



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2017-02989

In the matter between

ALFRED ANGULA

PLAINTIFF

AND

NAMIBIA FARM WORKERS UNION (NAFWU)

1ST DEFENDANT

ROCCO NGUVUAVA

2ND DEFENDANT

ASSER HENDRICKS

3RD DEFENDANT

Neutral citation: *Angula v Namibia Farm Workers Union* (HC-MD-CIV-ACT-CON-2017/02989) [2021] NAHCMD 295 (15 June 2021)

Coram: CLAASEN, J

Heard: 18-22 March 2019, 11-14 June 2019, 9, 12 and 24 June 2019, 25-16 September 2019, 24 January 2020, 23 April 2020, 18 May 2020, 21-25 September 2020, 20 November 2020, 19 January 2021, 5 March 2021 and 11 March 2021.

Delivered: 15 June 2021

Flynote: Capacity to enter into agreement on behalf of trade union NAFWU – Existing leadership positions were suspended at time – NAFWU functioned under regime stipulated in court order dated 4 February 2015 which curtailed the authority of the interim leadership – Court order circumscribed the type of expenditure that could be paid and the procedures for approval of payments – Interim President had no authority to conclude the settlement agreement with plaintiff at the time .

Summary: The plaintiff instituted action on the basis of a settlement agreement concluded on 14 June 2015 between himself and the third defendant, who concluded the said agreement on behalf of NAFWU. The four claims by plaintiff were payment of N\$ 20 000 for inconvenience caused by the unjustified deprivation of a Kia motor vehicle, payment of N\$ 772 050 from the first and second defendant, jointly and severally for compensation in respect of the mileage driven on the KIA motor vehicle, transfer of 50% of first defendant's investment shares in NAM-MIC Property to the plaintiff as damages for defamation, as well as payment of N\$ 681 221.70 outstanding salaries and an exit package. Plaintiff' asserted that the third defendant had authority which was conferred upon him during a Congress held at Aussenkerh in 2012.

First and second defendant denied claims and averred that the third defendant, who signed the settlement agreement on behalf of NAFWU did not have authority and concluded the agreement of his own volition. That was because NAFWU, at the time, was bound by parameters as demarcated in a court order dated 04 February 2014, that curtailed the powers of the interim leadership, the type of expenditure that could be paid and the procedures for that.

In a counterclaim first defendant claimed the return of a KIA motor vehicle.

Held – Onus was on the plaintiff to prove that the third defendant had authority to conclude the settlement agreement on behalf of NAFWU.

Held – Though plaintiff throughout used the word resolution in respect of the Aussenkehr Congress of 2012, no such resolution was tendered into evidence.

Held – When settlement agreement was concluded NAFWU operated with interim leadership and circumscribed authority as per court order dated 04 February 2015. In particular, it prescribed the type of expenditure that could be paid, the procedure for approval of such expenditure and the course of action for expenses not expressly listed in the settlement agreement that was made an order of court.

Held – The authority to have concluded the settlement agreement on behalf of the third defendant must have existed at the time of the conclusion of the contract. In view of the interim leadership and restricted authority at the time, as set out in the settlement order that was made an order of court, the third defendant did not have such authority.

Held – As for the counterclaim for the return of the KIA motor vehicle, the onus was on the first defendant to prove its ownership, which it failed to do.

ORDER

1. As respects the claims in convention, the plaintiff's claims are dismissed with costs.
2. As respects the counterclaim, it is dismissed with costs.
3. The matter is considered finalized and is removed from the roll.

JUDGMENT

CLAASEN J

Introduction

[1] In the case before me, the plaintiff claims payment of an exit package, delictual damages for defamation and inconvenience, as well as 50% of NAFWU's investment shares in NAM-MIC under the auspices of a 'settlement agreement' purportedly concluded between the plaintiff, hereafter called Mr Angula and the first defendant, hereafter called NAFWU. In turn, NAFWU slapped Mr Angula with a counterclaim to return a Kia motor vehicle, registration number N 35459, hereafter referred to as the KIA vehicle, ostensibly the property of NAFWU, though it is in the physical possession of Mr Angula.

[2] The plaintiff in this matter is Mr Alfred Angula, a former employee of the first defendant, who resides in Windhoek.

[3] The first defendant in this matter is Namibia Farm Workers Union (NAFWU), a trade union registered in terms of the Laws of Namibia, with its address at erf 8506 Mungunda Street Windhoek. The core objectives of the entity as contained in the 1994 constitution were to mobilize, organize and work towards the improvement of farm workers in the agricultural sector across Namibia.

[4] The second defendant is Mr Rocco Nguvauva, currently employed by the first defendant as its Secretary-General.

[5] The third defendant is Mr Asser Hendricks, who was cited in his former capacity as Interim President of the first defendant. No order is being sought against him. The third defendant also ended up being called by the plaintiff as a witness for the plaintiff.

Summary of pleadings

[6] The plaintiff contends that on 14 June 2015 at Windhoek, Mr Angula and NAFWU, represented by its interim President, herein the third defendant, concluded a settlement agreement. The agreement, admitted and marked as exhibit 'A' originates from decisions made during a National Congress held on 18 August 2012 at Aussenkehr.

[7] In particular, the plaintiff's four claims are set out below:

(a) Payment of compensation in the amount of N\$ 20 000. by the first defendant for inconvenience caused by the unjustified deprivation of the Kia vehicle, plus interest of 20% per annum from 06 August 2015.

(b) Payment of N\$ 772 050. from the first and second defendant, jointly and severally, the one paying and the other to be absolved. This claim is compensation for kilometres driven with the Kia vehicle at a rate of N\$ 6 per kilometre for 145 000 kilometres, which the plaintiff contends was unlawfully driven by the second defendant. The claim includes interest of 20% per annum to be calculated from 06 August 2015.

(c) Transfer of 50% of first defendant's investment shares held with NAM-MIC Property to the plaintiff; alternatively payment of the equivalent monetary value thereof.

(d) Payment in the amount N\$ 681 221.70 from the first defendant for outstanding salaries and exit package plus 20% per annum as from 30 May 2013.

