

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO. I 3826/2011

In the matter between:

**GENERAL FRANCOIS OLENGA**

**PLAINTIFF**

and

**ERWIN SPRANGERS**

**DEFENDANT**

Neutral Citation: *Olenga v Sprangers* (I 3826/2011) [2019] NAHCMD 192 (17 June 2019)

**CORAM: MASUKU J**

**Heard:** 1, 2 June, 3 November 2015; 18 - 21 April 2016 and 17 June 2016, 28 October 2016; 14 November 2016; 22 June 2017; 25 July 2017; 20 September 2017; 15 November 2017; 5-9 February 2018; 4 April 2018; 4, 5, 6 June 2018; 3 - 5 September 2018; 5 November 2018.

**Delivered:** 17 June 2019

**Flynote:** Civil procedure – stay of civil proceedings – whether civil proceedings should be stayed where the same facts give rise to criminal proceedings – Law of Evidence – dealing with disparate pieces of evidence – how to deal with such evidence and to make factual findings – failure to call a

witness – adverse inference drawn therefrom. Whether plaintiff is entitled to the money claimed

**Summary:** The plaintiff, an army General from the Democratic Republic of Congo sued the defendant, a local estate agent, for payment of an amount equivalent to USD 850 000. The amount, the plaintiff alleged, was paid on his instructions by Breadfield a company in the United States into the defendant's business bank account. The defendant denied that the amount had been paid by the plaintiff and claimed there was no proper nexus between the plaintiff and Breadfield. The defendant further averred that the amount was paid by a buyer who had been introduced to the defendant by the plaintiff for the purchase of an 18<sup>th</sup> century Chinese vase and that he had paid the plaintiff a commission for brokering the deal.

Held that: the disparate versions testified to by both parties, when considered suggests that the version given by the plaintiff is more probable and consistent with other objective facts.

Held further: that objectively viewed, there was a nexus between the plaintiff and the depositing of the money into the defendant's bank account and that one of the plaintiff's witnesses from Hungary explained how he came about to deposit the money, namely, at the instance of the plaintiff.

Held that: the defendant's version regarding the sale of the vase was highly improbable as it had many gaping holes that were left unexplained, rendering not worthy of credit.

The court accordingly granted judgment in the plaintiff's favour as prayed with costs.

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**ORDER**

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1. The Defendant, Mr. Erwin Rozalia Ludovic Sprangers is ordered to pay to the Plaintiff, General Francois Olenga, the amount, which is the Namibian Dollar equivalent, of United States Dollar 850 000. 00.
2. The above-named Defendant is ordered to pay interest on the aforesaid sum mentioned in paragraph 1 above, at the rate of 20% per annum reckoned from the date of the issue of summons to the date of payment.
3. The Defendant is ordered to pay the costs of the action, consequent upon the employment of one instructing and one instructed Counsel.
4. The matter is removed from the roll and is regarded as finalised.

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**JUDGMENT**

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**MASUKU J;**

Introduction

[1] This is a matter that has a chequered history. As is evident from the case number, the matter was registered in 2011 and has been interned in the belly of the court for a considerable period of time but through no fault on the part of the court. It was often punctuated by a number of sudden twists and turns that prolonged its completion. There is a measure of relief that finally, the matter is being put, hopefully, to eternal rest, subject of course to the parties' right to appeal to the Supreme Court.

### The parties

[2] The plaintiff General Francois Olenga, is an adult male of the Democratic Republic of Congo. His address is given as AV Frederic 12, Kinshasa-Delvaux in the said Republic. He is a top military official in that Republic. The defendant, on the other, is Mr. Erwin Rozalia Ludovic Sprangers, a Namibian male who resides in Swakopmund in this Republic. At the time of the institution of these proceedings, the defendant was a registered Estate Agent, who carried on business as such under the style Kintscher Estates, whose principal place of business was situate at Woerman Brock Mall in Swakopmund.

### The claim

[3] Serving before court is a claim by the plaintiff for the payment of an amount of US Dollars 850, 000 in terms of which the plaintiff avers he paid into the defendant's account in terms of an oral agreement. In this oral agreement, the plaintiff avers that he deposited the amount in question into the defendant's account for the purposes of the development of his property, namely Erf 4136, Extension 12, Swakopmund and Erf 4120, Extension 12 Swakopmund.

[4] The plaintiff avers further that it was a term of the said oral agreement that the defendant would render to the plaintiff accounts at regular intervals regarding the usage of the funds placed at his disposal. The plaintiff further averred that when the defendant failed to render the accounts as agreed, he terminated the oral agreement and demanded repayment of the said amount.

[5] In the alternative, the plaintiff avers that the defendant was a duly appointed agent and in that regard, undertook fiduciary duties towards the plaintiff and that upon the conclusion of the agreement inter partes, the plaintiff paid the aforesaid amount into the defendant's bank account. It is further averred that in violation of his fiduciary duties to the plaintiff, the

defendant refused to account to the plaintiff regarding the amount mentioned above. As a result of the defendant's failure to render an account, the plaintiff accordingly terminated the agreement rendering the amount paid into the defendant's account due and payable to the plaintiff.

[6] In his plea, the defendant denied that the amount claimed was paid into his account by the plaintiff but alleged that it was deposited into his account by a third party, namely, Breadfield Trade Ltd, of Loockerman Square 101D, 19904, Dover, Delaware in the United States of America. The defendant raised the plea of non-joinder of the said Breadfield and moved the court to dismiss the claim for non-joinder.

[7] On the merits, the defendant denied the oral agreement alleged by the plaintiff, together with the alleged terms thereof. The defendant averred that the oral agreement between the parties involved the sale by the defendant of the plaintiff's landed property mentioned above, which sale the defendant would carry out on the plaintiff's behalf.

[8] It was the defendant's further averrals that in or around November, 2009, the parties entered into another oral agreement in terms of which the plaintiff agreed to act as the defendant's agent to sell the defendant's antique 18<sup>th</sup> century Qianlong Chinese vase. It was the defendant's further averrals that the parties agreed in terms of the same oral agreement that the plaintiff would be entitled to earn a commission in the event the vase was sold.

[9] The defendant further pleaded that a buyer was secured by the plaintiff for the amount of N\$ 10 million and that the identity of the buyer is unknown to the defendant. The said purchaser then paid an amount of N\$ 6, 785. 531.76 as part payment and this amount was paid into the defendant's business account. For his part in this transaction and as part of the commission, the defendant averred that he paid a sum of N\$ 500 000 to the plaintiff and this was during September 2010.

