



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1522/2008

In the matter between:

JIN CV JOINT FITMENT CENTRE CC**PLAINTIFF**

and

ELIA HAMBABI t/a ALPHA TYRES**DEFENDANT**

Neutral citation: *Jin CV Joint Fitment Centre CC v Hambabi* (I 1522/2008) [2014] NAHCMD 73 (6 March 2014)

Coram: PARKER AJ

Heard: 4 March 2013; 6 March 2013; 8 March 2013; 16 April 2013; 3 July 2013; 22 November 2013; 5 February 2014

Delivered: 6 March 2014

Flynote: Evidence – In civil proceeding – Where court is faced with two mutually destructive versions of facts – Approach to determination of dispute of facts – Court to apply its mind not only to the merits and demerits of the two sets of versions but also to their probabilities – It is so applying its mind that court would be justified in deciding which version to reject and which to accept.

Summary: Evidence – In civil proceeding – Court was faced with mutually destructive versions – Defendant denied existence of contract whereby the plaintiff sold and delivered imported goods (second-hand tyres) to the defendant – Consequently, the defendant refused to pay the purchase price and cost of

transportation ex-Walvis Bay Port to Ohangwena – The court applied the following dicta from *Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR 555 (HC) at 559D and from *National Employers' General Insurance Co. Ltd v Jagers* 1984 (4) SA 437 (E) at 440E:

'... the proper approach is for the court to apply its mind not only to the merits and demerits of the two mutually destructive versions but also their probabilities and it is only after so applying its mind that the court would be justified in reaching the conclusion as to which opinion to accept and which to reject. (See *Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR 555 at 559D.)

'...where the onus rests on the plaintiff and there are two mutually destructive stories he (the plaintiff) can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the version advanced by the defendant is therefore false or mistaken and falls to be rejected. (*National Employers' General Insurance Co. Ltd v Jagers* 1984 (4) SA 437 (E) at 440E)'

Having applied the above tests, the court accepted the plaintiff's version and rejected the defendant's version, and granted judgment for the plaintiff with costs.

ORDER

Judgment is granted for the plaintiff in the amount of N\$149 885,73, plus interest at the rate of 20 per cent per annum, calculated from the date of issuance of summons, that is, 15 May 2008, to the date of full and final payment, with costs, including costs of one instructing counsel and one instructed counsel.

JUDGMENT

PARKER AJ:

[1] This matter is a strong brew of concoction in which men used women to hoodwink a Government Ministry in order to get what the men wanted, ie an Import License from the Ministry of Trade and Industry (MTI). Leaving these introductory remarks I move on to the individual cases of the plaintiff and the defendant. For the sake of simplicity, Neumbo or the plaintiff and Hambabi or the defendant are used in that form of interchange where the context allows.

[2] The case of the plaintiff and of the defendant are as parties have set them out in their individual pleadings. Consequently, I have disregarded any matters brought up in submissions by counsel that are a stranger to the pleadings on either side of the suit (ie the claim and the defence thereto) and contentions put forth and admissions made by the parties provided in the pre-trial conference order.

[3] The plaintiff claims as follows:

- '1. Plaintiff is **JIN CASINGS & TYRES SUPPLIES CC**, a Close Corporation with limited liability, duly incorporated in terms of the close corporation laws of the Republic of Namibia having its principal place of business at Erf 1169, Okapi Street, Windhoek, Republic of Namibia.
2. Defendant is **E HAMBABI**, an adult male, trading as **ALPHA TYRES** with its principal place of business at Soweto Market, Independence Avenue, Windhoek, Republic of Namibia and whose full and further particulars are to plaintiff unknown.
3. During 2006 and at Windhoek goods were sold and delivered by the plaintiff to the defendant.
4. The plaintiff duly sold and delivered the goods to the defendant and made certain necessary disbursements on defendant's behalf.
5. It was an implied term of the instructions that the plaintiff would be entitled to be paid a reasonable fee for his goods sold and delivered and recompensed for all necessary disbursements made on defendant's behalf.

6. Plaintiff's reasonable fee for the goods sold and delivered is N\$149 885,73. The amount of N\$149 885,73 is still outstanding to the plaintiff by the defendant as detailed in Annexure "A" (to the particulars of claim).
7. Despite demand, the defendant has failed to pay the aforesaid amount to the plaintiff.
8. In the premises the defendant is liable to pay the plaintiff the N\$149 885,73. Notwithstanding demand, the defendant refuses and/or neglects and/or fails to pay the plaintiff the aforesaid sum or any part thereof.'

