



NOT REPORTABLE

CASE NO: I 1402/2007

IN THE HIGH COURT OF NAMIBIA

MAIN DIVISION

HELD AT WINDHOEK

In the matter between:

COASTAL CELLULAR CC

PLAINTIFF

and

PAAVO AMWELE T/A HUHUCITY

DEFENDANT

CORAM: HOFF, J

Heard on: 13 – 14 April 2010

Delivered on: 21 May 2010

Reasons on: 12 April 2012

JUDGMENT

HOFF, J: [1] In an action instituted by the plaintiff an amount of N\$31 051.00 plus interest was claimed from the defendant in respect of goods sold and delivered.

The defendant in a counterclaim claimed an amount of N\$2 599.50 for unjustified enrichment on the basis of an overpayment made by the defendant to the plaintiff.

[2] This Court on 21 May 2010 made the following order:

1. That the defendant pays the plaintiff the amount of N\$31 051.00 plus interest at the rate of 20% per annum as from 11 April 2005 to date of final payment.
2. That the defendant pays costs of suit.
3. That the Counterclaim of the defendant is dismissed with costs.

[3] The following are the reasons for abovementioned order.

[4] During the trial the plaintiff called two witnesses. The first witness Johannes Willemse worked as a salesperson for the plaintiff. Willemse testified that he had concluded an agreement with the defendant during the year 2004 in terms of which plaintiff would sell their telecards and recharge vouchers to the defendant. On two occasions during June 2004 and August 2004 the said goods were delivered and payments were subsequently received.

[5] The dispute relates to a third occasion during August 2004 when according to Willemse he had met the defendant at a place referred to as the "whole sale" in Ondangwa where it was agreed upon that the defendant would buy a number of recharge vouchers. It was the evidence of Willemse that the defendant was on his way to a certain destination (Oshikango) and that the defendant had instructed Willemse to deliver the recharge vouchers at one of the defendant's business premises "Huhu City" where employees of the defendant would take delivery of the vouchers. Willemse testified that he duly delivered the vouchers and that one of the employees of the defendant, after counting these vouchers, signed on a tax invoice for the receipt of those vouchers. Willemse referred to a document (tax invoice) attached to plaintiff's particulars of claim in respect of which he confirmed that this tax invoices was the document reflecting the

quantity of cards sold for the amount of N\$33 600.00. The date which appears on this document is 17 August 2004. Furthermore he confirmed that his signature appears on this tax invoices and that one of the employees of the defendant signed for the receipt of the vouchers. The name of the employee which appears on this invoice is Sophia Namupala. His evidence during cross-examination was that the person who signed as Sophia Namupala was behind the counter when she so signed the invoice. Payment not forthcoming from the defendant, Willemse subsequently personally requested payment from the defendant. There was an altercation in the office of the defendant which resulted in Willemse leaving the office of the defendant, and defendant according to Willemse, promising that payment would be made in due course. Willemse testified that on this occasion he had recognised the lady who had previously signed for the vouchers.

[6] David Gibbons the managing member of the plaintiff testified that after the conclusion of the third sale of vouchers to the defendant he phoned the defendant in connection with the arrear payment on which occasion the defendant had informed the Gibbons that one Sophia Namupala did not work for defendant anymore since she had stolen from the defendant. The defendant during cross-examination did not deny someone on behalf of plaintiff phoned him in connection with the outstanding monies but stated that he was unable to recall the name of the person who had phoned him.

[7] After the closure of plaintiff's case an application for absolution of the instance was made on behalf of the defendant. This application was unsuccessful.

[8] The defendant thereafter testified that he is the owner of several businesses and that Willemse approached him on 19 June 2004 on which date the first transaction was concluded. Thereafter on 6 August 2004 he received another consignment by mail and subsequently made certain payments to the plaintiff. Defendant denied meeting Willemse at the "wholesale", denied that he received any vouchers from anyone of his employees,

denied that a person by the name of Sophia Namupala was ever employed by him, that he had only seen the tax invoice dated 17 August 2004 for the first time when he received the summons, denied that he had ever met Willemse for a second time in his (i.e defendant's office) where there was an altercation between himself and Willemse, and denied that he ever said to Gibbons that Sophia Namupala was not working there anymore.

[9] The issue in dispute is whether the defendant had received the relevant vouchers on a third occasion.

[10] Ms Schneider-Waterberg submitted that the defendant, on plaintiff's version, made a representation to Willemse that he may deliver the vouchers to one of defendant's employees and that defendant should be estopped from denying taking delivery of the relevant vouchers since the plaintiff acted to its prejudice on the representation made by the defendant himself.

[11] Mr Namandje on behalf of the defendant submitted that plaintiff must prove that an agreement was entered into between the parties relating to the third consignment and in addition to this the plaintiff must prove delivery of the vouchers to the defendant by the plaintiff. He submitted in this regard that Willemse could not remember how many boxes of vouchers he delivered, could not recall the value of the vouchers (after six years), could not recall the month of the transaction, and that the tax invoice referred to by Willemse could not be of any use to this Court when the whole transaction of delivery is denied by the defendant.

[12] In order to decide the issue in dispute one has to consider the probabilities. Even though Willemse testified that he could not recall all the detail after a period of six years he identified the tax invoice dated 17.08.2004 as the one which he had completed in his

handwriting, that defendant's name appear on it, that his signature appears on it as well as the number of cards sold and the price of those cards, and that an employee of the defendant Sophia Namupala's signature appear on it. There is no reason why Willemse's testimony in this regard should be ignored.

Willemse testified about an incident in the office of the defendant when Willemse requested payment in respect of the relevant vouchers when the defendant lost his temper and that defendant afterwards promised to make the payment. Thereafter Gibbons was informed of the incident and he in turn requested payment from the defendant in respect of the arrears. Defendant does not deny this conversation in respect of the request for payment of the arrears. It is not the defendant's case that Willemse forged the relevant tax invoice. I am of the view in the light of the bare denial by the defendant that the probabilities favour the version of Willemse. I am satisfied that plaintiff has proved the agreement of sale of the relevant vouchers and their delivery to one of the employees of the defendant. The defendant is therefor indebted to the plaintiff in respect of the amount claimed for. This in turn also disposes of the counterclaim by the defendant.

[13] The plaintiff is the successful party and therefore entitled to costs of suit.

HOFF J

ON BEHALF OF THE PLAINTIFF:

MS SCHNEIDER-WATERBERG

Instructed by:

FISHER, QUARMBY & PFEIFER

ON BEHALF OF THE DEFENDANT:

MR NAMANDJE

Instructed by:

SISA NAMANDJE & CO. INC.