REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CIV-ACT-OTH-2017/04333

In the matter between:

SAREL JACOBUS BURGER OBERHOLZER **PLAINTIFF**

and

ANNA MARIA LOOTS **FIRST DEFENDANT**

MYL VYFTIG PUB AND GRILL CLOSE CORPORATION **SECOND DEFENDANT**

Neutral Citation: *Oberholzer v Loots* (HC-MD-CIV-ACT-OTH-2017/04333) [2020] NAHCMD 164 (16 April 2021)

CORAM:	UEITELE J
Heard:	**08-12 June 2020; 10-14, 27, 28 & 31 August 2020; 01-03 & 30 September 2020**
Delivered:	**31 March 2021**
Reasons Released	**16 April 2021**

Flynote: Evidence — *Onus* of proof — When discharged — Estimate of credibility of witness inextricably bound up with consideration of probabilities of case — He who asserts the existence of a fact in issue shoulders the *onus* of proving such fact.

Trust — Action for fulfilment of an alleged oral agreement that first defendant purchase immovable property as "nominee/trustee" for plaintiff — "Nominee" in its context might well denote that first defendant would act as trustee for plaintiff — agreement to form trust not set forth in any written document — but is a purely verbal one. For that reason it may be difficult to prove, but if it can be proved, there is no reason in law why it should not be enforced.

Marriage — Breach of promise — Damages — Aggrieved party may claim contractual or delictual damages — Assessment of — Factors to be taken into consideration.

Summary: The plaintiff was previously married in community of property. After his marital bonds were dissolved he entered into a romantic relationship with the first defendant. Plaintiff alleges that during the subsistence of the romantic relationship between him and the first defendant, he erroneously and wrongfully laboured under the impression that his previous wife may be able to claim half of all his assets on the basis that they were previously married to each other in community of property.

Plaintiff claims that because of the erroneous and mistaken belief, he entered into an oral agreement with the first defendant in terms of which they agreed to establish an informal trust which would be utilized for purposes of acquiring immovable or movable assets/properties which the first defendant may from time to time acquire as nominee or trustee or agent for and on behalf of the plaintiff.

The plaintiff further alleged that on the strength of the oral agreement he during June 2016 purchased and paid for an immovable being Erf 172, Henties Bay (Extension No 1) as well as 100% membership in and to Myl 50 CC. In January 2017 the romantic relationship between the plaintiff and the first defendant broke down.

As a result of the breakdown and termination of the romantic relationship between the plaintiff and the first defendant the plaintiff demanded that first defendant re-transfer Erf 172, Henties Bay (Extension No 1) and the member’s interest in and to Myl 50 CC back

to him. When 1st defendant refused to effect the re-transfer, plaintiff, during November 2017, instituted these proceedings.

The first defendant in addition to defending the action filed a counterclaim wherein she claims for damages in respect of *contumelia* based on the premise that plaintiff promised to marry her and broke that promise and consequently the oral agreement, by moving in with and subsequently marrying someone else.

Held, that a verbal informal trust agreement in terms whereof one party act as nominal owner on behalf of the beneficial owner, in respect of immovable property, is recognised in terms of our law, and it would be possible for the parties to conclude an informal trust agreement to that effect.

Held, that he who relies on a contract must prove its existence and its terms. It is for that reasons that plaintiff bears the *onus* to convince this Court on a balance of probabilities that he and the first defendant concluded an informal agreement and also to prove the terms of the alleged oral agreement.

Held, that the plaintiff's evidence was vague and inconsistent when one looks at that evidence with respect to the undisputed or indisputable facts. The Court accordingly rejected the plaintiff's evidence that plaintiff and the first defendant entered into an oral agreement to establish an informal trust for plaintiff's benefit.

Held further, that a breach of promise may give rise to two distinct causes of action. The one is the *actio iniuriarum* and the second cause of action is for breach of contract. In this matter the first defendant's grounds her claim on *actio iniuriarum.*

Held further, that in respect of 1st defendant's claim in reconvention, the first defendant is required to allege and prove that the plaintiff, being the so-called 'guilty party', in putting an end to the engagement, acted wrongfully in the delictual sense and *animo iniuriandi.*

Held further, that with regard to the requirement the first defendant complied with the requirement by alleging that plaintiff acted *animo iniuriandi* in that he, before calling off the engagement and whilst they were still living together, started a romantic relationship with another woman, thus intending to injure and hurt her feelings, which he in fact then did.

ORDER

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1 The plaintiff's claim is dismissed.

2 In respect of the first defendant's counterclaim the plaintiff must pay to the first defendant the amount of N$ 5 000 plus interest at the rate of N$ 20% per annum reckoned from the 01st of April 2021 to the date of payment both days included.

3 The plaintiff must pay the first defendant's costs of suit.

4 The matter is regarded as finalised and removed from the roll.

JUDGMENT

UEITELE J:

Introduction

[1] In the Afrikaans language there is an adage that goes as follows: "*slim vang sy baas*". Loosely translated it means "smart catches his boss". The import of this saying is that in life, the human being at times thinks he or she is smart and design plans the

implementation of which at times backfires against the designer and comes to bite him or her. This matter is an exemplification of a design that has gone awry and has come back to bite the designer.

[2] The plaintiff in this matter is Sarel Jacobus Burger Oberholzer, who identified himself as a businessman, residing at Riverview, number 683, Okahandja. I will for ease of reference, refer to the plaintiff as Oberholzer in this judgement.

[3] The first defendant is Anna-Maria Loots, who identified herself as an adult female hotel manager employed as a manager by Mariental hotel. She says she is a resident of Mariental. I will for ease of reference, refer to the first defendant as Loots in this judgement.

[4] The second defendant is Myl 50 Pub and Grill CC t/a Legends Pub and Grill, a close corporation incorporated in terms of the Close Corporation Act, 1988 (Act No. 26 of 1988), with its principal place of business situated at Jakkelsputz Street, Number 172, Henties Bay. I will for ease of reference, refer to the second defendant as 'Myl 50 CC' in this judgement. Where I need to refer to both the first and second defendants, I will simply refer to them as the defendants.

