

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA,



MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-OTH-2019/02373

In the matter between:

**ADAMS LEOPOLD JUSTICE**

**PLAINTIFF**

and

**TULU TRADING ENTERPRISES CC**

**DEFENDANT**

**Neutral Citation:** *Justice v Tulu Trading Enterprises CC* (HC-MD-CIV-ACT-OTH-2019/02373) [2020] NAHCMD 412 (14 September 2020)

**CORAM:** SIBEYA, AJ

**Heard:** 22-23 June & 01 July 2020

**Order:** 11 September 2020

**Delivered:** 14 September 2020

**Flynote:** Contract Law – Oral agreements – Site agent an employee or not – responsibility of overseeing the construction project is supervisory and not actual construction – A claim for profit sharing based on hearsay evidence – Hearsay evidence inadmissible as a matter of law – Evidence of the plaintiff lacked specific details and was disjointed – The approach to mutually destructive evidence revisited – Plaintiff failed to disclose the total amount received – Site agent found to be an employee in the

context of this matter – Defendant's explanation that the first agreement about paying the plaintiff N\$1 500 per toilet constructed was revised with the second agreement as it was too costly to the project found to be highly probable – Found that it was highly probable that plaintiff was employed to be remunerated according to progressive monthly payments received – Plaintiff was not impressive as a witness and found not credible.

**Summary:** The plaintiff claims unpaid amounts totaling N\$347 152 from the defendant for services rendered to the defendant based on oral agreements concluded between the parties. This amount is alleged to be constituted of 50% of the amounts generated from the project and unpaid amounts arising from part payments of the amounts due. The plaintiff claims that he was not employed by the defendant but was a site agent. The defendant denied liability for the plaintiff's claim.

Held that, he who alleges bears the burden to prove his allegations on a balance of probabilities. The plaintiff therefore bears the evidential burden to successfully prove a claim.

Held further that, a person cannot claim payment of 50% of the profit generated from the project without establishing that indeed the project made profit.

Held further that, evidence which is mutually destructive invites an analysis of the witnesses' evidence, probabilities and the credibility of the witnesses and the more convincing the evidence of one party, the less convincing the evidence of the adversary will be.

Held further that, it is, in the context of the matter amplified by the minutes of the site meeting, revealed that a site agent is an employee.

Held further that, the plaintiff did not render construction services to the defendant, to the contrary, he oversaw the project on a day-to-day basis thus his status was indicative of an employee.

Held further that, plaintiff's evidence was found to be highly improbable and the plaintiff was found not credible.

Held further that, a witness' change of evidence on a specific issue without a satisfactory explanation, can affect his credibility.

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ORDER

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1. The plaintiff's claim is dismissed with costs.
2. The matter is removed from the roll and regarded as finalized.

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JUDGMENT

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SIBEYA A J:

Introduction

[1] Is a site agent or site foreman at a construction project an employee or an independent contractor. This question is answered as the judgment unfolds.

[2] The plaintiff was appointed to oversee the project of constructing ablution facilities for Omaheke Regional Council. The parties agreed that the plaintiff will be remunerated with a fixed amount of N\$25 000 plus transport and accommodation costs amounting to N\$4 000. A dispute arose between the parties as to whether the plaintiff was paid all amounts due to him for services rendered to the defendant.

The parties

[3] The plaintiff is *Adams Leopold Justice*, a major male person and a building contractor.

[4] The defendant is Tulu Trading Enterprises CC, a close corporation duly registered and incorporated in accordance with the Close Corporations Act of the Republic of Namibia.<sup>1</sup> The defendant's principal business includes rendering construction, building and renovation services.<sup>2</sup>

#### Summary of pleadings

[5] The defendant was awarded a tender to construct ablution facilities for the Omaheke Regional Council. The plaintiff acting in person and the defendant represented by *Mr. Efraim Toolu (Mr. Toolu)* entered into an oral agreement where the plaintiff was appointed to be the site agent. The exact nature, position, responsibilities and remuneration of the plaintiff is the subject of this dispute.

[6] The plaintiff in his particulars of claim alleges that:

‘4. During March 2017 and at Windhoek, the plaintiff and the defendant, being represented by *Mr. Efraim Toolu*, entered into an oral agreement.

5. The material express, alternatively tacit, in the further alternative implied terms of the agreement were as follows:

5.1 Plaintiff would construct a number of toilets in the Omaheke Region on behalf of the defendant at a fixed rate of N\$25 000.00 plus transport and accommodation costs in the total amount of N\$4 000.00.

5.2 It was a further material term of the agreement that the defendant would share 50% of the total profit made from the construction project.

