

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-CON-2020/00835

In the matter between:

TRIUMPHANT INVESTMENT CLOSE CORPORATION

PLAINTIFF

and

FADI FADEL AYOUB

DEFENDANT

Neutral Citation: *Triumphant Investment Close Corporation v Ayoub* (HC-MD-CIV-ACT-CON-2020/00835 [2023] NAHCMD 259 (12 May 2023))

CORAM: PRINSLOO J

Heard: 7 November 2022, 26 January 2023, and 7 March 2023

Delivered: 12 May 2023

Flynote: **Action** – Contract – Plaintiff sued Defendant – Plaintiff withdrew claim against Defendant – Defendant subsequently pursued counterclaim – Enrichment – Defendant’s counterclaim of enrichment succeeds.

Summary: The plaintiff instituted action against the defendant. The plaintiff withdrew its claim against the defendant on 2 November 2022. The defendant, however, persisted with his counterclaim. In his counterclaim, the defendant pleaded that in December 2018, he entered into negotiations with the plaintiff, represented by Messrs Tan Jeng Seng and Ching Chen Chen. The defendant wanted to sell 15 erven to the plaintiff in the Sable View Development outside Windhoek. The parties agreed that the land would be purchased by bartering several goods instead of by way of cash payment.

The parties entered into an oral agreement, however, same was reduced to writing but never signed by the parties. It was a term of the agreement that the defendant took possession of the Bobcat, Iveco truck, and Bentley motor vehicle. Unfortunately, the plaintiff later backed out of the agreement. The defendant claims that he was under the impression that the deal with the plaintiff was finalised and as a result, he incurred significant expenses. The defendant further asserts that because of the plaintiff's failure to honour their agreement, he incurred damages amounting to N\$124 000. The defendant's counterclaim is based on enrichment. The defendant raised a defence of an improvement lien against the plaintiff's claim for rei vindicatio.

Held that although the evidence of the defendant is unopposed for all practical purposes, the onus still rests on the defendant to prove his counterclaim on a balance of probabilities.

Held that the principle that applies is that if the defence of a lien is successfully raised, the owner may not recover possession of the property from a person who is lawfully in possession and has an underlying valid enrichment claim.

Held that the court is of the view that it is clear that the defendant's claim is not a damages claim but one of enrichment.

Held that removing the parts and the tyres from the Bentley would leave the vehicle in a state where it cannot move. Therefore, the removal of materials from the Bentley does not constitute a remedy.

Held that the defendant, as the bona fide possessor of the goods, has the right to claim compensation for necessary and useful expenses incurred in effecting necessary and useful improvements to the property of another.

Held that the defendant claims reimbursement for the necessary and useful expenses but does not distinguish between the two categories of expenses.

Held that if one has regard to the definition of useful expenses, then it is clear that the defendant's evidence is lacking, as there is no acceptable evidence that the value of either the Bentley or the Bobcat has appreciated.

Held that the plaintiff cannot dispute the repairs made to the Bentley and the Bobcat. Furthermore, the defendant has testified under oath that these repairs were made, and the plaintiff cannot gainsay this evidence in any way. Therefore, the court is satisfied that the repairs made to the Bentley and the Bobcat were all necessary to preserve the vehicles.

Held that the relevant exception to the current facts is that in certain instances, secondary evidence of a private document is admissible if there is an acceptable explanation for the non-availability of the document or if it is lost or destroyed.

Held that the court is satisfied that the defendant made out a case for the reimbursement of the necessary expenses in respect of the Bobcat and the Bentley, with the exception of the payment made by FA Business Solutions CC regarding the Bentley's tyres. Defendant's counterclaim succeeds.

ORDER

Judgment is granted in favour of the defendant in the following terms:

1. Payment in the amount of N\$104 000;
 2. Interest a temporae morae at a rate of 20% from the date of judgment to date of final payment; and
 3. Cost of suit.
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JUDGMENT

PRINSLOO J:

The parties

[1] The plaintiff is Triumphant Investments CC, a close corporation duly incorporated in terms of the Close Corporations Act 26 of 1988 with its registered address at Erf 729, Unit 22, Kahimemua Nguvauva Street, Windhoek, Namibia.