Background

[5] From the facts that I could gather from the pleadings and the evidence, Mr Oberholzer was previously married to a certain Valmarie Oberholzer in community of property (I will, without being disrespectful to former Ms Oberholzer but simply for ease of reference, refer to her as Valmarie). It appears that the marriage between Oberholzer and Valmarie hit the rocks during 2010 and the two separated during that year. During the period of separation Oberholzer became unemployed and it is also during that period the he met Loots and the two started a romantic relationship and also started cohabitating.

[6] On 19 September 2011 this Court terminated the bonds of marriage that

subsisted between Oberholzer and Valmarie. As I indicated earlier, Oberholzer and Loots cohabited during the subsistence of their romantic relationship, they furthermore took their relationship to another level, they shared their profits and losses and also dealt with their financial accounts and affairs as if they were a married couple. At that time Loots was employed at a company known as Wutow Trading.

[7] Shortly after Oberholzer and Valmarie's marriage was dissolved, Oberholzer and Loots became engaged (that is on 25 September 2011). Sometime after the engagement Oberholzer landed a lucrative service contract with Weatherly Mining at the Otjihase Mine just outside Windhoek. After landing the employment service contract Oberholzer floated a close corporation named Brak-Wasser Engineering CC. Oberholzer and Loots then moved to Otjihase Mine and took up residence there. It was after he landed the contract with Weatherly Mining that Oberholzer demanded that Loots resign her employment with Wutow Trading so that she could help him with the management of the affairs of Brak- Wasser Engineer CC.

[8] During 2014 another opportunity presented itself to Brak-Wasser Engineering CC when it landed a subcontract to do work for a South African company, named Rula who obtained a contract with Nampower for the construction of a coal conveyor and ash plant at its Van Eck Power Station. Who the beneficiary of this contract was is an issue in dispute between the parties.

[9] The Rula subcontract terminated by effluxion of time towards the end of the year 2014 and Oberholzer's contract of service with Weatherly Mining Namibia came to an end at the end of October 2015. After Oberholzer's contract with Weatherly Mining ended, Oberholzer and Loots decided to move and moved to Henties Bay. During their residence in Henties Bay in 2016 the parties acquired some immovable properties and Myl 50 CC. One of the immovable properties was registered in the joint names of Oberholzer and Loots while one immovable property (Erf 172 Henties Bay) and Myl 50 CC were registered in the name of Loots alone.

[10] Life being what it is, the romantic relationship between Oberholzer and Loots

disintegrated towards the end of the year 2016 and was dissolved during January 2017. After the dissolution of the romantic relationship between Oberholzer and Loots, Oberholzer claiming that he laboured under a *bona fide* but erroneous belief that due to his marriage in community of property to Valmarie, Valmarie may be able to claim half of his estate, he and Loots concluded an oral agreement in terms of which they established an informal trust in terms of which Loots will act either as nominee or trustee or agent on his behalf.

[11] Oberholzer further alleging that on the strength of the alleged oral agreement he during June 2016 purchased and paid for an immovable being Erf 172, Henties Bay (Extension No 1) as well as 100% membership in and to Myl 50 CC. As a result of the breakdown and termination of the romantic relationship between him and Loots, he alleges that he demanded that Loots re-transfer Erf 172, Henties Bay (Extension No 1) and the member's interest in and to Myl 50 CC back to him. When Loots refused to effect the re-transfer he, during November 2017, instituted these proceedings.

The pleadings

[12] In his particulars of claim, Oberholzer, amongst other allegations, alleges that:

(a) During the subsistence of the romantic relationship between him and Loots, he erroneously and being under the wrongful impression that his previous wife, Valmarie, may be able to claim half of all his assets on the basis that they were previously married to each other in community of property, concluded an oral agreement with Loots in terms of which they agreed to establish an informal trust which could be utilized for purposes of acquiring assets/properties, immovable or movable, which Loots may from time to time acquire as nominee or trustee or agent for and on behalf of Oberholzer.

(b) The material terms of the oral agreement concluded between him and Loots were as follows:

(i) Oberholzer would from time to time purchase assets/properties, immovable or movable, from third party sellers;

(ii) Loots would purchase these assets/properties on the basis of nominee or trustee or agent for and on behalf of Oberholzer whereupon the assets so purchased would also be registered in Loots' name;

(iii) Loots would, however, have no claim to the beneficial ownership of the assets/properties so purchased but would hold same as trustee for and on behalf of Oberholzer;

(iv) Oberholzer would always retain the right to ownership in and to any asset or property forming the subject of the trust relationship;

(v) Loots would manage and take care of his personal financial affairs as well as Brak-Wasser Engineering CC's affairs and that he would be responsible for the physical engineering works of Brak-Wasser Engineering CC; and

(vi) That upon the breakdown of the relationship between Oberholzer and Loots Oberholzer would be entitled to the re-transfer of the assets or properties held in trust by Loots.

(c) He on or about the 1st of June 2016 purchased and paid for an immovable property Erf 172, Henties Bay (Extension No 1) as well as 100% membership in and to Myl 50 CC.

(d) In order to give effect to the informal trust agreement between him and Loots, Loots concluded two purchase agreements (one agreement in respect of Erf 172 and the other in respect of the members' interest in Myl 50 CC) as undisclosed nominee for and on behalf of Oberholzer with a certain Jacobus de Jagger, the seller. Oberholzer attached copies of the sales agreement and those copies were admitted into evidence as exhibits. The purchase price for Erf 172, Henties Bay was N$ 1 500 000 and the purchase price in respect of the member's interest Myl 50 CC was N$1 000 000.

(e) Pursuant to the oral agreement, both Erf 172 as well as the members' interest in and to Myl 50 CC were registered into the name of Loots.

(f) The romantic relationship between the parties (that is Oberholzer and Loots) was terminated during 2016 whereupon the plaintiff demanded the re-transfer of both Erf

172 and the members' interest in and to Myl 50 CC into his name.

(g) Notwithstanding proper demand Loots has failed or refused or neglected to re-transfer the ownership in and to Erf 172, Henties Bay (Extension No 1) or the members' interest in and to Myl 50 CC to him.

