

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT

Case No.: HC-MD-CIV-ACT-CON-2020/04741

In the matter between:

**ANNA EUNICE SHIWEDA**

**PLAINTIFF**

and

**TWEYA TRADING CC**

**FIRST DEFENDANT**

**MAX NDAUDALENI NDEUNEMA**

**SECOND DEFENDANT**

**ROBERTO KANDJILA VAHEKENI**

**THIRD**

**DEFENDANT**

**NDESHIHAFELA LUISE SHUUYA**

**FOURTH**

**DEFENDANT**

**Neutral citation:** *Shiweda v Tweya Trading CC and Others* (HC-MD-CIV-ACT-CON-2020/04741) [2023] NAHCMD 101 (9 March 2023)

**Coram:** SIBEYA J

**Heard:** 6 December 2022 and 15 February 2023

**Delivered:** 9 March 2023

**Flynote:** Contract – Action for damages – Based on alleged breach of contract – Who are the parties to the contract – The approach to mutually destructive versions

restated – The court found that the plaintiff's evidence is, on the balance of probabilities, true and the second defendants' evidence is on the same standard false – The court found that the second and third defendants constructed a precast structure without a building permit from the City of Windhoek Municipality – The structure was built using second hand materials contrary to utilising new materials as agreed to between the parties and paid for by the plaintiff – The structure was later demolished for non-compliance with the City of Windhoek Municipality Building Regulations – The plaintiff suffered damages as a result – Plaintiff's claim succeeds.

**Summary:** The plaintiff claims damages emanating from an alleged breach of contract by the second and third defendants. The plaintiff alleges that she entered into an oral agreement with the second and third defendants for the second and third defendants to construct a precast structure on her property using new materials which she had to purchase. The second and third defendants were to further obtain a building permit from the City of Windhoek Municipality before they could construct the precast structure. She paid an amount of N\$28 000 each for two invoices. The precast structure was built with second hand materials and without a building permit. The City of Windhoek ordered the plaintiff to demolish the precast structure for being built without a building permit and thus in contravention of the Building Regulations of the City of Windhoek Municipality. The second defendant defended the action and claimed that he was not a party to the agreement but participated and represented the first defendant when the said agreement was concluded. The second defendant also denied the allegation that he was paid N\$28 000 for the second invoice.

*Held that* – Where the probabilities do not resolve the matter, the court can resort to the credibility of witnesses in order to find in favour of the one or the other party and this includes considering the candour and demeanour of witnesses, self-contradiction or contradiction with the evidence of other witnesses who are supposed to present the same version as him or her, or contradiction with an established fact.

*Held further that* – Where the evidence of a witness is left unchallenged, such witness is entitled to assume that such evidence is accepted as correct.

*Held further that* – The failure to challenge the evidence of the plaintiff that the amount of N\$28 000 paid in cash regarding the first invoice was paid to the third

defendant in the presence of the second defendant, means that such evidence was accepted as correct and payment of such money between the plaintiff, the second and third defendants confirms the parties who were present as the parties to the agreement.

*Held further that* – The second defendant never informed the plaintiff that he was acting for the first defendant and, therefore, the meeting of the minds was between the plaintiff, second and third defendants.

*Held further that* – The second and third defendants, the experts in construction, informed the plaintiff that she did not require a building permit before she could commence to build a precast structure which advice from the experts was wrong and resulted in the precast structure built being demolished on the order of the City of Windhoek Municipality for being built contrary to Building Regulations.

*Held further that* – The probabilities in the evaluation of mutually destructive evidence between the parties favour the evidence of the plaintiff resulting in accepting the evidence of the plaintiff and rejection of the evidence of the second defendant. The second defendant is found to liable for the plaintiff's claim.

*Held that* – The plaintiff's claim succeeds, and is awarded damages in the amount of N\$61 000.

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### **ORDER**

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Judgment is granted in favour of the plaintiff against the second defendant for:

1. Payment in the amount of N\$61 000.
2. Interest on the amount of N\$61 000 at the rate of 20% per annum calculated from the date of judgment to the date of final payment.
3. Costs of suit.

4. The matter is removed from the roll.

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## JUDGMENT

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SIBEYA J:

### Introduction

[1] The court is seized with a claim based on the breach of an oral agreement. The agreement concerned the construction of precast walls on the property of the plaintiff. It is alleged that the precast structure was poorly constructed using second-hand materials and in non-compliance with the City of Windhoek Municipality's Building Regulations. The plaintiff claims payment of N\$61 000.

[2] The court is tasked to assess the propriety of the plaintiff's claim which is opposed.

### The parties and their representation

[3] The plaintiff is Ms Anna Eunice Shiweda, an adult female residing at Erf 1389, Signa Street, Khomasdal, Windhoek.

[4] The first defendant is Tweya Trading CC, a close corporation duly registered according to the laws of the Republic with registration number CC/2014/04887 and with its principal place of business situated at Erf 129, Ichaboe Street, Rocky Crest, Windhoek. No relief is sought against the first defendant which is cited merely for the interest that it may have in the matter.