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<sup>1</sup> Act 26 of 1988.

<sup>2</sup> Exhibit "G".

5.3 Plaintiff would therefore be paid a total amount of N\$29 000.00 for each and every month he remains on the construction site, plus 50% of the total profit made from the construction project.

6. At all relevant times plaintiff complied with its (sic) obligations in terms of the oral agreement, rendered construction services to the defendant and remained on site for 11 months from March 2017.

7. Defendant is in breach of its obligations in that it failed to pay the amounts due to plaintiff as and when such amounts became due and payable.

8. Defendant only paid N\$226 300.00. A total of N\$92 700.00 therefore remains outstanding or unpaid.

9. The construction project was valued at N\$8 million, the value of which the defendant made a profit of N\$508 904.00 to which plaintiff is entitled to 50%. An amount of N\$254 452.00 therefore remains outstanding or unpaid.'

[7] The plaintiff claims that the defendant did not fully pay him the amount due for construction services rendered leaving a shortfall of N\$92 700. He further claims that the defendant owes him 50% of the profit generated from the project amounting to N\$254 452. The total amount therefor alleged to be outstanding is N\$347 152.

[8] The defendant disputed the plaintiff's claims. I do not intend to set out the plea in detail save to state that the defendant pleaded that during November/December 2016 it employed the plaintiff as a site foreman with the responsibility to supervise the defendant's workforce, and not to carry out construction services. The defendant stated further that the plaintiff was to be remunerated with N\$1 500 for every toilet constructed by its workforce under plaintiff's supervision.

[9] The defendant further alleged that during January 2017, the parties concluded another oral agreement to the effect that the plaintiff would be paid an amount of N\$25 000 after every progress payment made for the contractual project period of 8 months. The defendant alleges further that out of its own goodwill, would pay N\$4 000 to the

plaintiff for the months that the plaintiff would remain on site for accommodation and transport costs. The defendant denied the allegation of profit sharing but stated that it undertook to demonstrate appreciation to the plaintiff in the event that the project was successfully completed in time by providing him with a bonus. The construction project was due for completion in 8 months but was extended to 11 months. The defendant was not compensated by the Omaheke Regional Council for the expenses occasioned by the extension. In its plea, the defendant stated that it paid the plaintiff the total amount of N\$276 300 as claimed by plaintiff in his letter of demand.

[10] The parties filed a signed joint pre-trial report dated 28 February 2020 the content of which was adopted in the pre-trial order of 04 March 2020. The material part of the pre-trial order provides as follows:

'ALL ISSUES OF FACT IN DISPUTE TO BE RESOLVED DURING THE TRIAL:

1. Whether or not the parties entered into an oral agreement during March 2017 or whether they entered into such an agreement during November 2016.
2. Whether or not the parties agreed that the plaintiff will be the site foreman or whether he will be constructing the ablution facilities.
3. Whether or not the parties agreed that the plaintiff shall be entitled to the fixed monthly payments of N\$25 000.00 (Twenty-Five Thousand Namibia Dollars), or whether the plaintiff will be paid the amount of N\$25 000.00 after every progress payment made for a duration of or equal to 8 months.
4. Whether or not it was agreed between the parties that the defendant will pay the plaintiff for transport and accommodation in the amount of N\$4 000.00 (Four Thousand Namibia Dollars) per month or whether the defendant's member added on the said amount out of his own goodwill which amount the defendant's member paid to the plaintiff.
5. Whether or not the parties agreed that the plaintiff shall be entitled to 50% of the total profits made from the construction project.

6. Whether or not the plaintiff duly complied with his duties and obligations in terms of the oral agreement in that he duly rendered construction services to the defendant and he remained on the site for 11 months as from March 2017.
7. Whether or not the defendant breached the oral agreement by only paying the plaintiff the amount of N\$226 300.00 (Two Hundred and Twenty-Six Thousand and Three Hundred Namibia Dollars) and by not paying the plaintiff the further amount of N\$92 700.00 (Ninety-Two Thousand and Seven Hundred Namibia Dollars) and the amount of N\$254 452.00 which is 50% of the profits made from the construction project.
8. Whether or not the total amount of N\$347 152.00 is due, owing and payable by the defendant to the plaintiff.
9. Whether or not judgment should be given in favour of the plaintiff as prayed for in the particulars of claim.

**(b) ISSUES OF LAW IN DISPUTE TO BE RESOLVED DURING THE TRIAL**

1. Whether or not the defendant breached the material terms and conditions of the oral agreement between the parties.

**(c) ISSUES NOT IN DISPUTE**

1. Citation of the parties.
2. The plaintiff and defendant duly concluded an oral agreement for the construction of ablution facilities in the Omaheke Region.'