[8] The first and second defendants deny the claims and pleaded that no settlement agreement existed between the parties. In amplification of their plea, they rely on an agreement admitted as exhibit 'J2' that was concluded during February 2015 between the first defendant and its members. This agreement exhibit 'J2' was made an order of court as depicted in exhibit 'J1'. It demarcated the conduct, duties, responsibilities and decisions that could be taken for the interim period by the organization and its members, pending the holding of a National Congress to appoint

permanent leadership positions in the positions of Chairperson, Vice Chairperson, Treasurer, and Secretary General.

[9] The first and second defendants pleaded that the first defendant and its members were bound by the terms of exhibit 'J2', specifically the third defendant who signed the agreement with the plaintiff. As a result, the third defendant did not have authority to enter into the purported agreement, exhibit 'A' with the plaintiff, on 14 June 2015.

[10] The first and second defendants pleaded that the third defendant entered into exhibit 'A' after the fact, out of his own volition and without consultation and proper authority.

[11] Furthermore it was pleaded that the second defendant was not a party to exhibit 'A', therefore no case is made out concerning the second claim sought against the second defendant.

[12] Initially the first defendant filed a conditional counterclaim which it has abandoned. It will not be dealt with.

[13] In respect of the KIA vehicle, the first and second defendants deny that the plaintiff is the lawful owner and contend that the vehicle belongs to the first defendant. As such, the first defendant instituted a counterclaim for the return of the vehicle, which it asserts was purchased during July 2011 by virtue of an instalment sale agreement between the first defendant and Bank Windhoek.

[14] The plaintiff replicated and contended that exhibit 'A' is binding and enforceable. The plaintiff reiterated that when the said document was signed the third defendant was the Interim President of the first defendant and he was authorized by the General Congress to implement its resolutions.

[15] Thus the plaintiff contends that the first and second defendant's averments with regard to exhibit 'J2' are immaterial. This is because that was the outcome of a different dispute among first defendant's employees and or office bearers and/or members who were embroiled in an internal strife.

[16] The plaintiff denies the counterclaim and maintains that the plaintiff is the lawful owner of the KIA vehicle. Plaintiff contends that the plaintiff paid the full purchase price for the KIA vehicle. Furthermore the plaintiff explains that during the year 2013, he was incarcerated on fabricated criminal charges. During that time the first defendant's representatives unlawfully removed the KIA vehicle and changed the ownership documents. Presently, the said vehicle is in the name of the first defendant who refuse to transfer the vehicle into the plaintiff's name.

[17] Initially the plaintiff raised a special plea that there was no document that authorizes the legal practitioners for the first and second defendant to defend the suit. That was resolved as the resolution was annexed to the pleadings.

Issues in pre-trial order

[18] The main issues for determination in respect of the plaintiff's claim revolves around the settlement agreement, and in particular whether it is legally binding and enforceable. The nub of the counterclaim rests on the issue of ownership of the KIA motor vehicle.

Summary of Plaintiff's three Witnesses

Mr Alfred Angula

[19] Mr Angula described himself as a founding member of NAFWU. He testified that during the third National Congress held on 18 August 2012 at Aussenkehr, discussions took place regarding his exit package. A specific committee was

designated to deal with that. He testified that the elected President, Ms Ronel De Jongh and the elected Vice President, Mr Asser Hendricks were assigned to ensure the exit package is paid out accordingly. These deliberations were recorded in the minutes, exhibit 'B1', which was signed by Mr Asser Hendricks on a subsequent Congress on 21 December 2013.

[20] He testified that the first defendant did not pay him accordingly. During 2013 he was arrested on allegations of fraud/theft which charge was instigated by NAFWU. At some stage the case was withdrawn. Then he pursued the outstanding monies through a legal practitioner, who wrote a letter. In reply the President, Ms De Jong confirmed NAFWU's commitment to honour its obligations, in a letter admitted as exhibit 'I'.

[21] On 14 June 2015 he entered into a settlement agreement, exhibit 'A' with NAFWU who was represented by Mr Asser Hendricks. The purpose of exhibit 'A' was to implement a resolution of NAFWU Congress held at Aussenkehr. The figure in respect of outstanding salaries was an amount of N\$ 681 221,790 plus interest at 20% per annum from 20 May 2013. The first payment of N\$ 100 000 was due by 28 June 2015 and the remaining balance will be paid in monthly instalments of N\$ 35 000 as from 06 August 2015.

[22] In addition, Mr Angula testified that it was also agreed at the 2012 Aussenkehr Congress to transfer 50% of NAFWU's shares held in NAM-MIC as settlement of delictual damages for defamatory publications that were made by NAFWU. Alternatively the shares must be sold and the proceeds to be paid to him. In support of this claim he tendered a distressed document, marked exhibit 'C' which purports to be a one paragraph extract of the minutes. It was signed by the President, Treasurer and the Secretary on 18 August 2012, which is the date of the Aussenkehr Congress and refers to the 50% shares to be transferred to Mr Angula.

[23] Exhibit 'A' also included post-employment medical aid coverage of N\$ 6 000. monthly. It was not discussed when such benefit will end.

[24] Mr Angula testified that he purchased the KIA vehicle through NAFWU. In terms of that arrangement he had to pay the deposit of N\$ 37 048, exhibit 'M' which he did. Thereafter his car allowance will be used to pay the monthly instalments of the KIA vehicle. He explained that during his incarceration in 2013, the KIA vehicle was removed from his residence. The ownership documents were changed at NaTIS to reflect NAFWU as the registered owner. It was because of that hardship caused by the actions of Mr Ngauvua, that he claims N\$ 20 000 and N\$ 772 050. The latter claim was instituted against the first and second defendant jointly and severally.

[25] It was also agreed in terms of exhibit 'A' that NAFWU will return the KIA vehicle to him. He further explained that at the Aussenkehr Congress they agreed that NAFWU will pay the outstanding balance of the car also as part of his exit package, exhibit 'D'. He denies that NAFWU is the lawful owner of the KIA vehicle. If that was the case, he argues, the KIA vehicle should have been in the financial statements of NAFWU, exhibit 'K'.

[26] The plaintiff disputes the legitimacy of the exhibit 'B2' which is a second set of minutes of the Aussenkehr Congress, presented by NAFWU. It was Mr Angula's view that exhibit 'B2' is not a true reflection as regards his exit package.