[13] As a consequence of the allegations that I set out in the preceding paragraph Oberholzer seeks an Order from this Court:

(a) directing Loots to, within 10 days from date of judgment, transfer the following immovable property namely:

CERTAIN: ERF 172, HENTIESBAAI (EXTENSION NO.1)

SITUATE: IN THE MUNICIPALITY OF HENTIESBAY
REGISTRATION DIVISION "G"
ERONGO REGION

MEASURING: 998 (NINE HUNDRED AND NINETY EIGHT) SQUARE METERS

HELD: BY DEED OF TRANSFER NO T 3048/2013

into the name of Oberholzer, and to sign all papers necessary and to execute all documents necessary to effect such transfer.

(b) An order directing the Loots to, within 10 days from date of judgment, transfer and sign over her 100% member's interest in and to the Myl 50 CC to Oberholzer and to sign all papers necessary and execute all documents necessary to effect such transfer.

(c) Costs of suit.

[14] Loots in her personal capacity and in her capacity as the holder of the 100%

members' interest in Myl 50 CC defended Oberholzer's claim. The essence of Loots' defence is that she denies that she ever concluded an oral agreement with Oberholzer in terms of which she established an informal trust. She further denied that she acted as a trustee or nominee or agent for and on behalf of Oberholzer. She pleaded that she bought Erf 172, Henties Bay, and the members' interest in Myl 50 CC for her benefit and with moneys donated to her by Oberholzer and with moneys she generated from the Rula subcontract.

[15] In addition to defending Oberholzer's claim Loots filed a counterclaim. In her particulars of claim as plaintiff in reconvention Loots alleges that on 25 September 2011 and at Windhoek, Oberholzer promised to marry her. She further alleges that the undertaking to marry her was again repeated during 2016 at Henties Bay and they orally agreed to marry each other on 09 June 2017.

[16] Loots furthermore pleaded that during January 2017 and at Henties Bay, Oberholzer breached the oral agreement by breaking off the engagement, leaving their common home and by moving in with another woman one Marina van Wyk. As a consequence of the alleged breach Loots claimed an amount of N$ 50 000. Oberholzer in his plea to Loots' counterclaim admits that he was involved in a romantic relationship with Loots but denies that he ever promised to marry her or that he was ever engaged to her.

[17] I find it appropriate to mention some interlocutory procedures that occurred in this matter. I indicated that on 10 November 2017 Oberholzer commenced proceedings by issuing summons out of this Court. On 12 January 2018 Loots filed her notice to defend the action. The matter was, after notice to defend was entered on 16 January 2018, docket allocated to me for me to case manage it. I case managed the matter and sometime during the process of case management, to be precise on 17 April 2018 I referred the matter to Court connected mediation. The mediation was scheduled to take place over two sessions and the last session was scheduled to take place on 24 July 2018.

[18] The defendants did not attend the second mediation session scheduled for 24 July 2018 and they also did not file reports or any application to condone their failure to attend the second mediation session. I, after the defendant failed to attend the second mediation session, amongst other orders ordered the defendants to file their pleas by 17 August 2018 and I postponed the matter to 16 October 2018. Shortly after I ordered the defendants to file their pleas, the legal practitioner for the defendant withdrew as legal practitioners for the defendants. When the matter came up for a pre-trial conference on 16 October 2018 the defendants had still not filed their plea or filed their explanation for the failure to attend the second mediation session, nor were they in attendance at Court. I consequently in terms of Rule 53(1) struck the defendants defence and postponed the matter to 4 December 2018 for Oberholzer to bring an application for default judgment in terms of rule 15.

[19] On 6 November 2018 Oberholzer filed his application for default judgment. On 4 December 2018 I found that the application for default judgment did not comply with rule 15(2) & (3) I accordingly postponed the matter to 5 February 2019 to allow Oberholzer an opportunity to comply with rule 15(2) & (3). The hearing for the application for default judgment did not proceed on 05 February 2019 because on 4 February 2019 the defendants filed a status report in which they, amongst other matters reported that Jan Olivier & Co. Legal Practitioners of Walvis Bay received instructions on 30 January 2019 to act on their behalf in this matter; that their erstwhile attorney incorrectly indicated Neves Legal Practitioners as their new legal practitioners in the notice of withdrawal; and that they intend to bring an application for the rescission of the order of 16 October 2018 and condonation for non-compliance with the case plan order.

[20] The defendants accordingly, on 21 February 2019, launched their application to rescind the Order of 16 October 2018, in terms of which they also sought leave to defend the action and condonation for the late filing of their plea. The rescission application was opposed by Oberholzer. In terms of a joint status report filed on 2 April 2019, Oberholzer withdrew his opposition to the rescission application and I subsequently condoned the defendants' non-compliance with the court order of 24 July 2018 and granted the defendants leave to defend the action.

The issues

[21] From the pleadings the issues that I am required to resolve crystalized into the following questions:

(a) Is it possible in terms of our law to conclude an informal trust agreement of the characteristics as alleged by Oberholzer?

(b) If the answer is in the affirmative did Oberholzer prove the existence of an agreement between him and Loots to form the informal trust? And

(c) If the answer is further in the affirmative, what were the terms and conditions of the informal agreement?

(d) Is a claim for damages for breach of promise to marry still available in our law?

[22] In determining the issues that I am required to determine I find it appropriate to commence with the evidence that was presented at the hearing of this matter.

The evidence

[23] Oberholzer in the attempt to prove his claim testified in support of his own claim and *subpoenaed* six witnesses namely, Jan Hendrik Hofmeyer van Blerk, Magda du Preez, Fransina Gamibes, Liesel Gaeses, Desire Muller, Simon Seister and a certain S Tjiweza to testify in support of his claim. Loots testified in support of her defence and *subpoenaed* three witnesses, namely Winnie Nembungu, Shean Swanepoel, and Tshinana Tshiqwetha, to testify in support of her defence.

