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IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

CV 36 of 2016

BETWEEN: LUNA'EVA ENTERPRISES LTD

Plaintiff

AND: MESAKE MAPAPALANGI

Defendant

BEFORE THE LORD CHIEF JUSTICE PAULSEN

**Counsel: Mr. H. Tatila for the plaintiff
Mr. S. Vaipulu for the defendant**

Hearing: 26, 27, 28 April and 4 May 2017

Date of Ruling: 5 May 2017

RULING

The claim and the pleadings

- [1] This is an action by Luna'eva to recover from Mesake Mapapalangi (Mesake) a balance of \$26,141 for materials and loader hire supplied to Mesake at his request between August 2014 and November 2014 (inclusive).
- [2] In the statement of claim it is alleged that Luna'eva is a registered company, that in or around August 2014 it agreed to supply Mesake

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with goods on monthly credit and that Mesake made purchases amounting to \$38,141 and payments of \$12,000 leaving a balance owing of \$26,141. Luna'eva seeks judgment for that sum.

- [3] In the statement of defence Mesake admits that Luna'eva is a registered company, that there was an agreement that goods would be supplied on credit to be repaid monthly and that the payments made by Mesake totaled \$12,000. He puts in issue only the value of the goods supplied and receipt of Luna'eva's invoices.

The evidence

- [4] Luna'eva called 15 witnesses. Mesake gave evidence but called no other witnesses. I will summarise the evidence insofar as it is relevant to this ruling below.

Luna'eva's witnesses.

- [5] Luna'eva's managing director Falakiko 'Etiluna Mafi said that he is a friend of Mesake and he agreed that Luna'eva would supply Mesake with materials on credit with which to build his house. He said materials were supplied for which there is owing '\$26,000 plus' and that Luna'eva stopped supplying Mesake when staff learned that he was buying materials elsewhere. Mesake was angry about that and made no more payments. Mr. Mafi said that he asked Mesake to make an arrangement to pay off the balance owing but he would not do so.
- [6] Luna'eva's second witness was Lisa Tu'ipulotu (Lisa). She is employed by Luna'eva as a clerk. She said that Mr. Mafi had

approved credit for Mesake and materials were supplied according to Mesake's orders. She described the process by which orders are processed. The orders are given to drivers who load the materials onto trucks (for instance coral rocks from the quarry). The load is checked at the office before delivery. A record of the delivery is kept in the supply book. After delivery an invoice is prepared based on the information in the supply book. The invoice is personally delivered to the customer by another employee. Lisa said invoices were delivered to Mesake by Foueti Kelo.

- [7] Lisa produced a statement of account containing the date, description, quantity and value of materials supplied to Mesake along with the names of the drivers who delivered the materials and the relevant invoice numbers. She also produced a customer ledger showing the balance owing as well as copies of the invoices. Lisa acknowledged that on one occasion materials had been returned by Mesake but said the cost of those materials was not part of the claim.
- [8] It is a feature of this case that Luna'eva did not require Mesake to sign for his deliveries. Mr. Vaipulu put it to Lisa that drivers might have cheated Luna'eva and delivered materials to someone other than Mesake. Lisa said that Mesake was given a document by one of the drivers to record the deliveries (document B) and that Luna'eva had trusted Mesake because he came from Malapo and was the 'best friend of our boss'.
- [9] Lisa's evidence was that Luna'eva had stopped supplying Mesake because he owed a substantial sum and he was buying goods from

another supplier. She also said she had received no complaints from Mesake about the deliveries.

