Case No.: 1.1118/97

IN THE HIGH COURT OF NAMIBIA

In the matter between:

COMMERCIAL BANK OF NAMIBIA LTD **PLAINTIFF**

and

KUAIMA ISAC RIRUAKO **DEFENDANT**

CORAM: HANNAH, J

Heard on: 2000-4-20,25

Delivered on: 2000-05-05

JUDGMENT

HANNAH, J: In this action the plaintiff claims damages in the sum of NS54 000,00 arising from fraudulent, alternatively negligent, misrepresentation allegedly made by the defendant. There is an additional, alternatively an alternative, claim for the same amount based in contract.

The facts are relatively straightforward and briefly are as follows. The plaintiff received from a bank in Cape Town a conditional letter of credit issued for the benefit of the defendant. The letter required the

defendant to produce various documents in connection with a shipment of

harpaqo from Windhoek to Cape Town including a copy of a stamped consignment note completed by Namibian Railways which is a reference to Transnamib. On 21st September, 1995 the defendant approached the plaintiff with a bundle of documents relating to the shipment and was seen by the plaintiffs international manager, Christopher Leaf. The documents were examined and certain discrepancies were noted including the absence of a report on the harpaqo to be shipped. The defendant asked Leaf if he would telephone the consignee and ascertain if he would be satisfied with the documents as they were so that the letter of credit in the sum of N$54 000,00 could be met. Both the defendant and Leaf spoke to the consignee and what emerged from that conversation was that provided Leaf was satisfied that the harpaqo had been shipped payment on the letter of credit could be made. One of the documents handed by the defendant to Leaf was a consignment note made out by Transnamib. It was dated 19th September, 1995 and, save for one discrepancy relating to the date of receipt and the date of despatch, purported to show that 6000 kgs of harpaqo had been received by Transnamib on 19th September for shipping to the consignee. Leaf made it clear to the defendant that this document was the most important document with regard to shipment and the defendant said that the harpaqo would be shipped that day. Accordingly, payment of N$54 000,00 was made by the plaintiff to the defendant on 25th September, 1995.

The harpaqo was not received by the consignee and as a result the plaintiff was not reimbursed by the consignee's bank for the amount of N$54 000,00 which it had paid to the defendant. The defendant was contacted and he claimed that the harpaqo had been stolen from his house. In February, 1996 the defendant attended a meeting with Leaf and another of the plaintiffs officials. He confirmed that the harpaqo had been stolen and acknowledged that he owed the plaintiff N$54 000,00 arising from the payment made on the letter of credit on 25th September, 1995 together with interest on that sum from that date at 31% per annum. However, no payment was made and the present action was commenced.

Leaf said that payment would not have been made by the plaintiff had he, Leaf, known that the goods had not been shipped. None of the foregoing was challenged nor was it contradicted in any way. The defendant chose to call no evidence.

As for the question whether the shipment of harpaqo was ever received by Transnamib this was dealt with by three Transnamib employees. Arri Husselman is a depot supervisor and he testified that on 19th September, 1995 the defendant came to his depot. He told Husselman that he had a Transnamib container at his premises which he was busy loading. He asked for a consignment note to be completed as his time was limited. To complete a consignment note before receipt of a loaded container was not in accordance with correct procedure. However, the defendant had done business with Transnamib previously and as he had said that his time was limited Husselman was prepared to oblige. He assumed that the loaded container would be received later that same day. Accordingly, Mimisius Nau-Eiseb, the cargo controller at the depot, completed the consignment note which was ultimately shown by the defendant to Leaf. Nau-Eiseb also testified and he explained that when filling out the note he had made a mistake by giving the date of dispatch as 18lh September. He should have written 19th which is the date given in the note as being the date when the goods were received.

