

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
JUDGMENT**

Case No: I 644/2015

In the matter between:

**KAVANGO SUPERMARKET AND BOTTLE STORE CC  
t/a OK KAVANGO FOODS**

**PLAINTIFF**

and

**GLOBAL QUAESTER INTERNATIONAL (PTY) LTD**

**DEFENDANT**

**Neutral Citation:** *Kavango Supermarket and Bottle Store CC t/a Kavango OK Foods v Global Quaester International (Pty) Ltd* (I 644/2015) [2021] NAHCMD 41 (12 February 2021)

**CORAM:** CLAASEN, J

**Heard:** 17 - 20 June 2019, 4 - 7 November 2019, 11 November 2019, 13 - 15 November 2019, 27 - 29 January 2020, 18 March 2020, 15 April 2020, 18 May 2020, 8 June 2020, 12 October 2020, and 23 October 2020.

**Delivered: 12 February 2021**

**Reasons released: 15 February 2021**

**Flynote:** Written acknowledgements of debt – Preceded by written agreement between parties – Subsequent acknowledgments of debt constitute a new obligation – Plaintiff's claim succeeds on that basis.

**Summary:** The parties operated a successful business operation to provide supplies to 67 police stations in Angola. Defendant had a tender from the Angolan Ministry. The parties had an agreement in terms of the tender that plaintiff will deliver the said goods, which was conditional on the defendant receiving orders from the said Ministry and that the defendant will effect payment within 14 days after delivery. Plaintiff avers that during 2010 the defendant fell behind in the payments. Furthermore reconciliation of the account was done, the parties discussed the situation, defendant offered some of its business property and partial payment was done. Subsequently the defendant issued acknowledgments of debt for the outstanding amount. Plaintiff's claim predicated on the acknowledgments of debt.

Defendant denied the claim and pleaded that plaintiff breached the agreement as it failed to effect due and proper delivery, which disentitle the plaintiff to the amount claimed. Defendant also filed a counterclaim, on the basis that it paid for goods not delivered. In the end defendant withdrew the counterclaim and closed its case without bringing any evidence thereon.

*Held* that the court was satisfied that in the circumstances of the case the subsequent acknowledgments of debt constituted a substantive cause of action and found in favor of the plaintiff.

---

**ORDER**

---

1. Judgment is granted in favour of the plaintiff in the following terms:
  - 1.1. Payment in the amount of N\$ 54, 097, 448.49.
  - 1.2. Interest on the said amount at the rate of 20% per annum from the date of summons to date of payment.
  - 1.3. Cost of suit, which cost to include the costs of one instructing and one instructed counsel.
2. The defendant has withdrawn its counterclaim and tendered costs, to include the cost of one instructing and one instructed counsel.

---

## JUDGMENT

---

### CLAASEN J

#### *Introduction*

[1] The plaintiff is a close corporation duly incorporated with its principal place of business situated at Markus Siwarongo Street in the town of Rundu in Namibia. The defendant is a duly incorporated private company with its principal place of business situated at Agostino Neto Street in Windhoek.

[2] The parties are former business partners whose relationship, after years of a profitable business venture, turned sour, resulting in protracted and acrimonious litigation.

#### *Summary of Pleadings*

[3] The plaintiff issued summons in 2015 for an amount of N\$ 54, 097, 448 .49 plus interest and costs. The claim revealed that the parties previously had an agreement, first oral during 2006, and thereafter reduced to writing in 2007. The provisions thereof

was that the plaintiff undertook delivery of goods as specified by the defendant to various police stations in Angola whereafter the defendant will pay for the goods. The plaintiff contends that it duly delivered the goods, but that the defendant failed to fully settle the outstanding balance on the account.

[4] Subsequently, according to the summons, the defendant acknowledged in writing that it was indebted to the plaintiff. During 2012 the outstanding amount was N\$ 59,354,886.49, where-after the defendant made a partial payment. On the date of 21 January 2015, the defendant again acknowledged its indebtedness in writing in 3 separate documents, which brought the total outstanding amount to N\$ 54,097,448.49. The series of documents were attached to the summons.

[5] The defendant attacked the claim with a special plea of prescription, a counterclaim and a plea on the merits. The plea, which is not a model of clarity, avers that there were additional material terms to the service level agreement, specifically that proof of delivery entailed invoices and bills of entry of the goods into Angola and that such invoices was a condition precedent for payment by the defendant.<sup>1</sup>

[6] The defendant pleads that there were additional material terms to the oral joint venture agreement<sup>2</sup> which I summarize as that the plaintiff had to proof of its capacity to deliver in Angola, that payments to both plaintiff and defendant were subject to the conditions as set by the Ministry, that the defendant will only be able to make payments to the plaintiff upon receipt of payments from the Ministry, that due to bureaucracy, delays in payment from the Ministry were to be expected, that the Ministry reserved the right to withheld payment if goods were not delivered timeously, or if the quality of the goods was bad, that the plaintiff will provide an invoice for the goods delivered and customs duties paid, and that the defendant will effect payment thereon.

---

<sup>1</sup> Paragraph 12.4 of plea.

<sup>2</sup> Paragraphs 15.2, and sub-paragraphs 15.2.1 – 15.2.9 of plea.

