

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

**JUDGMENT**

CASE NO: I 2073/2015

In the matter between:

**RALF HORST CONRAD**

**PLAINTIFF**

and

**HENNING DOHRMANN**

**1<sup>ST</sup> DEFENDANT**

**ANJA MARIA DOHRMANN**

**2<sup>ND</sup> DEFENDANT**

**Neutral Citation:** *Conrad v Dohrmann* (I2073/2015) [2018] NAHCMD 121 (14 May 2018)

**CORAM:** MASUKU J

**Heard:** 7, 8, 9, 10, 11 November 2016 and 11, 12, 13, 14, 15  
September 2017 and 30 January 2018

**Delivered:** 14 May 2018

**Flynote:** **LAW OF CONTRACT** – Divisibility of a written contract – when applicable – repudiation of a contract – notice of cancellation of a contract.

**RULES OF COURT** – Rule 37 – the import of a pre-trial order and its impact on live matters for determination by the court – impermissibility of including new issues not recorded in the pre-trial order, particularly in the absence of an application for the inclusion of the new matters, accompanied by a sound explanation for the order sought – Rule 130 – the need for legal practitioners to follow the provisions of this rule and not to merely file certificates which amount to lip service to the rule in question.

**CIVIL PROCEDURE** – the approach of the court where there are mutually destructive versions placed before the court – how the court should reach conclusions on reliability, creditworthiness and where the probabilities lie - the impermissibility of allowing the defendant the right to comment on the plaintiff's witness' statement after the latter has been excused and can no longer respond to the said comments – prejudice to the plaintiff – the need for the defendant's case to be fully put to the plaintiff in cross-examination reinforced – the function and proper approach to heads of argument.

**LAW OF EVIDENCE** – The necessity of a party putting its version to the opposing witnesses. Failure to do so results in the court regarding the evidence elicited therefrom as an afterthought – an adverse inference drawn from failure to call an important witness to testify – impermissibility of eliciting questions from the defendant regarding contents of a witness' statement.

**LEGAL ETHICS** – the impropriety of a legal practitioner who acts on behalf of clients in a non-litigious matter, to then act on behalf of one of the parties to the dispute that later arises – the proper course is to withdraw and refer the parties to find lawyers to represent them in the litigious dispute. The role of counsel and function of heads or argument discussed.

**Summary:** The plaintiff and the defendants entered into a written agreement of sale in respect of 100% membership in a close corporation and sale of furniture and inventory. The plaintiff testified that he complied with his part of the agreement but the defendants failed to deliver the furniture and inventory he paid for in the sum of N\$400 000.

*Held* – though the agreement was contained in a single document, a reading thereof, together with the intention of the parties was that the agreement was divisible and separate and as a result of which the plaintiff could sue only in respect of the furniture and inventory.

*Held further* – that the defendants, in terms of their behaviour, in availing the furniture and inventory worth N\$ 20 830, evinced an intention to no longer be bound by the agreement they had signed. It was in that context found that the plaintiff was, in the circumstances, entitled to cancel the contract as he did and was at large to claim the return of the money he had paid, against the tender of the furniture and inventory received.

*Held* – that the pre-trial order is a very important document which carries the imprimatur of the court and outlines the issues to be decided at trial. In that regard, it is not open to a party to unilaterally include issues at the trial that were not recorded in the pre-trial order as this is prejudicial to the court and the other party, who may have no notice of the witnesses required to deal with that issue.

*Held further* – that a defendant's legal practitioner, may not, after the plaintiff has been excused, elicit comments on the plaintiff's witness' statement as that is prejudicial to the plaintiff or his witnesses, who cannot, at that stage, be recalled to deal with the issues subsequently raised. The proper course, is to put the entire version of the defendant about the former's witness' statement to him or her while he or she is in the witness stand.

*Held* – that a legal practitioner, who acts for two parties in a non-litigious matter, should, after the parties cross swords, withdraw from the matter and refer both parties to independent lawyers to represent them. It is ethically improper, once a dispute arises, for that lawyer, to act on behalf of one of the protagonists.

*Held further* – that legal practitioners have a duty to file proper heads of argument to assist the court by referring the court to the particular pages of the judgment referred to. Furthermore, that in filing a certificate in terms of Rule

130, alleging that there are no local authorities in the jurisdiction, legal practitioners should ensure that they have done the necessary research and that the certificate they file is accurately reflective of the true position on the ground. Mere lip service to the provisions of this rule will not be tolerated.

*Held that* – failure to call an important witness for a party elicits an adverse inference. In this case, the defendant did not call a critical witness, being the 2<sup>nd</sup> defendant.

*Held further* – that it is important for a party to put its case to the opposing witness while the latter is still on the witness stand. Failure to do so results in the court consigning the version put as an afterthought and liable therefor to rejection.

The court upheld the plaintiff's main claim and held that the divisible aspect of the agreement relating to the furniture and inventory, was properly cancelled and that the plaintiff was entitled to recover the amount of N\$400 000, he had paid to the defendants, against him returning the furniture and inventory he had received from the defendants. In the event the plaintiff failed to tender the furniture and inventory supplied, he would be entitled to the purchase price of the inventory, less the value thereof as ascertained by the plaintiff's expert witness.

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### ORDER

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1. Payment of N\$ 400 000 by the first and second defendants, to the plaintiff, jointly and severally, the one paying and the other being absolved.
2. Interest of the aforesaid amount at the rate of 20% per annum *tempore morae*, to run from 7 July 2015 to the date of final payment.

3. Costs of suit consequent upon the employment of one instructing and one instructed counsel.
4. The payment of N\$ 400 000 stipulated in paragraph 1 above, is contingent upon the tender made by the plaintiff to return the furniture and inventory valued at N\$ 20 830, which must be done within ten (10) days of the date of this judgment, or such date as the court may in writing stipulate.
5. In the event the tender is not made within the period stated in paragraph 4 above, the defendants are ordered to pay the plaintiff the amount of N\$ 379, 170, with interest on the aforesaid amount calculated from 7 July 2015, to the date of final payment.

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## JUDGMENT

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MASUKU J:

### Introduction and background

[1] The date 19 February 2011, may, to many, have come and passed as mundane, with nothing of consequence to record. For the plaintiff and the defendants however, it was a remarkable day because on that day, in Swakopmund, they signed what may have been a destiny changing written agreement in their respective lots. In terms of the said agreement, the plaintiff bought 100% shares in a close corporation, called Eulennest Investment CC, which owned property measuring 820 square metres in the Municipality of Swakopmund.

[2] Furthermore, the plaintiff was, in terms of the said agreement, liable to pay an amount of N\$ 400 000 for certain furniture and inventory sold to him by the defendants and which was to be found on the landed property referred to above. There was mutual beneficiation from this agreement. The plaintiff acquired immovable property and also had furniture and an inventory in his

name. The defendants, on the other hand, received a healthy bank balance from the sale of their property, both movable and immovable.

[3] As some of these matters are wont to, a disagreement developed between the parties, culminating in the present suit. Chiefly, the plaintiff alleges that the defendants did not keep their part of the bargain in relation to the latter portion of the agreement, namely that they failed to deliver to him the furniture and inventory as contemplated and recorded in the written agreement.

[4] In consequence, the plaintiff approached this court seeking alternative claims as follows:

- (a) a claim based on the defendants' alleged repudiation of the agreement in question. This was particularly in relation to the furniture and inventory, as the plaintiff claims that he cancelled the divisible portion of the said agreement, tendered the return of the furniture against the repayment by the defendants of the amount of N\$ 400 000 paid to the defendants by the plaintiff;
- (b) a claim based on the defendants' alleged material breach of the contract relating to the sale and purchase of the furniture and inventory which breach resulted in the plaintiff cancelling the divisible portion of the agreement and tendered a return of the furniture and inventory against the repayment of the amount of N\$ 400 000, which is claimed against the defendants;
- (c) an alternative claim based on certain misrepresentations allegedly made by the defendants to the plaintiff and which allegedly induced the latter to purchase the furniture and inventory, in respect of which the defendant cancelled the divisible portion of the agreement, tenders the return of the furniture and inventory against repayment of the amount of N\$ 400 000 he paid to the defendants; and
- (d) a claim allegedly based on unjust enrichment, in respect of which the plaintiff claims payment of the amount of N\$ 379, 170.

[5] Needless to say, the defendants denied any liability for the main and alternative claims set out above and in this regard raised certain defences that it may not be necessary to set out at this particular juncture. In essence, the defendants moved the court to dismiss the plaintiff's claim with costs as an unmeritorious claim. I will, for purposes of consistency in this judgment, refer to the plaintiff as such and to the 1<sup>st</sup> defendant as such or merely as 'the defendant'. I will refer to both defendants as 'the defendants'.

#### The pre-trial order

[6] The parties submitted a pre-trial report dated 1 April 2016, which was, on 20 April 2016, adopted and made an order of court without any variations or amendments. I do not intend to reproduce the entire document, which is long and quite exhaustive of the issues the parties wished to submit to the court for determination. I will confine myself to a few areas that I consider germane to the present enquiry.