Husselman testified that he subsequently checked his records in order to ascertain whether the defendant had indeed had a container on 19th September. All movements of vehicles, trailers and containers are kept in a book called "register of the movements of heavy haulers". The register shows the date and time when a vehicle leaves the depot, the driver's name, the vehicle number, the firm or address to which the vehicle is destined, the container number, whether the container is empty or loaded, the trailer number, the name of the driver who collects the trailer and container and the date and time when the trailer and container are returned to the depot and whether the container is empty or loaded. The only entry in the register in September, 1995 pertaining to the defendant was an entry

made on 22nd September showing that an empty container was delivered to the defendant's premises on that day and that it was collected empty on 23rd September. The details relating to the outward trip were completed by an employee called a scheduler and Husselman explained that this person can no longer be traced. The details relating to the inward trip were completed by the driver, Conrad Koopman, because the 23rd September was a Saturday and the scheduler was not on duty.

Another document produced in evidence by the driver, Koopman, was his trip card for 23rd September, 1995. This gives details of the various trips which he made that day. The trip card records that his third trip was to 17, Haneman Street where he collected trailer No. 98584 and container No. 1695592 and returned with them to the depot. When a comparison is made between the register of the movements of heavy haulers and Koopman's trip card certain discrepancies appear. In the register the house number in Haneman Street is given as 7 whereas in the trip card it is given as 17. It is clear from the defendant's amended plea that his house has the latter number and what must have happened was that the scheduler omitted the 1 when he wrote out the address. It would also appear that the scheduler made a mistake when he wrote down the container number in the register. He wrote 1695270 whereas the number of the

t

container collected by Koopman and recorded on the trip card was 1695592. The explanation tendered was that the scheduler wrote the former number but the driver who delivered the trailer and container took a container with the latter number. This explanation seems to me to be eminently acceptable for the following reason. A container weighs 3 tons and can only be loaded and unloaded from a trailer by a crane or fork-lift. The number of the trailer collected by Koopman was the same as the number of the trailer recorded in the register as having been delivered to Haneman Street. There could have been no reason for the container on that trailer to have been changed and, for that matter, no means would have existed for such a change to have been made.

One other item in the register was explained by Koopman. In the column headed "loaded or empty in" the number 15 has been deleted and replaced with the number 0. Koopman said that the number 15 signifies loaded whilst the number 0 signifies empty. The scheduler had written 15 in anticipation of the container being loaded when collected but when Koopman discovered it was empty he deleted 15 and wrote in 0.

The question whether the container was empty when collected was canvassed with Koopman by Mr Mbaeva who appeared on behalf of the defendant. Why counsel saw the need to do so is not clear to me as the defendant admits in his plea to the plaintiffs amended particulars of claim that he did not deliver the harpaqo to Transnamib. However, lest something turns on it I will deal with this aspect of the evidence.

Koopman said that the container was empty and it was for that reason that he deleted the 15 and replaced it with a zero. However, in cross-examination he said that it was the duty of his assistant to check the container. As driver he would remain in the cab of the horse. He relied on what his assistant told him. However, there were other indications that the container was in fact empty. If it was loaded he would have obtained a cargo letter from the consignor and he did not. Also, he would have felt whether the container was loaded or not once the trailer was connected to the horse and he was driving.

Then there was the evidence of Husselman. He said that on Monday, 25lh September he was told that the container was empty and when he inspected it he found that to be the case. He telephoned the defendant who said not to worry. He would telephone when he was ready to load. But he never did. And, of course, there was the evidence of Leaf that the defendant informed him that the harpaqo had been stolen from his house. All the evidence points to the container being empty when it was collected

by Koopman and I accept that to be the case.

What it comes to is this. The defendant represented to Leaf on 21st September, 1995 that the harpaqo had been received by Transnamib and would be shipped to Cape Town that day. That representation was false. A container was not delivered to his premises until the following day and even then no harpaqo was loaded into it. The defendant knew that the representation was false. Acting on that false representation Leaf authorised payment to the defendant of NS54000,00 on the consignee's letter of credit. A clear case of false misrepresentation has been made out and this resulted in a loss to the plaintiff of N$54 000,00. The plaintiffs claim must succeed.

