

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

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| Case Title: Mateus Enkali vs Zaheer Brenner T/A Brenner Fruit | Case No: HC-MD-CIV-ACT-CON-2019/04690 |
| | Division of Court: HIGH COURT (MAIN DIVISION) |
| Heard before: Honourable Lady Justice Rakow, J | Date of hearing: 7 May 2021 |
| | Date of order: 8 June 2021 |
| Neutral citation: <i>Enkali v Zaheer Brenner t/a Brenner Fruit</i> (HC-MD-CIV-ACT-CON-2019/04690) [2021] NAHCMD 286 (8 June 2021) | |
| IT IS HEREBY ORDERED THAT: <ol style="list-style-type: none">1. The application for absolution from the instance is dismissed.2. The matter is postponed for the continuation of the trial to 16 -17 August 2021 at 10h00 for the continuation of trial. | |
| Reasons for orders: | |
| <u>Background</u> <p>[1] The plaintiff in the current matter, Mr. Enkali instituted action against the first defendant, Zaheer Brenner t/a Brenner Fruit, and the second defendant, Abbas Brenner for the damages caused to him concerning 2 666 boxes of fish which perished and eventually had to be destroyed due to the actions of the defendants. It was pleaded that</p> | |

the cause of action arose when an agreement was entered into between the second defendant on behalf of the first defendant and the plaintiff for the rental of cold storage facilities at the premises of the first defendant and the removal of the fish from these facilities subsequently.

[2] The second defendant did not defend the matter and the first defendant, Mr. Zaheer Brenner pleaded that he ceased trading as Brenner Fruit at the end of 2017. He further denies that he entered into any transaction with the plaintiff and has no knowledge of such a transaction. He pleaded that he entered into a lease agreement for the premises where Brenner Fruit was trading with the second defendant who commenced trading fresh fruit and vegetables produce from the said premises under the name and style of Oshikango Oonoli Fruits. The second defendant had no mandate and authority to represent the first defendant in any capacity.

The evidence presented by the plaintiff.

[3] The plaintiff, Mr Enkali testified that on 10 March 2019 he was looking for freezer space to rent in Oshikango after a consignment of horse mackerel fish could not be exported through the border to Angola due to the ban on such imports on the Angolan side of the border. He testified that he was referred to Brenner fruit's premises and after discussions with the second defendant, they agreed that he would rent freezer space for 2 666 boxes of fish at N\$15 000 per month. He was told by Mr. Abbas Brenner that he was the owner of the business and he found vehicles branded with the name Brenner Fruit on the premises. They then unpacked the fish from its container over into the container pointed out to them by the second defendant. He was also granted permission to store the freezer truck trailer in which the fish was transported at the yard of Brenner fruit.

[4] Mr. Enkali complied with the agreement and paid N\$15 000 to the defendants on 17 March 2019. On 28 March 2019, Mr. Enkali was contacted by Mr. Shakier Brenner (not one of the parties in this matter) and he asked Mr. Enkali to remove his fish from the container as he had fruit coming from South Africa. Mr. Enkali contacts Mr. Abbas Brenner who assured him that his fish would not be removed. Later the same day Mr. Enkali received a text message from Mr. Shakier Brenner stating that the fish has been

removed, he must come and collect it. Again Mr. Abbas Brenner was contacted and he assured Mr. Enkali that the fish will not be removed.

[5] On 11 April 2019 he was again informed by Mr. Shakier Brenner that he must come and collect his fish and Mr. Enkali informed him that he would be in the North the next day but only managed to go to the premises where the fish was stored on 13 April 2019 and found the fish rotting as well as the padlocks on the freezer broken. The fish was subsequently destroyed by the Government's Environmental Health officials. As a result, he suffered damages in the amount of N\$694 226.40 as well the profit he stood to make in the amount of N\$1 062 662.00, and his freezer truck trailer was also kept by the defendants. They invoiced him for parking fees and he testified that it was never their agreement and that the defendants are therefore keeping the trailer without legal basis.

[6] Mr. Enkali was at all times under the impression that he was dealing with the owner of the business. He also received two invoices at a later stage from Mr. Abbas Brenner, the one for fish storage for 90 days, in the amount of N\$90 000 dated 25 September 2019 but without a business name printed on the invoice and another invoice dated 3 October 2019 in the amount of N\$45 600 for truck parking fees for 304 days. This invoice had the name of Brenner fruit printed on it. This invoice had a vat reg. number printed on it, 297 969 6015.