[7] In regard to the issues of fact to be resolved, the parties identified a plethora of issues. I will, for purposes of this judgment, highlight some of the important issues and I do so below:

- (a) what furniture and inventory was sold to the plaintiff by the defendants;
- (b) whose responsibility it was to draw the list of the furniture and inventory as a separate annexure to the agreement;
- (c) whether the defendants sold to plaintiff the property in question relying on the representations, warranties and undertakings and indemnities given by the defendants and the plaintiff purchased the property free of all liens, charges and encumbrances, the subject matter, and the furniture and inventory;
- (d) whether the sale and purchase of the interest and claims are indivisible from the sale and purchase of the furniture and inventory;

- (e) whether the only furniture and inventory the defendants left at the premises constituted only of a dirty carpet, a dining table, six chairs, a double bed mattress and side tables, two pine beds and a side cabinet;
- (f) whether the furniture and inventory delivered had a value of N\$ 16 180;
- (g) whether the defendants' conduct mentioned above constituted an unlawful repudiation of the divisible portion of the agreement;
- (h) whether the plaintiff had the right to cancel the divisible portion of the agreement relating to the sale of the furniture and inventory;
- (i) whether the defendants, by accepting the amount equivalent to N\$400 000 in respect of the purchase of the furniture and inventory, represented to the plaintiff that an agreement was concluded between the parties regarding the sale and purchase of the furniture and inventory; the purchase consideration for the furniture and inventory is the Euro equivalent of N\$400 000 and that upon payment of the said amount, the defendants shall make delivery of the furniture and inventory by leaving same behind for the plaintiff to take delivery upon occupation of the landed property.

#### Common cause facts and issues

[8] In the self same pre-trial report, the parties also identified the issues that were not in contention, and which can be regarded as common cause. These include the following:

- (i) the identity of the parties;
- (ii) the court's jurisdiction to deal with the matter. This was important because the defendants are German citizens, living in Germany at the institution and conclusion of the trial;
- (iii) a legal practitioner in Swakopmund, Mr Ahrens, was requested to draw up a sale agreement between the parties;
- (iv) the agreement, after being read out, was signed by the parties in Swakopmund, on 19 February 2011 and a true copy of which was attached to the particulars of claim;



- (v) a 'list of furniture and inventory', although referred to in the agreement, was not availed at the signature of the agreement. In this regard, no such list was ever drawn up nor was it signed by the parties and annexed to the sale agreement, as recorded therein;
- (vi) the plaintiff complied with his obligations by paying the equivalent of N\$ 400 000 in Euro to the defendants;
- (vii) the defendants delivered certain furniture to the plaintiff, *to wit*, a leather lounge suite, with table and side cabinet; a dining table with 6 chairs; 2 cane lazy chairs; 1 big carpet; a kitchen fridge/freezer; a dishwasher and a washing machine; a double bed with mattress; two side cabinets; 2 single beds with mattresses and a further 2 single beds with mattresses;
- (viii) the defendants removed the clothing, main linen, cutlery, toys, buckets/pails, grill rosters, old dilapidated carpets, camping equipment and certain garden furniture;
- (ix) the plaintiff, by letter dated 20 June 2011, elected to accept the alleged repudiation by the defendants and purported to cancel the divisible portion of the agreement relating to the sale of the furniture and inventory, which repudiation was communicated to the defendants in the same letter.

#### The chronicle of evidence led

[9] In this leg of the judgment, I do not need to state each and every allegation of the witnesses made in court. I will attempt to refer only to what I consider to be the critical aspects of the evidence, which will, at the appropriate juncture, be analysed and findings of fact and credibility findings made where appropriate.

[10] The plaintiff was called as a witness, together with his expert witness, whose evidence was left totally unchallenged. The first defendant testified and called two further witnesses whose evidence I find does not add much to the proceedings as will be evidenced as the judgment unfolds. I proceed to capture the salient portions of the relevant witnesses evidence below.

*The plaintiff*

[11] The plaintiff testified that during February 2011 and at Swakopmund, he received information from a certain Mr Grabenkamp to the effect that the defendants are the owners of immovable property in Rossmund village, which they intended to sell, should they receive a good offer. It was the plaintiff's evidence that he was interested in purchasing property in Namibia, more particularly in Swakopmund.

[12] The plaintiff thereupon requested Mr Grabenkamp to arrange a meeting and house viewing with the defendants at the property. The meeting was arranged between the plaintiff and the defendants on 18 February 2011 at the property, specifically known as Euphobia Avenue Number 6, Rossmund. Mr Grabenkamp was also present. There the plaintiff viewed the house together with both defendants. The plaintiff indicated his interest to purchase the house for N\$ 2,400,000.00.

[13] At that time that the first defendant indicated to the plaintiff that he was selling the furniture and inventory in the residence as seen by the plaintiff lock, stock and barrel, excluding the personal effects of the defendants, such as pictures of his children. The latter items the defendants wanted to sell in the amount of N\$ 400,000.00.

[14] The plaintiff testified that he was made to understand that if he should purchase the property, the property would be delivered to him as is and he would consequently move into a fully functional residence. In this regard, it was the plaintiff's evidence that during the tour of the house, he took pictures of the interior of the residence and these were not for the purpose of recording the inventory and inventory.

[15] The 1<sup>st</sup> defendant thereafter informed the plaintiff that he would contact his attorneys for the purpose of drafting a sale agreement between the parties. An appointment with Mr Ahrens from Ahrens and Associates, in Swakopmund

was arranged for 19 February 2011 and the plaintiff was informed thereof. Mr Grabenkamp accompanied the plaintiff to the consultation with Mr Ahrens.

[16] It was agreed, regarding the property for sale, that portion 67 of the Farm No.161 in the Municipality of Swakopmund, registration division "G", Erongo Region, measuring 280m, held by Deed of Transfer No. 7810/2005 which was also known as Euphobia Avenue Number 6, Rossmund Swakopmund which was registered in the name of a close corporation known as Eulen Nest Investment CC was being sold to the plaintiff.

[17] The purchasing of the property would be structured as a sale of members' interest and claims of the said corporation. This was done so that the plaintiff as the purchaser could save transfer costs. There were consequently two sale agreements namely, the members' interest and claims to the value of N\$ 2,400,000 for which specific separate payment arrangements were discussed and agreed to, and that of the furniture and inventory in the amount of N\$400,000 and for which separate payment arrangements were discussed and agreed to.

[18] The sale agreement was concluded on 19 February 2011 and the list of the furniture and inventory was to be attached to the agreement as an annexure.

[19] After the signature of the agreement, Mr Ahrens requested to be furnished with the list as recorded in the agreement but the first defendant stated that he had not had the time to compile same in time for the consultation but would compile same and furnish it to Mr Ahrens in the due course of time. The plaintiff testified that he expected that list to include all the furniture and inventory he had seen during the inspection of the premises the previous day.

[20] It was the plaintiff's evidence that he never received a list of the furniture and inventory even though he was of the *bona fide* belief that he would receive same, once the plaintiff and defendants had concluded the sale agreement. The first defendant pointed out to the plaintiff the furniture and inventory he

intended to sell to the plaintiff. This pointing out was sufficient to the plaintiff as the first defendant is a practicing attorney in Germany and the plaintiff thus reposed his trust in the 1<sup>st</sup> defendant.

[21] It is common cause that the plaintiff paid the defendants the N\$ 400,000 for the furniture and inventory as agreed. It is further common cause the furniture and inventory was never listed; never signed or initialled by the parties to be part of the sale agreement as an annexure.

[22] The plaintiff and defendants arranged for the occupation of the property and takeover of the furniture and inventory on 30 April 2011. The plaintiff testified that when he arrived at the premises, he noticed a truck in front of the house and some people were busy loading boxes from the house into the truck. Only the second defendant was present at that stage.

[23] When the plaintiff entered the house it was his evidence that he was shocked to discover that almost all the furniture and inventory had been removed therefrom. In this regard, all the pictures, paintings, utensils, ornaments, wall clocks and lamps and other décor were removed. When he attempted to discuss this issue with the first defendant, the latter informed him that he was on his way to Germany and had no time to resolve the issue. The first defendant gave the plaintiff some of the keys and informed him that a certain Mr Schlusche would attend to cleaning the house where after, the plaintiff would receive the remaining keys to the property.

[24] The plaintiff further testified that Mr Schlusche, however, never came to clean the house and when the plaintiff confronted Mr Schlusche on receiving the remaining keys, the latter insisted the plaintiff should sign an acknowledgment stating that he had received the property, furniture and fittings in good order. This, the plaintiff testified, he was not prepared to do.

[25] The plaintiff in the course of time faxed a letter to the defendants complaining about the furniture. The defendants responded thereto by letter, saying that the plaintiff had never requested for an inventory list. Thereafter,

the plaintiff appointed an expert Mr Hasso Gantze to evaluate the property in the house, which he found to be worth N\$ 16,130, and to that effect attached his report and ascertainment of the value of the property.

[26] For the purposes of the trial, however, the plaintiff called Mr Michael Kriner, an adult male assessor based in Swakopmund, who assesses, amongst other things, second-hand furniture and household goods. His curriculum *vitae* was attached to his witness' statement. I am satisfied that he is an expert in his field and the court is perfectly entitled to rely on his expert testimony. He valued the second hand furniture and household goods at the plaintiff's house at N\$ 20 830. His evidence was not contested and must for that reason, be accepted without demur. The plaintiff thereafter closed his case.

#### *The defendants' case*

[27] As indicated earlier, the first defendant testified. His evidence was that he and second defendants were co-owners of Eulennest Investment CC whose members' interest they sold to the plaintiff on 19 February 2011. The first defendant testified that the purchase price was fixed at N\$2,800,000.00 and that no specific allocation of house, garden and inventory was made.

