CASE NO.: SA 07/2001

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

FIRST NATIONAL BANK OF NAMIBIA LTD

APPELLANT

And

ALOYSIUS ABRAHAMS

RESPONDENT

Coram: Strydom, C.J.; O'Linn, A.J.A. *et* Chomba, A.J.A.

Heard on: 10/10/2001

Delivered on: 28/03/2002

APPEAL JUDGMENT

Chomba, A.J.A.: By a combined summons dated 14th April 1999, Mr. Aloysius Abrahams commenced civil proceedings in which he was claiming damages for breach of contract. The action was against the First National Bank and was tried by Levy, A.J., in the High Court. Judgment was given in favour of Mr. Abrahams who was awarded N$198,905.32 in damages, together with interest at the rate of 20% from the date of the summons, and costs. Being dissatisfied with both the verdict and award, the First National Bank has appealed to this court. For the sake of convenience, I shall in this judgment refer to the Appellant and Respondent by the roles they had at the trial, namely the Respondent as the Plaintiff and the Appellant as the Defendant.

Mr. R.W.F. McWilliams SC, assisted by Advocate Vivier and Mr. David Beasley SC, assisted by Advocate B. Maselle, appeared before us representing the Defendant and Plaintiff respectively. I would like, at the outset, to pay tribute to all the Learned Counsel for the erudite manner in which they presented their submissions and the evident illustrious preparations they made in anticipation of the appeal hearing.

In the Particulars of the Claim accompanying the combined summons it was alleged that on or about 16th March 1994 at Windhoek the Defendant, represented by its duly authorized but unnamed

employee, entered into a Suspensive Loan Agreement with the Plaintiff. The agreement entailed purchase by the Plaintiff of two trailers which were to be supplied by a third party, while the Defendant was to finance the transaction by paying to that third party a sum of N$80,000 in respect of the one trailer, the Zali, and N$65,000 for the second trailer, the Zelna. The total financing involved was N$171,817 which included various bank charges. According to the agreement, which was in writing and executed by the parties with their respective witnesses on the 16th of March 1994, the Plaintiff was to repay that amount by way of instalments spread over a period of 60 months, commencing on 1st May 1994. the last instalment was payable on the 15th March 1999.

The Suspensive Sale Agreement was produced by the Plaintiff by mutual consent. It shows the Plaintiff as the buyer and the Defendant as the Seller. The serial or chassis numbers on the trailers are shown as 880315143060 for the Zali and 0693927 for the Zelna. All these details, together with those mentioned in the preceding paragraph, are reflected on the obverse side of the agreement, while on the reverse side there are printed a number of conditions to be observed by both parties.

It is now necessary to summarise the essence of a Suspensive Sale Agreement. An intending buyer of specific and identified goods would conclude negotiations with the supplier thereby ascertaining the goods and also the purchase price. The buyer is required to satisfy himself/herself that the goods are fit for the intended purpose. Thereafter he/she would request the supplier to furnish an invoice detailing the goods to be sold and purchased, name and address of the supplier, name and address of the buyer and the price. The invoice, is addressed to the financier, usually a bank. The buyer would then apply to the bank for the financing of the transaction on the strength of the invoice. Upon acceptance of the application, a Suspensive Sale Agreement, which is a stereotype printed form is completed and executed as hereinbefore stated. Subsequently a delivery note, also a stereotype printed form is completed. The latter is addressed to the supplier as per the invoice. The delivery note in effect calls on the supplier to deliver the goods in good order and to the satisfaction of the buyer who is to accept delivery as an agent of the bank. Further the note states that after the buyer has inspected the goods, the supplier should arrange for the buyer to sign an acknowledgment of the delivery which is the bottom part of the delivery note itself. The bank thereby undertakes, upon receipt by it of the duly completed acknowledgement of delivery, to pay the purchase price to the supplier.

Before reviewing the evidence in this matter, let me reproduce herein a few of the salient conditions in the Suspensive Sale Agreement.

Para 2 . Declaration and Acknowledgment

2.1.1 Buyer agrees to recognize FNB as the new owner and to hold the goods as bailee on behalf of FNB subject to the terms of the agreement and that any right recorded herein in favour of Seller, shall on cession enure to the benefit of FNB

2.1.2 acknowledges that prior to the signing of the agree-

ment and the schedule (except in respect of the registration number, if any of the goods) were fully completed and that the particulars set forth therein are true and correct.