[2] The defendant is Fadi Fadel Ayoub, an adult male residing in Windhoek, Namibia.

[3] The plaintiff instituted action against the defendant, praying for relief which is of limited relevance to the current judgment. The reason is that the plaintiff withdrew its claim against the defendant on 2 November 2022. The defendant, however, persisted with his counterclaim, and for purposes of this judgment, I aim to refer to the plaintiff's claim and the defendant's plea only where relevant. I will refer to the parties as they appear in the main action.

Background

[4] The defendant defended the plaintiff's claim and filed his plea and counterclaim on 18 September 2020. On 18 November 2020, the defendant filed an amended plea and counterclaim.

[5] In his counterclaim, the defendant pleaded that in December 2018, he entered into negotiations with the plaintiff, who was represented by Messrs Tan Jeng Seng and Ching Chen Chen. The defendant wanted to sell 15 erven to the plaintiff in the Sable View Development outside Windhoek. The parties agreed that the land would be purchased by bartering several goods instead of a cash payment.

[6] The land was to be purchased by way of barter for the following goods:

- a) KOBELCO Excavator 40 SR engine no: 4TNV88-XYB;
- b) KOBELCO Excavator 135 SR with chassis no: 24100N7529F1;
- c) Bobcat with chassis no: 86611573;
- d) Iveco Truck with chassis no: ZCFB90CS009014430;
- e) Bentley motor vehicle with chassis no: SCBBE53277C046217;
- f) All material on-site at the game lodge on the plot at Sable View;
- g) Two Standtford generators.

[7] Although the agreement was reduced to writing, it was never signed by the plaintiff due to terms that were considered unacceptable. Nevertheless, an oral agreement was reached between the plaintiff and defendant, resulting in the defendant taking possession of the Bobcat, Iveco truck, and Bentley motor vehicle. Unfortunately, the plaintiff later backed out of the agreement.

[8] The defendant claims that due to his belief that the deal with the plaintiff was finalised, he incurred significant expenses. The defendant further asserts that the plaintiff's failure to honour the agreement resulted in him suffering damages amounting to N\$124 000, which included the costs of collecting the Iveco truck (N\$32 000), repairing the Bobcat (N\$45 000), and replacing five tyres and repairing the Bentley motor vehicle (N\$79 000).

Evidence by the defendant

[9] The defendant, Mr Ayoub, testified in support of his case and called no further witnesses.

[10] During his testimony, Mr Ayoub revealed that he engaged in negotiations with the plaintiff's representatives for the purchase of 15 erven in the Sable View Development. After identifying the relevant erven, the parties engaged in talks for three months but failed to agree on a cash payment. In light of this, Mr Ayoub suggested concluding the sale through a bartering system, which the plaintiff accepted. The parties then reached an agreement to exchange the equipment for the land.

[11] The defendant was offered various types of equipment, including a Bentley motor vehicle, excavators, an Iveco water truck, generators, and a Bobcat. The defendant had already rented the bobcat from the plaintiff at the time of the agreement. Additionally, the plaintiff allowed the defendant to possess the Bentley motor vehicle and the Bobcat immediately, while the Iveco water truck had to be collected from a farm in the Omitara region. The defendant was responsible for collecting the truck at his own expense.

[12] Mr Ayoub testified that a written agreement was drafted to include the terms of the oral agreement. However, when the plaintiff's representatives realised the erven was part of a sectional title scheme, they refused to sign the written agreement. This was because they did not want to be bound by the terms and conditions of the Sable

View Home Owner's Association. Despite further negotiations between the parties, the situation remained unresolved.

[13] Mr Ayoub testified that he replaced four of the Bentley's tyres, and in addition, he replaced the front and rear shocks of the vehicle, the grill and a gearbox cover. The total cost of repairs, which includes the price of the four tyres, amounted to N\$79 000. Mr Ayoub testified during cross-examination that the number of the replaced tyres was four and not five as pleaded and that his business, FA Business Solutions CC, paid the costs of replacing the tyres, which amounted to N\$20 000. Mr Ayoub further conceded that FA Business Solutions CC is not a party to the current proceedings. Mr Ayoub, however, contended that as he is the sole member of the CC and therefore he effectively made the payment.

