price of the equipment, it requested from the plaintiff, the registration documents of the truck and trailer but the plaintiff refused to provide same.

[15] The defendant further claims that during August 2022, the parties attempted settlement negotiations and agreed that the defendant must pay N$40 000 after which the plaintiff will release the licence registration certificate of the truck in order to allow the defendant register the said truck in its name. The defendant paid N$40 000 on 23 August 2022, but the plaintiff still did not release the registration certificate or registration documents of the truck.

[16] It is on the basis of the above that the defendant, in the counterclaim, prays for:

‘1. An order for cancellation of the agreement between the parties;

2. The plaintiff is ordered to pay the amount of N$613 000 to the defendant together with interest thereon calculated as 20% per annum from the date of judgment until date of final payment.

3. The plaintiff is ordered to pay to the defendant the sum of N$344 600 in damages, together with interest thereon at the rate of 20% per annum from the date of judgement, until the date of final payment.

4. Cost of suit.

5. Further and/or alternative relief.

Alternatively

6. An order that the plaintiff be ordered to, within 20 calendar days from date of this judgment, pay all arrears at Roads Authority’s Namibian Traffic Information System (Natis) in respect of both the VOLVO FM9 TRUCK and the TRAILER 3 AXEL as at the date of signature of the agreement between the parties (23 April 2021) less the N$50 000 agreed to;

7. An order ordering the plaintiff to deliver to the defendant’s legal representatives all documentation necessary for the registration of the truck and the trailer into the name of the defendant, free from licencing and registration arrears as at 23 April 2021, and within 30 days from date of judgement, failing which the deputy sheriff of the district of Windhoek is immediately authorised to demand the said documents, and plaintiff must, on presentation of a list of documents compiled by the defendant’s legal representatives, immediately produce the said documents upon such demand.

8. In the event that all arrears at Roads Authority’s Namibian Traffic Information System (Natis) in respect of both the VOLVO FM9 TRUCK and the TRAILER 3 AXEL are not paid by the plaintiff within 20 days of the date of this judgement, an order authorising the deputy sheriff

for the district of Windhoek to sign on behalf of the plaintiff or any other person required by Natis to effect the name change, to sign all documents necessary for the registration of the aforementioned truck and trailer in the name of the defendant, without carrying over to the defendant, any arrear fees as at 23 April 2021 whatsoever.'

Pre-trial order

[17] In a joint pre-trial report dated 31 May 2023, which was made an order of court on 29 June 2023, the parties set out the issues not in dispute and the issues to be determined at the trial. The facts not in dispute in the form of agreed facts were listed as follows:

(a) That on 23 April 2021, the parties entered into a written agreement of sale where the defendant agreed to purchase from the plaintiff, who agreed to sell to the defendant, a truck and a trailer, free and clear of any liens, claims and encumbrances of any kind whatsoever;

(b) That the purchase price for the equipment was N$350 000 for the truck and N$380 000 for the trailer, with a total amount of N$730 000 payable within a period of nine months from 30 May 2021;

(c) That, in terms of the agreement, the defendant acknowledged that it inspected or caused the equipment to be inspected by a mechanic who was satisfied with the condition of the equipment;

(d) That the defendant acknowledged and agreed that the equipment is sold *voetstoots*;

(e) That the plaintiff provided no warranties, express or implied, as to the conditions of the equipment;

(f) That the defendant shall pay all the applicable taxes, fees, levies, imports, duties, withholdings or other charges (including license and any interest and penalties thereon) if any, imposed by any taxing authorities by reason of the sale and delivery of the equipment by the plaintiff to the defendant;

(g) That at the time that the agreement was entered into, the trailer was not registered in the name of the plaintiff.

[18] The following were listed as issues of fact to be resolved during the trial:

(a) Whether on 23 April 2021, the parties entered into a partly written and partly oral agreement;

(b) Whether the ownership of the trailer passed to the plaintiff at the time that the agreement was entered into, or whether the plaintiff could lawfully sell the trailer while it was not registered in own name;

(c) Whether at the time of entering into the agreement, the plaintiff disclosed to the defendant that the trailer was not registered in its name and whether the defendant was misled that the plaintiff was the registered owner;

(d) Whether around August 2022, the parties agreed to a settlement where the defendant would make a final payment of N$40 000, after which the plaintiff would release the licence registration certificate in order to allow the defendant to register the truck in its own name;

(e) Whether the full debts owed by the plaintiff to Natis were disclosed by the plaintiff to the defendant;

(f) Whether there was misrepresentation by the plaintiff to the defendant that induced the defendant to enter into the agreement;

(g) Whether the defendant suffered any loss.