[28] The first defendant further testified that the plaintiff had recommended Mr Ahrens from Ahrens & Associates to draft the agreement of sale between the parties. The first defendant further testified that the plaintiff did not have the full purchase price in Namibian dollars and wanted to settle the purchase price by making part-payments being N\$ 2,400,000 and N\$400,000 equivalent in Euro, which the first defendant alleges was excluding personal belongings and camping equipment.

[29] The inventory and furniture was to be inserted upon the request of the plaintiff and first defendant and that Mr Ahrens never had a true reflection of the value of the furniture and inventory. The first defendant stated that there was never a separate valuation made on the furniture and inventory situated in the house.

[30] It was his evidence that Mr Ahrens had requested a list of the furniture and inventory, which was not available at the time of drafting the said agreement and requested the parties to produce such list at a later stage. The first defendant stated that he requested the plaintiff to draw up the inventory, which the plaintiff refused to do and declared that a few photographs the plaintiff had captured, would be sufficient for the purpose.

[31] The first defendant confirmed that he, and the second defendant, removed all their personal belongings and cleaned the house as best they could in order for the plaintiff to move into the house unhindered. The first defendant confirmed that when the plaintiff arrived on 30 April 2011, to take possession of the property, Mr Schlusche, was present. The first defendant requested from the plaintiff whether or not he had any objection during the handing over of the property. However, the plaintiff informed the first defendant he does not have the photos with him to know if everything was in place.

[32] It was the first defendant's evidence that the plaintiff was requested on numerous occasions to sign the receipt for the proper handing-over of the house which the plaintiff refused to sign. The plaintiff requested that he have access to the house due to him before moving in on 1 May 2011. It was arranged that the plaintiff would meet with Mr Schlusche to hand over the property together with all the keys, accounts and insurance papers on 1 May 2011, but the plaintiff did not attend on that day. The plaintiff refused to deal with Mr Schlusche and by then the plaintiff had still not signed the receipt of the proper hand-over of the property.

[33] All in all, the first defendant denied that the house was stripped of all its furniture and further denied that the plaintiff conveyed his dismay on the proper hand over of the property on 30 April but rather later in May 2011.

*Mr Heiner Michael Schlusche*

[34] Mr Schlusche stated that he used to visit the defendants' house, which was fully furnished. He recounted the furniture that he knew was in the house, including a leather lounge suite with a table, side cabinet; a dining table with 6 chairs; 2 cane lazy chairs; 1 big carpet and other contents of the bedrooms.

[35] It was his evidence that the defendants departed to Windhoek during midday on 30 April 2011 and the first defendant handed the front door key and the garage alarm and remote control to the plaintiff. It was his evidence that the house was left by the defendants fully furnished.

[36] The evidence of Mr Zeferinu Rozeriu, also called by the defendants was almost a carbon copy of the evidence of Mr Schlusche. He stated that he often visited the house in question, which was fully furnished. He recounted the items referred to above in the witness statement of Mr Schlusche. Significantly, it was his evidence that when the defendants left on 30 April 2011, the items remained intact inside the house and were never removed. That was the extent of the evidence adduced by the parties.

#### Divisibility of the agreement

[37] I find it imperative, at this very early juncture in the judgment, to deal with the argument that loomed large, namely, whether or not, the agreement signed by the parties, which was contained in one memorial, can be said to be divisible, as the plaintiff contends, namely, the acquisition of the shares in the close corporation, resulting in the plaintiff acquiring the landed property on the one hand, and the sale of the furniture and inventory, on the other.

[38] I choose to follow this approach for the reason that if this issue is resolved this early, it may lead to a measure of clarity in the judgment, as it seems that the issue of divisibility of the agreement is a golden thread that runs through the main claim together with all the alternative claims. To put this issue

at rest this early will conduce to clearing the way forward and making it possible to decide the other issues, hopefully, with relative ease.

[39] The first issue to note is that the agreement contains a clause that deals with the divisibility of the contract. Clause 3.3 reads as follows:

‘This transaction constitutes an indivisible sale of the interest and claims’.

‘Interest’ and ‘claims’, referred to above, were also defined in the agreement as follows:

‘2.6 The INTEREST means 100% (One hundred per cent of the Seller’s interest in the CORPORATION.

2.7 The CLAIMS mean 100% (one hundred per cent) all sums of whatsoever nature and owing to the SELLER by the CORPORATION on the EFFECTIVE DATE.’

[40] Clause 2.9. of the agreement, on the other hand defined the subject matter as ‘100% (One hundred per cent) the INTEREST and the CLAIMS’.

Furniture and inventory were defined in the agreement at clause 2.12 as, ‘the furniture and inventory as found in the residence erected on Erf 67 Swakopmund and listed in a separate Annexure’.

[41] The question for determination is whether the plaintiff is at large to cancel, as he purported to do, one portion of the written agreement, namely, the one relating to the furniture and inventory, and leave the one on the 100% member’s interest in the corporation intact? In other words, the question is whether the agreement in question was divisible.

[42] Ms De Jager argued that the plaintiff was entitled, as it were, to sever the agreement and choose to have one aspect of it enforced, namely, the one relating to the membership interest in the corporation, and on the other hand, cancel the one relating to the furniture and inventory, due to the defendants’ breach of same. It was her argument that properly read and construed, although



the agreement in question dealt with the concept of divisibility, same related only to the indivisibility of the 'interest' and 'claims', which have been defined above. Significantly, she further argued, there is no clause in the agreement that records specifically and unambiguously, regarding the indivisibility of the interest particularly in relation to the member's interest in the corporation of the one part and the furniture and inventory, of the other.

[43] I have read Mr Brandt's written submissions and he does not appear to have dealt with this aspect of the matter at all. In that regard, I will consider the submissions and case law Ms De Jager studiously referred to and relied upon. I will thereafter decide whether the law and the factual situation that obtains in this matter is in her favour.

[44] Ms De Jager, in the first instance, relied on *Collen v Rietfontein Engineering Works*<sup>1</sup> where the Appellate Division of South Africa, reasoned as follows on this subject:

'The remaining question is whether the contract between the parties was divisible or indivisible. In *Vorster Bros v Louw* (1910) TPD 1099, at 1113, DE VILLIERS, J.P., stated:

"The authorities are clear that redhibition would comprise all the objects sold if in the ordinary course of business or by the contract itself they form such a unity that the particular pieces cannot be separated from one another. . ."

The above passage appears to be a somewhat free translation of the cited passage in Dernberg. I venture the following translation of the latter passage: -

"When several articles are sold together and one of them is defective, the redhibitory action necessarily lies in respect of all, if they were bought in the business sense (im Sinne des Verkehres) as a unity or if at the time of entering into the transaction there was an express declaration (besonderer Erklaring) that they were being bought as a unity."

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<sup>1</sup> 1948 (1) SA 413 (A) at 434 to 435.

Dernberg does not explain what he means by the words “besonderer Erklaring” but there can be no doubt that if the Court is satisfied that several articles were sold and bought as a unity, then the redhibitory action would lie in respect of all the articles if the vendor failed to implement his contract in respect of one of the articles. Support for this view may be found in the Digest (21,1 34.1) and Voet (21.1.4) and the following comment of Brunnemann, who Voet cites – “Nam licet singulis rebus pretium dictum sit, censebitur tamen una venditio unam rem emere vel vendere non voluisse.” (For although a price has been stated in respect of particular articles, it will nevertheless be held that there is one sale, if it is established that the buyer or the seller would not have been willing to buy or sell one article). In such a case the redhibitory action lies in respect of all the articles sold, if one should turn out to be defective.

The question at issue really resolves itself into what was the intention of the parties at the time they entered into the contract. That intention may be expressly stated in the contract itself, in which case there can be no difficulty. The difficulty arises where there is no such express intention: where, in other words, the intention is a matter of inference. It is, presumably, such cases which have led some authorities, such as Pothier on the Contract of Sale, par. 229. to say that separate prices create a strong presumption that the contract is divisible. But although there is such a presumption it is, as, Pothier indicates, only a presumption and must give way to the stronger presumption, which results from the quality of the things sold, such as in the case of the sale of a pair of carriage horses. I should add that the presumption based on separate prices must, of course, also give way to an expressed intention and also to any proper inference that the parties intended that the several articles should be bought and sold as a whole.’ (Emphasis added).

[45] The court was also referred to *Exdev v Pekudei Investments (Pty) Ltd.*<sup>2</sup> There, the Supreme Court of Appeal of South Africa expressed itself in the following terms on this subject:

‘[10] At the outset it must be remembered that there is a distinction between the severance of a portion of a contract, e.g. on the grounds of vagueness or illegality, and recognising that a contract may contain several distinct and separate agreements

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<sup>2</sup> 2011 (2) SA 292 (SCA) at paras [10] and [11].

divisible from each other. As was explained in Wessels The Law of Contract in South Africa 2ed vol 1 para 1615:

“It is often loosely said that a contract is divisible or separable where, though in form there is only one contract, in reality, there are several distinct agreements entered into at the same time. There is, however, a clear distinction between this class of contract and a divisible or separable contract.

If the obligation is divisible in the material or physical sense, there is only one contract, though the subject matter may consist of several parts considered as one whole. The contract is entire, but the object of the obligation is separable into homogenous parts. If, however, there are several distinct obligations, we are not dealing with a divisible or separable contract at all, but with a collection of separate contracts embodied in one single writing or agreement.