[5] The second defendant is Mr Max Ndaudaleni Ndeunjema, an adult male businessman residing at Erf 129, Ichaboe Street, Rocky Crest, Windhoek. The second defendant is the only one who defended the claim.

[6] The third defendant is Mr Roberto Kandjla Vahekeni, an adult male businessman residing at Erf 221, Ondudu Street, Wanaheda, Windhoek.

[7] The fourth defendant is Ms Ndesihafela Luise Shuuya, an adult female residing at Erf 129, Ichaboe Street, Rocky Crest, Windhoek. No relief is sought against the fourth defendant who is cited for interest that she may have in the matter.

[8] Where reference is made to the plaintiff and the second defendant jointly, they shall be referred to as 'the parties'.

[9] The plaintiff is represented by Mr Kanyemba while the second defendant is represented by Mr Silungwe.

### Pleadings

[10] The plaintiff alleges, in the particulars of claim, that in August 2018, she approached the second and third defendants and entered into an oral agreement with them. The material expressed, implied and or tacit terms of the agreement are said to be:

- (a) That the second and third defendants would build a precast wall on the property of the plaintiff;
- (b) That the second and third defendants would ensure that the precast structure would conform to the Windhoek Municipality Building Regulations;
- (c) That the precast structure would be built with new materials, purchased by the plaintiff from the second and third defendants.

[11] The second and third defendants provided the plaintiff with two invoices under the letterhead of the first defendant for the cost of building the precast structure. The first invoice dated 3 August 2018 was for an amount of N\$37 728.78 where the second and third defendants agreed that the plaintiff must pay N\$28 000, states the plaintiff. On the same date, the plaintiff paid N\$28 000 in cash to the third defendant. The second invoice dated 25 September 2018 was for an amount of N\$28 000. The

plaintiff alleges that, on 4 October 2018, she paid N\$28 000 in cash to the second defendant in respect of the second invoice.

[12] The plaintiff claims that the second and third defendants breached the agreement by:

- (a) using second-hand materials to build the precast structure;
- (b) rendering poor and substandard workmanship;
- (c) failing to comply with the City of Windhoek Municipality Building Regulations (Regulation 25(a)), when they build the structure without securing a valid building permit from the Municipality.

[13] Due to non-compliance with the Regulations, the Municipality demanded demolition of the structure. The plaintiff claims that the second and third defendants refused to remedy the defect resulting in the plaintiff incurring an expense of N\$5 000 to demolish the structure.

[14] The plaintiff, therefore, cancelled the agreement and claims payment of the total amount of N\$61 000 consisting of the amounts paid to the second and third defendants and the money paid for the demolition. She also claims interest and costs.

[15] The second defendant, in his plea, denies liability for the plaintiff's claim. He alleges that the oral agreement was concluded between the plaintiff, the third defendant, and the first defendant represented by him. He was, therefore, not a party to the oral agreement.

[16] The second defendant alleges that the terms of the agreement were that:

- (a) The first and third defendants would build a precast structure on the property of the plaintiff;
- (b) The plaintiff would pay the first defendant N\$96 000 upon receiving an invoice, for new materials to build the structure;

(c) Upon completion of work, the plaintiff would pay the first defendant for labour which the first and third defendants would invoice the plaintiff.

[17] The second defendant alleges further that after the conclusion of the agreement, the plaintiff informed the first and third defendants that she could not afford the amount of N\$96 000 for new materials. The second defendant claims further that the plaintiff, first defendant and third defendants then agreed that the first and third defendants would utilise new and second-hand materials to build the precast structure at a reduced amount of N\$65 728.78.

[18] The second defendant alleges that the invoices were issued under the name of the first defendant and the amount was paid to the first defendant. He states that of the N\$28 000 paid to the third defendant in respect of the first invoice, only N\$23 000 was paid over to the first defendant. Regarding the alleged amount of N\$28 000 paid to him in respect of the second invoice, he avers that only N\$22 000 was paid to the first defendant by the plaintiff. He states further that the moment the above-mentioned amounts were received by the first defendant, they were utilised to purchase materials which were supplemented with second-hand materials as agreed.

[19] The second defendant further alleges that the plaintiff, the first and third defendants agreed that the third defendant would obtain a valid building permit from the City of Windhoek Municipality after which the precast structure would be built. The third defendant, however, informed the plaintiff and the second defendant that the City of Windhoek Municipality does not issue permits for building precast structures.

[20] The second defendant called for the dismissal of the plaintiff's claim with costs.

The pre-trial order

[21] The parties, in a joint pre-trial report that was made an order of court on 2 November 2021, by agreement, listed the following issues to be resolved during the trial:

- a) Whether or not, the second defendant was a party to the oral agreement of August 2018 or any other subsequent oral agreement where a precast structure was to be built on the property of the plaintiff;
- b) Whether or not the second defendant was at all material times acting on behalf of the first defendant.
- c) What the terms of the oral agreement of August 2018 were. Particularly whether the second defendant would ensure that the precast structure would conform to the Building Regulations; that the precast structure would be built with new materials bought by the plaintiff from the second and third defendants; and whether or not upon completion, the plaintiff would pay the first defendant for labour on work done which the first and third defendants would invoice the plaintiff.
- d) Whether or not, on 4 October 2018, the plaintiff paid the amount of N\$28 000 or N\$22 000 for the second invoice.
- e) Whether or not the second defendant is liable for the plaintiff's claim of N\$61 000.