(h) Whether the plaintiff is responsible for the Natis fees and levies incurred prior to the conclusion of the contract.

The evidence

[19] Mr Antonio Di Savino was the sole witness for the plaintiff. He testified, *inter alia*, that he was the manager of the plaintiff, a close corporation owned by his wife. In April 2021, he was approached by a certain Mr Alfred Clayton whom he knew well and with whom he did some work in the past. Mr Clayton informed of him of the interest shown by Mr Jonathan Amupolo, the representative of the defendant, to purchase the truck and trailer from the plaintiff.

[20] Mr Amupolo telephoned Mr Di Savino and stated that he saw the truck and trailer and expressed the intention to purchase the equipment. Mr Di Savino testified further that his wife, a member of the plaintiff, authorised him to sell the equipment. He testified that the equipment required attention and service, therefore, after some negotiations, the purchase price for the truck and trailer was lowered to N$780 000. The defendant had a period of two weeks before signing the agreement to ascertain the status of the equipment.

[21] Mr Di Savino testified further that during their discussion, he informed Mr Amupolo, that the trailer was licensed while the truck was not as it had outstanding fees at Natis. He, thereafter agreed with Mr Amupolo to an extra discount of N$50 000 on the purchase price and they included this aspect in the written agreement of sale concluded by the parties. He denied novation, or compromise or accepting any amount in full settlement of the claim other than the amount of N$171 202,09 claimed by the plaintiff herein.

[22] In cross-examination, Mr Di Savino was questioned about the ownership of the truck, and he testified that the truck was registered under the name of Rivoli Namibia (Pty) Ltd. Mr Di Savino stated that the ownership of the truck passed from Rivoli to the plaintiff at the time of signing the present agreement on 23 April 2021, as the purchase price was paid in full, therefore, the truck was by then owned by the plaintiff. When asked as to the whereabouts of the documents that show that the equipment belonged to the plaintiff, Mr Di Savino stated that he did not bring them. The truck was, however, up to the date of the testimony of Mr Di Savino on 2 October 2023, still registered in the name of Rivoli.

[23] In further cross-examination, it was revealed by Mr Di Savino that he never met Mr Amupolo before the signing of the agreement. The negotiations that occurred were made through third parties. He stated that he provided the registration and licence documents of the equipment to the plaintiff's mechanic who was on site, a certain Mr Lukas.

[24] Mr Di Savino was questioned that he did not disclose the penalties and arrears at Natis on the truck and trailer. His response was that the penalties and arrears outstanding at Natis were about N$50 000 in total. He stated that at the time of the agreement, the outstanding fees at Natis regarding the truck were for a period of one year and that was N$35 000. Mr Shapumba put to Mr Di Savino that the plaintiff discovered that there were no licensing arrears at Natis on the trailer but there were arrears and penalties on the truck dating back to 28 February 2015, and by 21 April 2021, the arrears and penalties amounted to N$291 000. To this, Mr Di Savino testified that he disclosed what was outstanding, which were arrears for a period of one year.

[25] When questioned further on the arrears outstanding at Natis, Mr Di Savino testified that when the plaintiff purchased the truck in the year 2020, he was in Cape Town where he was attended to after he suffered a heart attack. He knew that the truck was licensed and was in arrears for a period of one year as the previous owner informed him so. He admitted that, in respect of the arrears, he did not verify the

information received from Rivoli but just relied on it. It was put to him further that the defendant would not have purchased the truck if he knew of the outstanding amount at Natis. Mr Di Savino stated that he was not aware of that. When asked whether penalties, fees and arrears would accumulate on the truck if the licensing fees are not paid, Mr Di Savino testified that he does not know.

[26] When put to him that he intentionally misrepresented the outstanding fees and penalties on the truck at Natis, Mr Di Savino stated that he did not know the amount.

[27] Mr Di Savino testified further that clause 5 of the agreement included the obligation on the defendant to pay all licence fees. The plaintiff disagreed. When questioned that he did not disclose the licence disc and registration documents of the truck to the defendant, Mr Di Savino refuted the assertion and stated that he disclosed same and had proof thereof on WhatsApp. The WhatsApp communication was not produced by the plaintiff in court. When questioned further on the reason why the truck was not transferred to the name of the plaintiff, Mr Di Savino stated that it was due to the heart attack that he suffered and the effect of the COVID-19 pandemic.

