CASE NO.: I 2902/2004

IN THE HIGH COURT OF NAMIBIA

In the matter between:

HORST HELMUT SCHNELLE PLAINTIFF

and

RELYANT RETAIL LIMITED FIRST DEFENDANT
LG ELECTRONICS (SA) (PTY) LTD SECOND DEFENDANT

CORAM**:** NDAUENDAPO, J

Heard on: 13 May 2008
Delivered on: 08 July 2011

JUDGMENT

NDAUENDAPO, J: [1] The plaintiff, Horst Helmut Schnelle (who previously traded as S & H import/export) issued summons against first defendant Relyant Retail Limited, a company with limited liability duly registered and incorporated in accordance with the company laws applicable in the Republic of South Africa, and the second defendant, LG Electronics SA (Pty),

a company with limited liability duly registered and incorporated in accordance with the company laws applicable in the Republic of South Africa, with its principal place of business at LG house 1st Borber Road, Elandsfontein Republic of South Africa.

[2] In the particulars of claim, the plaintiff, alleges, inter alia, the following:

"CLAIM AGAINST THE FIRST DEFENDANT:

5. On 15 August 2001, the Plaintiff and the second Defendant entered into a written settlement agreement annexed hereto as annexure "B1" to "B4"

6. The settlement agreement was made an order of Court – annexure "C" hereto.

7. In terms of the settlement agreement the second Defendant ceded unto and in favour of the Plaintiff, all the rights, title and interest it had in the invoices marked "Beares" set out in the annexure "B" hereto.

8. The second Defendant's right, title and interest in and to the invoices included the right to receive payment of all outstanding amounts in respect of the invoices from the first Defendant.

9. Despite demand, the first Defendant has refused to pay the outstanding amount of N$162 846.23, or any amount thereof, to the Plaintiff, which amount remains due, owing and payable.

ALTERNATIVE CLAIM AGAINST THE SECOND DEFENDANT

10. The Plaintiff reiterates paragraphs 4 – 8 supra herein.

11. Subsequent to the cession agreement, the first Defendant advised the Plaintiff that there were no monies due by the first Defendant to the second Defendant in respect of the invoices.

12. The Plaintiff alleges that if there are no monies due and payable by the first Defendant to second Defendant, then:

12.1 The first Defendant had paid the second Defendant either prior to or after the settlement agreement was reached; in which event

12.2 The second Defendant is in breach of the warranty given to the Plaintiff in paragraph 5 of the annexure "B2", alternatively the second Defendant as set out in paragraph 6 of annexure 'B2".

13. As a result of such breaches, the Plaintiff has been unable to collect the amount of N$162 846.23 and has suffered damages in the amount of N$162 846.23.

14. Despite demand, the second Defendant refuses and/or neglects to pay the said amount of N$162 846.23 or any part thereof to the Plaintiff."

[3] The first defendant denied liability and in amplification of the denial, pleaded that:

"*7.2.1 the plaintiff does not set out any basis and/or supporting facts for the contention that "the second defendant's right, title and interest in and to the invoices included the right to receive payment of all*

outstanding amounts in respect of the invoices from the first defendant.

7.2.2. the plaintiff does not set out the nature of the relationship between "Beares" and the first defendant which would give rise and/or provide a basis for the implication that the first defendant is liable to Beares.

7.2.3 the plaintiff does not set out the nature of the relationship between 'Beares', the first defendant which would give rise for the conclusion that the first defendant was liable to the second defendant for payment of the invoices.

7.2.4 the plaintiff does not provide a proper description, alternatively sufficient particularity of 'Beares' to enable the first defendant to identify 'Beares'.

7.2.5 Annexure "B2" to the plaintiff's particulars of claim sets out that 'The plaintiff does not warrant the validity of any such claim, but hereby gives a warranty that it has not received payment from the customer in each such invoice'. The plaintiff does not set out in his particulars of claim whether the claims upon which his cause of action is found are valid, as per the express terms of the settlement agreement marked "B1 to B4"

[4] The second defendant pleaded and denied liability. It however, admitted the terms of the cession agreement as contained in the cession agreement itself. It also admitted paragraph 8 of the particulars of claim.

Plaintiff's case:

[5] Mr Heathcote appeared on behalf of the plaintiff. He called Mr Schneller to testify. Mr Schneller testified that he was trading as S & H Import/Export.