[14] Mr Ayoub testified that the Bobcat had a problem with its hydraulic system and needed repairs, and as a result, he enlisted the services of a handyman who repaired the hydraulic arm of the Bobcat at the cost of N\$45 000. Mr Ayoub testified that he does not have any invoices and receipts in this regard, as all documents relating to the work done by the handyman were stolen during a breaking-in in 2019. Mr Ayoub testified that he had been unable to locate this gentleman post-Covid.

[15] Mr Ayoub testified that the agreement was that he had to transport the Iveco water truck at his own cost. The Iveco and an excavator were at the plaintiff's farm in the Omitara district. Mr Ayoub, therefore, had to make arrangements with EAM Logistics CC to proceed to the farm of the plaintiff with two low-bed trucks to load the Iveco and the excavator and transport it to Windhoek. Mr Ayoub testified that he made an upfront payment to the transport company of N\$32 000. This payment was made in cash to the service provider.

[16] On 15 March 2019, the low-bed trucks were dispatched to Omitara to collect the water truck and excavator, which the plaintiff refused to release, causing a loss on the defendant's part in the amount of N\$32 000.

[17] Mr Ayoub stated that on 25 March 2020, he terminated his agreement with the plaintiff via his legal representative and offered to return the goods, specifically the Bentley and Bobcat, upon reimbursement of the defendant's expenses. Unfortunately, the plaintiff declined the offer, and as of now, the defendant still has possession of the goods without receiving any payment for the required expenses, as well as the costs associated with the Bentley, Bobcat, and transportation fees.

[18] During cross-examination, Mr Ayoub was confronted with the fact that he did not produce any documentary proof of the money expended regarding the repair of the Bentley and the Bobcat, apart from the invoice for the Bentley's tyres. Mr Ayoub testified that he had been engaged in the buying and selling of motor vehicles for 31 years and gained sufficient experience, and is familiar with the following in an expert capacity:

- a. the fair and reasonable rates charged for labour in the panel beating industry;
- b. the fair and reasonable costs of new parts and second-hand parts required for the repair of vehicles in the panel beating industry;
- c. what parts and labour are necessary to effect repairs to damaged motor vehicles; and
- d. the value of second-hand motor vehicles.

[19] As an expert in his field, Mr Ayoub testified that he can confidently attest to the reasonable expenses necessary or required to repair the Bentley.

[20] After the defendant's case, the plaintiff's case was closed without calling any witnesses.

Discussion

Onus

[21] Apart from the spirited cross-examination by the plaintiff's legal practitioner, no witnesses were called on the plaintiff's behalf to rebut the defendant's evidence.

[22] The cross-examination by the plaintiff's legal practitioner highlighted several issues in the defendant's case, even though no evidence was presented on behalf of the plaintiff to contradict the evidence of the defendant.

[23] Even though the evidence of the defendant is unopposed for all practical purposes, the onus still rests on the defendant to prove his counterclaim on a balance of probabilities.

[24] The defendant's counterclaim is a claim in its own right, and it is a matter of convenience for the main claim and counterclaim to be adjudicated simultaneously.

[25] In *Erasmus Superior Court Practice*,¹ the learned author stated as follows:

'It does not infrequently happen that a defendant not only defends the action but also has an action of his own to bring against the plaintiff. This cross-action may arise out of the same transaction that gave rise to the plaintiff's claim or may be quite separate and distinct from it. In both cases it is desirable that the defendant, instead of being required to institute a separate cross-action with his own summons, and which proceeds eventually to a separate trial and judgment, should be allowed to link his action with the plaintiff's action so that in a proper case the two actions may be heard together, and so that the judgment in the two may be pronounced at the same time . . . A claim in reconvention is, therefore, a convenient surrogate for an independent action.'

¹ *Erasmus Superior Court Practice* 13th Service Edition at B1-164.

Arguments advanced

[26] Ms Ndamanomhata, in her heads of arguments, contended that the defendant failed to discharge the onus resting on him. In addition, Ms Ndamanomhata contended that the defendant failed to prove the damages claimed, either by qualifying the amounts claimed, by tendering a reasonable explanation or by providing documentary evidence as proof of payments.

