

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT

Case no: I 1652/2016

In the matter between:

**GUNNAR JENSEN ACTING IN HIS CAPACITY  
AS A TRUSTEE OF THE GUNNAR JENSEN  
BUILDING MATERIAL TRUST T/A  
PENNYPINCHERS TIMBERCITY WINDHOEK  
PLAINTIFF**

and

**CHRISTOPHER LLOYD QUICKFALL**

**DEFENDANT**

**Neutral citation:** *Penny Pinchers Timbercity Windhoek v Quickfall (I 3086/2012)*  
[2017] NAHCMD 246 (29 August 2017)

**Coram:** UNENGU, AJ

**Heard:** 26 April 2017

**Delivered:** 29 August 2017

**Flynote:** Practice – Trial – Plaintiff sued defendant for money owed – Defendant denying that he owed plaintiff the money claimed – Defendant alleging that a certain Maria bought goods on his account without his consent – Court ordered defendant to pay the amount claimed.

**Summary:** The plaintiff sued the defendant, a client of it whose account was in arrears. The defendant in his plea to the claim, denied liability to pay the money as it was a certain Maria who bought goods on his account without his consent.

*Held:* That defendant authorised Maria to buy on his account, therefore, liable to pay the defendant the amount claimed with costs.

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### ORDER

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- (i) The defendant pays the plaintiff the amount of N\$ 43 483.96.
  - (ii) Interest on the amount at the rate of 20% per *annum a tempore morae*.
  - (iii) Costs as agreed on an attorney and own client scale.
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### JUDGMENT

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UNENGU, AJ:

#### Introduction

[1] The plaintiff is Gunnar Jensen Acting in His Capacity As a Trustee of the Gunnar Jensen building Material Trust T/A Pennypinchers Timbercity Windhoek, with its principal place of business at No 27 Parsons Road, Southern industrial Area.

[2] The defendant is Christopher Llyod Quickfall, an adult male resident at No 21 Back Street, Windhoek West, Windhoek.

#### Background

[3] The basis of the action instituted by the plaintiff against the defendants is contained in paragraphs 3, 4, 5, and 6 of the particulars of claim which provides as follows:

'3. On or about the 28 June 2005 and at Windhoek, the Plaintiff, duly represented by Mr Gunnar Jensen and the Defendant, acting personally, concluded a written agreement annexure "GJ1",

4. The material express, alternatively implied, in further alternative tacit terms were as follows:

4.1 Plaintiff would sell and deliver goods to the Defendant on credit;

4.2 Ownership of any goods sold and/or delivered by the Plaintiff to the Plaintiff to the Defendant shall remain the property of the Plaintiff until the Defendant had paid any amount due in respect of such goods;

4.3 Any goods sold and delivered by the Plaintiff to the Defendant would be payable within 30 days from the current statement date;

4.4 The Defendant would be liable towards the Plaintiff for all costs incurred by the Plaintiff for the recovery of any amounts unpaid by the defendant on the attorney- and –own client scale;

4.5 The Defendant chose No 21 Bach Street, Windhoek West, Windhoek, Republic of Namibia, as his *domicilium citandi et executandi*; and

4.6 A Certificate signed by the Plaintiff shall be *prima facie* proof and valid as liquid document in any legal proceedings as to the fact and extent of the Defendant's indebtedness.

5. Plaintiff duly complied with its obligations in terms of the agreement and during the period of October 2014 to November 2014 sold and delivered goods in the amount of N\$43 483.96 to the Defendant, at the Defendant's special instance and request and duly issued monthly statements to the Defendant.

6. The Defendant breached the material terms of the agreement in that it inter alia failed and/or refuses to pay the Plaintiff the amount of N\$43 483.96, which amount is due, owing and payable.'

[4] Paragraph eight of the particulars of claim avers that despite demand the defendant failed and/or neglected to pay the amount of N\$43 483.96 to the plaintiff.

[5] The allegations contained in paragraphs two and three are denied by the defendant. In the plaintiff's replication it states that a trust is not a legal person but a legal institution *sui generis*. The trustee is therefore cited *ex officio nomini* in his capacity as trustee. Paragraphs four and six are denied. The defendant denies that he is indebted to the plaintiff in the amount claimed or any part thereof, or that he is in breach of his obligations in terms of "GJ1".

[6] In respect of paragraph five, seven and eight the defendant admits that he have not paid the plaintiff the amount claimed, but denies that the amount claimed is due by the defendant to the plaintiff, rather it is due by a certain Maria and while is it the plaintiff's duty to alert the account holder of any purchases being made by any other person that is not the account holder who is liable, the plaintiff failed to alert the defendant.

[7] In his denial the defendant claims that he is the account holder of the account with Pennypinchers Timbercity. He, however, denies that he did authorise Maria to make purchases on his account; and contends that the shop was negligent for allowing a third party to purchase goods on his account without getting confirmation and/or consent from him.