[7] It is defendant's case that it complied with the oral agreement as it placed the orders for the plaintiff to deliver the said goods, but that the plaintiff failed to comply with the 'oral joint venture agreement,'<sup>3</sup> by failing to effect delivery timeously, by failing to deliver all of the goods and failing to provide invoices. That resulted in the Ministry of Interior to withhold payment. Defendant also avers that it requested invoices from the plaintiff on numerous occasions, but the plaintiff failed to do that.<sup>4</sup>

[8] The defendant raised *exceptio non adimpleti contractus*,<sup>5</sup> and in that regard pleaded that in terms of the conditions of the tender of the Ministry of Interior and the oral joint agreement the plaintiff had a reciprocal contractual obligation. In this regard, the defendant denies that the plaintiff supplied all the goods that were ordered by the plaintiff during the years 2006-2010.

[9] Regarding the plaintiff's allegation that defendant failed to pay for all the goods delivered, it was denied and the defendant amplified it as follows: ... 'the defendant pleads that, the plaintiff did not deliver all the goods that were ordered by the defendant. In addition, the defendant pleads that, the defendant paid the plaintiff the full purchase price of the goods in the bona fide and reasonable belief that the plaintiff delivered all the goods that were ordered by the defendant.'<sup>6</sup>

[10] My understanding of the defendant's counterclaim of N\$ 86, 121, 683.62 is that during 2008 until 2010 the defendant paid the plaintiff the full amount as quoted in the *bona fide* belief that the plaintiff delivered accordingly, but that the plaintiff failed to deliver all the goods as ordered by the defendant during that period.

[11] As far as the purported acknowledgements of debt are concerned, the defendant denied that it constitutes liquid documents, or represents unconditional liability or establishes unconditional and substantive acknowledgements of debt. The defendant

---

<sup>3</sup> Paragraph 16.2 of plea.

<sup>4</sup> Paragraph 19.7 of plea.

<sup>5</sup> Sub-paragraphs 17.3 – 17.6 of plea.

<sup>6</sup> Paragraph 19.2 of plea.

pleaded that it did not author the documents with the purpose to acknowledge debt to the plaintiff and that the letters were requested by Mr Machado for audit purposes.

[12] The plaintiff denied the averment in the counterclaim that it failed to effect full delivery and put the defendant to the proof thereof. The plaintiff also shot back with a special plea of prescription.

#### *Issues before the court*

[13] According to the plaintiff the issue was crisp, namely whether or not the written documents issued by defendant in 2015 constitute valid acknowledgments of debt, which it contends established a fresh cause of action.

[14] The defendant on the other hand took the court back to the preceding underlying agreements concluded in 2006 and 2007 respectively, and its main issues centered around whether there was a requirement for invoices to the defendant, and whether there was mal-performance in the form of delivery shortages by the plaintiff which would disentitle the plaintiff to payment.

[15] As for the purported acknowledgments of debt, the defendant denies their validity, the defendant denies it as liquid documents and asserts that it issued the documents merely for the purpose of being supplied to auditors.

[16] Though each of the parties raised special pleas of prescription, it was not pursued during the hearing by any of the parties.

[17] The counterclaim, was belatedly withdrawn by the defendant on the morning that the defendant was set to commence the presentation of its evidence and costs were tendered.

#### *Prologue to evidence*

[18] The trial was halted in its starting blocks, as the first witness was about to testify about a certain ledger of the account which is a spreadsheet that he prepared on his computer. Counsel for the defence objected to the admissibility on the basis that it falls foul to the Computer Evidence Act.<sup>7</sup> In view of the fact that the majority of the discovered documents were e-mails, quotations, invoices and delivery notes, the matter stood down until the next day for parties to argue the point.

[19] Counsel for the plaintiff construed the objection as another attempt to derail the trial as the documents and witness statements had been discovered 3 years prior to the trial date. He argued that these objections are no longer available to the defendant, as he raised no red flags about any document during the case management stage nor during the pre-trial phase. Plaintiff nevertheless, out of caution, tendered an affidavit prepared by Mr Machado overnight to cover the computer generated documents.

[20] Counsel for the defendant opined that the documents such as the delivery notes and spreadsheets were done in Microsoft Excel and converted into 'PDF' format. It was submitted that the affidavit does not cure the predicament as the deponent has no qualification in computer science and is no expert in operating systems or computer hardware. In support of his argument he referred to *Rally for Democracy and Progress & Others v Electoral Commission of Namibia & Others*<sup>8</sup> and other Namibian authorities. He argued that a rule cannot overrule a statute, and that it was not the defendant's task to tell the plaintiff what the law of the land is.

[21] There is no qualm about the requirements that pertain to computer generated documents and that the relevant statute is applicable in Namibia. Whilst it is true that the rules does not surpass the law, it must also be said that the law is practiced through the rules. The parties went through case management and pre-trial and the defendant did not register a single dispute about admissibility of any of the plaintiff's discovered

---

<sup>7</sup> Computer Evidence Act No 31 of 1985.

<sup>8</sup> *Rally for Democracy and Progress & Others v Electoral Commission of Namibia & Others* 2013 (2) NR 390 (HC)

documents. That did not honor the spirit of judicial case management, in particular Rule 28(7)(b)<sup>9</sup> which provides that, unless a document, analogue, or digital recording is specifically disputed for whatever reason, it must be regarded as admissible without further proof, but not that the contents thereof are true. That the defendant did not do. Therefore the plaintiff's discovered documents were ruled admissible and that it remained open to the defendant to attack the probative value thereof.