[22] The parties listed the following agreed facts between them:

- (a) That there was an oral agreement concluded in August 2018;
- (b) That two invoices were issued to the plaintiff on the letterhead of the first defendant;
- (c) That a precast structure was built on the plaintiff's property;
- (d) That the precast structure was built without a building permit from the City of Windhoek Municipality;



(e) That the plaintiff, on 16 January 2019, received a demolition order from the City of Windhoek Municipality to demolish the precast structure;

(f) That the plaintiff, after receiving the demolishing order, demolished the precast structure at own cost of N\$5 000.

[23] I proceed to consider the evidence led in order to ascertain the propriety of the plaintiff's claim.

#### Plaintiff's evidence

[24] The plaintiff was the sole witness for her case.

[25] The plaintiff testified, *inter alia*, that in August 2018 she approached the third defendant to build a precast structure on her property. The third defendant indicated his willingness to construct the precast walls and introduced the plaintiff to the second defendant whom he could work with. The plaintiff, and the second and third defendants agreed that the plaintiff will pay them so that they can purchase new materials to construct the precast structure. An oral agreement was concluded between the three.

[26] The plaintiff testified further that the second and third defendants provided her with two invoices under the letterhead of the first defendant for costs of building the precast structure. Notwithstanding the said letterhead, the plaintiff paid the money in cash and personally to the second and third defendants respectively. The payment was as follows: on 3 August 2018, she paid an amount of N\$28 000 to the third defendant, in the presence of the second defendant, regarding the first invoice and the third defendant acknowledged payment of N\$28 000. On 4 October 2018, she paid an amount of N\$28 000 to the second defendant. The second defendant acknowledged payment and wrote on the second invoice of N\$28 000 that: "I Ndeunjema Max hereby inform that this invoice is complete (*sic*) paid by Mrs Anna on the 04/10/2018."

[27] She testified further that the second and third defendants informed her that the City of Windhoek Municipality require a building plan to be approved so that they

could grant a building permit to build the precast structure. They assured her that they will submit building plans for approval so that construction can commence. She stated further that the second and third defendants later informed her that they will just proceed to build the precast structure without a building plan and without a building permit. She was concerned with the approach to which the second and third defendants assured her that it was possible to first build the structure and later submit the building plans for approval. Trusting their expertise and know how, she agreed to the construction of the precast structure without a building permit.

[28] The second defendant built the precast structure of poor quality with second hand materials contrary to using new materials as agreed to and paid for by the plaintiff. The precast structure was not pillared into the ground but was loosely placed on the ground with no supporting structure and it swung with the wind. The plaintiff testified further that she informed the second and third defendants of the defects to the structure but they did not rectify such defects.

[29] On 16 January 2019, she was served with a demolition order by the City of Windhoek Municipality to demolish the structure within 28 days as it was not in compliance with regulation 25(a) of the City of Windhoek Municipality Building Regulations promulgated under Government Gazette Notice 57 of 1969, for commencing to build the structure without a valid building permit and a building plan. She provided the demolition order to the second and third defendants and demanded that they should demolish the structure and refund her money. They refused to heed the demand.

[30] The plaintiff further said that due to pressure from the Windhoek Municipality, in November 2019, she complied with the demolishing order by hiring manpower at a cost of N\$5 000 to demolish the precast structure and remove the rubble. The plaintiff said that she, therefore, suffered damages as a result and seek compensation with interest and costs.

[31] In cross-examination it was put to the plaintiff that she concluded an oral agreement with the first defendant represented by the second defendant not the second defendant in his personal capacity. The plaintiff disagreed and reiterated that she concluded an oral agreement with the second and third defendants in their

personal capacity. Neither the second nor the third defendant informed her of representing the first defendant. There was, therefore, no meeting of the minds with the first defendant on the terms of the agreement but rather with the second and third defendants. She further said that she was only presented with two invoices on the letterhead of the first defendant but there was no involvement or any mention of the first defendant.

[32] On the invoices, the plaintiff testified that she was only directed to the materials listed to be purchased. She also did not ask as to why the invoices were on the letterhead of the first defendant. Notwithstanding the bank details of the first defendant appearing on the first invoice, no mention was made to her by either the second or third defendant to pay the amount to the first defendant. She paid for the invoices in cash to both the second and third defendants so that they could purchase the new materials to construct the precast structure.