Evidence on behalf of the plaintiff
Magda du Preez's testimony

[24] The first witness who was called to testify on behalf of Oberholzer was Ms Magda Du Preez. Ms du Preez introduced herself as an estate agent who owns an estate agent's company, Du Preez Properties, at the coast, and more in particular at Henties Bay. She testified in that:-

(a) she was approached by both Oberholzer and Loots at her business premises in order to assist them in purchasing a business in Henties Bay;

(b) Oberholzer and Loots decided to purchase the Erf 172, Henties Bay and Myl 50 CC after they visited the premises and met with de Jager, the owner;

(c) when she asked who was going to sign as purchaser, Oberholzer stated that the property must be registered into the name of Loots. In this regard, she testified as follows:

> 'I asked them who will be the purchaser in this matter.
> Yes? --- Mr Oberholzer said to me that they are not married and I must put the property into the name of Ms Loots. I see. --- I explained to them that it is better to put it in both their names and Mr Oberholzer instructed me to put it onto, into the name of Ms Loots and I prepared the documents accordingly.'

(d) she saw a receipt for the deposit paid into the trust account of Malherbe Associates, and the receipt was made out to Brak-Wasser Engineering.

During cross-examination she confirmed that she cannot say whose funds were used to pay the deposit.

Sarel Oberholzer's testimony

[25] The second witness to testify for the plaintiff was Oberholzer himself. His testimony can be summarised as follows: He testified that:-

(a) he was previously married to Valmarie, in community of property, which marital relationship was terminated by a decree of divorce issued by the High Court of Namibia on the 19th of September 2011;

(b) in terms of the divorce order he was ordered to, in respect of the minor children born of the marriage between Oberholzer and Valmarie to pay:

(i) maintenance in the amount of N$2 000 per month per child,

(ii) government school fees,

(ii) day care fees in respect of a minor child who needed day care, and

(iv) all medical, dental, pharmaceutical, hospital and ophthalmological expenses;

(c) subsequent to his divorce and since 2013 Loots and him became involved in a romantic relationship and pursuant to same resided together as husband and wife, despite the fact that they never lawfully married each other;

(d) during the subsistence of the romantic relationship between him and Loots he made various purchases of immovable properties from monies derived from his business;

(e) that during the period that he was involved in the romantic relationship with Loots he laboured under a *bona fide* but apparently erroneously belief that due to his marriage in community of property to his previous wife, Valmarie, she may still be able to claim half of all his assets on the basis that they were previously so married;

(f) on the strength of the misconception he concluded an oral agreement with Loots in terms whereof they agreed to establish an informal trust which could be utilized for purposes of him acquiring assets/properties, immovable or movable, from time to time but in respect of which Loots will act as nominee/trustee/agent for and on behalf of him; (he then testified to the alleged terms of the oral agreement, I quoted them earlier in the background part of this judgement[1]);

(g) on a question from his counsel whether something happened which fortified his

[1] See para [12(b)] of this Judgement.

misconception, he testified that in 2016 he received a letter from his previous wife. He testified that he had an erf in Henties Bay which he purchased cash, and she wanted to confiscate it. The testimony went as follows:

'COURT: When did you buy this erf in Henties Bay? --- I think it was in 2013/2015 around there My Lord.

MR STRYDOM: What did you do when this happened? --- My Lord I immediately put it on the market and sold it My Lord to get the money.'

(h) on the strength of the oral agreement to create an informal trust he, on or about the 1st of June 2016, purchased and paid for an immovable property namely Erf 172 Henties Bay (Extension No 1) as well as 100% membership in and to Myl 50 CC;

(i) in order to give effect to the informal trust agreement Loots concluded two purchase agreements as an undisclosed nominee for and on behalf of him with one Jacobus de Jager;

(j) pursuant to the informal agreements both Erf 172 as well as the members' interest in and to Myl 50 CC were registered into Loots' name;

(k) during January 2017 the romantic relationship between Loots and him was terminated. On the strength of such termination and breakdown in their relationship he demanded from the Loots the re-transfer of both Erf 172 and the members' interest in and to Myl 50 CC into his name;

(l) notwithstanding such demand Loots failed or refused or neglected to re-transfer the ownership in and to Erf 172, Henties Bay (Extension No 1) and the members' interest in and to Myl 50 CC to him; and

(m) that he has since also become aware of various discrepancies and other irregularities with reference to the way in which Loots has handled both his and Brak-Wasser Engineering CC's finances. To that end he discovered that Loots has misappropriated monies belonging to both him and Brak-Wasser Engineering CC for

her personal benefit; and

(n) further investigations revealed that monies to the tune of N$1 504 000 were either stolen or misappropriated by Loots from his other business account held in the name of Brak-Wasser Engineering CC; and

(o) further amounts of N$1 050 000 and N$1 431 486-06 from the same account are also unaccounted for; and

(p) with reference to Loots' counterclaim he denies that she is entitled to any compensation so claimed in her particulars of claim.

[26] The testimony by van Blerk and the other witnesses (Fransina Gamibes, Liesel Gaeses, Simon Seister and Tjiweza) on behalf of Oberholzer was so poor, vacillating or of so romancing a character and failed to deal with the *essentiale* of Oberholzer's claim that I reject it and I need not repeat or summarise it here.

Evidence on behalf of the defendant
Anna-Maria Loots' testimony

[27] Ms Loots was the first to testify in support of the defendants' defence. Her testimony can be summarized as follows: She testified that:-
(a) she and Oberholzer became involved in a romantic relationship during the year 2010. He was unemployed at the time and although separated from his wife was not yet divorced. She was employed at A Wutow Trading in Windhoek, financially independent with medical aid and a pension fund;

(b) Oberholzer then moved in with her and during the year 2011 he got a contract at Otjihase Mine outside Windhoek, during that same year he started Brak-Wasser Engineering CC and took up employment with Weatherly Mining Namibia at the Otjihase Mine. They then moved to the mine since the mine insisted that he resides at the mine. Oberholzer requested her help and involvement in the affairs of Brak-Wasser

Engineering CC and it became so demanding that she had to start working half days at A. Wutow Trading in order to attend to what was required by him of her;

(c) at Oberholzer's insistence she later resigned and started to help him full time. She handled the administrative part, pay-roll and payments and did all negotiations with the Mine with him on behalf of Brak-Wasser Engineering CC. The accounting work was done by an external accountant, a certain Mrs. Soekie Bestebreurtje of M J Accounting Services;