*The evidence*

*Mr Jose Machado*

[22] The plaintiff led the evidence of two witnesses, namely Mr Jose Machado and Mrs Caroline De Jesus. Mr Machado is a businessman and member of the plaintiff. He testified about the oral and written agreement that was concluded by himself on behalf of the plaintiff and Mr Manuel Joao on behalf of the defendant. In simple terms the agreement denoted that the defendant will order and pay for goods to be supplied and delivered by the plaintiff to various police stations located in southern Angola, or at the regional headquarters at Menogue and Lubango and the defendant will pay thereafter. The business venture appears to have been well under way until the year of 2010 when problems emerged. Payment was however made for all deliveries prior to 2010, but not for some of the deliveries made during 2010 to 2011.

[23] The basic process of transacting commenced with a list of required goods being issued by the Angolan Ministry of Interior which the defendant forwarded to plaintiff for a detailed quotation, acceptance and forwarding of the quotation by the defendant to the Angolan Ministry of Interior, confirmation of acceptance by the Angolan Ministry of Interior to the defendant who then instructs the plaintiff to deliver the goods to the destinations.

[24] Mr Machado described the standard delivery process, which started with loading of the trucks in Rundu, issuance of invoices which are then used for clearance of the

---

<sup>9</sup> High Court Rules of Namibia



goods by the Customs officials by the Namibian and Angolan borders respectively. Customs duties were paid by the plaintiff and the defendant was to reimburse that, which he contends that in some cases were not done. At times the trucks were escorted by a Logistics Officer of the Angolan Police. Once at the final destination the respective receiving partner signs a delivery note. In addition, the plaintiff send periodic progress on all deliveries and a final report with copies of the signed delivery notes.

[25] In amplification of the transactions, the witness referred to several big orders during the year 2010. One such request<sup>10</sup> was on 7 February 2010 for food supplies, plaintiff provided the quote<sup>11</sup> on 11 February 2010 of N\$ 26 041 795.38 for Cunene and N\$ 31 857 280.68 for Kuando Kubango. The instruction to execute the order was given on 10 March 2010. As far as delivery goes, the defendant testified that in Cunene 5 deliveries were executed at a cost of N\$ 4 687 590.87 and Kuando Kubango it was 49 deliveries at cost of N\$ 5 490 177.75<sup>12</sup> which quantities and amounts were not disputed.

[26] Another request was received on 16 July 2010,<sup>13</sup> and plaintiff quoted N\$ 11 746 042.98 for Cunene and N\$ 14 341 242.97 for Kuando Kubango. Plaintiff testified that the defendant requested a reduction which caused a revised quote and deliveries started on 22 September 2010. Deliveries on this order were finalized in March 2011, with the Regional Commanders who signed for that.

[27] During August 2010 the plaintiff was informed to stop deliveries, which was pending a meeting on 23 September 2010 about the cumbersome approval of delivery. Apart from the representatives of the plaintiff and defendant, the Regional Police Commanders were also present. New procedures were adopted, which entailed that furnishing of delivery notices at the respective police stations will be sufficient and the need for a final report was abolished.

---

<sup>10</sup> Exhibit 'D'

<sup>11</sup> Exhibit 'E'

<sup>12</sup> Exhibit 'F'

<sup>13</sup> Exhibit 'R'

[28] During September 2010 the plaintiff was informed via e-mail of new contract conditions, that total quantities should match volumes ordered, that reimbursement of customs duties should be specified and that plaintiff should no longer effect deliveries directly to the police stations, as a central procurement unit was formed.

[29] Again, on 16 September 2010 the plaintiff was requested to provide a quote for food supplies<sup>14</sup> which plaintiff did on 29 October 2010 for Cunene N\$ 10 628 271.28 and Kuando Kubango for N\$ 13 013 373.67 and received the greenlight from the defendant to deliver it on 22 December 2010.<sup>15</sup>

[30] The plaintiff received another request for a quote on 28 September 2010 for hygienic supplies, which was provided in the amount of N\$ 578 377.05 for Cunene and N\$ 767 538.74 for Kuando Kubango. The deliveries hereon concluded in February 2011. It comprised of 42 deliveries at 21 stations in Cubango and the Regional Commander signed for receipt thereof on 7 March 2011 and in Kuando Kubango it was 57 deliveries at 29 police stations for which that Regional Commander signed for receipt of the deliveries. According to Mr Machado proof of these deliveries were sent to the defendant on 8 March 2011<sup>16</sup> and the defendant did not bring up any dispute about deliveries.

[31] The last quote for goods was sent to the defendant on 13 December 2010, for an amount of N\$ 1 979 710.73 and N\$ 2 929 595.02<sup>17</sup>.The defendant sent that quote to the Angolan Ministry of Interior on 14 December 2010. The deliveries thereof comprised of 26 deliveries in Cunene which concluded on 2 January 2011 and 46 deliveries in Kuando Kubando completed on 5 March 2011. The proof of deliveries were signed and stamped by the Regional Logistics Commander and sent to defendant on 10 March 2011.