[27] Mr Angula disagrees with the first and second defendant's contention that as a result of the subsequent court order, exhibit 'J1' which comprises of a settlement agreement exhibit 'J2' that Mr Hendriks was not mandated to conclude exhibit 'A' on behalf of NAFWU.

[28] Vigorous cross-examination followed, which I will attempt to summarize according to the material issues.

Salary package in relation to exit package calculations

[29] When questioned about his salary, Mr Angula said before the 2012 Congress at Aussenkehr he received a basic monthly salary of about N\$ 18 500 as well as a car allowance, cell phone allowance and housing allowance. He conceded that he did not pay tax, nor was he able to produce a pay-slip. It was put to him that nobody at the Congress at Aussenkehr knew what his salary was at that stage and he answered that might be true.

Minutes of 2012 Aussenkehr Congress exhibit 'B1' vs exhibit 'B2'

[30] According to Mr Angula the persons who recorded the minutes were Mr Asser Hendricks and Mr Lesley Mosegedi, as the Secretary Rosaline was not in attendance. Afterwards the President and Vice-president compiled the minutes and it is signed by the Chairperson. He indicated that the President provided him with the minutes. When asked when exhibit 'B1' was endorsed, he gave a date of December 2013 at a purported Congress. During further questioning it turns out that he did not attend it, that not all the members agreed to the minutes and thus he cannot conclusively say whether these minutes were confirmed by the subsequent Congress.

[31] He was asked to comment about the first and second defendant's version that it was a certain Ms Gwenith Phillips that took the minutes, of which the content is different and which was admitted as exhibit 'B2'. He denied being aware of exhibit 'B2'. His view was that Ms Phillips deals with administrative issues only and has nothing to do with any structural meetings, nor was she appointed by Congress to record minutes. It was further put to him it is the Secretary's responsibility to safeguard the minutes which he agreed to. He further indicated that he will not dispute it, if the Secretary says that the minutes that he received from Mr Hendriks are not the minutes that were kept at NAWFU's premises.

Proof of payment of Kia motor vehicle

[32] Mr Angula was questioned about proof of payment for the KIA vehicle's instalments. He repeated that his monthly car allowance of about N\$ 3 500. was paid to the Bank. When asked for documentary proof, he said that can be gathered from the amount of salary that was paid in his bank account by NAFWU. He has however not proffered any such document as evidence before court. His explanation was that there was a break-in at the NAFWU Office therefore he will not be able to provide a pay slip.

[33] It was further put to Mr Angula that the financial records, exhibit 'K' do not list the Kia vehicle because he, as the General Secretary, did not provide that information to the Accounting Officer. He disputes that he was the person responsible to give the information to the accounting officer.

Receipt of N\$ 650 000 as partial payment of exit package

[34] The plaintiff explained that he received the N\$ 650 000 during March 2013 as part of his exit package. It was his testimony that NAFWU sold some of its Nam-MIC shares because there was not enough funds to fund his exit package. He was asked how was that figure of N\$ 650 000, arrived at, as it is not in accordance with the formula as depicted in exhibit 'B1' which refers to '2 weeks payment for every year completed or worked'. He referred to exhibit 'D,' which according to him, was calculated on the basis of Congress resolutions. It was put to him that there was no resolution to the effect that he should be paid housing allowance and car allowance and he answered that the minutes indicate that all outstanding debt must be paid. It was put to him that the figures was thumb sucked by someone and he did not agree.

Settlement Agreement and Court Order dated 04 February 2015

[35] Initially Mr Angula denied knowing about or participating in the court proceedings that culminated in the court order, exhibit 'J1' dated 4 February 2015. He

could however not maintain that position once he was confronted with the replying affidavit that he deposed to on behalf of NAFWU at the time.

[36] It was put to the plaintiff that the settlement agreement, exhibit 'A', was signed by Mr Hendricks during June 2015, after the court order, which contains a settlement agreement, exhibit 'J2'. The latter settlement agreement outlines certain running expenses payments which NAFWU was permitted, and it does not include the expenses for an exit package of Mr Angula. Mr Angula was asked whether in those circumstances Mr Hendricks could have concluded a settlement agreement about an exit package on behalf of NAFWU? Mr Angula answered in the affirmative, because Mr Hendricks was the Interim President as per exhibit 'J2' and further because he was tasked at the Aussenkehr Congress in 2012 to attend to the payment and modalities of the exit package.

[37] It was put to him that exhibit 'J1' and exhibit 'J2' suspended everything until a new Constitution is put in place, but Mr Angula disagreed. In re-examination his Counsel again posed the question as to whether exhibits 'J1' and 'J2' meant that Mr Hendricks had no authority to conclude the said settlement agreement and Mr Angula stuck to his position.

Claims in exhibit 'A', not discussed at Aussenkehr Congress

[38] It was advanced that the claims pertaining to inconvenience and kilometres driven on the KIA vehicle, definitely do not originate from the Aussenkehr Congress, as those issues arose after that congress. Mr Angula agreed to that, but nevertheless stated that usage of the KIA vehicle involves NAFWU as the vehicle was used for Union activities. As for the figures in those claims he said that he proposed it and it was accepted by the NAFWU representative, Mr Hendricks. Mr Angula emphasized that part of his exit package, *i.e.* N\$ 650 000. was already paid to him.

Mr Lesley Museghedi

[39] He was the Vice-President of NAFWU and attended the Aussenkehr Congress in 2012. He assisted in chairing the Congress proceedings and was a member of the Committee that deliberated about Mr Angula's exit package. According to him the items to be paid were:

- a) 2 weeks payment for every year completed;
- b) All outstanding leave days, salaries and benefits to be paid in full;
- c) One month notice to be paid;
- d) Token of appreciation of N\$ 250 000;
- e) Medical assistance of N\$ 6 000 from June 2013.

[40] He testified that the exit package was signed off by the newly elected President, Ms De Jong and the Vice-President, Mr Hendriks. He further indicated that the Congress mandated these two office bearers to enter into an agreement with the plaintiff as to how they will pay the exit package. It was also agreed that Mr Angula will continue to work for NAFWU until June 2013. It became apparent during his evidence that the Aussenkehr Congress deliberated about the exit package, without having any idea as to how much it will cost the organization. According to him, he did not see the subsequent settlement agreement that was concluded between Mr Angula and Mr Hendriks.

