

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT

CASE NO.: I 1147/2016

In the matter between:

ONCORE INVESTMENT CC

PLAINTIFF

and

REMIZIUM

FIRST DEFENDANT

SHARP DESIGN AND PRINTING

SECOND DEFENDANT

Neutral Citation: *Oncore Investment CC vs Kamati and Another* (CC I 1147/2016)
[2022] NAHCMD 7 (18 January 2022)

CORAM: UEITELE, J

Heard: 17-20 & 25 August 2021.

Delivered: 18 January 2022

Flynote: *Evidence — Onus of proof —* when discharged — he who asserts the existence of a fact in issue shoulders the *onus* of proving such fact.

Summary: During the year 2015 the plaintiff submitted a proposal to the then Ministry of Foreign Affairs to provide it with corporate gifts in the form of Ostrich eggs. During the same period the first defendant through Sharp Design and Printing CC, the second defendant, also made a presentation to the Office of the Prime Minister to provide it with T-Shirts for the Independence celebrations.

Both proposals were accepted and the plaintiff and the first defendant entered into an oral agreement with Queen of Namibia/African Gemstones for it to provide them with the corporate gifts and the T-Shirts on credit on the understanding that once the plaintiff and the second defendant have delivered the corporate gifts and the T- Shirts and they receive payments they will in turn pay Queen of Namibia/African Gemstones the cost price of the corporate gifts and the T–Shirts. The parties further agreed that the profits derived from the tenders to provide the Ministry of Foreign Affairs with the corporate gifts and the Office of the Prime Minister with the T – Shirts will be shared equally amongst them.

During March 2015 the first defendant entered into an oral agreement with the plaintiff (the plaintiff then being represented by its sole member) in terms of which the plaintiff purchased a motor vehicle for the first defendant. The oral agreement further provided that the first defendant will repay the purchase price for the motor vehicle to the plaintiff by the end of March 2015.

Alleging that the first defendant breached the oral agreement by failing to repay the purchase price for the motor vehicle, the plaintiff during May 2016 commenced proceedings in this Court in which he claimed payment of the amount of N\$ 496 235-80 from the first defendant, being the purchase price of the vehicle.

The first defendant entered notice to defend the plaintiff's claim. The first defendant's defence in essence is that he has repaid the purchase price of the vehicle to the plaintiff.

Held that it is a well-established principle of our law that 'he who alleges must prove'. The first rule of that principle is that the person who claims something from another has to satisfy the court that he is entitled to it. Secondly, where the person against whom the claim is made is not content, but sets up a special defence, then he is regarded *quoad* that defence, as being the claimant: for his defence to be upheld he must satisfy the court that he is entitled to succeed on it.

Held further that Mr Kamati has not satisfied the court that his defence must be upheld entitling him to succeed on it.

ORDER

1. The, first defendant, Mr Remizium Kamati, must pay to the plaintiff, Oncore Investment CC, the amount of N\$ 496 235 –80 plus interest at the rate of 20% per annum on the amount of N\$ 496 235 –80 reckoned from the 19 January 2022 to the date of final payment both days included.
2. The, first defendant, Mr Remizium Kamati, must pay the plaintiff's, costs of suit up to the stage when the plaintiff's legal practitioners of record withdrew, and from thereon, the defendant must pay the plaintiff's disbursements.
3. The matter is regarded as finalised and is removed from the roll.

JUDGMENT

UEITELE, J:

Introduction

[1] The plaintiff, in this matter is Oncore Investment CC, a close corporation duly registered in accordance with the close corporation laws of the Republic of Namibia. The close corporation was, at the trial of this matter, represented by its sole member, a certain Gustav Shinyama.

[2] The first defendant in this matter is Remizium Kamati a major male Namibian citizen and who is also the sole member of the second defendant, Sharp Design and Printing CC, a close corporation duly incorporated and registered in accordance with the close corporation laws of the Republic of Namibia.

