

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2021/02518

In the matter between:

TRENDY DESIGNS AND CONSULTING ENGINEERS CC

PLAINTIFF

and

G MARWA LAND SURVEYORS CC

DEFENDANT

Neutral citation: *Trendy Designs and Consulting Engineers CC v G Marwa Land Surveyors CC* (HC-MD-CIV-ACT-CON-2021/02518) [2022] NAHCMD 628 (17 November 2022)

Coram: COLEMAN J

Heard: 19-23 September 2022

Delivered: 17 November 2022

ORDER

1. Defendant is absolved from the instance.
2. Plaintiff is ordered to pay defendant's costs.
3. The matter is removed from the roll and regarded as finalised.

JUDGMENT

COLEMAN J:

Introduction

[1] This is a claim for fees for civil and structural engineering services. Only the respective close corporations are parties.

Plaintiff's case

[2] According to the plaintiff's particulars of claim, the plaintiff close corporation duly represented by its managing member entered into an oral agreement with the defendant's close corporation duly represented by its member.

[3] Plaintiff's managing member, Mr Chimonyo, testified that he is a civil engineer. He related that on or about 22 October 2020, Mr Marwa contacted him about a warehouse he was planning to construct in Zimbabwe. Mr Marwa told him his architect would forward architectural drawings for a quotation for engineering services.

[4] The drawings were forwarded to Mr Chimonyo and he provided the quotation. He further testified that he met with Mr Marwa to discuss the quotation on 26

October 2020. Mr Marwa subsequently instructed him to provide his engineering drawings to a quantity surveyor to '...run the costs'.

[5] Mr Chimonyo further testified that his quotation was value-based and that he determined the value of the project by using the architectural drawings provided to him by the architect. He determined the value of the project to be N\$7 500 000. He calculated his fee on this value and reduced it by 65%.

[6] On this basis he says he produced what was required and on 11 March 2020 emailed Mr Marwa a full set of material list, bending schedules, drawings and his invoice. Then a series of communications followed in which Mr Marwa never disputed his liability. He essentially indicated that he was owed money and would settle the fees when paid.

Defendant's case

[6] In its plea defendant close corporation denies that it ever entered into an agreement with the plaintiff. It pleads that Mr Marwa, who is the sole member of the defendant, approached Mr Chimonyo in his personal capacity for the quotation in question and reiterates that Mr Marwa acted in his personal capacity at all material times. It also pleads that Mr Marwa set a N\$ 2 million budget for the project.

Conclusion

[8] Having considered the evidence and in particular the communications exchanged between Mr Chimonyo and Mr Marwa I am satisfied that an agreement was reached for the professional fees claimed.

[9] However, the evidence does not establish whether or not the defendant close corporation entered into any agreement with Mr Chimonyo or the plaintiff close corporation. Never in his witness statement or during his testimony did Mr Chimonyo mention the defendant close corporation as party to the agreement. The defendant specifically put this in issue in its plea. For some reason Mr Marwa was never cited personally at the outset or joined later.

[10] The problem here is that while close corporations generally feature, their significance as corporate entities are not appreciated by the members. The lines between the corporate character and the members' personal activities are blurred. The safe approach in instances such as this is to cite the close corporation as well as each and every member. In this instance it was not done. Instead of dismissing the action I am inclined to leave the plaintiff (and Mr Chimonyo) another bite at the cherry. Consequently I grant absolution of the instance.

[11] I make the following order:

1. Defendant is absolved from the instance.
2. Plaintiff is ordered to pay defendant's costs.
3. The matter is removed from the roll and regarded as finalised

G COLEMAN
Judge

APPEARANCES

PLAINTIFF:

E Katjaerua
of Katjaerua Legal Practitioners

DEFENDANT:

K Kamuhanga
of Kamuhanga Hoveka Samuel Inc.