[33] Mr Silungwe questioned the plaintiff that the first invoice was for materials of a total amount of N\$37 728.78, which the plaintiff said she could not afford and asked for a reduction to N\$28 000. The plaintiff answered in the affirmative. Mr Silungwe asked further that the parties agreed that the reduction in the amount would result in the new materials to be bought being supplemented with second hands. Plaintiff disagreed and said that there was no mention of second hand materials and mentioned further that the reduction in the amount resulted in the removal of some of the items from invoice not reduction in quality. She, however, agreed to a question that the reduction in materials would compromise the precast structure.

[34] Mr Silungwe further questioned the plaintiff that the second invoice was for a total amount of N\$62 803 to which she asked for a reduction of N\$12 803 and she confirmed. She, however, disputed the allegation that the second invoice included second hand materials. Mr Silungwe further put it to the plaintiff that she only paid the second defendant N\$22 000 in respect of the second invoice. The plaintiff disagreed and insisted that she paid him N\$28 000.

[35] When further questioned in cross-examination why she allowed the structure to be constructed without a building permit, the plaintiff said that the second and third

defendants informed her that a precast structure can be built without a permit and that the permit can be obtained afterwards. They also informed her that the process to obtain a permit for a precast structure is not as cumbersome as that of a brick structure. She further said that the third defendant was supposed to obtain a building permit.

[36] The second defendant disputed the assertion that there were defects to the structure. The plaintiff was adamant that there were defects to the structure and when it rains water passes through the precast structure.

#### Defendant's evidence

[37] The second defendant, was also the only witness for his defence to the claim. He testified, *inter alia*, that he is a member of the first defendant and that in August 2018, the plaintiff, the first and third defendants entered into an oral agreement. The terms of the oral agreement were that:

- (a) The first and third defendants would build a precast structure on the property of the plaintiff;
- (b) The third defendant would obtain a valid building permit from the City of Windhoek Municipality before the precast structure is built;
- (c) The plaintiff would pay the first defendant N\$96 000 for new materials to build the structure upon receiving invoices from the first defendant;
- (d) Upon completion, the plaintiff would pay the first defendant for labour performed, which the first and third defendants would invoice the plaintiff.

[38] The second defendant testified further that after concluding the oral agreement, the plaintiff informed the first and third defendants that she could not afford to pay N\$96 000 for new materials. The plaintiff, the first and third defendants then agreed that new and second hand materials would be used to build the precast structure at a reduced price of N\$62 803.

[39] The second defendant testified further that the first defendant provided the plaintiff with two invoices. Upon being presented with the first invoice, the plaintiff informed him that she could not afford to pay the total amount of the invoice of N\$37 728, 78 for materials. The plaintiff, first and third defendants then agreed that the plaintiff will pay N\$28 000 for materials, provided that in addition to the new materials second hand materials will be utilised. The amount of N\$28 000 was handed to the third defendant by the plaintiff. The second defendant said that this amount was received on behalf of the first defendant and was to be transferred to the first defendant, but the third defendant only transferred N\$23 000 to the first defendant.

[40] In respect of the second invoice, the second defendant said that the plaintiff informed the first and third defendants that she could only pay an amount of N\$22 000 for materials. He further said that on 4 October 2018, while acting for the first defendant, he received an amount of N\$22 000 from the plaintiff for materials.

[41] The second defendant further testified that he was informed together with the plaintiff, by the third defendant that the City of Windhoek Municipality does not give permits for building precast structures as the parties to the oral agreement had thought at the conclusion of the agreement. It is after receipt of this information that the precast structure was built.

[42] The second defendant testified further that he had been involved in constructions projects before and met the third defendant in the construction trade. When questioned in cross-examination by Mr Kanyemba whether he was authorised to act for the first defendant, he said that the first defendant had two members and he was the managing member but he did not have a specific resolution authorising him to enter into an oral agreement with the plaintiff on behalf of the first defendant.

[43] It was put to the second defendant by Mr Kanyemba that he informed the plaintiff that she required a building permit to build a precast structure but later informed her that such building permit was not necessary to commence building as it could be obtained after building the structure. He denied the allegation and said that it was the third defendant who said that the Municipality stated that they do not provide building permits for precast structures.

[44] The second defendant testified further that when confronted by the plaintiff with a demolition letter from the municipality, the first defendant refused to demolish the structure and to refund the plaintiff, as the money paid was used to purchase the materials and before demolishing the structure, he intended to discuss the content of the letter with the author thereof.

[45] The second defendant further testified that there was no relationship between the first and the third defendants and he has no knowledge why payment of the first invoice of N\$28 000 for the first defendant was made to the third defendant.

#### Brief submissions by counsel

[46] Mr Kanyemba argued that the fact that the second defendant failed to produce a resolution by the first defendant which allowed him to act on its behalf meant that he acted in his personal capacity. He further argued that the second and third defendants are experts in the construction field and should have acted with due skill and diligence when they constructed the precast structure and should have ensured that the structure complies with the statutory requirements including having a building permit. He further argued that the precast structure built was of poor quality and sub-standard. He called for the plaintiff's claim to be upheld.