The plaintiff's evidence

[11] The plaintiff testified that from 2013 he engaged in construction businesses as a sole proprietor and his duties included overseeing building projects.

[12] He testified further that during March 2017 he entered into the first oral agreement with the defendant represented by *Mr. Toolu*. The material express, alternatively tacit and further alternative implied terms of the agreement were that he will oversee the construction of the 350 toilets at a cost of N\$1 500 per toilet.

[13] He further testified that subsequent to the conclusion of the first agreement, the parties entered into a second oral agreement with the terms that he will oversee the construction of the toilets at a monthly fixed rate of N\$25 000, plus transport and accommodation costs in the amount of N\$4 000 monthly until the completion of the project. He proceeded to testify that the parties also agreed to share the profits of the project on a 50% basis. These new terms, he testified, enticed him to enter into the second oral agreement.

[14] He testified that he rendered construction services to the defendant and remained on site for 11 months calculated from March 2017. He stated that the defendant failed to pay him for said period of 11 months. He was only paid an amount of N\$226 300. The total amount due for payment was N\$319 000 (calculated at N\$29 000 x 11 months), thus payment of N\$226 300 left a shortfall of N\$92 700 which amount is outstanding, due and payable. In cross examination it was put to him that the defendant paid a total amount of N\$281 000 to him, which assertion he disputed with emphasis that he was only paid a total amount of N\$226 300.

[15] Plaintiff testified further that the defendant made profit in the amount of N\$508 904 from the construction project and by virtue of their oral agreement he was entitled to payment of 50% thereof, being an amount of N\$254 452. This amount was not paid to him and remains outstanding. He stated that the overall amount outstanding for the construction services rendered and the 50% profit share totals N\$347 152.

[16] During cross examination by *Ms. Shikale*, for the defendant, the plaintiff when questioned, agreed that he is not a member of the defendant and that he was not involved in the process of acquiring the project from Omaheke Regional Council. He further conceded that he only came on board after the project was awarded to the



defendant. He further agreed during cross examination that he did not contribute any machinery or tools to the project.

[17] It was further put to the plaintiff in cross examination that the first agreement was concluded earlier than March 2017 to which plaintiff conceded. This concession was brought about by the fact that, already in November 2016 defendant paid plaintiff an amount of N\$10 000 in respect of the first agreement. Plaintiff proceeded to state that in December 2016 and January 2017 he was on site save for a short break taken in between.

[18] In substantiating his claim that he was an independent contractor and not an employee, plaintiff placed heavy reliance on the content of the minutes of the site meeting of 23 January 2018 (hereinafter referred to as the minutes of the site meeting). The minutes of the site meeting which were received into evidence provides that the plaintiff was a site agent.<sup>3</sup>

[19] When blame was placed on his feet as the cause for the delay for failure to complete the construction project in time, the plaintiff disagreed and shifted the blame to the Omaheke Regional Council. This was disputed and it was put to him in cross examination that if the contractor (the defendant) was not responsible for the delay (where plaintiff was overseeing the project), then what was the reason for assuring the site meeting and Omaheke Regional Council that work will be completed by end of March.<sup>4</sup> To this the plaintiff had no comment, save to say that the defendant paid no penalties for delaying the completion of the project and this is indicative of no blame being attributed to the defendant. This version was challenged as it was mentioned that the only reason why the defendant paid no penalties for the delays was that it proactively engaged the Omaheke Regional Council to explain its predicament.

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<sup>3</sup>Exhibit "B" Item 3.3 of the minutes of the site meeting.

<sup>4</sup> Exhibit "B" Clause 2.1.1 of the minute of the site meeting.

[20] The plaintiff conceded during cross examination that about five toilets had to be reconstructed as the foundation thereof was still wet. This was viewed as substandard work.

[21] It was further put to him in cross examination that the amount of N\$25 000 was to be paid to the plaintiff as per progressive payment for the 8 months project period, plaintiff disputed this version.

### The defendant's evidence

#### *Mr Efraim Toolu*

[22] Just as the plaintiff was the sole witness for his case, *Mr Toolu* was a single witness for the defendant. He testified that he is the sole member of the defendant and that in 2016 he, single handedly, successfully applied for a tender on behalf of the defendant to construct ablution facilities at Omitara in the Omaheke Region. The tender was awarded to the defendant in November 2016. He ensured that the machinery and manpower were in place to carry out the construction.