[41] In respect of the KIA vehicle, he testified that Mr Angula paid the deposit out of his own pocket. The balance was to be paid directly to the Bank on a monthly basis by NAFWU from the plaintiff's car allowance. He further explained that the committee resolved that the outstanding balance of the Kia is to be settled in full and the plaintiff would retain the said motor vehicle in his possession.

[42] He explained that the NAM-MIC shares did not emanate from the Committee, but rather from the Congress itself who decided to offer the plaintiff 50% of the said shares. During cross-examination he elaborated that the Congress resolved that

NAFWU would sell its shares in NAM-MIC and that 50% of the proceeds are to be paid to the plaintiff. He did not know the quantity or value of the shares that were to be sold.

[43] During cross-examination he indicated that he was aware of the practice at NAFWU in which the KIA vehicle was acquired for the incumbent General Secretary, Mr Angula. His impression was that when the vehicle is purchased in that manner, it will become the incumbent's own property. He was unable to say whether this policy was in writing or not, nor could he shed light on how much Mr Angula's car allowance was, as he was not employed at NAFWU.

[44] Counsel for the first and second defendant postulated that the medical assistance was supposed to benefit the plaintiff only until June 2013 because that was the month in which he was leaving NAFWU for good. Mr Museghedi understood the medical assistance to commence with effect from June 2013 but could not say whether the benefit would then continue into perpetuity. As such he did not dispute the interpretation that the medical aid assistance would run only until June 2013.

Mr Asser Hendricks

[45] Similar to Mr Angula, this witness was a veteran in the leadership of NAFWU, as he was first elected in 1996 as President. He attended the 2012 Aussenkehr Congress as President and was elected as the Vice-President at the said Congress as Mr Musegedi stepped down from that position. He explained that upon resignation, Mr Angula failed to hand over the financial reports of NAFWU, which prompted NAFWU to open a criminal case against Mr Angula.

[46] Information about the minutes of the Aussenkehr Congress was elicited. Mr Hendriks confirmed to have signed exhibit 'B1' which according to him was prepared by Mr Musegedi. He conceded that Ms Gwenyth Philips, could also have taken minutes, if she was asked to, since she was employed as an administrator. He stated

that the plaintiff was tasked to keep the minutes at the Office during December 2013. When Counsel for the first and second defendant put to him that exhibit 'B1' was never stored at the NAFWU office, he said that he was not aware of that. In his recall he gave exhibit 'B1' to Mr Angula during December 2013 to keep because he was the one who was still in the office. That proposition was challenged in view of the fact that Mr Angula left the employment of NAFWU during June 2013 which was the end of his extended term. He answered in a rather unintelligible phrase: 'That is where the confusion was. There was confusion at that time. Even the President saw them.'¹

[47] Mr Hendricks reiterated that the exit package was discussed at the 2012 Congress as it is reflected in exhibit 'B1'. He confirmed that a Committee deliberated on the exit package of Mr Angula and thereafter reported to Congress. He added that the Congress agreed to the specific Committee's proposals, which included the allocation of 50% of NAFWU's shares in NAM-MIC as well medical assistance.

[48] During cross-examination, the picture was confirmed that at the time of the Aussenkehr Congress Mr Hendricks did not know the total monetary cost of the exit package. He was asked whether the President had the power to determine the value of the exit package and his answer was in the affirmative. He further indicated that he did so with the help of a consultant accountant, by the name of 'Nomore'. He could however not put a monetary value to the housing and car allowance and spoke just about it in generic terms. According to Mr Hendricks he provided the plaintiff's contract of employment and payslip to 'Nomore' to do the calculations. Mr Hendricks was unable to give an explanation as to why Mr Angula could not tender in evidence any form of a pay-slip or a contract of employment.

[49] In turning to the settlement agreement, that is exhibit 'A', Mr Hendricks confirmed that it was concluded on 14 June 2015 between himself in representative capacity of NAFWU and Mr Angula. When asked for the basis on which he signed the said document, he answered as follows:

¹ Page 395 of record

'My lady I just did my work. As from the congress of 2012 I was then authorized. I had the authority to sign all the documents and to meet all the needs as a President or as that was part of my work. I was authorized.'²

According to Mr Hendriks, Mr Angula received N\$ 650 000 as part of the exit package but an amount of N\$ 681 221.70 was outstanding on that item. This amount was calculated by 'Nomore' and was approved by the then President. During cross-examination however, he could not inform the court how much of the plaintiff's exit package is still outstanding. He declared that when exhibit 'A' was entered into, he did not verify how much of the exit package was outstanding and had no consultations with other members of NAFWU.

[50] As for the ownership of the vehicle, Mr Hendricks's view was that Mr Angula was the owner. Mr Angula paid the deposit and NAFWU undertook to pay the outstanding amount, by transferring the plaintiff's car allowance in the form of instalments directly to the Bank on a monthly basis. He indicated that on the day of the Aussenkehr Congress, the vehicle was not yet fully paid off and Congress decided as part of the plaintiff's exit package that NAFWU was to pay the outstanding amount.

[51] He also testified that during the plaintiff's arrest the KIA vehicle was confiscated by Mr Nguvauva and used without Mr Angula's permission. That was the reason for the inclusion of the N\$ 20 000. for inconvenience as well as N\$ 772 050. for kilometers driven without Mr Angula's permission. He admitted under cross-examination that he was not mandated by Congress to appropriate N\$ 20 000. and the N\$ 772 050 for the purposes as he explained. He also conceded that he did not know the mileage driven by Mr Nguvauva and merely accepted the information by Mr Angula.

² Page 340 of record.

[52] He denied having knowledge that the vehicle was repossessed by the Bank and registered in NAFWU's name. He also denied having knowledge that the Bank restored the vehicle back to NAFWU and that NAFWU did not actually obtain the vehicle from Mr Angula.