- [10] Twelve of Luna'eva's witnesses were drivers who delivered materials (or in a few instances drove a loader to level Mesake's land) to Mesake's property. Each driver confirmed that they knew Mesake personally, that they had delivered materials and that in most cases the materials were received by Mesake. They also said no complaints were received from Mesake about the deliveries.
- [11] The drivers confirmed the process whereby they received orders from the office, loaded them and had them checked at the office before delivery. They all referred to the supply book. The supply book contains a detailed description of each delivery (or loader hire) including the date, client name, nature and quantity of the materials, vehicle registration, destination of delivery, invoice number and source of the materials. The drivers confirmed that they sign the supply book when the materials are checked at the office and immediately before delivery. In all but a few cases that process was followed.
- [12] The other witness for Luna'eva was Mesake's cousin Tavite Mapapalangi (Tavite). He used his vehicle and assisted Mesake to collect 300 bricks (Luna'eva says 301 bricks) from Luna'eva and delivered them to Mesake's property. His recollection was that this occurred over 2 days but the supply book showed the three loads were collected on one day. Tavite signed for each of the loads.

Mesake's evidence

- [13] Mesake began his evidence by stating that he had been warned that there was a lot of dishonesty in Tonga. I presume that this was to lay the foundation for a submission that the drivers may have cheated Luna'eva. There is no evidence that the drivers cheated anyone.
- [14] Mesake said that although Luna'eva was expensive he bought materials from it because Mr. Mafi was his friend and they lived in the same village. His evidence was that Mr. Mafi offered him a discount of up to 50 per cent on his purchases.
- [15] Mesake also said that because he was concerned to have proof of deliveries he was given a form (document B) and instructed to record them but because he was not told when deliveries would be made he was not always present. For this reason, he said, it was then agreed that he would sign delivery dockets. He produced one delivery docket (document A) but as that does not postdate the entries in document B it does little to support Mesake's evidence. Mesake also said that he had the delivery dockets at home but when he travelled overseas they went missing.
- [16] Mesake said he travelled to Australia and sent back \$30,000 to Tavite and asked him to pay Luna'eva and to deposit the balance in his bank account. Tavite told him, he said, that Luna'eva had broadcast his name on the radio in relation to his debt and so he cancelled the payment to Luna'eva. Mesake produced correspondence that his lawyers had written in June and July 2015 disputing Luna'eva's demand for payment. One of his former lawyers, Mr. Tu'utafaiva, had

advised him to meet with Mr. Mafi to see if they could settle. He had met Mr. Mafi at Veitongo but nothing was resolved.

[17] Mesake gave two examples of goods being delivered which he did not order or want. On one occasion he told the driver to return the materials. Lisa acknowledged this had occurred but said Mesake was not charged for the materials. Mesake referred to another occasion when a delivery was made by Maamaloa Tu'ivailala and Leaongo Tu'ivailala. Mesake said that he was told that Semisi Manukia (Semisi) had ordered the delivery and that he understood it was a gift until he received Luna'eva's invoice.

[18] Under cross-examination Mesake denied that he bought materials from Luna'eva because it was the only supplier who would provide him with credit. He confirmed that he had not travelled while his house was built. He said he had paid \$13,000 to Luna'eva (not the \$12,000 that it claimed) and that he had receipts for his payments but that these too had been lost. I note that contrary to Mesake's evidence the receipts are on the Court file having been filed by Mesake's lawyer. The receipts show payments of \$12,000. It was put to Mesake that Tavite did not confirm his evidence that he had transferred money to pay Luna'eva. He said that Tavite's evidence was untrue. He also said he had paid around 80 per cent of what Luna'eva was owed.

Credibility

[19] At this juncture I should say something about the credibility of the witnesses. I believe that all of Luna'eva's witnesses were truthful.

Some of the drivers made errors but that is to be expected when they were being asked about events that occurred some years ago. Often the errors were not material. For instance, Kefilini Tu'ivailala was clearly mistaken about the number of years he has worked for Luna'eva and he was not sure of his age. Neither matter is of any direct relevance. As I noted earlier, Tavite said he collected bricks on two days when the supply book (which he signed and which I accept) shows he collected three loads on one day. There was no dispute that he did collect the bricks. That Tavite was mistaken does not affect Luna'eva's entitlement to be paid for bricks it undoubtedly supplied.