### The evidence

[10] The plaintiff testified and further called four other witnesses, namely, Mr. Moses Kamunguma, Ms. U. Engelbrecht, Ms. Jacomina Fredika Hugo, an employee of First National Bank, Namibia, who was subpoenaed to testify. Last, but by no means least, was Mr. Jozfef Feher. The defendant, for his part, was the sole witness. It must be mentioned that although it had been indicated that he would call his wife as a witness and whose witness' statement was prepared and served, she was ultimately not called. In dealing with the defendant's version therefor, it is only his evidence that will be put in the scales of credibility.

### *The plaintiff*

[11] The plaintiff testified that he and the defendant, an estate agent, sometime in January 2010 entered into an oral agreement. Mr. Moses Kamunguma was present at this meeting. In terms of the agreement, plaintiff would cause an amount of US\$ 900 000 to be deposited into the defendant's trust account and the purpose of this money was to develop the immovable property to wit: Erf 4136 and 4120 Swakopmund which the plaintiff bought in its undeveloped state during or about 2003.

[12] Plaintiff's testimony was further that, aside from developing the aforementioned properties, the moneys were also to be used for the possible acquisition of further immovable properties. According to the plaintiff, the aforementioned properties were sold to a third party in 2012 in their undeveloped state.

[13] According to the plaintiff, a further term of the oral agreement was that the defendant was not at liberty to use the money unless and with the plaintiff's express prior consent. Prior to the sale of the properties, he further testified, he and the defendant met, along with Mr. Kamunguma and at which

meeting defendant advised the plaintiff to sell the properties aforementioned instead of developing same and rather opt to buy already developed properties. It was plaintiff's testimony that he did not find this option to be viable. He instead invited and arranged a visa for defendant to travel to the Democratic Republic of Congo for the defendant to bring ideas and designs to the plaintiff.

[14] The plaintiff further testified that money, in the amount of US\$ 900 000 was paid from his Breadfield account in instalments from February to July 2010 the defendant's account that the latter had provided and it was not to be used for any general payment, maintenance and upkeep of the properties.

[15] His testimony was further that, he never consented to any portion of the funds being utilized except for US\$ 50 000 which plaintiff had requested and that towards the end of 2010, the defendant developed withdrawal symptoms as it were and started avoiding contact with plaintiff as well as Mr. Kamunguma. As a result, the two gentlemen then travelled to Swakopmund in search of the defendant. Upon arrival at the defendant's offices, they were informed that he was in South Africa.

[16] The plaintiff testified further that this information was proved to be palpably incorrect in that they got information from a certain Diane, also an estate agent, that defendant was in actually in Swakopmund and had not travelled to South Africa as previously claimed. Ms. Diane took Mr. Kamunguma to defendant's house and upon arrival, he found that the defendant was indeed at home but had changed his appearance by growing a beard and dyeing his hair pink.

[17] Mr. Kamunguma and the defendant then proceeded to the latter's offices where the plaintiff was waiting for them. The defendant requested for plaintiff's account details and promised to repay the US\$ 850 000 but has to the date of trial not done so.

[18] Finally, it was the plaintiff's testimony, that he has never at any stage contracted with the defendant regarding a vase or sale thereof, nor was such vase handed to him.

*Mr. Moses Kamunguma*

[19] Mr. Kamunguma testified that he was present when plaintiff first met defendant for the envisaged development of property belonging to the plaintiff, as well as when the oral agreement between the two at Swakopmund was entered into. His testimony was that he was tasked by the plaintiff to, from time to time, pass on messages on the plaintiff's behalf to the defendant. The plaintiff also informed him he had paid US\$ 900 000 into defendant's business banking account for safe-keeping.

[20] It was Mr. Kamunguma's further evidence that he accompanied the plaintiff to his further meetings with defendant in Swakopmund. At the first meeting, he further testified, the defendant showed to the plaintiff some already developed properties which he wanted the plaintiff to purchase and then sell the two properties he already owned. The plaintiff declined this offer. The plaintiff in turn invited the defendant to the Democratic Republic of Congo and arranged a visa for him. This trip, however, never materialised.

[21] According to Mr. Kamunguma, sometime from August 2010, the defendant started playing truant and avoided him. Whenever the witness called the defendant, the latter would no longer take or return his calls and towards the end of 2010, Mr. Kamunguma, together with the plaintiff, went in search of the defendant in Swakopmund. Upon arrival at the defendant's offices, they were informed that he was in South Africa.

[22] It was Mr. Kamunguma's evidence that this allegation proved to be untrue in that he and the plaintiff got information from a certain Diane, also an estate agent, that defendant was in Swakopmund and had not travelled to South Africa as had been alleged to them. Diane took Mr. Kamunguma to defendant's house and upon arrival, he found that the defendant was indeed



at home but had changed his appearance by growing a beard and dyeing his hair pink.

[23] Mr. Kamunguma testified further that he and the defendant then proceeded to the latter's offices where the plaintiff was waiting for them. The plaintiff enquired from the defendant why he was avoiding him and also informed him he wanted the defendant to repay the US\$ 850 000 to him. The defendant thereupon requested for the plaintiff's account details and undertook to repay the US\$ 850 000 immediately thereafter.

[24] Lastly, Mr. Kamunguma, in his testimony, stated that by virtue of him being in the presence of plaintiff during all the meetings between defendant and the plaintiff, there was never any discussion between the two contractants regarding a vase, nor was such vase ever handed to the plaintiff.

*Ms U. Engelbrecht*

[25] This witness testified that she is an estate agent that was contracted by the plaintiff to sell his two properties at Swakopmund. It was her further testimony that her estate agency could not sell the plots since they were waiting for certain documents which were in the defendant's possession. She testified further that she, on several occasions, attempted to contact the defendant but was always informed by the defendant's wife that he was either out of the country or simply unavailable.

[26] Ms. Engelbrecht testified further that It was after these failed attempts to meet the defendant that she decided to contact the plaintiff who then, intimated that he would come to Swakopmund. According to her evidence, on 26 May 2011, the plaintiff came to Swakopmund, signed the deed of sale and decided that she and Mr. Kamunguma should go on a man hunt, in search for the defendant.