---

<sup>14</sup> Exhibit 'EE'

<sup>15</sup> Exhibit 'GG'

<sup>16</sup> Exhibits 'P' and 'Q'

<sup>17</sup> Exhibit 'NN'

[32] On 21 September 2010 defendant requested reconciliation of defendant's account and the plaintiff replied to certain queries on the account on 29 September 2010<sup>18</sup> and again on 4 October 2010, and 4 December 2010 respectively.<sup>19</sup>

[33] On 6 March 2011 the plaintiff informed the defendant that deliveries will cease due to non-payment and on 14 May 2011 the defendant sent an e-mail wherein it confirmed that due to lack payment deliveries stopped and to enquire about all outstanding payments. During the month of October 2011 the plaintiff sent a copy of the account ledger to the defendant which depicts the outstanding amount at the time.<sup>20</sup>

[34] On 20 February 2012 the plaintiff sent an updated account at defendant's request.<sup>21</sup> On 6 March 2012 Mr Machado enquired about the acknowledgment of debt which was discussed with defendant<sup>22</sup> and on the same date the defendant issued the first series of acknowledgments of debt in the amount of N\$ 59 354 886.05<sup>23</sup>

[35] During 2014 two meetings were held between the parties about the outstanding debt. The first meeting was early in the year and it was attended by a delegation from plaintiff and defendant at time represented by Manuel Joao and Djorn Neto. According to Mr Machado the defendant asked to pay off the debt in instalments which was granted. Subsequently the defendant partially paid off the debt.<sup>24</sup>

[36] During the middle of 2014 another meeting was held between the parties. At that meeting the defendant offered some of its other business properties in an effort to set off the debt. These were not accepted by plaintiff as it all involved payment of cash in return for acquiring equity in such properties. In particular the defendant offered a farm with the name of Melrose 386 and portion 4 of farm Hofnungsveld no 19 in Khomas region and a service station in Khomasdal, and Otjimbamba lodge in Otjiwarongo.

---

<sup>18</sup> Exhibit 'DDD'

<sup>19</sup> Exhibits 'GG', 'HH', 'II' and 'JJJ'

<sup>20</sup> Exhibit 'C'

<sup>21</sup> Exhibit 'KKK'

<sup>22</sup> Exhibit 'LLL'

<sup>23</sup> Exhibits 'QQ', 'RR', 'SS' and 'TT'

<sup>24</sup> Exhibit 'UU'

These offers were reflected in exhibit 'VV' provided by defendant. One of the proposals that was however accepted by the plaintiff was that the defendant transferred its shares in Auas City Hotel (Pty) Ltd to the tune of N\$ 2 342 800. to a business owned by the plaintiff and this amount was deducted from the outstanding debt.<sup>25</sup>

[37] Finally on 21 January 2015 the defendant furnished plaintiff with further acknowledgements of debt to value of N\$ 54 097 448.49

[38] Extensive cross-examination followed, which I endeavor to condense by dividing it into the themes that emerged.

*Delivery of the goods, delivery notes and invoices*

[39] Delivery and its cumbersome documents emerged as a main source of contention, and the witness was interrogated about the processes, the documents and whether these documents can be trusted. As for the basic delivery process Mr Machado answered that the goods are usually loaded on the trucks, where after the plaintiff obtains the necessary documents from the Namibian authorities to cross the border. Thereafter the journey commences, at the border the goods will be cleared and customs duties paid. He also stated that the arrangement was that at the delivery points there will always be a representative from the final client to receive the goods, the goods will be verified according to the delivery notes and will then be offloaded. The receiving entity signs those delivery notes and then his truck returns with all the documents.

[40] As for issuance of invoices it appears that it was done for cross border purposes and directed to the final client. He also explained that delivery progress reports would be sent by the plaintiff to the defendant and thereafter the defendant has to pay within 14 days after delivery. Mr Machado accepted that it was not always possible to deliver what he termed a hundred percent, but in the event of a partial delivery it will be

---

<sup>25</sup> Exhibits 'WW' & 'XX'

indicated on the progress report and the plaintiff will then only charge for that partial delivery.

[41] Mr Machado was referred to a certain delivery note, exhibit 'F' that depicts the deliveries for the first trimester to Kuando-Kubango. The witness explained that there was a correction made on this delivery note at the bottom as the quantities and weight of the item that was initially planned did not materialize and it was delivered in different quantities and sizes. According to him the person who loads the truck, will sign, the receiving team sign and the police representative sign. Counsel for the defendant postulated that the fact that exhibit 'F' was not signed at all means that the plaintiff did not comply with the terms of clause 2.3 of the service level agreement. The witness indicated that the signed document is in his office but not before court.

[42] Furthermore it was pointed out to Mr Machado that he was not physically present when each of the loads were loaded nor was he present at the places where the loads were delivered. He conceded that, but pointed out someone will always be present to represent the plaintiff and someone will be present to represent the defendant and the final client and when necessary someone representing customs when deliveries takes place. Counsel made the point that these delivery notes, such as the one in exhibit 'F' has no probative value as the persons who signed are not at court to be cross-examined.

[43] The plaintiff was taken to task about the invoices that were ostensibly delivered to the final client instead of the defendant, the witness reiterated that in their agreement the delivery notes were used and accepted as delivery documents by the defendant and that the defendant never disputed or indicated it to be an issue for them.

[44] It was put to the witness that the plaintiff is unable to prove that they delivered the items as indicated in their delivery notes and it thus does not correspond with the amounts they claim that are due to them. The witness indicated that they did not provide

all the documents because they did not think it was relevant or necessary to do so, as their cause of action is based on the new agreement.

[45] Counsel stated that if all the items were delivered the plaintiff would have provide proof such as in the case of exhibit 'W'. The witness replied that at that stage that was the requirement but since the meeting about cumbersome delivery the process was made simpler and entailed that the Logistical Director provided them with one document per police station or per delivery point, which plaintiff will then forward to the defendant who in turn will send it to the final client. Counsel indicated that he will argue that all documents from page 890 to 911 be struck out for being inadmissible as it amounts to double hearsay documents.