He entered into an agreement with the second defendant (for ease of reference I will refer to second defendant as LG) and LG would sent its goods to their warehouse in Windhoek. They would receive the goods from LG in South Africa and would keep them in the warehouse. Beares and other stores like Lewis would then order the goods from them. Beares had branches all over Namibia like in Windhoek, Oshakati, Swakopmund etc. The arrangement with LG in respect of LG goods which were delivered from their warehouse to Beares branches, were as follows:

They got orders from the branches for LG goods. They would write out an invoice to show that the goods left their premises. The invoices would then be sent to LG in South Africa and LG would then invoice Beares directly for the goods that left their premises. He testified that LG in South Africa sorted out their own payments, their own discount and terms with Beares in Namibia. Payments for the LG goods delivered to Beares were done by Bears directly to LG in South Africa. He further testified that they made use of Nampost courier to transport the goods from their warehouse to the various Beares branches in Namibia. The procedures were that Nampost courier (driver) would come to their premises and picked up the goods – they signed

the weigh bill, POD (proof of delivery), that the goods left their premises. Nampost would deliver the goods at the customer (Beares) and the customer will acknowledge receipt and sign for it. Once the goods have been delivered they would receive the POD. The next step was to fax/sent the copy of the invoice and the POD to LG in South Africa. He also testified that LG paid Nampost courier for services rendered. He testified that his claim in this case concerns 10 invoices which Beares owed

LG South Africa and which were ceded to him as per the settlement agreement and annexure 'A' (B3) to the settlement agreement. According to him LG was entitled to claim payments from Beares for those invoices.

[6] In support of his claim, he testified about a letter dated 3 March 2003 addressed by Beares to LG Electronics SA (Pty) Ltd, the letter state as follows (the letter was discovered by second defendant):

> *"There is litigation between LG and S & H, which resulted in a settlement agreement between LG and S & H, part of the which LG ceded its claims to certain invoices listed in annexure 'A' to the agreement. LG per the agreement did not warrant the validity of any such claim. In investigating the claim, the invoices listed were found to the S & H invoices? By digging though archives we were able to draw up a schedule of the LG invoices which were supposedly outstanding and ceded to S & H. I attached a copy of this schedule for your reference."*

He testified that the reference number, the date, the amounts and the invoice numbers on that schedule (annexed to the letter of 3 March 2003) are

exactly the same as per annexure A (B3) under Beares to the settlement agreement. He testified that the information/details on the schedule could only have been obtained from LG.

[7] On 09 June 2005 LG electronics SA replied to the letter of Bears dated 3 March 2003 as follows:

> *"This letter serves to confirm that in the matter between LG electronics and S & H imports in Namibia, that there is no monies outstanding and owing by the Beares Group for the services rendered between the two parties."*

On 01 October 2003 Beares wrote a letter to LG stating the following:

> *"In June 2003 you wrote a letter to Beares stating "This letter serves to confirm that the matter between LG Electronics and S & H imports in Namibia, that there is no monies outstanding and owing by the Beares Group for the services rendered between the parties" A copy of this letter was sent to the attorneys acting on behalf of the S & H Imports, S & H attorneys have now written to us after three months, disputing your letter because it referred to services rendered". They say the invoices were in respect of goods sold and delivered 'they are still claiming payment for the supposed amount owing per the invoices listed in the settlement agreement and have threatened to institute proceedings against us in the high court of Namibia. Please forward another letter directly to their attorneys (details as per attached) which should include the following:*

> *"This letter serves to confirm that in the matter between LG Electronics SA (Pty) Ltd and Horst Helmut Schunelle t/a S & H Import/Export case no (I) 393/99, there were no monies outstanding and owing by the Beares Group in respect of invoices referred to in the paragraph 4 of the settlement agreement of the time of the cession. In the circumstances, LG has no valid claim against Beares in respect of the such invoices....."*

He testified that he never received such a letter.

[8] He also testified that the weigh bills from Nampost courier were completed by either Eddy or Norman (his employees) and signed by either of them. He recognised their handwriting and/or signatures as he was working with them and he was familiar with their handwriting and signatures.

[9] He testified that he specifically remembers about invoices 2527 and 2526 (dated 2/9/97) from S & H Import/Export made out to Beares Swakopmund in the amounts of N$20 089-30 and N$28 048-00 (at pages 28 and 31 of plaintiffs discovery bundle "A"). He testified that the 2 invoices were for goods ordered from him by Beares and delivered at Swakopmund entertainment centre for promotion purposes. The regional manager of Beares asked them to deliver the goods. The goods were given to anyone who won a jackpot. He testified that the goods were delivered. Himself and Eddy went down to Swakopmund to set up a display at the Swakopmund and

entertainment centre for Beares. The Store manager of Beares in Swakopmund was also there when they unpacked the goods for Beares. The goods as per the invoices were television sets – Hifi (music system); microwaves, washing units, video machines etc. He also testified that the time when the settlement agreement was entered into, nobody on behalf of LG informed him that delivery of those goods to Beares stores in Namibia did not take place.

