

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

Case No: HC-MD-CIV-ACT-CON-2017/02384

In the matter between:

ERASTUS KAKORO

PLAINTIFF

and

STEVEN NDARA

DEFENDANT

Neutral citation: *Kakoro v Ndara* (HC-MD-CIV-ACT-CON-2017/02384) [2019]
NAHCMD 189 (14 June 2019)

Coram: USIKU, J

Heard on: 11 and 14 February 2019

Delivered: 14 June 2019

Flynote: Contract – Breach – Cancellation – Plaintiff seeking to recover amount of payment he made to the defendant in terms of the contract, on the basis of unjust enrichment – Unjust enrichment remedy not available to the plaintiff in the context of money paid in terms of a contract – Plaintiff’s claim dismissed.

Summary: The defendant sold a motor vehicle to the plaintiff for N\$ 60 000 on the terms that the plaintiff takes possession of the motor vehicle, uses it as a taxi and generate money to pay off the N\$ 60 000 purchase price to the defendant within a period of six months. The plaintiff only paid N\$ 27 000 to the defendant. The defendant repossessed the motor vehicle from the plaintiff. The plaintiff instituted action for recovery of the amounts he paid to the defendant on the basis of unjustified enrichment. The court held that the remedy of unjustified enrichment is not available to the plaintiff in the circumstances. Claim dismissed.

ORDER

1. The plaintiff's action is dismissed.
 2. The plaintiff is ordered to pay the defendant's costs of this action.
 3. The matter is removed from the roll and regarded finalised.
-

JUDGMENT

USIKU, J:

Introduction

[1] The plaintiff instituted action against the defendant for payment of N\$ 47 000.00 being the amount the plaintiff had allegedly paid to the defendant as part of the purchase price of a motor vehicle, based on alleged oral agreement.

[2] The plaintiff's cause of action against the defendant is based on unjustified enrichment in the form of the *condictio sine causa*.

Background

[3] The plaintiff and the defendant are brothers-in-law, the plaintiff being married to the defendant's sister.

[4] On or about September 2014 the plaintiff and the defendant entered into an oral agreement in terms of which the defendant sold to the plaintiff a motor vehicle for N\$ 60 000.00, on the following terms:

- (a) the plaintiff takes possession of the motor vehicle, registers it with relevant authorities as a taxi and operates it as a taxi-business;
- (b) the plaintiff uses the income generated from the taxi-business to pay off the aforesaid purchase price to the defendant;
- (c) the agreement between the parties as set out above shall be valid for a period of 6 months, from November 2014 terminating in April 2015;
- (d) upon payment of the full purchase price to the defendant, in terms of the above agreement, the motor vehicle shall become the sole and exclusive property of the plaintiff.

[5] In September 2014, the plaintiff took possession of the motor vehicle, fully registered it as a taxi and operated it as a taxi. On or about 27 January 2015 the plaintiff paid to the defendant an amount of N\$ 27 000.00 towards payment of the purchase price.

[6] On or about 9 January 2016 the defendant demanded and obtained repossession of the motor vehicle from the defendant.

[7] Subsequent to that, the plaintiff instituted the present action on the basis as aforesaid.

Plaintiff's version

[8] The plaintiff testified that in addition to the N\$ 27 000 he paid to the defendant in January 2015, he had also paid an amount of N\$ 20 000, in cash, to the defendant, on 30 May 2015. He deposed that he was alone when he delivered the N\$ 20 000 to the defendant and that he gave that amount to the defendant in the presence of the

defendant's daughter. That daughter was not called to give evidence. The defendant disputes receiving the N\$ 20 000 amount.

[9] The plaintiff further testified that during November 2015 the windscreen of the motor vehicle broke and as a result the motor vehicle could not pass the necessary roadworthiness test in that state. The motor vehicle lay idle since then, as the plaintiff had no funds to effect the necessary repairs.

[10] According to the plaintiff, during the period of 2014 to 2015, the plaintiff had invested a lot of money and energy into the motor vehicle and this, in the end, only enriched the defendant. The plaintiff further contends that the defendant breached the agreement when he repossessed the motor vehicle in January 2016.

[11] The plaintiff called one witness to testify, namely Mrs Shihetekera Lucia Sipeko, who is the wife of the plaintiff. Her evidence did not significantly advance the plaintiff's version on disputed issues, especially as she was not present when the plaintiff allegedly delivered the disputed N\$ 20 000 in cash to the defendant.

The defendant's version

[12] The defendant confirmed that the plaintiff and himself concluded the agreement valid for a period of six months. The plaintiff took possession of the motor vehicle in September 2014. However the defendant only received payment from the plaintiff once, in the amount of N\$ 27 000, which was paid directly into his bank account.

[13] The defendant maintains that it was the plaintiff that breached the terms of the agreement by failing to make full payment to the defendant within a period of six months as agreed.