2.2 If FNB is Seller under this agreement, Buyer shall, when

Receiving delivery of the goods be deemed to be acting as the agent of FNB for the sole purpose of accepting

delivery on behalf of FNB from the supplier, being the person selected by Buyer from whom FNB shall have purchased the goods, which Buyer shall have selected and approved as being fit for the purpose for which Buyer requires them, for resale to Buyer in terms of this agreement.

Paragraph 4 - Ownership and Risk

4.1 Ownership in the goods shall remain vested in Seller and not

pass to Buyer until receipt by Seller of all amounts payable by Buyer under this agreement.

4.2 All risk of loss damage destruction or otherwise in and to the goods shall pass to Buyer on delivery to Buyer or on signature of this agreement whichever is the earlier, and all costs of delivery and installation of the goods and insurance in transit shall be borne and paid by Buyer.

Paragraph 7 - Use of the Goods

7.1 Buyer shall at all times, keep the goods in his possession and control, and take reasonable care in the use of the goods and shall at his own cost and expense maintain the goods in proper working order, and if a motor vehicle in a roadworthy condition and shall protect them from loss or damage if the goods are not to be kept at Buyer's chosen domicilium. Buyer shall upon taking delivery of the goods notify Seller in writing of the address of the premises ("the designated address)" in or upon which the goods will be kept and notify Seller in writing immediately there is any change in such address or of the place where the goods are kept. Furthermore Buyer shall at his own expense keep the goods free from attachment, hypothec or other legal charge or process and shall not without the prior written consent of Seller sell, let, loan, pledge, transfer, or otherwise encumber the goods in any way or permit any lien to arise in respect of the goods.

As earlier noted, the Plaintiff filed particulars of claim in support of his combined summons. It is necessary to refer only to some of the paragraphs of these particulars, viz:

Paragraph 3

On or about the 16th March 1994 and at Windhoek the Plaintiff acting personally and the Defendant, represented by a duly authorized employee entered into a written Suspensive Sale Agreement in respect of two trailers – the one a Zelna and the other a Zali – which are hereinafter referred to as the "trailers". Copies of the obverse and reverse sides of the aforesaid Suspensive Sale Agreement are annexed hereto marked "A1" and "A2" respectively. The Plaintiff prays that the terms of the Suspensive Sale Agreement be incorporated herein as if specifically traversed.

Paragraph 4

It was a material express, alternatively implied, term of the aforesaid suspensive sale agreement that the Defendant was the owner of the trailers and would be able to pass ownership of the trailers to the Plaintiff.

Paragraph 5

The Defendant breached the aforesaid written Suspensive Sale Agreement in that, (the Defendant):-

5.1 during or about March 1995 entered into a written Suspensive Sale Agreement with Mr. Bindeman in terms whereof the Defendant sold to Mr. Bindeman who purchased from the Defendant, the Zali trailer with chassis number 880315143060 and pursuant to that agreement Mr. Bindeman obtained ownership of the trailer. As a consequence the Defendant was not able to pass ownership of the trailer to the Plaintiff.

5.2 at the time of conclusion of the agreement was not the owner of the trailers.

6. a) As a result of the aforesaid breach the Plaintiff has cancelled,

alternatively, hereby cancels the written Suspensive Sale Agreement

Alternatively to 6 a):

b) Performance in terms of the written Suspensive Sale Agreement was impossible at the time and during the existence of the said agreement inasmuch as the Defendant was not the owner of the trailers nor in a position to transfer

ownership in and to the trailers to the Plaintiff.

c) As a result of the aforesaid the agreement terminated, alternatively was void .

d) The Plaintiff is not in a position to tender return of the trailers to the Defendant inasmuch as the Defendant, alternatively, a third party has taken possession thereof.

Paragraph 7 – Alternatively to paragraphs 4 to 6 aforegoing the Plaintiff pleads :-

a) the Defendant, at the time of entering into the written agreement and represented by an authorized employee, represented to the Plaintiff that it was the owner of the trailers.

b) The aforesaid representation was material and was made:

i) with the object of inducing the Plaintiff to enter into the written agreement with the Defendant: and/or

ii) with the knowledge that the Plaintiff would act on

the assumption that:

A. the Defendant was the owner of the trailers;

B. the Defendant would at the conclusion of the agreement be able to give the Plaintiff free and undisturbed possession of the trailers,

and the Defendant owed a duty of care towards the Plaintiff to provide correct information.

c) The Plaintiff relying on the truth of the representation entered into the written Suspensive Sale Agreement with the Defendant.

d) At the time of negotiating the agreement and at the time of

entering into the written suspensive sale agreement, the respresentation was false in that the defendant was not the owner of the trailers and such representation was made negligently alternatively intentionally.

e) As a result of Defendant’s misrepresentation as aforesaid the Plaintiff cancelled alternatively hereby cancels the agreement.

f) Alternatively to paragraph 7 (e) above had the Plaintiff known of the true position, the Plaintiff would not have

concluded the agreement with the Defendant on any basis at all.

g) The Plaintiff is not in a position to tender return of the trailers to the Defendant inasmuch as the Defendant, alternatively a third party has taken possession thereof.