Thus the sale of a quantity of coal to be delivered by instalments of so many tons is, as a rule, an entire contract in which the obligation is divisible. In such a case it may be the intention of the parties that a default on the part of the seller in delivering, or on the part of the purchaser in accepting, one instalment will not justify a cancellation of the contract. (*Simpson v Crippin*, 1872, 8 LRQB 14: 42 LJQB 28: 27 LT 546). On the other hand, the sale of Stichus and Pamphilus for 100 and 200 aurei respectively is in reality an independent sale of Stichus for 100 and of Pamphilus for 200 aurei (D. 45.1.29.pr).

[11] Where there is a sale of ‘several distinct and separate items, and a price is fixed to each, the contract as a rule, will be held to be composed of several agreements.’ Furthermore, the nature of the performance required under a contract can be of decisive importance, and a contract is usually divisible where it makes provision for separate or distinctive performances. Thus in *Middleton v Carr* 1949 (2) SA 374 (A) at 391 Schreiner JA, in concluding that an undertaking by a husband to pay his estranged wife a substantial sum of money was severable from a collusive agreement for divorce, said”

“But the fact that two agreements were made at the same time does not provide sufficient reason for treating them as in fact one agreement: to reach that conclusion it would be necessary to find some express or implied interlocking of their terms.”

[46] From the excerpts quoted above, it becomes clear that there is a general presumption that where there is a single agreement in respect of the sale and purchase of certain specified items, that that contract is indivisible or inseparable. That notwithstanding, there are, however, instances detracting from the general rule, from which the opposite may be held, thus raising a contrary presumption that the agreement is severable as it were. These circumstances are captured in the above quotations and I will not repeat them and thus engage in a work of supererogation as it were.

[47] In the instant case, I am in full agreement with Ms De Jager that the presumption that the agreement, in respect of the purchase of the members' interest, which in real terms is actually the sale of the immovable property and the sale and purchase of the furniture and inventory to the plaintiff, is in the peculiar setting of this case separable or divisible. In the first place, as she correctly argued, there were different clauses that dealt with these two items in the agreement. Secondly, two different prices were stipulated for the sale and purchase of these distinct and separable items recorded in the agreement. These provide *indicia* that the agreement consists of separate items for sale and is therefore divisible.

[48] Furthermore, it must be borne in mind that even the modes of delivery of these two distinct items, was different. The one may have been via the *traditio brevi manu* (delivery by the short hand) and the other, the *traditio longa manu* (delivery by the long hand). It would also be important to have regard to the provisions of clause 12, which deal with what is referred to as 'the subject matter'. In that regard, the subject matter related to the members' interest and not the furniture and inventory. I deal with this issue in more detail from paragraph [106] below.

[49] Another issue that should not sink into oblivion, as one considers this issue, is that in terms of the clause that deals with the indivisibility of the contract, namely clause 3.3, it is stated in clear and unambiguous terms that what is indivisible is the 'sale of the interest and claims', which are defined in the agreement. From that definition, it is clear as noonday that those items

referred to, deal exclusively with the sale relating to the members' interest and nothing at all to do with the sale of the furniture and inventory.

[50] I am of the considered view that if it had been the intention of the parties to render the sale of the immovable property inseparable from the sale of the furniture and fittings, they had every opportunity to do so and would accordingly have recorded same in very clear and unambiguous terms in the agreement. That they did not do so, and also considering the clear divisibility of the items, considered *in tandem* with the injustice that may be yielded with dealing with what is the sale of two separately identifiable and generally speaking unconnected items, save that the seller and the buyer are the same, is apparent.

[51] Properly considered in context, the sale of one has no direct bearing on the other. To then say, for argument's sake that because the sale of the furniture and inventory should, for compelling reasons advanced, fall away, then the sale of the immovable property should also fall away, would be disconcerting and at odds with the reason, propriety, convenience and more particularly, inconsistent with the parties' intention, as can be fathomed from their conduct and the words they chose to employ in the memorial they, of their own free will, volition and accord, reduced to writing and signed.

[52] In the premises, I am of the considered view, that on a mature consideration of all the facts applicable to the matter, from the view of the parties' intention, the practicalities and convenience attendant to this matter, this is a proper case, which admits of the divisibility of the agreement and I therefor hold that the agreement was divisible. The plaintiff's prayer to have the portion of the agreement relating to the sale of the furniture and inventory set aside, does not automatically translate to the conclusion that the sale of the immovable property is also detrimentally affected thereby.

Locus standi in judicio

[53] In his written heads of argument, Mr Brandt raised the issue that the plaintiff does not have the *locus standi in judicio* necessary to institute this action. He raised this issue as a point of law *in limine*. This issue was premised on the argument that from the evidence adduced by the plaintiff, there is no evidence that the money paid in respect of the furniture and inventory was paid directly by the plaintiff. It was accordingly argued that in the absence of evidence that it was the plaintiff and not other parties on his behalf, who did so then the plaintiff, should be non-suited therefor. In this regard, reliance was placed on the cases of *Mars Inc. v Candy World (Pty) Ltd*<sup>3</sup> and *Kommissaris van Binnelandse Inkomste v Van der Heever*.<sup>4</sup>

[54] Ms De Jager, for her part, attacked the validity of this point *in limine* on the basis that it should not be entertained at all by the court. Two particular reasons were raised in support of this proposition. First, it was argued on the plaintiff's behalf that this issue has, like a mushroom plant, just emerged, without notice, at the stage of making final submissions. It was argued that the issue was not identified as an issue for determination in the pre-trial order. Secondly, it was submitted on the plaintiff's behalf that to make an already bad situation worse, this issue was not even raised in the pleadings, specifically in the defendants' plea.

[55] I wish to deal with the plaintiff's first argument first. In this regard, it is vitally important to revisit the nature and function of a pre-trial report made by the parties, which in this case metamorphosed into a pre-trial order, once it had gained the court's imprimatur, with or without amendments effected or ordered by the court. I deal with this issue because Mr Brandt did not deny, nor could he properly deny that this issue was not raised in the pre-trial order as one in contention.

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<sup>3</sup> 1991 (1) SA 567 (A) at 575.

<sup>4</sup> 1999 (3) All SA para. 10; 1999 (3) SA 1051 (SCA).

[56] In this regard, I have stated some of the most important issues that were identified by the parties and subsequently endorsed by the court as issues for determination. I hereby confirm that the issue of *locus standi* is starkly absent from the pre-trial order. What is the effect of this? May a party, arrogate upon itself the right to deal with this issue notwithstanding that it was not included in the pre-trial order?

[57] This very question has recently been dealt with in the case of *The Board of Incorporators of the African Methodist Episcopal Church and Two Others v Petrus Simon Moses Kooper and Three Others*<sup>5</sup>, which can be said to be hot from the oven as it were. In that case, the court placed heavy reliance on sentiments powerfully expressed by Smuts J in *Scania Finance Southern Africa (Pty) Ltd v Aggressive Transport CC*,<sup>6</sup> where the learned Judge dealt with the pedestal in which pre-trial orders deserve to be placed in litigation.

[58] The learned Judge commented on the matter as follows:

‘This approach has now been trenchantly reinforced by rule 37(14) when a matter is subject of case management and for good reason. The parties have after all agreed upon the issues of fact and law to be resolved during the trial and which facts are not to be disputed. That agreement, as occurred in this matter, is then made an order of court. Plainly, litigants are bound by the elections they make when agreeing upon which issues of fact and law are to be resolved during the trial and which relevant facts are not in dispute when preparing their draft pre-trial order. It is, after all an agreement to confine the issues, which is binding upon them from which they cannot resile unless upon good cause shown. It is for this reason that the rule-giver included rule 37(14). To permit parties without a compelling and persuasive explanation to undo their concurrence to confine issues would fundamentally undermine the objectives of case management. It would cause delays and the unnecessary expense of an application and compromise the efficient use of available judicial resources and unduly lengthen proceedings with the consequent cost implications for the parties and the administration of justice. (Emphasis added).

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<sup>5</sup> (I 3244/2014) [2018] NAHCMD 5 (24 January 2018).

<sup>6</sup> (I 3499/2011) [2014] NAHCMD 57 (19 February 2014).

[59] It is clear that the circumstances of this case are not on all fours with the matter before Smuts J. There is no attempt, in this case, by the defendants, to bring an application or some other judicial proceeding to change or extend the reach of the issues for determination. All that they have done, is to totally ignore the pre-trial order and to raise issues at the end of the trial for the first time, thus literally throwing the pre-trial order, to some extent, in the trash basket.

[60] In dealing with a similar approach in the *Board of Incorporators* case, where the defendants raised the issue of capacity to sue for the first time, at the stage of absolution from the instance, the court commented as follows at para [70] to [74]:

‘[70] In this case, I am of the firm view that there is no reason proffered as to why the issue of capacity to sue, should now fall for determination when the parties did not agree on it as an issue for determination in the first instance. Secondly, these issues were not submitted to the court for a variation of the court order. Such an application, in my firm view, should be accompanied with sound and compelling reasons why it is necessary for the parties, who are already in the filed of play, with the length and breadth of the issues identified well in advance, at the behest of the defendants, should, at the twelfth hour, (not even the eleventh, in the context of this case), so to speak, seek to change the goal posts and the nature and dimension of the issues for determination.

[72] In this regard, parties should be made aware that once the pre-trial report is endorsed, they have themselves limited the issues that the court will be called upon to determine and that they, in a sense, nail themselves to the cross, as it were, of the issues identified for determination. This is an exercise that they may not easily wiggle out of, seeing as it carries the court’s stamp of approval by being made an order of court.