[47] Mr Silungwe, on the other hand, did not receive the plaintiff's arguments hands down. He argued that the oral agreement was concluded between the plaintiff, and the first and third defendants only. He insisted that the issue raised by the plaintiff that the second defendant acted personally as he had no authorisation from the first defendant to conclude the oral agreement in question was not pleaded and should, therefore, not be considered by the court. He argued further that after the oral agreement was concluded, the plaintiff said that she could not afford the amount of N\$96 000 required for new materials for the structure. The parties, thereafter, agreed that the first and third defendants would use new and second hand materials to construct the structure.

[48] Mr Silungwe further argued that it was the third defendant who informed both the plaintiff and second defendant that the City of Windhoek Municipality does not

issue building permits for precast structures. He further argued that the plaintiff paid the first defendant only N\$22 000 on 4 October 2018 and not N\$28 000 as claimed.

### Burden of proof

[49] It is a well-established principle of law that the plaintiff bears the burden of proof of her claim on a balance of probabilities.

[50] It is further a well-beaten principle of our law that he or she who alleges must prove his or her allegations in order to succeed with his or her claim or defence.

[51] Equally the person that alleges the existence of a contract bears onus to prove consensus or a reasonable reliance on the appearance of consensus. The main question is, therefore, whether the minds of the parties actually met.<sup>1</sup>

### Analysis of evidence

[52] The plaintiff argues that the precast structure built was of poor quality and substandard. She attributes this conclusion to the precast structure that swung with the wind, that it was not pillared in the ground and that rainy water passes through the structure. This argument, in my view, can be disposed of without breaking a sweat. The court is not privy to the alleged defects observed on the structure. The structure was not presented to court in any form. The court is in darkness as to the quality or standard of the structure. No comparable structures were presented into evidence and there is no evidence on which to measure the quality or standard of the structure in question. In my view, the plaintiff failed to prove the alleged poor quality and substandard nature of the precast structure alleged.

[53] That is, however, not the end of the matter and I proceed further with the analysis.

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<sup>1</sup> *Muvangua v Hiangoro* (HC-MD-CIV-ACT-OTH-2019/00768) [2020] NAHCMD 292 (16 July 2020) at para 7.

[54] The next material question that I turn to is the true relationship between the plaintiff, the first, second and third defendants.

[55] It is common cause between the parties that there was an oral agreement concluded between the plaintiff and the third defendant. The plaintiff states that the second defendant was also a party to the oral agreement in his personal capacity while the second defendant says the contrary that he only acted as a representative of the first defendant.

[56] It is apparent that the parties are miles apart on their relationship in connection with the oral agreement, at least in evidence. Their evidence regarding their contractual relationship is largely mutually destructive of each other and cannot co-exist. The court will, therefore, have to decide as to which version to prefer over the other.

[57] The assessment of mutually destructive versions was discussed by the Supreme Court of Appeal of South Africa in *SFW Group Ltd and Another v Martell Et Cie and Others*, where it said the following:<sup>2</sup>

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

[58] The above authority lays bare that if a matter cannot be resolved on probabilities, the court can consider the credibility of witnesses in order to determine as to which of the two versions should be preferred. In this process, the court can

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<sup>2</sup> *SFW Group Ltd and Another v Martell Et Cie and Others* 2003 (1) SA 11 (SCA) at page 14H – 15E.



have regard to the candour and demeanour of witnesses, self-contradiction or contradiction with the evidence of other witnesses who are supposed to testify about the same event or where the evidence presented contradict an established fact.

[59] In *National Employers General Insurance Co. Ltd v Jagers*<sup>3</sup> Eksteen AJP remarked as follows regarding the onus of proof in civil cases at 440D-G:

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

[60] Literally, where the two versions are incapable of co-existing and are mutually destructive of each other, one such version cannot be accepted without necessarily rejecting the other.<sup>4</sup>

[61] In *Sakusheka & another v Minister of Home Affairs*,<sup>5</sup> Muller J referred with approval to the often cited case of *Stellenbosch Farmers' Winery Group Ltd & another v Martell et Cie & others*,<sup>6</sup> where the Supreme Court of Appeal of the Republic of South Africa remarked that if there are two mutually destructive versions

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<sup>3</sup> *National Employers' General Insurance v Jagers* 1984 (4) SA 437 (E) a full bench decision of the Eastern Cape Division.

<sup>4</sup> *Mabona & another v Minister of Law and Order & others* 1988 (2) SA 654 (SE) at 662C-E.

<sup>5</sup> *Sakusheka & another v Minister of Home Affairs* 2009 (2) NR 524 (HC).

<sup>6</sup> 2003 (1) 11 (SCA) at 14I-15D.

in a civil matter, the court must, in assessing disputes, make findings on (a) the credibility of various factual witnesses; (b) their reliability; and (c) the probabilities.

[62] In *casu*, the second defendant was adamant that he was not a party to the oral agreement as at all times he acted for the first defendant, hence the invoices for the materials were made under the name of the first defendant. The third defendant did not testify, leaving the court with only the evidence of the plaintiff and the second defendant. It was the evidence of the plaintiff that she approached the third defendant to construct a precast structure on her property. The third defendant brought the second defendant on board and the three of them agreed that the second and third defendants would construct the structure. No mention was made of the first defendant in their discussions.