In its pleading in reply to the claim by the Plaintiff the Defendant denied the allegations in all the paragraphs reproduced above from the particulars of claim and put the Plaintiff to strict proof, as indeed it did to the rest of the controversial particulars.

The only witness called in support of the Plaintiff's case was Mr. Johannes Bindeman. Herein below is a summary of his evidence:

At one time Bindeman was the owner of both trailers which, as we have already seen, were the subject of the Suspensive Sale Agreement between the Plaintiff and the Defendant on the 16th of March 1994. Bindeman testified that he purchased the Zali, also known as the Zanli semi-trailer, from a Mr. Du Plessis in Johannesburg sometime in 1993. He had it registered in Aranos, Namibia, as N149AR. Regarding the Zelna, he stated that he bought it from Zelna Trailers in Alberton in 1992 or 1993. Bindeman subsequently registered the Zelna as N567AR. Operationally he used the Zali semi-trailer at the front and

the Zelna at the back, both hooked to the Scania horse or Tractor which was also his property. It would appear that later in 1993 he sold the Scania horse and remained only with the two trailers. The trailers remained idle for sometime at Bindeman's farm. Later a friend and business partner of his, one Andriano Schneider, noticing the idle trailers, suggested to Bindeman that the two trailers could make money. Schneider mooted the idea of loaning both trailers, to which Bindeman was agreeable. Bindeman was imprecise as to the nature of the loan, whether gratuitous or was by way of renting.

In 1993 or 1994 Bindeman bought another Scania horse. He later entered into a contract with a company known as Pupkewitz to transport Zinc. For this purpose he needed, and did recover, the Zali trailer from Schneider. The actual recovery of the Zali was done some two or three months before he purchased the second Scania horse - he did this in anticipation of the Pupkewitz contract. Bindeman further disclosed that from the date of the recovery of the Zali he retained it in his possession throughout until the end of 1998 or beginning of 1999 when he sold it to one John George Thompson. In fact under cross-examination Bindeman disclosed that he remained the owner of the Zali right from the time he bought it in 1993 from Mr. Du Plessis up to the time he sold it to Mr. Thompson in 1998 or 1999. Documentation produced before the court a quo indicates that the Bindeman-

Thompson Zali sale was similarly by way of a Suspensive Sale Agreement with the Bank Windhoek as the financier.

It was Bindeman's evidence that the Zelna remained with Schneider from the time when he, Bindeman, retrieved the Zali up to the time of Schneider's death in 1997. However Bindeman did not know the actual physical whereabouts of the Zelna for sometime both before and after Schneider's death. After Schneider's death Bindeman made some concerted effort to try to locate the Zelna, which had continued to be his (Bindeman's) property, and did so through his Attorneys, K.S. Dannhauser. He did not succeed.

Under cross-examination Bindeman swore that he never sold the Zelna to anybody at all, thus re-affirming his evidence that Schneider had kept that trailer only as per loan arrangement to which reference has been made earlier herein.

During his business travels in his newly acquired Scania horse and while towing the Zali trailer attached to it Bindeman once came across Abraham's driver. This was at the Ariamsvlei border post between Namibia and South Africa. He noticed that coupled to that driver's own horse was the Zelna and another trailer which had same registration number, that is to say N149AR, which belonged to the Zali trailer which

was at that time connected to Bindeman's horse. On being questioned about the Zelna, the driver explained that a Mr. Abrahams, the Plaintiff herein, had purchased it from somebody. Later Bindeman brought to the attention of Schneider this anomaly of the duplication of the Zali registration number on one of Abrahams' trailers. Schneider promised that he would rectify the situation. As for the Zelna Schneider explained that Abrahams had just borrowed it from him.

Bindeman also testified that at one time he was indebted to Schneider in the sum of N$55,000 but did not have the means of paying it back. So he asked Schneider to issue an invoice to enable Bindeman get money from the Defendant. To this end Schneider made out an invoice on paper letter headed, "A.C.C. Agencies". This documentation is to be found at page 226 of Volume C of the Bundle of Documents with the following details written or printed on it :

Addressee : First National Bank of Namibia, Box 2941,

Windhoek

Invoice No. : 0140

Date : 28th March 1995

Quantity and description: 1 x 1995 Rebuilt Henred Trailer

Chassis No. : 880315143060

Buyer : J.K. Bindeman, Box 318, Aranos

Price : N$95,000.