[28] Mr Di Savino testified further that he did not want to have the agreement cancelled as he only sought payment of the outstanding amount from the defendant. He testified that the amount claimed included the outstanding capital amount after payment of N$613 000, and interest calculated thereon for late payment and interest on outstanding amount. He stated that the interest is calculated monthly. He stated that his communication via WhatsApp and email with Mr Amupolo does not reveal that the defendant was unhappy with the licencing fees. This was disputed by the defendant. When asked why he did not discover the said WhatsApp and email communication, Mr Di Savino testified that he thought that they were not necessary.

[29] The defendant produced a copy of a document from Natis containing the particulars of the truck under the name Hochobes FB showing the total amount in

arrears as N$335 866.80 as of September 2023. The document further provided that the licence disc of the truck expired on 28 February 2015.

[30] In re-examination, Mr Di Savino testified that the N$50 000 for the licencing fees and penalties was only in respect of the truck and not the trailer.

Defendant's case

[31] Mr Jonathan Amupolo was the only witness who testified for the defendant. He testified, *inter alia*, that he is the sole member of the defendant. He testified further that on 21 April 2021, the defendant entered into a partly written and partly oral agreement with the plaintiff in respect of the equipment. He testified that during the negotiations which occurred prior to signing the agreement, Mr Di Savino misrepresented that the equipment was registered in the name of the plaintiff, and that although sold *voetstoots* it was in a working condition. He did not speak to Mr Di Savino directly but through Mr Clayton.

[32] Mr Amupolo testified further that Mr Di Savino informed Mr Clayton that the truck and trailer had outstanding registration fees of N$35 000 and N$15 000 respectively. Although this information was communicated to him by Mr Clayton, Mr Di Savino later confirmed it. Mr Amupolo is related to Mr Clayton who is also his best friend. It was thereafter agreed that an amount of N$50 000 will be discounted from the purchase price. He stated further that upon inspection, he discovered that the truck was not in a good working condition, and the defendant was forced to hire another truck given the deadline of work that the truck was purchased for.

[33] Mr Amupolo testified that the defendant paid N$613 000 towards the purchase price of the equipment, after which, he requested Mr Di Savino to provide him with the registration documents of the truck and trailer. Mr Di Savino refused to provide the documents. Mr Amupolo then made enquiries at Natis where he found out that the truck and trailer had more outstanding fees than what he was informed by Mr Di Savino. The

outstanding fees on the truck dating to 2015 were N$291 000, while on the trailer it was N$47 000. The truck attracted penalties from 2015. The outstanding fees and penalties were not disclosed to him by Mr Clayton. He paid the licensing fees for the trailer. He took possession of the truck in August 2021. He stopped making payment for the truck after discovering the outstanding arrears at Natis.

[34] Mr Amupolo stated that he came to learn later that the plaintiff was not the owner of the trailer, alternatively that the trailer was not registered in the name of the plaintiff. He stated that up to the date of his testimony in court on 3 October 2023, the plaintiff refused to hand over the registration documents of the equipment or to pay the arrears at Natis and thus prejudicing the defendant.

[35] In cross-examination it was put to him by Mr Comalie that in his discovery affidavit, Mr Amupolo stated that he was in possession of the registration certificates of the truck and trailer. Mr Amupolo responded that it was a mistake as he only had a registration certificate for the trailer and not the truck.

[36] Mr Amupolo testified that he went to Natis in September 2022 where he found out that the trailer is registered in Rivoli's name. By then he did not obtain the outstanding amount as Mr Clayton informed him that all was in order, and he trusted Mr Clayton hence he did not go to Natis to verify that information. Mr Comalie put to him that the plaintiff did not make representations to him about the outstanding amount on the truck at Natis. He responded that Mr Clayton informed him about the outstanding fees but in May 2021, he spoke to Mr Di Savino about the fees.

[37] When questioned in cross-examination by Mr Comalie that he inspected the equipment, Mr Amupolo denied inspecting the truck and trailer prior to signing the agreement. He denied being assisted by an expert to inspect the equipment. He testified that he only saw pictures of the equipment. He only saw the equipment when he went to collect it, and by then Mr Di Savino was not present. When put to him that he

received the agreement two weeks before signing it, Mr Amupolo denied and testified that he received it two days before.