[63] There is no dispute that the two invoices were issued out under the name of the first defendant. It is an established fact that the third defendant did not work for the first defendant at all material times. It is further undisputed evidence between the parties that although the first invoice was issued under the name of the first defendant, the amount of the invoice which was reduced to N\$28 000 was paid to the third defendant. The plaintiff said that this amount was paid to the third defendant in the presence of the second defendant. The third defendant acknowledged payment by writing on the first invoice that he received N\$28 000. When the second defendant was questioned as to why the payment for the first defendant was paid to the third defendant, he had no explanation.

[64] The second defendant did not dispute the version that the plaintiff paid the third defendant an amount of N\$28 000 in cash for the first invoice in his presence. The second defendant's version was always that although the third defendant was paid N\$28 000, he only paid over an amount of N\$23 000 to the first defendant. It was only during the second defendant's case that he extended the goal posts and denied the allegation that the third defendant was paid in cash and that it was in his presence.

[65] Hoff JA in *Namdeb (Pty) Ltd v Gaseb*<sup>7</sup> while discussing the effect of failure to challenge the evidence of a witness remarked as follows:

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<sup>7</sup> *Namdeb v Gaseb*, Case No. SA 66/2016, NMSC, 9 October 2019 at para 61.

'It is trite law that a party who calls a witness is entitled to assume that such a witness' evidence has been accepted as correct if it has not been challenged in cross-examination. In *Small v Smith* 1954 (3) SA 434 (S.W.A) at 438E-G the following was said in respect of this aspect:

"It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved. Once a witness's evidence on a point in dispute has been deliberately left unchallenged in cross-examination and particularly by a legal practitioner, the party calling that witness is normally entitled to assume in the absence of a notice to the contrary that the witness's testimony is accepted as correct.

. . . unless the testimony is so manifestly absurd, fantastic or of so romancing a character that no reasonable person can attach any credence to it whatsoever.<sup>8</sup>"

[66] I have difficulties to understand the reason why the second defendant will leave the evidence of the plaintiff that the third defendant was paid an amount of N\$28 000 in cash and in his presence, without questioning such evidence. In the absence of the explanation for such failure by the second defendant to challenge the said evidence, I find that the call that the second defendant makes for the court to disbelieve the plaintiff's version which was left unchallenged is an afterthought. I further find that the second defendant's evidence, led during the defence case, that the third defendant was not paid in cash and in his presence also constitutes an afterthought. Such version of the second defendant falls to be dismissed, which I hereby do.

[67] I further find it difficult to comprehend the reasons why the third defendant who is unrelated to the first defendant and for reasons unknown to the second defendant (as testified to by second defendant) would accept a substantive amount

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<sup>8</sup> See also *President of the Republic of South Africa & others v South Africa Rugby Football Union and others* 2000 (1) SA 1 CC at 36J-38B – 'cross-examination not only constituted a right; it also imposed certain obligations'.

of money in cash or otherwise for the first defendant. The probabilities supports the version that, it is unless if the plaintiff, the second and third defendants were in agreement. The probabilities of the case further supports the version that the amount should have been provided in cash in the presence of the parties to the agreement.

[68] The plaintiff further testified at no stage did the second defendant inform her that he was acting for the first defendant. Save for the two invoices, the name of the first defendant features nowhere in this matter. The plaintiff further said that the two invoices were presented to her to consider and pay for the materials mentioned therein, not that her agreement was with the first defendant. The second defendant, upon receipt of the payment, acknowledged the payment in writing. In the said acknowledgement of payment, the defendant wrote that "I Ndeunjema Max hereby inform that this invoice is ... paid ...". The second defendant in the said acknowledgement does not state that he was acting for the first defendant.

[69] When one considers the credibility of the witnesses, it is worth commencing with an observation that in respect of the first invoice, the second defendant testified that the amount of N\$28 000 was to purchase new materials supplemented by second hand materials. The plaintiff insisted that at all times the materials to be bought and utilised were new materials and there was no mention of second hand materials. The first invoice makes no mention of second hand materials. In fact, the plaintiff said that the amount of the first invoice was reduced as she could not afford the original amount of N\$37 728.78 which resulted in some of the items which are crossed on the invoice being taken out. A rough calculation of the items on the first invoice demonstrates that when one removes the crossed items the value of the remaining items is about N\$28 628.78.

[70] The second invoice also makes no mention of the second hand materials. This invoice provides for the amount for materials as being a total of N\$62 803 minus N\$12 803, leaving an amount of N\$50 000. Deposit required was N\$28 000. A line appears below the deposit stating that "Money to be paid for Materials N\$22 000". The plaintiff testified further that she never agreed to have second hand materials used.