[3] On 13 May 2016 Oncore Investment Close Corporation (the plaintiff), instituted action proceedings against Pupkewitz Motors (Pty) Ltd trading as Pupkewitz Toyota Windhoek as the first defendant and Remizium Kamati as the second defendant. After some legal skirmishes between the parties, the plaintiff during the year 2017 abandoned and withdrew its action against Pupkewitz Motors (Pty) Ltd trading as Pupkewitz Toyota Windhoek.

[4] During April 2017 the plaintiff amended its particulars of claim on two occasions. I pause here to record that although the plaintiff withdrew its action against Pupkewitz Motors (Pty) Ltd trading as Pupkewitz Toyota Windhoek, it confusingly continued to cite Pupkewitz Motors (Pty) Ltd T/A Pupkewitz Toyota, Windhoek as the first defendant. In some pleadings it cited Mr Remizium Kamati as the first defendant and Sharp Design and Printing CC as the second defendant. I have opted to use the citation where Remizium Kamati is cited as the first defendant and Sharp Design and Printing CC as the second defendant, because the parties before Court during the trial of this matter were Oncore as the plaintiff and Remizium Kamati as the first defendant and Sharp Design and Printing CC as the second defendant.

[5] In its amended particulars of claim the plaintiff particularized its claim in two parts namely Part A and Part B. The plaintiff latter abandoned its claim under Part B and only proceeded with its claim under Part A, I will therefore say nothing more with respect to the claim under Part B. Under Part A of the claim the plaintiff claims payment from the first defendant in the amount of N\$ 496 235 – 80.

The background to the plaintiff's claim.

[6] The facts which gave rise to the dispute between the parties are simple and are not, except for a few details, in dispute. Shinyama and Kamati were longtime childhood friends. During the year 2015 Mr Shinyama, through the plaintiff submitted a proposal to the then Ministry of Foreign Affairs to provide it with corporate gifts in the form of Ostrich Eggs. During the same period Mr Kamati through Sharp Design and Printing CC made a presentation to the Office of the Prime Minister to provide it with T-Shirts for the Independence celebrations.

[7] The plaintiff and Sharp Design and Printing CC's proposals were accepted by the Ministry of Foreign Affairs and the Prime Minister's Office respectively. The plaintiff's proposal for the corporate gifts tendered and accepted price was the amount of N\$ 528 885 and the tendered and accepted price for the T - Shirts was the amount of N\$ 1 900 000.

[8] Both the plaintiff and Sharp Design and Printing CC did not have the financial capacity to source and acquire the corporate gifts and the T - Shirts. They accordingly made use of an entity known as Queen of Namibia/African Gemstones from whom they, on credit, sourced the corporate gifts and T-Shirts on the understanding that once the plaintiff and Sharp Design and Printing CC have delivered the corporate gifts and the T- Shirts and are paid for that they will in turn pay Queen of Namibia/African Gemstones the cost price of the corporate gifts and the T – Shirts. The parties further agreed that the profits which will be realized from the provision of the corporate gifts and the T Shirts will then be shared between them

and a certain Basheer of Queen of Namibia/African Gemstones. I need to point out here that Mr Kamati disputes that the agreement of profit sharing also included Mr Basheer.

[9] On 25 March 2015 the Ministry of Foreign Affairs paid an amount of N\$ 450 000 and on 27 March 2015 paid another amount of N\$ 165 135 into the account of the plaintiff in respect of the corporate gifts. It was also during this period that Mr Kamati had planned to purchase a motor vehicle for himself. It is then that Mr Shinyama and Mr Kamati orally agreed that the plaintiff would, on behalf of Mr Kamati, pay the purchase price for the vehicle to Pupkewitz Motors (Pty) Ltd T/A Pupkewitz Toyota, Windhoek. Mr Shinyama and Mr Kamati further orally agreed that Mr Kamati would by the end of March 2015 reimburse Oncore with the purchase price, of N\$ 496 235 – 80.