[73] To depart therefrom, it is clear that a full, proper and convincing explanatory application should be timeously made to the court for the shifting of the goalposts as it were. At the same time, especial care should be taken in making doubly sure that the other party, not initiating the variation, is not negatively affected thereby, as in this case, when it is suddenly faced with an issue in argument, which it had no idea would,



at any stage, loom large for determination. To this extent, even the court is ambushed and is called upon to deal with issues it had no inkling would become live for determination. Such a scenario must be avoided at all costs.

[74] A party to a trial should not blow hot and cold regarding the issues for determination. If the issues are finally committed to writing and have been made an order of court, it hardly lies in the mouth of a party to start approbating and reprobating at the same time. Certainty in this regard there is need, as the identity of the witnesses that may be required to be called or subpoenaed, together with the determination of the days required for the trial rest to a large extent, on the nature and extent of the factual and legal issues identified for determination.’ See also *De Beers Marine Namibia (Pty) Ltd v Lange N.O. And Others*.<sup>7</sup>

[61] In view of the foregoing considerations, it becomes clear, that the issue of *locus standi*, was not at all identified by the parties as an issue for the court’s determination. In that event, the defendants cannot unilaterally impose it upon the opponent and the court as an issue to deal with in this fashion and particularly so late in the day. As indicated, had this issue been raised timeously, the plaintiff may have been able to deal with it and may have called the witnesses necessary to canvass the matter. This, he was denied by the defendants’ silence and inaction.

[62] What makes this matter worse, and I move on to the plaintiff’s second point, is that this is an issue that was not even pleaded by the defendants in their plea. As a result, the plaintiff was denied an opportunity of dealing with it at pleading stage and is suddenly called upon to deal with it in closing argument for the very first time.

[63] I find it appropriate to briefly deal with the nature and function of pleadings in litigation. In *Zamnam Exclusive Furniture CC v Josef Stephanus Lewis and Another*,<sup>8</sup> this court dealt with the function of pleadings. In this

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<sup>7</sup> 2014 (2) NR 437 (HC).

<sup>8</sup> (I 4268/2010) [2016] NAHCMD 298 (30 September 2016).

regard, a number of cases were cited in support. These included *Spedding v Fitzpatrick*,<sup>9</sup> where Lord Justice Cotton said the following of pleadings:

‘The old system of pleading at common law was to conceal as much as possible what was going to be proved at the trial; but under the present system we ought to see to it that a party so states his case that his opponent shall not be taken by surprise. I take it that this is a principle of pleading which applies as well to our courts as to the Supreme Court of Judicature. It follows therefore that the plaintiff must set out his facts with such particularity that the defendant will know exactly what facts he will have to meet so as to enable him to disprove the correctness of the facts alleged against him.’

[64] In *Minister of Agriculture and Land Affairs and Another v De Klerk and Others*,<sup>10</sup> a case also cited with approval in *Zamnam*, the court reasoned as follows about the function of pleadings:

‘It is trite that the parties are bound by their pleadings – the object thereof being to enable the other party to know what case has to be met. It is impermissible to plead one particular issue and then seek to pursue another at the trial.’ (Emphasis added).

[65] From a local perspective, this court dealt with this issue in the following terms in *Courtney-Clarke v Bassingthwaite*,<sup>11</sup>

‘Secondly, it is trite that the pleadings define the issues between litigants and in the trial, parties should be confined thereto.’ (Emphasis added).

[66] In *Zamnam*, having had regard to the foregoing authorities, the court summed up the position in the following language at para [14] and [15]:

‘[14] What is the import of all the foregoing? In my view, the principle that is clearly established from the authorities cited above is that pleadings are designed to mark the exact boundaries of the issues that the court will be required to determine at trial. In this regard, both parties, namely, the plaintiff and the defendant are required to plead

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<sup>9</sup> 38 Ch D at 410.

<sup>10</sup> 2014 (1) SA 212 (SCA) at para 39.

<sup>11</sup> 1990 NR 89 (HC) at 95.

their respective cases fully and concisely so as to leave the other protagonist and the court in no doubt as to the exact nature and scope of the case and the evidence that may be required to establish the claim or the defence as the case may be.

[15] For that reason, it would seem to me that the pleadings constitute the Alpha and Omega of the case, as it were. In this regard, the issues to be determined by the court, both factual and legal, should find their life, being and continued existence in the pleadings and nowhere else. Issues extraneous to those recorded in the pleadings, regardless of how interesting, causally connected, even if like Siamese twins, to the issues clearly spelt out in the pleadings, should, in my respectful view, not be entertained by the court'. (Emphasis added).

[67] It would appear, from the foregoing, that the defendants have breached the cardinal principles of pleading and the procedures to be followed at trial by introducing for the first time, in closing argument, issues that were never pleaded, nor, I may necessarily add, submitted to the court for determination during the case management stage. Where a party chooses to confine issues for determination in the deep recesses of his or her bosom, until the last minute of the trial or the last stage before judgment, thus laying an ambush both for the court and the opponent, he or she should be faced with one unequivocal and firm response, namely, a stern refusal by the court to entertain that issue or issues. This, in my considered view, is the fate that must await the defendants in this matter.

[68] What compounds issues in this matter is that from the portions quoted of the pre-trial order recorded above, it is clear that the plaintiff actually accepted that the amount of N\$ 400 000 was paid by the plaintiff in compliance with the agreement. It is accordingly impermissible for a party, to then at trial, make a complete *volte-face* in this regard. It must actually carry the greatest weight of condemnation by the court, which I hereby do express.

[69] In the premises, I come to the inexorable view that due to the defendants' iniquitous action of raising issues not pleaded and also not included in the pre-trial order, the court must refuse to entertain this issue, thus sending a clear

and unambiguous message that the rules matter and must be followed to the letter, failing which a heavy price may have to be paid. This is the price fitting for the defendants to pay in this matter for their actions, which amounts to them sending both the plaintiff and the court on a wild goose chase, as it were. A strong message must be sent that parties will not be allowed to canvass issues not pleaded nor those that have not been sanctioned by the pre-trial order as open for determination at the stroke of the pen of one of the parties.

### Analysis of the evidence and evaluation thereof

[70] It is clear from the discordant accounts testified to by the parties' witnesses that their evidence is at complete variance. What must a court do in circumstances such as this, to arrive at a conclusion on where the probabilities lie at the end of the case, and which would eventually determine whether the party on whom the onus rests, has been able to discharge same?

[71] In *Ndabeni v Nandu*,<sup>12</sup> this court dealt with the proper approach to such issues. The court referred to the *locus classicus* judgment of *SFW Group Ltd v Another v Martell Et Cie and Others*,<sup>13</sup> which has been cited with approval in this jurisdiction in the case of *Life Office of Namibia Ltd v Amakali*.<sup>14</sup> Nienaber JA, who wrote the judgment for the majority in the *SFW* case, stated the applicable principles as follows:

'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's candour and demeanour; (ii) his bias, latent and blatant; (iii) internal contradictions in his evidence; (vi) external contradictions with what was pleaded or what was put on his behalf, or with established

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<sup>12</sup> (I 343/2013) [2015] NAHCMD 110 (11 May 2015).

<sup>13</sup> 2003 (1) SA 11 (SCA) at p. 14H -15 E.

<sup>14</sup> 2014 NR 1119 (LC) p. 1129-1130.

fact 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 . . .’

[72] I will, at this juncture, deal with the evidence of both protagonists, with a view to deciding on their credibility and which of the irreconcilable versions adduced the court should lend credence to. In coming to a conclusion on this matter, the court will put to use the methods suggested by the court in the above case, or those of them that may prove applicable to the case at hand.

[73] The plaintiff, it must be accepted, is a very old man. That, notwithstanding, he adduced his evidence matter-of-factly and in a chronological manner. In my view, he stood up well to cross-examination by Mr. Brandt. He was, in his evidence, constant as the Northern star. There is one blemish, if blemish it is, on his evidence, and on which Mr. Brandt capitalised. This related to the question whether the defendants’ children were present on the occasion when the defendants were leaving for Germany and were packing the property in the house in readiness for the plaintiff to move in.

[74] In his evidence, the plaintiff testified that when he came to the defendants’ house, he saw the defendants’ children playing around, as their mother was busy packing. In cross-examination, it was put to the plaintiff that his evidence in this regard, was incorrect, as the defendants’ children were not in Namibia but were left behind in Germany on that particular trip. In proof of this, the defendants produced the children’s passports, which corroborated their version in that regard.

[75] I am of the considered view that it is clear that the plaintiff was mistaken on this aspect of his evidence, as shown by independent evidence. His recollection of the event was, for that reason, incorrect. But should that reduce him to a liar so that the court should have no regard to the balance of his evidence, particularly that which could not be discredited in cross-examination? I think not.

[76] It must be recalled that the plaintiff is not a young man at all. He is a man of mature age and generally of venerable disposition. Other than this blemish in his evidence, one cannot fault the balance of his evidence, in my view on any other score. As recorded above, he was otherwise a credible witness and who was remarkably consistent in his version. The incorrect rendition that he made in his evidence regarding the children, should, in my view, be attributed to a mistake in recollection and not a deliberate effort on his part to throw dust into the court's eyes. It must, in this connection, also be stated, that the issue of the presence or indeed the absence of the children, was, neither material, critical nor decisive to any of the key issues in the trial. It was really colourless, so to speak, on the material issues in need of determination by the court.