Needless to state that the supplier, according to this invoice, was A.C.C. Agencies, a company owned by Schneider.

In consequence of that invoice, the Suspensive Sale Agreement was concluded and executed by a representative of that Bank and by Bindeman. The details of the goods subject of the Suspensive Sale Agreement were as per the invoice aforesaid. The date of execution of the agreement is shown as 29th March 1995; mode of repayment 36 monthly instalments with effect from 29th March 1995 and to be completed on the 28th of March 1998. (See at page 225 of Volume C). One copy of this Suspensive Sale Agreement was handed to Mr. Bindeman. A copy of this is at page 220 of Volume C and this copy has the word “COPY” in bold print across it. On this copy Mr. Bindeman scored through the word “Henred” and superimposed over it the word “Zanli”.

The invoice and the Suspensive Sale Agreement were put under scrutiny during cross-examination of Mr. Bindeman. He disclaimed the latter as a Suspensive Sale Agreement and instead called it a mere

loan agreement whereby he borrowed from the Defendant N$95,000 and pledged the Zali trailer as a collateral, adding that he needed the money in order to repay the loan to Schneider. Challenged as to why he used the artifice of the Suspensive Loan Agreement when all that he needed was a loan, Bindeman confessed that not only he alone resorted to such practice when in need of money. He was also challenged on his self confessed cancellation of the word “Henred” and replacement herewith of a “Zanli”. Bindeman lamely insisted that the trailer at issue in that transaction was not a Henred, as he had never ever in his life owned a Henred trailer. He further explained that the invoice was not made by himself but by Schneider; equally the insertion of Henred in the Suspensive Sale Agreement was not one of his making, but that of the bank, the Defendant, Bindeman said. When it was bluntly put to him that he defrauded the Defendant in that transaction by representing falsely that he was intending to buy the trailer indicated therein to be supplied by A.C.C. Agencies, Bindeman apparently found no way of escape and answered - “Yes, we do this for me to get the money by the bank”. (see at page 237, lines 16 – 18, Volume 3 of the record of appeal). In cross-examination Bindeman confessed that at the time of this Suspensive Sale Agreement the Zali trailer was in fact in his possession at Aranos and that he never purported to buy it from anybody. Yet on the supporting invoice it was

stated that the trailer was to be delivered by A.C.C. Agencies to Bindeman in Aranos.

While under the pressure of cross-examination Bindeman was forced to make the following admission as reflected at page 226, lines 20 to page 227 line 4 Volume 3 of the record –

"Ms. Vivier Turck - Yes, and you also earlier indicated it is quite possible to remove a plate or to have a plate punched out with the same chassis number as yours.

Bindeman Yes he (ie. Schneider) can do it.

Ms. V. Turck You say it is easy to do that?

Bindeman Ja

Ms. V. Turck So it is quite possible, now there are two trailers with the same number, it is possible that they may have had the same chassis number and that one was in fact sold to Mr. Abrahams that was not yours?

Bindeman The front one, Ja."

The reproduction and any imprinting of duplicate chassis numbers is also elaborated on at pages 147 – 148 of the appeal record where the following occurs from line 20:

Ms. V. Turck Where is the chassis number usually found on the trailer?

Bindeman You put it under a plate, on small place, they stencil it on a plate.

Ms. V. Turck And that can also be removed at leisure?

Bindeman Yes.

Ms. V. Turck And moved about?

Bindeman Yes. A few times he(Schneider) told me he only pay for one trailer and there run now three trailers on my number."

And at pages 149 – 150 the following dialogue continued in the some vein:

"Ms. V. Turck Yes. Mr. Bindeman, the reason why I ask you this is, you say that Mr. Schneider practiced in that way, he says you, only need one Zelna and one Zali and thereafter you just change number

plates and chassis numbers and things and ……."

Court	No, who said about chassis numbers, he never said that he changed chassis numbers.
Ms. V. Turck	Well, I did ask him whether the chassis number could easily be placed on another truck.
Bindeman	Yes, you could have.
Ms. V. Turck	It is just a plate that you loosen it or you can make a duplicate and put it on another truck or trailer?
Bindeman	Yes, everybody can put this chassis number on a trailer. If I built the trailer I quickly just put the chassis number on with my own, I built lots of trailers."