[23] He testified that he approached the plaintiff and offered him employment as a site foreman to which the plaintiff agreed. The terms of the employment agreement were:

23.1 That the defendant would employ the plaintiff as a site foreman which included being a health and safety officer;

23.2 That the construction project had to be completed within a period of 8 months;

23.3 That the plaintiff would supervise the contracted employees of the defendant;

23.4 That the plaintiff would ensure that all work performance is up to standard and completed within the project period;

23.5 That the plaintiff will ensure that all materials and equipment are kept in safe custody and good order;

23.6 That the plaintiff will be remunerated with N\$1 500 per toilet constructed.

[24] He testified further that in January 2017, after experiencing financial difficulties, the parties varied their oral agreement to reflect that:

24.1 The plaintiff will be paid an amount of N\$25 000 for every progress payment made by Omaheke Regional Council;

24.2 The said amount will only be for the tender contractual period of 8 months irrespective of the period that the plaintiff would remain on site;

24.3 In the event that there was good profit, the defendant would consider rewarding the plaintiff with a bonus.

[25] He testified further that considering the position that there would be months where no progressive payments would be received while the plaintiff was on site, the defendant out of goodwill decided to pay plaintiff an additional monthly amount of N\$4 000 (comprising of N\$1 000 towards accommodation and N\$3 000 towards transport costs). He testified that plaintiff agreed to these terms. The defendant paid the plaintiff as and when payments were received from Omaheke Regional Council.

[26] He testified further that while the plaintiff was on site, the defendant suffered loss of equipment of about 50 spades and 32 wheel barrows.

[27] He further testified that the construction project was not completed within the project period of 8 months due to poor workmanship and variation orders not approved. *Mr. Toolu* then proactively requested for extension of the project period which was granted for an additional 8 months.<sup>5</sup> Resultantly the defendant was not charged penalties for the delay to complete the project. Defendant was not remunerated for the extended project period of a further 8 months.

[28] He testified that ordinarily defendant would pay the plaintiff through the bank account but at times *Mr. Toolu* made cash payments to the plaintiff where plaintiff would deduct his allocated portion of the money and pay the remainder thereof to other

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<sup>5</sup> Exhibit "B" page 1.

employees. At times he sent money to the plaintiff through cellphone banking following a complaint received from the plaintiff about exorbitant bank charges experienced.

[29] He testified further that the defendant should have paid the plaintiff an amount of N\$200 000 for eight months together with N\$32 000 for accommodation and transport totaling N\$232 000, but ended up paying the plaintiff in excess of N\$281 000.

[30] *Mr. Toolu* vehemently disputed the claim that defendant agreed to pay plaintiff N\$29 000 monthly and further disputed the alleged agreement on profit sharing at 50%. He testified that in any event, the defendant made no profit owing to a huge debt at Pupkewitz for materials procured for the project.

[31] During cross examination *Mr Nangolo* for the plaintiff questioned *Mr Toolu* regarding the purpose of the payment of N\$125 050 made to the defendant on 21 December 2017.<sup>6</sup> *Mr. Toolu* responded that of the said amount N\$75 000 was due to the plaintiff as payments for the months of September, October and November 2017 as there were no progressive payments in the mentioned months. He testified that the plaintiff was entitled to N\$25 000 per month. When questioned further as to the reason why he paid the plaintiff N\$75 000 while during the said months of September, October and November there were no progressive payments, *Mr Toolu* mentioned that the plaintiff was paid for the 8 months period of the contract with Omaheke Regional Council. When pressed further by *Mr Nangolo*, as to the reason for payment, *Mr Toolu* changed his version and stated that the plaintiff was paid for the work carried out.

[32] *Mr. Toolu* was questioned in cross examination whether the cash payments made to the plaintiff was for acquiring food, to which he responded that it was not meant for food as he bought food for the workers at stop and stop.

[33] When questioned in cross examination about the purpose of a payment of N\$50 000 paid to plaintiff on 27 January 2017,<sup>7</sup> *Mr Toolu* testified that the whole amount was

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<sup>6</sup> Exhibit "F" page 66.

<sup>7</sup> Exhibit "C" page 2.

remuneration for the plaintiff. Plaintiff however stated that he was only entitled to N\$15 000 from the said amount hence he withdrew N\$35 000 to pay salaries for the employees.

[34] the defendant concluded his testimony by stating that the number of toilets constructed was reduced from 350 to 244.

