

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO. I 160/2015

In the matter between:

SOLTEC CC

PLAINTIFF

and

SWAKOPMUND SUPER SPAR

DEFENDANT

Neutral citation: *Soltec CC v Swakopmund Super Spar* (I 160/2015) [2018]
NAHCMD 251 (20 August 2018)

Coram : MASUKU J

Heard: 7, 8, 9, 10, 11 March 2016; 16 January 2017; 15 March 2017;
12, 13, 16 February 2018

Delivered: 20 August 2018

Flynote: Law of Contract – for work done in installing invertors and switch gear to defendant’s shop – whether contract was entered into – terms thereof
- Law of Evidence – approach to disputed facts and procedure to be employed in resolving the disputes – the fact that a witness has lied in respect of an issue does not necessarily mean that his or her entire evidence must of

necessity be discarded - Law of Costs – circumstances in which attorney and client scale are granted – party inventing a counterclaim that does not exist is liable a punitive costs order.

Summary: The plaintiff and the defendant entered into an oral contract for the installation of an inverter box and switch gear at its premises. The plaintiff led evidence to show that it had done the work as agreed between the parties. The defendant denied liability and claimed that it was not liable as the work allegedly done by the plaintiff had been covered under an agreement it had made with a German outfit called Calyxo. In addition, the defendant filed a counterclaim for costs associated with the use of a forklift used by the plaintiff, in terms of an alleged oral agreement. As the trial progressed, the defendant withdrew the counterclaim but persisted with its defence on the plaintiff's claim.

Held – that the plaintiff, on a mature consideration of the evidence, had proved that it had done the work, pursuant to an agreement made *inter partes*.

Held further – that although the plaintiff did not perform well as a witness, as he appeared confused and at times contradictory, that performance could not be attributed to him being a witness who was intent on lying to the court and that as such, his credibility was not affected as the probabilities showed that the work was done by the plaintiff as claimed.

Held – that the fact that a witness has lied in respect of one matter in his or her evidence, does not necessarily have to result in the court jettisoning that witness' evidence in its entirety.

Held further – that the defendant, on the other hand, was a witness who lied deliberately under oath and conjured up a counterclaim against the plaintiff, which in fact did not exist and that the court had to punish to show its displeasure.

Held – that the defendant appeared not to have understood the impact and extent of the work that had to be done, particularly that it was outside the scope of the work that was done by Calyxo and for which the defendant had paid.

Held further – that the defendant, on account of conjuring a non-existent defence, was liable to pay costs on the punitive scale as it had abused the court's processes for a nefarious purpose.

The court granted the plaintiff's claim with punitive costs.

ORDER

1. The Plaintiff's claim succeeds.
2. The Defendant is ordered to pay interest on the aforesaid amount of N104.086.82, at the rate of 20% *a tempore morae* from 18 June 2014 to the date of final payment.
3. The Defendant is to pay the Plaintiff's costs on the attorney and client scale, consequent upon the employment of one instructing and one instructed Counsel.
4. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction and Background

[1] This is a defended action in which the plaintiff, a close corporation, duly incorporated in terms of the Close Corporations Act,¹ sued the defendant, described as a firm or association, as contemplated in terms of rule 41(1) of the High Court Rules, for payment of an amount of N\$ 104, 086.82, interest thereon and costs of suit.

[2] In its particulars of claim, the plaintiff averred that it had, through the instrumentality of its member, Mr. Heinrech Steuber, entered into an oral agreement for the supply and installation of an additional inverter combiner enclosure together with additional safety equipment, known as a switchgear or circuit breaker, to the defendant's shop in Swakopmund. The defendant, it was further alleged, was represented by a Mr. Du Preez, at the conclusion of the said oral agreement.

[3] The defendant denied liability for payment of the said amount or of any lesser amount to the plaintiff. The defendant denied that it entered into any contract with the plaintiff, alleging that the plaintiff, in dealing with the defendant, acted as an agent for an entity known as Calyxo, and with which the defendant had contracted. The plaintiff's *locus standi* was thus placed in issue by the defendant.