[27] She further testified that after this instruction, she, along with her business partner and Mr. Kamunguma went in search of the defendant at some of his properties. It was during this search that Mr. Kamunguma spotted

the defendant's car and asked that he be dropped off at the house where the latter's car was parked. She testified that he then went inside while she and her business partner waited outside and after a while, the two men, namely Mr. Kamunguma and the defendant came out and rode in defendant's car and went to his offices where the plaintiff was waiting. Ms. Engelbrecht testified further that Mr. Kamunguma told her that defendant nearly had a fit when he saw him.

*Ms. Jacomina Frederika Hugo*

[28] Ms. Hugo is employed by the First National Bank of Namibia 'FNB' and has been so employed since 1995 as the Manager: Treasury Support. Her testimony was to the effect that she was tasked by defendant to do a query into his business cheque account in order to establish where the US\$ 900 000 was from. She testified that various amounts were paid into the business account of defendant from Breadfield Trade Ltd, a certain company incorporated in the United States of America as follows:

- a) N\$ 75 000 on 11 February 2010;
- b) N\$ 2 202 723.99 on 23 February 2010;
- c) N\$ 1 467 619.21 on 08 March 2010;
- d) N\$ 1 519 582.30 on 7 July 2010; and
- e) N\$ 1 519 593.26 on 7 July 2010.

[29] According to Ms. Hugo, when regard is had to the MT103, which is a computer extract of FNB, the monies were received from Breadfield Trade Ltd but that nowhere on the said document did that the name of the plaintiff appear. She testified that the documents received did not reflect or prove that the moneys were paid by the plaintiff into the defendant's account.

*Mr. Jozfef Feher*

[30] The last witness for the plaintiff was Mr. Jozfef Feher, an adult male of Hungary. It was his evidence that he is a former director of Bradfield and a

duly authorized representative of Bradfield Trading Ltd, which was an entity registered in Delaware, the United States of America. It was his evidence that the plaintiff requested him to transfer US\$ 900 000 that was claimed in his favour in the books of Bradfield. This amount, he further testified, was to be deposited into an account of Kischener Agents and Auctioneers in Swakopmund, Namibia. Acting on the plaintiff's request, he instructed MTB Bank Ltd which has a legal address in Budapest, to transfer the funds to the bank account whose details the plaintiff had supplied.

[31] Mr. Feher also testified that the amount was deposited in five instalments. The first was of US\$ 10 000, followed by US\$ 290 000 and lastly by three transfers of US\$ 200 000. It was his evidence that the above amounts were paid into account No. 55460040542, held with First National Bank, Namibia, with Branch Code 280472. It was Mr. Feher's further evidence that the plaintiff later informed him that he was in dispute with the defendant and accordingly asked him to request MKB Bank to send additional swift messages with specific reference to the earlier deposits to the beneficiary's bank account. It was his further evidence that MKB Bank executed his instructions on 25 April 2013.

[32] Mr. Feher further testified that the financial records Breadfield were no longer available as they had been given to Mr Volkov and they had subsequently been destroyed. It was his evidence that Breadfield, was deregistered in 2010. This was the material aspects of Mr. Feher's evidence

#### Application for absolution from the instance

[33] It must be mentioned, as is evident in the history of this matter, that after the close of the case for the plaintiff, an application for absolution from the instance, was moved on behalf of the defendant. It is a historical fact that the said application was dismissed with costs and a reasoned ruling on the reasons therefor was delivered and it is unnecessary to revisit the same. I now proceed to chronicle the plaintiff's evidence below.

*Evidence of the defendant*

[34] The defendant testified that he did receive money paid by a third party in the amount of N\$ 6 785 318.76 into his business banking account. It was his testimony that this money was paid by an undisclosed overseas buyer whose identity he is not sure of. He further testified that he tasked Ms. Hugo of FNB to conduct a trace and search from whose account exactly the money was paid and the search provided that the money was paid by a third party namely Breadfield Trade Ltd in the United States of America.

[35] He further testified that a company search was conducted but yielded no fruitful results as he could not trace a registered agent and the contact details of the company in order to contact the company, nor was there any such company website. It was the defendant's testimony that the plaintiff purchased two properties through his estate agency to wit: Erf 4136 and 4120 Swakopmund sometime in 2003 and that in 2005. The plaintiff later asked him to sell the aforementioned properties but that the sale did not materialise.

[36] According to the defendant, he had an interest in the DRC and that during the times he and plaintiff met, their discussions were about the DRC. The defendant testified further that it was during one of these sporadic meetings that the two got to know each other on a personal level and at which time the plaintiff told the defendant he was an informal dealer in antiques etc.

[37] From that conversation, the defendant told plaintiff that he had an antique Chinese vase from the Qianlong period and would be interested in selling if the price was right. It was defendant's testimony that on 9 December 2009, the plaintiff asked him whether he still owned the vase and that the offer was US\$ 1 250 000, including his commission. The defendant then informed the plaintiff that he was happy with the offer and then asked who the buyer was, but was informed by the plaintiff that the buyer wanted to remain anonymous.

[38] The defendant further testified that the two agreed on one million as commission for the plaintiff and that the latter would inform the buyer about defendant's willingness to accept the offer and would subsequently also revert to him to discuss the payment method. It was the defendant's testimony that the plaintiff contacted him from the Ukraine and informed him that the buyer would make payments in instalments but could not confirm the exact payment dates. It was the defendant's further evidence that the plaintiff called him on or about 9 July 2010 to ask whether he had received payment of around US\$ 900 000, to which he responded in the affirmative.

[39] According to the defendant, the plaintiff informed him that he would send two Chinese men to collect the vase but was not given a date on which to expect them. On 17 July 2010, two Chinese men came to the defendant's offices to collect the vase and when asked who they were, they responded that they had been sent by the plaintiff to collect the vase. A certain Heidi from defendant's office showed them to the latter's office where he was seated with a certain Mr. van Rensburg. The men of Chinese extraction then introduced themselves and the exchange of the vase took place and they left. Towards the end of July 2010, the plaintiff informed defendant that the buyer had received the vase.

[40] In his further testimony, the defendant stated that the plaintiff informed him that he would be visiting Namibia in September. During September 2010, the defendant met with the plaintiff and the latter enquired as to his commission for the sale of the vase and that it was at this stage that defendant effected a payment of N\$ 500 000 in part payment of the said commission to the plaintiff.