On behalf of the Defendant it has been submitted by Mr. McWilliams, inter alia, that Bindeman's evidence was "wholly unsatisfactory and should have been rejected in its entirety " (Heads of Argument at paragraph 27.2). In further argument at paragraph 27.3 the Appellants' Heads of Arguments state –

"Even if one were to accept the evidence of (Bindeman) upon which the (Plaintiff) relies, when one analyses this evidence it does not provide a foundation for the

(Plaintiff's) claim".

In retort to the foregoing, the Heads of Argument on behalf of the Plaintiff state as follows in paragraph 4 :

"4.1 Bindeman was criticized by Counsel for the Bank (Defendant) as being a "poor witness, and unsatisfactory in many respects" and whose evidence should be rejected.

4.2 The Court *a quo* was fully alert to this criticism. There is no doubt that Bindeman was not an ideal witness. Despite this, the court a quo was prepared to accept his testimony in certain respects.

There are no good grounds for rejecting the approach adopted by the court below.

No misdirections are relied upon by the bank and general approach is that an appeal court will be slow to interfere with the findings of credibility made by the lower court. See generally R v Dhlumayo and Anor 1948(2) S.A. 677(A)"

Upon a proper reading of the judgment of the trial judge it is indeed correct that to a large extent the verdict in favour of the plaintiff was founded on the credibility tagged to Bindeman's evidence. Therefore the submission on behalf of the Plaintiff that the appellate court ought to be slow in interfering with the trial court's decision based on the credibility of witness ses was well founded. It is a well established and recognized legal truism, indeed it is a principle of law, that a trial judge has an advantage over an appellate court in that the judge has seen and heard the witnesses and therefore is in a better position to assess their credibility.

In the case of Watt or Thomas v Thomas (1947) A.C. 484 Lord Thankerton (sitting in the House of Lords with Viscount Simon, Lord McMillian, Lord Simmonds and Lord du Parq) stated at page 487 –

> "1. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain and justify the trial judge's conclusion.

2. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

3. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

Furthermore in Benmax v Austin Motor Company Limited (1955) 1 All ER 326, another House of Lords case, the headnote reads -

"An appellate court, on an appeal from a case tried before a judge alone should not lightly differ from a finding of the trial judge on a question of fact, but a distinction in this respect must be drawn between the perception of facts and evaluation of facts. Where there is no question of credibility of witnesses, but the sole question is the proper inference to be drawn from specific facts, an appellate court is in as good a position to evaluate the evidence as the trial judge, and should form its own

independent opinion, though it will give weight to the opinion of the trial judge."

In the present case the learned trial judge assessed the evidence of Bindeman by stating the following at page 352 of Volume 4 of the Appeal Record, i.e. in his judgment –

"(Bindeman) certainly impressed the court with a sound knowledge relating to trailers. This knowledge was tested in cross-examination but not dented".

And on page 354 he said –

"Bindeman is an objective witness with no interest in this matter."

That assessment quite clearly shows that the judge held Bindeman to be a credible witness. But was he satisfactory? And if not, in what respect was he not satisfactory? The answer to the first part of this question is provided by the Plaintiff's own appeal advocate Mr. Beasley, who submitted, as shown earlier herein, namely –

"Bindeman was criticized as being a poor witness and not satisfactory in many respects. The court a quo was fully alert to

> this criticism. There is no doubt that Bindeman was not an ideal witness."

This was a concession that Bindeman was not a satisfactory witness, albeit that the court found him to be credible. We should therefore explore in what way, his credibility notwithstanding, Bindeman was not a satisfactory witness. It is necessary to make this exploration and in doing so I propose to rely on Lord Thankerton's dictum in Watt or Thomas, supra, when he said –

> "The appellate court, either because the reasons given by the trial judge are not satisfactory or it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then be at large for the appellate court."

I equally rely on Benmax, supra, to the extent that the headnote states that where there is no question of the credibility of witnesses, but the sole question is the proper inference to be drawn from specific facts, an appellate court is in as a good position to evaluate the facts as the trial judge, and should form its own independent opinion."

A well worn legal principle states that he who asserts the affirmative must prove his assertion. In other words when a plaintiff sets out particulars of his claim, he thereby makes only allegations. These have to be proved. Indeed we have seen that on all controversial particulars given by the plaintiff herein, the defendant has him to strict proof.

