

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 654/2015

In the matter between:

T&M AUTOMOTIVE CLOSE CORPORATION

PLAINTIFF

And

ONDANGWA AMBULANCE SERVICES CC

DEFENDANT

Neutral citation: *T&M Automotives CC v Ondangwa Ambulance Services CC* (I 654/2015) [2017] NAHCMD 98 (10 March 2017)

Coram: PRINSLOO AJ

Heard: 7 – 10 February 2017, 1 March 2017

Delivered: 10 March 2017

Flynote: Law of Contract – written agreement – terms of agreement modified due to subsequent oral agreement – plaintiff succeeds partially in its action as it has proven its case on a balance of probabilities – defendant's counter claims are dismissed – lack of evidence – onus not discharged.

Summary: The plaintiff and the defendant entered into a written agreement for the conversion of one VW Crafter vehicle into an ambulance. The quotation issued by the plaintiff was approved by the defendant and subsequently the plaintiff commenced its work. During the course of the conversion, the defendant instructed the plaintiff verbally to fit additionally equipment to the said vehicle. Accordingly, the vehicle was not completed within the period agreed upon by the parties in the written agreement.

Held, that the oral agreement varied the terms of the written agreement.

Held, that delay in delivering the vehicle to the defendant was reasonable.

Held, that taking the said vehicle to another company to complete the work amounted to repudiation of the agreement between the plaintiff and the defendant.

ORDER

1. **Plaintiff's claim against the defendant succeeds in part and the defendant is ordered to pay the amount of N\$126,950.00 over and above the amount of N\$95,025.00 agreed upon between the parties and which agreement was made an order of court on 9 July 2015.**
 2. **Plaintiff is awarded interest on the amount of N\$126,950.00 at the rate of 20% per annum calculated from August 2014 to date of payment.**
 3. **Plaintiff is awarded costs of suit.**
 4. **Defendant's counterclaim in respect of Claim A, B and C is dismissed.**
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JUDGMENT

PRINSLOO, AJ

Introduction:

[1] Both the plaintiff and the defendant in this matter are close corporations registered in terms of the *Close Corporation Act, 26 of 1988*. When the cause of action arose, the plaintiff had two members with 50 % share each, namely Mr. Brian

Colin Motsang and Mr. Harry Tlhalehile. Mr. Tlhalehile is however no longer a member of the plaintiff. The members of the defendant, Mr. Josef Gerson Auala and Dr Jerry Lwande, also had a 50% share each. The plaintiff conducts business wherein it converts vehicles. The defendant is in the ambulance business.

[2] At all material times the plaintiff was represented by Mr. Brian Colin Motsang (hereafter referred to as Motsang) and the Defendant was represented by Mr. Josef Gerson Auala (hereafter referred to as Auala).

Common cause issues:

[3] It is common cause that during March 2014 the plaintiff and defendant entered into a partly written and partly oral agreement in which the defendant would deliver to the plaintiff a VW Crafter vehicle for the purpose of converting same into an ambulance. Motsang compiled a written quotation¹ for the conversion of the vehicle into an ambulance and the fitting of medical equipment and accessories to the said vehicle. The plaintiff had to source the relevant medical equipment prior to fitting it. The quotation was for the amount of N\$385,237.35; which quotation was accepted by Auala on behalf of the defendant.

[4] The defendant secured financing for the vehicle and its conversion from Bank Windhoek, Ondangwa and took delivery of the vehicle on 31 March 2014.

[5] The new VW Crafter was delivered to the workshop of the plaintiff during the first week of April 2014 where the conversion would be done.

[6] Specific terms of the agreement were that the conversion will be completed within six (6) to eight(8) weeks after approval of the quotation.

[7] During August 2014, the vehicle was delivered to AutoHaus Windhoek. AutoHaus in turn delivered the said vehicle to Bus Builders Namibia CC (hereinafter called 'Bus Builders') on the instructions of the defendant. The vehicle was not returned to the plaintiff after it was delivered to AutoHaus Windhoek.

¹Exhibit A to the proceedings.

[8] During pre-trial proceedings, a partial settlement was reached on the 9 July 2015 where it was agreed that the defendant would pay the plaintiff the amount of N\$95,025.00, which is made up as follows:²

'2.1.2 The Defendant will pay the Plaintiff for the following items:

a) Bull bar -	N\$ 7 500.00;
b) Signage -	N\$ 9 500.00;
c) Spotlight - 1 650.00;	N\$
d) Till geysers-	N\$ 6 500.00;
e) Mini-light bar-	N\$ 8 500.00;
f) Extra Battery system-	N\$ 8 500.00;
g) Red light Build Mini-	N\$ 15 300.00;
h) Siren and PA system-	N\$ 5 625.00;
i) Amber Cluster (4)-	N\$ 2 250.00;
j) Self-loading stretcher, client shall pay for one -	N\$17 500.00;
k) Oxygen Socket-	N\$ 2 700.00;
l) 12 V Cooler bag-	N\$ 9 500.00.

[9] This agreement was reached on 9 July 2015 and was made an order of court.³

[10] The parties are in agreement that the amount of the plaintiff's claim is the total amount claimed by plaintiff, less N\$95,025.00.

[11] No payment was made by either party in this matter, neither on the claim in convention or claim in reconvention nor in terms of the court order dated 9 July 2015.

Pleadings:

Plaintiff's claim:

[12] Plaintiff alleges that during March 2014 the quotation to convert a VW Crafter into an ambulance was accepted by the defendant. The plaintiff ordered the

²Case Management and Court Order Bundle, p121.

³Case Management and Court Order Bundle, p123.

necessary equipment and it was received during May 2014, where after it was confirmed with Auala that the conversion may proceed as agreed upon.

[13] Subsequent to the written agreement, a further oral agreement was reached between Motsang and Auala regarding additional work relating to the conversion of the said vehicle, which included sourcing of extra medical equipment.⁴ Because of the additional workload the plaintiff was unable to finalize the conversion within the six (6) to eight (8) weeks 'time-frame as agreed upon between the parties.

[14] In August 2014, the plaintiff was ordered by the defendant to deliver the vehicle to Autohaus Windhoek in order to test if the conversion was correctly done. The vehicle was duly delivered to Autohaus Windhoek, but since date of delivery the vehicle was not returned to the plaintiff to fit the additional medical equipment and accessories agreed upon.

[15] As a result, during November 2014, the plaintiff issued a letter of demand to which defendant responded.

[16] Plaintiff set its claim out as follows⁵:

'9. It is apparent from the Defendant's letter that they wrongfully and without notifying the Plaintiff, terminated the agreement surviving between the parties.

