REPORTABLE

CASE NO.: SA 13/2012

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

NAMIB CONTRACT HAULAGE (PTY) LTD **Appellant**

and

OSHAKATI GARAGE CC **Respondent**

Coram: MARITZ JA, MAINGA JA and MTAMBANENGWE AJA

Heard: **17 June 2013**

Delivered: **15 November 2013**

APPEAL JUDGMENT

MAINGA JA (MARITZ JA and MTAMBANENGWE AJA concurring):

[1] The appellant (the defendant in the Court *a quo*) appeals against the whole judgment and order of Miller AJ in the High Court in which he upheld an action for payment of the sum of N$628 500,65 for services rendered, goods sold and

delivered, storage fees and interest claimed by the respondent (the plaintiff *a quo*).[1]

[2] On 22 August 2007 the respondent instituted action by simple summons (later amplified by an amended declaration) against the appellant seeking relief on the grounds as set out in paragraph [1] for the amount of N$685 673,69, subsequently reduced to N$628 500,65. During 2008 the plaintiff *a quo*, Trailer Spares and Repairs CC, was substituted with Oshakati Garage CC. The substitution was not opposed. As it were, counsel for the respondent informed us from the Bar – and this has not been gainsaid - that the substitution took place by agreement between the parties. Unfortunately, the pleadings and citation of the parties in the headings thereof were not formally amended to reflect the substitution and, as a result, the judgment and order were issued under the seal of the Registrar of the High Court on a document citing the parties without regard to the substitution. When the matter came before us on appeal, Trailer Spares & Repairs CC was therefore still cited as a party to the dispute. As a consequence, the appellant raised a point *in limine* – albeit for the first time in this Court - that no notice of amendment had been filed to reflect the substitution and that no power of attorney and resolution had been lodged *a quo* to authorise one Mr Jakobus Hermanus van Staden to act on behalf of Oshakati Garage CC.

[3] In its amended declaration, the respondent alleged that the following had been the express, alternatively implied or, in the further alternative, tacit terms of the agreement with appellant:

---

[1]See *Trailer Spares and Repairs CC (Oshakati Garage CC) v Namib Contract Haulage (Pty) Ltd*, Case No. I 2377/2007 judgment of the High Court delivered on 1 March 2012.

3.1 The respondent would repair appellant's motor vehicles at the appellant's special instance and request, if and when required, and at the respondent's normal rate for such repairs and services;

3.2 The respondent would order any goods and/or parts necessary for repairing the vehicle, the costs of which the appellant would be liable for;

3.3 The respondent would charge storage costs in respect of motor vehicles at the rate of N$45,00 per day per vehicle.

3.4 The appellant would pay the respondent for all services rendered, goods and/or parts ordered and storage fees charged on a monthly basis and that a minimum amount of N$25 000,00 would be paid each month in settlement thereof;

3.5 Interest on overdue accounts would be charged at a rate of 2.5% per month.

3.6 The appellant would be liable towards the respondent for tow-in costs at the rate of N$12,50 per kilometre if the required tow-in necessitated the use of tow-in truck, alternatively at the rate of N$4,50 for the costs of travelling to a broken down vehicle.

[4] In the amended declaration there was a further claim of N$4887,50 for a Mercedes L15 Truck which the respondent had leased to the appellant in terms of an agreement, the appellant represented by one Fillemon at the time when it was concluded.

[5] From the appellant's plea it is clear that it denies the alleged agreement on the storage costs, the monthly minimum payment of N$25 000,00 and the interest of 2.5% per month. The appellant pleaded that it had been agreed that it would pay respondent on presentation of invoices for the work done by respondent to appellant's vehicle and admitted that respondent had rendered the services claimed and demanded payment. It pleaded that it was entitled to refuse payment in the amount of N$685 673,69 because the amount included storage costs and interest for which it was not liable and, given payments already made, that it did not know whether it still owed appellant money in respect of the services rendered and, if it did, in what amount.

[6] The High Court found in favour of the respondent on the evidence of Messrs van Staden (the principal and managing member of the respondent) and Blaauw, a former employee of the appellant who acted on its behalf at the time the service agreement was concluded with the respondent. Although it appears from the judgment of the Court that the learned Judge erroneously referred to Mr van Staden as Mr Blaauw and *vice versa*, that fact does not otherwise detract from the factual correctness of the findings made by that Court. The High Court found that Messrs van Staden and Blaauw corroborated each other on the terms of the agreement as alleged by the respondent in the amended declaration. The Court *a*

quo further found that the discrepancies between different sets of documents pointed out by counsel for the appellant during the cross-examination were satisfactorily explained by ‘Mr Blaauw’ (meaning Mr van Staden). The Court further found that Mr van Staden was a reliable and honest witness whose evidence was frank and credible. In addition, it pointed out that there was nothing to gainsay Mr van Staden’s evidence. As it were, his evidence was corroborated by that of other witnesses, the Court *a quo* held.