[38] Mr Amupolo was questioned regarding the representation that the truck was in good working condition while it was broken down and that this was made to deceive him to enter into the agreement with the plaintiff appear to have been made by Mr Clayton. Mr Amupolo agreed as Mr Clayton served as a middleman, but after signing the agreement he started communicating directly with Mr Di Savino.

[39] Mr Amupolo testified that payment of the amount of N$40 000 in full settlement of the matter was made in May 2022 and not August 2022. He attributed the error to his erstwhile legal practitioners. He later, however, testified that there was no compromise as the payment made in May 2022 was payment as usual.

[40] Mr Comalie put to Mr Amupolo that Mr Di Savino did not misrepresent to him about the ownership of the equipment and the outstanding fees, to which Mr Amupolo responded that maybe there is a possibility that he did not know about the ownership but he knew about the penalties as he demanded for the documents of the truck but was denied access thereto.

[41] Mr Amupolo testified that he seeks cancellation of the agreement, payment of the N$613 0000 paid and he returns the equipment. In the alternative, he seeks that the plaintiff must pay all the outstanding fees at Natis. Mr Amupolo later said that Mr Clayton informed him that the truck was scrapped.

Arguments

[42] Mr Comalie argued that the question of ownership of the equipment was only raised in respect of the trailer and not the truck. Therefore, there is no issue regarding the ownership of the truck and accordingly no misrepresentation regarding ownership of

the truck. He argued that the plaintiff owned the trailer as by the time that the agreement was entered into, the plaintiff had already paid Rivoli for the trailer.

[43] Mr Shapumba argued that the plaintiff misrepresented to the defendant regarding the penalties and fees outstanding at Natis in respect of the truck, which exceeded half of the purchase price. He argued further that the only fees and penalties disclosed were for a period of one year yet the said arrears spanned from 2015 to 2021. He argued further that even if the misrepresentations were not made directly by Mr Di Savino to Mr Amupolo, it suffices that they were made indirectly as such information was confirmed by Mr Di Savino by email. He argued also that the plaintiff did not discover anything and can therefore not be said to have proven ownership of the equipment, the result of which should be cancellation of the agreement.

[44] Mr Shapumba further argued that the *voetstoots* clause of the agreement is limited to mechanical fault but does not extend to outstanding penalties and fees at Natis. He argued further that the plaintiff failed to prove the claim amount through a certificate of indebtedness as required by the agreement, and for that reason, the plaintiff's claim must fail. Mr Comalie argued the contrary, namely that the claim of the outstanding amount is not restricted to filing a certificate of balance.

[45] Mr Shapumba further argued that Mr Di Savino did not confirm that the registration documents allegedly given to Mr Lukas, whom he referred to as his boy, were delivered to the defendant. Mr Shapumba conceded that the defendant led no evidence about the damages suffered as a result of the rent of another truck. Damages were, therefore, not proven. He argued that the mentioned clause of the agreement related only to taxes. The defendant seeks restitution.

Analysis

[46] The parties, who called one witness each, presented mutually destructive versions. In such circumstances the court must assess the versions and attach weight to the most probable version.

[47] When faced with mutually destructive versions during a trial, our courts have adopted the approach set out by the Supreme Court of Appeal of South Africa in the celebrated decision of *Stellenbosch Farmers*' *Winery Group Ltd v Martel et Cie & Others,*[1] where the court remarked as follows at paragraph 5:

'[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by 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's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) 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. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c), the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities

[1] *Stellenbosch Farmers*' *Winery Group Ltd v Martel et Cie* 2003 (1) SA 11 (SCA).

in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail'. *(*See *U v Minister of Education, Sports and Culture and Another* 2006 (1) NR 168 (HC); *Sakusheka and Another v Minister of Home Affairs* 2009 (2) NR 524 (HC)).

[48] In *National Employers' General Insurance Co Ltd v Jagers*[2] it was held as follows:

'(The plaintiff) 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 any 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 defendant's version is false.'

[49] The above principles shall be kept in mind as I consider the evidence led by the parties in order to determine as to who managed to prove its claim.

Voetstoots

[50] As a prelude to the discussion on *voetstoots*, I consider it necessary to refer to the following clauses of the agreement:

'1.1 The SELLER hereby sells to the BUYER and the BUYER hereby purchases from the SELLER, free and clear of any liens, claims and encumbrances of any kind whatsoever, the following earthmoving machines (hereinafter referred to as the "EQUIPMENT") on the same terms and conditions specified herein

[2] *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at H 440E – G; Also see *Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR 555 at 556.