### The burden of proof

[35] It is trite law that he who alleges bears the burden of proof of such allegation on a balance of probabilities to sustain his claim. In discussing the burden of proof and evidential burden *Damaseb JP* in *Dannecker v Leopard Tours Car and Camping Hire CC*<sup>8</sup> stated as follows:

[44] It is trite that he who alleges must prove. A duty rests on a litigant to adduce evidence that is sufficient to persuade a court, at the end of the trial, that his or her claim or defence, as the case may be should succeed. A three-legged approach was stated in *Pillay v Krishna* 1946 AD 946 at 951-2 as follows: The first rule is that the party who claims something from another in a court of law has the duty to satisfy the court that it is entitled to the relief sought. Secondly, where the party against whom the claim is made sets up a special defence, it is regarded in respect of that defence as being the claimant: for the special defence to be upheld the defendant must satisfy the court that it is entitled to succeed on it. As the learned authors Zeffert *et al South African law of Evidence* (2ed) at 57 argue, the first two rules have been read to mean that the plaintiff must first prove his or her claim unless it be admitted and then the defendant his plea since he is the plaintiff as far as that goes. The third rule is that he who asserts proves and not he who denies: a mere denial of facts which is absolute does not place the burden of proof on he who denies but rather on the one who alleges. As was observed by Davis AJA, each party may bear a burden of proof on several and distinct issues save that the burden on proving the claim supersedes the burden of proving the defence.<sup>9</sup>

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<sup>8</sup> (I2909/2016) [2016] NAHCMD 381 (5 December 2016) at para 44-45.

<sup>9</sup> *Supra* at 953.

[45] In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548A-C, Corbett JA discusses the distinction between the burden of proof and the evidential burden as follows:

'As was pointed out by DAVIS, A.J.A., in *Pillay v Krishna and Another*, 1946 AD 946 at pp. 952 - 3, the word onus has often been used to denote, *inter alia*, two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent. Only the first of these concepts represents onus in its true and original sense. In *Brand v Minister of Justice and Another*, 1959 (4) SA 712 (AD) at p. 715, OGILVIE THOMPSON, J.A., called it "the overall onus". In this sense the onus can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal ("weerleggingslas"). This may shift or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other. (See also *Tregea and Another v Godart and Another*, 1939 AD 16 at p. 28; *Marine and Trade Insurance Co. Ltd. v Van C der Schyff*, 1972 (1) SA 26 (AD) at pp. 37 - 9.)'

[36] For plaintiff to succeed in his claim, he is required to adduce evidence which proves on a balance of probabilities: the terms of the oral agreements between the parties; that the defendant breached such agreements; that resultantly the defendant is indebted to the plaintiff in the amount claimed.

### Analysis

[37] From the onset I opt to consider the claim by the plaintiff to 50% of the profit generated from the project. Plaintiff claims that part of the second oral agreement was that he will be paid 50% share of the profit. Plaintiff proceeded to state that the defendant made profit of N\$508 904 and his 50% share thereof is N\$254 452 which is due to him.

[38] The allegation of profit sharing was spiritedly disputed by the defendant. The defendant's case was not only that there was no agreement between the parties about profit sharing but further that the defendant made no profit. Without making any finding as to whether there was such an agreement on profit sharing or not, it is inevitable to state that the plaintiff remained in his starting blocks in his quest to prove this claim. This is based on the fact that when plaintiff was pressed in cross examination by *Ms. Shikale* for the plaintiff to provide proof of the alleged profit of N\$508 904 generated by the defendant, the plaintiff could do no more than state that he received such information about the profit made from an engineer (a certain *Mr. Hasheela*). It is critical to note that *Mr. Hasheela* was not called to testify neither was any evidence presented to corroborate the claim of the alleged profit generated. Whilst acknowledging the importance of the evidence of *Mr. Hasheela*, plaintiff was at pains to justify his failure to obtain and present the said evidence of *Mr. Hasheela*.

[39] *Damaseb AJA* sitting in the Court of Appeal of the Kingdom of Lesotho in the matter of *Mokhosi & Others v Mr. Justice Charles Hungwe & Others*<sup>10</sup> stated that:

'As we have said before, admissibility of evidence is a question of law and not of judicial discretion. Evidence is admissible either under the rules of the common law or under statute. Hearsay evidence is no exception. Once an item of evidence constitutes hearsay, it must either be sanctioned by statute or the common law to be admissible. If it does not, it remains inadmissible as a matter of law and stands to be rejected by the court even if not specifically objected to by the opposing party.'

[40] I endorse the above passage and find it equally applicable to our law. It is therefore inescapable that the information received from a certain *Mr. Hasheela* about the alleged profit generated from the construction project constituted inadmissible hearsay evidence as a matter of law. The said hearsay evidence falls to be rejected which I accordingly do. Proof of profit made is a basic jurisdictional element to the claim of profit sharing. Having stripped the plaintiff of the information regarding the alleged profit made, it follows that no evidence remains on record to substantiate the claim that

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<sup>10</sup> (Cons Case No/02/2019) [2019] LSHC 9 (02 May 2019) para 55.

the defendant generated profit from the project. In the absence of proven profit, there can be no claim to sharing of what is non-existent. Resultantly, the plaintiff's claim to 50% of the alleged profit in the amount of N\$254 452 falls to be dismissed.