[41] The defendant further testified that the plaintiff invited him for a visit to the DRC and even arranged a visa for him to explore a business opportunity for the development of a lodge in the DRC. The visa was arranged but the trip to DRC never materialised. The defendant also testified that he made various payments on behalf of the plaintiff towards the two undeveloped properties for

arrear municipal and Erongo Red accounts, including the purchase of a brick making machine, which he sent to the plaintiff in the DRC.

[42] Finally, the defendant testified that on 23 August 2011, he received a letter of demand from plaintiff's attorneys wherein they demanded the delivery of certain close corporation documents as well as original title deeds in respect of Erf 4136 and 4120 Swakopmund. In the same letter of demand, plaintiff also demanded payment of US\$ 900 000.

[43] It was defendant's testimony that the said documents were not in his possession but that same were delivered to plaintiff during 2003. The defendant denied being indebted to plaintiff and testified that the plaintiff never paid any moneys into his trust banking account but that an amount of N\$ 6 785 318.76 was paid by a third party into his business account. That was the extent of the evidence adduced in the case.

#### Application for stay of proceedings

[44] At the opening of the defence case, the defendant moved an application for the stay of proceedings. This application, it must be stated, was influenced by the fact that the defendant together with his wife, have been charged and were arraigned before the Criminal Division of this court on charges of fraud which appear to relate directly to the dealings between the plaintiff and the defendant herein.

[45] The application, which is undated, is accompanied by a notice of motion seeking the following relief:

- '1. The civil action to be stayed pending the finalisation of the criminal trial under case number CR 06/11/2014, alternatively;
2. Staying the civil action until the testimony of the defendant and Mrs. Sprangers (witness) is heard in the aforementioned criminal trial; alternatively;
3. Postponing the matter until a date to be arranged between the managing judge and the parties;

4. The defendant to be ordered to pay the taxed wasted costs of the stay, in the alternative, the postponement.
5. Further and/alternative relief.'

[46] The application is supported by the defendant's affidavit. I will not repeat the matters he refers to in the application but will confine myself to the nub of the reasons why he sought the application for the stay of proceedings. At paras 8 to 12, the defendant states as follows:

'8. I am advised that the grounds advanced for an application to stay the current proceedings should be exceptional and that I also need to address the issue of the prejudice caused to the opposing party.

9. I am informed that the Court is also burdened by the prescribed benchmarks and that a request for a postponement/stay is not merely there for the asking.

[10] I submit that I am ready to testify and that I have, together with my legal representative prepared myself to do just that. The only barrier causing concern is the rights I have to waive in order to do so vis-à-vis the criminal trial.

[11] I further humbly submit state that the issues as set out above hinders (*sic*) me from properly presenting my case, as it would have to be mindful throughout the hearing of the effect my testimony might have on the criminal matter. This also finds application to Mrs. Sprangers, my main corroborating witness.

[12] I submit that I am obviously anxious to dispense with the civil suit, as the financial burden on my family is causing severe strain, not to mention the fact that I have to divide my resources and focus between these two matters simultaneously. I however still have to weigh up the benefit of finalising this matter against the potential harm it might cause me in the criminal matter bearing in mind the harshness of the penalties I might have to face there opposed to those imposed by the civil action.'

[47] This application was vigorously opposed by the plaintiff contending that the application is devoid of any proper reasons why it is claimed that the defendant and his wife would be seriously prejudiced in tendering their evidence in this trial and later cross-examined thereon. It was pointed out in

this regard that both the defendant and his wife had already filed witness' statements in this matter and their version was laid bare to the court therein.

[48] After listening to oral argument presented by the parties' representatives, I dismissed the application and intimated that reasons therefor will accompany the main judgment. I accordingly deliver those reasons below.

[49] In support of her argument in favour of the application for stay, Mrs. Delport placed reliance on *Prosecutor-General v Mwananyambe*<sup>1</sup> where the learned Deputy Judge President Angula, among other issues, dealt with applications for stay of proceedings. It appears that at p221, he was referred by Mr. Muluti, who appeared for the respondent, to *Randell v Cape Town Law Society*<sup>2</sup>.

[50] The learned DJP, in his judgment, quoted the following principles enunciated in that case:

'The applicable principles in my view can then be summarised as follows:

- (a) Our courts have a discretion to suspend civil proceedings where there are criminal proceedings pending in respect of the same issues.
- (b) Each case must be decided in the light of the particular circumstances and the competing interests in the case.
- (c) In exercising its discretion the court will have regard to, inter alia, the following factors:
  - (i) The extent to which the person's right to a fair trial might be implicated if the civil proceedings are allowed to proceed prior to the criminal proceedings.'
  - (ii) The interests of the plaintiff in dealing expeditiously with a litigation or any particular aspect thereof.
  - (iii) The potential prejudice to the plaintiff if the proceedings are delayed.
  - (iv) The interests of persons involved in the litigation.
  - (v) The interests of the public in the pending civil and criminal litigation.

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<sup>1</sup> 2017 (1) NR 215 (NR).

<sup>2</sup> 2012 (3) SA 207 (ECG).



(d) The court must be satisfied that there is a danger that the accused might be prejudiced in the conduct of his defence in the criminal matter if the civil case is allowed to proceed before the finalisation of the criminal case against him.'

[51] From my reading of the judgment, the learned DJP does not seem to have applied the principles quoted above. I say so for the reason that he found that in the case before him there were no pending criminal proceedings, properly so-called and this was because what was pending in court was an application for condonation for the late filing of an appeal. He took the view that only once the application for condonation had been granted could the court deal with the application for leave to appeal. I agree with his approach in the circumstances.

[52] Mr. Maasdorp, for the plaintiff pertinently drew the court's attention to the fact that the *Randell* case was overturned on appeal, including the principles that the High Court had held are applicable to applications for stay in matters where both civil and criminal proceedings based on the same facts were pending.

[53] In *The Law Society of the Cape of Good Hope v Michael Wharton Randell*<sup>3</sup>, after reviewing the authorities, which include *Du Toit v Van Rensburg*<sup>4</sup> and *Davis v Tip* **NO**<sup>5</sup> judgment in *Randell*, the SCA observed that in all the previous cases which upheld the principle that the civil proceedings should be stayed until the finalisation of the criminal proceedings, there were sequestration proceedings in which the examinee respondent was required to subject himself or *herself* to interrogation or to answer certain questions put to him or her by a provisional trustee. In that regard, the court found, there was an element of compulsion because of s. 65 of the Insolvency Act provided that the examinee was not entitled to refuse to answer questions put to him or her.