4. WARRANTIES

4.1 The BUYER acknowledges having inspected the EQUIPMENT assisted by an expert mechanic/technician and being satisfied with the condition of the EQUIPMENT and further acknowledges and agrees that the EQUIPMENT is sold “VOETSTOOTS”.

4.2 The SELLER gives no warranties, express or implied, as to the condition of the EQUIPMENT, of the design, operation quality, merchantability, suitability or fitness for any particular purpose of the EQUIPMENT and shall in no circumstances be liable for damages of any kind, howsoever arising form *(sic)* the BUYERS use of the EQUIPMENT, or otherwise.

5. TAXES

The BUYER shall be responsible for and shall pay all applicable taxes, fees, levies, imposts, duties, withholdings or other charges (including License and any interest and penalties thereon) if any, imposed by any taxing authorities by reason of the sale and delivery herein provided for.

…

7.1 No representation, express or implied term, warranty, or the like not recorded herein shall bind either party unless reduced to writing and signed by the parties.’

[51] I shall revert to some to the above clauses as the judgment unfolds.

Plaintiff’s claim

The outstanding fees on the truck at Natis

[52] Mr Di Savino testified that he informed the defendant through Mr Clayton that the trailer was licensed while the truck was not, and that the truck had outstanding fees at Natis. This necessitated the inclusion of a discount of N$50 000 in the purchase price. Mr Di Savino testified that the outstanding fees and penalties at Natis on the truck were about N$50 000. Mr Amupolo, on the other hand, testified that the outstanding fees and penalties amounted to N$47 000 on the trailer and N$291 000 on the truck.

[53] The parties locked horns on the full debts owed to Natis in arrear licence and registration fees and related penalties, and whether the plaintiff was responsible for payment of the fees and levies incurred regarding the equipment prior to the conclusion of the agreement.

[54] Clause 1.1 of the agreement provides that the seller sells the equipment free of any encumbrances whatsoever. The English Oxford Dictionary, 11th edition defines an encumbrance as a claim against a property by a third party that is not the owner. An encumbrance can affect the transferability of the property and restrict its free usage. The common forms of encumbrances are mortgages and property taxes.

[55] The literal interpretation of clause 1.1, in my view, reveals that the equipment was sold by the plaintiff to the defendant free of any encumbrances whatsoever. This means that the equipment was sold free of any claim against the property by a third party that may affect the transferability of such property. The outstanding levies and penalties against the truck at Natis fall in the category of encumbrances as they are levies and penalties registered against the truck. In further support of this finding, registration and licensing of the property at Natis ordinarily requires the levies and penalties to be paid before being effected.

[56] The plaintiff, in my view, had an obligation to ensure that the equipment sold was free from any encumbrances whatsoever. The plaintiff, however, argues that clause 5 of the agreement puts the responsibility to pay licensing fees and penalties of the equipment on the defendant. Therefore, the plaintiff is exonerated from paying licence fees, penalties and levies. The plaintiff argues further that clause 5 was introduced to ensure that the defendant pays the levies after having the purchasing price reduced by N$50 000. The defendant disagrees.

[57] In interpreting clause 5 of the agreement, I take into consideration the following remarks made by O'Regan AJA in a Supreme Court decision of *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors,*[3] para 18 on interpretation of contracts:

'[18] South African courts … have recently reformulated their approach to the construction of text, including contracts. In the recent decision of *Natal Joint Municipal Pension Fund v Endumeni Municipality,*[4] Wallis JA usefully summarised the approach to interpretation as follows –

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used."'

[58] Armed with the above authority, I proceed to consider clause 5 of the agreement. The said clause is titled "TAXES" and provides that: "the BUYER shall be responsible for and shall pay all applicable taxes, fess, levies, imposts, duties, withholdings or other charges (including License and any interest and penalties thereon) if any, imposed by any taxing authorities by reason of the sale and delivery therein provided for.'

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[3] *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors* 2015 (3) NR 733 (SC) paras 18-19 and 24.
[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) 604 para 19.

[59] Clause 5 by virtue of carrying the title of taxes applies to taxes. The content of the provision provides for different forms of taxes payable by the defendant to taxing authorities for the sale and delivery of the equipment. The said provision has taxes payable to taxing authorities written all over it. The taxes, fees or charges including license fees, interest and penalties charged by any taxing authorities in order to in order to effect the sale and delivery of the equipment is payable taxing authorities.