[27] Ms Ndamanomhata submitted that there is no proof of payment of the invoices submitted to the court. Ms Ndamanomhata submitted that where the quantum of the defendant's claim is in issue, it is not sufficient to produce invoices and that the defendant was liable to call witnesses to adduce evidence of the concerns raised.

[28] Specific issues raised by Ms Ndamanomhata is as follows:

- a) The tax invoice issued in respect of the Bentley's tyres was issued to FA Business Solutions CC, which is the business of the defendant and is not a party to the current proceedings;
- b) No proof was submitted to the court concerning repairs to the Bobcat's hydraulic system, and no witnesses were called in this regard;
- c) The defendant is not an expert in the repair of hydraulic systems and is therefore not able to say if the N\$45 000 paid for the repairs were fair or whether the repairs were necessary;
- d) No proof in respect of the further repairs on the Bentley to justify the claimed costs of N\$79 000.
- e) No proof of payment of the transport costs;
- f) The defendant testified regarding the costs associated with the repairs, of which he has no knowledge or expertise.

[29] Mr Kasper argued that the defendant made out his case for the relief claimed and contends that the defendant has proven that the expenses he had incurred for the tyres and in respect of the truck and excavator, as well as the repairs to the vehicle and Bobcat were indeed necessary expenses and/or useful expenses which improved the usefulness and possibly the economic value of the property. The money expended in connection with the preservation of property constitutes necessary expenses. Most importantly, the evidence tendered by the defendant herein is uncontested, and as already set forth above, there is no version of the plaintiff before the Court.

[30] After considering the respective parties' arguments, I directed several questions to the legal practitioners, but more specifically to Mr Kasper. One of the main issues to address was the issue of enrichment, as the defendant relied on improvement liens in his defence to the claim of the plaintiff, which in itself does not constitute a cause of action. I wanted Mr Kasper to address the issue of whether the counterclaim supported an enrichment claim as it was not pertinently pleaded.

[31] In response to the questions directed to the parties, Mr Kasper argued that there is a nexus between the breach of contract by the plaintiff and the reimbursement claimed by the defendant.

[32] Mr Kasper submitted that for the defendant to succeed with his claim, the defendant has the onus to prove unjust enrichment and to discharge the onus by proving the amounts expended on the improvements and enhancing the property's value.

[33] Based on the evidence, Mr Kasper contended that the plaintiff provided the Bentley and Bobcat with functional defects, which the defendant had to repair to ensure their intended use. As a consequence of the repairs, the plaintiff was responsible for reimbursing the defendant for the expenses incurred.

[34] Furthermore, at the time, the parties were under a contractual obligation. Therefore, due to the agreement, the defendant readily incurred the expenses. Consequently, when the plaintiff breached the agreement, the defendant had already incurred the costs and expenses regarding the repairs.

[35] Mr Kasper submitted that due to the circumstances, the principle of enrichment arises. Mr Kasper further concedes that the observation by the court is correct that the pleadings do not specifically speak to an enrichment claim. However, should the reimbursement sought not be awarded, the plaintiff would be unduly enriched at the defendant's expense.

[36] Ms Ndamanomhata urged the court to hold that the evidence adduced by the defendant is not sustainable.

Relevant legal principles

[37] The defendant's counterclaim is based on what appears to be enrichment. The defendant raised a defence of an improvement lien against the plaintiff's claim for rei vindicatio. The principle that applies is that if the defence of a lien is successfully raised, the owner may not recover possession of the property from a person who is lawfully in possession and has an underlying valid enrichment claim.

[38] The question this court has to answer is whether it is evident from the counterclaim that the defendant's claim is indeed based on unjust enrichment or not. The parties are at odds as to what the defendant's cause of action is. In fact, Ms Ndamanomhata argued from the onset that the defendant's claim is a claim for damages.

[39] The law on what constitutes a cause of action is settled. A cause of action is simply a factual conspectus, the existence of which entitles one person to obtain from

the court a remedy against another person. In other words, it is an entire set of facts upon which the relief sought stands.²

[40] In *Abrahamse & Sons v SA Railways and Harbours*,³ Watermeyer J stated:

'The proper legal meaning of the expression "cause of action" is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not "arise" or "accrue" until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action.'