[54] At para 13, the Supreme Court of Appeal made the following conclusions and findings regarding the *Randell* judgment in the High Court:

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<sup>3</sup> (341/2012) [2013] ZASCA 36 (28 March 2013).

<sup>4</sup> 1967 (4) SA 433.

<sup>5</sup> 1996 (1) SA 1152

'13. The approach adopted by the High Court below is, with respect, erroneous in two important respects. The first involves its broad formulation of the general principle applied in determining whether a stay should be granted where civil and criminal proceedings arising out of the same circumstances are pending against a person and there is a likelihood of prejudice to the person concerned if he or she made a statement prior to the disposal of the criminal proceedings. On the approach adopted by the court below, the power to grant a stay under these circumstances would be unlimited. One would envisage a situation where a stay will be refused because, as Nugent J correctly pointed out in *Davis*, civil proceedings invariably create the potential for information damaging to the accused person being disclosed by the accused person himself, not least because it will often serve his or her interests in the civil proceedings to do so.

[14] The second important respect in which the court erred is with regard to the application of the principle to the facts. In my view the respondent failed to show that he would be prejudiced if the application to strike him off the roll was proceeded with. I will deal more fully with this aspect later in the judgment.

[55] It would appear that what the court considered would be crucial in exercising its discretion in favour of staying the civil proceedings is where there is need to ameliorate State compulsion or coercion. The court further pointed out that in those circumstances, the court would, where appropriate, often issue orders that the element of compulsion be not implemented, rather than staying the civil proceedings.

[56] Furthermore, the court if there is no compulsion, then an accused person has a personal choice to make and that the preservation of his rights lie completely in his or her hands. Citing further from *Davis (supra)* the court held that ' . . . in principle a party should be left to his or her choice as to how he or she conducts the civil proceedings. The learned judge pointed out that the allegations in pending criminal investigations or proceedings, without indicators that state compulsion or coercive means are to be employed in the civil proceedings, are not sufficient to prove prejudice of a kind that will justify a stay.'<sup>6</sup>

[57] In concluding on this aspect, the court said at para [23]:

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<sup>6</sup> At para 20 of the SCA judgment.

‘In my view the approach in *Davis* is sound and does no more than reiterate the approach of the previous decisions; namely that a stay will only be granted where there is an element of state compulsion impacting on the accused person's right to silence. . . . Our courts have only granted a stay where there is an element of state compulsion.’

[58] The question to be posed at this juncture is whether there is any justifiable reason for the stay in the instant matter? I am of the view that the defendant goes nowhere near alleging any state compulsion or coercion, which would be a just reason for granting a stay, absent any other less drastic measure, including an order staying the compulsion feared. He is accordingly free to conduct his defence in a manner that he considered appropriate, including taking into account his rights to a fair trial, which encompasses a right against self-incrimination.

[59] The following remarks by the SCA in the *Randell* judgment accordingly resonate with my views:<sup>7</sup>

‘If the approach adopted in the court below is taken to its logical conclusion, in every case where civil and criminal proceedings are pending and there is a likelihood of prejudice, the court will be vested with unlimited jurisdiction to stay the civil proceedings until the criminal proceedings have been finalised, even where there is no compulsion on the part of the person concerned to disclose his or her defence – where the person concerned is faced with a “hard choice.”

[60] In the premises, it would seem to me that the remarks in *Mouton v Gaoseb*<sup>8</sup>, quoted with approval by Angula DJP in *Mwananyambe (supra)*, still ring true. There the court said the following regarding applications for stay of proceedings:

‘It thus becomes clear that applications for stay of proceedings are not granted lightly and merely for the asking. It would seem that exceptional circumstances must be proved to be extant before the court may resort to this

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<sup>7</sup> At para 29 of *Randell*.

<sup>8</sup> (I 425/2011) [2015] NAHCMD 257 (28 October 2015) para 20.

measure. I would think this is because once legal proceedings are initiated, it is expected that they will be dealt with speedily and brought to finality because tied in them are rights and interests of parties, which it is in the public interest to bring to finality without undue delay. Applications for stay have the innate consequence of holding the decisions and the rights and interests of the parties in abeyance. It is for that reason that these applications are granted sparingly. It would appear to me, in line with the overriding principles of judicial case management, the bar for meeting the requirements for stay of proceedings is even higher as the application impacts on the completion of the case, time expended on the application itself (not to mention the time to be waited during the time when the stay operates if successful) and obviously, the issue of costs.'

[61] It will be immediately clear that the defendant does not show that there are any exceptional circumstances in this matter. Furthermore, there is no allegation and proof of any element of State coercion or compulsion in this case. He may rightly consider himself to walking precariously on eggshells or in between Scylla and Charybdis, so to speak, but that is a matter that he will have to negotiate with sensitivity and adroitness. His legal representative will have to assist him in that regard. There is no legally permissible justification to stay the proceedings, and in any event, considering the fact that the matter has been dragging for so long and cries for completion without any further avoidable delay.

#### Common cause issues

[62] It is clear that although there are major differences in the version of the parties, there are, however, certain issues that may be regarded as common cause or not seriously disputed. I presently enumerate them.

- (a) that the plaintiff and the defendant knew each other and had a long standing relationship since around 2003;
- (b) the relationship stemmed mainly from the plaintiff's desire to develop properties he had acquired in Swakopmund and which the defendant, a registered estate agent managed it being common cause that the plaintiff does not live in this country but is mostly in the DRC;

- (c) on 27 January 2010, the plaintiff contacted the defendant and requested the latter's business account banking details. The defendant obliged by providing same via email addressed to a hotel where the plaintiff was temporarily resident in Kiev;
- (d) on the heels of this communication, i.e. on 11 February 2010, payments into the defendant's business account the details of which he had given to the plaintiff, ensued;
- (e) the payments ended in June 2010 and the total amount paid into this account was US Dollar 900 000 from an account in Hungary held with MKB Bank ZRT;
- (f) the money, from the documents accompanying the transfers, reflected that an entity known as Breadfield Trade Ltd caused the transfers in question to be made into the defendant's business account. The person who made the transfers into the defendant's aforesaid account was one Mr. Jozfef Feher.

#### Analysis of the evidence

[63] It would appear in the circumstances that there are two irreconcilable versions presented to the court. Of course the court was not there for it to confirm one version or reject the other. The only weapon in the hands of the court that can be used to resolve the contested issues is to consider the evidence, weigh the probabilities and then make a finding as to where the probabilities lie.