[60] Tax is the compulsory contribution to State Revenue imposed by levies on personal income, business profits or added to some of the goods, services or transactions. I pause here to state that the equipment was sold at the purchase price without value added tax. That, however, does not mean that the parties could make provision for any eventuality on some form of tax to be paid on the equipment. Such foreseeability, in my view, probably gave rise to clause 5.

[61] The interpretation of clause 5 suggested by Mr Comalie that it relates to the defendant being responsible to pay all the fees, levies and penalties due at Natis, is in my view, not consistent with the reading of clause 5. Clause 5 makes no reference to Natis or the motor vehicle institution. Natis imposes levies, licensing fees and penalties and not tax. In my view, Natis is not a taxing authority. Furthermore, clause 5 makes no reference to the amount of N$50 000 which Mr Di Savino testified that it is the amount that birthed clause 5.

[62] The interpretation of clause 5 as it stands, in my view, will be unbusinesslike if it is to be interpreted to include payment of the outstanding fees, levies and penalties at Natis when the said outstanding fess, levies and penalties were unknown to the parties at the time of concluding the agreement.

[63] As the evidence revealed, Mr Di Savino, through Mr Clayton informed Mr Amupolo that the trailer was registered while the truck was not registered and the truck had outstanding levies for a period of one year. Mr Di Savino estimated the outstanding levies to be about N$35 000 for the truck and N$15 000 for the trailer. At some stage

Mr Di Savino changed and stated that the outstanding levies were about N$50 000. I observed that Mr Di Savino struggled to answer the question in cross-examination regarding the levies that were outstanding at Natis. It also came as no surprise that Mr Di Savino changed his version on the outstanding levies from about N$35 000 to later being about N$50 000. When pressed in cross-examination, Mr Di Savino testified that the defendant undertook to verify the outstanding levies at Natis.

[64] In further explanation of the outstanding levies, Mr Di Savino testified that he relied on the information from Rivoli, where the plaintiff purchased the truck, that the outstanding levies were only for a period of one year, without verifying such information. This I find to be manner in which Mr Di Savino just thought to explain the reason why he did not disclose to the defendant that the truck had outstanding levies since the year 2015 when it was last registered. I find it highly improbable that Mr Di Savino, the husband to the member of the plaintiff and the manager of the plaintiff would purchase the truck in the year 2020, without verifying that such truck was last registered with Natis in the year 2015.

[65] I find the evidence of Mr Amupolo on the period that the truck was unlicensed and unregistered to be from the year 2015 credible. This, I find is supported by the documents from Natis produced in evidence by the defendant, showing the outstanding levies from the year 2015.

[66] It would be clear by now that Mr Clayton played a significant role in the conclusion of the agreement by the parties. He was the intermediary between the parties. Both Mr Di Savino and Mr Amupolo had close ties with Mr Clayton. Mr Di Savino knew Mr Clayton well and they carried out some work in the past, while the same Mr Clayton is related to Mr Amupolo and they are best friends, yet none of the parties found it fit to call Mr Clayton as its witness. I will revert to this issue.

[67] Although Mr Di Savino stated that he never presented to Mr Amupolo the outstanding levies for the truck at Natis, the information conveyed by Mr Clayton, that

the truck had outstanding levies of only one year correlated with the evidence of Mr Di Savino. I, therefore, find that it is highly probable that the source of such representation was Mr Di Savino. It puzzles me why the plaintiff failed to call Mr Clayton who was instrumental in the conclusion of the agreement and who is said to have conveyed statements between the parties.

[68] The outstanding levies of the truck for a period of one year is not consistent with the established evidence, which proved that the outstanding levies on the truck stems from the year 2015. I accept that the defendant established that by 21 April 2021, when the agreement was entered into, the outstanding levies on the truck stood at N$291 000. How Mr Di Savino was not aware of such highly accumulated levies on the truck is not convincingly explained. I accept that Mr Di Savino ought to have verified the outstanding levies on the truck with Natis, rather than simply taking the word of Rivoli at face value that the outstanding levies were only for a period of one year. The plaintiff failed to call any person from Rivoli to corroborate the version of Mr Di Savino.