[53] Mr Hendricks testified that it was indeed agreed by the Aussenkehr Congress that 50% of NAM-MIC shares was to be transferred to Mr Angula. He explained that because the first defendant did not have the necessary funds, NAFWU had to sell shares in NAM-MIC that the plaintiff can be paid from. During cross-examination he explained that the plaintiff was supposed to get 50% of NAFWU's shares in NAM-MIC and the rest were to be sold to pay the rest of the exit package. Initially when asked about the value of these shares, he claimed that he did not know but later on said that he got information from NAM-MIC that the value of the shares was in the region of N\$ 900 000 or more. More specifically the question posed to Mr Hendricks during cross-examination was:

'So the 50% of the shares he must get because he was defamed and the other amount of the shares must pay his exit package...--- That is correct.'³

[54] In Mr Hendricks's view, the settlement agreement and resultant court order of 4 February 2015 did not affect his authority to conclude the settlement agreement with Mr Angula on 14 June 2015. Mr Hendricks indicated that Ronell De Jong and Leslie Musegedi was present when he signed the settlement agreement with the plaintiff. That is at variance with Mr Musegedi who testified that he did not see exhibit 'A' at all. When he signed the settlement agreement he did so in his capacity as Interim President as a result of exhibit 'J2'. He was adamant that he attained authority from the 2012 Congress to enter into the settlement agreement with the plaintiff and still had authority as Interim President under the auspices of exhibit 'J2'.

³ Page 360 of the record.

[55] At the end of the plaintiff's case, the defense applied for absolution from the instance, which was declined with costs. Brief reasons were given in a PD-61. As such it will not be repeated.

Summary of two Defense Witnesses.

Mr Rocco Nguvauva

[56] Mr Rocco Nguvauva is the second defendant. He also attended the Aussenkehr Congress in 2012 at which time he was the Deputy Secretary General of NAFWU. When he was appointed as Secretary General in August 2015 he was informed by their legal practitioners of the apparent agreement, exhibit 'A'. He regards it as a shocking development, and it was not only because of the astronomic expenditure for NAFWU.

[57] He was also amongst the Committee members that deliberated on the exit package of the plaintiff. According to him the Committee was unable to determine the salary of Mr Angula. In view of that the Executive Committee was tasked to obtain the figures of Mr Angula's salary, do the calculations for the exit package and report back to the Central Executive Committee. It is his testimony that Mr Hendricks as the Chairperson of the Congress was not instructed to enter into any agreement on behalf of NAFWU without the Executive Committee.

[58] His stance was that Mr Hendricks entered into this agreement, of his own volition and he did not have the authority to bind NAFWU. He reiterated that viewpoint under cross-examination and explained that the affairs of the first defendant are run by the National Executive Committee, thus there should have been a resolution mandating Mr Hendricks to enter into a settlement agreement with the plaintiff. It could not have been done by the Mr Hendriks alone. As for the letter, exhibit 'D' that was entitled 'Alfred M Angula Total Pay Out Package' and signed by the President and the Vice President, which was Ms De Jong and Mr Hendriks at the time, he testified that no such document exist in the NAFWU Office files. Along the

same line, he testified that exhibit 'I', the letter wherein Ms De Jong commits NAFWU to honor its obligations is not amongst the NAFWU records.

[59] He testified that he never entered into an agreement and did not have knowledge of an agreement with the plaintiff for compensation of mileage driven on the said Kia motor vehicle. Mr Hendricks never called a meeting or visited the NAFWU office to engage him as regards the terms in exhibit 'A' that relate to the mileage driven on the KIA vehicle. He gave testimony that the vehicle was bought by the NAFWU on a hire purchase agreement with Bank Windhoek during July 2011 and it belongs to NAFWU.

[60] In explication of the issue of authority, Mr Nguvauva referred to exhibit 'J1' and exhibit 'J2' which provided that a Special General Congress will be held so that new leadership be appointed. In the interim and until new leadership was elected the leadership will compose of the Mr Hendricks as the Interim Chairperson. He explained that in terms of exhibit 'J2', only 'running expenses' such as salaries, funeral cover for the members, affiliation fees, Telecom accounts, existing debit orders and stationary expenses of the first defendant will be paid. Furthermore that such payment will be upon production of invoices, and only if approved jointly by the Chairperson and the Secretary General who was Mr Kativa.

[61] The further provision of the said court order was that any expenses not contained in paragraph 10 of exhibit 'J2' were to be approved jointly by the leadership structure put in place by exhibit 'J2'. He testified that he was not aware of any resolution after exhibit 'J2' that authorised Mr Hendricks to enter into agreements on behalf of the Union, nor was there any meeting of the executive members to agree on a decision about Mr Angula's situation.

[62] Mr Nguvauva did not agree with the contention by Council for the plaintiff during cross-examination that when Mr Hendricks signed the agreement with the plaintiff in respect of the exit package, he was merely executing NAFWU's

Aussenkehr Congress resolution. The witness explained that exhibit 'J1' and exhibit 'J2' clearly stipulated the mandate of the interim leadership, thus Mr Hendricks was not authorised to conclude the agreement with the plaintiff.

[63] As for the two sets of minutes, he was not aware of the existence of exhibit 'B1'. He only knew of the minutes, exhibit 'B2' which was taken by NAFWU administrator, Ms Gweneth Philips. He explains these minutes were kept in the NAFWU office files, which is normally kept by the General Secretary. When cross-examined on the authenticity of the exhibit B1, Mr Nguvauva stated that the Congress minutes was supposed to be signed at the next Congress, which according to him, Mr Hendricks did not attend. When referred to page 5 of exhibit 'B2' he confirmed that those were the terms of the exit package that was agreed by the Congress. Clearly these terms were at variance with those reflected in exhibit 'B1', of which some appeared in the exhibit 'A'.

[64] He was also not aware that anybody was being paid car allowance at NAFWU. In addition, he explained that he was not aware of any arrangement that that NAFWU would pay the remaining balance of the vehicle on a monthly basis. When asked about the sentence in the minutes exhibit 'B1' that portrays that the KIA of Comrade Angula must be paid in full by NAFWU, he denied that such an agreement as made at the Aussenkehr Congress.