[4] In the alternative, and only in the event that the court found that the defendant had indeed contracted with the plaintiff and not with Calyxo, as alleged, the defendant denied that any agreement was made regarding the installation of any equipment. It was the defendant's case that Mr. Steuber had assured the defendant that no additional equipment would be necessary. When it later transpired that such additional equipment was necessary, the plaintiff assured the defendant that there would be no additional costs as the costs therefor were included in the price quoted by the plaintiff, the defendant further averred.

¹ Act No. 26 of 1988.

[5] The defendant did not end there. It further instituted a counter-claim against the plaintiff consisting of two separate claims. The first one was for payment of an amount of N\$ 2 559, 175 allegedly premised on the allegations that the equipment supplied and installed by the plaintiff to the defendant was faulty, unsuitable and defective, particularly considering the purpose for which it was installed. It was further averred that the installation was done in a poor and unworkmanlike fashion, leading to cracked solar panels and broken cables connectors eventuating.

[6] The second counter-claim was for the payment of an amount of N\$ 66,412.50, which it claimed was due as a result of the plaintiff and the defendant entering into an oral agreement in terms of which the plaintiff rented the latter's forklift for payment of the agreed amount of N\$375.00 per hour. It was alleged that the plaintiff used the said forklift for a period of 154 hours and that the defendant was liable to pay the said amount on the presentation of an invoice. It was averred further that despite the presentation of the invoice, on 7 August 2013, the plaintiff refused and/or neglected to honour same.

[7] The plaintiff, in its replication, denied the averrals made by the defendant stated above. In particular, it denied the existence of an agency agreement with Calyxo in so far as the installation of the equipment was concerned. The plaintiff further denied giving the warranty alleged and further denied installing faulty and/or defective equipment. It further denied that the installation was done in a poor and unworkmanlike fashion.

[8] Regarding the second claim, the plaintiff, although admitting the use of the forklift for the purpose, it specifically denied that the said forklift was used on the terms alleged by the defendant. Its case was that it used the forklift at the insistence of the defendant and that the work done using the forklift related to the agency agreement it had with Calyxo but not in relation to the agreement it had with the defendant as pleaded above.

[9] It is pertinent to mention that at the pre-trial conference stage, the defendant, elected to withdraw its first counter-claim against the plaintiff. In this regard, the defendant was accordingly ordered to bear the costs attendant thereto. As a result, the matter proceeded on the basis of the plaintiff's claim and the defendant's second counter-claim based on the alleged use of the forklift.

[10] The matter commenced in earnest. At the close of the case for the plaintiff, an application for absolution from the instance, was moved by the defendant. This application was refused on 3 June 2016 and the defendant was thus placed in its defence.² The defendant, some months later, but before the opening of its case, then moved an application for the re-opening of the plaintiff's case and for it to lead further evidence. This application was dismissed by the court on 18 April 2017, thus setting the stage for the defendant to place its defence and existing counterclaim before the court³.

Approach to the case

[11] As intimated in the previous judgments referred to above, the plaintiff called Mr. Steuber as its sole witness and the defendant, for its part, called Mr. Ryno Du Preez. I will briefly narrate the salient portions of the evidence both witnesses adduced and will evaluate same. This should lead to a conclusion as to whether the plaintiff should succeed in its claim. In this regard, it must be mentioned that the onus to prove the existence of the agreement and the amount allegedly due from the defendant, lies with the plaintiff.

² *Soltec CC v Swakopmund Super Spar* (I 160/2015) [2016] NAHCMD 159 (3 June 2016).

³ *Soltec CC v Swakopmund Super Spar* (I 160/2015) [2017] NAHCMD 115 (18 April 2018).