[41] From the pleadings, it stands undisputed that the plaintiff voluntarily surrendered the Bentley, the Bobcat and the Iveco truck to the defendant. This was done in anticipation of the conclusion of the written agreement for the sale of land, which never materialised. There is, therefore, no contractual agreement between the parties from which damages could flow. The plaintiff sought to redeem its property in its claim, and the defendant, in his counterclaim, seeks reimbursement for the costs incurred. I am of the view that it is quite clear that the defendant's claim is not a damages claim.

[42] The question is whether it is an enrichment claim or not. It is, therefore, necessary to consider the requirements for liability for enrichment. Geier J in *Lauer v Müller*⁴ summarised the general requirements for liability for enrichment as follows:

'[79] In order to then tie up all the loose ends it is useful to, again, call to mind, the general requirements, for liability for enrichment, as conveniently summed up, by Fourie J in *Watson NO v Shaw NO* 2008 (1) SA 350 (C). He held that what has to be established is that:

....

(a) the defendant must be enriched;

² *Silonda v Nkomo* ZWSC 6 (25 January 2022) at p 16.

³ *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626.

⁴ *Lauer v Müller* (I 3829/2011) [2021] NAHCMD 577 (09 December 2021) at para 79.

- (b) the plaintiff must be impoverished;
- (c) the defendant's enrichment must be at the expense of plaintiff; and
- (d) the enrichment must be unjustified (*sine causa*).

[43] I am of the view that the defendant's counterclaim is not a model of drafting, and the cause of action for the improvements was poorly and inelegantly framed. However, the defendant, in a roundabout manner, included the four requirements of an enrichment cause into the counterclaim, which contains phrases like 'assurances made by plaintiff that their deal is as good as sealed'; 'plaintiff on the said day reneged on its agreement'; 'incurred costs in relation to the repairs'; 'plaintiff failed to reimburse the defendant for the said costs incurred' and 'defendant requested reimbursement for such expenses incurred'.

Enrichment liability

[44] In principle there are three remedies available to a person who has improved another's property at his own expense. He may-

- a) claim compensation for the expenses he has incurred.
- b) claim a lien over the property until he has been compensated, and
- c) in specific circumstances, remove the materials employed in improving the property.

[45] Mr Kasper argued that the improvements to the Bentley and the Bobcat could not be removed without causing damage to the respective vehicles. This makes sense in respect of the Bobcat, as the repairs concerned the machine's hydraulics. Removing the parts and the tyres from the Bentley would leave the vehicle in a state where it cannot move. Therefore, the removal of materials from the Bentley and the Bobcat is not a remedy.

[46] The defendant tendered the release of the Bentley and the Bobcat but resisted the plaintiff's claim by exercising a lien over the items pending reimbursement of his

costs. He relies on a claim of unjustified enrichment for his counterclaim, therefore exercising remedies a) and b) set out above.

[47] The defendant, as the bona fide possessor of the goods, has the right to claim compensation for necessary and useful expenses incurred in effecting necessary and useful improvements to the property of another. This right dates back to Roman-Dutch law and has been adopted into our law through case law.

[48] Necessary expenses are regarded as expenses that are incurred in the preservation or protection of the property.⁵ In this regard, the enriched owner of the property is expected to compensate the impoverished bona fide possessor for such expenses fully. The rationale is that the owner has been enriched in that if it were not for the voluntary act of the bona fide possessor, the owner himself or herself would, in any event, have had to incur such necessary expenses.⁶

[49] Regarding useful expenses, the compensation amount is limited to the amount by which the property's value has been increased or the amount of the expenses incurred by the defendant, whichever is lesser. The court has a broad discretion in this regard.

[50] The defendant claims reimbursement for the necessary and useful expenses but does not distinguish between the two categories of expenses. A question was directed to Mr Kasper to explain what, on the current facts, would qualify as necessary expenses and what would be useful expenses. In my view, necessary expenses would be useful but useful expenses do not automatically mean they are necessary. The question in this regard remains unanswered.