[69] Damaseb AJA when sitting in the Court of Appeal of the Kingdom of Lesotho in *Mokhosi & Others v Mr. Justice Charles Hungwe & Others,*[5] had occasion to consider what constitutes hearsay evidence and remarked as follows:

> 'As we have said before, admissibility of evidence is a question of law and not of judicial discretion. Evidence is admissible either under the rules of the common law or under statute. Hearsay evidence is no exception. Once an item of evidence constitutes hearsay, it must either be sanctioned by statute or the common law to be admissible. If it does not, it remains inadmissible as a matter of law and stands to be rejected by the court even if not specifically objected to by the opposing party.'

[70] The above legal position regarding hearsay evidence is good law on the approach that the court should adopt regarding hearsay evidence.

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[5] *Mokhosi & Others v Mr. Justice Charles Hungwe & Others* (Cons Case No/02/2019) [2019] LSHC 9 (02 May 2019) para 55.

[71] In *casu*, I find that the plaintiff's failure to call the person from Rivoli to corroborate his version that Rivoli informed him that the outstanding levies on the truck was only for a period of one year, constitutes inadmissible hearsay evidence, and I treat it as such.

[72] The plaintiff's failure to call the person from Rivoli to testify on the allegations mentioned, in my view, attracts negative consequences. Masuku J in *Conrad v Dohrmann and Another*[6] remarked as follows at paragraph 84 on the failure to call a crucial witness:

> '[84] I must, in this regard, point out that the second defendant was not called as a witness, particularly to explain and put her version of the events to the court. In this regard, the plaintiff adduced evidence that touched upon her and in the circumstances, I am entitled to draw an adverse inference against her, though being a party to the proceedings but not availing herself as a witness.[7]'

[73] I, therefore, draw a negative inference against the plaintiff for its failure to call a witness from Rivoli to corroborate its version on the outstanding levies. What is worse for the plaintiff on this aspect is further that Rivoli is a company, and it is common knowledge that a company cannot speak and Mr Di Savino failed to inform the court as to which person from Rivoli informed him as he alleged.

[74] The outstanding levies on the truck at Natis exceeded half of the purchase price by a whooping N$291 000 as of 23 April 2021. The plaintiff appears to shift the blame to the defendant, ie that it was the duty of the defendant to find out the outstanding levies on the truck from Natis. I disagree. It was the applicant who undertook to sell the truck to the defendant free from encumbrances as per clause 1.1 of the agreement. The plaintiff should, therefore, have complied with his obligations in terms of the agreement, which, I find that he failed to do on this score. On this basis alone, I find that the

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[6] *Conrad v Dohrmann and Another* 2018 (2) NR 535 (HC) 555 para 84.
[7] *Elgin Fireclays Ltd v Webb* 1947 (4) (SA) 744 (A) at 745. See also *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621 (AD).

plaintiff's claim for payment of the outstanding payment of the purchase price of the truck against the defendant cannot succeed.

[75] I further hold that, given the finding stated above that the outstanding levies at Natis for the truck stood at N$291 000 on 23 April 2021, while the purchase price was N$350 000, I hold the view that the defendant's version is highly probable that had it known of the amount of the said outstanding levies, it would not have entered into the agreement. I opine that it would be unbusinesslike for the defendant to enter into an agreement to purchase a truck for N$350 000 while such truck has a debt of outstanding levies of N$291 000, especially where it was established that the presentation to the defendant was that the arrear levies and penalties were about N$35 000 or N$50 000. This, in my view, demonstrates material non-disclosure by the plaintiff to the defendant. I find that the above material non-disclosure induced the defendant to enter into the agreement.

[76] If I understood Mr Comalie well, he appeared to rely, amongst other several issues that he raised, on the *voetstoots* clause that the defendant purchased the equipment as is. The *voetstoots* clause may be relied on by a seller as a defence to a claim centred on a latent defect.[8] A defect is latent if it is not visible or discoverable upon a mere inspection. *Voetstoos* would be a perfect defence to the defendant's claim for damages as a result of the alleged poor condition of the equipment. This claim was, however, abandoned by the defendant during the hearing.

[77] I find that the *voetstoots* clause does not cover the plaintiff's failure to sell the equipment to the defendant free of encumbrances as provided for in the agreement. The *voetstoots* clause does not provide shelter to the plaintiff where the plaintiff bore a duty to disclose material facts like the hefty outstanding levies and failed to do so.

[78] I find that Mr Di Savino was not impressive a witness. I find his evidence, particularly on the issue of the oustanding levies, to be highly improbable and

[8] *Odendaal v Ferraris* [2008] 4 All SA 529 (SCA).

unreliable. He kept changing his version, was visibly shaken, failed to provide reasonable explanations and was not credible.