The evidence

The plaintiff's evidence

[12] Mr. Steuber testified under oath and stated that he is a sole member of the plaintiff. It was his evidence that on 10 January 2013, a written agreement was entered into between the company Calyxo and the defendant and in terms of which Calyxo and the plaintiff were to supply certain goods and services to the defendant. This agreement was, however, cancelled by agreement among the parties. Thereafter, the defendant and Calyxo entered into another written agreement and to which the plaintiff was not party. The agreement related to Calyxo rendering certain services to the defendant, including invertors, DC Combiner boxes, cabling, a roof mounting system and PV modules or solar modules.

[13] The plaintiff was sub-contracted by Calyxo to attend to the installation of the items mentioned above but under the technical supervision, instruction and direction of Calyxo. It was his further evidence that the agreement referred to in the pleadings was then entered into between the parties herein. In terms of this agreement, the plaintiff was to install an additional safety inverter combiner and such additional safety equipment as was necessary, including wiring, termination and ducting of invertors supplied to the combine enclosure.

[14] The plaintiff also had to connect the inverter enclosure to the main distribution board of the defendant's shop, called in technical language, tie-in services. These, according to PW1 were additional services. It was the plaintiff's evidence that Calyxo's responsibility ended at the supply of and installation of the string inverters. In this regard, the inverters and the DC Combiner supplied by Calyxo still had to be connected to the grid and such further connection was required outside the scope of the agreement between Calyxo and the defendant.

[15] Further to this, PW1 further testified, a further connection, which is referred to as the tie-in services, an additional switchgear, such as circuit breakers and earth fault detectors were necessary and had to be supplied and installed. These additional items had to be placed in an enclosure known as the inverter combiner enclosure.

[16] Although this enclosure existed at the defendant's business, on inspection, PW1 discovered that same was small and could not house the new equipment to be supplied. To this end, it was deemed necessary that an additional enclosure had to be provided and the plaintiff and the defendant agreed to this additional enclosure being provided. It was PW1's evidence that all these additional items required some money and the defendant accepted that the necessary goods and services could be supplied and installed by the plaintiff. In this regard, the plaintiff would charge its ordinary and customary rates for the supply and installation of these goods and services.

[17] PW1's further evidence was to the effect that he had a long standing business relationship with Mr. Du Preez Senior and had in that regard provided services and installations at the latter's farm, after which he would issue invoices which would be paid within a reasonable time after issue. He testified that he was never requested by the defendant to supply any quotations in relation to this work. He accordingly did the work as required and advised and charged his usual fees for same.

[18] In relation to the counterclaim, PW1 denied that he had entered into any agreement as alleged by the defendant. His evidence was that the defendant supplied the forklift in respect of the work that he did as an agent for Calyxo and this was because some of the panels had to be installed on the roof of the building and it was necessary to get a forklift to take these to the roof. This forklift, continued PW1, was offered by the defendant of its own accord and at no fee. In this regard, no word or intimation was given that some fee would be payable for the use of the forklift. PW1 accordingly testified that had he known that some fee was payable, he would not have

made use of the service offered and would not have contracted Calyxo to pay same without having received their express agreement in that regard.

[19] Mr. Steuber was cross-examined at length by Mr. Jones for the defendant. He established in cross-examination that PW1 was not certain with whom he dealt in the matter of the agreement between Mr. Du Preez Junior and Senior. It was PW1's evidence though that he dealt with both of them in the presence of each other in most instances. In my view, nothing turns much on this issue, as it is unmistakable that PW1 did deal with both and as far as I could ascertain, Junior testified that he dealt with PW1 regarding the installation of the equipment at the shop in question. There is thus no doubt about the fact that the transaction was made by the plaintiff in respect of the defendant, in my view.