(d) Oberholzer's formal order of divorce was granted on 19 September 2011 and on 25 September 2011, they became engaged. They announced the engagement on the occasion of the birthday party of a female friend, at her residence at the Otjihase Mine;

(e) during 2014 an opportunity materialized to do subcontract work for a South-African company, called Rula who obtained a contract with Nampower for the construction of a coal conveyor and ash plant;

(f) by virtue of Oberholzer's employment with Weatherly Mining Namibia he was prevented from becoming personally involved with the contract. Oberholzer then said to her that she can have the subcontract for herself and that she could run the subcontract through Brak-Wasser Engineering CC for her own profit. Brak-Wasser Engineering CC then entered into this subcontract with Rula;

(g) she and Oberholzer giving effect to their agreement, opened a second bank account for Brak-Wasser Engineering CC specifically for purposes of the subcontract which in essence was her bank account (referred to as "the Nampower account");

(h) she managed the sub-contract with her own personnel whom she specifically appointed for the contract (although in the name of Brak-Wasser Engineering CC) and Oberholzer was not involved with the contract. She was very grateful for the opportunity and out of gratitude at the conclusion of the contract gave Oberholzer N$100,000 at the time;

(i) the Rula subcontract concluded in 2014 and Oberholzer's employment with Weatherly Mining Namibia and the contract between Brak-Wasser Engineering CC and Weatherly Mining Namibia CC came to an end at the end of October 2015. They then moved to Henties Bay and during 2016 they agreed to get married on 09 June 2017 (That is on Loots' birthday). They stayed in Loots' house which she later sold and then moved into a house that they bought together, as co-owners, namely erf 245, corner of Atlantic Street and Kreef Street, Henties Bay;

(j) it was mostly the profits from the Rula subcontract that placed her in the position where she was able to buy as she did the business premises at Erf 172, Henties Bay and Myl 50 CC, in 2016, which Oberholzer now claims from her, alleging an oral trust agreement in terms whereof it was merely registered in her name but is actually hers;

(k) there was never any agreement to the extent alleged by Oberholzer and although he did contribute to the purchase price he never had any interest in the purchase or business and unlike her in any event had no experience owning a business of this nature;

(l) the costs to acquire the erf 172 and Myl 50 CC were as follows:-

(i)	Myl 50 CC	N$ 1 500 000;
(ii)	Erf 172, Henties Bay (Extension No 1)	N$ 1 000 000; and
(iii)	Legal and Transfer Costs approximately	N$ 53 000
Total Cost approximately		**N$ 2 553 000;**

she paid a deposit of N$500 000, this deposit and the transfer costs came from her personal savings. At least N$1 500 000 came out of her Nampower account and the rest which was not more than N$500 000 was donated by Oberholzer to her and came from his Brak-Wasser account.

Tshinana Tshiqwetha's testimony

[28] *Tshiqwetha* testified that he is a qualified boilermaker and a resident of, Khomasdal, Windhoek. His nickname is Madala. He further more testified that at one stage he worked for Oberholzer at Brak-Wasser Engineering CC at the Otjihase Mine, but left due to disagreements with him. He continued his testimony that during 2014 Loots called him and told him about the Nampower project which they had in terms of a contract with Rula Bulk Material Handling (Pty) Ltd for work at the Van Eck Power Station in Windhoek. He furthermore testified that Loots told him that she had problems with her existing supervisor at the time, a certain Tommy, and asked him whether he would be willing to be the supervisor on the project. He agreed and she then appointed him as the supervisor.

[29] Tshiqwetha furthermore testified that the testimony by Van Blerk that he was the supervisor employed by Brak-Wasser on the Rula Nampower project is not correct because van Blerk worked for Rula Bulk Material Handling (Pty) Ltd. He continued and testified that he did his work under the authority of Ms. Loots, not Mr. van Blerk or Mr. Oberholzer. He testified that he did not deal with Oberholzer much, but Oberholzer made it clear that Ms. Loots was in control of the project and not him. He did refer to the project as the Loots' project. He further testified that although the subcontract was signed under the name of Brak-Wasser Ms Loots was the sub-contractors of Rula Bulk Material Handling (Pty) Ltd and supplied the labour and technical expertise. He said he was the one who had to interpret the technical drawings and execute the work with the workforce which he supervised, which were all employed by Brak-Wasser Engineering CC.

[30] The testimony by Winnie Nembungu, and Shean Swanepoel on behalf of Loots was more about their perception as to who the owner of Myl 50 CC was and does in my view not carry any probative value and I therefore disregard it.

[31] It is against the backdrop of the evidence that I have summarised in the preceding paragraphs that I proceed to consider the issue that I have identified as needing resolution in this matter.

Discussion and findings

[32] I preface this part, in which I discuss the evidence led at the trial, some of the relevant legal principles, the application of those legal principles to the facts of this case and my findings, with the following statement: In this matter the parties led evidence for a period spanning 3 weeks on various matters incidental to the subject matter of the dispute and submitted into evidence volumes of documents such as bank account statements in respect of various bank accounts of the parties, which in my view was, for the most part, contemporaneous evidence and did not assist much in determining the real issue in dispute – which was whether there existed an oral agreement between the parties which created the informal trust on the terms and conditions, as alleged by the plaintiff. Lord Macmillan[2] in 1933 already stated:

> 'If I were to select the rule which in my estimation above all others should govern the presentation of an argument in Court, it is this – always keep steadily in mind that what the judge is seeking is material for the judgment or opinion which all through the case he knows he will inevitably have to frame and deliver at the end. He is not interested in the advocate's pyrotechnic displays: he is searching all the time for the determining facts and the principles of law which he will ultimately embody in his decision.'

[33] I now return to the discussion of this matter. In this matter the evidence demonstrates that the two versions of the protagonists are mutually destructive. The approach then is set out in *National Employers' General Insurance Co Ltd v Jagers*[3] as follows:

> '(The plaintiff) can only succeed if he satisfies the Court on a preponderance of

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2 "*Some Observations on the Art of Advocacy:"* An Address delivered by the Right Hon. Lord Macmillan, President of the Birmingham Law Students' Society, at the Annual Dinner of the Society on 1st December, 1933 reproduced in his book Law and Other Things, Lord Macmillan, Cambridge, at p 200;

3 *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440E – G: Also see Harold Schmidt t/a Prestige Home Innovations v Heita 2006 (2) NR 555 (HC) at 556-8.