[7] In this Court the appellant raised a point *in limine* on the issue of authority, as I have already stated, and two issues on the merits, namely, whether a contract in the form of *locatio conductio operis* and storage fees existed between the parties and, if so, what the terms were and whether the quantum was correctly proven. Before advancing contentions on these issues, counsel for the appellant sought condonation for the late filing of the notice of appeal and reinstatement of the appeal.

[8] Counsel for the appellant contended *in limine* that respondent’s failure to comply with rules 7(1) and (4) of the High Court Rules, (i.e. the filing of the power of attorney with the Registrar before summons was issued) could not be condoned by this Court. Counsel further contended that when Trailer Spares & Repairs CC was substituted with Oshakati Garage CC, no notice of amendment was filed pursuant to the substitution and no power of attorney and resolution were filed to authorise Mr van Staden to act on behalf of Oshakati Garage CC. He contended that the filing of a power of attorney and resolution were mandatory and, failing compliance, that the proceedings were void.

[9] On the principal issue in the appeal, counsel contended that, the plaintiff had issued a simple summons for a liquidated debt, but that the Court *a quo* could not find that the claim was liquidated as there were too many discrepancies in the case of the respondent. He further contended that the Court should have questioned the credibility of Mr van Staden when Mr Werner Blaauw, who had represented and worked for the appellant at the time the agreement was concluded, testified and denied that Mr van Staden had contacted him about the outstanding balance. The integrity and veracity of the evidence is seriously eroded when regard is had to the fact that Messrs Blaauw and Van Staden, who are friends, on their own admissions on two occasions consulted with counsel for the respondent simultaneously, so argued counsel.

[10] Counsel questioned Mr van Staden's evidence that the parties had entered into an agreement to sell the vehicles and argued that, if that had been the case, there was no reason advanced why the respondent did not execute that agreement. He submitted that no such agreement existed, also not on storage fees.

[11] Counsel finally contended that the respondent's claim, which was based on a liquidated debt, was not readily ascertainable, as it was not clear what amount was claimed for repair services, parts, storage fees and/or interest respectively. Counsel submitted that the respondent did not prove the exact amount claimed and that the respondent did not prove the existence of an agreement in respect of

storage fees. Therefore, the Court *a quo* misdirected itself and that the Court should have granted the order of absolution from the instance, counsel submitted.

[12] The respondent opposes the application for condonation on the ground that the appellant failed to comply with rule 5(1) of the rules of this Court when the notice of appeal was filed out of time and because the appeal was devoid of any merit in the light of the uncontested evidence adduced on behalf of the respondent.

[13] Counsel for the respondent spent a greater part of his argument on the appellant's failure to comply with rule 5(1) of the rules of this Court and made reference to various decisions of this Court on the issue. In as far as the point *in limine* is concerned, the main thrust of his argument was that the issue could not be raised for the first time in this Court. Counsel, however, conceded that, on the face thereof, the order of the Court *a quo* was in favour of Trailer Spares & Repairs CC but argued that the evidence led in the High Court revealed that the plaintiff was, Oshakati Garage CC in substance and that the High Court's order was issued on that premise. He nevertheless sought an amendment to reflect 'Oshakati Garage CC' wherever the name 'Trailer Spares & Repairs CC' appears. Counsel for the appellant opposed the amendment.

[14] On the principal issue of this case, counsel for the respondent argued that at no stage did the appellant dispute that a contract had been concluded between the parties and that, what was in dispute, were the terms of the contract and the quantum of the claim. From the evidence led it emerged that the parties concluded

the contract alleged in the declaration as amended immediately before the commencement of the trial as per paragraph 3 above. He further argued that the respondent had complied with the agreement whereas the appellant breached the terms of the agreement by making only partial payments when the appellant had received invoices and statements. It was further argued that the appellant did not call witnesses to refute the evidence of the respondent's witnesses; neither did the cross-examination of the respondent's witnesses place in dispute the material aspects of their evidence.