The pleadings

[11] Alleging that Mr Kamati breached the oral agreement that the plaintiff caused summons to be issued out against Mr Kamati. I indicated earlier that the plaintiff amended its particulars of claim on more than one occasion. In its amended particulars of claim the plaintiff alleges that:

(a) During March 2015 the plaintiff, at Windhoek, duly represented by Gustav Shinyama in his capacity as the sole member of the plaintiff entered into an oral agreement with Mr Remizium Kamati for the purchase of Toyota Hilux, Double Cab, and D4D 4x4 motor vehicle.

(b) The express, implied and tacit terms of the said oral agreement were that:

(i) That the plaintiff will directly pay to the dealer the purchase price, which purchase price was in the amount of N\$ 496 235-80;

- (ii) That once payment has been effected, Mr Kamati will take possession of the said vehicle and the vehicle shall become his sole and exclusive property;
 - (iii) That upon the conclusion of the sale and Mr Kamati receiving possession of the vehicle, Mr Kamati would before the end of March 2015 repay to the plaintiff the purchase price of N\$ 496 235-80.
- (c) On or about the 27 March 2015 the plaintiff in accordance with the pleaded oral agreement paid the amount of N\$ 496 235-80 in to the account of Pupkewitz Motors (Pty) Ltd T/A Pupkewitz Toyota, Windhoek.
- (d) Notwithstanding having effected the required purchase amount and delivery of the vehicle having been made to Mr Kamati, Mr Kamati despite demand and in breach of the oral agreement refused, or neglected to pay back the value (N\$ 496 235-80) of the purchase price by the end of March 2015.

[11] The defendant entered notice to defend the plaintiff's claim and in his plea to the plaintiff's amended particulars of claim pleaded that:

- (a) That on the 27 March 2015 Mr Kamati and the plaintiff entered into a partly written and partly oral agreement on the following terms :
 - (i) that the plaintiff was to tender payment on behalf of Mr Kamati for the purchasing of the brand new vehicle in the make of a Hilux Legend 45;
 - (ii) That the purchase price of the aforementioned vehicle was to be an amount of N\$ 496 235-80;
 - (iii) That after payment of the purchase price by plaintiff that the motor vehicle was to be delivered to Mr Kamati by attending to place the vehicle in his possession and by registering it in Mr Kamati's name;

(b) That Mr Kamati would reimburse the plaintiff the purchase price of the vehicle in the following ways:

- (i) Gave the plaintiff an amount of N\$ 100 000 (One Hundred Thousand Namibia dollars cash, this amount was given to the plaintiff's member Mr Gustav Shinyama on 27 March 2015);
- (ii) Pay Queen of Namibia/African Gemstones the company that supplied the corporate gifts in the form of the Ostrich Eggs an amount of N\$ 250 000), this amount was paid to Mr Basheer Abrahams (who was the representative of Queen of Namibia/African Gemstones) on 07 April 2015, and
- (iii) That Mr Kamati would pay NEKA's chairperson Benita Nakaambo an amount of N\$ 40 000 (Fourty Thousand Namibia Dollars).

The issues

[12] From the pleadings it is apparent that the issue that has to be decided is a very narrow one, namely, whether Mr Kamati did repay to the plaintiff the amount of N\$ 496 235-80 which was paid on his behalf to Toyota Pupkewitz T/A Pupkewitz Toyota.

Discussion

[13] As I indicated above the dispute between the parties is very narrow and the bulk of the evidence between the parties is not in dispute. Before I embark on the discussion of whether or not Mr Kamati repaid the amount of N\$ 496 235-80 that was paid on his behalf, I start off by considering the issue of evidentiary burden. In the

matter of *Oberholzer v Loots*¹ I remarked that

'The incidence of the *onus* tells us who must satisfy the Court. With regards to the incidence of the burden of proof, the following can be said. It is a well-established principle of our law that 'he who alleges must prove'. This approach was stated in *Pillay v Krishna*². The first rule is that the person who claims something from another has to satisfy the court that he is entitled to it. Secondly, where the person against whom the claim is made is not content, but sets up a special defence, then he is regarded *quoad* that defence, as being the claimant: for his defence to be upheld he must satisfy the court that he is entitled to succeed on it.'