[41] What remains to be considered is the second part of the plaintiff's claim, namely: the claim of a total amount of N\$92 700 resulting from the alleged non-payment of the monthly remuneration due to the plaintiff for 11 months spent on site. Plaintiff claimed that subsequent to the second agreement where the defendant allegedly agreed to pay him a total amount of N\$29 000 monthly, defendant failed to pay him the full amount due. Plaintiff claims that the total amount due of N\$319 000 should have been paid but, to the contrary, defendant only paid him an amount of N\$226 300 leaving an outstanding amount of N\$92 700.

[42] In the analysis of the evidence it is important to identify factors which are common cause. These are:

[42.1] That the defendant was awarded a tender to construct ablution facilities for the Omaheke Regional Council;

[42.2] That *Mr. Toolu*, the sole member of the defendant without assistance from the plaintiff, applied for the tender successfully, acquired machinery and manpower in order carry out the construction project;

[42.3] That the defendant contracted the plaintiff as a site foreman and agreed to remunerate him with N\$1 500 per toilet constructed and subsequently the parties entered into another oral agreement.

[43] There are several material differences in the testimony of the plaintiff compared to that of *Mr. Toolu* to the extent that their versions are mutually destructive. The approach to evidence which is mutually destructive was addressed by *Muller J* in *Sakusheka v The Minister of Home Affairs*<sup>11</sup> and said the following:

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<sup>11</sup> 2009 (2) NR 524 (HC) para 37-42.



[37] Ms Conradie submitted that in this case the court is faced with two different versions, namely that of the two plaintiffs, which are denied by the witnesses of the defendant on material and relevant aspects. She consequently submitted that the court has to deal with two mutually destructive versions. She referred to several decisions of South African courts where the approach that a court has to follow in such a situation has been formulated. (National Employers' Mutual General Insurance Association v Gany 1931 AD 187; National Employers' General Insurance Co Ltd v Jagers 1984 (4) SA 437 (E); Mabona and Another v Minister of Law and Order and Others 1988 (2) SA 654 (SE) and Stellenbosch H Farmers' Winery Group Ltd and Another v Martell et Cie and Others 2003 (1) SA 11 (SCA).)

[38] In the case of National Employers v Jagers supra Eksteen AJP (sitting with Zietsman J and Van Rensburg J) formulated this approach at 440D - G as follows:

'It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

[39] Nienaber JA had to deal with two irreconcilable versions in the case of Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others supra. At 14I - 15D para 5 he formulated the court's approach as follows:

'On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by 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 in the witness-box, (ii) his bias, latent and blatant, (iii) F internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial 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. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii),(iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

[40] In a subsequent case in the South African Appeal Court, Zulman JA followed the formulation of Nienaber JA, but, after an analysis of the evidence, concluded that the court a quo in that case made a finding of credibility, which is untenable. (See *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) ([2004] 2 All SA 23) at 589H-I para 6. See also *Louwrens v Oldwage* 2006 (2) SA 161 (SCA) ([2006] 1 All SA 197) at 167I para 14; and *Dreyer and Another NNO v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA) ([2006] 3 All SA 219) at 558E para 30.)

[41] On behalf of the defendant, Mr Coleman agreed that in this case the court is faced with two mutually destructive versions, as well as with the approach to be followed.

[42] I also agree that this is the way the evidence in this consolidated case should be approached. I shall consequently discuss and evaluate the evidence put before me and in the end determine whether I can believe and can be satisfied that the evidence of the plaintiffs is true and the version of the defendant is false. To reach that conclusion I shall follow the technique suggested by Nienaber JA in the *Stellenbosch Farmers' Winery v Martell* case supra.'

[44] The above quoted passage sets out the approach to the analysis of mutually destructive evidence and I endorse same. I further bear the above principles in mind as

I navigate through the evidence in an attempt to resolve the dispute between the parties.

[45] Next in line I venture into the discussion which appears to be the bedrock of the dispute. It was apparent from the commencement of the proceedings that the parties locked horns on the question whether the plaintiff was an employee of the defendant or not. Plaintiff testified that he was contracted by the defendant to render construction services and he rendered such construction services. He proceeded to state that he was not an employee of the defendant but was an agent.