[64] In *Jin CV Joint Fitment Centre CC v Hambabi*<sup>9</sup>, Parker AJ, in resolving disputes that afflicted the case before him, resorted to employing the following dictum in *National Employers' General Insurance Co. Ltd v Jagers*<sup>10</sup>, where the court expressed itself as follows:

'I must follow the approach that has been beaten by the authorities in dealing with such eventuality; that is to say, the proper approach is for the court to apply its mind not only to the merits and demerits of two mutually destructive versions but also

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<sup>9</sup> (I 1522/2008) [2014] NAHCMD 73 (6 March 2014), para 11.

<sup>10</sup> 1984 (4) SA 437 (E) at 440E.

their probabilities and it is only after so applying its mind that the court would be justified in reaching the conclusion as to which opinion to accept and which to reject. . . Where the onus rests on the plaintiff and there are two mutually destructive stories he (the plaintiff) can only succeed if he satisfied the court on a preponderance of probabilities that his version is accurate and therefore acceptable, and that the version advanced by the defendant is false or mistaken and falls to be rejected.’ See also *Stellenbosch Farmers’ Winery Ltd and Another v Martell CIE and Others*.<sup>11</sup>

[65] It is to these guiding principles that the court will resort in trying to resolve the inconsistencies in the evidence. In this regard, there are two major disparate versions presented to the court in the evidence, being the source of the money that was deposited into the defendant’s business account. The plaintiff’s evidence, read as a whole and in company and consideration of the other relevant evidence, is to the effect that the money was sent to the defendant’s account at his behest for the purpose of developing the properties he owned in Swakopmund.

[66] The defendant, on the other hand contends that he obtained a Chinese vase, described earlier in this judgment from a relative and that the plaintiff promised to find a buyer for same. The plaintiff would then have told him that he had found a buyer and as a result, two men of Chinese extraction came to the defendant to collect the vase, which he gave to them on the plaintiff’s instructions. The money, referred to earlier, that was paid into the defendant’s account, he testified, was the part-payment from the plaintiff in relation to the vase.

[67] The first issue that I should mention upfront, is that on the balance, I have weighed the evidence adduced by both sets of witnesses and it appears to me that the evidence adduced by the plaintiff and his witnesses was by and large consistent, matter-of-factly and thus credible. In this regard, and I will just point to a few issues, the plaintiff is the one who requested the defendant to give him his account number and soon thereafter, the money was sent to the defendant’s account.

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<sup>11</sup> 2003 (1) SA 11 (SCA).

[68] In the circumstances, it is my considered view that the probabilities favour the plaintiff's version in this regard because he mentioned that the money he received was from Breadfield and although he did not mention Mr. Feher by name, the latter was called as a witness and he testified that it was the plaintiff who asked him to transfer the money into the defendant's account. The defendant never knew Mr. Feher and had no business receiving money from Bradfield at all. Clearly, the plaintiff was the nexus in that regard.

[69] An argument was raised to the effect that the evidence of Mr. Feher regarding that the plaintiff asked him to send money to the defendant is hearsay. I reject that submission for the reason that the fact that the plaintiff did not mention that he asked Mr. Feher to caused the transfer to be made to the defendant does not detract from his evidence that he asked Breadfield to cause the money to be transferred to the defendant.

[70] There is nothing hearsay about this at all. It was his evidence, which was and could not be contested that there was money to be transferred to the plaintiff from Bradfield. I agree with Mr. Maasdorp that this evidence was not tendered to prove what the plaintiff told Mr. Feher but to explain why Mr. Feher did the indisputable, namely, to send the amount in question to the defendant's account. It was an instruction that the plaintiff testified he issued and Mr. Feher carried out and manifested itself with deposits being made into the defendant's account.

[71] It is also clear that the defendant's bankers confirmed receipt of the money from Breadfield. This could not be denied. Furthermore, Mr. Kamunguma also testified and in large measure corroborated the plaintiff's evidence. This included the evidence that after some time, the defendant began to make himself unavailable and that Mr. Kamunguma found him in his house with his hair dyed pink after having been told that he was not in the country. The fact that he became unavailable was corroborated by Mrs. Engelbrecht who was eventually asked by the plaintiff to sell his properties as the defendant was playing truant so to speak.

[72] I do find for a fact that the evidence of the plaintiff and his witnesses in this regard, is creditworthy as it is supported by Mrs. Engelbrecht's evidence. Mrs Engelbrecht testified that the defendant was unavailable as they required to obtain some of the plaintiff's documents from him to enable them to sell the plaintiff's property according to his instructions.

[73] It is the court's view that Mrs. Engelbrecht had no reason to fabricate this evidence in this connection and no reason therefor was suggested to her. It also shows that something had become amiss between the plaintiff and the defendant. This, accordingly lends credence to the plaintiff's story that he had caused the money to be paid to the defendant and the latter was unable to return it when demanded by the plaintiff. It should be mentioned in this regard that there was official demand of the payment from the defendant by the plaintiff's legal practitioners of record, dated 23 August 2011.<sup>12</sup>

[74] It is also well to consider that the defendant's evidence was that the money was paid by the plaintiff in respect of the Chinese vase. I reject this story as a fabrication by the defendant. I say so for the reason that the evidence adduced by the defendant is of a romancing character and one assigned to the movies or novels. Everyone who could testify and corroborate his evidence was simply unavailable.

[75] His wife, who would have known everything about this vase was not called and his niece, whose mother had given the defendant the vase had her whereabouts unknown to the defendant. Furthermore, Mr. Van Rensburg, who was also present when the consignment was handed over to the nameless Chinese persons, was never called and there is no plausible explanation therefor.

[76] Furthermore, the whole story about how unknown Chinese men came to the defendant's estate agency to collect the vase is extremely fanciful. No one who is a businessman of the note, as the defendant was, could, allegedly

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<sup>12</sup> See Exhibit "O".



on the strength of the plaintiff's unverified communication, hand over a vase worth, according to the defendant, N\$ 10 million, to unknown people, whose names and official identities were not recorded.

[77] They are simply unknown and there are no witnesses who were with the defendant who were called to corroborate his account. His failure to call his wife and Mr. Van Rensburg will therefor attract an adverse inference in this regard.<sup>13</sup> Mrs. Sprangers had been identified in the pre-trial report, which was adopted and made an order of court, as a witness who would corroborate the defendant's evidence in material respects.