[65] At the time of repossession, the vehicle was registered in the name of the plaintiff, as per exhibit R. At that stage NAFWU's President Mr Cornelius Ntelamo, on the direction of Bank Windhoek, instructed him orally to register the vehicle in the name of NAFWU because the suspensive sale agreement, exhibit 'S' was concluded between the first defendant and the Bank. He complied with that request. He explains that after consulting Bank Windhoek, they found out that the KIA vehicle belongs to NAFWU, thus it would not pay off the vehicle for Mr Angula. He furthermore indicated that the plaintiff is not entitled to compensation for the usage of the vehicle because it is not his property. He states the vehicle is currently registered in the name of the first

defendant. He conceded under cross-examination that, apart from the hire purchase agreement from the bank, NAFWU does not have proof that the vehicle is its property.

[66] He testified that he was given possession of the KIA vehicle by an official of Bank Windhoek who called him to collect it. This was after it was taken by the Deputy Sheriff as a result of a different claim wherein NAFWU was unable to pay a dismissed staff member. He did not confiscate it from the plaintiff as alleged by the plaintiff. In respect of how it happened that the Kia is in the possession of Mr Angula, he said it was the making of Mr Hendriks, who instructed the Namibian Police to collect it from him at the NAFWU premises and deliver it to Mr Angula.

Ms Gweneth Phillips

[67] This witness is the administrator at NAFWU's office since 2011. She attended the said Congress in her capacity as administrator and was not a participant in Congress deliberations. She testified that she was given the task of taking minutes by Mr Angula, which task she complied with. She wrote it down in her own hand writing⁴ and subsequently typed it. That is the authentic source of the minutes exhibit 'B2'. She testified that exhibit 'B2' are the authentic minutes of the deliberations regarding the plaintiff's exit package at the Aussenkehr Congress held on 18 August 2012.

[68] She further explained that she handed exhibit 'B2' to the General Secretary, i.e the plaintiff who requested it, to give it to the previous President and the newly appointed General Secretary to sign off.

[69] She never saw exhibit 'B1' and does not know who its author is. It was her view that exhibit 'B1' is invalid.

⁴ The handwritten notes were handed up and marked as exhibit 'B3.'

[70] During cross-examination she confirmed that in terms of the NAFWU Constitution, exhibit 'N' the Chairperson or President must sign the minutes who was Mr Hendricks at the time of the Congress. That was done for exhibit 'B1'. She testified that she recognized the signature on exhibit 'B2' as that of a certain Mr Moses who was elected at the said Congress. She however did not agree that exhibit 'B2' is not valid and a true reflection of what transpired at the said Congress, merely because it was not signed by the President.

[71] Permission was granted for plaintiff to re-open its case, in view of the court affording the evidence of Ms Phillips. The plaintiff re-called Mr Angula to the stand to rebut the evidence of Ms Phillips. In brief, Mr Angula testified that Ms Phillips was not a Congress delegate and she was there to assist with administration and food. He denied asking her to take minutes. In his recollection she was in and out of the Congress, busy with food preparation. During cross-examination when asked why did he not say that in evidence in chief, he answered that he simply forgot. He also emphasized the fact that exhibit 'B2' does not comply with the NAFWU Constitution as it was not signed by the President.

The Law and Analysis to the Facts

Plaintiff's Four Claims

[72] A determination of the plaintiff's four claims requires the court to consider whether indeed a settlement agreement was concluded between the plaintiff and NAFWU and if so whether it was valid and enforceable. Counsel for the plaintiff argues that all the plaintiff seeks for in this court is the standard relief for breach of contract, namely specific performance of the terms of the settlement agreement, exhibit 'A'.

[73] Given that the main defense was concerned with an apparent lack of authority, that in my view, remains the overarching question to be answered by the court. The

first and second defended challenged all the claims on the basis of a lack of authority on the part of Mr Hendriks when he concluded the said agreement on 14 June 2015. Furthermore the second defendant's liability was denied for the claim of N\$ 772 050. which represented an agreed tariff between Mr Angula and Mr Hendriks, as the second defendant was not a party to the settlement agreement, exhibit 'A'.

[74] It is common cause that NAFWU is a registered trade union. The effect thereof in terms of s 58 of the Labour Act,⁵ is that it is a juristic person.

[75] The author Joubert in *The law of South Africa*⁶ has this to say about the legal persona in the context of trade unions:

'The legal person according to its origin is an abstract entity and cannot function without human agency. A body corporate must have organs consisting of natural persons to enable it to function and take part in the legal process. The conduct and acts of such persons on behalf of the body corporate, provided they fall within the framework of the body's constitution, are not those of the body's members but are the acts of the body itself as an independent legal entity.'⁷

[76] The evidence established that Mr Hendriks on the date of 14 June 2015, being the date of the conclusion of the settlement agreement, was an office bearer at NAFWU and that he concluded the settlement agreement in that representative capacity.

[77] The onus was on the plaintiff to prove that Mr Hendriks had authority to conclude the settlement agreement on behalf of NAFWU. The argument was that Mr Hendriks acted in terms of actual authority conferred upon him in terms of resolutions taken during a National Congress that was held 3 years earlier on 18 August 2012 at Aussenkehr. Mr Hendriks himself fluctuated between authority that was conferred on him in terms of the Aussenkehr Congress of 2012 and his authority as Interim Chairperson later on during 2015 when exhibits 'J1 and J2' came to life. When it was put to Mr Hendriks that exhibit 'J2' did not permit him to enter into agreements on

⁵ Labour Act No 11 of 2007

⁶ Joubert *The Law of South Africa* Vol 13 p 191 para 343

⁷ Footnote omitted

behalf of the first defendant, his rationale was that he concluded the settlement agreement to make sure that affairs, in the interest of NAFWU, proceeded. In spite of that proclamation Mr Hendriks also testified that he did not consult others when he concluded the said agreement with Mr Angula. This gives credence to the intimation by the first and second defendant that Mr Hendricks took it upon himself to enter into the settlement agreement with the plaintiff.

[78] It is remarkable that the word 'resolution' was used throughout in the plaintiff's evidence, but no single written 'resolution' surfaced before court. That much was admitted by Mr Angula himself:

'Mr Angula I put to you that you only rely on Congress resolution, there is only evidence in a minutes of the meeting signed by Mr Hendriks? --- Correct...'⁸

[79] During closing submissions the court enquired about the existence of the 'resolution' relied upon. Counsel for the plaintiff pointed to exhibit 'C', which was not a resolution. Ultimately, there was no resolution tendered into evidence.