10. In the premises, Plaintiff had performed as contemplated by carrying the conversion and did procure the necessary medical equipment and accessories, which are to date still at the premises of Plaintiff and which as earlier stated Plaintiff had offered to mount and fix same on the vehicle.

10.1 As a result of defendant's failure to return the vehicle to Plaintiff for purposes of finalizing the conversion and fitting of that equipment, Plaintiff was prevented and/or barred to oblige its aforesaid undertaking and particularly the fitting of the equipment and accessories.

10.2 As a consequence, Plaintiff suffered damages in the amount of N\$ 447 120.00 made up of the conversion cost and expenses for the medical equipment sourced, such medical equipment was specifically designed and sourced for the defendant's specific requirement and which plaintiff cannot use or mount on any vehicle other than to the specific vehicle of the defendant and or similar vehicle.'

⁴Exhibit B to the proceedings.

⁵Page 4-5 of the Pleadings Bundle.

[17] Plaintiff seeks the following relief:

- 1) **The total cost in the sum of N\$447,120.00;**
- 2) **Interest on the aforesaid amount at the rate of 20% from August 2014 until date of final payment;**
- 3) **Cost of suit;**
- 4) **Further and/or alternative relief.**

Defendant's plea:

[18] The defendant denied in his plea that the written agreement was reflected in TM1⁶; and pleaded that there was only one agreement in existence as reflected in OAS1.⁷ The defendant further denied that the plaintiff ever communicated with the defendant that the parts would only be delivered in May 2014 nor did the plaintiff confirm with Auala whether he should proceed in terms of the agreement.⁸ The Defendant also denied that the parties entered into a subsequent oral agreement for the installation of the additional equipment which were not quoted in the initial written agreement OAS1.⁹

[19] The defendant further pleaded that the plaintiff breached the agreement, in that:

1. **it failed to finalize the conversion of the vehicle within six (6) to eight (8) weeks in terms of the agreement;**
2. **it failed to complete the conversion as per the specifications of the defendant; and**
3. **it failed to carry out the conversion in a proper and workmanlike manner.**¹⁰

Counter Claim:

[20] The defendant's counter claim consists of three claims:

⁶ Par 4.2 of Defendants plea, page 25 of the Pleadings Bundle.

⁷ Page 69-75 of the Pleadings Bundle.

⁸ Par 7.2 of Defendants plea, page 26 of the Pleadings Bundle.

⁹ Par 9.2 of Defendants plea, page 27 of the Pleadings Bundle.

¹⁰ Par 9.5 and 9.6 of Defendants plea, page 27 of Pleadings Bundle.

20.1 Claim A is in respect of breach of contract:¹¹

' 10. Parties agreed that defendant would deliver to Plaintiff, its Volkswagen Crafter vehicle, for the purpose that Plaintiff would convert same into an ambulance in a proper and workmanlike manner in terms of industrial standards and the standards of the Ministry of Health and Social Services.

11. Parties further agreed that the Plaintiff shall complete the conversion (sic) of the ambulance within six to eight weeks.

11.1 Plaintiff breached the agreement failed to finalise the conversion as per the specifications the Plaintiff provided the Defendant and further failed to carry out the conversion in a proper and workmanlike manner...'

Defendant alleged that plaintiff's breach of the contractual obligations would lie in the following respects:

1. **failure to convert the vehicle into an ambulance within six to eight weeks. Plaintiff took 24-30 weeks to supply all the necessary equipment and convert the vehicle into an ambulance;**
2. **failure to convert the vehicle into an ambulance and fit all medical equipment into the ambulance in a proper workmanlike manner and has failed to comply with industry standards and the Ministry of Health and Social Service standards.**

It is alleged that the defendant had to take the vehicle to another service provider, i.e. Bus Builders Namibia CC, to remedy the defects created by the plaintiff and complete the conversion of the VW Crafter into an ambulance. As a result of the poor work performed by the plaintiff, the defendant suffered damages in the amount of N\$278,783.04.

20.2 Claim B relates to breach of contract due to the use of the VW Crafter by the plaintiff.¹²

It is alleged that the vehicle was brand new when received by the plaintiff and therefore it had a reading of zero kilometres on its speedometer.

¹¹ Page 63 of the Pleadings Bundle.

¹² Pleadings Bundle, p64.

The Claim is on the following:

'16. It was contemplation of the contract,¹³ alternatively it was express or tacit or implied term of the agreement that the Plaintiff will not cause the aforesaid VW Crafter to be driven to the extent of accumulating 400 km, save for driving it from Auto Haus to the Plaintiff place of business and back to Auto Haus on completion of the conversion, which distance is less than 30 km.

17. In breach of the aforesaid agreement the Plaintiff caused the VW Crafter to be driven, while it was in custody of the Plaintiff.'

The defendant claims damages in the amount of N\$6,290.00. The said damages was calculated at a rate of N\$17.00 per kilometre, which is the rate that would be charged in the normal cause of business for the use of the ambulance, over a distance of 370 km.

20.3 Claim C relates to breach of contract set out in the following terms:

'27. It was the contemplation of the agreement that if the said VW Crafter was not converted into an ambulance by the beginning of May 2014 or by mid May 2014 as the case may be the Defendant will lose income to be generated from the use of the said ambulance-to-be.

28. The Plaintiff was given the VW Crafter for conversion into an ambulance at the end of February 2014, to be converted into and (sic) ambulance between six and eight months (sic), therefore in terms of the aforesaid agreement the aforesaid VW Crafter should have been converted into an ambulance at the latest by mid May 2014.

29. In breach of the aforesaid agreement the Plaintiff failed to convert the VW Crafter into an ambulance by mid-May 2014 but returned same to Defendant by mid-August without completing the conversion of same into ambulance.

30. The conversion of the VW Crafter into an ambulance by the Plaintiff was incomplete and defective and failed to comply with the industry and the Ministry of Health and Services standards.

¹³ With reference to the contract to convert the vehicle into an ambulance.

31-32.....

33. But for the wrongful and unlawful conduct of the Plaintiff as aforesaid the Defendant would have earned N\$ 50 000.00 per month from mid-August 2014 to the end of November 2015 from the use of the VW Crafter ambulance in issue.
34. In the premise the Defendant suffered damage in the amount of N\$ 325 000.00 in loss of income from mid-May 2014 to the end of November 2014 and Defendant is entitled to claim same from Plaintiff.

The defendant alleges that due to the breach by the plaintiff, the vehicle had to be taken to another service provider to complete the conversion and same was only completed by end of November 2014.

The defendant claims damages in the amount of N\$325,000.00 for loss of income for the period from mid-May to end of November 2014. The damages was calculated at a rate of N\$50,000.00 profit per month that the ambulance would have generated if not for the wrongful and unlawful conduct of the plaintiff.