[79] In view of the above conclusions, I find it unnecessary to venture into other disputes between the parties and the further questions of fact and law listed for determination. I find that the plaintiff's claim against the defendant for payment of the outstanding payment of the purchase price cannot succeed.

Defendant's claim

[80] As stated earlier, the defendant claims restoration of the amount of N$613 000 paid to the plaintiff for the equipment. Alternatively, it claims payment of the outstanding levies at Natis.

[81] At the outset, I record my displeasure towards the defendant just as I said in respect of the plaintiff that I fail to understand the reason why the defendant equally failed to call Mr Clayton despite the crucial role that he played in the conclusion of the agreement. The failure by the parties to call Mr Clayton when he was literally the intermediary between the parties, smells of a rat, which the parties can be taken to have attempted to suppress. When witnesses who play a pivotal role in a disputed transaction are not called to testify, one is allowed to ponder whether the facts before court are the true facts of the matter or the court is being taken on a joy ride.

[82] What is strange is that despite Mr Clayton being the intermediary, none of the parties appear to have regarded him as its agent in the communications and activities leading to the conclusion of the agreement.

[83] As much as I found that the plaintiff had a duty to sell the equipment to the defendant free from encumbrances, which he failed to do, the defendant is not exonerated as stated below.

[84] Mr Di Savino testified that Mr Amupolo undertook to investigate the outstanding fees at Natis. After all, Mr Amupolo testified that the moment you present your identity document (ID) at Natis, you will be asked for a VIN number of the vehicle and they will provide to you the outstanding fees on the vehicle. Mr Comalie argued that had the defendant made a diligent search at Natis, he would have known about the outstanding levies.

[85] Mr Amupolo's response to questions in cross-examination, reveal that it was relatively easy to obtain information regarding the outstanding levies on the equipment at Natis. As much as the plaintiff had a duty to disclose material facts regarding the outstanding levies to the defendant, Mr Amupolo could easily obtain the information about the outstanding levies at Natis.

[86] Mr Amupolo was also not the best of witnesses. He contradicted established facts and when pressed in cross-examination, he tried his best to lay blame on other people, but himself. All along the evidence was that he had about two weeks to carry-out an investigation about the property as he received the agreement two weeks before he signed it, and when this was later put to him he, for the first time denied it and stated that he only had two days before signing the agreement and not two weeks. Mr Amupolo deposed to a discovery affidavit on oath and stated that he was in possession of the registration certificate of the truck as a follow up to the question that he had the registration certificate and could therefore easily have obtained the outstanding levies from Natis. Mr Amupolo attempted to disown that part of his affidavit and denied that he did not possess the registration certificate of the truck. He laid blame on his erstwhile legal practitioner for the alleged mistake.

[87] Both parties, in my view, were economical with the truth and their failure to call Mr Clayton, whom the court was informed that was around, puts a dark cloud over the versions of the witnesses, particularly the sole witnesses' evidence on similar issues which are miles apart. The extent demonstrated by both witnesses in evidence that they are prepared to go at length to lay blame on other persons who were not called to testify

in order to clear themselves is concerning. On the basis of the above conclusions, I draw negative inferences against both parties for failure call crucial witnesses like Mr Clayton.

[88] In the premises, I find that the defendant was not entirely an innocent party in the matter of the outstanding levies as he could easily have obtained the arrear levies from Natis. I also find that he was in possession of the registration certificate of the truck as per discovery affidavit that he deposed to. He also filed nothing from his erstwhile legal practitioner nor did he call his erstwhile legal practitioner to testify to corroborate his version. I am not convinced that the defendant managed to prove its claim.

Conclusion

[89] In view of the findings and conclusion reached hereinabove, I am of the considered opinion that both parties were economical with the evidence that they presented to court. I, therefore find that both parties failed to prove their claims against one another, and their claims, therefore, falls to be dismissed.

Costs

[90] Ordinarily, costs follow the event. Both parties failed to prove their claims against one another. As a result, no costs will be awarded to either of the parties.

Order

[91] In the result, this court makes the following order:

1. The plaintiff’s claim is dismissed.

2. The defendant’s counterclaim is dismissed.

3. Each party must pay its own costs of suit.

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

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O SIBEYA

Judge

APPEARANCES:

FOR THE PLAINTIFF: J Comalie

Of BD Basson Incorporated, Windhoek

FOR THE DEFENDANT: A Shapumba

Of Shapumba & Associates, Windhoek