[14] In addition the defendant testified that he only got the motor vehicle back from the plaintiff in October 2016 and that the motor vehicle was in bad shape in that:

- (a) the windscreen was broken (cracked);
- (b) the seats inside the motor vehicle were torn;
- (c) one of the rear-view mirrors was broken;
- (d) the rear bumper had a dent;
- (e) the spare-wheel was missing; and
- (f) the plaintiff took the keys to the motor vehicle with him and has not delivered them since.

[15] The defendant denied having received N\$ 20 000 from the plaintiff as alleged by the plaintiff. Furthermore, the defendant denied having been unjustifiably enriched, as he was entitled to the payment

Analysis

[16] In this matter the plaintiff alleged among other things, that he had made payment of N\$ 20 000 to the defendant in addition to the initial payment of N\$ 27 000. The defendant denies receiving the N\$ 20 000 payment.

[17] The only witness who testified to the payment of N\$ 20 000 is the plaintiff himself. Apart from his *ipsissima verba* there is no other evidence in support of that allegation. On this aspect, I am persuaded to accept the version of the defendant. He strikes me as an honest and truthful witness. From his evidence there can be no suggestion that he in any way wishes to hide certain facts from the court. The same cannot be said of the plaintiff. The plaintiff did not reveal that when he delivered the motor vehicle back to the defendant he took the keys to the motor vehicle with himself or that the motor vehicle, apart from the windscreen, has other patent defects which were not present when he took possession of the motor vehicle. On the evidence before me, I am satisfied that the defendant had acted in good faith at all times and believe the defendant when he testified that he did not receive N\$ 20 000 from the plaintiff.

[18] On the evidence presented before the court, the parties agreed that the plaintiff shall use the motor vehicle in question as a taxi and the plaintiff was obliged to make payments to the defendant to the amount of N\$ 60 000 within a period of six months from November 2016. Upon payment of N\$ 60 000, the motor vehicle becomes the sole and exclusive property of the plaintiff.

[19] The plaintiff now seeks to recover by way of action for unjust enrichment based on the *condictio sine causa*, the amounts by which he claims to have been impoverished and the defendant have been enriched. The requirements for unjustified enrichment action are that:

- (a) the defendant must be enriched;
- (b) the plaintiff must be impoverished;
- (c) the defendant's enrichment must be at the expense of the plaintiff; and
- (d) the enrichment must be unjustified (*sine causa*).

[20] It is common cause that in this matter the plaintiff had paid N\$ 27 000 to the defendant. Where there is payment of money, there is little controversy over whether or not a benefit was received and since payment of money was received, an enrichment of some sort was conferred on the defendant. In the similar vein and for the same reasons, I find that the plaintiff was impoverished thereby and that the enrichment was at the expense the plaintiff. The degree of the enrichment and impoverishment in this particular case is difficult to quantify in the light of the evidence that when the plaintiff returned the motor vehicle to the defendant in October 2016, the motor vehicle was in a bad state and in need of repairs. Due to the conclusion I have reached hereunder, this aspect is not important now.

[21] In any event, the above is not all that the plaintiff must establish to succeed with the unjustified enrichment claim. The plaintiff is required further to prove that the payment by him to the defendant was made without just cause (i.e *sine causa*) and was therefore unjustified.

[22] On the basis of the evidence presented in this matter it is clear that the plaintiff paid the N\$ 27 000 to the defendant in terms of the oral agreement concluded between the parties. In terms of that agreement, the plaintiff was only entitled to ownership of the motor vehicle upon full payment of N\$ 60 000 to the defendant within six months from November 2014. The plaintiff did not fulfil his part of the bargain and therefore ownership of the motor vehicle did not accrue to him. On the evidence, it was not the intention of the parties for the plaintiff to continue possession and use of the defendant's motor vehicle after the agreement has been cancelled. It, therefore, follows that when the defendant cancelled the agreement, he was entitled to foreclose on his security by obtaining repossession of his motor vehicle from the plaintiff.

[23] Since the payment by the plaintiff to the defendant was made in terms of the agreement between the parties, the unjustifiable enrichment claim is not open to the plaintiff for the recovery of the amount, from the defendant.

[24] In the result, the claim of the plaintiff stands to be dismissed.

[25] With regard to the question of costs, the defendant is the successful litigant and is entitled to his costs. I shall therefore make an order to that effect.

[26] It is accordingly ordered that:

1. The plaintiff's action is dismissed.
2. The plaintiff is ordered to pay the defendant's costs of this action.
3. The matter is removed from the roll and regarded finalised.

B Usiku
Judge

APPEARANCES:

PLAINTIFF:

F. Gaes

Instructed by Uanivi Gaes Incorporated

Windhoek

DEFENDANTS:

K. Mudzanapambwe

Instructed by Etzold-Duvenhage

Windhoek