Plaintiff's plea to the counterclaim:

[21] The plaintiff in essence denied the allegations set out in the counterclaim as follows:

1. **TM 1 was the only written agreement between the parties. OAS 1 contained TM 1 as well as a list of disposables and drugs that plaintiff could not provide.**
2. **The additional equipment listed in TM2 was items for which Defendant tendered payment.**
3. **The vehicle was fitted with equipment reflected in TM 1 and 2¹⁴ and that same was in accordance with the standards of the Ministry of Health and Social Services.**
4. **After sourcing medical equipment which was received in May, Auala confirmed that the plaintiff could proceed with the conversion.**

¹⁴ Exhibit A and B.

5. **The vehicle was delivered to Autohaus on the instructions of Auala, but the defendant failed to return the vehicle to the plaintiff.**
6. **Due to the defendant's demands for additional equipment, the conversion could not be finalized in six (6) to eight (8) weeks.**

The evidence:

[22] Two witnesses testified on behalf of the plaintiff, namely Mr Motsang and Mr Tlhalehile.

Mr Brian Colin Motsang:

[23] Motsang testified that at the time of concluding the agreement with the defendant, he and Mr Tlhalehile owned 50 % membership in the plaintiff, however, Mr. Tlhalehile has since ceased to be a member.

[24] According to the witness, Auala requested a quotation on behalf of the defendant for the conversion of the VW Crafter into an ambulance. On 10 February 2014 a written quotation¹⁵ was prepared according to the specifications of Auala. In terms of the written quotation, the delivery period for conversion and sourcing of medical equipment was estimated to take six (6) to eight (8) weeks, after approval of the quotation was sent to the plaintiff.

[25] The quotation was approved by Auala in March 2014. As the quotation was only valid for a period of 30 days, Motsang stated that he had to confirm the prices as quoted from his suppliers once the vehicle was delivered at his workshop which was in beginning of April 2014. Once the prices were verified, Motsang discussed it with Auala, who gave the go ahead to order the equipment and proceed with the conversion. The equipment was ordered from South Africa and China and was received by the beginning of May 2014 when the conversion of the vehicle commenced.

[26] It was the understanding that the defendant secured financing from the bank to pay for the conversion and as with previous conversions done on behalf of the

¹⁵ TM1 –page 188 or the Case Management and Court order bundle. Also marked as exhibit A.

defendant, payment would be effected by the bank after final inspection. Motsang however received no order from the bank regarding payment prior to the commencement of the work.

[27] During the process of converting the vehicle, Auala visited the workshop on a regular basis to check on the progress of the vehicle. Twice during these visits Auala saw some new equipment fitted on other vehicles and wanted same to be fitted on the ambulance of the defendant. For example, in June 2014 Auala requested for a teal geyser, extra battery, scoop stretcher and spinal boards (long and short) to be fitted in the vehicle which caused problems as additional space had to be created inside the ambulance to fit this equipment. On another occasion in July 2014, Auala requested fitment of strobes and a mini rear light bar on the vehicle. Motsang stated that none of these items were initially quoted for and accordingly issues regarding cost and delay in finishing the conversion project was discussed with Auala, who indicated that it was in order. As a result, Motsang proceeded to order the items and fit them.

[28] The additional equipment that was ordered caused the total cost of the conversion and equipment to rise from N\$385, 237.35 to N\$447,120.00.¹⁶ However this seemed to be no obstacle as the discussions with Auala clarified the position that the difference between the quoted amount and the amount due would be covered by the defendant.

[29] Motsang furthermore stated that the requests for all the additional equipment caused the plaintiff to be unable to keep to the agreed delivery date, but by the end of July 2014 the conversion was 90% complete and the vehicle was ready to be inspected. Motsang testified that this was the opportune time for the client to inspect the vehicle and in the event that the client wished to make changes, the cost implication would not be so far reaching to as would be in the case where the vehicle was 100% completed.

[30] During the first week of August 2014, Motsang testified that he was contacted by Mr. Hanekom of AutoHaus who informed him that the vehicle needed to be taken for a road worthy test. Motsang followed it up with Auala, who confirmed, and

¹⁶ Included in invoice TM2 in the Case Management and Court order Bundle. Also marked as Exhibit B.

Motsang complied with the request. He stated that at the time when the vehicle was taken for the road worthy tests, not all the medical equipment was fitted to the vehicle as such equipment was not required for purposes of passing the road worthy test and also because the equipment was expensive and could go missing. His understanding was that it would be fitted when the vehicle was returned to the workshop after the road worthy test, but before final inspection.

[31] Motsang further noted to the court that the vehicle was never returned to the workshop of the plaintiff. Approximately after a week, Motsang contacted Hanekom of Autohaus to enquire about the status of the vehicle, but he was directed to speak to Auala. When Motsang called Auala to enquire when the vehicle would be brought back to the workshop for the remaining equipment to be fitted and for the final inspection to be conducted, Auala indicated to Motsang that he would come back to him.

[32] The vehicle was however never returned to the workshop of the plaintiff and no payment was effected to date. On the 4 November 2014 the plaintiff directed a letter to the defendant addressing the issue. On the 28 January 2015a reply on such correspondence was received by the plaintiff from the legal practitioner of the defendant.

[33] Motsang confirmed that there was a partial settlement reached prior to the commencement of the current proceedings and in light thereof the monies due and payable to the plaintiff is N\$447,120.00 less the settlement amount of N\$95,025.00.

[34] In respect to the counter claim the witness stated the following:

Ad Claim A:

Motsang denied that the conversion was done defectively and/or not in a workmanlike manner. Further he outlined that at no stage did any of the members of the defendant address complaints to him nor point out or discuss any defects with him. He stated that the equipment was sourced from different suppliers than that of Bus Builders, but all the equipment complied with SABS standards. Motsang also

considered the quotation of Bus Builders and commented that if one compares the quotations, it is evident that the instructions were different.

Ad Claim B:

Witness denied that the odometer reading of the vehicle was zero when they received the vehicle as they not only viewed the vehicle but also drove it. Once the vehicle was at his workshop, he had a duty to test the vehicle to see if there were any rattles in the vehicle. The vehicle had to be tested under different circumstances and on different road surfaces. In his estimation he drove the vehicle approximately 80-90 km in order to test it, but stated that the defendant was well aware of the fact that the vehicle had to be tested. He further tested this particular vehicle the same way as he did with the other two vehicles that he previously converted for the defendant.