[10] Olivier testified that he used to work for Mr Schnelle as a sales representative. Procedures were that Beares Namibia ordered goods - an invoice will be made out, goods will be taken out of the warehouse, weigh bill

number would be written, wait for the Nampost courier to collect and signed it off. He testified that he had to see to it that the goods were collected and received in good order by the Nampost courier company. He testified that a Nampost courier employee had to sign the document when he received the goods. He testified that the handwriting on the weigh bill and signature on the documents discovered was his. He testified that he remembers the transaction involving N$20 089.30. Beares ordered the goods for a promotion they had at Swakopmund casino. The goods were delivered by Nampost courier. The goods arrived in Swakopmund the next day. The regional manager, area manager of Beares and himself went to the casino and the goods were there. He checked the goods and everything which was ordered was there. It was a promotion with Beares and Swakopmund casino.

He testified about another transaction involving N$28 048.00 – this (involved goods ordered by Beares Swakopmund from the plaintiff. It was also delivered to the casino for promotion. He testified that he also saw the goods in Swakopmund when they prepared the display for Beares of Swakopmund entertainment centre.

That was the case for the plaintiff.

[11] The first defendant was represented by Mr Barnard and the second defendant by Mr Segal. Both defendants closed their cases without calling witnesses.

[12] It is common cause that the second defendant admitted the terms of the cession agreement as reflected in the cession agreement itself. Mr Schnelle testified that the invoice numbers referred to in annexure "A" (under the name Beares) were invoices in respect of which LG was entitled to claim payment from Beares and those are the claims (invoices) which were ceded by LG to the plaintiff. As Mr Heathcote put it "*the uncontroverted facts are that all three parties knew about this agreement all along. Beares never denied or laid evidence that Beares was not responsible party to pay the amount as reflected on the invoices, to LG".* Mr Heathcote further submitted that in terms of the cession agreement, Beares had to pay the plaintiff.

Demand was made by plaintiff, but Beares refused to pay. Beares had no defence against plaintiff's claim. Mr Barnard submitted that the plaintiff did not set out the nature of the relationship between "Beares" and the first defendant which would give rise and/or provide a basis for the implication that the first defendant is liable to Beares." I disagree with that submission. Mr Schnelle testified about the long established relationship between the plaintiff, first defendant and second defendant. He testified that first defendant was trading as Beares, the shops of first defendant where known as Beares and it is to the Beares shops that the goods were transported to from the warehouse of the plaintiff.

[13] Mr Barnard also disputed that delivery took place. Delivery was never put in issue in the plea. In any event, Mr Schnelle testified about the procedure relating to delivery. His evidence was that Nampost courier will come and collect the goods from the warehouse. A weigh bill will be prepared

and a POD. Once the goods are received at Beares, a representative of Beares would sign the POD. He also testified about the invoices of the N$20 89.30 and N$28 048.00 – in relation to those invoices he testified that they related to goods that Beares ordered from him for promotion at Swakopmund casino. He testified that he and Olivier travelled to Swakopmund the next day, after the goods arrived – they unpacked it and put up the display for Beares. That evidence was corroborated by Mr Olivier. Mr Barnard did not

put any version of his client to the plaintiff and nor did he put to the plaintiff's witnesses that the goods were not received.

[14] Mr Barnard further submitted that there is no reliable evidence or admissible evidence before court that first defendant is Beares or is in any way responsible or liable for whatever Beares did.

The evidence by Mr Schnelle was that once the goods were ordered the invoice was sent to LG in South Africa. LG will then invoice Beares directly. In a letter dated 30 January 2003 from the first defendant (Relyant Retail Limited) to Engling, Stritter & Partners (legal practitioners for the plaintiff), the following is stated:

> *"Re: HORST HELMUT SCHNELLE T/A S & H IMPORT EXPORT/LG ELECTRONICS (SA) (PTY) LTD*
>
> *We have been instructed to respond as follows:*
>
> 1. *Beares have in good faith investigated the validity of the plaintiff's claims and advise that there are no monies due to the plaintiff in respect of the invoices provided. We are awaiting confirmation of this from Mr Roy Fulton, the current National Credit Manager of LG.*
>
> 2. *Beares respectively submit that all and any claim in terms of the invoices referred to in item 4 of the settlement agreement have in any event prescribed by operation of law.*
>
> *In the light of the above, Beares denies any liability to your client in the amount claimed or at all and reserves all it's rights."*