[46] The witness was also taken to task about a discrepancy in that his witness statement which refers to exhibits 'N', and 'O' to depict delivery of Christmas packs of 2010, but it turned out that the Christmas hamper was actually in Exhibit 'Q'. The witness explained that the documents are repeated in different exhibits because it has the purpose of demonstrating the correspondence he had with the defendant. Counsel's point was that all these documents discovered by the plaintiff are very confusing. The witness reiterated that the purpose of these documents to court was to demonstrate their process and history, and furthermore that the deliveries were previously verified by the defendant who never had queries about deliveries, the defendant was satisfied and signed the acknowledgments of debt.

#### *Ledger of account*

[47] Counsel for the defence also took issue with exhibit 'C', in that some dates do not make sense chronologically. The witness confirms that in this document one cannot correlate the payments made with the goods supplied and that the purpose of the document was to inform the defendant about the status of the account at that point. He clarified that if amounts were due in the previous year, and they are paid during the next

year, such entry was allocated in the year that payment was due and that the defendant never indicated a problem with this document.

[48] It was furthermore put to Mr Machado that exhibit 'C' is irrelevant as the outstanding amount is not the amount claimed by the plaintiff in their particulars of claim. The witness repeated that the purpose of the document was to illustrate the history of transactions between the plaintiff and the defendant from 2007 to 2010. He further stated that based on the email correspondence with Ms Wyk, the bookkeeper of the defendant on 29 January 2010, the defendant admitted to owing plaintiff. Mr Machado again referred to the various email correspondence between the parties which finally resulted in the confirmation of debt. It was put to the witness that the assertion by the plaintiff was contrary to the defendant's instructions.

*Meetings between the parties in 2014 and purported acknowledgements of debt:*

[49] Counsel for the defense advanced that the defendant disputes that the said documents were issued to serve that the purpose, it is their case that there was no talks of acknowledgment of any debt between the parties, and that he was not aware of such debt. The plaintiff denied and recapitulated that if the defendant was not aware of any debt, he would not have attended the meetings in 2014 and offered property and the shares to the plaintiff. As for the contention that the acknowledgements were not real, Mr. Machado answered that one of the directors of the defendant signed the acknowledgments of debt because she knew the debt was real.

[50] Counsel for the defence put it to the witness that the reason the defendant made this offer was firstly, because the defendant was still waiting for invoices and secondly because there was no proof of delivery and offered close to fifty percent of the plaintiff's claim amount. This was denied by the witness. Mr Machado explained that after the first meeting, he pursued the debt, which is why during September 2014 he bought the defendant's shares in Auas City Hotel, there was no cash involved and the transfer of shares was made to a company of his. Thereafter they made the necessary adjustment

on the defendant's account and the value thereof was mentioned in one of the acknowledgments of debt. The witness further explained that there were continuous meetings and continuous promises by the defendant that he will settle the debt.

[51] When it was further put to the plaintiff that there are proforma invoices which the defendant sent to the Ministry of Interior, the plaintiff reiterated that if the defendant invoiced the Ministry of Interior it meant that the defendant acknowledged that the goods were delivered because they were paid by the Ministry of Interior on these invoices.

[52] The plaintiff further indicated that he requested updated acknowledgments of debt and put it the council for the defendant that if they claim that the acknowledgments of debts were not real, the defendant would not have made payments between 2012 and 2015. At the end of cross-examination council for the defendant promised that the defendant and all the relevant witnesses referred to in their case will be called.

*Re-examination of Mr Machado*

[53] During re-examination the witness clarified that their case rests on the acknowledgement of debt signed 06 March 2012 and 21 January 2015. He further explained during the course of conducting the business, their relationship became more relaxed and that plaintiff continued with deliveries on the strength of promises by the defendant that payments will be made. He further explained that various reconciliations were made before the defendant issued the acknowledgments of debt and he referred the court to that correspondence. He reiterated that the correspondence bears no markings of reservations about the issuance of the acknowledgments of debt or problems as to non-delivery of the said goods.

*Mrs Carolina De Jesus*



[54] The second witness is a member of the plaintiff and she testified that she as a family member also became aware of the agreement between the plaintiff and defendant because it was discussed as a family. She did not bear knowledge of the specific terms of the service level agreement. According to her she knew that deliveries were stopped due to the defendant's failure to effect full payment and that the defendant acknowledged his indebtedness to the plaintiff.

[55] She confirmed that she was present at two meetings where the defendant promised to effect payment to the plaintiff. She indicated that the first meeting took place during the early part of 2014, approximately February or March 2014. She confirmed that during this meeting the defendant asked whether he could pay of this debt in instalments and the defendant at no stage denied liability of the outstanding amounts. The plaintiff agreed to this and thereafter partial payment followed. During cross-examination she indicated that there was no specific instalment amounts that was stipulated.

[56] She testified that she was also present at a second meeting which was held during June or July 2014. At the meeting they again discussed ways of the defendant paying of the debt. The defendant again did not deny liability to the plaintiff. The defendant proposed selling certain of his properties to the plaintiff at a particular value, a portion which would be used to set off the debt of the defendant. These properties the defendant proposed to sell were:

- a) The farm Melrose no.368 and portion 4 of the farm Veld no.19 in the Khomas region which is valued around N\$ 45 000 000. The defendant proposed that the plaintiff buy this property at an amount of N\$ 25 000 000, by paying him N\$ 5 000 000 in cash and setting off the N\$ 20 000 000. of his debt.
- b) Otjimbamba Lodge (Pty) Limited situated at the district of Otjiwarongo, valued at N\$ 20 000 000. The defendant offered that the plaintiff purchase his company for N\$ 8 000 000. and pay the defendant N\$ 4 000 000. in cash and the remaining be set off against his debt.

c) A petrol station in Khomasdal valued at N\$ 8 000 000. and he proposed that the plaintiff purchase it for N\$ 8 000 000. and pay him N\$ 4 000 000. and set the rest off against the debt.

d) Two other properties were offered. One in Windhoek and the other in Oshikango but no values were provided for the purchase of these properties.