Ad Claim C:

Motsang conceded that the completion of the conversion was not in accordance with the period agreed upon initially, however was adamant about the fact that the additional sourcing of equipment and additional work requested by the defendant caused delays, which would not have been the case had they proceeded as initially agreed upon and quoted for. In respect of this claim, the witness reiterated in what he stated in Claim A. Motsang denied any breach of contract on the part of the plaintiff in this matter.

Mr. Harry Tlhalehile:

[35] Mr. Tlhalehile was a 50 % member of the plaintiff during 2014; however such membership ceased around September 2014. Tlhalehile was head foreman of the workshop at the time when the request was given to the plaintiff regarding the conversion of the said vehicle. He would receive instructions from Motsang and convey the instructions to the workers in the workshop. Tlhalehile confirmed that the defendant was furnished with a quotation for the conversion of a VW Crafter to an ambulance and the equipment was received in May 2014, when they started with the conversion of the vehicle. During the course of the conversion, Auala come to check

on the progress of the plaintiff in respect of the vehicle on a regular basis, but he himself never spoke to Auala. He was however aware of the additional work and equipment requested by Auala during June and July 2014.

[36] During August 2014, Tlhalehile was instructed to take the vehicle to Autohaus and drop it off for a road worthy test. According to the witness, at the time of delivery of the vehicle to Autohaus, the conversion was not fully completed. It was Tlhalehile's understanding that the vehicle would be returned to the workshop once the road worthy test was completed. The witness confirmed that the vehicle was neither returned to the plaintiff's workshop nor was any payment effected for the work that was done.

[37] That concluded the case for the plaintiff.

[38] Three witnesses testified on behalf of the defendant, namely Dr Jerry Lwande, Mr Francois Hanekom and Mr Riaan Tersius Basson.

Jerry Lwande:

[39] The court must interpose here and remark that when Dr Lwande read his witness statement and supplementary witness statement into the record he made substantial corrections to his statements, which I will discuss in due course.

[40] Dr Lwande (hereinafter referred to as Lwande) is a medical practitioner by profession, who is in full time practice in Ondangwa. During 2014 he was not only a 50% member of the plaintiff together with Mr Joseph Gerson Auala, but also the managing director of the defendant.

[41] He testified that during February 2014 the defendant, as represented by Auala, sought quotations for a VW Crafter with the aim of converting such vehicle into an ambulance. Once the quotation was obtained from the plaintiff, it was submitted to Bank Windhoek which approved financing for it and the conversion thereof.

[42] The defendant took delivery of the vehicle on 31 March 2014¹⁷ and shortly hereafter, the vehicle was delivered to the plaintiff. According to the witness, the conversion should have been completed by mid-May in accordance with the quotation. He calculated the period from date of delivery of the vehicle which was during the beginning of April.

[43] Lwande stated that all negotiations regarding this vehicle was done by Auala, but he was kept up to date regarding the progress thereof by Auala. Lwande denied that there were any requests for additional equipment to be fitted to the vehicle. He based this contention on the fact that Auala could not make any such decisions unilaterally and whenever agreed to the fitting of additional equipment. According to Lwande, Auala addressed the delay in the completion of the conversion with plaintiff and an extension of three (3) weeks was granted by Auala to the plaintiff. He stated that he was unaware of the discussion regarding the further acceptance of the quotation in April as well as any discussion about additional cost that would be incurred for the additional equipment to be fitted. He was also unaware of the fact that sourcing and fitting of such equipment would put the project behind schedule. In fact the witness was adamant that there were no such conversations, because if there were, Auala would have informed him of such. He further added that there was no proof to the effect that Auala entered into a further verbal agreement with the plaintiff.

[44] During cross-examination, Lwande was confronted with specific items contained in the Status report¹⁸ dated 9 July 2015 that Auala agreed to pay for, e.g. the teal geyser, extra battery and the mini rear light bar. It was pointed out to the witness that these items were not included in the initial quotation,¹⁹ but was added at the instance of Auala. The witness was of the opinion that if it is proven the items were fixed on the ambulance, the items should be paid for, but that does not mean they requested it.

[45] Lwande stated that he only visited the workshop of the plaintiff once and that was on the 6 August 2014, which was a surprise visit. He stated that when he inspected vehicle, he found that the inside of the vehicle was hollow. Apart from the

¹⁷Case management and Court order bundle, p269.

¹⁸Case Management and Court order bundle, p120.

¹⁹ TM1 marked as Exhibit A.

round tubing in the inside of the vehicle for re-enforcement, nothing was done to the vehicle. According to the witness he saw equipment lying around, but nothing was done with it. When he spoke to Motsang, he was told that the vehicle was tested, but rattled and the work had to be redone. He stated that he also took photographs of the incomplete vehicle, but the said photographs were not produced into evidence before this court. In the opinion of Lwande the work to the vehicle was defective as nothing was done. On a question as to what was defective, the witness replied that in his opinion everything was defective.

[46] Also, when invited to comment on the appearance of the ambulance when it was delivered to Autohaus, the witness stated that he was unable to as he did not see the vehicle again.

[47] Lwande indicated that thereafter they had discussions with the bank and Autohaus and instructions were given that the vehicle should be delivered to Autohaus to check on the conversion. The witness however stated that from what he saw during his inspection of the vehicle on 6 August 2014, he had no intention of returning the vehicle to the plaintiff's workshop. The vehicle was delivered to Autohaus where after it was delivered to Bus Builders. The latter company completed the conversion of the vehicle and Bank Windhoek effected payment to them in the amount of N\$348,448.18.²⁰ Lwande confirmed that no payment to date was effected to the plaintiff in respect of the work done on the vehicle or for equipment sourced prior to its removal.

[48] Lwande stated in support of his counter claim, the following:

Ad Claim A:

The witness stated that if the plaintiff not did breach the terms of the agreement that stated that the conversion had to be finished within six (6) to eight (8) weeks then the defendant would not have taken the vehicle to Bus Builders and defendant would not have suffered damages in the amount of N\$385,237.35²¹. It was pointed out to the witness during cross-examination that the defendant was not out of pocket as he did

²⁰Case Management and Court order Bundle,p275-279.

²¹Pleadings bundle, p64. Amount as corrected by the witness when statement was read into the record. Claim A in counterclaim is N\$ 278 783.04.

not pay the plaintiff. Defendant paid Bus Builders Namibia the amount of N\$385,237.35 for the conversion and had the end product in the form of a fully converted ambulance. To this, the witness replied that if the plaintiff was not demanding to be paid for work he did not do, then the issue of damages would not have been there.