[14] During his testimony, Mr Shinyama who testified on behalf of the plaintiff testified that the plaintiff's close corporation was awarded the tender to provide corporate gifts in the form of Ostrich eggs to the then Ministry of Foreign Affairs. The tender amount for the Ostrich eggs was the amount of N\$ 528 885 whilst the cost price for the Ostrich eggs was the amount of N\$ 250 000. Mr Shinyama furthermore testified that Mr Basheer of Queen of Namibia/African Gemstones paid the cost price of N\$ 250 000 for the Ostrich eggs.

[15] Mr Shinyama further testified that Mr Kamati's Close Corporation, Sharp Design and Printing CC was awarded the tender to supply 50 000 T-Shirts for the independence celebrations. He further testified that the cost price for the T-Shirts and the cost of transporting the T-Shirts from South Africa to Namibia was also paid for by Mr Basheer of Queen of Namibia/African Gemstones. He furthermore testified that it was the agreement between the three of them that the profits from those tenders were to be shared equally between him, Mr Kamati and Mr Basheer.

¹ *Oberholzer v Loots* (HC-MD-CIV-ACT-OTH-2017/04333) [2020] NAHCMD 164 (16 April 2021).

² *Pillay v Krishna* 1946 AD 946 at 951 -2.

[16] Mr Shinyama further testified that the amount of N\$ 496 235-80 that he utilised to pay for the vehicle on behalf of Mr Kamati was part of the proceeds of the tender prize of the corporate gifts. He testified that the reason why he paid that money on behalf of Mr Kamati was simply that he was under the impression that by the time that Mr Kamati wanted to purchase the vehicle the Prime Minister's Office had not yet paid Sharp Design and Printing CC's proceeds for the T-Shirts and he trusted that Mr Kamati would pay back the money.

[17] He thus testified that he categorically told Mr Kamati, who was his childhood friend and his close business associate, that once Sharp Design and Printing CC has received its payment he (Mr Kamati) must not touch that money until they have paid Queen of Namibia/African Gemstones the cost prize for both the T-Shirts and the corporate gifts. He further testified that after Sharp Design and Printing CC was paid its share of the project moneys Mr Kamati decided to avoid and evade him until he was forced to seek recourse in law and issue summons against Mr Kamati.

[18] Mr Kamati did not dispute the testimony of Mr Shinyama. The only aspects he disputed as regards Mr Shinyama's testimony is the profit sharing allegations and the alleged repayment terms of the amount paid on his behalf. As regards the profit sharing Kamati testified that only he and Mr Shinyama would share in the profit on a 50/50 basis, he denied that Basheer had to share in the profits. As regards the repayment of the purchase price for the vehicle he repeated the allegations in his plea namely that in terms of the oral agreement, he and Mr Shinyama agreed that he would pay to the plaintiff an amount of N\$ 100 000 (One Hundred and Fifty Thousand Namibia dollars cash as part of Shinyama's profit share).

[19] He testified that, on 27 March 2015, he withdrew a cash amount of N\$ 100 000 from his Bank Windhoek account and paid that amount of money to Mr Shinyama, he could, however, not produce any proof of the N\$ 100 000 he alleges he paid to Mr Shinyama. He further testified that on 07 April 2015, he paid Queen of Namibia/African the amount of N\$ 250 000 in respect of the corporate gifts in the form

of the Ostrich eggs and that he paid NEKA's chairperson Benita Nakaambo an amount of N\$ 40 000 (Fourty Thousand Namibia Dollars). According to his testimony he paid a total amount of N\$390 000 on behalf of Oncore and as such he does not owe the plaintiff any money.