[80] In light of the angle I take, I do not deem it necessary to belabor ancillary issues such as the minutes and the different Constitutions, the alleged failure to submit financial reports and the arrest and who were signatories of NAFWU's accounts, as the matter did not turn on that.

[81] I return to the legal issue of capacity or authority in a representative capacity. Authority to conclude a legal act is one of the essential requirements for a valid contract to be concluded on behalf of an association. In respect of the authority of an agent it is stated in the textbook *Wille's Principles of South African Law*⁹ that:

'The agent's authority to represent the principal constitutes the essence of commercial agency. The principal may authorize the agent expressly or impliedly. Generally the acts of an 'agent' without that authority cannot bind the principal...'

⁸ Page 261 of transcribed record.

⁹ Francois Du Bois, *Wille's Principles of South African Law*, 9th ed Juta & Co, Ltd 2007 p 989.

[82] Thus when an association acts, the person that acts on behalf of the artificial entity must be duly authorized to do so. In this regard it was held *Mall Cape Pty Ltd v Merino Kooperasie Bpk* that: ‘... Unlike an individual, an artificial person can only function through its agents and it can only take decisions by the passing of resolutions in the manner provided for by its constitution...’

[83] The argument was made by counsel for the plaintiff that the dispute that culminated in these exhibits ‘J1’ and ‘J2’ was totally irrelevant and had nothing to do with the issues before court. He also argued that there was no difference in the powers of Mr Hendriks between the time that he was the substantial Chairperson as he was at the Aussenkehr Congress and the time in 2015 when he was the Interim Chairperson. This argument was done at the absolution from the instance application and the same thread continued at the end of the trial.

[84] It is prudent to consider the content of these documents to assess if that argument holds water. Exhibit ‘J2’ is also entitled ‘SETTLEMENT AGREEMENT’ and reached between NAFWU and certain respondents of which some appears to have been members and or office bearers at the time. It caters for a Special General Congress to be called and that the President of the Law Society of Namibia to appoint a suitable person to chair that meeting. Certain paragraphs of exhibit ‘J2’ will be set out below:

‘7. All existing leadership positions shall be vacated by the persons occupying such positions (whether in terms of the 1994 or any other later Constitution so relied on by such member) at the commencement of the General Congress and new persons shall be elected to occupy the said positions at the General Congress.’ My emphasis.

[85] The issue of interim positions was dealt with at para 8 of exhibit ‘J2.’

‘In the interim, until new leadership is elected, the leadership positions shall be as follows:

Chairperson: Asser Hendriks

Secretary General: Moses Kativa

Treasurer: Frans Ngoma

National Secretary: Frans Kamati'

[86] Furthermore, the said agreement also explicitly refers to expenditure of NAFWU and prescribed the type of expense eligible for payment as well as the procedure for that. It reads as follows:

'10 All running expenses of NAFWU shall be paid provided that invoices are presented and approved jointly by the general secretary and the chairperson. The expenses include the following:

- 10.1 Salaries;
- 10.2 Funeral cover for the members;
- 10.3 Affiliation fees;
- 10.4 Telecom account;
- 10.5 Existing Debit Orders;
- 10.6 Stationery expenses – Waltons.

11. Subject to paragraph 12 any other expenses not identified in paragraph 10 must be approved by the existing leadership structure jointly. '

Paragraph 12 deals with salary negotiations, which does not come into play herein.

[87] This settlement agreement was signed by Mr Asser Hendriks on behalf of NAFWU and by Mr Rocco Nguvuava on behalf of the respondents. It means that Mr Hendriks was acutely aware of the court order of 04 February 2015. That was the prevailing operational context wherein the said settlement agreement was signed by Mr Hendriks on behalf of NAFWU on 14 June 2015.

[88] In scrutinizing the categories of permissible expenditure in this interim phase, I struggled, in vain, to locate items such as damages for inconvenience, compensation for kilometres driven with a Kia vehicle, damages for defamation, transfer of investment shares of NAM-MIC or an exit pay package for Mr Angula. In the same vein, the procedure for expenses not listed in para 10 was spelled out in paragraph 11 of exhibit 'J2'. Nowhere in the plaintiff's evidence was it shown that these

protocols were complied with when Mr Hendriks's signed away thousands of dollars and well as half of the investment shares of NAFWU in NAM-MIC.

[89] The settlement agreement and court order of 04 June 2015 curtailed mandate and authority to be exercised by the interim leadership. At the time the general mandate under the NAFWU Constitution was suspended and so were the leadership positions. NAFWU functioned with an interim leadership structure with limited powers which were expressly circumscribed in exhibit 'J1' and 'J2'. I thus disagree with the argument made by counsel for the plaintiff that the powers of Mr Hendriks was the same during 2012 when he was the substantial Chairperson of NAFWU and the subsequent time in 2015 when he was an Interim Chairperson of NAFWU.

[90] The set of rules prescribed in the court order which was made a court order on 04 February 2015 stipulated the mandate in operation at the time. That court order contained no authority for a golden handshake for Mr Angula. Such authority must have existed at the time of the conclusion of the contract. It is one of the essential requirements to make the contract binding on the principal and enforceable. In view of the above, I find that the requisite authority did not exist at the time. Therefore the settlement agreement is not valid and enforceable.

[91] As regards to the joint liability in respect of the claim for payment of N\$ 772 050, it was not in dispute that the second defendant did not authorize the third defendant to enter into a settlement agreement on his behalf, nor was the second defendant part of the conclusion of exhibit 'A'. On that basis, this claim insofar as liability of the second defendant is concerned, cannot be sustained.

[92] Finally , as for the for the letter, exhibit 'I' written by the NAFWU President on 5 August 2013, which may be construed as a confirmation of indebtedness, unfortunately, it does not cure the non-existence of capacity when exhibit 'A' was concluded.

[93] In these premises, I find that the plaintiff failed to discharge the onus that was on them.

Counterclaim

[94] NAFWU asserts that it is the lawful owner of the KIA vehicle and claims return thereof from Mr Angula who currently has possession of the vehicle.