The basic breach of contract which is alleged in the present case is that the Defendant, having bought and resold the Zali and Zelna trailers through the mechanism of the Suspensive Sale Agreement on the 16th March 1994, later entered into yet another such agreement on 29th March 1995 whereby one of the same trailers, the Zali, was sold to Bindeman. As a result of that second resale the defendant, being the person in whom ownership in the trailers was vested under the sale agreement of 16th March 1994, disabled itself from transferring, at the time of maturity of the said sale of 16th of March 1994, such ownership to the Plaintiff. I pose the question. Was that breach proved by the Plaintiff's only witness, Bindeman?

Bindeman's total evidence in this regard was that he bought the Zali and Zelna Trailers way back in 1992 or 1993. He used them in tandem with his scania horse until sometime later in 1993 when he sold that horse. The trailers then remained for sometime idle on his farm. In

due course, his friend and business partner, Schneider, borrowed the two trailers and used them in business. At yet a later stage Bindeman purchased a second scania horse. For the purpose of utilizing that horse in a transport contract which Bindeman then had with Pupkewitz, Bindeman withdrew the Zali from Schneider. The Zali thereafter remained in Bindeman's physical possession until he sold it to Thompson at the end of 1998 or at the beginning of 1999. As for the Zelna Trailer, this remained with his friend Schneider up to the time of Schneider's death in 1997. Thereafter he took action through his Attorneys to recover the Zelna.

The nearest Bindeman came to proving that the Zali trailer went through a sale by way of a Suspensive Sale Agreement on the 29th March, 1995, was when he stated that during that period Bindeman had a loan of N$55,000 from Schneider. Not having his own independent means of repaying that loan, he conceived the idea of getting yet another loan from the defendant in order to pay Schneider. To that end Bindeman asked Schneider to let him have an invoice to present to the defendant.

That invoice, as we have earlier seen, represented that the A.C.C. Agencies, a company owned by Schneider, had a rebuilt Henred trailer, chassis number 880315143060, for delivery to Bindeman upon

payment of N$95,000. It was on the basis of that invoice that the 29th of March 1995 agreement was concluded, showing that the Defendant bought and resold the said rebuilt Henred trailer to Bindeman for the basic price of N$95,000.

I have shown hereinbefore that under cross-examination Bindeman disclaimed the transaction of 29th March 1995 as a Suspensive Sale Agreement; he denied that the trailer concerned therein was a rebuilt Henred, but a Zali; to that end he cancelled the word “Henred” and superimposed over it the word “Zali”, doing so only on the copy supplied to him by the Defendant. Bindeman conceded that the copy (of that transaction) which remained with the Defendant, and which was exhibited at the trial during Bindeman’s cross-examination still had the description of the trailer sold as a “rebuilt Henred”. Moreover, Bindeman denied the clear statement in the A.C.C. Agencies’ invoice suggesting that the rebuilt Henred trailer, which, as we have seen, was, according to Bindeman, not a rebuilt Henred but a Zali, to be delivered to Bindeman at Aranos. Bindeman asserted that in fact at the material time the Zali was in his physical possession at Aranos. Bindeman moreover brazen-facedly had no option but to confess that as regards the so called Suspensive Sale Agreement of 29th March 1995 he did defraud the Defendant, the transaction having been a fake sale.

In a nutshell the only credible evidence Bindeman gave regarding his association with the Zali trailer was this. Having bought it in Johannesburg sometime in 1992 or 1993, it remained in his ownership and possession throughout, save for a period of two to three months when it was on loan to Schneider; he only disposed of it by sale to Thompson in 1998/99. On 29th March 1995, however, he was involved with Schneider in a cooked up fake sale of the Zali by presenting it to the Defendant as a rebuilt Henred trailer, but otherwise with the same Zali chassis number 880315143060, and, as a result, he obtained N$95,000, out of which he paid Schneider N$55,000. He categorically denied having sold the Zelna to anybody, excepting its being loaned and retained by Schneider up to 1997 when Schneider died.

It will clearly be seen, therefore, that Bindeman's evidence was a far cry from the allegation of breach asserted in paragraph 5 of the particulars of claim which suggested that the Defendant divested itself of the ownership of the Zali by reselling it to Bindeman on 29th of March 1995 during the existence and continuance of the Suspensive Sale Agreement which the Defendant had concluded with the Plaintiff on 16th of March 1994. In fact Bindeman's evidence was blatantly in contradiction with the Plaintiff's allegation that the plaintiff bought the trailers through the Suspensive Sale Agreement on the 16th of March

1994. This begs the question whether the so called Suspensive Sale Agreement of 16th of March 1994 was not another bogus transaction.