And the defendant's plea is as follows:

'1. AD PARAGRAPH 1 & 2 THEREOF

The content hereof are admitted.

2. AD PARAGRAPH 3 & 4 THEREOF

2.1 The content hereof are denied.

2.2 Without derogating from the aforesaid denial, the defendant pleads that:

2.2.1 The defendant and plaintiff were business associates importing second-hand tyres from Australia;

2.2.2 In pursuance of their business objects, each business associate would at his own cost order his own consignment of second-hand tyres and sell them locally for his own benefit and profit;

2.2.3 The defendant similarly ordered and paid for his own consignment of second-hand tyres; and

2.2.4 During 2006 the parties entered into an oral agreement the terms of which were the following:

- (i) On arrival of the consignment, the plaintiff would clear it with the customs authorities.

- (ii) Plaintiff would then transport or cause the consignment to be transported to the defendant in Ohangwena; and
- (iii) On presentation of the invoice by the plaintiff, the defendant would reimburse the plaintiff for the transport costs incurred in respect of the transport of the consignment from Walvisbay to Ohangwena.

2.3 The plaintiff never presented the defendant with an invoice in respect of the transport costs.

2.4 On 29 March 2007, the plaintiff collected tyres to the value of N\$15 760,00 from the defendant and never paid the defendant for it, despite undertakings to do so.

2.5 The defendant tenders the difference between the value of the tyres taken by the plaintiff (as per paragraph 2.4 above) and the amount now claimed as transport costs.

3. AD PARAGRAPH 5 & 6 THEREOF

The contents hereof are denied.'

[4] The matter went through the judicial case management ('JCM') processes, ending in the issuance of a pre-trial conference order, dated 2 October 2012, some of whose terms the defendant attempted unsuccessfully to have varied in an interlocutory application.

[5] It is not in dispute that the plaintiff did transport the goods, being second-hand tyres, listed in Annexure A to the particulars of claim ('the goods') from Walvis Bay to Ohangwena and the transportation cost is N\$16 937. It is also not in dispute that the defendant did receive the goods and that the defendant has not paid the amount of N\$132 948,73, being the price of the goods, and also the amount of N\$16 937, being the transportation cost, making N\$149 885,73.

[6] The burden of the court in terms of the pre-trial conference order is to resolve the dispute between the parties respecting the following factual disputes:

- '(a) Whether the plaintiff sold to the defendant the goods listed in annexure "A" to the amended particulars of claim.
- (b) Whether part of the agreement between the parties was that the defendant would pay to the plaintiff the amount of N\$132 948,73 for the goods.
- (c) Whether it was part of the agreement that the defendant would pay to the plaintiff the amount of N\$16 937,00 (including VAT) in respect of actual transport costs of the goods from Walvis Bay to Ohangwena.
- (d) Whether the agreed-upon amounts would become due and payable on the date of invoice, being 12 April 2006, alternatively within a reasonable time.
- (e) Whether the plaintiff and the defendant were business associates importing second-hand tyres from Australia.
- (f) Whether the goods listed in annexure "A" to the amended particulars of claim were on consignment, belonging to the defendant who ordered and paid therefor.
- (g) Whether the plaintiff presented the defendant with an invoice in respect of the transport cost.
- (h) Whether the plaintiff collected tyres to the value of N\$15 760,00 from the defendant on 29 March 2009 and whether he paid for the tyres.

[7] In my opinion, the key aspect which goes to the root of the entire dispute between the parties is as set out in para 1(a) of the pre-trial conference order (see subpara (a) of the preceding paragraph). The plaintiff contends that in terms of a partly written and partly oral agreement the plaintiff sold and delivered the goods to the defendant. Thus, for the plaintiff the dispute relates basically to the sale of goods. The defendant's contrary averment is as follows: According to the defendant the relationship between the plaintiff and the defendant in the transaction in question is not that of seller and buyer, but that of business associates engaged in the importing of second-hand tyres from overseas. The arrangement was that each person would, at his own cost, order his own consignment of second-hand tyres and sell the tyres

'locally for his own benefit and profit'. Pursuant to that arrangement, so says the defendant, the defendant 'ordered and paid for his own consignment of second-hand tyres'; and furthermore, during 2006 the plaintiff and the defendant entered into an oral agreement in terms of which on arrival of the defendant's consignment at the Walvis Bay Port the plaintiff would clear the consignment with the customs and excise authorities. The defendant would thereafter transport, or cause to be transported, the consignment to the defendant in Ohangwena, and on presentation of an invoice respecting the cost of transportation the defendant would reimburse the plaintiff accordingly. The defendant says he has not paid the transportation cost because no invoice has been presented to the defendant.