[57] During cross examination she explained that the family discussed the defendant's offers and even went to inspect some of the properties offered but did not accept them. As a result the defendant on 21 January 2015 furnished the plaintiff with further written acknowledgements of debt.

#### *Absolution from the instance*

[58] At the end of the plaintiff's evidence the defence brought an application for absolution from the instance. The contentions by the defendant were that plaintiff failed in its reciprocal obligation of delivery of all the goods as ordered and that the delivery documents cannot be relied upon as it was signed by witnesses that are not in court to testify, which amounts to inadmissible hearsay alternatively that the spreadsheets compiled by Mr Machado is inadmissible computer evidence. It also argued that the documents were not liquid and are not substantive unconditional acknowledgements of debt.

[59] In opposition of the application for absolution from the instance, counsel for the plaintiff referred to the application as a red herring. It was argued that the focus of the cross-examination was misdirected as very little thereof was about the cause of action being the acknowledgements of debt. Counsel for plaintiff further pointed out that ultimately the defendant has not denied to have been the author of the acknowledgements of debt but instead contends that the said documents were intended merely for auditing purposes, which it bears the onus of proving.

[60] The test for absolution is not whether the evidence led by the plaintiff established what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff.<sup>26</sup>

[61] Again the inadmissibility of the plaintiff's discovered documents reared its head. One of the central threads of judicial case management is that parties are obliged to identify the real issues in dispute at the earliest opportunity and to meaningfully participate in the case management as well as the pre-trial conference. The defendant appears to have little regard for that, as its disputes about the inadmissibility is not captured in the case management report nor in the pre-trial order. Disputes about admissibility of documents should have been raised after discovery, in the case management report. Rule 28(7)(c)<sup>27</sup> even goes further by stating that the party must briefly state the basis for the dispute. That would have placed the other side on notice as to the evidence to cover that bases. What the defendant did was to lie in wait for trial day. The scheme of trial by ambush no longer has a place in civil litigation in Namibia. It is also imperative to consider the effect of Rule 26(10)<sup>28</sup>. It reinforces the importance of demarcating issues at the pre-trial conference by attaching consequences for a litigant. It provides that: 'Issues and disputes not set out in the pre-trial order will not be available at the trial, except with leave of the managing judge or court granted on good cause shown.' Thus the defendant has to bear that consequences.

[62] Returning to the test for absolution, and having regard to the evidence tendered in respect of the purported acknowledgements of debt, the court was of the view that there was *prima facie* evidence on which a court might find in favour of the plaintiff. Therefore the absolution application was dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.

### *The law and application to the facts*

<sup>26</sup> *Labuschagne v Namib Allied Meat Company (Pty) Ltd* (I 1-2009) [2014] NAHCMD 369 (1 December 2014), para 7; *Stier and Another v Henke* 2012 (1) NR 370 (SC).

<sup>27</sup> High Court Rules of Namibia

<sup>28</sup> High Court Rules of Namibia

[63] Ultimately the dispute turned on whether the documents issued by the defendant constitute valid and enforceable acknowledgements of debt that entitles the plaintiff to judgment.

[64] Given the constant dichotomy between the parties as to the cause of action, I move to that first. Counsel for the plaintiff in its opening address made it clear that it relies on the acknowledgments of debt as a 'new' cause of action, a position it maintained throughout the case. Incidentally, that was also declared in the witness statement of Mr Machado. The defendant on the other hand attacked the matter mostly from the angle that the cause of action is premised on the underlying agreements as opposed to the acknowledgments of debt. The defendant's argument was that if the plaintiff relied only on the subsequent acknowledgments of debt, it did not need to refer to the agreement(s) in its particulars of claim, nor did it have to produce the volumes of papers. The plaintiff's answer to this was that its claim is quite a substantive amount, and it produced the documents as background information to show that the claim did not fall from the sky.

[65] The question that arise is thus, in a situation where parties had a preceding agreement of sale of goods on account, and thereafter the debtor issues documents that purports to be acknowledgments of debt, whether the creditor can rely on the said documents as a new, independent and substantive cause of action?

[66] The question was answered in the affirmative by the Appellate Court in *Adams v SA Motor Industry Employers Association*.<sup>29</sup> The relevant principle was explained and its history traced through various decisions as follows at 1198 B-E:

'There is ample authority to the effect that an acknowledgment of debt, provided it is coupled with an express or implied undertaking to pay that debt, gives rise to an obligation in terms of that undertaking when it is accepted by the creditor, and it does not matter whether the

---

<sup>29</sup> *Adams v SA Motor Industry Employers Association* 1981 (3) 1189 (A).