Ad Claim B:

The witness stated that the defendant suffered damages in the amount of N\$5,100.00.²² The witness conceded that he could not say what the odometer reading of the vehicle was at the time of the delivery of the said vehicle to the plaintiff nor could he say what the reading was when the vehicle was delivered back to Autohaus or when it was delivered to Bus Builders. He could also not comment on the statement of Motsang that he tested the vehicle and during the course of testing, he might have driven the vehicle for 60-90 km.

Ad Claim C:

The witness stated that defendant suffered damages in the amount of N\$220,000.00.²³ Lwande stated that at the time (2014) the defendant was the only privately-owned ambulance services in Ondangwa. Currently there are three (3) or four (4) such companies in operation.

The conversion had to be finished by mid-May in terms of his calculations, but as the plaintiff did nothing with regards to the conversion of the vehicle it had to be taken to another service provider in August 2014. It took another two months, until November, to receive the converted ambulance. The witness stated that the ambulance they had at the time operated at a nett profit of N\$486,904.00 for the 2014/2015 financial year. The damages suffered was calculated at an average of N\$40,575.00 per month. These calculations were done by the bookkeeper of the defendant.

²²Pleadings bundle, p65. Amount as corrected by the witness when statement was read into the record. Claim B in counterclaim is N\$ 6290.00.

²³Pleadings bundle, p66. Amount as corrected by the witness when statement was read into the record. Claim C in counterclaim is N\$ 350 000.

Francois Hanekom:

[49] Again, when Mr Hanekom's statement was read into the record the witness also had to make made various corrections thereto.

[50] Mr. Francois Hanekom (hereinafter referred to as Hanekom) is a Sales Executive at Autohaus Windhoek (Pty) Ltd and was in the same position during 2014. Hanekom testified that he was requested by Auala to follow up on the progress of the conversion on the vehicle. He went to the workshop of the plaintiff twice to see what the progress was and he then reported back to Auala that the vehicle was still incomplete. During his last visit to the workshop, Hanekom was informed that once the vehicle is ready it would be dropped off at Autohaus.

[51] In August 2014, a representative of the plaintiff brought the vehicle to AutoHaus and told Hanekom the conversion was complete. According to Hanekom, he received a list via e-mail from Auala, according to which he then checked the vehicle. After he checked the vehicle, he informed Auala that in terms of the list provided, the vehicle was not completed. Hanekom testified that he was not in the position to judge if the vehicle was fit to operate as an ambulance or not and could not comment as to any existing defects. He however advised Auala to take the vehicle to another converter. Auala apparently consulted Bus Builders and instructed Hanekom to deliver the vehicle there.

[52] Prior to doing so, Hanekom caused the vehicle to be taken to NaTIS for the roadworthy test. The witness emphasized that the vehicle was only tested to determine if it was road worthy and not to determine the fitness of the vehicle to be an ambulance. After the vehicle was successfully tested, it was delivered to Bus Builders. The vehicle was not returned to Autohaus after the conversion was completed.

Riaan Tersius Basson:

[53] Mr Riaan Tersius Basson (hereinafter referred to as Basson) is a managing member of Bus Builders Namibia CC and has 30 years' experience in building buses and motor vehicles.

[54] The witness testified that during August 2014 a VW Crafter was delivered to their place of business and he received instructions to inspect the vehicle and prepare a quotation for the conversion of the said vehicle into an ambulance. Auala provided him with list of equipment and some of the specifications they required. The quotation furnished to the defendant was for a standard conversion, that Bus Builders does, and the parties agreed regarding the costs. The agreement between plaintiff and defendant was not discussed.

[55] Basson outlined that he inspected the vehicle and was of the opinion that the lay-out of the ambulance was impractical as there was limited space to move and it had insufficient storage facilities to store and carry equipment. Certain proposals were made to the defendants where after changes followed, such as the removal of one stretcher which was replaced with a bench containing storage and removal of a seat which was replaced with a cabinet.

[56] When confronted with the quotation of the plaintiff ²⁴, Basson indicated that the list of equipment to be fitted was similar to the list of the equipment that Bus Builders would fit and both lists appeared to be in compliance with the standards of the Ministry of Health and Social Services.

[57] Basson however did not want to comment on the differences found on the quotation in respect of the conversion of the vehicle and stated that there was insufficient detail on the plaintiff's quotation in that regard. He however stated that no structural changes were made by Bus Builders. The witness further stated that the round tubing round roll bars were removed from inside of the vehicle as the vehicle apparently already has a re-enforced structure.

[58] The checkered aluminium plating, covering the inside of the ambulance, was also removed as it can be difficult to be cleaned and same was replaced with smooth aluminium.

[59] The witness stated that they discovered a problem with the fuse box, but he failed to elaborate on the exact nature of the repairs that was to be/that was effected.

²⁴ TM 1 marked as Exhibit A.

[60] Furthermore, he testified that a number of the equipment fitted by the plaintiff was retained for example an aircon evaporator, cab slider, spine boards, stretchers, signage, lights, etc. as it was used in the course of the conversion. The witness was however unable to recall exactly which of the equipment fitted by the plaintiff was re-used.

[61] That concluded the case for the defendant.

Evaluation of evidence:

[62] In respect of the witnesses who testified Motsang made a good impression on the court as a witness and his evidence withstood the scrutiny of cross-examination. Tlhalehile also made a good impression on this court as a witness, however as his testimony continued, Tlhalehile could not assist the court with exact dates and the relevant time periods. This witness unfortunately did not take the matter much further, but he was able to corroborate the evidence of Motsang regarding the additional requirements that Auala requested.

[63] Hanekomand Basson could also not be faulted as witnesses. These witnesses were independent witnesses that were not part to the original agreement between the parties. Hanekom was requested to check on the progress of the conversion, which he did. The list received from Auala was not handed into evidence and thus the court was not privy to the content and does not know what Hanekom checked and what was outstanding in the vehicle. The witness is however not an expert in coach building and did not take the matter any further.

[64] Mr. Basson was not called as an expert witness, in spite of his years of experience in the field and he testified regarding their quotation and work done on the vehicle. In the statement of the witness it was alleged that 'the workmanship was poor'²⁵ and 'the workmanship of and material used by the plaintiff in general was very poor'²⁶, but the allegation was left at that and was not elaborated on. During his

²⁵ Paragraph 2.2 of Witness statement of Mr Basson- page 281 of Case Management and Court order Bundle.

²⁶ Paragraph 2.2.4 of Witness statement of Mr Basson- page 281 of Case Management and Court order Bundle.

evidence he elaborated on the work done in the vehicle, but was unable to compare the quotation of the plaintiff with that of Bus Builders or comment thereon.