[78] The fact that Mr. Van Rensburg was a lawyer, as Mrs. Delport submitted, did not preclude him from being a witness on issues of fact. He did not act as a lawyer in the proceedings and there is no known rule of evidence or of legal ethics that could have precluded him from serving as a competent witness in the circumstances..

[79] He was taxed at length about how the vase could have been taken out of Namibia in the absence of following the provisions of the Customs and Excise Act that require one declare goods to be transported to or from Namibia, There was no declaration of the vase anywhere, suggesting, if the defendant's story is creditworthy, which I have held is not, that he would have allowed the vase to be spirited out of the country contrary to the laws of this country.

[80] Furthermore, there is no shred of any evidence, be it a photograph of the vase, any email or any proof as to the existence and appearance of the vase, which could corroborate his oral *ipse dixit*. With the digital age in vogue, it would have been the easiest and most natural thing for the defendant to have captured, even with his cell phone, the 'Kodak moment' as it were, when the 18<sup>th</sup> century item was handed over to the Chinese buyers. So important and life-changing for the defendant was that moment that it would ordinarily

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<sup>13</sup> Conrad v Dohrmann 2018 (2) NR 535 (HC), para 84.

have been expected to be kept as some type of special memorabilia by him. But not so with the defendant, as it appears on the evidence.

[81] There is evidence that the defendant's bankers obtained his signatures to the deposits from Breadfield. It is clear that the deposits were in relation to property development, which is the purpose that the plaintiff had testified about in relation to the deposits. The defendant tried to explain this away by saying that he did not carefully scrutinise the documents. He stated that an official from the Bank would come to him and ask him to sign the document and he did not read the contents of the said documents.

[82] I reject the defendant's version in this regard as not worthy of credit. No businessman of note, as the defendant was, could sign documents absent-mindedly, where they may have a bearing on the reasons why the money was being received. He signed certifying that the amounts received were not in respect of proceeds of crime.

[83] In any event, the defendant's version in this regard cannot be accepted on the basis of the doctrine *caveat subscriptur*. He appended his signature to the inscription that the money transactions were in respect of the plaintiff's landed property in Swakopmund. The defendant, although he had the opportunity, did not write that the transfers were in respect of the hallowed Chinese vase.

[84] If the money was in respect of part-payment for the vase, the inscription would have stated so. It becomes clear that the depositor's inscription of the purpose for the credit into the defendant's account must be accepted and the defendant accepted that by appending his signature to the form. In view of the foregoing, I reject the defendant's version that there was any money owed by the plaintiff to him.

[85] If that had for any reason been true, the one reasonable thing that the defendant would have done after receiving the summons from the plaintiff would have been to institute a counter-claim for what he alleges is the

balance from the amount to be paid on behalf of Mr. Olenga into the defendant's account. The defendant is not acting in person in this matter, but is represented and has always been. The fact that he did not institute a counter-claim, in my view, lends credence to the plaintiff's version and correspondingly relegates the defendant's version to the realms of one without any credence.

[86] There is one matter that I must deal with that the defendant attempted to raise as a defence. He produced a statement of his mobile telephone calls allegedly from MTC Namibia, his mobile phone service provider. It was argued on his behalf that there was no entry therein that reflected or confirmed the communication between the parties and Mr. Kamunguma as testified in evidence. In this regard, the defendant testified that a witness from the service provider would be called to testify accordingly.

[87] It is now a historical fact that no such witness was called on the defendant's behalf to confirm his version. In this regard, the trial was adjourned to enable the defendant to call the said witness but that was not to be. The defendant later informed the court that his service provider had advised that they no longer have in their possession and system records relating to the year as their system changed in 2014. A letter was produced by the defendant alleging that the invoices he had supplied were originals sent to him by MTC.

[88] In the premises, I agree wholeheartedly with Mr. Maasdorp that the evidence that the defendant attempted to tender to the court is inadmissible, as it stands unverified by the relevant officials. He is not an employee of MTC to give the necessary verifications. I accordingly find that the plaintiff's objection to the admission of this evidence is condign. In this regard, the case referred to in support of the argument by Mrs Delpont finds no application since it is based on South African legislation.<sup>14</sup>

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<sup>14</sup> *MTN Service Provider (Pty) Ltd v LA Consortium Vending CC t/a Enterprises and Two Others* [2007] ZAGPHC 362

[89] In this regard, the court was referred to *Rally for Democracy and Progress and Others v Electoral Commission of Namibia*<sup>15</sup>, where the court expressed itself as follows regarding the admission of evidence:

‘The admissibility of evidence is a matter of law and not of discretion. Admissibility of evidence is governed either by statute or by the common law. The court does not choose itself what evidence to admit. The legislature, through the CEA, has defined the conditions under which a computer print-out is admissible.’

[90] Whatever sympathy I may have for the defendant for the situation in which he finds himself, I am not able, as the law, peremptorily requires, to come to his assistance. I will therefore have no regard for this piece of evidence, as it is worthless in the eyes of the law.

[91] Equally worthy of dismissal, is the defendant’s evidence that the plaintiff at some stage asked the defendant to give him an advance of US\$ 50 000, which the defendant agreed to. It is the defendant’s evidence that he then bought a brick making machine for the plaintiff and paid an amount of N\$ 66 000 to the Windhoek Municipality. How these transactions could take place when the plaintiff owed the defendant the amount now alleged just beggars belief. It is a version that deserves to be rejected out of hand and I accordingly do so.

[92] I accordingly come to the conclusion, taking into account the common sense approach to the evidence adduced by both protagonists, in particular the uncontested evidence and facts outlined above, the inherent probabilities of the plaintiff’s case, weighed against the inherent improbabilities of the defendant’s case, that the general probabilities at the end of the case favour the plaintiff unblinkingly. I can state without fear of contradiction that considered as a whole, the version canvassed by the plaintiff is acceptable and that the version of the defendant is false and stands to be rejected.

[93] In this regard, it also follows as night follows day that the only plausible and acceptable conclusion on the evidence led shows on a balance of

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<sup>15</sup> 2013 (2) NR (HC), p. 492B-C.

probabilities that it was the plaintiff that instigated and caused the transfer of the funds in question to the defendant's account. Furthermore, it becomes clear that on the probabilities that the transfer made into the defendant's account was made for and on behalf of the plaintiff, it having been rejected as not creditworthy that the defendant's version that the money paid in was in respect of the vase, which the plaintiff, I must mention, rejected out of hand in a laughable manner.