acknowledgement is by way of an admission of the correctness of an account or otherwise. ( Cf Divine Gates & Co Ltd v Beinkinstadt & Co 1932 AD 256; Somah Sachs (Wholesale) Ltd v Muller & Phillips SA (Pty) Ltd 1945 TPD 284; Mahomed Adam (Edms) Bpk v Raubenheimer 1966 (3) SA 646 (T).) In *Chrisou v Christoudoulou* 1959 (1) (SA) 586 (T) there are dicta to the effect that an admission in respect of an existing debt cannot “found an independent cause of action” unless it amounts to a novation (at 587G-588A). This, with respect, appears to rest on a misapprehension. There can be no objection in principle to a second obligation arising in respect of an existing debt, and this appears to have been recognized by this Court (*Smit v Rondalia Versekeringskorporasie van Suid Afrika Bpk* 1964 (3) SA 338 (A) at 346G) The decisive question is whether the acknowledgement contains an express or implied undertaking to pay, a matter which relates to the intention of the parties. ‘

[67] On the pleadings, the defendant’s position is that the documents were not made with the intention of acknowledging indebtedness, but merely with the intention of auditing purposes. However, when it became time for the defendant to tender its evidence for the court to know what informed the defendant when it issued the documents, it was a no show. Thus, the court only has the plaintiff’s impressions on the surrounding circumstances and context within which the documents were issued.

[68] As regards to the importance of intention, the Appellate Court endorsed the *Adams* principle in *Chemfos Ltd v Plaasfosfaat (Pty) Ltd*<sup>30</sup> and held that:

‘Such emphasis was nor misplaced for it is important not to loose sight that the creation of a new obligation in respect of an existing debt necessarily postulates a new agreement – a new consensus.

As was clearly stated in the *Adams* case, such a new agreement need not be expressed in terms – it is sufficient if it is implied, which mean that, in the absence of an express undertaking to pay the debt, the intention to assume liability for payment, and therefore the undertaking to pay, may be inferred from the wording and form of the acknowledgement, the conduct of the parties and all the relevant attendant circumstances.’

[69] There is no doubt as to the existence of the preceding agreement between the parties which continued blissfully with orders, deliveries and payments being effected.

---

<sup>30</sup> *Chemfos Ltd v Plaasfosfaat (Pty) Ltd* 1985 (3) 106 at 115 F-G

That was up until 2010. According to Mr Machado's evidence payment was effected for all deliveries that occurred prior to 2010, but that the debt for the deliveries thereafter was not settled.

[70] In the course of the operations there was regular communication and reconciliation of the account. That much is evident from the several e-mails<sup>31</sup> that was exchanged between the parties. Amongst that is a bundle of e-mails of 20 February 2012, namely exhibit 'BBBB' is an e-mail wherein the defendant's bookkeeper confirms that the plaintiff's statement is the same as the defendant's, exhibit 'KKK' wherein Ms Van Wyk requested an updated invoice statement for the year 2010 from the plaintiff who replied by sending exhibit 'CCCC' which depicted an outstanding balance of N\$ 59 354,886.39 and exhibit 'UUU' which was from Mr Nelo to Ms Van Wyk to coordinate with Mr Machado and verify if the plaintiff's figures are equal to those of the defendant. This was the picture painted by the plaintiff in respect of the 2012 acknowledgments of debt issued by the defendant.

[71] Plaintiff's evidence was also that there was 2 meetings during the year 2014 between the parties about the debt and possible payment options. During one of the meetings the defendant suggested equity in some of his properties. These offers were not amenable to the plaintiff. Plaintiff's witness, Mrs De Jesus confirmed the meeting and the offers made, which plaintiff did not accept. This was with the exception of shares in a certain hotel, which was valued and transferred to the plaintiff in partial redemption of the debt. This confirms that there was dialogue concerning the settlement of the debt. In addition further payments were made between 2012 and 2015, which amounts were deducted. The probabilities are slim that defendant would have continued to pay off amounts if there was no outstanding debt and if it at that stage overpaid the plaintiff in an astronomical amount, as the defendant contended in the counterclaim. That is the backdrop for the documents issued on 21 January 2015.

---

<sup>31</sup> Exhibits 'VVV', 'WWW', 'XXX', 'YYY', 'TTT', 'ZZZ', 'AAAA', 'BBBB', 'KKKK', 'CCCC', 'UUU', 'DDDD'.

[72] Furthermore, it is a general principle in the interpretation of contract that the words used therein be considered. In this regard the Supreme Court in *Egerer v Executrust (Pty) Ltd*<sup>32</sup> stipulated a contextual and unitary approach:

‘Context is considered by reading the particular provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible and unbusinesslike results or one that undermines the apparent purpose of the document. The court must avoid the temptation to substitute what it regards as reasonable, sensible or unbusinesslike for the words actually used.’

[73] The first of the documents issued by the defendant in 2015, which was annexed as ‘C1’ to the particulars of claim, and admitted as exhibit ‘ZZ’ is set out below:

**‘Confirmation of payments towards debt- OK Kavango Foods 2010**  
**GQI – Global Quaestor International (Pty) Ltd**  
**INVOICES FOR 2010 – 1<sup>ST</sup> Semester – N\$ 10,177,768.62**

Dear Sirs

Please be advised that GQI – Global Quaestor International (PTY) Ltd. Hereby confirms that per our records the following payments were made against **INVOICE: 01-MIN-10-KK N\$ 5,490 177.75**

1. 09/04/2014 N\$ 159 781.32 ( Balance from 300 000.00 made)
2. 02/07/2014 N\$ 2,342 800.00 (Auas City Shares)

The above payments were for the supply and delivery of goods and products, as per contracts signed between JQI and OK Okavango Foods.