[95] It is trite that the owner of property is entitled to reclaim possession of his or her property with the *rei vindicatio*. The requirements to be proven on a balance of probabilities are ownership of the thing as well as that the defendant was in possession of the thing when the action was instituted.¹⁰

[96] In respect of the first requirement of ownership it was said in *Wille's Principles of South African Law*¹¹ that:

'If a movable is sought to be recovered, the owner must rebut the presumption that the possessor of the movable is the owner thereof.'

[97] This was the onus that rested on the first defendant. The evidence that NAFWU relies on for ownership is the instalment sale agreement, exhibit 'S'. That agreement was concluded on 01 July 2011 between NAFWU and Bank Windhoek. Mr Nguvauva testified that he does not bear knowledge of the car scheme that Mr Angula, Mr Musegedi and Mr Hendriks referred to. It was his testimony that he on the instructions of the then President of NAFWU Mr Ntelamo and Bank Windhoek, removed the KIA vehicle from Mr Angula's name and registered NAFWU as the owner at the National Traffic Information System (NaTIS).

[98] In a strange twist of events, the Kia vehicle was also the subject matter of judicial attachment during the course of 2013. Mr Nguvauva explained that history as follows:

¹⁰ Harms *Amlers Precedents of Pleadings* 7th ed. LexisNexus 2009 p 392-393.

¹¹ Francois Du Bois, *Wille's Principles of South African Law*, 9th ed Juta & Co, Ltd 2007 p 539.

'The vehicle come into my possession after I was called by the Bank Windhoek to come and take the vehicle from them because it was an asset of the Bank Windhoek that the organization was paying to. So how the vehicle came to Bank Windhoek it was taken from the Sheriff because the Organization and Namibia Farm Workers Union could not pay the unfairly dismissal staff. So they took their case to court and the win that case and they were supposed to be paid.'¹² (sic).

[99] Furthermore, it appears from Mr Nguvauva's evidence that the concept of ownership and the act of registration of the KIA dawned upon NAFWU only as a result of Bank Windhoek's instalment sale agreement: The much is evident from the following passage: ¹³

'Please be clear you know the several people you are talking about? --- Yes the Bank Windhoek instructed the Unions to register the vehicle under the organization then which is Namibia Farm Workers Union.

Okay --- So on that is where we as staff member in the office and Executive member realized the car belongs to the Union and it must stay at the Unions and do the operation of the Unions.'

[100] From the plaintiff's perspective, the court heard evidence of an arrangement that existed between Mr Angula and NAFWU, to acquire the KIA on a hire purchase agreement through NAFWU, at the time. According to Mr Angula the conditions entailed that he must pay the deposit of N\$ 37 048, and thereafter his monthly car allowance was applied to pay the pay the monthly instalments at Bank Windhoek. It was not disputed that Mr Angula paid the deposit per cheque. Mr Musegedi confirmed the existence of that practice at NAFWU, so did Mr Hendriks. In addition, the plaintiff tendered exhibit, 'R' which depicts that on 27 November 2013 the Kia vehicle was registered in Mr Angula's name at NaTIS.

[101] It must be said that the latest NaTIS registration, as attested to in oral evidence, that in itself, is not enough to conclusively prove ownership. In *The Acting*

¹² Page 85 of transcript.

¹³ Page 86 of transcript.

*Deputy Sheriff of Windhoek v Minnesota Trading Enterprises Group CC and Others*¹⁴

it was stated that registration of a vehicle at NaTIS does not detract from ownership, which still has to be proven on the facts.

[102] The presumption that ownership flows from possession, which in this case favours Mr Angula, could have been rebutted in view of the suspensive sale agreement. But that will make Bank Windhoek, who is not a party to the suit, the owner of the KIA vehicle, as long as there were outstanding payments. The principle on the purchase of a vehicle on a hire purchase agreement was explained in *Standard Bank of Namibia Ltd, Stannic Division v Able Trading (PTY) LTD and another*¹⁵ that:

‘As is usual for such agreement the vehicle had to be paid off in monthly instalments and ownership remained vested in the bank until the first defendant had discharged all his obligations in terms of the agreement.’

[103] The obligations refer to the payment of the full purchase price of the vehicle. In the case before me, it is not clear whether the full purchase price was settled at bank Windhoek. In the evidence on behalf of the first and second defendant there was no clarity on this aspect, nor was there a statement from Bank Windhoek that shows a zero balance on this transaction.

[104] The situation was even more confusing in view of the following evidence by Mr Nguvauva, when asked about one of the sentences in the minutes exhibit ‘B1’ that the KIA vehicle should be paid off for Mr Angula:¹⁶

‘ Okay. What is not correct then? --- That the Union should pay his car off. Okay. what was supposed to happen? --- It was supposed to, what my Lady what we say is if the car belongs to him so but we noticed that the car belongs to the Union then we do not need to pay the car off. ‘

¹⁴ *The Acting Deputy Sheriff of Windhoek v Minnesota Trading Enterprises Group CC and Others*(HC-MD-CIV-ACT-CON-2020-01229/INT-HC-INTERP- 2020/0024) [2021] NAHCMD (25 January 2021)

¹⁵ *Standard Bank of Namibia Ltd, Stannic Division v Able Trading (PTY) LTD* 2003 NR 183

¹⁶ Page 105 of the transcript.

[105] At the end of the day, the impression that the court was left with was that NAFWU never paid off the full purchase price of the KIA vehicle. This can be deduced from the following sentence: ¹⁷

'Is that the reason why the car was never paid off in full by the Union? --- That is the reason my lady.'

[106] Moreover, when Mr Nguvauva initially joined NAFWU it was in 2009 and he worked as a National Organiser. He answered that he was not aware of the KIA vehicle's arrangement. In that capacity he would not necessarily have been privy to the car scheme arrangement which as attested by Mr Angula, and confirmed by Mr Museghedi as well as Mr Hendriks, as he joined the management cadre later on.

[107] In view of the inconclusive evidence, is my view that NAFWU did not discharge the onus on them to prove ownership of the KIA vehicle on a balance of probabilities. In the premises the counterclaim fails.

[108] Based on these reasons, I order as follows:

1. As respects the claims in convention, the plaintiff's claims are dismissed with costs.
2. As respects the counterclaim, it is dismissed with costs.
3. The matter is considered finalized and is removed from the roll.

C Claasen
Judge

¹⁷ Page 106 of transcribed record.

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