Defendant's evidence

[20] Testifying for the defendant and the only witness, was Mr. Ryno Du Preez, who is the junior of the two Messrs. Du Preez. I shall refer to him as 'Junior' henceforth. It was his evidence that he is the owner of the defendant and also serves as its manager. He testified that in February 2013, he negotiated with Calyxo, a German outfit, for the possible installation of a solar energy solution for the defendant's business. He was, in this connection, informed that Calyxo had a local agent, the plaintiff.

[21] It was his further evidence that prior to the acceptance of an agreement with Calyxo, PW1 had inspected the defendant's premises and paid specific attention to whether or not the electrical box was big enough to house the additional system to be installed. PW1's finding was positive. It was Junior's evidence that he accepted Calyxo's quote and the additional system was duly installed towards the middle of 2013. Once the work was completed, he further testified, he then paid Calyxo in full. It was his position that whatever was owing to the plaintiff was a matter between the plaintiff and Calyxo and had nothing to do with the defendant at all.

[22] Junior specifically denied ever entering into an agreement with the plaintiff for the installation of the invertors and related switchgear equipment. It was his understanding that all the work required was to be done by the plaintiff in its capacity as Calyxo's agent and for which the defendant paid any dues to Calyxo, leaving the defendant with no liability to the plaintiff. In regard to the plaintiff's claim, Junior testified that when the items in question were installed, the plaintiff informed him that these had already been paid for and included in the payment of the quotation made by Calyxo.

[23] The defendant therefor categorically denied the existence of any agreement between that parties herein and specifically denied entering into the agreement alleged by the plaintiff. It was his further contention that his position that there had been no agreement between the parties herein, was fortified by the fact that Calyxo had warranted the material supplied, together with the workmanship for a staggering period of 10 years.

[24] In this connection, Junior further had stated in his witness' statement, that the plaintiff did work on behalf of Calyxo and to that end, required to and used a forklift that belonged to the defendant. It was used for a period of 154 hours, which translated to N\$ 66,412.50, at the rate of N\$375.00 per hour. It was alleged that the plaintiff had refused to settle this invoice despite demand. Junior stated further that he understood the plaintiff to deny this claim and to lay liability at the door of Calyxo, a position that the defendant found confusing as it appeared the plaintiff claimed payment for work it did for the plaintiff on its own account as it were, but where the defendant laid a claim in relation to the same piece of work the plaintiff transferred the liability of that claim to Calyxo. In short, this showed bad faith on the plaintiff's part, it would seem.

[25] I must specifically mention that the contents of the immediately preceding paragraph were excised in the plaintiff's evidence, as the second counter-claim, was also withdrawn by the defendant. I capture these contents for the reason that they may be very crucial on the issue of Junior's credibility and *bona fides* in instituting the counter-claim in the first instance.

Analysis of the evidence

[26] It is very clear that the evidence of the parties, was at variance and for that reason, it is necessary for the court to call in aid the principles applicable in matters where there is a disparity in the parties' version. In *Ndabeni v Nandu*⁴ and *Life Office of Namibia v Amakali*,⁵ the court adopted the position applied in *SFW v Martell Et Cie and Others*⁶, where the applicable principles were outlined as follows:

'The technique generally employed by our courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues, a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That, in turn, will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour; (ii) his bias, latent and blatant; (iii) internal contradictions in his evidence; (iv) external contradictions with what was pleaded or what was put on his behalf, or with established fact and his with his own extra-curial statements or actions; (v) the probability or improbability of particular aspects of his version; (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. . .'

[27] In this regard, I will have regard to the credibility of the two witnesses called by the parties, which may, in turn assist in showing where the probabilities of the case lie. In this regard, I cannot fault Mr. Jones, and ultimately, Mr. Nekwaya, in his criticism of the Mr. Steuber on the issue of the contract *viz* who he contracted with and possibly, the legal jargon employed, as to what were the tacit terms.

[28] In regard to the latter, the fact that the plaintiff is not a lawyer, must not be allowed to sink into oblivion. I am of the view that it would be unfair to jettison a witness' entire evidence on the basis that he or she failed to

⁴ (I 343/2013) [2015] NAHCMD 110 (11 May 2015).