[8] In amplification of its case the plaintiff called three witnesses namely:

**Mr Gunner Max Jensen**

Mr Jensen confirmed that there is an agreement that was entered into between the defendant and the plaintiff which is not in dispute in any case, and explained why one item on the statement of account was removed. Mr Jensen explained that the salesperson had erroneously booked one invoice on the account of the defendant whilst it had to be booked on another customer's account. During cross examination of Mr Jensen, the defendant put to him that he (the defendant) is not liable to pay the account because of the plaintiff's systems not working. Mr Jensen explained that there is nothing wrong with the system and that it was simply a human error. He further testified that it is the duty of a client to monitor his account and to inform plaintiff if anything on the account is wrong.

**Mrs Abrina Christoffely De Jager**

[9] Mrs De Jager testified that prior to October 2014, the defendant came to the plaintiff's offices. Defendant came to her and introduced a lady by the name of Maria. She said that the defendant came into her office with Maria, and introduced her as being one of the defendant's students. Defendant specifically told her that Maria is allowed to make purchases on his account and that the witness should please assist her. Defendant also said that he would take liability for such purchases. Since 15 October 2014 Maria regularly made purchases from the plaintiff. She continued to make purchases on the account of the defendant until the end of November 2014. After November 2014, the account was blocked due to non-payment thereof.

[10] The defendant occasionally signed for receipt of the goods ordered by Maria. The invoices and delivery notes clearly indicate that the purchases were made on the account of the defendant and that Maria was the person who placed the orders. According to her it is simply untrue that the defendant did not authorise Maria to make purchases on his account. Nobody ever queried this account or the invoices appearing thereon. The defendant certainly did not query the account nor did he at any stage inform me that Maria was not authorised to make purchases on the account. In fact, during February 2015, both the defendant and Maria attended to the plaintiff's offices, the witness said. On this occasion, the defendant made a payment in the amount of N\$40,000.00 towards his account and in respect of purchases made by Maria.

[11] Mrs De Jager further testified that after February 2016, it became almost impossible to make contact with Mr. Quickfall. She phoned Maria and the wife of defendant on numerous occasions to enquire as to when payment would be made. Maria's empty promises came to nothing and no further repayments were received. On one occasion on 29 March 2016 she managed to speak to the defendant and he requested that plaintiff should give Maria an extension of time until 7 April 2016 to pay the account. The witness informed him that if payment is not made, his account will be handed over for collection. The defendant did not deny his liability to pay on any of these occasions.

[12] The first time the defendant made mention of not being liable for the account was when Mr. Behrens (the plaintiff's legal practitioner) informed the witness of the defense raised by the defendant during the legal proceedings. At all relevant times, the witness was under the impression that defendant authorised Maria to make purchases on his account and that he would take liability therefore. If this was not the case, she would have given Maria a new credit application to complete, which application she would then have presented to Mr. Jensen for approval. She said that Mrs Smith and her share an office and she clearly remembers the conversation during which Mr Quickfall told her that Maria may make purchases on his account. Mrs Nelia Smith was present in the office.

[13] During cross examination, Mrs De Jager testified that despite the fact that there was no written permission from the defendant that Maria may make purchases, both her and Mrs Smith were present when defendant gave permission for Maria to make purchases on his account. When the defendant put to her that he at some stage (without indicating a date) attended to the offices of the plaintiff to stop Maria from making purchases on his account (thereby withdrawing the authority previously granted), she answered in no uncertain terms that at the time defendant came in to stop Maria from making further purchases, the account was already in arrears. The witness testified further that the plaintiff placed the account on hold i.e. that no further purchases could be made at the end of November 2014 because of non-payment. In cross examination, she also testified that usually, the plaintiff would phone the account holder if a third party wants to make a purchase, but in this case, it was not necessary to phone the defendant because he expressly gave his permission for Maria to buy. When it was put to the witness that there was no arrangement to let Maria buy on his account the witness reiterated that the defendant had introduced Maria and told plaintiff that Maria could buy on his account and that he will pay for the said purchases.

**Mrs Nelia Smith**

[14] In her evidence Mrs. Smith confirmed that the defendant had expressly gave his permission that Maria may make purchases on his account and that she was present during this meeting. She stated that the meeting took place in 2014.

[15] During cross examination, it became apparent – that Maria also on previous occasions (before the express authorization) made purchases because she saw her name on the statement. During these previous occasions, the witness did not know Maria as the defendant only said that one of his students will buy. The defendant on each such occasions authorised Maria to buy. During 2014, the defendant came to introduce Maria and expressly gave permission that Maria could make purchases on defendant's account. For this reason, they did not phone defendant to verify the purchases because of the express authority that had been granted. The authority was open ended and not limited in amount or by time. According to Mrs Smith, the plaintiff allowed Maria to make purchases because of this express authority and because their long-standing relationship. The witnesses knew the defendant well. She was coherent, her evidence was clear and her demeanour in Court cannot be faulted. Despite somewhat unclear, inconsistent and at times, illogical cross-examination, all plaintiff's witnesses clearly answered all questions put to them by the defendant and the court. There is no reason whatsoever that these witnesses should be disbelieved.