The plaintiff also claims interest on the sum of N$54 000,00 at the rate of 20% per annum ***a tempore morae*** as from 25th September, 1995. Mr Totemeyer, for the plaintiff, submitted that the defendant is liable to pay interest from that date on two grounds. Firstly, although the plaintiffs main claim is for damages, the amount payable has always been readily ascertainable and this case therefore falls outside the ordinary rule that interest on damages runs only from the date of judgment. Secondly, the defendant expressly agreed to pay interest on the amount of NS54000,00 from 25,h September, 1995.

In support of his first submission Mr Totemeyer referred the Court to ***Victoria Falls and Transvaal Power Co. Ltd v Consolidated Langlaagte Mines Ltd*** 1915 AD 1. Innes, C.J. said at pp 31-33:

"... the question with which we are concerned is whether in a claim for unliquidated damages only ascertainable as to amount, after a long and intricate investigation, the defendant can properly be held liable for interest, prior to judgment upon the sum finally assessed. In the present case the defendant was ***in mora*** so far as the supply of electric power was concerned, and for that it must pay damages. But was it ***in mora*** with regard to those damages, and therefore subject to an order for interest in addition? Under the common law of England and America that question would probably be answered in the negative, on the ground that the party sued did not know what sum he owed, and therefore cannot be in default for not paying (see ***Sutherland,*** Vol II, sec. 347). The New York practice, however, would seem to be different. The Courts of that State have adopted the principle that 'whenever a debtor

is in default for not paying money, delivering property, or rendering services in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which he has done him; and a just indemnity, though it may sometimes be more, can never be less, than the specified amount of money, or the value of the property or services at the time they should have been paid or rendered, with interest from the time of the default until the obligation is discharged.' ***(Van Rensselaer v Jewett,*** *2* N.Y., p 135). In that case the value of the matters in respect of which default had been made was far more easily ascertainable than in the present instance. But there is much to be said in favour of extending the application of the rule there laid down; and if the matter were open it would merit very careful consideration. In my opinion, however, it is not open. The civil law did not attribute ***mora*** to a debtor who did not know and could not ascertain the amount which he had to pay. ***'Non potest improbus rideri, qui ignorat, quantum solvere debeat.'*** (Dig., 50, 17, 99.) And that rule was adopted by the Courts of Vriesland. (See Sande, Dec, 3, 14, 9.) It has also bee followed in our own practice. No South African decision was quoted to us, nor have I been able to find any, in which interest before judgment has been awarded upon unliquidated damages. I do not think, therefore, that they can be given here. I do not say that under no circumstances whatever could such damages carry interest. Cases may possibly arise in which though the claim is unliquidated the amount payable might have been ascertainable upon an inquiry which it was reasonable the debtor should have made. Such cases, should they occur, may be left open. But the present matter stands in a different position. It was not possible for the defendant to know or ascertain what damage its breach of contract had caused, and it cannot therefore on the principles of our law be held liable for interest prior to judgment upon the amount of the damage."

Mr Totemeyer submitted that the facts of the present case fall squarely within the class of case which Innes, C.J. left open to be considered as an exception to the ordinary rule that interest will not run on unliquidated damages until judgment is given. I find it unnecessary to consider this submission. The plaintiffs claim is for liquidated damages and as such is not caught by the rule referred to by Innes, C.J.

Quite apart from the foregoing, there was an agreement between the parties that the defendant would pay interest on the sum of N$54 000,00 as from 25th September, 1995. In my judgment, the plaintiff is entitled to interest from that date.

For the foregoing reasons judgment is entered for the plaintiff for the amount of N$54 000,00 with interest on that sum at the rate of 20% per annum as from 25th September, 1995, such interest not to exceed the capital sum, with costs.

Counsel for the Plaintiff: R. Totemeyer

Instructed by: Messrs Engling, Stritter & Partners

Counsel for the Defendant: T. Mbaeva

Instructed by: Messrs Dammert & Hinda