[20] I did not find Mesake to be a credible witness. I found much of what he said implausible. An example is his evidence that he believed Semisi had ordered a delivery as a gift without any compelling explanation why he might have done so. Mesake's evidence that Mr. Mafi offered him a 50 per cent discount is in the same category. That allegation was not put to Mr. Mafi as it should have been. The letters from Mesake's lawyers make no reference to a 50 per cent discount. As Mesake and Mr. Mafi remain friends I cannot conceive that Mr. Mafi would not have given Mesake a discount if indeed he had offered one.

[21] Some of Mesake's evidence was contradicted by witnesses whose evidence I prefer. Maamaloa denied the incident when Mesake says he believed a delivery was a gift from Semisi. I prefer Maamaloa's evidence. I prefer Tavite's evidence that Mesake did not ask him to pay Luna'eva. Tavite is Mesake's relative and had assisted him collect his bricks. He was an earnest, and in my view, honest man. I can

see no reason why he would give evidence that was, as Mesake alleged, untrue.

[22] A number of Luna'eva's witnesses were challenged that Luna'eva had not provided Mesake with delivery dockets yet Mesake's evidence was that he had collected delivery dockets and had lost them. Mesake could not produce documents to support his evidence and I found his explanation that documents have been lost unconvincing. His evidence that he had lost his receipts was plainly wrong.

[23] The documents Mesake did produce contradict some aspects of his evidence. Mesake said that he instructed Tavite from Australia not to pay Luna'eva when he was told that his name was on the radio. His lawyer's letter of 22 June 2015 suggests that his decision was made before he travelled to Australia because he had received a demand for payment from Luna'eva's lawyers which he considered was in breach of the agreement he had with the company. Subsequent correspondence from Mesake's lawyer of 13 July 2015 records that Mesake believed the agreement was that he could pay Luna'eva 'when convenient'. As another example, document B shows that as at 6 October 2014 Mesake calculated that he had made purchases totaling \$17,278.27. In the following month he received more deliveries including hundreds of bricks. This is incongruous with his evidence that the \$13,000 he had paid Luna'eva was 80 per cent of what he owed.

Discussion

[24] The principal issue in this case is whether Luna'eva has on the balance of probabilities proved delivery of the materials for which it seeks payment. Luna'eva relies upon at least all of:

- a. Mesake's request for credit;
- b. Lisa's largely unchallenged evidence that the materials were ordered by Mesake and invoiced to him;
- c. The drivers' evidence that they personally delivered the materials and that Mesake was usually present;
- d. Tavite's evidence that he collected 300 bricks at Mesake's request;
- e. The contents of the supply book confirming the deliveries which was in most cases signed by the drivers; and
- f. The absence of any complaints from Mesake.

No invoices

[25] The statement of defence pleads that Mesake had no knowledge of Luna'eva's invoices. There is nothing in this point. The letter from Mesake's lawyer, Mr. Tu'utafaiva, to Luna'eva of 22 June 2015 acknowledges the amount of Luna'eva's claim. The lawyers' letters produced by Mesake do not allege that he had never received invoices. There was no challenge to Lisa's evidence that invoices were personally delivered to Mesake and he acknowledged he had seen invoices. In any event the invoices are all listed in the statement of claim which is in itself sufficient demand for payment.

Luna'eva's incorporation

[26] Mr. Vaipulu submitted that Luna'eva had failed to prove that it is a registered company. Its status as a registered company is admitted in paragraph 1 of the statement of defence.

The materials supplied

[27] Mr. Vaipulu submitted that there were 'contradictions' in the evidence of the drivers as to whether they had signed the supply book and therefore the deliveries were not proven. I will deal with each matter he raised.

[28] Kefilini Tu'ivailala said he delivered six loads of clay soil to Mesake's property on 29 August 2014. That involved two deliveries as each truck holds three loads. There are two relevant entries in the supply book. The second is not signed by Kefilini. Kefilini said that he was sure he made both deliveries and I believe him. Not only do I consider him to be an honest witness but his evidence is confirmed by Mesake's document B which shows two deliveries by 'Kefi' on 29 August 2014.