[46] It was submitted by *Mr. Nangolo* on this matter that the defendant did not raise a special plea of jurisdiction to suggest that the plaintiff dragged the defendant to a wrong forum as labour matters should be adjudicated on by the Office of the Labour Commissioner and ultimately the Labour Court, not the High Court strictly speaking. The defendant maintains that the plaintiff was its employee, notwithstanding the absence of a special plea on jurisdiction. Inviting as the argument of *Mr. Nangolo* appears, the failure by the defendant to raise a special plea on jurisdiction does not automatically result in a metamorphosis of an employee into an independent contractor. The evidence should be examined in totality to make a determination on whether the plaintiff was employed by the defendant or not.

[47] The plaintiff stated in the particulars of claim that it was a material term of the agreement that he would construct a number of toilets in the Omaheke Region on behalf of the defendant at a fixed rate of N\$25 000 plus N\$4 000 for transport and accommodation costs.<sup>12</sup> In evidence, the plaintiff changed the goal posts, so to speak and testified that he was contracted by the defendant to oversee the construction of the toilets at the aforesaid fixed rates. In cross examination the plaintiff stated that at the site he was a supervisor and safety officer.

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<sup>12</sup> The letter of demand which was received into evidence contains the same wording in para 2 regarding the service allegedly agreed to be rendered and the fixed payment rates.

[48] The minutes of the site meeting and which meeting was attended by the plaintiff and *Mr. Toolu* provides, *inter alia*, that:

48.1 There was no subcontractor on the project;<sup>13</sup>

48.2 The plaintiff was the site agent and safety officer;<sup>14</sup>

48.3 Both *Mr. Toolu* and the plaintiff attended the meeting as representatives of the defendant.<sup>15</sup>

[49] It was plaintiff's evidence that he did not render construction services to the defendant but rather supervised the construction work carried out at the site as a site agent. The ordinary dictionary meaning of site agent is a person responsible for identifying problems with on-site work activities and providing a solution to ensure that the project proceeds well. (Concise Oxford Dictionary, 11<sup>th</sup> ed). This meaning accords an understanding to the title "site agent" as a supervisor responsible for the day-to-day operation of the project. I should not be misunderstood to mean that in every agreement where a person is contracted as a site agent, such person is an employee, as the ultimate position and responsibilities for such person depends on the intention of the parties to the contact. Whereas *in casu*, there is a dispute on whether the plaintiff was an employee or not, the ordinary meaning of site agent is resorted to.

[50] The Labour Act 11 of 2007<sup>16</sup> on the other hand defines an employee as: 'an individual, other than an independent contractor, who –

- (a) works for another person and who receives, or is entitled to receive, remuneration for that work; or
- (b) in any manner assists in carrying on or conducting the business of an employer;'

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<sup>13</sup> Item 2.5 of Exhibit "B".

<sup>14</sup> Item 3.3 and 3.6 of Exhibit "B".

<sup>15</sup> Item 1.1 of Exhibit "B".

<sup>16</sup> Sec 1.

[51] In the face of the evidence that the plaintiff was not sub-contracted by the defendant, as provided beyond dispute in the minutes of the site meeting,<sup>17</sup> and contrary to the allegations in the letter of demand and the particulars of claim that plaintiff rendered construction services, it is proven that the plaintiff did not render construction services to the defendant but was overseeing the construction project. Why the letter of demand and the Particulars of claim provided that the plaintiff rendered construction services which clearly was not correct is a mystery as same was not explained to court. I observed that plaintiff struggled to explain his position whether he was an employee or an independent contractor. Plaintiff was in charge of the day-to-day activities at the site as clearly testified to by *Mr. Toolu*. This court finds that it is highly probable that the plaintiff was employed by the defendant as opposed to being an independent contractor.

[52] The testimony of the plaintiff had contradictions. He testified that the first oral agreement between the parties was entered into in March 2017. This is also stated in the letter of demand;<sup>18</sup> and the particulars of claim.<sup>19</sup> When confronted in cross examination that already in November 2016, he received payment of N\$10 000 from the defendant, and therefore, the first oral agreement was concluded way earlier than March 2017, plaintiff agreed and stated that the initial agreement was entered into in December 2016.

[53] In the letter of demand, plaintiff stated that he remained on site for 16 months,<sup>20</sup> while in the particulars of claim he alleges that he remained on site for 11 months.<sup>21</sup> In evidence he testified that he remained on site for 11 months hence the claim for payment is for 11 months. Plaintiff however did not dispute the evidence of *Mr. Toolu* that the project which was to be carried out in a period of 8 months was extended for another 8 months. From the plaintiff's evidence, the number of months which he spent on site is not clear.

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<sup>17</sup> Exhibit "B" item 2.5.

<sup>18</sup> Para 2.

<sup>19</sup> Para 4.

<sup>20</sup> Para 4.

