

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2019/04676

In the matter between:

AM-CHAGAS & GILDHOS LDA

PLAINTIFF

and

FIEST INVESTMENTS NUMBER SEVENTY TWO CC

FIRST DEFENDANT

ALI FADI AYOUB

SECOND DEFENDANT

Neutral citation: *AM-Chagas & Gildhos LDA v Fiest Investments Number Seventy Two CC* (HC-MD-CIV-ACT-CON-2019/04676 [2023] NAHCMD 345 (21 June 2023))

Coram: TOMMASI J

Heard: 1 – 5; 24 – 25 November 2021, 26 January 2022, 9 February 2022, 13 June 2022, 16 - 17, 22 June 2022, 22 - 24 August 2022, 31 January 2023 and 15 March 2023

Delivered: 21 June 2023

Flynote: Practice – Rule 98 (1) and (2) – Plaintiff's failure to attend on date matter was postponed for continuation of trial - resulting in absolution being granted and judgement granted in respect of first defendant's counterclaim – first defendant proved claim on a balance of probabilities that goods have been sold and delivered as per verbal agreement between the parties.

ORDER

Plaintiff's Claim:

1. The court grants absolution from the instance.
2. Cost of suit in favour of the first and second defendant.

First defendant's counterclaim:

The court grants judgment in favour of the plaintiff in re-convention (first defendant in convention) against the defendant in re-convention (plaintiff in convention) in the following terms:

1. Payment in the sum of N\$2 002 500.
2. Interest at the rate of 20 percent per annum from date of delivery of judgment until date of payment.
3. Cost of suit.
4. The matter is removed from the roll and regarded as finalised.

JUDGMENT

TOMMASI J:

[1] The plaintiff herein instituted action against the first, alternatively, the second defendant on the strength of a verbal contract in terms whereof the first defendant, duly represented by the second defendant agreed to sell the plaintiff 13 200 units of 25 kg maize meal at a price of N\$120 per unit. The plaintiff claims that despite payment of the purchase price in the sum of N\$1 627 500, the defendants failed to deliver the goods.

[2] The defendants opposed the action and lodged a counterclaim, claiming that the parties verbally agreed that the first defendant undertook to sell onions and maize meal to the plaintiff. The defendants claimed that the first defendant delivered onions to the plaintiff to the value of N\$3 630 000 between 25 June 2018 to 2 August 2018 against pro-forma invoices. The first defendant claimed that the plaintiff occasionally made payments in the sum of N\$1 627 500 but neglected to pay the outstanding balance in the sum of N\$2 002 500. The first defendant claims payment of the outstanding balance, interest thereon and cost of suit.

[3] The matter progressed to trial and evidence was led on behalf of both the plaintiff and the defendants. The matter was postponed for continuation of trial on 25 August 2022 to 31 January 2023 for the court to hear the interlocutory applications which the parties intended to bring.

[4] On 31 January 2023 there was no appearance on behalf of the plaintiff and the court ordered the plaintiff to show cause before or on 10 March 2023 why it failed to attend the hearing of the matter on 31 January 2023. The order further informed the plaintiff that failure to do so may result in sanctions in terms of rule 53(2)(c)(i) dismissing its claim or entering a final judgment. The court further directed the defendant to serve the court's order on the plaintiff. The matter was subsequently postponed to 15 March 2023.

[5] The legal practitioner for the plaintiff subsequently withdrew as legal practitioner for the plaintiff and served the said notice on the plaintiff. The defendants also filed an affidavit of service indicating that the court order of 31 January 2023 was sent to the

known e-mail addresses of the plaintiff. On 15 March 2023 there was no appearance on behalf of the plaintiff and the court indicated that judgment would be delivered herein.

[6] The plaintiff's absence at trial entitles the defendant to an order in terms of rule 98 which provides that:

'If a trial is called and the defendant appears and the plaintiff does not appear in person or by his or her legal practitioner, the defendant is entitled to an order granting absolution from the instance with costs, but he or she may lead evidence with a view to satisfying the presiding judge that final judgment should be granted in his or her favour and the presiding judge if so satisfied may grant such judgment.'

[7] In light of the fact that the plaintiff failed to attend the trial, the first and second defendants are entitled to an order granting absolution from the instance and costs.

[8] The first defendant is also the plaintiff in reconvention and in terms of rule 98 (1), the first defendant would also be entitled to judgment in his favour insofar as he or she has discharged such burden. The first defendant in his testimony provided the court with the following:

- (a) Pro-forma invoice dated 25 June 2018 – N\$330 000 (Manifest number QUI100032);
- (b) Pro forma invoice dated 27 June 2018 – N\$330 000 (Manifest Number Qui100032);
- (c) Pro-Forma invoice dated 6 July 2018 – N\$330 000 (Manifest no E 7700);
- (d) Pro Forma invoice dated 11 July 2018 - N\$330 000 (Manifest No E7724);
- (e) Pro Forma invoice dated 17 July 2018 – N\$330 000 (Manifest No C128075);
- (f) Pro Forma invoice dated 18 July 2018 – N\$330 000 (Manifest No C125753);
- (g) Pro Forma invoice dated 20 July 2018 – N\$330 000 (Manifest No E8487);
- (h) Pro Forma invoice dated 21 July 2018 – N\$330 000 (Manifest No E6970);
- (i) Pro Forma invoice dated 27 July 2018 – N\$330 000 (Manifest NO C132672);
- (j) Pro Forma invoice dated 2 August 2018 – N\$330 000 (Manifest No C136591);

(k) Pro Forma invoice dated 2 August 2018 – N\$330 000 (Manifest NO E8987).

[9] The testimony of the second defendant, the invoices and the supporting documents proves, on a balance of probabilities that the first defendant sold and delivered goods to the plaintiff in the sum of N\$3 630 000 as per the verbal agreement between the parties. The first defendant acknowledged having received payment in the sum of N\$1 627 500. The first defendant is thus entitled to the outstanding balance in the sum of N\$2 002 500 together with interest at the rate of 20 percent per annum from date of delivery of judgment until date of payment as prayed for in the first defendant's counter claim and cost of suit.

[10] In the premises the following order is made:

Plaintiff's Claim

1. The court grants absolution from the instance.
2. Cost of suit in favour of the first and second defendant.

First defendant's counterclaim:

The court grants judgment in favour of the plaintiff in re-convention (first defendant in convention) against the defendant in re-convention (plaintiff in convention) in the following terms:

1. Payment in the sum of N\$2 002 500.
2. Interest at the rate of 20% per annum from date of delivery of judgment until date of final payment.
3. Costs of suit.
4. The matter is finalised and removed from the roll.

M A TOMMASI

Judge

APPEARANCES

PLAINTIFF: Mateus Andre Das Chagas
Zona Industrial Lubango, Angola

DEFENDANT: Gilroy Leonard Kasper
Murorua Kurtz Kasper Incorporated, Windhoek.