

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

JUDGMENT

Case No.: HC-NLD-CIV-ACT-CON-2017/00253

In the matter between:

ERASTUS UUTONI

PLAINTIFF

and

FREEDOM SQUARE INVESTMENTS TWENTY FOUR CC

T/A OSHAKATI FISH SHOP

DEFENDANT

Neutral citation: *Uutoni v Freedom Square Investments Twenty Four CC* (HC NLD-CIV-ACT-CON-2017/00253) [2020] NAHCNLD 151 (22 October 2020)

Coram: SIBEYA AJ

Heard: 12 and 14 October 2020

Delivered: 22 October 2020

Flynote: Civil procedure – preponderance of probabilities – Mutually destructive versions – Material contradictions by plaintiff – Plaintiff alleges non-payment – Defendant produced concrete proof of one payment – Court held that the defendant’s version is more probable.

Summary: The cause of action arose when the plaintiff and the defendant entered into an agreement where the defendant would receive N\$200 000 from the Ministry of Veterans Affairs on behalf of the plaintiff’s mother. The plaintiff and the defendant then agreed that the defendant would charge for his services and provide the difference to the plaintiff.

The plaintiff sued the defendant for N\$170 000 as a result of two dishonored cheques drawn for the benefit of the plaintiff. The defendant on 18 July 2016 paid into the plaintiff’s bank account an amount of N\$80 000 but the plaintiff denied having received this payment. The defendant alleged that he paid the remaining amount of N\$90 000 in cash to the plaintiff on his own request.

The plaintiff changed his version from not having received the N\$80 000 to acknowledging receipt thereof, but only after the production of defendant’s bank statement. He further changed his claim as stipulated in his particulars of claim from claiming N\$170 000 to N\$110 000 in evidence. The plaintiff could not provide a reasonable explanation as to why he did not claim the remaining N\$20 000. These contradictions tainted the plaintiff’s credibility.

The court held that both versions are mutually destructive, however the defendant’s version is more probable and dismissed the plaintiff’s claim with costs.

ORDER

1. The Plaintiff's claim against the defendant is hereby dismissed;
2. The defendant is awarded costs on a party and party scale.
3. The matter is removed from the roll.

JUDGMENT

SIBEYA AJ:

Introduction

[1] The plaintiff claimed money allegedly owed to him by the defendant. In such circumstances it is incumbent on the plaintiff to adduce evidence which can sustain his claim on a balance of probabilities.

[2] The Plaintiff is Mr Erastus Uutoni, a farmer in Namibia who issued summons out of this court against the defendant, a close corporation duly registered in terms of the laws of Namibia and operating in Oshakati. Where reference is made to the plaintiff and the defendant jointly, they shall be referred to as "the parties".

[3] The claim of the plaintiff is for payment of the sum of N\$170 000.

[4] The plaintiff is represented by Mr Kandara, of AngulaCo, Inc and the Defendant is represented by Ms Shailemo, of Shailemo and Associates.

Background

[5] The cause of action arose when the parties entered into an oral agreement where the plaintiff acted in person and the defendant was represented by Mr. Abner Nambombola. It was agreed between the parties, *inter alia*, that the defendant would receive N\$200 000 from the Ministry of Veterans Affairs (the Ministry) on behalf of the

Plaintiff's mother who had passed. They further agreed that the defendant was entitled to deduct an amount for administration costs for services which he renders to the plaintiff in order to facilitate the aforesaid payment to the plaintiff. The parties, however, had divergent views on the total amount of the administration costs, with the plaintiff stating that such agreed costs amounted to N\$10 000 while the defendant's position is that the costs are N\$10 499.

[6] The plaintiff contended that the amount of N\$200 000 was paid to the defendant in 2015. On demand of payment of funds from the Ministry, the defendant drew two post-dated cheques for the payment of the monies of the plaintiff's deceased mother. The said cheques dated 6 July 2016 for the sum of N\$80 000 and 8 July 2016 for the sum of N\$90 000 were made in favour of "cash". The Plaintiff presented the cheques for payment on 6 and 8 July 2016 respectively and were dishonoured for non-payment.

[7] It is plaintiff's allegation that the defendant did not pay over any amounts due to him necessitating his claim against the defendant for the amount of N\$170 000 as per the particulars of claim dated 25 October 2017.

[8] The defendant does not dispute receiving the amount of N\$200 000 from the Ministry for the benefit of the deceased's mother, but provides that this amount was only received on 14 July 2016. It further does not dispute the fact that the two "cash" cheques dated 6 and 8 July 2016 were dishonored on the respective dates on which they were presented to the bank for payment. It states that the said two cheques were provided to the plaintiff only as a guarantee for payment in due course, and that the parties agreed that the plaintiff will not present the cheques to the bank, until such time that the defendant advises on the availability of the funds in its bank account. Plaintiff disputes this version and acted to the contrary.