It is my considered view that once the averment in paragraph 5 of the particulars of claim is irreparably dented, then the Plaintiff is left with no leg to stand on in his claim against the Defendant. That averment was most pivotal to the case against the Defendant.

The strength of a party's case must be self sustaining: it must never be propped up by reason of the weakness of the case of the opposite side. This is a truism to which the trial judge in this case, with due respect to him, seemed oblivious. His judgment shows that he dwelt in extenso on the weaknesses of the Defendant's pleadings. In doing so the learned judge allowed those weaknesses to over shadow the emptiness of the Plaintiff's supporting evidence.

If the obverse side of the Plaintiff's case does not stand the test of scrutiny because of the failure by Bindeman's evidence to prove the Plaintiff's basic averment, let us look at its reverse side – the case as presented by the Plaintiff having been the unusual witness for the Defendant. I propose to do this merely ex abundante cautela . Let us see whether that case fills up the yawning gap which Bindeman's evidence shied away from plugging .

In his evidence the Plaintiff, Abrahams, emphatically said at the outset that when he entered into the agreement of 16th March 1994 earlier mentioned, he did not take delivery of the trailers soon after the agreement was executed. It was his evidence that the trailers were delivered to him three or four months after the execution of the contract, adding that that was because the trailers were not in good working condition at the time of the sale. His attention was drawn to the delivery receipt to be found at page 90 of the volume A of the record of appeal. That receipt contained the information requesting A.C.C. Agencies, the suppliers of one Zali trailer and one Zelna trailer to deliver to the Plaintiff as a customer of the Defendant and was signed on the 16th of March 1994 by a representative of the Defendant. It is there stated also that upon delivery of the goods sold, the trailers, the customer should inspect the goods and then sign an acknowledgement of delivery. During the questioning by Ms. Vivier Turck, Abrahams acknowledged his signature on the said receipt and added that he appended it thereon on 16th March 1994, the very day of the Suspensive Sale Agreement. Notwithstanding his admission that he so signed the acknowledgement the Plaintiff asserted that he did not take delivery of the trailers as acknowledged. The Plaintiff was further asked if he had seen or inspected any of the two trailers before

he bought them by way of the Suspensive Sale Agreement. He answered that he did not.

An affidavit which is at pages 14 – 20 in volume A of the record was put to the Plaintiff while he was in the witness box. He acknowledged it to be an affidavit he swore in regard to the court action he had instituted against Schneider. The position as represented in that affidavit was succinctly that by the Suspensive Sale Agreement of 16th of March 1994 aforesaid the Plaintiff bought the Zali and Zelna trailers from Schneider. However the Plaintiff did not take delivery of the trailers upon concluding the agreement that day. He instead took delivery on the 15th of July 1994. This was because at the time of the agreement the trailers were not in good working order. By 15th of September 1994 the mechanical problems of the trailers had worsened and the plaintiff had to, and did, return the trailers to Schneider for further attention.

The Plaintiff swore in terms of that affidavit that while the two trailers were with Schneider after their return to him, the Plaintiff's pleas for Schneider to surrender them back were falling on deaf ears. Schneider was continually giving excuses for non-delivery. Eventually at the end of February 1995 the Plaintiff and Schneider agreed that Schneider would repurchase the two trailers from the Plaintiff at a price equivalent to the outstanding balance on the Suspensive Sale

Agreement of 16th March 1994. That deal was concluded legally with the involvement of the Attorneys of both the Plaintiff and Schneider.

At pages 320 to 321 occurs a text as to how the foregoing repurchase proceeded -

"Vivier Turck Yes. What was your concern in regard to the payment to the Bank, What was your way?

Plaintiff Well there were no concerns. After (Schneider) took over the trailers he said that he would pay for the trailers. But after he passed away the bank came back to me.

Vivier Turck Sir, is it correct that (Schneider) paid for these trailers until he passed away?

Plaintiff Yes. That is correct.

Vivier Turck That this whole application was brought about because at one stage (Schneider) didn't pay and he didn't comply with his commitment to you?

Plaintiff That is correct, on a certain stage he didn't pay.

Vivier Turck And you took him to court to enforce your agreement, is that correct?

Plaintiff That's correct"

It is patently clear to me that the plaintiff did not cut a good figure as a witness. In a nutshell his story was that after he had concluded the Suspensive Sale Agreement and acquired the two trailers, he returned them to Schneider so that the latter could put them into good working order. Schneider procrastinated in that assignment and by February 1995 the Plaintiff was fed-up and decided that Schneider should retain the trailers permanently. He therefore resold them back to Schneider. That resale was by way of Schneider taking over the Plaintiff's obligations under the Suspensive Sale Agreement of 16th March 1994. That deal concluded, Schneider duly paid subsequent instalments as they fell due. Regrettably, Schneider died before he finished paying the outstanding balance.