[77] In *S v Oosthuizen*,<sup>15</sup> the court dealt with the issue arising in the following terms:

'Plainly, it is not every error made by a witness that affects his credibility. In each case, the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness's evidence.'

[78] I have dealt with this issue and come to the conclusion that the witness cannot be said to have been deliberately lying and this was not put to him or even suggested, in any event. The fact of his age and time when the incident happened, on the one hand, namely in 2011, and on the other hand, when he adduced evidence, in 2017, around six to seven years, is certainly a long time by any standards. *Ceteris paribus*, human memory does not improve with time. I am of the view that this mistake cannot have the effect of the court debunking the plaintiff's evidence in its entirety based solely on this memory lapse and I so find.

[79] In this regard, I must point out that the first defendant admitted in cross-examination that the plaintiff was mistaken in stating that the children were

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<sup>15</sup> 1982 (3) SA 570 at 576 G.

present and attributed this mistake to the plaintiff's age, which is in line with my own finding in this regard.

[80] The first defendant, who was the main witness for the defendants, did not impress me as a credible witness. In the first place, he attempted to introduce evidence that contradicted the parol evidence rule, which is not permissible in this jurisdiction. He argued that in Germany, where he practices law, this is allowed and is normal. He had to be reminded a number of times about the inadmissibility of the evidence he sought to tender. In this regard, I cannot treat the 1<sup>st</sup> defendant as a normal witness as he is an admitted lawyer and should be aware of the impermissibility of what he was trying to do.

[81] Secondly, he testified that the plaintiff refused to sign the acknowledgment of the receipt of the property and he did not understand why this was the case. On the same breath, he testified that the plaintiff was happy with the property he found in the premises, which is contradicted not only by the plaintiff's evidence, but also by the letters, which were admitted in evidence. This did the defendant's evidence a major, if not a shattering blow, as far as his credibility is concerned.

[82] In this regard, it was clear from the plaintiff's evidence that he was unhappy with the furniture delivered to him right from the onset and he registered his protestations and hence refused to append his signature to the receipt he was being asked to sign by the defendants. In this regard, it seems to me nonsensical, as the first defendant sought to do, to expect the plaintiff, who was not the owner of the furniture and inventory, to prepare the annexure referred to in the agreement. His evidence that he did not know the furniture, save the fleeting visit he made to the defendants' home, is consistent with the probabilities of the case and hence acceptable to the court and must be accepted therefor.

[83] The uncontested evidence was that most of the furniture and inventory was removed from the house and the first defendant was hard pressed to explain why that was the case as the plaintiff had paid a whopping N\$400 000.

That notwithstanding, the defendants were busy, removing the majority of items from the house to some storage facility some 200 or so metres, away from the house. The plaintiff's evidence that he found the defendant's wife removing a mirror and protested at that action, was not explained, as the latter was not even called as a witness. His protestations were recorded but there was, in my view, no reasonable explanation for this, as it seems to have gone against the agreement of the parties.

[84] I must, in this regard, point out that the 2<sup>nd</sup> defendant was not called as a witness, particularly to explain and put her version of the events to the court. In this regard, the plaintiff adduced evidence that touched upon her and in the circumstances, I am entitled to draw an adverse inference against her, though being a party to the proceedings but not availing herself as a witness.<sup>16</sup>

[85] On a number of occasions when the first defendant found his back against the wall, his ready response was to allege, what one may call the 'German card' as it were, namely, that things in Germany are done differently from this jurisdiction, which I find and hold to be a lame excuse that did not serve to endear the first defendant in so far as his credibility was concerned. I have made reference to the issue of the attempt to import 'facts' that sought to negate the written agreement. He, as a lawyer, entered into a transaction in this jurisdiction and thus submitted himself to the law of this land. He cannot then be allowed to introduce some other law in the circumstances.

[86] Another example of how he tried to avoid giving straightforward testimony and eventually attempted to hide behind how differently things are done in Germany, was in relation to who came to recommend Mr Ahrens to draft the agreement. This is how the battle of wits between the first defendant and Ms De Jager unfolded:

'Q: Who recommended Mr Ahrens to draft the agreement? Gravenkamp or the plaintiff?

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<sup>16</sup> *Elgin Fireclays Ltd v Webb* 1947 (4) (SA) 744 (A) at 745. See also *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621 (AD).



A: It was both. Gravenkamp spoke for the plaintiff.

Q: You can't use one name for another. You must be specific.

A: I don't know. They came to me in one unit.

Q: You presented it as a fact that it was one and not the other?

A: In Germany, if one appears, he appears for the other. You mention the other.

Q: Why not mention that it was so and so specifically?

A: In Germany, it is vice versa.

Q: I put it to you; this is nothing to do with the law. It is a factual issue.

A: This is not a direct speech.

Q: Where does it say that?

A: In Germany.'

[87] It is clear, from the foregoing, that the defendant was being deliberately evasive and failed to answer clear and direct questions and used Germany as a ruse for his failure to answer the questions posed to him clearly and truthfully. In fact, on a number of occasions, he answered questions which had not been put to him, a sign that he was anticipatory in his answers, which did not do him a world of good as a witness worthy of credit.

[88] The first defendant was at pains to try to convincingly explain the pictures that the plaintiff captured of the premises before the handover of the property and how bare the house looked after the defendants had left. It was like a *tsunami* had come and swept most of the furniture and other items away. This was an objective fact that seemed to cement the plaintiff's position and correspondingly served to weaken the credibility and believability of the defendants' story.

[89] These objective facts, served, in my view, to break the defendants' case to smithereens. The plaintiff's recorded complaint that for all the money he paid, the defendants even failed to leave a roll of toilet paper in the bathrooms, was

understandable in the circumstances and was an unrehearsed response that served to show the level of hurt, disillusionment and despair he had reached, seeing the prospect of his money going down the drain and for a song, as it were.

[90] Another issue that does not paint the first defendant in a positive light relates to the issue of the inventory. It was put to him that Mr Ahrens required him to hand over the inventory. His answer was that the inventory was requested from 'all of us', i.e. including the plaintiff. He confirmed that the following day, Mr Ahrens again asked for the inventory but denied when put to him that he undertook to provide it when he arrived in Germany, as he did not have enough time to prepare one before departure. This the defendant denied, claiming that they had enough time to submit it as they had taken photographs of the premises as both parties did not want the inventory list anymore.

[91] I interpose and mention that this issue was never put to the plaintiff in cross-examination and was only mentioned for the first time by the defendant in cross-examination, and under intense and excruciating cross-examination, I must necessarily add. It was a face-saving version that was also self-serving to the defendants. On the authority of *Small v Smith*,<sup>17</sup> and *South African Rugby Football Union v The President of South Africa*,<sup>18</sup> this issue must be regarded and consequently treated as an afterthought and I proceed to do so. It is inconceivable that the plaintiff would have agreed for the pictures to take the place of the inventory, thus jettisoning that which was specifically recorded in the written agreement.

[92] It was, in any event, put to the first defendant that if his version in this regard was true, Mr Ahrens would have changed the agreement to reflect the parties' latest intention. His answer was to agree but hastening to mention that both parties did not want this. When taxed as to why he then signed the agreement in its original form, requiring that the list be attached, if both parties

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<sup>17</sup> 1954 (3) SA 434 (SWA) at 438.

<sup>18</sup> 2001 (1) SA 1 (CC) at p. 36-38 paras [61] to [64]. See also *Swakopmund Superstar v Soltec* CC (I 160/2015) [2017] NAHCMD 115 (18 April 2017).

had had a change of heart as alleged by him, the first defendant reverted to the Germany refrain again, namely that maybe that is how it is done in Namibia but in Germany, the parties, if they know what they want to sell, they can go against what they have recorded and signed in their written agreement. I very much doubt that the defendant's version is an accurate representation of German law, though I have no knowledge of how it works and it was not properly brought to this court and proved as a fact, it being foreign law.

[93] Of particular interest, regarding the issue of the inventory, is the official translation of a letter written by the defendant, dated 9 June 2011, addressed to Ahrens & Associates. In para1, the defendant says:

'On enquiry, Mr Conrad himself specifically had chosen to do without the inventory list and believed that the photographs would suffice.'

At para 3 of the same letter, the defendant expressed himself as follows:

'In light of the fact that the purchaser did not want the inventory list and was not in possession of the photographs he had specifically taken for the purposes of hand-over, incorporating the related negotiation and documentation, could not take place.'

[94] It is clear that the defendant's position in regard to this issue, is convoluted. He said one thing during cross-examination, alleging that the parties did not want the inventory and it is clear that the plaintiff denied the suggestion that he did away with the inventory. This places the defendant's evidence in a precipice, suggesting that it be consigned to pigeonhole of being not worthy of credit. His position on this critical issue was neither clear nor consistent, and thus unimpressive. It is accordingly rejected.

[95] It was the defendant's further evidence in heated cross-examination that the parties' spoken word goes and carries more weight than what they have reduced to writing and have signed in Germany. This reaction clearly nailed the defendant's colours to the mast. As Ms De Jager put to the defendant in cross-

examination and in evidence, this evidence was improbable and I wholeheartedly agree.

[96] Furthermore, it was the defendant's evidence under cross-examination that the parties agreed that they would not submit the inventory list but that photographs, which were captured, would replace the list. When asked about where the said photographs were, the first defendant expressed ignorance of same. How that can be the case when reliance is to be placed on those photographs to complete the identity of the items sold just beggars belief.