[9] The defendant further alleges that in addition to the N\$ 10 499 charged for administration fees, it further deducted funds for payment of Value Added Tax (VAT). It contends that it paid an amount of N\$80 000 through electronic transfer (EFT), and paid over the remaining amount of N\$90 000 in cash, to the plaintiff. The defendant therefore contends that it is not indebted to the plaintiff in any amount.

Issues to be resolved

[10] Amongst the relevant questions raised by the parties in the proposed pre-trial order dated 14 August 2019, which was made an order of court on 16 September 2019, this court is called upon to determine the following:

10.1 Why the cheques delivered to a cash bearer dated 06 and 08 July 2016 respectively were dishonoured, and if rectified, how such rectification occurred.

10.2 whether the plaintiff received the amount of N\$80 000 by EFT on 18 July 2016 and an amount of N\$90 000 in cash between 14 and 20 July 2016 from the defendant.

11. From the evidence raised it appears that the court is duty bound to further resolve the following:

11.1 Whether the defendant is indebted to the plaintiff in the amount of N\$110 000 or N\$170 000, and

11.2 Whether the defendant settled the outstanding amount.

[12] In endeavour to answer the above questions, it is now opportune to consider the relevant evidence led by the parties.

Plaintiff's case

[13] In an attempt to prove his case, the plaintiff took to the stand and testified, *inter alia*, that during 2014, he approached the defendant to assist him with his late mother's

veteran funding scheme for the amount of N\$200 000. The parties agreed that the funds will be paid into the defendant's bank account and upon receiving the funds, defendant will deduct his administration fee of N\$10 000 from the N\$200 000 and thereafter pay over the remaining amount to the plaintiff.

[14] The plaintiff testified that on 6 and 8 July 2016, he attended to Bank Windhoek, Oshakati, to present the cheques in favour of "cash" and such cheques were dishonoured for non-payment. The plaintiff testified that on 18 July 2016 the defendant paid an amount of N\$80 000 into his bank account. This payment, as per the plaintiff, was only actioned after the defendant informed him that it paid the money over to someone else erroneously and that it could therefore only pay an amount of N\$80 000 at that time.

[15] The plaintiff further testified that subsequent to the payment of N\$80 000, the defendant still owed him an amount of N\$110 000. The plaintiff denies receiving an amount of N\$90 000 in cash from the defendant.

The Defendant's case

[16] Mr Abner Nambombola, the sole member of the defendant, testified on behalf of the defendant. He testified, *inter alia*, that the plaintiff and plaintiff's late mother were accorded veteran status by the Government of the Republic of Namibia (the Government) and as such they qualified for projects of their choice valued in the amount of N\$200 000 each, funded by the Government.

[17] He testified further that he assisted the plaintiff and his late mother Ms Nekwiita Selma with their war veteran projects authorized by the Ministry. The funds for the said projects were paid into the defendant's bank account.

[18] He further testified that there were business activities between the parties before the dispute in the present matter arose. Such business activities were not related to this matter, but cemented the assertion that a relationship existed between the parties, so the testimony went. He testified that in terms of the projects from the Ministry, the beneficiaries being war veterans were not entitled to receive funds directly, but through projects financed by the Ministry. However, due to the nature of the relationship that existed between the parties, they entered into an oral agreement regarding the project of the plaintiff's mother. It was a material term of the said agreement that the plaintiff will receive the money from the defendant, paid by the Ministry, instead of the tractor which was initially sought to be purchased for the project. He testified further that the parties also agreed that the defendant will deduct the administration costs and VAT charges from the funds received from the Ministry, and pay over the remainder to the plaintiff.

[19] The defendant acknowledged that it issued two post dated cash cheques which were dishonoured on demand of payment. Mr. Nambombola's testimony was that he instructed the plaintiff not to present the cheques to the bank for payment, until such time that there was confirmation from the Ministry that the funds were loaded onto the defendant's account, and has informed the plaintiff accordingly. The defendant's evidence is that the plaintiff acted contrary to this instruction.

[20] Defendant's evidence is further that the parties entered into an oral agreement after the cheques were dishonoured, for the defendant to pay an amount of N\$80 000 into the plaintiff's bank account and the remaining amount of N\$90 000 to be paid in cash. It was further the defendant's evidence that on 18 July 2016 an amount of N\$80 000 was paid into the plaintiff's bank account and that between 14 and 20 July 2016 an amount of N\$90 000 was paid to the plaintiff in cash. It was further testimony of Mr. Nambombola that the plaintiff insisted on being paid the amount of N\$90 000 in cash.