[20] On a question from the Court, Mr Kamati confirmed that the cost price of the T Shirts was the amount of N\$ 980 000, the cost price of the corporate gifts was the amount of N\$ 250 000 and the cost of NEKA's consultancy services was the amount of N\$ 50 000. He also confirmed that he received payment totalling N\$ 1 964 000 from the office of the Prime Minister in respect of the T-Shirts. On a further question from the Court Mr Kamati confirmed that he, in total, paid an amount of N\$ 1 300 000 to Queen of Namibia/African Gemstones, in respect of the cost price for the corporate gifts and the T - Shirts.

[21] On the authority of *Pillay v Krishna* that I quoted earlier, it is clear that Mr Kamati bears the *onus* to satisfy this Court that he repaid the amount of N\$ 496 235-80 to the plaintiff. If one has regard to the agreement between the plaintiff and Mr Kamati it immediately becomes apparent that the costs of the T-Shirts was the amount of N\$ 980 000 whilst the cost price of the corporate gifts was the amount of N\$ 250 000 and the consultancy costs was the amount of N\$ 50 000. All these costs amounting to N\$ 1 280 000 had to be paid before the profits could be shared between Mr Kamati and Mr Shinyama.

[22] What is clear from the evidence is that Mr Kamati, in addition to the amount of N\$ 1 964 000 that he received from the Prime Minister's Office further received the amount of N\$ 496 235-80 from the plaintiff. The amount of N\$ 1 300 000 which Mr Kamati thus paid to Queen of Namibia/African Gemstones is therefore part of the cost price of the goods (that is the corporate gifts, the T-Shirts and the consultancy services) tendered for. It can therefore not be correct that the amount of N\$ 250 000 that Mr Kamati paid to Queen of Namibia/African Gemstones is part of Shinyama's profit share. That amount was part of the cost price. On the evidence before me Mr

Kamati received N\$ 496 235-80 in respect of the proceeds of the corporate gifts (that is N\$ 250 000 of the costs price and N\$ 246 235-80 of the profit share).

[23] As regards the allegation that he paid the amount of N\$ 100 000 in cash to Mr Shinyama I find that allegation to be improbable and I reject it. The amount of N\$ 30 000 that was paid to Ms Nakaambo was also part of the cost price and cannot be part of the profit share of Mr Shinyama.

[24] I am therefore of the view that Mr Kamati has not satisfied the court that his defence must be upheld entitling him to succeed on it. For the avoidance of any doubt I find that the plaintiff advanced the amount of N\$ 496 235-80 to the defendant and the defendant has not repaid that money to the plaintiff.

[25] Finally regarding the question of costs. The normal rule is that the granting of costs is in the discretion of the court and that the costs must follow the cause. No reasons have been advanced to me why I must not follow the general rule. In this matter the plaintiff engaged the services of a legal practitioner up to the stage of when it filed its amended particulars claim. The plaintiff is thus entitled to its legal costs up to the stage where its legal practitioners withdrew and thereafter it is entitled to its disbursements.

[26] For the reasons that I have set out in this judgement I make the following Order:

1 The, first defendant, Mr Remizium Kamati, must pay to the plaintiff, Oncore Investment CC, the amount of N\$ 496 235 –80 plus interest at the rate of 20% per annum on the amount of N\$ 496 235 –80 reckoned from the 19 January 2022 to the date of final payment both days included.

2 The, first defendant, Mr Remizium Kamati, must pay the plaintiff's, costs of suit up to the stage when the plaintiff's legal practitioners of record withdrew, and from thereon, the defendant must pay the plaintiff's disbursements.

3 The matter is regarded as finalised and is removed from the roll.

S Ueitele
Judge

APPEARANCES

PLAINTIFF:

GUSTAV SHINYAMA, IN PERSON

DEFENDANT:

CHARMAINE KAVITJENE
Tjombe & Elago Inc, Windhoek