[97] A further reason for rejecting the first defendant's evidence as not worthy of credit relates to a confirmatory affidavit that he filed in support of an affidavit filed by his legal practitioner of record. This was in opposition to an application filed by the plaintiff to found and/or confirm jurisdiction. In the opposing affidavit, the defendants' legal practitioner of record stated the following at para 5.4 of the said affidavit:

'The Applicant relies on the written agreement annexed as "RC1" in the Applicant's Founding Affidavit, in an attempt to recover N\$ 400 000-00 from the Respondents herein. No mention is made of the amount. The agreed purchase price in the agreement as referred to is N\$2,4 Million. In addition to the foregoing, there is no mention of any obligation to compile an inventory as per "RC1".

[98] It is a historical fact that in his evidence, the first defendant departed from that evidence as it is clear that the agreement in issue makes a specific reference to the amount of N\$ 400 000. To this extent, the first defendant perjured himself in making common cause with the founding affidavit, whose contents he confirmed under oath. There are a few other issues, which on account of the length of the judgment, I am unable to include but which inexorably point in the direction that the first defendant was a poor witness, whose credibility was torn to shreds and did not depict himself as a witness of credit.

[99] The other witnesses for the defendants, Messrs. Schlusche and Rozeriu did not know much about the furniture and they appeared to have been mistaken on the contents of the house before the handover of the property was made. There is therefor very little value that can be said to have been added by them to the first defendant's impoverished evidence in any event. In particular, it became clear that Mr Schlusche, who was alleged to have been present during the discussions between the plaintiff and the defendant, was not party to the conversations between the first defendant and the plaintiff as he was busy removing the items from the house to the garage where same was stored. The evidence of these witnesses added very little, if any value to the defendants' case, and I can put this issue no higher.

[100] In point of fact, the letters exchanged by the parties, considered in context, serve to detract materially from the version testified to under oath by the first defendant, regarding the agreement not to have the list prepared. It is clear that the plaintiff refused to append his signature to a document indicating receipt of the contents of the house in good order, despite the insistence of the defendant before the latter departed because from a very early stage. The plaintiff was of the opinion that he had been short-changed by the defendant as the property, i.e. the furniture and inventory he was purchasing, was not identified.

[101] In the circumstances, I find for a fact that the plaintiff, as undertaken, did pay to the defendants as amount of N\$ 400 000 in respect of the furniture and inventory, which was supposed to be left behind by the defendants when they left for Germany. I also find for a fact that the garden furniture and camping equipment was removed by the defendants. Also removed by them or on their instructions, were pictures, paintings, ornaments, wall clocks, lamps, décor, kitchen utensils, linen and bedding. Whereas the plaintiff was shown a functional home when he did the inspection, the value of what was he left with, namely N\$ 20 830, was nothing short of a horror sight and nowhere near the amount of N\$ 400 000 he had paid. He certainly did not get his money's worth from every perspective one looks at what was delivered to him in contradistinction to the fortune he paid. I hold all these for a fact.

[102] I also find that the evidence of the plaintiff's expert witness, Mr Kriner, whose evidence was left totally unhinged, in my view should stand. He testified on the value of the property that was left behind at the plaintiff's house as being worth N\$ 20 830. There was no evidence adduced by or on the defendants' behalf, to gainsay this evidence and as such the said evidence remains uncontradicted and must accordingly stand and is accepted by the court.

[103] The question that must now be answered is whether the defendants' conduct as stated above amounted to a repudiation of the agreement, such as to entitle the plaintiff to cancel same. In *Mobile Telecommunications Ltd v Eckleben*,<sup>19</sup> the Supreme Court dealt with what constitutes a repudiation of a contract in the following terms at para [14]:

‘ . . . The test to determine whether conduct amounts to repudiation has been stated as being “whether fairly interpreted it exhibits a deliberate and unequivocal intention no longer to be bound”. In *Ponisammy and Another v Versailles Estates (Pty) Ltd*, the following passage from the judgment of Devlin J is cited with approval:

“A renunciation can be made either by words or by conduct, provided it is clearly made. It is often put that renouncing must evince an intention not to go on with the contract. The intention can be evinced either by words or conduct. The test of whether an intention is sufficiently evinced by conduct whether the party renouncing has acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract.”

[15] . . . In *Tuckers Land and Development Corporation (Pty) Ltd v Hovis*, Jansen JA referring to the test in the *Universal Cargo Carriers Corporation* case, stated:

“The test here propounded is both practicable and fair, and this is the test which I propose to apply in the present case. The question is therefore: has the appellant acted in such a way as to lead a reasonable person to the conclusion he does not intend to fulfil his part of the contract? Obviously, the reasonable person must be placed in the position of the respondent . . .”

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<sup>19</sup> 2017 (2) NR 580 (SC).

[104] I am of the considered view that a full and sober consideration of the evidence and the manner in which the defendants acted, considered *in tandem* with the agreement that they signed and the money that they received for the furniture and inventory, there can be no doubt in my mind that the removal of the majority of the furniture and other property that would have formed part of the inventory amounts to a repudiation of the contract by the defendants. This, in my view entitled the plaintiff to reasonably conclude that the defendants were no longer willing to be bound by the contract they had signed.

[105] An argument was advanced on behalf of the defendants to the effect that the plaintiff did not comply with the provisions of clause 12.2 of the agreement before cancelling the agreement. This clause called upon the plaintiff in this case, to give the defendants 14 days' notice in writing to remedy the breach first before purporting to cancel the agreement. It was accordingly argued on the defendants' behalf that the plaintiff is accordingly not entitled to the relief he seeks.

[106] Ms De Jager argued that this clause does not apply to the furniture and inventory and for that reason has no bearing on the plaintiff's present claim whatsoever. I agree. In this regard, it is important to quote the said clause, entitled 'DEFAULT BY SELLER' in full. It reads as follows:

'12.1 It is recorded and agreed that in purchasing the SUBJECT MATTER, the PURCHASER is relying on the representations, warranties, undertakings and indemnities given by the SELLER as herein set forth.

12.2 Should the SELLER breach all or any of the terms hereof or of the warranties or representations, then the PURCHASER shall (without prejudice to all or any other rights that he may enjoy in consequence of such breach) be entitled to cancel this agreement.

12.3 The PURCHASER shall not be entitled to cancel this Agreement in the circumstances provided for in Clause 12.2 until he or his agent shall have first given the SELLER notice in writing, requiring the SELLER to remedy such breach within a period of 14 days of the receipt by them of the said notice.'

[107] Properly read in context, it is in my view clear that the clause applies strictly to default in respect of 'the SUBJECT MATTER' and that much is clear from clause 12.1. In clause 2.9 of the agreement, the 'subject matter' of the sale is defined as '100% (One hundred percent) the INTEREST and CLAIMS.' In clause 3 of the same agreement, it is clear that the agreement applies to two separate aspects, namely the SUBJECT MATTER and THE FURNITURE & INVENTORY (LAST MENTIONED SEPARATELY LISTED IN AN ANNEXURE).

[108] For the foregoing reasons, it becomes clear that the subject matter does not include the furniture and inventory. A reading of clause 12 shows indubitably that any default in that case referred exclusively to the subject matter and had nothing to do with the purchase of the furniture and inventory. It is for that reason that I am of the considered opinion that Ms De Jager is eminently correct and Mr Brandt is correspondingly wrong in his reliance on this clause. In any event, this issue was never pleaded by the defendants, thus depriving the plaintiff, of the necessary notice, to deal with it at the appropriate time. Neither, I must add, was it raised with the plaintiff in cross-examination. The defendants attempt to use this as a sword when it was never even introduced in the pleadings as a shield, so to speak, must accordingly be rejected as I hereby do.

[109] Ms De Jager also argued, in the event her submissions recorded above did not carry the day, that even if the plaintiff had given notice, there was no prospect of the defendants remedying the breach for the reason that they left for Germany, with the property forming part of the furniture and inventory locked away. I do not think it is necessary to deal with this issue in the light of the clear and unambiguous wording of the agreement as discussed above.

[110] One thing is, however, certain as death and taxes and it is this - the plaintiff, by letter dated 6 June 2011, authored by Messrs. Ahrens & Associates on his behalf, cancelled the portion of the agreement relating to furniture and inventory in clear and unambiguous terms. A tender for the return of the



furniture and inventory received, was also made in this letter. In this regard, at the top of page 3 of the letter under reference provides the following:

‘On instructions from Mr Conrad we have therefore been instructed to inform you, as we hereby do, that you have breached one part of the agreement, in our opinion a divisible part of the agreement, by not having delivered to Mr Conrad all the furniture and inventory which he purchased from you for n\$400 000.00.’

[111] It remains for me to comment, however, that it was ethically improper for Mr Ahrens to have written the letter in question on behalf of the plaintiff. I say so for the reason that it is clear that he initially acted on the instructions of both parties in drafting the agreement in what was clearly a non-litigious matter at the time. When issues of breach of contract arose, however, and the matter assumed a litigious trajectory, Mr Ahrens should have withdrawn and referred both parties to find alternative lawyers to represent them thenceforth. Happily, it does not seem that he did any more after the letter referred to above.

[112] In support of the above proposition, the learned author Ingrid Hoffman, in her work entitled, *Lewis & Kyrrou’s Handy Hints on Legal Practice*,<sup>20</sup> says the following at p. 35:

‘A distinction is sometimes drawn between litigious and non-litigious matters. Whilst it is clear that you cannot act for two opposing parties in an actual or contemplated litigation, in most jurisdictions there is no absolute rule precluding you from acting for both parties in non-litigious matters. However, it is generally unwise to do so and in certain circumstances, it might be misconduct to do so.’

