



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

In the matter between:

Case no: I 1675/2012

HANGANA SEAFOOD (PTY) LTD

PLAINTIFF

And

MAGADHI FOX ALOISIUS

DEFENDANT

Neutral citation: *Hangana Sea Food (Pty) Ltd v Aloisius* (I 1675-2014) [2015]
NAHCMD 280 (19 November 2015)

Coram: MILLER AJ

Heard: 21- 25 September 2015

Delivered: 19 November 2015

Flynote: Damages – Claim for damages of goods stolen by employee – Overwhelming evidence in favour of the plaintiff – No contradictory evidence offered by the defendant – Test in solving factual disputes - Being on a balance of probabilities which necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues - Damages proved on all probabilities.

ORDER

Judgment is granted in favour of the plaintiff as against the defendant in the following terms:

1. Payment in the amount of N\$ 345 696.90.
2. Interest *a tempora morae* at the rate of 20% per annum;
3. Costs, such costs to include the costs of one instructing and one instructed counsel.

JUDGMENT

MILLER AJ:

[1] The plaintiff is a company based at the coastal town of Walvisbay and is involved in fishing operations using fishing vessels. The plaintiff instituted action against the defendant, a natural person, alleging that on 17 December 2011, the defendant took possession or disposed of three brass grid coolers ('coolers') which are used to cool units for the engines on plaintiff's motorized fishing vessels. The plaintiff further alleges that the defendant knew that the plaintiff was the lawful owner of the coolers and did not have any consent to take possession or to negligently lead to the destruction of such coolers. The plaintiff therefore claims damages in the amount of N\$ 345 696.90 being the fair and reasonable costs required in order to replace the grid coolers required for the plaintiff's motorized fishing vessels.

[2] The defendant denies each and every allegation by the plaintiff including the allegations that the defendant had knowledge of the plaintiff's ownership over the coolers. The initial plea to the claim admitted this fact but such admission was withdrawn by the amended plea filed on 21 September 2015 which reads:

'Except to deny that the defendant knew that the plaintiff was the owner of the grid coolers the content of this paragraph is denied and the plaintiff is put to the proof thereof.'

[3] An interpretation of this plea would thus mean that the defendant denies all the allegations, including ownership of the coolers. This is further evident from the pre-trial order which identifies the issues for determination by the court as:

- a) Whether the plaintiff is the owner of 3 (three) Grid coolers;
- b) Whether the Defendant without the plaintiff's consent took possession of such grid coolers;
- c) Whether the defendant on 17 December 2011 disposed of the grid coolers intentionally and without the plaintiff's consent, alternatively caused the destruction of it negligently';
- d) Whether the value of the grid coolers are N\$ 345 696.90.

[4] The parties further identified that the issues of law that needs to be resolved at trial would be the ownership of the grid coolers and whether the defendant's actions amounts to an intentional, or alternatively negligent, removal or destruction of the grid coolers. The legal issues identified are highly depended on the factual issues to be resolved. As soon as the factual disputes are resolved, the legal issues become academic and the court would not need to deal with them.

The Evidence

[5] The plaintiff led the evidence of 5 witnesses. Mr Eugene Louw who is employed as the Fleet Manager and who testified that he received a report from Mr Van Zyl, the procurement officer, that three grid coolers had gone missing from the vessel stores. Mr Louw thereafter proceeded, together with Mr Van Zyl and Mr Christie Sitzer, to the premises of Scrap Metal Sales CC as that could be the only place that the grid coolers could have been sold off as scrap since the brass grids cannot be used for any other purpose apart from being sold for a profit. They enquired as to whether such grids had been sold to them, whereupon the employees of Scrap Metal Sales CC identified the grid coolers, although cut in pieces, sold to them on 17 December 2011. Mr Louw identified the pieces with a stock number that was painted on the grid cooler in yellow paint since it corresponds with the number of the missing pieces store register. The number was 25400. A video footage and an invoice of the 17 December 2011 were also shown to Mr Eugene Louw and Mr Van Zyl, which shows that Mr Magadhi Fox was the

seller. Mr Louw also testified that from the video footage that was shown to them, he could recognise the defendant by his red Opel Corsa Bakkie with a canopy from which the grid coolers were being offloaded and himself, together with employees of Scrap Metal Sales CC as the persons of loading the pieces.

[6] Mr Van Zyl, who worked as the procurement officer for the plaintiff until 2013, corroborated the evidence of Mr Louw and further added that the defendant had no permission to remove the items from the stores or to sell such items on behalf of the plaintiff. His evidence is that the stock item number that was painted on the grid cooler pieces recovered from Scrap Metal Sales CC was 25400 which correspond with the number allocated to the missing grid cooler pieces in the store register.

[7] Mr Christie Sitzler testified that he is employed as a Marine Engineering Manager for the plaintiff since 1997 and has extensive experience in maintaining and repairing fishing vessels as well as procuring and purchasing parts for the maintenance and repairs of such vessels. He is thus fully acquainted with the specifications and reasonable prices for such parts. This witness testified that on 21 December 2011, he accompanied Mr Louw to the premises of Scrap Metal Sales CC where the missing grid coolers were identified, although cut into smaller pieces. According to him, the pieces were cut beyond repair and were of no economic value to the plaintiff and that the price of N\$ 345 696.90 is fair and reasonable as no second hand grid coolers could be secured at a cheaper price. Mr Sitzler also identified the defendant as the seller from the invoice and the footage.