[65] This brings the court to the evidence of Lwande. I left the discussion of the evidence of this witness to last for a reason. Lwande made bold allegations throughout his evidence on issues that he had no knowledge of. Lwande was not prepared to accept that Auala made independent decisions without discussing it with him first. In addition, Auala had the mandate to act on behalf of the defendant and he used it to make decisions that are considered binding on the defendant.

[66] The majority of Lwande's evidence was hearsay and based on conjecture. What is of concern to this court is that Auala, who is the axis around whom this whole matter turns, was not called to testify. It is impermissible hearsay if evidence is tendered with the purpose of proving the truth of a matter without calling the person who made the statement or on whose information the statement is made.²⁷

[67] In light of defendant's failure to call Auala, the evidence of Motsang stands largely unchallenged.

Witness statements:

[68] At this juncture the court needs to briefly address the issue of witness statements that were filed on behalf of the defendant. *Rule 93 of the Rules of the High Court* deals with the use of witness statements at trial. *Rule 93 (2) and (3)* specifically sets out the following:

'(2) Where a witness is called to give oral evidence under this rule his or her witness statement will stand as his or her oral evidence-in-chief unless the court orders otherwise.

(3) A witness giving oral evidence at a trial may, with the leave of court, amplify his or her witness statement and give evidence in relation to new matters which have arisen since the witness statement was served on the other parties, except

²⁷*Gemeenskapsontwikkelingsraad v Williams and Others* (1) 1977 (2) SA 692 (W) at 696H; *Passano v Leissler* 2004 NR 10 (HC) at 17BC; *Damaraland Builders CC v Ugab Terrace Lodge CC* 2012 (1) NR 5 (HC) on pg 17 at [21].

that the court may give such leave only if it considers that there is good reason not to confine the evidence of the witness to the contents of his or her witness statement.'

[69] The witness statements of Lwande and Hanekomboth were shockingly inaccurate. The result was that the witnesses did not just have to amplify their statements, but also correct it as they went along. As already mentioned the corrections made by Lwande cut to the heart of the counter claim. Lwande also made corrections as to the amounts claimed for damages in his counterclaims which is unacceptable. If the defendant wanted to amend any of the particulars of claim it should have followed the procedure for amendment of pleadings as set out in the *Rules*.²⁸

[70] In the matter of *Josea v Ahrens*, Schimming-Chase AJ remarked the following in respect of witness statements:²⁹

[13] The proposed pre-trial order is therefore not a simple document that legal practitioners can gloss over. It is a blueprint for trial. By this time, the parties must have engaged in some form of consultation, considered each other's pleadings and discovery and where the onus lies, and would be aware of the strengths and weaknesses of their respective cases. Thus, when the witness statement is delivered it should contain the result of those consultations and preparation for purposes of giving evidence-in-chief. One can only imagine the saving of time when the evidence-in-chief (contained in a properly prepared witness statement) is read into the record. For this reason, a witness statement must comply with certain standards...

[15] A witness statement must, if practicable, be in the deponent's own words and should be expressed in the first person. The witness's style of speaking should as much as possible be adhered to. For example, words like 'seriatim' or 'inter alia' do not belong in the statement of a person who does not know what those words mean or the context in which they are used. A witness statement is not to be used as a vehicle for conveying legal argument, nor should it contain lengthy quotations from documents unless it is necessary in the circumstances of the case. '

²⁸ *Rule 52*.

²⁹2015 (4) NR, p1205.

[71] The statements recorded on behalf of the witnesses for defendant are nowhere near in line with the directions set out by Schimming-Chase AJ supra. The statement of Basson, for example, was used in an effort to convey legal argument by using the phrase 'defective workmanship' throughout. For example para 2.7 of the statement reads as follows:

' The defective workmanship of the Plaintiff in respect of the VW Crafter if not remedied would have rendered the VW Crafter not roadworthy and not safe to use as an ambulance.' (my underlining)

[72] These were clearly not the words of the witness, but rather that of council who wishes to enforce their point.

Issues in dispute:

Existence of a valid contract between the parties:

[73] During the pre-trial proceedings, the question was raised whether there was a valid contract which came into existence between the parties.³⁰ The agreement in the current matter was concluded on the basis of a quotation and it is well established that, in the ordinary course, a tender or quote, being unilateral in nature, constitutes an offer.³¹ This quote was subsequently accepted by Auala on behalf of the defendant and a contract did in fact come into existence.

[74] The quotation, TM 1, was the written part of the agreement and the acceptance thereof was oral. There is no quarrel between the parties about this part of the agreement. The bone of contention is TM 2, which included additional work and equipment that was not included in the initial quotation. In argument, on behalf of the defendant, is that the parole evidence rule applies i.e. the defendant alleges that evidence of further unwritten contracts which modifies the written agreement between the parties is inadmissible.

[75] The issue here is not that the original agreement was contradicted or altered or added to or varied by the oral evidence of Motsang and Thlahelile. In fact the

³⁰ Case Management and Court Order bundle: Pre-trial minutes on p241.

³¹ Christie (4th Ed). *The Law of Contract*, at 47.

contrary is true. Motsang confirms the agreement as per TM 1 and also proceeded to do the work on the vehicle accordingly. The alleged additional instructions by Auala is disputed by the defendant, but Motsang's evidence stands unchallenged in this regard as Auala failed to testify. The fact that additional instructions were given to Motsang was corroborated by Thlahilile and the subsequent partial settlement agreement.

[76] This court accordingly finds that there was indeed a subsequent independent oral agreement between the parties that related to the additional work and equipment. During the subsequent agreement, Auala was informed of the consequences as to the cost and the delay of delivery, which was apparently acceptable to Auala as Motsang was instructed to proceed with the sourcing of the additional equipment and the fitting thereof. According to Motsang, Auala even indicated that the respondent will pay for the said additional equipment which is not covered by the initial quotation (TM 1).

[77] That issue of the parol evidence rule and exceptions thereto was discussed in the matter of *Damaraland Builders CC v Ugab Terrace Lodge CC*, where Muller J stated as follows:³²

'There are some exceptions to the parol evidence rule, namely whether or not there was a contract, supplementary and subsequent oral contracts, and to explain the terms used in the contract. (McKenzie, supra, 23 – 24.)

In respect of the exceptions only the second one mentioned above may have application to this case. As an exception to the parol evidence rule a party is entitled to show by evidence that apart from the written contract there have been an independent oral contract. It is permissible to provide evidence of the subsequent oral agreement which alters the terms of the written contract. This issue will be discussed later herein. (Goss v Nugent (1833) 2 LJKB 127; African Films Trust v Popper 1915 TPD 201; Cohen v Surkhey Ltd 1931 TPD 340; and Aird v Hockly's Estate 1937 EDL 34.)'