⁵ (LCA78/2013) [2014] NALCMD 17 (17 April 2014).

⁶ (427/01) [2002] ZASCA 98 (6 September 2002).

properly explain what are clearly terms in legal jargon, even if they relate to a claim that the said witness instituted or is a witness. In this regard, legal practitioners should do their part by explaining whatever legal jargon they choose to employ in the witness' statement to the witness, so that he or she can fully understand the import and implication thereof.

[29] In this regard, I cannot say that Mr. Steuber was lying about the contract entered into with the defendant. He may well be criticised, as Mr. Nekwaya, understandably did, that he was not sure who he entered into the contract with between the two Messrs. Du Preez. I must confess that his evidence was at times confusing and appeared contradictory, but in my assessment and having had the opportunity to observe his demeanour in the witness' box, at the end of the day, I cannot, on the evidence, be a ground to say that he was throwing dust into the court's eyes and was falsely testifying to what never happened.

[30] There are many reasons why some witnesses may appear to contradict themselves when they adduce evidence. It may be that they are under pressure, being people who are not used to court proceedings and this is my assessment of Mr. Steuber. Furthermore, he is not a young man anymore, as he stated in one of the affidavits filed in opposition to the defendant's application for reopening of the case. All in all, I never got the distinct impression that he set out to lie and to invent a claim that never was.

[31] Admittedly, he cannot be described as a witness who is a model of clarity or one possessed of formidable powers of recollection but I am of the considered view that otherwise considered, his evidence does set out that there was a contract between the two parties, although his recollection of who he dealt with between the two Messrs. Du Preez or whether it was both at some stages, is not very clear.

[32] That cannot, on its own, be a basis for dismissing the claim. In this regard, he testified that he dealt with both Messrs. Du Preez most of the time, particularly Senior. It was his evidence that Senior is the one who told him to

go ahead with the project forming the basis of this claim, which Junior appears to deny. The defendants bore the duty to call Senior, if their version was that the plaintiff's account is incorrect but they did not do so and this decision must haunt them.⁷

[33] As a witness, Junior was a different proposition altogether, particularly when it came to his credibility. His evidence was not marred, as Mr. Steuber's was, by old age and a poor recollection of the events in question. I have no fear of contradiction that he did not impress me as a witness of truth as he clearly lied under oath. In this regard, he filed the second counter-claim against the plaintiff, which did not in fact exist. He conjured up this counterclaim in his depraved mind for no other reason than, he testified, that he was mad. He clearly knowingly abused the court's processes, behaviour that should attract a condign rebuke.

[34] In this regard, I must mention that Junior did not only cause the non-existent counter-claim to be instituted without any basis in law or in fact. Faced with a summary judgment application, he deposed to an affidavit under oath, verifying the counterclaim and the court was duped into thinking that there was indeed a genuine counterclaim for determination. As a result, the summary judgment application was denied, with the counterclaim probably and understandably forming some basis for enabling the defendant to be granted leave to defend.

[35] During the trial, however, Junior's conscience got the better of him, it would seem, and he decided to withdraw the second counterclaim also. He did not volunteer the reason for the withdrawal. The reason was only elicited as the burning heat of the oven of cross-examination was brought to bear on him. As this heat of cross examination is wont to, particularly when applied tactfully by masters at it, it took its toll and Junior had not where to hide but let the cat out of the bag. Had he volunteered the reasons for the withdrawal at the time he did, his situation may have been better. Although the withdrawal

⁷ *Elgin Fireclays Ltd v Webb* 9147 (4) 744 (A) at 745 and *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621 (AD).

was a good and commendable step, it came too late in the day and furthermore, as indicated, his counterclaim simply had no basis in fact and in law. Very little credit can be attributed to his evidence as a credible witness.