[94] I must pertinently mention that I observed the plaintiff's demeanour as he did so. There was an unmistakeable mark of contempt and unbelief written legibly and in bold print all over his face. It should be mentioned also, in this regard, that whereas one would have expected the defendant to produce some modicum of written corroborative documentation cementing his version, this has not been forthcoming, something that cannot be properly levelled against the plaintiff in this case.

[95] It must be mentioned in this regard that the defendant is not an *ignoramus* who can be said to have no or a little encounter with the classroom. He is a businessman of note, who ran an estate agency, a business than one needs to qualify him or herself to join. He would, in the circumstances, have been expected, as a diligent businessman, to have ensured that he maintained a good and proper documentary record of his dealings in this matter, particularly considering the large amount that he attaches to the vase. In this regard, I note, there is no professional opinion attaching the value that he did to the vase. It is just his *ipse dixit*.

[96] In this regard, these findings lead me to what I consider as the wholesome conclusion, in the light of the evidence that the plaintiff is, properly considering and weighing the entire evidence led, including all its probabilities and improbabilities, that it is the plaintiff, and him alone, that is entitled to the receipt of the monies transferred by Breadfield into the defendant's account.

[97] I say so for the reason that the defendant, admittedly has no knowledge of or any business or personal dealings with Breadfield. On the

other hand, it is the plaintiff and him alone who, from the evidence, had that contact. Furthermore, after he had contacted the defendant requesting the latter's account, the monies were credited into the defendant's account. Clearly, the plaintiff is the one who completes the jigsaw puzzle between the defendant and the receipt of the huge sums deposited into the defendant's account.

[98] I say this, considering in particular, that the defendant's version of the reasons why he would have received the money in question, namely, as part payment for the vase, has been rejected and held by the court to be impoverished of creditworthiness. Absent that finding in favour of the defendant, there is no plausible or conceivable reason for him to have received the huge amount of money from Breadfield.

[99] The matter becomes reduced to this – between the two protagonists, who has a better right to the money in question? Is it the plaintiff or the defendant? The resounding answer is that and for the reasons advanced earlier, it is the plaintiff. The defendant, outside the plaintiff, had no reason whatsoever to have received that windfall from Breadfield, which was unquestionably the depositor and whom the plaintiff unquestionably had dealings with as testified by him and confirmed by Mr. Feher. The defendant must be left to wallow in valley of his devices, uncovered by both the facts and/or the law in this case.

[100] Having said this, the court must not be understood to have ruled that the plaintiff's case was the model of clarity and co-ordination or consistency, with the flawless synergy as between a train and its carriages. There are some issues of inconsistency which may seem out of line with the general trend of the plaintiff's version, but in the court's view, these inconsistencies are merely peripheral in nature and do not afflict the core of the important and decisive issues that define the entire case viewed objectively.

[101] Those that may be considered to have been central on the issue, even if they may have certain imperfections about them, may not, in my view, be

properly regarded so improbable or vague and therefor ineffectual as to render them chaff. On the central and decisive issues, however, I am of the view that the plaintiff's case should succeed for the reasons that it accords more with the probabilities than that of the defendant.

[102] The defendant has challenged the plaintiff and claims that the latter is not entitled to the money, an issue I have dealt with previously. I just need to point out that with the defendant's version having been held to be improbable, there would be no justice in him retaining the money when he has done nothing, from the evidence, to receive such a windfall. He surely cannot reap where he has not sown, which appears to be the intended destiny of his argument in this regard.

[103] I should, as I draw a close to this matter, mention an argument that Mrs. Delport made reference to in her detailed closing written submissions. This was in reference to the Finance Intelligence Act<sup>16</sup>. She argued that if the order of the court was to be issued in favour of the plaintiff, as prayed for, then the provisions of the said Act would thereby be contravened. Happily, Mrs. Delport, in an auto-correct function, acknowledged correctly and fairly, that the Act succeeded the transaction between the parties. It is well-recognised principle of the law that legislation does not have retrospective or retroactive application ordinarily.<sup>17</sup> The Act has no such provisions and that puts the argument on behalf of the defendant in the present context, to eternal rest, in my considered view.

### Conclusion

[104] In view of the issues adverted above, it is the court's view that the plaintiff has, on a balance of probabilities, shown that he is entitled to be granted the prayer he seeks. The onus was thrust upon the plaintiff and he has, in my view, discharged it satisfactorily. Correspondingly, and to the

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<sup>16</sup> Act No. 13 of 2012.

<sup>17</sup> *Maletzky v The Government of the Republic of Namibia* (HC-MD-CIV-MOT-GEN-2017-00148) NAHCMD 142 (2 May 2019).

extent that the evidential burden rested on the defendant, however, it must be mentioned that the defendant has failed in that regard.

### Commendation

[105] The court wishes to express its deep indebtedness to counsel on both sides for the formidable manner in which they have pursued and applied themselves on behalf of their respective clients in this matter. I particularly wish to commend Mrs. Delport for her dynamism and her deep sense of duty, industry and application. I say so for the reason that she came into the case in defence of the defendant well after the close of the plaintiff's case. The fact that the case has turned out against her client is not a reflection on her level of application and assiduousness in serving the interests of her client and those of justice in equal measure. She has conducted herself in the best traditions of the profession, an example worth emulating.

### Costs

[106] The ordinary legal principle that applies, almost invariably, is that the costs follow the event. This means that unless there are some exceptional circumstances that exist, the party that is unsuccessful should bear the costs. I did not understand Mrs. Delport to suggest or point out any such circumstances. I will accordingly apply the general rule in this case.

### Order

[107] For the reasons advanced above, the court's judgment in this matter is the following:

1. The Defendant, Mr. Erwin Rozalia Ludovic Sprangers is ordered to pay to the Plaintiff, General Francois Olenga, the amount, which is the Namibian Dollar equivalent, of United States Dollar 850 000. 00.



2. The above-named Defendant is ordered to pay interest on the aforesaid sum mentioned in paragraph 1 above, at the rate of 20% per annum reckoned from the date of the issue of summons to the date of payment.
3. The Defendant is ordered to pay the costs of the action, consequent upon the employment of one instructing and one instructed Counsel.
4. The matter is removed from the roll and is regarded as finalised.

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T.S. Masuku  
Judge

## APPEARANCES:

PLAINTIFF: R. Maasdorp  
Instructed by ENSAfricaNamibia Inc.

DEFENDANT: A. Delport  
Of Delport Legal Practitioners