[29] Tavite said he collected bricks over two days but he signed for the three loads of bricks on one day. As noted above, there is no dispute that he collected the bricks for Mesake and whether that was over one or two days is immaterial.

[30] Ngungutau Fifita (Ngungutau) gave evidence that he had driven a loader for Mesake on 14 August 2014 and again on 26 August 2014. He said also that he had delivered 33 loads (11 trucks) of coral rocks

on 5 September 2014. Initially Ngungutau said the signatures in the supply book were not his signatures. Later he said that he had signed the supply book. Ngungutau was initially overwhelmed by the experience of giving evidence in Court and once he settled he was clear that he had both made the deliveries and signed the supply book. It is also quite plain to me that Ngungutau did sign the supply book and did make these deliveries. Confirmation that he drove the loader on 14 August 2014 and 26 August 2014 is to be found in Mesake's document B. The signatures in the supply book for that work are the same as the signatures for the delivery of 33 loads of coral rocks. Added to that, this was a very large amount of coral rocks and delivered on just one day. Mesake would clearly remember if he had not received it. Mesake did not give evidence disputing that he ordered the coral rocks or that they had been delivered.

- [31] Semisi Manukia said he had made deliveries of clay soil, gravel, and sand between 21 August 2014 and 17 October 2014 and had driven a loader for Mesake on 4 November 2014. He denied making a delivery of 10 yards of sand to Mesake on 6 October 2014 and said that the signature in the supply book was not his. Similarly Semisi did not sign the supply book entries for four deliveries on 10 October 2014 and 16 October 2014 (12 loads of clay soil). Semisi said that he made those deliveries and referred to the name 'Misi' next to the entries in the supply book as evidence of that. He said that he did not sign the supply book on those occasions because there was a lot of work to do.

[32] The supply book is strong evidence of delivery because it is signed by the drivers only once they have loaded the truck, the order is confirmed correct and at that time delivery is actually made. However Semisi he did not sign the supply book in every case. Whilst I found him to be an entirely credible witness I am not satisfied (in relation to the 10 and 17 October deliveries by only the finest of margins) that it was proved that the deliveries of 6 October 2014, 10 October 2014 and 17 October 2014 were made by him. No one else gave evidence that they made those deliveries. I will give Mesake credit for those deliveries. The amount is \$1,980.

[33] 'Akilisi Tui gave evidence that he had made a delivery of 5 yards of sand on 4 September 2014 but he too did not sign the supply book. For the same reason I will give Mesake a credit for that delivery. The amount is \$450.

[34] Mr. Vaipulu argued that he discovered after the hearing that drivers' signatures on their briefs of evidence do not match the signatures in the supply book. The briefs of evidence were not read by the drivers nor did they confirm their contents or their signatures. The briefs are not in evidence and this is not a matter that was put to the drivers. It cannot now be raised. Out of an abundance of caution I have compared the signatures and I see nothing in Mr. Vaipulu's submission in any event.

Mesake's payments

[35] Mesake said he paid Luna'eva \$13,000 towards his debt. The statement of defence admits he paid \$12,000 and there is nothing to suggest that Luna'eva is incorrect.

The result

[36] For the reasons I have given I largely reject all of the matters raised by Mesake in defence of the claim.

[37] Luna'eva is entitled to judgment in the sum of \$23,711 which is the amount of its claim of \$26,141 less the credits that I have found Mesake is entitled to in the sum of \$2,430 as set out in paragraphs 32 and 33 above. This sum will attract interest from the date of this ruling until paid at 10 per cent per annum.

[38] Luna'eva has been substantially successful and is entitled to its costs to be fixed by the Registrar if not agreed.

NUKU'ALOFA: 5 May 2017.



A handwritten signature in black ink, appearing to read "O.G. Paulsen", is written over a large, empty oval shape.

O.G. Paulsen
LORD CHIEF JUSTICE