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.'

[34] In the matter of *Motor Vehicle Accidents Fund v Lukatezi Kulubone*[4] Mtambanengwe, JA outlined the approach he adopts in determining which of two conflicting versions to believe as the approach advocated by Mr. Justice MacKenna[5] when he said:

"I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help. This is how I go about the business of finding facts. *I start from the undisputed facts which both sides accept. I add to them such other facts as seem very likely to be true, as for example, those recorded in contemporary documents or spoken to by independent witnesses like the policeman giving evidence in a running down case about the marks on the road. I judge a witness to be unreliable, if his evidence is, in any serious respect, inconsistent with those*

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[4] *Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone* Case No SA 13/2008 (unreported) at 16 - 17 para 24). 2

[5] Mtambanengwe JA says (at para 51) in a paper read at the University College, Dublin on 21 February 1973 and printed in the Irish Jurist Vol IX new series P.1) which was concurred with in its entirely by Lord Devlin at 63 in his Book entitled "The Judge" 1979.

undisputed or indisputable facts, or of course if he contradicts himself on important points. I rely as little as possible on such deceptive matters as his demeanour. When I have done my best to separate the truth from the false by these more or less objective tests I say which story seems to me the more probable, the plaintiff's or the defendant's.' (Italicised and underlined for emphasis)

[35] With the above introductory remarks I now proceed to consider the issues that I am required to consider.

Is it possible in terms of our law to conclude an informal trust agreement of the characteristics as alleged by Oberholzer?

[36] The question whether it is possible to conclude an informal trust agreement with respect to immovable property or interest in immovable property arose because of the provisions of the Formalities in respect of Contracts of Sale of Land Act, 1969[6]. Section 1 of that Act reads as follows:

'1 (1) No contract of sale of land or any interest in land (other than a lease, mynpacht or mining claim or stand) shall be of any force or effect if concluded after the commencement of this Act unless it is reduced to writing and signed by the parties thereto or by their agents acting on their written authority.

(2) The provisions of subsection (1) relating to signature by the agent of a party acting on the written authority of the party, shall not derogate from the provisions of any law relating to the making of a contract in writing by a person professing to act as agent or trustee for a company not yet formed, incorporated or registered.'

[37] Some of the earlier cases in which the question of whether it is possible to establish an informal trust arose are, *Strydom en 'n Ander v De Lange en 'n Ander*[7]*, Lucas' Trustee v Ismail and Amod*[8] and the case of *Adam v Jhavary and Another*[9]. In

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6 Formalities in respect of Contracts of Sale of Land Act, 1969 (Act No. 71 of 1969). Section 1(

7 *Strydom en 'n Ander v De Lange en 'n Ander* 1970 (2) SA 6 (T).

8 *Lucas' Trustee v Ismail and Amod*[?] 1905 TS 239.

9 *Adam v Jhavary and Another* 1926 AD 147.

the case of *Adam v Jhavary* the situation there was that, by oral agreement a father transferred property to his two sons in trust, subject to re-transfer to him on fulfilment of the trust. The Court held that the father, on fulfilment of the trust, had a cause of action for re-transfer of the property to him. The Court, said:

'… in the case of *Estate Kemp v McDonald's Trustee* (1915 AD 491) it was pointed out that, though the English law of trusts forms no part of our jurisprudence, yet the term "trustee" is freely employed in our practice, as denoting "a person entrusted (as owner or otherwise) with the control of property with which he is bound to deal for the benefit of another." And that other may be the owner himself, as well as any third party. As was said by the CHIEF JUSTICE in that case:

> "The trustees to whom the estate is directly bequeathed are vested with the legal ownership in the assets. But it is clear that the testator never intended that they should have any beneficial interest".'

In the present case the trust is not set forth in any written document, but is a purely verbal one. For that reason it may be difficult of proof, but if it can be proved there is no reason in law why it should not be enforced.'

[38] There is thus authority in our law that a trust may be formed by way of oral agreement. I turn now to the question whether the alleged oral agreement between Loots and Oberholzer for the former to acquire immovable property as trustee for and on behalf of Oberholzer (if proven) in the present case is hit by s 1 (1) of Formalities in respect of Contracts of Sale of Land Act, 1969.

[39] This question came up for decision in the Appellate Division in the matter of *Dadabhay v Dadabhay and Another*[10]. After a survey of authorities on the subject Holmes AJA who delivered the judgement on behalf of the Court said:

'To sum up, in the present matter, on the case pleaded in the appellant's particulars of claim, there was an oral agreement that the respondent would buy an erf from the Board; that he would do so as "nominee" (which, as I have said, may well have been intended to mean

[10] *Dadabhay v Dadabhay and Another* 1981 (3) SA 1039 (AD);

"trustee") for the appellant; that there is no mention of monetary consideration for this service; and that, when called upon, he would sign all documents necessary to enable the erf to be registered in her name. Having regard to the authorities cited above, in my view the oral agreement is not hit by s 1 (1) of Act 68 of 1957; it is not a contract of sale or a cession in the nature of a sale.'

[40] In the matter of In *Hadebe v Hadebe*[11] Gildenhuys J said:

'The legal relationship between the plaintiff and the first defendant which emanated from the facts set out above, is that of an informal trust where under the first defendant (as "nominee", which could also mean trustee) would hold the property for the plaintiff.'

[41] In view of the authorities that I have referred to I answer the question whether '*it is possible in terms of our law to conclude an informal trust agreement of the characteristics as alleged by Oberholzer'* in the affirmative and find that a verbal informal trust in terms whereof one party act as nominal owner on behalf of the beneficial owner, in respect of immovable property, is recognised in terms of our law, and it would be possible for the parties to conclude an informal trust agreement to that effect. The follow up question is then, whether Oberholzer proved the existence of an agreement between him and Loots to form the informal trust in terms of which Loots would acquire immovable property on his behalf as the beneficial owner.

Did Oberholzer prove the existence of an agreement between him and Loots to form the informal trust?

