

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

<b>Case Title:</b> Mateus Enkali v Zaheer Brenner T/A Brenner Fruit	<b>Case No:</b> HC-MD-CIV-ACT-CON-2019/04690
	<b>Division of Court:</b> HIGH COURT (MAIN DIVISION)
<b>Heard before:</b> Honourable Lady Justice Rakow, J	<b>Date of hearing:</b> 18 October 2021
	<b>Date of order:</b> 26 November 2021
<b>Neutral citation:</b> <i>Enkali v Zaheer Brenner t/a Brenner Fruit</i> (HC-MD-CIV-ACT-CON-2019/04690) [2021] NAHCMD 553 (26 November 2021)	
<b>IT IS HEREBY ORDERED THAT:</b> <ol style="list-style-type: none"><li>1. Absolution from the instance is granted.</li><li>2. Costs are awarded to the first defendant.</li><li>3. The matter is removed from the roll and finalized.</li></ol>	
<b>Reasons for orders:</b>	
RAKOW, J  <u>Background</u>  [1] The plaintiff, 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 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[2] The second defendant defend the matter at a very late stage and the case was subsequently withdrawn against him. 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) who asked Mr. Enkali to remove his fish from the container as he had fruit coming from South Africa. Mr. Enkali contacted 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 off. 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 registration 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. Zaheer 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] The plaintiff's witness, Mr. Hernani Joao 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.

[9] The first Defendant testified on his own behalf and called no witnesses. He testified that he does not know the plaintiff and had no dealings with him. He further did not appoint anyone as his agent to deal with the plaintiff or any one else in the name of his business, Brenner fruit. He never received any money from the plaintiff and the account into which the plaintiff paid money, is unknown to him and not the account of Brenner Fruit. With reference to the exhibits handed in, he testified that the information contained in Exh. A contains references to his brother's cell phone number and email address and has no reference to Brenner fruit. This exhibit is an invoice for the storage of fish. Exh. B is an invoice for the parking of a truck on a Brenner fruit invoice heading but the information displayed is information of his brother, the second defendant. The Vat number displayed looks almost similar to his own Vat number except that some digits are missing.

[10] He further testified that he gave his brother, Abass Brenner, the second defendant permission to use his premises in Oshikango to trade as Oshikango Onooli Fruits in 2018 when he stopped trading as Brenner Fruits. He moved from the premises in Oshikango in 2016 when he moved his business to Windhoek. He further testified that he enquired from the Ministry of Finance regarding the VAT registration number and the fact that he stopped trading as Brenner Fruit and was informed that he cannot close the VAT account as it is held against his personal name and therefore still active. There are further four other tenants at the premises in Oshikango besides his brother.

#### Issues of fact and law that needed to be resolved during the trial

[11] The pertinent issues of fact to be resolved at trial in terms of Rule 26(6)(a) as agreed to between the parties in the pre-trial report are:

- Whether or not the first defendant was trading as Brenner Fruit in the year 2019.
- Whether or not there was a valid agreement between the first defendant and the plaintiff.
- Whether or not the plaintiff had a reasonable belief that the second defendant represented the first defendant in entering into the agreement.

[12] The pertinent issues of law to be resolved at trial in terms of Rule 26(6)(b) as agreed to between the parties in the pre-trial report are:

- Whether a valid agreement existed between the first defendant and the plaintiff.
- Whether the second defendant represented and was acting for the first defendant.
- Whether the first defendant is vicariously liable for the actions of the second defendant.

### Discussion

[13] To decide whether there was a valid agreement between the first defendant and the plaintiff and whether the plaintiff had a reasonable belief that the second defendant represented the first defendant in entering into the agreement, the court needs to look at the basic requirements for an agreement. In *Ceomar Consult CC v China Harbor Engineering Company Ltd Namibia*<sup>1</sup> Parker AJ said the following regarding a contract:

'First and foremost, in our law there are two fundamental grounds upon which a person X can prove the existence of a contract, namely, 'consensus' and 'reasonable reliance'. As to the first ground, X must establish that there has been an actual meeting of minds of the parties, that is, X and Y were ad idem (ie consensus ad idem). If that was established, the validity of the contract is put to bed, not to be awoken. If, however, there was not an actual meeting of minds, that is, X and Y were never ad idem, the question to answer is whether X or Y by their words or conduct led the other party into the reasonable belief that consensus was reached; that is 'reasonable reliance' (Dale Hutchison (Ed) et Chris-James Pretorius (Ed) *The Law of Contract in South Africa* 2nd ed (2012) at 19-20). The second relevant basic principle is this. An 'oral agreement made seriously and deliberately with the intention that a lawful obligation should be established and has a grounded reason which is not immoral or forbidden' is valid and enforceable (DM v SM 2014 (4) NR 1074 (HC) para 23), as Mr Phatela submitted. The third relevant basic principle is that the onus of establishing that a contract exists rests squarely on the party who alleges the existence of the contract. He or she may establish the existence of the contract on the ground of consensus ad idem or on the ground of reasonable reliance. That is not all. That party must also prove the terms of the contract. Generally, the opposing party bears no burden to prove that no contract exists.'

[14] Similarly, the onus rest on the plaintiff to establish that the second defendant was indeed acting on behalf of the first defendant. The plaintiff testified that he thought the second defendant was acting in his own capacity until such time as he checked the VAT

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<sup>1</sup> *Ceomar Consult CC v China Harbor Engineering Company Ltd Namibia* (I2115/2015) [2021] NAHCMD 455 (5 October 2021).

number and realized that the first defendant is still the owner of Brenner fruit. The invoice for the storage of the fish was also not issued by Brenner fruit but just a mere invoice without displaying a business name. It is clear that the plaintiff at all times had dealings with the second defendant and another Brenner brother with whom he exchanged text messages. At no time did the plaintiff had any dealings with the first defendant and the evidence from the first defendant was that Brenner fruit stopped trading in 2018. There was no evidence placed before this court to indicate that Brenner fruit was indeed still trading at the time that the second defendant and the plaintiff entered into an agreement.

[15] The question that should be asked at the end of the case, in order to determine whether absolution from the instance should be granted or not, differs from the one at the end of the plaintiff's case in that it is no longer whether a prima facie case was made out, but whether a case indeed has been made out. We now come to the real issue in the case, whether Mr. Enkali has produced enough evidence to escape an absolution finding, taken into account the evidence produced by the first defendant. There is simply not enough evidence before court to show that there was indeed a contract between the plaintiff and Brenner fruit and further, that the second defendant acted in respect of the first defendant as his agent and that there was enough evidence present for the plaintiff to form a reasonable believe that the second defendant acted on behalf of the first defendant. The court therefore grants absolution from the instance.

[16] In the result:

1. Absolution from the instance is granted.
2. Costs are awarded to the first defendant.
3. The matter is removed from the roll and finalized.

<b>Judge's signature</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Applicants</b> E. Shikongo	<b>Respondent</b> N. Enkali

<p>of</p> <p>Shikongo Law Chambers</p> <p>Windhoek</p>	<p>of</p> <p>Kadhila Amoomo Legal Practitioners</p> <p>Windhoek</p>
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