[78] In light hereof, this court finds that the parol evidence rule does not find application in this matter and that there was indeed a subsequent oral agreement and the said agreement is binding on the parties.

³²2012 (1) NR 5 (HC), p14.

Poor workmanship:

[79] The defendant pleaded that the plaintiff breached the agreement by failing to complete the conversion in a workmanlike manner.

[80] According to Lwande, the ambulance was still hollow and nothing was done on 6 August 2014, yet this vehicle was delivered to Autohaus approximately a week later and photos as per exhibit D were handed in as to the appearance of the ambulance and was clearly not as the witness testified. Lwande did not see the ambulance at the time of its delivery to Autohaus and cannot comment as to the state of the conversion. Hanekom had a list to check and as previously indicated that list was not handed in for the court to see what Hanekom was required to check or even to consider if this list was in line with the conversion that the plaintiff had to do.

[81] The plaintiff denies that there was any truth in the defendant's accusation and Motsang stated that the defendant never raised any concerns regarding the quality of the workmanship with him. It is this court's understanding that "workmanship" may be said to be faulty if it has not been properly carried out. It is the evidence of the plaintiff that the conversion was indeed done in a workmanlike manner and photographs were handed in, in support thereof.

[82] In the matter at hand, Motsang admitted that the work on the VW Crafter was incomplete at the time of delivery to Autohaus, as the understanding was that the vehicle would return to his workshop where the outstanding work would be finished off and the vehicle would be delivered. There is however a difference between poor workmanship and incomplete performance. It is not sufficient to make a bold statement and say that the plaintiff used inferior material or equipment, as Lwande did.

[83] It is common cause that the overall onus of proof rested on the plaintiff, but defendant had the burden of adducing evidence in rebuttal in this matter if the plaintiff *prima facie* proved that the work was done in a proper manner.

[84] One way to establish poor workmanship is to determine if there was the use of sub-standard or inferior grade materials or processes during the performance of

work under the contract. If the defendant believed the workmanship to be poor, it was necessary to bring in an expert who independently supports the standards of work in the contracted workmanship, and provide testimony as to the quality of the work done under the contract in order to rebut the version of the plaintiff. This was not done.

[85] There is no evidence before this court that shows poor workmanship. Basson commented on the practicality of the conversion done by the plaintiff, but it is appears that the plaintiff and Bus Builders had different briefs with regards to the conversion that needed to be effected. From the quotation of Bus Builders it appears that they would charge N\$142,000.00 for the conversion and the balance of the N\$385,237.35 was for the payment of equipment that was fitted to the vehicle.

[86] During cross-examination Basson actually confirmed that the list of items to be fitted by Bus Builders was similar in nature to the items to be fitted by the plaintiff. Bus Builders thus sourced the same equipment which the plaintiff did.

Breach of contract:

[87] One of the central issues to the dispute is the period within which the conversion had to be done. Defendant pleaded that the plaintiff breached the contract between the parties by failing to deliver the vehicle within six (6) or eight (8) weeks.

[88] It is trite that the obligation imposed by the terms of a contract are meant to be performed and if they are not performed at all, or performed late or performed in the wrong manner, the party on whom the duty of performance lay (the debtor) is said to have committed a breach of the contract,³³ however the effect of extras and variations to a contract depends on the interpretation of the particular contract.

[89] In *Damaraland Builders CC v Ugab Terrace Lodge CC* (supra) Muller J stated as follows on the delays caused by extras or variation of orders:

³³Christie (5th Ed). *The Law of Contract*, p495.

'The issue of delay caused by the execution of extras and variation orders by the employer in respect of the agreed time of completion has been interpreted by our courts in the past. It has been held that the stipulated time of completion in the majority of cases cease to apply.'³⁴

[90] When there is a clause stipulation for work to be done in a limited time, if one party by his conduct (*albeit quite legitimate*, such as ordering extra work), renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated.

[91] Motsang gave evidence in respect of additional instructions by Auala during which the plaintiff was ordered to source and fit additional equipment, which caused the delivery period to overrun. It is not necessary to repeat the evidence in this regard, as Motsang testified in detail as to how much time was consumed not only by doing the extra work but by sourcing the additional equipment from elsewhere. This also did not happen only once, it happened in June as well as July 2014.

[92] It is thus clear that the delay in delivery of the converted vehicle was due to the additional instruction of Auala.

[93] When the time period for delivery then fall away due to subsequent agreements, delivery should have been within a reasonable period of time. Reasonable time should be considered in light of the circumstances of the matter.

[94] According to Motsang, he had to source the equipment from South Africa and even as far as China. The importation of goods from other countries can cause a substantial delay and can even bring a project to a standstill, which apparently happened in this instance.

[95] It was further testified that the vehicle was 90% complete when it was delivered to Autohaus for the roadworthy test.

[96] The plaintiff's explanation for the delay in delivering the vehicle, in this court's opinion, is reasonable and I cannot find any breach on the part of the plaintiff.

³⁴*Damaraland Builders CC v Ugab Terrace Lodge CC* 2012 (1) NR 5 (HC), p14 at [12].

Repudiation:

[97] There is a dispute between the parties as to the reason for the delivery of the vehicle to Autohaus, as Hanekom stated that when the vehicle was delivered to him he was told that the conversion of the vehicle was completed. Plaintiff on the other hand maintained that the vehicle had to go for a road worthy test, which was coincidentally caused to be done by Hanekom after delivery of the vehicle.

[98] The attitude of Lwande was that the vehicle had to be 'repossessed' by Autohaus and then to be handed to another service provider. During cross-examination, Lwande stated that after 6 August 2014 he had no intention for the vehicle to be returned to the plaintiff's workshop.

[99] In *Schlinkmann v Van der Walt*, Lewis J said:³⁵

'Repudiation is in the main a question of the intention of the party alleged to have repudiated. As was said by LORD COLERIDGE, L.C.J., in *Freeth v Burr* (1874) (L.R., 9 C.P. at p. 214):

'the true question is whether the acts or conduct of the party evince an intention no longer to be bound by the contract,'

a test, which was approved by the House of Lords in *Mersey Steel Co v Naylor* (9, A.C. 434). In *Re Rubel Bronze and Metal Co. and Vos* (1918, 1 K.B. at p. 322) MCCARDIE, J., said as follows:

'The doctrine of repudiation must of course be applied in a just and reasonable manner. A dispute as to one or several minor provisions in an elaborate contract or a refusal to act upon what is subsequently held to be the proper interpretation of such provisions should not as a rule be deemed to amount to repudiation . . . But, as already indicated, a deliberate breach of a single provision in a contract may under special circumstances, and particularly if the provision be important, amount to a repudiation of the whole bargain . . . In every case the question of repudiation must depend on the character of the contract, the number and weight of the wrongful acts or assertions, the intention indicated by such acts or words, the deliberation or otherwise with which they are committed or uttered, and the general circumstances of the case.'