#### Defendant's case

[16] After the plaintiff's case, the defendant also testified in his own defence. He did not call any witness to support him. His version is that he did not authorised Maria to purchase on his account. However, this changed during his own cross-examination of plaintiff's witness when he put it to the witnesses that he indeed gave Maria permission to buy goods on his account but stopped it at a certain stage. Again when cross-examined by counsel for the plaintiff, the defendant gave in by saying that he allowed Maria to buy on his account, although reiterated that such permission was terminated during October/November 2014.

## Submissions

[17] Ms Campbell submitted that the evidence of the witnesses was not contended and relied on the principle in *Small v Smith*<sup>1</sup>, where Claasen J. stated the following:

'It is, in my opinion elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, other witnesses will contradict him, so as to give him a fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness' evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved. Once a witness' evidence on a point in dispute is left unchallenged in cross-examination and particularly by a legal practitioner, the party calling that witness is normally entitled to assume in the absence of notice to the contrary that the witness's testimony is accepted as correct.'

[18] Counsel referred also to the matter of *R v Dominic Mngomezulu And Others*<sup>2</sup> where the following is said:

*'It is, I think, clear from the foregoing that failure by counsel to cross examine on important aspects of a prosecution witness testimony may place the defence at risk of adverse comments being made and adverse inferences being drawn. If he does not challenge a particular item of evidence then an inference may be made that at the time of cross examination his instructions were that the unchallenged item was not disputed by the accused, and if the accused subsequently goes into the witness box and denies the evidence in question the court may infer that he has changed his story in the intervening period of time. It is also important that counsel should put the defence case accurately. If he does not, and the accused subsequently gives evidence at variance with what was put, the court may again infer that there has been a change in the accused's story.'*

[19] On the other hand the defendant submitted that permission was at no point granted to Maria to purchase items on the defendants account on credit. Defendant further contended that there is a statement extract indicating that certain materials and products were requested and / or delivered to a certain Maria and a certain Albert.

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<sup>1</sup> 1954 (3) SA 434 (SWA) at p 438 E-F.

<sup>2</sup> *Criminal Case No 94/1990.*



[20] He further argued that paragraph four of the plea at page two of the Credit Application form makes specific reference to who is authorised to sign for receipt of materials, and which was left blank, an indication that he did not authorise a certain Maria and Albert to order at his expense materials and / or goods. In any event, he said that it is a standard procedure of Pennypinchers that where someone other than the account holder makes a purchase, then the account holder is contacted to verify the purchase.

[21] The defendant argued further that he was never contacted by Pennypinchers to verify the purchases or that it was done at defendant's special instance and request. It is Pennypinchers' own internal procedural irregularities that led to an unauthorised person making purchases on defendant's account which was always kept proper and never in arrears, as he maintained a clean account record with them. He denies that he made these alleged purchases at his special instance and request and did not derive any benefit from the service allegedly rendered and never had sight of such goods either.

[22] However, in his evidence on pages 21 and 23 of the record he states the following which is the opposite:

*'My Lord the Plaintiff she is even still confused of what I said by authority or reference that Maria could buy on my account. I never denied that Maria could buy on my account.'*<sup>3</sup>

*at page 23*

*'During October November 2014 I came to Penny Pinchers and said stop please stop. Maria cannot buy on my account anymore without my written consent because it is a problem'.*

### Conclusion

[23] The facts in this matter are to be approached in accordance with weighing up the probabilities on a preponderance whose account is more likely to be probably true. The disputes in this matter are whether or not the defendant is responsible for the payment of N\$ 43 483.96 and whether or not the defendant authorised Maria to buy on his account at the plaintiff.

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<sup>3</sup> He repeated these sentiments again on page 25 of the record.

[24] It is trite law that, unlike in criminal proceedings where the State has to prove its case against the accused person beyond a reasonable doubt, in civil litigations though, the burden of proof is on a balance of probabilities which is more lighter than that in criminal proceedings. Having listened to their testimonies, witnesses for the plaintiff did not give the court any reason to doubt their credibility. They emphasised that the defendant introduced Maria to them as one of his students and that she could buy on his account, so, they must assist her when she does her purchases. The defendant himself also testified that he authorised Maria to buy on his account at the plaintiff which was done in the presence of Mrs De Jager and her colleague, Mrs Smith. The problem arose when Maria abused the account by buying more on the account which she could not afford to pay. Had it not been the case, there would have been no problems between the two parties.

[25] Therefore, when taking into account the evidence of the matter as a whole, together with the written and oral submissions presented by counsel for the plaintiff as well as the case law cited in the written heads of argument, I am satisfied that the plaintiff had proved on a balance of probabilities that the defendant permitted Maria to buy on his account, therefore liable and plaintiff should succeed in its claim against the defendant with costs.

[26] Consequently, the following order is made:

- (iv) The defendant pays the plaintiff the amount of N\$ 43 483.96.
- (v) Interest on the amount at the rate of 20% per *annum a tempore morae*.
- (vi) Costs as agreed on an attorney and own client scale.

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Acting Judge

APPEARANCES

PLAINTIFF : Y Campbell  
Instructed by Behrens & Pfeiffer, Windhoek

DEFENDANTS : In Person  
Christopher Quickfall