[8] I shall start with the transportation cost. I shall not waste my time reviewing the evidence on the transportation cost. The defendant admits that the cost involved is in the amount of N\$16 937 and he admits further that he has not paid that amount. That is the end of the matter of transportation cost. The defendant has no real defence to the claim of N\$16 937.

[9] I shall now proceed to consider the rest of para 1(a) of the pre-trial order and in respect of the claim of N\$132 948,73. As I see it, the essence of the key aspect of the dispute between the parties is primarily the nature of the relationship that existed between the parties respecting the transaction about the goods. Was it a relationship of seller and buyer or a relationship of business associates going into a venture as such. The plaintiff says it is the former relationship; the defendant says it is the latter. The relevance of these conflicting contentions will become apparent shortly.

[10] I accept submission of Ms Schneider, counsel for the plaintiff, that in virtue of the order this court made, dismissing the defendant's interlocutory application in which the defendant prayed the court to vary the aforementioned pre-trial conference order, the only real issues of relevance in the present proceeding that should be determined are (a) whether the goods were a consignment that belonged to the defendant who ordered and paid for them; and (b) whether the plaintiff collected tyres to the value of N\$15 760 from the defendant on 29 March 2007 and whether the plaintiff has paid the amount.

[11] Mr Simeon Neumbo was the first plaintiff witness. Apart from Neumbo, Mrs Neumbo (wife of Neumbo) gave evidence for the plaintiff. The third plaintiff witness was Mr Malakia Emvula (an employee of Neumbo). Mr Hambabi gave evidence for the defendant. I have carefully considered the evidence that has probative value in resolving the relevant issues. And in weighing the evidence on both sides of the suit I conclude that the versions of the plaintiff and of the defendant are mutually destructive. In that event, as I said in *Absolute Logistics (Pty) Ltd v Elite Security Services CC* I 1497/2008 (Unreported), para 6 –

‘I must follow the approach that has been beaten by the authorities in dealing with such eventuality; that is to say, the proper approach is for the court to apply its mind not only to the merits and demerits of the two mutually destructive versions but also their probabilities and it is only after so applying its mind that the court would be justified in reaching the conclusion as to which opinion to accept and which to reject. (See *Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR 555 at 559D.) Additionally, from the authorities it also emerges that where the onus rests on the plaintiff and there are two mutually destructive stories he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the version advanced by the defendant is therefore false or mistaken and falls to be rejected. (*National Employers’ General Insurance Co. Ltd v Jagers* 1984 (4) SA 437 (E)); *Stellenbosch Farmers’ Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA); *Shakusheka and Another v Minister of Home Affairs* 2009 (2) NR 524; *U v Minister of Education, Sports and Culture* 2006 (1) NR 168)’

[12] Having applied my mind not only to the merits and demerits of the two mutually destructive versions but also their probabilities I make the following factual findings and attendant conclusions. Neumbo initially carried on business as ‘Jin CV Joint Fitment Centre CC’ and it was a business of selling and fitting tyres. He decided to go into the business of importing second-hand tyres and selling them locally. Neumbo needed an Import Permit from the Ministry of Trade and Industry (‘MTI’). On one fine day while in the MTI buildings Neumbo met Hambabi whom he knew because he had sold tyres to him before. Neumbo told Hambabi his mission at MTI; whereupon Hambabi informed him that he would assist him in obtaining the Import Permit. Hambabi informed Neumbo further that for Neumbo to obtain the

Permit it would be advisable if MTI saw that women were involved in Neumbo's business. Here enters the registration of Jin Casings and Tyres Supplies CC (the plaintiff) whose membership consisted of Julia Neumbo (Neumbo's wife and plaintiff witness), Victoria Kakololo (Hambabi's wife), Lydia Shimanda and Esther Andima. Thus, Hambabi's wife was a member of the plaintiff until 7 December 2006 when she ceased to be a member. By then the transaction of importation of the goods had long been completed.