[36] Having said this, I am alive to the legal proposition that the fact that a witness has lied in respect of one portion of his or her evidence, does not necessarily result in his or her evidence being discarded hook, line and sinker. The court retains the discretion to consider the balance of the evidence, and where appropriate, to give it the weight due.⁸ It is that approach that I will employ in dealing with the defendant's evidence going further, regardless of the invented counterclaim.

Findings of fact

[37] I am of the considered view, that on a mature consideration of the evidence, on the balance of probabilities, the plaintiff has established its claim. I say so for the following reasons. First, considered in its entirety, the evidence, in my considered view, shows that the plaintiff did the work forming the basis of the claim. Furthermore, there is no basis for denying that he fitted the parts and material that he testified to in his evidence. He explained the entire project, including the work done by Calyxo and the additional work he had to do in a diagram that he explained to the court. I entertain no doubt that he carried this work out.

[38] Although the defendant denied that this work was done, and pointed to the agreement with Calyxo, that does not, on its own show that the plaintiff never did its work. In this regard, Junior, when pressed in cross-examination by Ms. Campbell, conceded that his understanding of what had to be done was incorrect, as he did not have the technical knowhow to understand the intricate and specialist work that had to be done. There is no denying that the work done by the plaintiff is of a highly technical nature and Junior did not fully understand its impact. That does not, however, translate to saying the plaintiff did not do the work as initially alleged by the defendant.

⁸ *S v Oosthuizen* 1982 (3) SA 570 (TPD) at 577 A.

[39] It also became evident that Junior did not fully understand the relationship between the plaintiff, Calyxo and the defendant. He seems to have attributed the work the plaintiff did to that contracted to Calyxo, yet it is clear from the plaintiff's uncontroverted version, as explained in the diagram that the plaintiff performed additional work to that performed by Calyxo.

[40] Mr. Nekwaya, as had been sought to be established in cross-examination, argued and quite forcefully too, that because the defendant did not understand what was entailed in the agreement between the plaintiff and the defendant, there was no consensus between the parties, which is a necessary ingredient to be proved when claimed that a contract was entered into.

[41] I agree with Ms. Campbell that the issue raised is a red herring for the reason that the fact that Mr. Du Preez Junior did not understand the technical aspects of the work, does not necessarily mean that he did not agree to the work being done. Many times, we take our motor vehicles to the garage and we explain what problems we encounter or what we want the fitted items to do. In many cases, we do not understand the intricate technical work that needs to be done and cannot explain it. That does not however, mean that there was no consensus regarding what was to be done. Mr. Du Preez Junior's impoverished understanding of what was to be done, even when an explanation was tendered, cannot avail him, to successfully allege that there was no contract between the parties for work that was necessary to be done for the solar system to function properly.

[42] It is, my considered opinion, in any event, that the plaintiff's version is more probable than that of the defendant. I say so for the reason that the evidence of Mr. Steuber, which stands uncontroverted regarding the work he did and why, it is clear that the defendant acted under the mistaken belief that the work was tenable in terms of the Calyxo agreement, which was not the case and this was established in evidence. This is quite understandable because according Mr. Steuber, Junior walked away when he was explaining

the work that needed to be undertaken to get the whole system to function properly. Only Senior lent him an ear in this regard.

[43] Furthermore, it is established on the evidence of the plaintiff, which was not gainsaid, and which according to my understanding, makes sense, that there were three stages of the installation, the first being completed by Calyxo. If the plaintiff had not carried out the works it did, then there would have been no connection between the work done by Calyxo and the third connection, from the defendant's DB board to the grid, which would have rendered the whole project a white elephant, not fit for the purpose.

[44] I am of the view that the plaintiff proffered a reasonable explanation why Calyxo could not have done the work to completion. Mr. Steuber, explained, without demur, if I may add, that Calyxo, being a German outfit, was not *au fait* with local safety requirements and prescriptions. This necessitated that a company of the plaintiff's experience and expertise, particularly one armed with knowledge of local safety requirements, be engaged to finish the work and to make the entire solar system work by tying the loose ends together, as it were. This, therefor, renders the defendant's case that Calyxo was to deliver a finished product, as it were, improbable in the circumstances. The probabilities accordingly favour the plaintiff in this regard.