[113] At p. 39, the learned author proceeds and states that, ‘Even if it were originally proper for you to act for both parties to a transaction, once a dispute arises between the parties, you must cease acting for one of them. In most cases, you will need to cease acting for both of them.’ (Emphasis added).

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<sup>20</sup> Lewis & Kyrrou’s Handy Hints on Legal Practice, South African Edition, Lexis Nexis, 2004.

I will say nothing more of the matter as the comment was meant to be a guide, particularly to young legal practitioners, who may find themselves caught in the horns of such a dilemma, so to speak.

[114] In this regard, Mr Brandt had argued that the plaintiff did not give the defendants notice of cancellation of the agreement. For this proposition, he relied on some cases, one of them being *Van Zyl v Roussow*.<sup>21</sup> I am accordingly satisfied, contrary to his argument, that the plaintiff did give notice to the defendants as required in law although it does not seem to me, as I have found, to have been in terms of the agreement. No provision was made for the cancellation regarding the furniture and fittings as I have recorded earlier above. This may have been done as a matter of course and *ex abundanti cautela*, (out of the abundance of caution).

[115] In this regard, I am of the considered opinion that the plaintiff alleged and proved repudiation as required of him in law. In this connection, I have found that the defendants' conduct, objectively considered, evinced a clear and settled intention no longer to be bound by the contract. In this regard, the plaintiff, as found immediately above, elected to terminate the contract and communicated this election to the defendants as recorded above. This puts paid the argument to the contrary by Mr Brandt.

[116] In view of the foregoing, I am of the considered opinion that the plaintiff was able to discharge the onus thrust upon him. In my considered opinion, a case for the grant of the relief sought was made out on a balance of probabilities. On the other hand, the defendants' case was very poor and vacillating. Despite his best efforts, Mr Brandt could not stitch up the huge perforations and loopholes to the defendants' case that required clear and persuasive answers that only his clients could give. This was not forthcoming until the curtain on the entire trial was closed.

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<sup>21</sup> 1976 (1) SA 773 (NC) 777-778.

### Procedural issues

[117] I am in duty bound to deal with two issues, as a matter of comment in this matter. The first relates to comments that were solicited by Mr Brandt from the defendant regarding certain portions of the plaintiff's witness' statement, which I disallowed. The second issue relates to the closing submissions filed on behalf of the defendants. I will deal with the first issue first.

#### *Portions of plaintiff's witness put to defendant during the latter's sojourn in witness box*

[118] After the defendant had finished reading his statement into the record as required by rule 93(3), before he could be cross-examined by Ms De Jager, Mr Brandt solicited comments from the defendant regarding certain portions of the plaintiff's witness' statement. As indicated, I ruled this approach to be out of order for the reason that this raised a potential that the defendant would give answers in respect of matters which the plaintiff could no longer be called to come and deal with, having been properly excused.

[119] I found this approach, not only not in keeping with the rules and normal procedures of the conduct of a trial, but also potentially prejudicial to the plaintiff because the proper manner of dealing with instructions on the plaintiff's witness's statement, is by cross-examination, where the defendant's version is put to the plaintiff. Where that is not done at the appropriate time, one cannot, regardless of how badly one's case is disintegrating, then take advantage and put questions to deal with issues not raised in cross-examination once the plaintiff has been released and cannot be able to deal with those issues.

[120] If such a procedure was allowed, there would be no end to litigation as the plaintiff may then be entitled to be called to re-open his case, entailing further cross-examination, which may itself raise new issues that were never traversed at an earlier stage. I do hope that this judgment will assist in clarifying the permissible and impermissible in this regard. The introduction of witnesses' statements by the new rules has not changed the rules of the game as it were,

such as to allow the new set of questions that Mr Brandt, in a genuine desire to advance his client's case, sought to pursue. These are the reasons I declined the line of question adopted on the defendants' behalf.

### *Compliance with Rule 130*

[121] The last issue relates to the provisions of rule 130, which deal with the citation of foreign authority. The said rule reads as follows:

'Subject to Article 140(1) of the Namibian Constitution, where a legal practitioner in his or her heads of argument or any other written submissions or oral submissions relies on foreign authority in support of a proposition of law –

- (a) he or she must certify that he or she is unable after (*sic*) diligent search to find Namibian authority on the proposition of law under consideration; and
- (b) whether or not Namibian authority is available on the point, he or she must certify that he or she has satisfied himself or herself that there is no Namibian law, including the Namibian Constitution, that the foreign authority is said to establish.'

[122] In the instant case, Mr Brandt, for the defendants seems to have done a remarkable work in doing his research. In his written submissions, he quoted an unprecedented whooping 126 cases from South Africa and certified that despite a diligent search, he could not find Namibian authority on the legal propositions canvassed. This is simply incorrect as there are cases in this jurisdiction that deal with some of the legal propositions he relied on.

[123] In this regard, this court has commented on the need for legal practitioners to take the certificate in terms of this rule seriously and why this should be so. In *Quenet Capital (Pty) Ltd v Transnamib*,<sup>22</sup> the court remarked on certificates willy-nilly filed by some practitioners, as follows:

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<sup>22</sup> (I 2679/2015) [2016] NAHCMD 104 (8April 2016) at para [32] – [34].

[32] I note that most practitioners do not pay heed to the latter certification at all. That should not be the case. In relation to the former, it must be mentioned that the requirements of this rule are not pedantic and a mere shibboleth or religious incantation to be mumbled as a magic wand. The rule is to ensure homogenous growth and development of autochthonous jurisprudence and also to avoid conflicting judgments ushered in by foreign judgments which may unwittingly filter into our jurisprudence and bring uncertainty and hence confusion.

[33] It is incorrect for a legal practitioner to rely on foreign authority when local authority on the subject abounds. In the instant case, most of the cases relied on by the applicant's legal representative were obtained from the Republic of South Africa and they relate to legal propositions which abound in this jurisdiction. That this is the case can be seen from the local case law that decorates this judgment.

[34] Mere lip service to the requirements of rule 130 will not do. Practitioners must appreciate that the court takes and is entitled to take their word, including any certification by them on the face of it and as a bank guaranteed cheque. This is so because they occupy an especial position of being officers of the court. If the court must start investigating the true circumstances behind a legal practitioner's certificate, it is a sign that we have tough times ahead and that a legal practitioner's certificate may be well returned marked "refer to the drawer."

[124] I fully embrace these remarks as being apposite in the instant matter. Legal practitioners should therefor take the certificates they sign seriously and not merely go through the motions required by the rule maker.

[125] Another related matter regarding Mr Brandt's written submissions is that most of the numerous cases cited, did not refer to particular pages, paragraphs or excerpts relied upon. For one, including the court, to know where the argument advanced is predicated, one needs to plough through the entire 126 cases and try and fathom, with guesswork the main contributor, as to the correct portion relied on. That is not desirable, proper or fair both to the court and the other side. Judges are not necessarily impressed by the high number of cases referred to, as much as a few cases, with clear and discernible portions relied on and which can be identified readily with no particular difficulty. We do hope

that with time, our rules will be tailored on similar lines as those of Supreme Court in which a limit to the number of authorities authority relied on has been introduced.

[126] In *S v Ntuli*<sup>23</sup> Marcus A.J. had the following to say regarding the function of heads of argument in court proceedings:

‘At issue is simply the basic notion that the minimum required of counsel is to prepare and present a proper argument on behalf of his or her client. Heads of argument serve a critical purpose. They ought to articulate the best argument available to the appellant. They ought to engage fairly with the evidence and to advance submissions in relation thereto. They ought to deal with the case. Where this is not done and the work is left to the Judges, justice cannot be seen to be done. Accordingly, it is essential that those who have the privilege of appearing in the Superior Courts do their duty scrupulously in this regard.’

[127] I can do no better than to repeat the above sentiments in this matter, particularly in relation to the manners that I have complained about in the heads of argument filed in this matter. Courts, in particular, should be assisted when cases are quoted, to be able to comprehend what point is being made and where. It is unfair to expect the court and the other side to plough scrupulously through a morass of judgments trying to find what may sometimes be a needle in a haystack.

### Disposal

[128] In the premises, as indicated earlier, I am of the considered view that the plaintiff has made a good case for the main relief sought. In the premises, I grant the following order:

1. Payment of N\$ 400 000 by the first and second defendants, to the plaintiff, jointly and severally, the one paying and the other being absolved.

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<sup>23</sup> 2003 (4) SA 213 (W) at para [16].

2. Interest of the aforesaid amount at the rate of 20% per annum *tempore morae*, from 7 July 2015 to the date of final payment.
3. Costs of suit consequent upon the employment of one instructing and one instructed counsel.
4. The payment of N\$ 400 000 stipulated in paragraph 1 above, is contingent upon the tender made by the plaintiff to return the furniture and inventory valued at N\$ 20 830, which must be done within ten (10) days of the date of this judgment, or such date as the court may in writing stipulate upon application.
5. In the event the tender is not made within the period stated in paragraph 4 above, the defendants are ordered to pay the plaintiff the amount of N\$ 379, 170, with interest on the aforesaid amount calculated from 7 July 2015 to the date of final payment.

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TS Masuku  
Judge

## APPEARANCES

## PLAINTIFF:

B De Jager

instructed by Behrens &amp; Pfeiffer, Windhoek

## DEFENDANTS:

C Brandt

of C Brandt Attorneys, Windhoek