[51] If one has regard to the definition of useful expenses, then it is clear that the defendant's evidence is lacking, as there is no acceptable evidence that the value of either the Bentley or the Bobcat has appreciated.

⁵ *Nortje v Pool* 1966 (3) SA 96 (A) at 131.

⁶ *Lechoana v Cloete* 1925 AD 536.

[52] The crucial question to be decided in the case is whether the expenses incurred by the defendant in effecting the repairs to the Bentley and the Bobcat were necessary expenses. The question of quantum can only be decided once it is determined whether the expenses incurred were necessary expenses.

[53] It is Mr Ayoub's evidence that the costs incurred to repair the hydraulic system of the Bobcat was both a necessary expense and a useful expense to restore the machine to working condition. As indicated above, the expenses incurred for this machine can, at best, be necessary expenses.

[54] Regarding the Bentley, Mr Ayoub testified that the plaintiff undertook to provide him with two front and two rear shocks and a grill for the Bentley, which never materialised. In addition to it, the vehicle required tyre replacement and a gearbox cover. He then proceeded to replace the parts and tyres at his cost and submitted that these were also necessary and useful expenses to protect the vehicle's condition. I will not repeat my views regarding useful expenses concerning the Bentley, as I expressed the same clearly in para 43 above.

[55] In its plea and during cross-examination, the plaintiff denied that either the Bentley or the Bobcat needed repairs, but there is no evidence to the contrary before this court.

[56] The plaintiff lost sight of the fundamental principle that prima facie evidence by the defendant in the absence of evidence by the plaintiff became conclusive proof. In *Ex parte Minister of Justice: In re V v Jacobson and Levy*,⁷ the court held that:

'Prima facie evidence in its usual sense is used to mean prima facie proof of an issue, the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges his onus.'

⁷ *Ex parte Minister of Justice: In re V v Jacobson and Levy* 1931 AD 466 at 478.

[57] The plaintiff cannot dispute the repairs to the Bentley and the Bobcat. Furthermore, the defendant has testified under oath that these repairs were made, and the plaintiff cannot gainsay this evidence in any way. Therefore, I am satisfied that the repairs to the Bentley and the Bobcat were all necessary to preserve the vehicles.

[58] The defendant, having crossed the hurdle to show that the expenses were necessary to preserve the items, now faces a further problem as he is unable to present these items' invoices or proof of payment apart from the tax invoice for the tyres of the Bentley, which tax invoice was issued to the defendant's business and not to him personally.

[59] Mr Kasper argued that the defendant's experience was canvassed, and the defendant placed his best evidence before the court. Mr Kasper further claimed that Mr Ayoub's uncontroverted evidence was that he has been buying and selling motor vehicles for 31 years and is qualified to make cost assessments. As a result, Mr Kasper urged this court to accept Mr Ayoub's evidence regarding the repairs and the value thereof for both the Bentley and the Bobcat as the best evidence. I take no issue with Mr Ayoub's experience and agree that after 31 years in the second-hand car business, he can be regarded as an expert. I must, however, point out that, in my view, this matter does not turn on the defendant's expertise or lack thereof.

[60] Ms Ndamanomhata took issue during cross-examination and in her heads of argument with the fact that there is no proof of payment of the repairs in respect of either the Bentley or the Bobcat.

[61] The undisputed evidence before this court is that there was a breaking-in at the defendant's house and, amongst other things, his documents were stolen. The witness further testified that despite several attempts to trace the handyman who repaired the Bobcat, he could not trace him post-Covid.

[62] I take no issue with the fact that proof of payment should be done by producing the document itself. However, I would like to point out that the defendant's claim for unjust enrichment should not be conflated with the quantification of damages. The evidence is that repairs were done, payments were made, and the paperwork was lost.

[63] There are exceptions to the primary evidence rule, which stems from common law and statutory enactments, which are not all relevant for purposes of this judgment. The relevant exception to the current facts is that in certain instances, secondary evidence of a private document is admissible if there is an acceptable explanation for the non-availability of the document or if it is lost or destroyed.