<sup>21</sup> Para 6.

[54] In the letter of demand, plaintiff claimed that the total amount paid to him by the defendant was N\$276 300<sup>22</sup> while in the particulars of claim he alleged that the defendant paid him an amount of N\$226 300.<sup>23</sup> Plaintiff laid blame to his legal practitioners of record for providing wrong figures in the letter of demand as the amount which he was paid by the defendant.

[55] When the plaintiff attempted to verify the amount received from the defendant, he relied on his bank statement which was received into evidence. Plaintiff placed heavy reliance on the said bank statement in cementing his testimony that the defendant only paid him an amount of N\$226 300. Astoundingly the said bank statement provided for financial transactions of plaintiff's bank account only up to end of September 2017. This, notwithstanding the fact that plaintiff received payment of N\$25 000 and other small amounts from the defendant subsequent to September 2017. Plaintiff further did not dispute receiving the payment from the defendant together with other payments made through his phone. This demonstrates that plaintiff received money from the defendant in excess of N\$226 300, the precise amount of which is unknown. For his sake, the plaintiff laid blame to his banker for not providing him with a complete bank statement that covers all payments received from the defendant. I find this approach surprising to say the least and it affects the credibility of the plaintiff. It could be that the plaintiff intended to withhold the information about the further payments made to him after September 2017. It is no wonder that the defendant claimed it paid the plaintiff about N\$325 400.

[56] A lot of labour was spent by the plaintiff trying to justify his claim that the defendant agreed to pay him a monthly amount of N\$29 000. By his own version the shortfall of N\$92 700 resulted from 11 months spent on site. The plaintiff does not dispute the assertion of the defendant that the project which was initially set to be completed in 8 months was extended for another 8 months. The plaintiff does not further dispute the evidence that the defendant was not compensated for the 8 months extended period. Some of the explanations which one searches for in vain, include; the reason why the plaintiff claims payment for 11 months only and not 16 months; why

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<sup>22</sup> Para 5.

<sup>23</sup> Para 8.

plaintiff claim payment for a period of more than 8 months whilst not disputing the defendant's evidence that it was not paid for the extended period.

[57] *Mr. Toolu* testified that the agreement with the plaintiff was for plaintiff to be paid monthly progressive payments of N\$25 000 for the 8 months of the project. The other payments were out of goodwill. These payments to the plaintiff were dependent on the payments received from Omaheke Regional Council. *Mr. Toolu*, however had difficulties to explain the payment for the month of October and November 2017 made to the plaintiff while during the said months there was no progressive payments received. *Mr. Toolu* finally testified on this question that defendant paid the plaintiff as plaintiff was on site.

[58] I observed that *Mr. Toolu's* explanations were more detailed and probable compared to the evidence of the plaintiff. *Mr. Toolu* further explained to court the reason of financial difficulties experienced which necessitated the conclusion of a second agreement, but which explanation is missing from the plaintiff's evidence. It appears therefore that the conclusion of the second agreement was necessitated by financial hardships experienced by the defendant subsequent to the conclusion of the first agreement. This explanation is more probable because of the following:

58.1 the project was just in its infancy stage and it is highly improbable that the defendant would increase its expenses regarding the project including payment of the plaintiff when the construction project was just commencing;

58.2 the defendant failed to complete the project within 8 months as, *inter alia*, some of the toilets needed to be reconstructed owing to poor workmanship which goes against the increasing remunerations of personnel in such a position;

[59] Having found that the explanation of the defendant which necessitated the conclusion of the second agreement is highly probable, it follows that the contrasting explanation tendered by the plaintiff that the defendant tendered extra payments which enticed him to conclude the second agreement is not probable. The plaintiff's evidence was disjointed. I further observed that the plaintiff was not credible as a witness.

[60] The testimony by the plaintiff that the terms of the second agreement were enticing as they included the payment of N\$29 000 monthly and 50% profit sharing is unreasonable and highly improbable in light of the evidence discussed *supra*. Such evidence cannot sustain the plaintiff's claim.

Conclusion

[61] From the evidence presented, this court finds that the plaintiff failed to prove its claim on a balance of probabilities. In the premises, the plaintiff's claim falls to be dismissed.

[62] As a result, it is ordered that:

1. The plaintiff's claim is dismissed with costs.
2. The matter is removed from the roll and regarded as finalized.

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O SIBEYA  
ACTING JUDGE



APPEARANCES:

FOR THE PLAINTIFF:

Ms. L Shikale  
Shikale & Associates  
Windhoek

FOR THE DEFENDANT:

Mr. E Nangolo  
Sisa Namandje & Co Inc  
Windhoek