[45] In fairness, Junior did admit under cross-examination when the entire process was put to him, including the extent of the work done by Calyxo and the outstanding work that still needed to be done, that he did not understand and was of the belief that Calyxo had done all there was to do. This concession, in my considered view, shows that the plaintiff's claim is sound and ought to be granted in the circumstances.

[46] I say so because the mainstay of the defendant's defence, which was shown to be based on a misunderstanding, was that the defendant had paid for everything that had been done by Calyxo and which would have seen the whole system work in perfect pie order. On the plaintiff's uncontradicted

evidence, this was shown to have been an incomplete piece of work that needed connecting the inverters to the defendant's DB board, which the plaintiff did and then sub-contracted the last portion, i.e. from the defendant's DB board to the grid to another entity, known as Walter's Electrical.

[47] I am, in the premises, of the considered view that maturely considered as a whole, the evidence in this case shows that the plaintiff successfully made a case against the defendant on a balance of probabilities. The defendant's defence was shown, particularly in cross-examination, to have been largely based on a misunderstanding of what the entire process, highly technical as it was, entailed.

Conclusion

[48] The defendant's defence lacks any credibility whatsoever. I am accordingly satisfied that the plaintiff and the defendant entered into an agreement for the installation of the combiner enclosure, together with the switchgear at the defendant's premises and that the plaintiff did this work.

[49] On the evidence, it is established the plaintiff did this work and not Calyxo. Furthermore, it is clear from Mr. Steuber's evidence that the plaintiff did not do this work for God. It was for the defendant, who must therefore pay for the work done. This work was clearly separate from that done by Calyxo and it is accordingly improper and unfair for the defendant, as it seems to be the mainstay of its defence that Calyxo should pay, for what it benefits from the work of the plaintiff's hands and not Calyxo's, done well after Calyxo had finalised their part of the work.

Costs

[50] Costs do not, normally present a formidable obstacle in trials. This case is, however, different. What renders it different, is the behaviour of Mr. Du Preez Junior, who, as previously stated in the judgment, contrived a non-existent counterclaim and had it prosecuted from summary judgment stage to

the point where the defendant was called upon to adduce its evidence. This, it must be specifically mentioned, was after the defendant had failed in its application for application from the instance.

[51] Authority is legion for the proposition that the court does not lightly grant punitive costs.⁹ This is so for the reason that as the name suggests, these costs are meted out as a form of punishment and rebuke for untoward conduct or behaviour, connected with the institution or conduct of the proceedings in issue. In this regard, the reluctance to readily grant this scale of costs stems from the right of every person to bring his complaints or alleged wrongs to court for a decision and should, for that reason not be penalised even if he is misguided in bringing what proves to be a hopeless case before court.¹⁰

[52] In this case, the despicable conduct of the defendant's sole witness, Mr. Du Preez Junior, is well documented in this judgment. In anger for his company being sued, for what this court has found to be justified claim, Junior threw his proverbial toys out of the proverbial cot. In that fit of anger, he craftily manufactured a counterclaim against the plaintiff that did not exist, but which was a figment of his fertile imagination. He invented terms of an agreement that were never there.

[53] He did not keep this bogus claim to the confines of his bosom and in the deep recesses of his heart. What did he do? Alas! He told his legal practitioners to raise it at the stage where the plaintiff moved an application for summary judgment, which did not pass muster. In that regard, he signed an affidavit confirming a non-existent claim, under oath. Clearly, the oath, sacred and binding as it should be on the signatory's conscience, it would seem, is a mere religious incantation, that means nothing to Junior's conscience.