[71] When it was put to the plaintiff that the amount on the second invoice was reduced and she ended up paying N\$22 000 for materials so that second hand items could be added to the items, the plaintiff disputed. The plaintiff said further that the agreement was that the invoice would be reduced to N\$22 000 and she will have to pay for the doors, basin, locks and oil paint which raised the amount to N\$28 000, hence she paid N\$28 000. The second invoice reveals, on the face of it, that the list of materials which are typed on the invoice required a deposit of N\$28 000 and underneath it is clear that the money to be paid is written as N\$22 000.

[72] There is, however, handwritten inscription under the typed items on the invoice where the following items appear: doors, basin, locks, oil paint. These four items are not allocated amounts as compared to the items that are typed on the invoice. This, I find, supports the version of the plaintiff that the amount of N\$22 000 was increased to N\$28 000 by the inclusion of the items in handwritten inscription. I, therefore, reject as false the allegation that the plaintiff only paid an amount of N\$22 000 for the second invoice.

[73] In keeping with the established facts and findings made hereinabove, in my view, it is clear that the agreement was concluded between the plaintiff, the second and third defendants.

#### The building permit

[74] The plaintiff testified that the third defendant informed her that he will be able to build the precast structure together with the second defendant, a constructor. The second and third defendants informed her that the City of Windhoek Municipality required a building plan in order to issue a building permit to build the precast structure. They assured her that they will submit the required plans. However, they later informed her that the precast structure could be built and the building plan could be submitted at a later stage for approval.

[75] The second defendant built the precast structure, claims the plaintiff. The second defendant stated that it is the third defendant who informed the plaintiff and him that the City of Windhoek Municipality does not give permits to build precast structures.

[76] Regulation 25 of the Windhoek Municipality Building Regulations, promulgated under Government Gazette Notice 57 of 1969 provides that:

‘25 (a) Any person who erects a building –

- (i) Without the plans or the material of the building having been approved by the Council, in accordance with regulation 8; or
  - (ii) In respect of which the approval of the plans by the Council has lapsed in terms of regulation 9, shall be guilty of the offence.
- (b) The Council may under any of the circumstances mentioned in subregulation (a) serve upon the owner of any building referred to in the said subregulation as the case may be, an order requiring such owner forthwith to begin to demolish such building and to complete such demolition by or on a date to be specified in such order which date may be extended by the Council.
- (c) ...
- (d) If any owner fails to comply with an order referred to in subregulation (b) of this regulation, the Council shall be entitled to give effect to the terms at the expense of such owner.’

[77] It is not in dispute that the precast structure was built without building plans and without a building permit. It is also not in dispute that the precast structure was ordered to be demolished and that it was subsequently demolished by the plaintiff at a cost of N\$5 000.

[78] The plaintiff says that she requested the third defendant to obtain the building plans to be approved by the City of Windhoek Municipality. She further said that both the second and third defendants informed her that the Municipality stated that she required no building permit to build a precast structure as it is not a brick structure. The second defendant stuck to his version that he was informed by the third defendant that no building permit was required to build a precast structure.

[79] What is strange is that, the second defendant is involved in the trade of construction. He met the third defendant in the said trade. He was, before the agreement, involved in several construction projects. He knew that in order to construct a building structure one requires building plans to be approved by the

Municipality. In his own words, he acted for the first defendant, a juristic person who built the precast structure in question. He knew that the structure was built without building plans and a building permit. According to him, he relied on the information received from the third defendant.

[80] I find that the second defendant, as an expert in the field of construction, was correct when he jointly with the third defendant informed the plaintiff that building plans and a building permit were required before they could build the structure. The plaintiff, a layperson, in the construction industry, relied on the advice of the experts in construction. If the advice was to change, it was incumbent on the experts to ensure that their advice is well researched and backed with authority before they could present it to client who is a lay person and who is likely to take such advice as presented.

[81] I further find that when the information was received, according to the second defendant, from the third defendant that the municipality do not issue permits in relation to precast structures, the second defendant, as the builder of the precast structure should have known better about the applicable Municipal regulations to such structures or at the very least should have verified the advice received from the third defendant. This duty emanates from the fact that the second defendant is an expert in construction and whether acting on behalf of the first defendant or in own capacity, the second defendant was an expert who was required to build the precast structure and, therefore, should have ensured that the building permit is available before construction commences.

[82] During his testimony, the second defendant was determined to draw a line between himself and the first defendant. He repeatedly sang a chorus that he was acting for the first defendant even when it was unnecessary to say so in view of his defence to that effect being before court in his earlier evidence. The plaintiff, on the other hand, testified in a forthright manner and I find her evidence to be credible. The second defendant was not a credible witness at all.

[83] Where the evidence of the second defendant stands in total contrast with the of the plaintiff, I reject the evidence of the second defendant and accept the version of the plaintiff, particularly that the second defendant was a party to the oral

agreement in his personal capacity, that the payment made to the second and third defendants was to purchase new materials, that the plaintiff paid N\$28 000 each for the two invoices and that the second and third defendants informed her that she did not require a building permit to construct a precast structure.