To this I would add only that the onus of proving that the one party has repudiated the contract is on the other party who asserts it.'

³⁵1947 (2) SA 900 (E).

[100] The conduct of the defendant in this matter was a deliberate and unequivocal intention to no longer be bound to the agreement. It is also not just limited to the conduct of the defendant. Lwande stated it in no uncertain terms.

[101] When Motsang enquired as to when the vehicle would be returned to the workshop, he got no clear answer. The issue of the removal of the vehicle to another service provider was never discussed with plaintiff.

[102] Failure to bring the vehicle back to enable the plaintiff to complete the conversion is repudiation of a fundamental term of the contract as defendant made it impossible for plaintiff to complete his performance in terms of the contract.

[103] The court was referred by the plaintiff to the matter of *Myer v Abramson* where Van Wisen J held that:³⁶

‘As a general rule a contract cannot be rescinded except by consent of both parties thereto or by order of a competent Court, on a ground recognised by law as one on which rescission can be claimed. See Wessels, Contract, vol. 1, paras. 1991 - 1996, vol. 2, para. 2917; Bacon v Hartshorne, 16 S.C. 230; Delany v Medefindt, 1908 E.D.C. 200 at p. 205. Where one party to the contract had unjustifiably repudiated it the injured party has as a general rule, the right to elect to accept the repudiation - and so by consent to put an end to the contract and sue for damages, or he is entitled to ignore the repudiation and hold the other party to the contract and claim specific performance.’

[104] The plaintiff accepted the repudiation of the contract and is suing for damages suffered because of defendant’s breach.

Nature of damage for breach:

[105] According to the learned author *Christie*, damages for breach of contract are normally not intended to recompense the innocent party for his loss, but to put him in the position he would have been in if the contract had been properly performed.³⁷

³⁶1952 (3) SA 121 (C), p123.

³⁷Christie (7thEd). *The Law of Contract in South Africa*,p543.

[106] The plaintiff claims damages in the amount of N\$447,120.00. A part settlement was reached between the parties which was made an order of court on 9 July 2015.³⁸

[107] Binns-Ward AJ in *Solomon NO and Others v Spur Cool Corporation (Pty) Ltd and Others* are instructive on the issue of quantification of damages:³⁹

'The fundamental principle in the quantification of contractual damages is that the object is, as far as it is possible without undue hardship to the party in breach to do so by an award in money, to place the innocent party in the position that party would have been had the contract not been breached or repudiated. See, for example, *Victoria Falls & Transvaal Power Co Ltd v Consolidated Lang laagte Mines Ltd* 1915 AD 1 at 22; *Culverwell and Another v Brown* 1990 (1) SA 7 (A) at 29F; and *Rens v Coltman* 1996 (1) SA 452 (A) at 458E. How that object is to be achieved will depend on the peculiar facts of a case.'

...

The judgments in *Culverwell* and *Rens* (supra) illustrate that, while on the facts of a case the dates of due performance, repudiation or cancellation may well be important in the appropriate computation of contractual damages, the overriding consideration is the calculation of a figure which fairly achieves the object of putting the innocent party in the position it would have occupied had the agreement been fulfilled. See also *Mostert NO v Old Mutual Life Association Co (SA) Ltd* 2001 (4) SA 159 (SCA) at 187B – E. Whichever approach to quantification achieves that object most effectively in the context of the peculiar facts of a case is the appropriate one. This entails the application of pragmatism and common sense rather than formalism. It will in general be appropriate in quantifying contractual damages which, from the perspective of the dates of breach or cancellation, involve a component of prospective loss, to have regard to the effect of relevant events intervening between those dates and the trial insofar as that will facilitate a more accurate achievement of the object.'

[108] Plaintiff already succeeded in obtaining judgment against the defendant for N\$95,025.00 in respect of equipment fitted to the vehicle. Plaintiff is also currently in possession of the remainder of the equipment, which is to the approximate value of

³⁸Plaintiff did not amend their pleadings accordingly.

³⁹2002 (5) SA 214 (C) ([2002] 2 All SA 359, at paras 34 and 46.

N\$225,145.00,⁴⁰ which equipment can be sold to other interested buyers to mitigate its losses, if any.

[109] The agreed price for the conversion was N\$126,950.00. This amount cannot be mitigated by the selling of equipment. This is damages suffered for work actually done. This also appears to be the actual damages that the plaintiff suffered.

[110] In respect of the counter claims of the defendant is it clear that the members or maybe more specifically Auala, was the author of its own misery. Defendant breached the agreement between the parties by repudiation.

[111] On counterclaim A, the defendant did not suffer any damages. By taking the vehicle to Bus Builders, it was apparently converted to the defendant's satisfaction and Bus Builders were paid for the conversion and defendant had its ambulance. No money was paid to the plaintiff in this matter. Defendant is thus not out of pocket. There is no breach on the part of the plaintiff herein.

[112] On counterclaim B, dealing with the alleged use of the vehicle while in the possession of the plaintiff and damages suffered because of it. There is no indication what the odometer reading of this vehicle was at any material time. There is no evidence before this court that the vehicle was used apart from the testing process. There was reasonable explanation for the use of the vehicle. There was thus no breach on the part of the plaintiff and the defendant was unable to prove any damage suffered by the mere testing of the vehicle.

[113] On counterclaim C, dealing with the loss of income. Apart from the fact that the court already found that the plaintiff was not in breach of the agreement, the defendant was totally unprepared to prove its claim regarding loss of income. Although there is apparently documentary proof of same, the said documentation was never disclosed and there is nothing before this court to substantiate such a claim.

[114] In the premises, I issue the following order:

⁴⁰ Total quotation less cost of conversion and partial settlement.

1. **Plaintiff's claim against the defendant succeeds in part and the defendant is ordered to pay the amount of N\$126,950.00 over and above the amount of N\$ 95,025.00 agreed upon between the parties and which agreement was made an order of court on 9 July 2015.**
2. **Plaintiff is awarded interest on the amount of N\$126,950.00 at the rate of 20% per annum calculated from August 2014 to date of payment.**
3. **Plaintiff is awarded costs of suit.**
4. **Defendant's counterclaim in respect of Claim A, B and C is dismissed.**

JS PRINSLOO
Acting Judge

APPEARANCES

PLAINTIFF: E Shifotoka
 of Conradie Damaseb

DEFENDANT: R Mukonda
 of Mukonda & Co Inc.