[21] Mr. Nambombola concluded his testimony by stating that the total amount paid to the plaintiff in respect of his mother's project is N\$170 000, constituting the remainder of the funds after deducting administrative costs and the VAT payable to the Receiver of Revenue.

Evaluation of evidence

[22] I must state from the onset that what is currently before me, is two mutually destructive versions by both the plaintiff and the defendant. It is up to this court to side with the version that is most probable through the evidence adduced.

[23] The approach of the courts to mutually destructive versions is set out in *National Employers' General Insurance Co Ltd v Jagers*¹ and which approach I will adopt is 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

¹ 1984 (4) SA 437 (E) at H 440E – G: Also see: *Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR at 556; *Sakusheka v The Minister of Home Affairs* 2009 (2) NR 524 (HC) para 37-42; *Justice v Tulu Trading Enterprises CC* (HC-MD-CIV-ACT-OTH-2019/02373) [2020] NAHCMD 412 (14 September 2020) para 43-44.

him and is satisfied that his evidence is true and that the defendant's version is false.'
(Own emphasis)

[24] The court was presented with numerous versions and explanations by both parties. I will confine my evaluation strictly on the relevant issues that need to be determined by this court. It follows that the court will devote attention to the main issues between the parties and will thus not engage in peripheral disputes.

[25] The plaintiff's version has always been that he did not receive any amount from the defendant, which can be seen from his particulars of claim where he maintained that he has a claim of N\$170 000 against the defendant.

[26] It should be noted that, the defendant has not disputed that the two cheques dated 6 and 8 July 2016 respectively were referred back to drawer for non-payment. The defendant acknowledged that during the said period it owed the plaintiff a collective amount of N\$170 000, being the combined value of the cheques. Mr. Nambombola stated that an amount of N\$10 499.00 for administrative costs and 15% of the funds received was deducted for VAT.

[27] The defendant then proceeded to state that, after the cheques were dishonored, it made an EFT payment of N\$80 000 into the plaintiff's bank account. The defendant presented its bank statement to court, evidencing the said payment made on 18 July 2016. The court accepts this evidence of the defendant to be credible and as a demonstration of the reliability of the evidence of the defendant.

[28] To the contrary, notwithstanding the fact that the plaintiff was paid the said amount of N\$80 000 on 18 July 2016, he went ahead and amazingly stated the following:

28.1 That he claimed an amount of N\$170 000 in his particulars of claim dated 27 October 2017 (inclusive of the N\$80 000 already paid).

28.2 That he claimed the total amount of N\$170 000 (inclusive of the N\$80 000 already received) as set out in his affidavit dated 5 February 2018 filed in support of the application for summary judgment.

28.3 That irrespective of the opposing affidavit to the application for summary judgment filed by Mr. Nambombola on behalf of the defendant dated 23 February 2018 where a bank statement was annexed revealing that an amount of N\$80 000 was paid to the plaintiff, plaintiff still insisted on claiming the whole amount of N\$170 000.

28.4 That despite the defendant having stated in para 4.2 of its plea dated 6 May 2019 to the above-mentioned plaintiff's particulars of claim and affidavit opposing the application for summary judgment with the annexure thereto, that it paid the plaintiff an amount of N\$80 000 on 18 July 2016, the plaintiff maintained as follows in his replication dated 23 May 2019: "Plaintiff denies that an amount of N\$80 000 was received on 18th July 2016 by electronic transfer from the defendant...";

28.5 That plaintiff proceeded to state in the pre-trial order dated 14 August 2019 that this court should determine whether he received payment of N\$80 000 on 18 July 2016, well knowing that he received same.

29. It was only in his evidence in chief that the plaintiff acknowledged that he received an amount of N\$80 000 through EFT from the defendant. When questioned as to the reason why he was claiming the amount of N\$170 000 in the face of the payment of N\$80 000, plaintiff stated that he informed his lawyers that he was paid N\$80 000 and was therefore only claiming the outstanding amount of N\$110 000. He proceeded to

state that the reference to the claim of N\$170 000 in his particulars of claim must have been a typographic error as it was meant to be N\$110 000.

[29] This court harbours no doubt that above explanation has the word 'fabrication' written all over it. If at all there was a typographic error which explanation is far-fetched, how does the plaintiff explain the presence of the same amount claimed again in the replication and the application for summary judgment. It is highly unlikely that a typographic error will triplicate itself in materially different documents. Even worse in support of the application for summary judgment, the plaintiff swore to an affidavit where he still claimed N\$170 000 well knowing that he had received part of the N\$170 000 in the form of N\$80 000. How the plaintiff replicated and insisted that he was not paid the N\$80 000 despite being provided with proof thereof in the form of a bank statement earlier during the summary judgment proceedings, is indicative of how much length the plaintiff can go in his deceit.