[15] On the complaint that Messrs Van Staden and Blaauw have been consulted simultaneously, counsel conceded that it had been established on evidence but argued that there was no factual basis for an allegation of any deliberate or 'innocent manipulation' of the evidence as a result.

[16] We directed that the condonation application and the application to amend should be argued together with the merits of the appeal. The applications were opposed but I do not think that there was prejudice to any of the parties as a result of the other's omissions. Judgment in the Court *a quo* was granted on 1 March 2012. The notice of appeal was served within 21 days on the respondent (19 March 2012) and the Registrar of this Court (20 March 2012). It was only on the Registrar of the High Court that it was served out of time (17 April 2012). The application for reinstatement of the appeal was filed on 11 June 2013, some 6 days before the hearing of the matter on 17 June 2013. Although the application was for initially reinstatement only, the words 'condoning and' were inserted before the word 'reinstating' in the second paragraph of the application on the date of

hearing. The appellant's instructing counsel was at a loss to explain why the notice of appeal had been filed out of time with the Registrar of the High Court. All the deponent to the affidavit supporting the condonation and reinstatement application could say was that 'I have no idea how it occurred'. To me, it seems like an oversight on the part of the messenger who had been tasked with delivery of the notice of appeal, which was not immediately realised and corrected through proper supervision.

[17] The failure to observe the rules of this Court, particularly rules 5(1) and 8(1) has become a menace in this Court. Almost every appeal matter that comes before this Court is preceded by an application for condonation. Some of these applications are most of the time heavily contested, wasting valuable time before the principal issues are canvassed. In appropriate cases, condonation had been refused. In our opinion this is not one of them. In circumstances where the notice of appeal was timeously lodged with the registrar of this court and delivered to the respondent's legal representatives, we cannot find that the respondent was prejudiced by the late filing of the notice of appeal with the Registrar of the High Court and the delayed filing of the application for condonation and reinstatement when the deficiency came to light. It seems to me that where there has been a formal deficiency in the manner in which an appeal has been noted rather than a failure to note it timeously, the Court should be more inclined to grant condonation for the non-compliance if it has not resulted in any prejudice to any party or a delay in the prosecution of the appeal. In the view I take, the application must be granted. The costs of applications of this nature are normally borne by the appellant but, because I do not regard the respondent's opposition to the

application to be reasonable, I consider it in the interest of fairness to both parties not to make any order of costs.

[18] In as far as the application to amend any reference to 'Trailer Spares & Repairs CC' to 'Oshakati Garage CC' is concerned, it should be borne in mind that, having been agreed to by the parties, the substitution took place in the Court *a quo* without opposition and without the need for a formal application to effect it. Without amending the pleadings to reflect the substitution, as the plaintiff *a quo* should have done, the claim and defence thereto were subsequently prosecuted on the premise of the substitution. The failure to effect the amendment – in particular to the headings of the pleadings - resulted in the registrar incorrectly issuing the Court's order with reference to the parties as cited in the headings at the outset of the proceedings and, for that matter, also in the noting of the appeal with reference to the same parties. Whilst we cannot amend the pleadings in the Court *a quo* in the absence of an application to that effect having been brought in that Court, we may amend the order of the High Court to make it clear that judgment was granted in favour of Oshakati Garage CC – as is apparent from the Court's reasons, it clearly intended – rather than in favour of the substituted party, Trailer Spares & Repairs CC. Moreover, we may grant the amendment in so far as it relates to the proceedings in this Court. Counsel for the appellant, notwithstanding his opposition thereto, could not point out any prejudice that might be attendant on the appellant for such an amendment on appeal, and I propose to grant it. The costs occasioned by amendments of this nature must normally be borne by the party seeking it but in view of the appellant's unreasonable opposition to it, I do not intend to make any order of costs pursuant to the application.

[19] In my opinion both applications should succeed but, in each instance, I must decline to propose an order of costs.

[20] I now turn the point *in limine* raised in respect of Mr Van Staden's authority. Counsel for the appellant contended that this Court cannot condone the non-compliance with the Rules of the High Court, when the respondent (plaintiff) in that Court failed to file an amendment substituting Trailer Spares & Repairs CC for Oshakati Garage CC failed to file the power of attorney and resolution authorising Mr van Staden to act on behalf of Oshakati Garage CC. He further contended that, that non-compliance with rule 7(1) and (4) rendered the proceedings in the High Court void.