[42] I start off by considering the issue of evidentiary burden and ancillary matters. The incidence of the *onus* tells us who must satisfy the Court. With regards to the incidence of the burden of proof, the following can be said. It is a well-established

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[11] *Hadebe v Hadebe and another* [2000] 3 All SA 518 (LCC) at para 17.

principle of our law that 'he who alleges must prove'. This approach was stated in *Pillay v Krishna*[12]. The first rule is that the person who claims something from another has to satisfy the court that he is entitled to it. Secondly, where the person against whom the claim is made is not content, but sets up a special defence, then he is regarded *quoad* that defence, as being the claimant: for his defence to be upheld he must satisfy the court that he is entitled to succeed on it.

[43] The first two rules have been read to mean that the plaintiff must first prove his declaration 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. Therefor a mere denial of facts which is absolute does not place burden of proof on he who denies but rather on the one who alleges. Davis AJA further pointed out that 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.[13]

[44] It is another well-established principle of our law that the incidence of the burden of proof is a matter of substantive law. In this instance the principle applies that he who relies on a contract must prove its existence and its terms.[14] It is for the above reasons that Oberholzer bears the *onus* to convince this Court on a balance of probabilities that the he and Loots concluded an informal agreement and also to prove the terms of the alleged oral agreement.

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[12] *Pillay v Krishna* 1946 AD 946 at 951 -2;

[13] *Pillay*, *ibid*, at 953;

[14] *Trethewey and Another v Government of the Republic of Namibia (unreported)* Case No: SA 13/2006 (Delivered on 29 November 2016). Also see Hoffmann & Zeffertt, *The South African Law of Evidence,* 4th ed, at 509.

[45] I indicated earlier in this judgment that Oberholzer testified that he laboured under the mistaken belief that due to his marriage in community of property to his previous wife, (Valmarie), she may still be able to claim half of all his assets on the basis that they were previously married in community of property. He further testified that the mistaken belief was fortified during the year 2016 after he received a letter from his previous wife, in terms of which she wanted to confiscate an immovable property he owned in Henties Bay.

[46] In cross examination he was asked as to what he and Loots agreed upon when he allegedly received the letter from his previous wife, Valmarie. His answer was as follows:

'… when I receive the letter from my ex-wife, so My Lord what we agreed was that My Lord that I will pay or I will purchase the properties and then she will then keep it on her name My Lord. Just to keep it away from my ex-wife.

So the agreement is that you agreed you will buy the properties in her name, you registered it in Ms Maria Loots name just to keep them away from your wife, your ex-wife and those properties will remain your property? --- So confirmed My Lord.
So is it correct that the real reason was that you feared that your wife could [claim] for maintenance of the children, that that is your problem? --- My Lord I was under the impression that I do not have the backgrounds of a lawyer...

Ja, yes? --- My Lord I was under the impression that she could confiscate the erf or the property and use the money My Lord when she need it for the children.

The way I understand it Sir is, if it was not for this letter that you received then you would not have entered into this informal trust agreement with the 1st Defendant, is it not so? --- That is correct My Lord.'

[47] The undisputed facts which both Oberholzer and Loots accept are that they had a romantic relationship and that during that relationship they shared most of their

income and they supported each other, they even got engaged to get married to each other. They both also accept that Oberholzer was previously married to Valmarie and that by Order of Court that union was dissolved and in terms of the settlement agreement which was made an Order of Court the joint estate between Oberholzer and Valmarie was equally divided between the two of them.

[48] What can furthermore not be disputed from the testimony (of both Oberholzer and Loots) is that the parties inter-changeably used their different bank accounts to pay for each other's expenses and business expenses. It appears from the evidence that there was no specific arrangement at the time with regards to loans or repayment, but that the understanding between the parties was (albeit tacit or implied) that their respective estates were dealt with as if it is a joint estate. This is indicative of the parties' mind-set at the time of the alleged informal trust agreement. A clear example is the fact that during December 2015 or January 2016 Oberholzer and Loots jointly purchased an immovable property; being Erf 245 Henties Bay (Extension No. 1) which was registered in both their names.

[49] Oberholzer testified that sometime during the year 2016 he received a letter from his former wife's legal practitioners in which letter he says his former wife was threatening to confiscate an immovable property he owned in Henties Bay. That letter was tendered into evidence and it reads as follows: (I quote verbatim)

'Good day,

I am not satisfied with the content of this letter.

Mr Oberholzer is currently living at Henties Bay and is mostly fishing and entertaining family and friends to the cost of our children.

I am aware that he has an empty plot at Henties Bay and also many vehicles. If he does not have current business, why can't the vehicles and/or plot be sold and the money be kept in trust for the children.

He also participates in Vasbyt 4x4 competitions with are very costly, but there is money for these expenses but not for the children.

I am certain that in some way Mr. Oberholzer or the court could come up with a solution soon.

Many thanks.'

[50] What became clear during cross-examination is that the above quoted letter was sent in response to a letter written by Oberholzer's legal practitioners to Valmarie's legal practitioners. It is also quite apparent from the letter that Valmarie in no way laid claim to half of Oberholzer's estate but was simply complaining about the fact Oberholzer was not honouring his obligation to pay maintenance in respect of his children from the marriage with Valmarie. In cross-examination Oberholzer further testified that after he received that letter he decided to sell his "empty plot" in Henties Bay and the proceeds of the sale were paid into Loots' account so as to hide the 'money' from Valmarie.

[51] In my view Oberholzer's evidence was vague and inconsistent when one looks at that evidence with respect to the undisputed or indisputable facts that I have narrated above. I therefore find his evidence unreliable and untruthful. He in addition contradicted himself on the pleaded case (the pleaded case was that the alleged oral agreement was based on the mistaken belief that his former wife will lay claim to half of his estate because of his marriage in community of property to her) and the evidence in cross-examination (in cross-examination he admitted that the reason for selling his immovable property and putting the money into Loots' account was to hide the money from his former wife as she was demanding money for the maintenance of their children).