[64] In *Transnet Ltd v Newlyn Investments (Pty) Ltd*,⁸ the Court of Appeal faced the issues raised regarding the evidence of the witnesses called on behalf of the respondent to prove the existence and terms of the addendum to a lease agreement which went missing. For the first time on appeal, the issue was raised that such evidence was inadmissible as much as the respondent failed to demonstrate that the lost addendum could not be found after a proper search. The issue of proper diligent search is not important for the current judgment, but what is important is what the court said about the rules of evidence.

[65] Cloete JA discussed these rules as follows:

[19] Furthermore, there was only one original addendum. The evidence (to which I shall refer presently) was that it was never in the possession of the respondent after it had been signed on behalf of the appellant. If it had ever existed, the original remained in the possession of the appellant. That being so, two rules of evidence came into play:

(a) It is well established that a party may adduce secondary evidence of a document in the possession of the opposite party if the latter has failed to produce it after having been given written notice to do so.⁹ But notice is not required where the nature of the proceedings is such as to inform the opposite party, by necessary implication, that production of the document will

⁸*Transnet Ltd v Newlyn Investments (Pty) Ltd* 2011 (5) SA 543 (SCA) [2011] ZASCA 44.

be required: *S v Miles*.¹⁰ If ever there was such a case, this is it. If it be accepted that the original had been lost by the appellant, then the second rule of evidence, which I shall now deal with, becomes applicable anyway.

(b) Once secondary evidence is admissible, there are no degrees of secondary evidence ie the common law no longer requires that the best secondary evidence has to be produced.¹¹ Phipson¹² states the position as follows:

“The general rule is that there are no degrees in secondary evidence; and that a party is at liberty (subject to comment if more satisfactory proof is withheld) to adduce any admissible description he may choose. The reason assigned is the inconvenience of requiring evidence to be strictly marshalled according to weight; and of compelling a party, before tendering inferior evidence, to account for the absence of all which is of superior value, but the very existence of which he may have no means of ascertaining.”

The respondent was therefore entitled to give whatever evidence it could in respect of the contents of the missing addendum. It was not obliged to satisfy the court that its copy was missing and could not be found despite a diligent search. Of course, production of a photocopy would be more reliable than oral evidence as to the contents of a document, but that goes to weight, not admissibility.’

[66] The evidence of Mr Ayoub stands as proof of the payments done and stands unchallenged despite the plaintiff’s best efforts. I am therefore satisfied that the defendant made out a case for the reimbursement of the necessary expense in respect of the Bobcat and the Bentley, with the exception of the payment made by FA Business Solutions CC regarding Bentley’s tyres. FA Business Solutions CC is not a party to the current proceedings and is a juristic person in its own right. Therefore, the defendant would not be entitled to be reimbursed for the payment of the tyres.

⁹ *R v Radziwill* (1902) 19 SC 195; *Dalgleish v J & H Israel* 1909 TH 229; *S v Shepard* 1966 (4) SA 530 (W) at 531E-F; *S v Miles* [1978 \(3\) SA 407](#) (N) at 410-411; *Singh v Govender Brothers Construction* 1986 (3) SA 613 (N) at 617G-618B.

¹⁰ *S v Miles* 1978 (3) SA 407 (N) at 412.

¹¹ *R v Green* 1911 CPD 823 at 825; *R v Press* 1923 CPD 310 at 311-2.

¹² Hodge M Malek QC (ed) *Phipson on Evidence* 16 ed (2005) para 41-26.

[67] The last issue to address is the transport cost the defendant paid to fetch the Iveco and the excavator. Again, there is nothing to contradict the evidence of Mr Ayoub in this regard.

Conclusion

[68] Having considered all the facts, I am of the view that the defendant is entitled to be reimbursed in the amount of N\$104 000.

[69] My order is as follows:

Judgment is granted in favour of the defendant in the following terms:

1. Payment in the amount of N\$104 000;
2. Interest a temporae morae at a rate of 20% from the date of judgment to date of final payment; and
3. Cost of suit.

JS Prinsloo

Judge

Appearances

For the Plaintiff:

Ms Ndamanomhata
of Khadila-Amoomo Legal Practitioners
Windhoek

For the Defendant:

Mr Kasper
of Murorua Kurtz Kasper Inc.
Windhoek