[8] Another witness that identified the defendant is Daniel So-Oabeb who was employed by Scrap Metal Sales CC during the years 1996 until 2011 as a foreman. On 17 December 2011, while he was on duty, 138kg of brass grid cooler were sold to Scrap Metal Sales CC by the defendant, identified as Mr Aloisius, and from whose car these pieces were being off loaded. The witness further testified that the invoice that was issued that day was for Mr Aloisius. It was shortly after that the employees of the plaintiff came to the premises of Scrap Metal Sales CC and identified such pieces as being those stolen from Hangana Seafood and he testified that such pieces were returned to the plaintiff.

[9] The defendant testified that he was employed by the plaintiff for 13 years before December 2011 and was never found guilty of any conduct which involved dishonesty. Accordingly, a criminal case for theft was opened against the defendant which resulted in his detention on 23 December 2011, although released on bail on 27 December 2011. As a result of such criminal proceedings, the defendant left the employ of the plaintiff was subsequently discharged from his new employment which he started at Gendev Fish Processors as HR Officer on 29 June 2012. This criminal case was accordingly withdrawn on 8 May 2012 and was never re-opened against the defendant.

[10] Mr Magadhi denies that he stole the coolers as they were too big to fit in his car and denies that he owes the plaintiff the amount claim. In reconvention, the defendant testified that it is the plaintiff that has caused damage to his name and reputation since he is unable to find work since then. There is however no counterclaim to that effect on record.

Analysis

[11] It is trite that the court uses the test to resolve factual disputes as that of being on a balance of probabilities which necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. The plaintiff's version is that ownership of the grid coolers belongs to the plaintiff, which was removed by the defendant without permission or consent and that the said grid coolers has , as a result, been destroyed, which has caused the plaintiff damages in the amount claimed. The defendant has been identified through the evidence of all witnesses who has proved to be reliable and their evidence was not tainted with any contradiction. An expert then determined the reasonable price of the pieces of brass as being the fair and reasonable price. No evidence whatsoever was tendered to contradict this proposition. Counsel for the defendant argued that the video footage relied on should be disregarded since it was not tendered in evidence. That much I agree with, but despite that, there is still ample evidence that strengthens the plaintiff's version is discharging the burden that is placed on the plaintiff.

[12] On the other hand, the version of the defendant merely denies the allegation with no facts to support such denials. Such bare allegations do not bring forth any

proposition that would make the evidence of the plaintiff less probable in the instance. For example,

- a) No evidence was led to disprove the fact that the plaintiff is the lawful owner of the grid coolers based on the unique stock number allocated to the pieces recovered at Scrap Metal Sales CC. It is thus more probable that the pieces did belong to the plaintiff. No evidence was also led as to who the lawful owner was if not the plaintiff.
- b) No evidence was produced to disprove the fact that it was not the defendant who signed the invoice or that it was made to a different person other than the defendant. No defence of *alibi* or of some sort was offered to maintain the possibility that the defendant was not at Scrap Metal Sales CC on the 17 December 2011, in fact, the defendant does not deny that he was at Scrap Metal Sales CC on the 17 December 2011.
- c) During December 2011, the defendant was still in the employ of the plaintiff and this much is conceded to by the defendant himself. On the evidence of the plaintiff, he was employed as transport Supervisor and no evidence was led to either indicate any consent or permission from the plaintiff to take possession of and dispose of the grid pieces on behalf of the plaintiff;
- d) The defendant did not produce any evidence to contradict the allegations that the grids were cut and disposed of intentionally or negligently. The Invoice handed up as an exhibit in court indicates that a profit was made to the amount of N\$ 2 070 for the sale of Braas, 138 Kg on 17 December 2011, purchased from Magadhi Aloisius of Bubles Street 1213, Kuisebmond. How this cannot be an intentional sale beats logical sense.
- e) The expert evidence as regards the sale remains undisputed by the defendant. No other amount was offered as being the fair and reasonable price for the pieces.
- f) All that the defendant offers is that his reputation has been damaged and merely led evidence on the impact that the criminal case had on his reputation. That has nothing to do with the current case before court and the

allegations in the face of the defendant. Technically, there is no defence against the claim instituted by the plaintiff.

[13] I am persuaded to therefore hold that it is highly probable that the plaintiff was the owner of the three grid coolers and that the defendant took possession of the coolers without any consent or permission from the plaintiff. It is further been established that the conduct of the defendant results in an intentional disposal and destruction of the three brass grid coolers which has caused the plaintiff to suffer damages in the amount of N\$ 345 696.90. I am therefore of the opinion that the plaintiff, in the circumstances, has proved its case on a balance of probabilities.

Order

[14] I hereby make the following order in favour of the plaintiff as against the defendant:

1. Payment in the amount of N\$ 345 696.90.
2. Interest *a tempora morae* at the rate of 20% per annum;
3. Costs, such costs to include the costs of one instructing and one instructed counsel.

Miller, AJ
Acting

Appearance:

Plaintiff

Y Campbell

Instructed by

MB De Klerk & Associates, Windhoek

Defendant

KN Amoomo

Of

Sisa Namandje & Co, Windhoek