[13] Neumbo was only able to import the tyres from Australia after he had obtained the aforementioned Import Permit. When the plaintiff needed a warehouse, Hambabi arranged with the lessor of the property for a lease agreement in respect of the warehouse in Ole Court, Windhoek. Hambabi was present during the signing of the lease agreement, and the agreement indicates that Hambabi is a contact person. For all this Mr Denk argues that there was 'no rational basis on which the defendant would go through all the trouble to register the plaintiff, get all the necessary import permit and arrange for a lease agreement to be signed for a warehouse to facilitate the business of the parties were not in a business venture together'. This is the only peg on which Hambabi hangs his contention that his relationship with the plaintiff was not that of buyer and seller but that of business associates. I find that Hambabi did 'go through all the trouble' because his wife had at all material times 25 per cent membership interest of the plaintiff. That, in my opinion, is a good reason (ie 'rational basis') for any caring and proactive husband to 'go through all the trouble', that is, to assist and promote the close corporation (ie the plaintiff). Accordingly, I find that as respects the transaction of importation of the goods the evidence does not establish that Hambabi was a business associate of Neumbo as Hambabi avers just because Hambabi gave Neumbo the aforementioned assistance.

[14] Furthermore, while there is cogent evidence, which I accept, that Neumbo transferred Namibian dollar equivalent of Australian Dollars 4596 to the Australian supplier of the goods, Miranda Tyres, as payment for the goods, there is not one grain of evidence tending to establish that Hambabi made any such foreign exchange payment, or any other form of payment at all, to any overseas supplier of the goods. The evidence is uncontradicted that Neumbo paid N\$46 303,41 to get the

container of the goods released from the Walvis Bay Port. Upon the arrival of the goods at Walvis Bay Port Neumbo requested Hambabi to make payment for the goods that were to be sold to him, as he needed some money to enable him to get the goods released from the Port. In response Hambabi paid N\$30 000 to Neumbo.

[15] The evidence is cogent and overwhelming that at Hambabi's special request and insistence Neumbo ordered the goods for Hambabi from Neumbo's suppliers in Australia Neumbo paid his Australian suppliers for the goods. Neumbo paid for the release of the goods from Walvis Bay Port, and in terms of the agreement between the plaintiff and the defendant the plaintiff transported the goods to Hambabi in Ohangwena and the transport cost stands at N\$16 937 and it remains unpaid. This amount has not been disputed by Hambabi. Thus, as respects the transaction of selling and buying of the goods, the only payment which Hambabi has made to Neumbo is N\$30 000.

[16] Based on these factual findings and conclusions thereanent I am satisfied that on a preponderance of probabilities the plaintiff has discharged the onus cast on it as I find that the plaintiff's version is true and accurate and therefore acceptable, and the defendant's version on the other hand, is false and is safely rejected.

[17] Thus, on the totality of the evidence, I am prepared to hold that the purchase price of N\$132 948,73 and the transportation cost of N\$16 939 became payable when the goods were delivered to Hambabi in Ohangwena. It is my view that while the purchase price and transport cost became payable on delivery of the goods to Hambabi in Ohangwena, payment was demanded when summons issued.

[18] I do not see how the defendant's plea in para 2.4 of the amended plea to the amended particulars of claim that '[O]n 29 March 2009, the plaintiff collected tyres to the value of N\$15 760 from the defendant and never paid the defendant for it, despite undertaking to do so' can be one of the answers to the plaintiff's paras 3 and 4 of the amended particulars of claim. This issue does not concern the transaction which is the cause of action in the instant proceeding. The defendant should have, if so advised, instituted a separate action in order to claim the amount since the

collection of the tyres and Neumbo's undertaking to pay for them is not related to the cause of action in the present transaction. It would have been so related if it was a term of the agreement between the plaintiff and defendant, the subject matter of the present matter, that the N\$15 760 shall be taken as part payment for the goods that Neumbo imported and sold and delivered to Hambabi.

[19] Based on all these reasons I grant judgment for the plaintiff in the amount of N\$149 885,73, plus interest at the rate of 20 per cent per annum, calculated from the date of issuance of summons, that is, 15 May 2008, to the date of full and final payment, with costs, including costs of one instructing counsel and one instructed counsel.

C Parker
Acting Judge

APPEARANCES

PLAINTIFF : H Schneider
Instructed by Du Pisani Legal Practitioners, Windhoek

DEFENDANT: A Denk
Instructed by LorentzAngula Inc., Windhoek