[52] In cross examination it became clear that Oberholzer was motivated by the desire to hide his assets from his previous wife than by than alleged erroneous belief that his former wife may lay claim to half of is estate. This clearly evident from his reply to a question in cross examination namely that: '*… if it was not for this letter* [that is the letter from Valmarie's legal practitioners] *that you received then you would not have entered into this informal trust agreement with the first defendant, is it not so*?' where he

confirmed that was correct. I therefore reject Oberholzer's evidence that he and Loots entered into an oral agreement to establish an informal trust for his benefit. Oberholzer has therefore failed to discharge the *onus* resting on him and his claim therefore fails.

Claim in Reconvention

[53] I indicated earlier in this judgment that in addition to defending Oberholzer's claim Loots filed a counterclaim. In her particulars of claim as plaintiff in reconvention Loots alleges that on 25 September 2011 and at Windhoek, Oberholzer promised to marry her. She further alleges that the undertaking to marry her was again repeated during 2016 at Henties Bay and they orally agreed to marry each other on 09 June 2017.

[54] I also indicated that Loots furthermore pleaded that during January 2017 and at Henties Bay, Oberholzer breached the oral agreement by breaking off the engagement by leaving their common home and moving in with another woman one Marina van Wyk whom he later married. Loots pleaded that the repudiation was wrongful and that Oberholzer acted *animo iniuriandi* by leaving her and marrying Marina van Wyk.

[55] In his plea as defendant in reconvention Oberholzer simply denied that he agreed to marry Loots or that he was engaged to her. He also simply denied that he moved out of the common home with Loots and went to live with Marina Van Wyk.

[56] During the trial Loots testified about the engagement and also tendered into evidence photos of the occasion of the alleged engagement. The photos depicted Oberholzer sitting on his knees and putting a ring on to the left hand of Loots. In her evidence Loots testified as follows:

'On 25 September 2011 and at Windhoek plaintiff and I orally agreed to marry each other and during 2016 and at Henties Bay we orally agreed for such marriage to take place on 09 June 2017. My birthday is on 09 June and his is on 10 June and the date was specifically decided on because both our birthdays would fall on a weekend. Mine on the Friday and his on

the Saturday.

After going away for work (according to him) in January 2017 he never returned home and then turned out to have left me for another woman, Marina van Wyk, in Okahandja, to whom he became married since.

During February 2017 he called me and asked whether I can give him N$2,500.00 which I refused. I was shocked and humiliated by the fact that he had a relationship behind my back and that he broke our engagement. In response he angrily said that I would see what he will do to me.'

[57] Oberholzer did not dispute nor contradict the above evidence by Loots. I therefore accept that Oberholzer and Loots orally agreed to marry each other and that Oberholzer breached the agreement when he moved in with Marina van Wyk, in Okahandja.

[58] A breach of promise may give rise to two distinct causes of action[15]. The one is the *actio iniuriarum* and the second cause of action is for breach of contract. In this matter Loots grounds her claim on *actio iniuriarum.*

[59] Where the claim is delictual the 'innocent' party is entitled to sentimental damages if the repudiation was contumelious. This requires that the 'guilty' party, in putting an end to the engagement, acted wrongfully in the delictual sense and *animo iniuriandi.* It does not matter in this regard whether or not the repudiation was justified[16]. What does matter is the manner in which the engagement was brought to an end. The fact that the feelings of the 'innocent' party were hurt or that she or he felt slighted or jilted is not enough.

[60] A breach of promise can only lead to sentimental damages if the breach was wrongful in the delictual sense. This means that the fact that the breach of contract itself was wrongful and without just cause does not mean that it was wrongful in the delictual

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[15] *Guggenheim v Rosenbaum* (2) 1961 (4) SA 21 (W) at 36.

[16] *Van Jaarsveld v Bridges*, 2010(4) SA 558 (SCA).

sense, i.e. that it was injurious[17]. Smalberger JA[18] explained that what this means is that one must commence by enquiring whether there has been a wrongful overt act. A wrongful act, in relation to conduct or a verbal or written communication, would be one of an offensive or insulting nature. In determining whether or not the act complained of is wrongful the court applies the criterion of reasonableness[19]. This is an objective test. It requires the conduct complained of to be tested against the prevailing norms of society.

[61] Loots, in respect of this claim, is required to allege and prove that the Oberholzer, being the so-called 'guilty party', in putting an end to the engagement, acted wrongfully in the delictual sense and *animo iniuriandi.* In that regard, Loots complies with the requirement by alleging that Oberholzer acted *animo iniuriandi* in that he, before calling off the engagement and whilst they were still living together, started a romantic relationship with another woman (Ms Van Wyk), thus intending to injure and hurt her feelings, which he in fact then did. Loots also gave evidence in support of this allegation to the effect that Oberholzer, after starting an affair with another woman, under false pretences of work, left the common home of the parties and started living with another woman, which was hurtful for her. As I indicated earlier her evidence was uncontested and un-contradicted, and I am satisfied that Loots had succeeded in proving that Oberholzer acted wrongfully in the delictual sense. The repudiation was clearly contumelious.

[62] As regards the amount of the delictual damages to be awarded in favour of the plaintiff, there are no hard and fast rules. As with claims for *iniuria* and defamation, the amounts awarded generally are, at best, modest. I am therefore of the view that an award for damages for breach of promise to marry must be made in favour of Ms Loots in the amount of N$ 5 000.

Order

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[17] *Ndamase v University College of Fort Hare and Another* 1966 (4) SA 137 (E) at 139G - 140C.

[18] In *Delange v Costa* 1989 (2) SA 857 (A) at 861 - 862

[19] *Van Jaarsveld v Bridges*, *(supra*).

[63] In the circumstances I make the following order:

1. The plaintiff’s claim is dismissed.

2. In respect of the first defendant's counterclaim the plaintiff must pay to the first defendant the amount of N$ 5 000 plus interest at the rate of N$ 20% per annum reckoned from the 01st of April 2021 to the date of payment both days included.

3. The plaintiff must pay the first defendant’s costs of suit.

4. The matter is regarded as finalised and removed from the roll.

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UEITELE S F I

Judge

APPEARANCES:

PLAINTIFF: ALBERT STRYDOM

Instructed by Fischer, Quarmby & Pfeifer

FIRST & SECOND DEFENDANTS: JAN OLIVIER

Of Olivier Legal Practitioners