[30] The plaintiff's misery does end there, in evidence he testified that the defendant owed him an amount of N\$110 000 after having confirmed receipt of N\$80 000. He stated further that the defendant was only entitled to deduct an amount of N\$10 000 from the amount of N\$200 000 received from the Ministry. This brings the total amount to N\$190 000 which is N\$20 000 short of N\$200 000. When asked why he did not claim for the outstanding N\$20 000 in his particulars of claim or anywhere else in his pleadings, the plaintiff stated that he intended to claim it later. I find this explanation amazing and devoid of any truth, to say the least. How a person attempts to claim amounts emanating from the same business transaction, from the same amount, for the same purpose but at separate times defeats logic.

[31] Plaintiff further made a serious allegation in his witness statement which formed part of his evidence in chief where he stated that:

'16. On 16 August 2017, the defendant informed my legal practitioners after he received a letter of demand that he did not trust me and that he will deposit all the outstanding amounts bak to the Veterans Fund account... I refer to the email correspondence marked hereto as annexuer "EU5".'

[32] The existence of the above statement was vigorously disputed by Ms. Shailemo. The said email would have established that by August 2017 the defendant had not fully paid the plaintiff the amount that was due to him, contrary to defendant's case. To my astonishment however, the said email correspondence was nowhere near the sight of the court. The plaintiff failed to produce it. I find that it is highly unlikely that such email exists.

[33] Mr. Kandara argued that the defendant's bank statement reveals a payment of N\$698 827.99 to the defendant's bank account made on 14 July 2016 from GRNEFT and that this amount is unrelated to the funds of the plaintiff's mother. Mr. Nambombola explained that the aforesaid payment was inclusive of the amount of N\$200 000 paid for the beenfit of the plaintiff's mother. Mr. Kandara argued that this explanation is unbelievable and should be rejected as the Remittance Advice obtained from the Ministry provided that the date of payment of the amount for plaintiff's mother was 5 August 2015.

[34] This court was not provided with bank statement of the defendant for the year 2015. However, the fact that it is in July 2016 when the two cheques were drawn; that it was in July 2016 when the amount of N\$698 827.99 was paid into the defendant's bank account by the Government; that it is in July 2016 when the amount of N\$80 000 was paid by the defendant to the plaintiff (*albeit* earlier denial thereof by the plaintiff) and the fact that the evidence of Mr. Nambombola that funds from the Ministry usually took long, and even a year could pass before being paid over to the bank account of the recipient

notwithstanding the date of payment on the Remittance Advice, supports the defendant's version that payment of the funds of the plaintiff's mother could have been made later than 5 August 2015. Indeed a year could have passed before such payment is received by the defendant. I find that the explanation by the defendant that the money of the plaintiff's mother was only paid into the bank account of the defendant on 14 July 2016 is probable and there is nothing sinister about it.

[35] The plaintiff struggled to answer questions and when he responded he was evasive. The plaintiff further provided fabricated evidence to the court and was not credible as a witness. Mr. Nambombola on the other hand testified in a forthright manner and save for minor discrepancies, I found him to be a reliable and credible witness. I find that the probabilities favour the evidence of the defendant that it paid the amount of N\$170 000 to the plaintiff and deducted administrative costs and VAT from the amount of N\$200 000 .

Conclusion

[36] The plaintiff's version was mirrored with material contradictions. The defendant maintained its evidence and provided the necessary proof to solidify its version. The court finds no reasonable explanation why the plaintiff would have to change his version so late into the trial proceedings, when he had ample time to amend and rectify any mistakes that might have been in his pleadings and not only during the trial. The court further finds that it is highly probable that the plaintiff was paid an amount of N\$90 000 in cash by the defendant.

[37] On a preponderance of probabilities, there is no way that the court can be made to believe the version of the plaintiff to be true or highly probable. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the

probabilities of the case. In this matter the preponderance of probabilities favours the defendant. In the premises of the above conclusions and findings, this court accepts the version of the defendant as being probably true and rejects that of the plaintiff.

Costs

[38] There exist no other compelling factors that would render the court to deviate from the principle that costs follow the event. Thus, the defendant is awarded costs in this matter on a party and party scale.

Order

[39] As a result I make the following order:

1. The Plaintiff's claim against the defendant is hereby dismissed;
2. The defendant is awarded costs on a party and party scale.
3. The matter is removed from the roll.

O S Sibeya
Acting Judge

APPEARANCES:

FOR THE PLAINTIFF:

Mr. J Kandara
Of AngulaCo Inc., Ongwediva

FOR THE DEFENDANT:

Ms. T Shailemo
Of Shailemo & Associates, Ongwediva