[84] It is trite that in finding facts and making inferences in a civil case, “the Court may go upon a mere preponderance of probability, even though it’s so doing does not exclude every reasonable doubt . . . for, in finding facts or making inferences in a civil case, it seems to me that the one may . . . by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one.”<sup>9</sup>

[85] In view of the findings that I have made hereinabove, I do not consider it necessary, in this matter, to consider whether the plaintiff can raise the issue of lack of authority by the second defendant from the first defendant to enter into the oral agreement without first raising the issue in her plea. That aspect has become academic and this court has no luxury of time and energy to engage in academic exercises.

[86] As draw this matter towards the finishing line, I consider it opportune to consider an application by Mr Kanyemba brought from the bar. Mr Kanyemba applied for a default judgment to be granted against the third defendant in view of the fact that the third defendant did not defend the action. I must state that the said application came about after the court enquired on the status of the third defendant.

[87] The summons were served on the third defendant on 1 December 2020 by delivering same to a certain Mr Fernando Vehekeni, the third defendant’s brother, in the absence of the third defendant. Rule 15 (2) and (5) of the rules of this court provide that:

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<sup>9</sup> *M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz Megabuilt v Kurz* 2008 (2) NR 775 (SC) at 790B – E, quoting from *Govan v Skidmore* 1952 (1) SA 732 (N) at 734A – D.



'(2) If a defendant fails to deliver a notice of intention to defend or a plea, the plaintiff may set the action down for a default judgment as provided for in subrule (4)...

(3) The court or managing judge may, where the claim is for a debt, liquidated demand or foreclosure of a bond, without hearing evidence and in the case of any other claim after hearing or receiving evidence orally or on affidavit, grant judgment against the defendant or make such order as the court or managing judge considers appropriate...

(5) No notice of set down for default judgment referred to in subrule (2) need be given to a party that fails to deliver a notice of intention to defend, except that if a period of six months has lapsed after service of summons, no order may be made in terms of subrule (3), unless a notice of set down has been served on the defendant.'

[88] The rationale behind the requirement of service of the notice of set down on the defendant where a period of six months has lapsed from the date of service of summons is to notify the defendant of the liveness of the action. The rules clearly prohibit default judgment to be granted after a period of six months has lapsed. In *casu*, over a period of two years has lapsed from the date of service of summons on the third defendant. I, therefore, hold the view, that it would be unjust to grant default judgment against the third defendant, as I hereby find.

### Conclusion

[89] In view of the foregoing findings and conclusions, I am of the view that the plaintiff proved on a balance of probabilities that the second defendant was a party to the oral agreement in his personal capacity; that the second defendant built the precast structure without the building permit from the City of Windhoek Municipality; that precast structure was built with second hand materials while the agreement was for utilisation of new materials; that she paid an amount of N\$28 000 for the first invoice, N\$28 000 for the second invoice and N\$5 000 for the demolition of the precast structure.

[90] After considering the evidence led, I find that the plaintiff proved on a balance of probabilities that the second and third defendants are liable for building a precast structure with second hand materials, without a building permit, for which she

suffered damages. The second defendant is, therefore, liable for damages suffered by the plaintiff.

### Costs

[91] It is a well-established principle of law that costs follow the result. No submissions were made to the contrary, nor could I find evidence to depart from the said principle.

[92] Mr Kanyemba appears on the instructions of the Directorate of Legal Aid.

[93] Section 17 (1) and (2) of the Legal Aid Act<sup>10</sup> provides that:

‘(1) Where a court awards costs to a legally aided person in any proceedings, such costs shall be the costs which would have been payable if the services performed under legal aid had been performed by a legal practitioner on the instruction of a client without benefit of legal aid, and such costs shall be taxed accordingly.

(2) Notwithstanding that costs referred to in subsection (1) have been awarded to the legally aided person, such costs shall be payable to the Director.’<sup>11</sup>

[94] The said provision of the Legal Aid Act together with the established principle that costs follow the result, makes it plain, in my view, that where ordinarily costs should be awarded to a successful litigant, such award of costs should not be withheld for the simple reason that the litigant is legally aided. True to word, I, therefore, find that the plaintiff deserves an award of a costs order for her success in the matter. I shall make an award as to costs.

### Order

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<sup>10</sup> Legal Aid Act 29 of 1990 as amended.

<sup>11</sup> *Ultimate Safaris (Pty) Ltd v Gariseb* 2022 (2) NR 487 (SC).

[95] I find the following order to meet the justice of this matter:

Judgment is granted in favour of the plaintiff against the second defendant for:

5. Payment in the amount of N\$61 000.
6. Interest on the amount of N\$61 000 at the rate of 20% per annum calculated from the date of judgment to the date of final payment.
7. Costs of suit.
8. The matter is removed from the roll.

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O S Sibeya  
Judge

## APPEARANCES:

PLAINTIFF:

S Kanyemba  
Of Salomon Kanyemba Inc,  
Windhoek.

2<sup>nd</sup> DEFENDANT:

R Silungwe  
Of Silungwe Legal Practitioners,  
Windhoek