The question I pose is, if the Plaintiff sold the Zali and Zelna trailers back to Schneider in February 1995, how could the Defendant sell the very same Zali trailer on the 29th March 1995 to Bindeman? In my view the pleading in paragraph 5.1 of the Plaintiff's particulars of claim does not make sense.

The contents of the affidavit in the action between the Plaintiff Abrahams and Schneider were put to the Plaintiff during examination by Ms. Vivier Turck and Abrahams conceded that everything in it which was put to him was true and correct. Therefore those parts of the affidavit became part of Mr. Abrahams' evidence in the instant case. He adopted them. It is consequently surprising that the learned trial judge in the court below never made any reference to that very crucial evidence. In my view the learned trial judge fell into error in this regard. He misdirected himself by failing to consider that relevant evidence.

On a critical analysis of the evidence of Bindeman and that of the Plaintiff what emerges is this. Bindeman bought the Zali and Zelna in 1992 or 1993. In due course he loaned the two trailers to Schneider, but later retrieved the Zali. He thereafter kept the Zali until at the end of 1998 or beginning of 1999 when he sold it to Thompson. The Zelna remained iin the possession of Schneider from 1993 until 1997 when Schneider died.

Bindeman's evidence has put into question the authenticity of the reputed suspensive sale agreement of 16th March 1994. Perhaps that explains why Abrahams faked signing for acceptance of the delivery of the 2 trailers on 16th March 1994 when in fact nothing was delivered to

him that date. It also seems to explain why Abrahams, though in accordance with the printed conditions of the suspensive sale agreement of 16th March 1994 he was required to inspect the trailers to satisfy himself that they were fit for the intended purpose, did not in fact inspect them.

Regarding the Plaintiff, Abrahams' evidence as told in the affidavit which has received scrutiny in this judgment, after what now appears to be a fake sale on 16th March 1994, except for a short period between 15th July 1994 and 15th September 1994 when the Plaintiff supposedly took delivery and kept the two trailers, the two trailers were in the possession of Schneider. This was because Schneider was ostensibly trying to repair them or was giving lame excuses for not delivering them back to the Plaintiff. Late in February 1995 the Plaintiff resold them to Schneider through a legally arranged agreement. This resale took place at a time when the Suspensive Sale Agreement of 16th March was subsisting.

By clause 4.1 of the printed conditions of that Suspensive Sale Agreement ownership of the trailers vested in the Dependant upon execution of that agreement. Consequently, the purported resale by the Plaintiff of the trailers in February 1995 breached that condition, because he had no power to transfer ownership. The Plaintiff cannot

now be heard to allege that the Defendant sold the Zali trailer to Bindeman on 29th March 1995, because by that date both trailers had been resold by the Plaintiff to Schneider. The Plaintiff's claim in this matter therefore seems to be spurious.

At the end of the day the situation is that neither Bindeman nor the Plaintiff succeeded in giving credence to the critical averments occurring in the Plaintiff's particulars of claim. To my mind, therefore, the learned trial judge erred in giving judgment in favour of the Plaintiff whose case remained unproved at the end of the trial.

I would allow this appeal.

_____
CHOMBA, A.J.A.

I agree

_____
STRYDOM, C.J.

I agree.

_____
O’LINN, A.J.A.

STRYDOM C.J.:

I agree with my brother Chomba that the appeal in this matter should succeed. Mr. MacWilliam, on behalf of the appellant, submitted that this was a matter where the Court should grant the costs consequent upon the employment of two Counsel. I agree with Counsel that the matter was not easy and that it involved complicated issues. This is in my opinion brought out by the fact that the respondent also employed the services of Senior Counsel. I am therefore satisfied that this is an appropriate instance where the Court should allow the costs of the appeal to be taxed on the basis of the employment of two Counsel.

In the result the following order is made:

1. The appeal succeeds with costs, such costs to include the costs consequent upon the employment of two Counsel.

2. The judgment of the Court *a quo* is set aside and the following judgment is substituted therefore, namely:

“The plaintiff’s claims are dismissed with costs.”

_____

STRYDOM, C.J.

I agree.

_____

O’LINN, A.J.A.

I agree,

_____

CHOMBA, A.J.A.

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ASSISTED BY : Adv. S. Vivier-Turck

COUNSEL ON BEHALF OF THE RESPONDENT: Adv. D.M. Beasley, S.C.

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