[54] It did not end there. Once granted leave to defend, Junior informed his legal practitioners to deploy this non-existent claim in the counterclaim, to

⁹ A. C. Cilliers, Law of Costs, Lexis Nexis, Service Issue 19, March 2009, para 4.09 at p 4-15.

¹⁰ *Van Wyk v Millington* 1948 (1) SA 1205 (C).

which the plaintiff was put, to what is now inexorably a vexation, to file a plea, at enormous cost. The matter ripened from case planning to case management and pre-trial stages. A pre-trial report was prepared by the parties and eventually endorsed and made an order of court. Junior had no compunctions whatsoever, about this lie he was allowing to develop. A trial date was eventually allocated to the matter.

[55] The trial commenced in earnest and Junior was present in court everyday of the trial, giving instructions to his legal team, where necessary. He did not find it fit, at this stage, to disclose to his team that he had laid a bogus counterclaim against the plaintiff. This remained a strictly guarded secret until he could no longer contain it. Should the defendant, because of the role of Junior, being the brains, the feet and the hands of the defendant, it would seem, escape the reach of Junior's despicable conduct?

[56] I think not. He would appear to have done this for the benefit of the defendant. This conduct, as I have endeavoured to show, is wrong, depraved and despicable. It forced the court to spend its time and energy on a phantom counterclaim, thus depriving other litigants of the time and facilities to prosecute their claims, which were not imagined. This reckless and irresponsible behaviour must meet its comeuppance, with an appropriate order as to costs. This is designed to drive the point home forcefully and painfully, if needs be, that the court is not a playroom, to which unscrupulous litigants can toss 'toys' in fits of anger. The taxpayer must not be saddled with the burden of paying judges for spending valuable time and effort on what are clearly contrived claims.

[57] I am satisfied, in view of the foregoing, that the defendant, in anger, crossed the boundaries into the realms of abuse of the court and its processes in regard to its counterclaim. In this regard, I am of the considered view that costs on the punitive scale are condign and the writing must be on the wall to similarly minded litigants that games and phantom claims must stay far away from the courts of law, which have to deal with real disputes involving real litigants. Any relegation of the court or its processes to play

games induced by anger or whatever other emotion, will be met with severe retribution.

[58] In the ordinary order of things, I would have been minded to grant the punitive costs up to the time when the defendant withdrew its claim. That, however, proved to be impracticable in the circumstances. I say so, for the reason that the issue of the defendant's conjured up counterclaim did not cease to be of relevance once it withdrew its phantom counterclaim. This very issue occupied the court up to the end of the proceedings, including taking up a considerable portion of Junior's cross-examination. Its effect on the trial coloured the entire proceedings and did not have a clear-cut end point early in the proceedings.

Acknowledgment

[59] I wish to expressly record the court's appreciation to counsel on both sides for their industry and assistance dutifully rendered to the court. I would, in particular, wish to commend Ms. Garbers-Kirsten and Mr. Nekwaya, who took over the trial at the opening of the defendant's case and handled it with admirable professionalism and dedication, regardless of the difficulties commented on in this case. Theirs is an example worth emulating.

Order

[60] In view of the foregoing, I am of the view that the following order, which I hereby issue, is appropriate in this matter:

1. The plaintiff's claim for the payment of N\$ 104, 086.82 succeeds.
2. The defendant is ordered to pay interest on the aforesaid amount of N104.086.82, at the rate of 20% *a tempore morae* from 18 June 2014 to the date of final payment.

3. The defendant is ordered to pay costs of suit on the attorney and client scale, consequent upon the employment of one instructing and one instructed counsel.
4. The matter is removed from the roll and regarded as finalised.

T S Masuku
Judge

APPEARANCES:

PLAINTIFF:

Y Campbell

instructed by Behrens & Pfeiffer, Windhoek

DEFENDANT:

H Garbes-Kirsten (with her E Nekwaya)

instructed by Ellis Shilengudwa Inc., Windhoek