[21] Counsel, on the question by the Court, could not refer this Court to any authority he relied on to contend that the non-compliance rendered the proceedings in the High Court void. When pressed further, his response was that he could not take his contention any further. I could not find any authority supporting counsel's contention that voidness would follow without more. On the contrary, in *Northern Assurance Co Ltd v Somdaka* 1960 (1) SA 588 (A) at 596C-D the South African Appellate Division held that where an attorney had been verbally authorised to issue summons on behalf of a plaintiff and executed his mandate without filing a power of attorney with the registrar, such omission could be condoned in appropriate circumstances. Similarly, in *Nampak Products Ltd t/a Nampak Flexible Packaging v Sweetcor (Pty) Ltd* 1981 (4) SA 919 (T) Ackermann J had occasion to deal with the question whether the issue of a summons by an

attorney on the strength of a defective power of attorney amount to a nullity. In that case the power of attorney to institute an action was defective because the person who had executed it was not one of the plaintiff's office bearers who had been authorised by the plaintiff to do so. When the defect was realised well after the action had been instituted, the plaintiff passed a resolution ratifying the institution of the action. The learned Judge held at 924H:

> 'In my view it cannot be said that the proceedings prior to ratification in the instant case are a nullity in the sense contemplated in *Krugel v Minister of Police (supra)*[2] *and Simross Vintners (Pty) Ltd v Vermeulen (supra)*.[3] In the same way that it cannot be said that an agent's unauthorised acts are a nullity because they are capable of retroactive ratification I do not think that the steps taken in this action prior to the ratifying resolution were a nullity.'

[22] Without condoning the respondent's failure to effect all the required amendments to the pleadings, the initial declaration of 2008 by the respondent and the subsequent amendments thereto which defined the terms of the contract between the parties, cites Oshakati Garage CC as the plaintiff in the body of the pleadings. In actual fact, on 2 February 2012 when the trial commenced, counsel for the respondent, after placing on record further amendments to the declaration, he, without an objection from the appellant, went on to say:

> '. . . from the reading of the pleadings in this matter, the amended declaration . . . it is apparent that the details and the citations of the parties, that is plaintiff and the defendant, as well as, the fact that the agreement was concluded, that is admitted.'

---

[2] 1981 (1) SA 765 (T).
[3] 1978 (1) SA 779 (T).

[23] In the summary of evidence of Mr Willem Herman Geurtse, who the respondent (plaintiff) called as an expert witness in terms of rule 36(9)(*b*), the document received by the appellant's attorney of record on 8 September 2011, Oshakati Garage CC is expressly referred to in paragraphs 3, 4 and 5. It is necessary to repeat the said paragraphs for they are relevant to the dispute on the point under consideration:

> '3. On 26 August 2011 the witness have been asked to evaluate and scrutinize invoices made out by Oshakati Garage to Namib Contract Haulage for repairs done on their fleet vehicles and busses for the year 2004.
>
> 4. The witness was given the following invoices to evaluate: Inv. No. 446, 437, 434, 432, 430, 420, 414 and 413, totalling N$229 375,61. After comparing the current 2011 prices to those invoiced by Oshakati Garage, the witness can safely say that all prices invoiced are within the reasonable profit margins, and certainly not excessive.
>
> 5. Although invoices do not reflect hourly rates or the amount of hours charged, it is possible for the witness to calculate the flat rate on these invoices and therefore the witness could say that the amount of labour charged, fairly accurately resembles the work carried out by Oshakati Garage.'

[24] It appears to be very clear that the respondent notwithstanding the alleged failure to have sought an amendment and file a power of attorney for the substitution, the pleadings and the evidence makes it abundantly clear who the plaintiff is and I should accept that the appellant having failed to object to the substitution during the pleadings and at the trial, it admitted that Oshakati Garage CC, is the plaintiff and it has no cause for complaint. Moreover, inasmuch as the substitution was effected in terms of an agreement between the legal

representatives of the parties, it seems to me that the appellant's legal representatives implicitly accepted at the time that Oshakati Garage CC had authorised the substitution. The point *in limine,* if upheld, would render the proceedings in the High Court nugatory, which would be prejudicial to the respondent at this late stage. If the point was taken timeously during the pleadings or at the trial, the respondent would have been able to address the complaint one way or another. The law is very well settled on that score. In *Di Savino v Nedbank Namibia Ltd* 2012 (2) NR 507 (SC) where a similar argument was raised, this Court at 515D-F and 518C-F had this to say:

> '[21] In this court, Mr Heathcote, who, together with Ms Schneider, appeared for the appellant, raised further grounds that were neither set out in the opposing affidavit nor advanced in the High Court. He contended that summary judgment should have been refused because there was no valid power of attorney; the allegations made in the affidavit in support of the applications for summary judgment are not adequate and do not comply with the rules; the particulars of claim do not support the relief sought; and, the particulars of claim do not sustain a claim for default interest. And as will appear below, he advanced an entirely new argument in support of the defence based on release from suretyship.
>
> [33] As a general matter, the appeal court is disinclined to allow a party to raise a point for the first time on appeal because having chosen the battleground, a party should ordinarily not be allowed to move to a different terrain. However, the court has a discretion whether or not to allow a litigant to raise a new point on appeal. In the exercise of its discretion, the appeal court will have regard to whether: the point is covered by the pleadings; there would be unfairness to the other party; the facts upon which it is based are disputed; and the other party would have conducted its case differently had the point been raised earlier in

litigation. In *Cole v Government of the Union of South Africa*[4] supra Innes J, as he then was, put the matter thus:

> "The duty of an appellate tribunal is to ascertain whether the Court below came to a correct conclusion on the case submitted to it. And the mere fact that a point of law brought to its notice was not taken at an earlier stage is not in itself a sufficient reason for refusing to give effect to it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the party against whom it is directed, the Court is bound to deal with it. And no such unfairness can exist if the facts upon which the legal point depends are common cause, or if they are clear beyond doubt upon the record, and, there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset."'[5]

[25] In *Workmen's Compensation Commissioner v Crawford and Another* 1987 (1) SA 296 (A) at 307G-I, Botha JA put it thus:

> 'So the appellant had chosen his own battle-ground, as it were, and he has no cause for complaint if on appeal the Court declines to move on to a different terrain. This is not a case in which this Court is constrained to decide a point of law and to deal with the appeal accordingly, whatever the position taken up by the parties may have been, on the basis that it is clear that all the relevant facts had been fully canvassed (cf *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23B-G). It is, on the contrary, in my opinion, a case where, if this Court were to accept the belated submission of counsel for the appellant on the point of law raised in argument, it would be wrong to decide the appeal on the basis thereof, for it would run counter to what was common cause in the Court *a quo*, and if the point had been taken there timeously, whether in the pleadings or otherwise, the possibility cannot be excluded that the respondents' conduct of their case would have been different.'

---

[4] 1910 AD 263 at 272-273; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (AD) at 23; *Ministry of Regional and Local Government and Housing v Muyunda* 2005 NR 107 (LC) 110-111; *Donnely v Barclays National Bank Ltd* 1990 (1) SA 375 (W) at 380H-381B

[5] At 314A-C

[26] Therefore, it follows for these reasons that the point *in limine* should fail with costs.

[27] After that detour, I now revert to the principal issues of this case. They revolve around whether the agreement between the parties, which was admitted, embodied an obligation to pay storage fees and whether the amount of N$628 500,65 was proven on a balance of probabilities.

[28] As I have already stated, it is not always clear what the basis of the appellant's defence is. Counsel for the appellant states in paragraph 17 in his heads of argument that '. . . From the evidence it appears that the main part of the *lis* between the appellant and the respondent seems to be the issue of storage fees' whereas in paragraph 15, he states that the defence of appellant is set out on page 285 of the record at lines 20 to 30. What is said to be the appellant's defence was put as follows to the witness Mr Van Staden:

> 'Sir, I am going to put it to you, my clients submit there was an agreement that they do not know whether they owe you money. And if so what amount? And I am going to show it to you that you also do not know what amount is due to you. And will come to that now. . . .'

Correctly interpreted, the extract above means that the appellant's defence is about the correctness of the total amount claimed, nothing about the non-existence of the storage fees agreement.

[29] In its plea to the respondent's claim, it admitted the agreement between the parties but denied the agreement on storage fees, the minimum monthly amount of N$25 000,00 which had to be paid and the interest of 2.5% per month. These denials are in contrast to the evidence of Mr Werner Blaauw, who concluded the contract on behalf of the appellant with Mr Van Staden, who acted on behalf of the respondent. Van Staden also testified and confirmed the terms of the contract as per the respondent's simple summons read together with the amended declaration and the reasonableness of the amounts claimed.