[7] When Mr. Enkali enquired concerning the vat number at the Inland Revenue Department of the Ministry of Finance, he was informed that this number belonged to Zaheer Brenner and then realized that Mr. Zaheed Brenner is the registered owner of Brenner Fruit. The Taxpayer Registration Certificate which he obtained with the said information is dated 18 October 2019. He, therefore, instituted action against both Mr. Zaheer Brenner t/a Brenner Fruit and Mr. Abbas Brenner.

[8] Mr. Hernani Joao then testified regarding the agreement between himself and Mr. Enkali and the value of the said agreement. He was to purchase 2 666 x 12kg boxes of horse mackerel fish for N\$659.00 per box.

The basis for absolution from the instance

[9] The process for the application for absolution from the instance is set out in rule 100 of the High Court rules but it however does not set out what needs to be considered. The test for granting absolution from the instance at the end of a plaintiff's case is set out in *Claude Neon Lights (SA) Ltd v Daniel*¹ where Miller AJA said:

' (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff.'

[10] In *Ramirez v Frans and Others*,² this court dealt with the application and the principles applicable. Concerning case law, the following principles were extracted:

“(a) (T)his application is akin to an application for a discharge at the end of the case for the prosecution in criminal trials ie in terms of s 174 of the Criminal Procedure Act — *General Francois Olenga v Spranger*³;

(b) the standard to be applied, is whether the plaintiff, in the mind of the court, has tendered evidence upon which a court, properly directed and applying its mind reasonably to such evidence, could or might, not should, find for the plaintiff — *Stier and Another v Henke*⁴ “

(c) the evidence adduced by the plaintiff should relate to all the elements of the claim, because in the absence of such evidence, no court could find for the plaintiff — *Factcrown Limited v Namibian Broadcasting Corporation*⁵.

(d) in dealing with such applications, the court does not normally evaluate the evidence adduced on behalf of the plaintiff by making credibility findings at this stage. The court assumes that the evidence adduced by the plaintiff is true and deals with the matter on that basis. If the evidence adduced by the plaintiff is, however, hopelessly poor, vacillating or of so romancing a character, the court may, in those circumstances, grant the application — *General Francois Olenga v Erwin Spranger*⁶;

(e) the application for absolution from the instance should be granted

¹ *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G – H

² *Ramirez v Frans and Others* [2016] NAHCMD 376 (I 933/2013; 25 November 2016) para 28. See also *Uvanga v Steenkamp and Others* [2017] NAHCMD 341 (I 1968/2014; 29 November 2017) para 41

³ *General Francois Olenga v Spranger* (I 3826/2011) [2019] NAHCMD 192 (17 June 2019), *infra* at 13 para 35

⁴ *Stier and Another v Henke* 2012 (1) NR 370 (SC) at 373.

⁵ *Factcrown Limited v Namibian Broadcasting Corporation* 2014 (2) NR 447 (SC)

sparingly. The court must, generally speaking, be shy, frigid, or cautious in granting this application. But when the proper occasion arises, and in the interests of justice, the court should not hesitate to grant this application — *Stier and General Francois Olenga v Spranger (supra)*.”

[11] It is further trite law that a principal is bound by the actions of his or her agent. In this instance, the second defendant represented to the plaintiff that he is the owner of Brenner fruit. The negotiations were at all times done with the second defendant and the second defendant also made the arrangement for the necessary payment. The invoice for the parking of the truck is a Brenner fruit invoice with the VAT number, which upon further investigation showed that it belongs to the first defendant t/a Brenner fruit, also displayed the name of the second defendant as part of the email address indicated in the contact information available on the face of the invoice. At all times these invoices originated from the second defendant. It, therefore, appears on the face of the case presented by the plaintiff that the second defendant was indeed the agent of the first defendant and authorized to contract on its behalf.

[12] It must further be borne in mind that the first defendant is not here in the name of only Zaheer Brenner but the entity Zaheer Brenner trading as Brenner fruit. The plaintiff testified that the agreement was concluded at the premises of Brenner fruit, the fish was stored at these premises, and the vehicle was stored at the same Brenner fruit premises. The court finds therefore that the plaintiff indeed discarded his burden and the application for absolution of the instance is not granted.

[13] As a result, I make the following order:

1. The application for absolution from the instance is not granted.
2. The matter is postponed for the continuation of the trial to 16 -17 August 2021 at 10h00 for the continuation of trial.

| Judge's signature | Note to the parties: |
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| Rakow, J | Not applicable. |

⁶ *General Francois Olenga v Erwin Spranger* (I 3826/2011) [2019] NAHCMD 192 (17 June 2019) and the authorities cited therein;

| Counsel: | |
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| Applicants E Shikongo Shikongo Law Chambers Windhoek | Respondent N Enkali Kadhila Amoomo Legal Practitioners Windhoek |