On 12 February 2003 Engling, Stritter & Partners wrote back to first defendant (Relyant Retail limited) and stated:

> *"Your letter dated 30th January 2003 refers.*
> *We wish to advise having obtained instructions from our client to the effect that it is impossible that the disputed invoices are paid, as same was admitted by your client to be outstanding. Furthermore, same was due to our client and was definitely not settled. We furthermore take note of your opinion of prescription, however disagree thereto and will formally institute legal proceedings herein unless we receive a reply to this before close of business, finishing 14th February 2003."*

On 13 February 2003, first defendant replied as follows:

> *"We are investigating the contents of paragraph two of your letter and will revert back to you in due course.*
> *In order to expedite our investigations, kindly furnish us with full details of the alleged admission by Beares, including a copy thereof, if in writing Beares reserves all rights"*

[15] Those letters are admissible evidence because they emanated from first defendant (Relyant retail limited) who is a party to the litigation. On a balance of probabilities those letters (on the letter head of Relyant retail limited) corroborates the relationship between Beares and 1st defendant. Nowhere in

those letters is there a denial that Beares is not Relyant Retail Limited. In the result that submission is rejected.

In *ex parte Minister of Justice. In re Jacobson & Levy* 1931 AD 466 Stratfon JA stated the following on 478:

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

[16] I am satisfied that in the absence of evidence to the contrary, the *prima facie* evidence by the plaintiff becomes conclusive proof. Accordingly, I am satisfied that plaintiff is entitled to judgment against first defendant. Mr Heathcote submitted that the plaintiff is entitled to interest as from date of summons being served and referred this court to the case of *ABSA Bank Limited v Erasmus* 2007(2) SA 547 (C) at 553 where Moosa J said the following:

> *"The in duplum rule (28) A further issue which requires the Court's attention is the relief sought by plaintiff in prayer (b) of the summons. In the light of the duplum rule, is plaintiff entitled to mora interest as claimed in prayer (b). According to the judgment of Standard Bank of South Africa Ltd v Oneate Investment (Pty) Ltd (in liquidation) 1998(1) SA 811 (SCA) [1998]1 All SA 413) at 834H (SA):*
>
> **(i)** *(T)he in duplum rule is* ***suspended petent*** *elite, where lis is said to begin upon service of the initiating process, and*

(ii) Once judgment has been granted, interest may run until it reaches the double of the capital amount outstanding in terms of the judgment."

I agree with that submission.

Mr Heathcote conceded that no case was proved against the second defendant and it must be absolved from liability.

[17] Mr Segal on behalf of second defendant submitted that the plaintiff must bear the costs of the second defendant because it was absolved from liability. I disagree with that. In terms of the settlement agreement between second defendant and plaintiff (annexure "B") to the particulars of claim at clause 6, the following is stated:

"6. The plaintiff (second defendant in this case) will do all such things as may be reasonably necessary to assist the defendant (plaintiff in this case) in collecting payments of such invoices from the customers concern, in particular plaintiff (second defendant) will (a) Address letter to such customers on its letterhead advising that it has ceded its claims to payment on such invoices to the defendant (plaintiff in this case)".

What does second defendant do? Mr Fulton on behalf of LG wrote a letter dated 9 June 2003 to Beares stating that there is no monies outstanding and owing by the Beares Group for services rendered. Mr Fulton knew very well that it was not about services rendered but goods sold and delivered. When that was pointed out to him he never rectified that. Mr Heathcote further

submitted that second defendant could have avoided being sued by simply providing

evidence that payment was not effected by Beares. Nothing of that happened. Not knowing whether payment was effected by Beares, the plaintiff had no choice but to sue both defendants. For all those reasons, I agree with Mr Heathcote that second defendant is not entitled to its costs from the plaintiff.

[18] In the result the following orders are granted:

1. Judgment is granted in favour of plaintiff against first defendant in the amount of N$162 846.23.
2. First defendant shall pay interest on the aforesaid amount of N$162 846.23 at the rate of 20% per annum calculated as from the date of service of the summons.
3. First defendant shall pay plaintiff's costs.
4. In respect of plaintiff's claim against second defendant the order is one of absolution from the instance.
5. The second defendant shall pay its own costs.

NDAUENDAPO, J

ON BEHALF OF THE PLAINTIFF Adv. R Heathcote

Instructed by: Engling, Stritter & Partners

ON BEHALF OF THE FIRST DEFENDANT Adv. Barnard

Instructed by: Francois Erasmus & Partners

ON BEHALF OF THE SECOND DEFENDANT Mr Segal

Instructed by: LorentzAngula Inc.