[30] Some of Mr Blaauw's evidence is recorded as follows:

> 'Q: Now, was there any agreement pertaining to storage costs?
>
> A: Yes, forty five Namibian Dollars (N$45-00) per bus. And I think for the smaller cars if there were any, was fifteen Namibia Dollars (N$15-00) I think per day, yes.
>
> Q: The forty five Namibian Dollars (N$45-00) that is per vehicle, is that per month, per day, per week, or?
>
> A: That is per day. Only if the repair fees or the service was not paid in time. So, for the first 30 days we would not pay any storage fees but if we did not pay after that time then storage fees would come into effect. I think that is normal practice within any other workshop.
>
> . . .
>
> Q: The Defendant, Namib Contract Haulage alleges that you in respect of the tow-in services, that would only occur upon written instructions in fairness to the Plaintiff.
>
> A: No (intervention)
>
> Q: What do you say to that?

A: It will take too long because you cannot let the passengers stay in a bus on an open road and wait for an instruction. That was not practical. It was done telephonically.

Q: Now, just to put you in perspective, the amount claimed that is outstanding balance, that is the outstanding balance by the Plaintiff it is six hundred and twenty eight thousand five hundred Namibian Dollars and sixty five cents (N$628 500,65) and this is in respect of work done, parts installed, storage costs and the like. Now, from what you have seen during the period were the amounts charged by the Defendant exorbitant according to you?

A: No, I think they were reasonable, compared to the company that used to do the repairs here in Windhoek.

Q: The Defendant also alleges that there was no agreement for storage costs.

A: It is impossible, if you do not pay vehicle cannot just stand there you have to pay the storage costs.

Q: And it is also your testimony that there was an agreement for storage costs?

A: Yes, definitely.'

[31] The reasonableness of the work done on the appellant's vehicles was confirmed by the respondent's expert witness, Mr Geurtse. On the analysis of his evidence it becomes clear that the prices charged by the respondent for the work it had done for the respondent on the various invoices that were presented to the witness, were much lower in many instances than the standard prices charged for work of a similar nature.

Mr van Staden testified that the N$628 500,65 was due and payable. There is nothing on record to gainsay that evidence. The appellant did not call any witnesses to refute the evidence of the respondent's witnesses. The cross-

examination of the respondent's witnesses did not detract from the material aspects of their evidence in chief. I am satisfied that the Court *a quo* correctly concluded on the evidence as a whole that the respondent had proven its claim on a balance of probabilities.

[32] In coming to this conclusion, I had due regard to the appellant's complaint that Messrs Blaauw and van Staden and van Staden's wife were interviewed on occasion by counsel for the respondent in the presence of each other. This is a practice that could result in the manipulation of evidence – even unintentionally – and should generally be discouraged. Whilst there may be exceptional circumstances where such practice is necessary or unavoidable, the Court will in all instances be alert to the possibility that the evidence of the one may have been influenced by the statements of the other during the joint interview and, depending on the circumstances of each case, will bear that in mind as a factor in assessing the weight to be accorded to the evidence of the respective witnesses. In this instance, it is evident that the terms of the agreement as pleaded was ascertained from Mr van Staden before the joint interviews in preparation for trial and that his evidence, even without corroboration from Blaauw on that point during the trial, was not gainsaid by other witnesses or detracted from in cross-examination and would have sufficed to discharge the respondent's burden of proof on that score.

[33] The appeal has no merit and it should fail.

[34] Accordingly I make the following order:

1. The appellant's application for condonation and reinstatement of the appeal is granted and no order is made as to the costs thereof.

2. The respondent's application for an amendment substituting for the name 'Trailer Spares & Repairs CC' wherever it may appear the name of the close corporation 'Oshakati Garage CC' is granted in respect of this appeal (including the citation of the respondent) but no order of costs is made.

3. The point *in limine* raised in relation to the respondent's failure to lodge a power of attorney in terms of High Court rule 7(1) is dismissed.

4. The appeal is dismissed with costs, which costs include the costs of one instructing and one instructed counsel.

5. Paragraph 16 of the order of the High Court made in Case No. I 2377/2007 on 1 March 2012 is amended to read:

'Judgment is granted in favour of Oshakati Garage CC in the amount of six hundred and twenty eight thousand five hundred Namibian Dollars and sixty five cents (N$628 500,65) together with interest thereon at the rate of 20% per annum, such interest to run from the date of the summons to date of final payment.'

_____

MAINGA JA

_____

MARITZ JA

_____

MTAMBANENGWE AJA

APPEARANCES

APPELLANT:	C Mostert
	Instructed by Kruger, van Vuuren & Co
RESPONDENT:	A van Vuuren
	Instructed by Kirsten & Co Inc