**BALANCE STILL TO BE PAID FOR INVOICES 1<sup>ST</sup> SEMESTER 2010**

- |                          |                   |
|--------------------------|-------------------|
| 1. Invoice: 01-MIN-10-KK | N\$ 2,987, 596.43 |
| 2. Invoice: 02-MIN-10-CC | N\$ 4,687, 590.87 |

<b>TOTAL</b>	<b><u>N\$ 7, 675,187.30’</u></b>
--------------	----------------------------------

<sup>32</sup> *Egerer v Executrust (Pty) Ltd* (SA 42-2016) [2018] NASC 6 February 2018 para 35

[74] The second document issued on 21 January 2015, as annexed as 'C2' to the particulars and admitted as exhibit 'AAA' reads as follows:

**'Confirmation of debt- OK Kavango Foods 2010  
GQI – Global Quaestor International (Pty) Ltd  
INVOICES FOR 2010 – 3<sup>rd</sup> Trimester – N\$24,887,673.14**

Dear Sirs

Please be advised that GQI – Global Quaestor International (PTY) Ltd. Hereby confirms that per our records the following invoices are outstanding and payment due for the supply and delivery of goods and products, as per contracts signed between GQI and OK Kavango Foods

**INVOICES FOR 2010 – 3<sup>RD</sup> TRIMESTER**

1. Invoice: 04-CC-10-KK	N\$12,970,318.67
2. Invoice: 05-CC-10-CC	N\$10,571,438.68
3. Invoice: 06-CC-10-Hig CC	N\$ 578,377.05
4. Invoice: 06-CC-10-Hig KK	N\$ 767,538.74

**TOTAL N\$24,887,673.14'**

[75] The final document issued in the series on 21 January 2015 attached to the claim as 'C3' and admitted as 'AAA1' reads as follows:

**'Confirmation of debt- OK Kavango Foods 2010  
GQI – Global Quaestor International (Pty) Ltd  
INVOICES FOR 2010 – 4<sup>th</sup> Trimester – N\$21, 534,588.05**

Dear Sirs

Please be advised that GQI – Global Quaestor International (PTY) Ltd. Hereby confirms that per our records the following invoices are outstanding and payment due for the supply and delivery of goods and products, as per contracts signed between GQI and OK Kavango Foods

**INVOICES FOR 2010 – 4<sup>TH</sup> TRIMESTER**

1. Invoice: 07-CC-10-CC	N\$7,386,716.10
2. Invoice: 08-CC-10-KK	N\$9,238,566.20
3. Invoice: 10-CC-10-Cesta Basica - Cunene	N\$1,979,710.73
4. Invoice: 10-CC-10-Cesta Basica	N\$2,929,595.02

**TOTAL N\$21,534,588.05'**



[76] I set out to contemplate the meaning of the word 'confirm' as well as the word 'confirmation'. Black's Law Dictionary<sup>33</sup> ascribes the following meanings to 'confirm' "*to complete or establish that which was imperfect or uncertain; to ratify what has been done without authority. To make firm or certain; to give new assurance of truth or certainty.*" The same Dictionary defines the word 'confirmation' as "a contract or written memorandum thereof, by which that which was infirm, difficult of proof, void, imperfect, or subject to be avoided is ratified, made firm and unavoidable."

[77] The words in all the documents pertinently refer to invoices that are outstanding, as per the defendant's records, that payment is due and then it specify the invoice numbers of the defendant and the corresponding amounts. This also supports the plaintiff's notion that these documents constitute liquid documents, as the amounts of indebtedness are clearly ascertainable and there is no trace any form of conditionality in the language.

[78] Moreover, these documents were addressed to the plaintiff from the defendant, typed on the defendant's letterhead, signed on behalf of the defendant, and completed with a stamp of the defendant.

[79] The court also could not loose sight that after all the promises made during the plaintiff's case about what the defendant and other witness will come and testify, none of that materialized. The defendant's instructions through his attorney remains just allegations. In addition the counterclaim, which was grounded in an averment that defendant paid for goods that was not delivered, was withdrawn, albeit was belatedly, and after having kicked up a lot of dust about short deliveries.

[80] In cumulatively considering the words of the documents, the conduct of the parties and the surrounding circumstances I am persuaded that the parties intended the creation of a new obligation and that the subsequent acknowledgments of debt constituted a substantive cause of action to form the basis of the plaintiff's claim and found in favour of the plaintiff.

---

<sup>33</sup> Black's Law Dictionary *Black's Law Dictionary Abridged 5<sup>th</sup> ed. West Publishing Co. (1983)*

[81] In view of the finding I came to I concur with the plaintiff's view that the defendant attack on the underlying agreements was a misdirected approach and do not deem it necessary to deal with that.

[82] In the result, the order follows:

1. Judgment is granted in favour of the plaintiff in the following terms:
  - 1.1 Payment in the amount of N\$ 54, 097, 448.49.
  - 1.2 Interest on the said amount at the rate of 20% per annum from the date of summons to date of payment.
  - 1.3 Cost of suit, which cost to include the costs of one instructing and one instructed counsel.
2. The defendant has withdrawn its counterclaim and tendered costs, to include the cost of one instructing and one instructed counsel.

---

C CLAASEN  
JUDGE

APPEARANCES:

PLAINTIFF:

AW Corbett (SC)

Instructed by Ellis Shilengudwa Incorporated

Windhoek

DEFENDANT:

JA Strydom with him Mr Van Zyl

Instructed by Erasmus & Associates

Windhoek