

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

JUDGMENT

Case Title: Erastus Enguwa vs Dennis MH Valombola and Poundland Trading CC	Case No.: HC-NLD-CIV-ACT-CON-2020/00225
Heard before: Honourable Mr. Justice Munsu, AJ	Division of Court: Northern Local Division Delivered on: 18 November 2022.
Neutral citation: <i>Enguwa v Valombola</i> (HC-NLD-CIV-ACT-CON-2020/00225) [2022] NAHCNLD 124 (18 November 2022).	
The order: The court grants judgment in favour of the plaintiff against the defendants jointly and severally, the one paying the other to be absolved in the following terms: <ol style="list-style-type: none">1. Payment in the amount of N\$ 25 000.2. Interest on the aforesaid amount of N\$ 25 000 calculated at a rate of 20% per annum from the date of judgment to the date of final payment.3. Costs of suit.4. The matter is removed from the roll: Case Finalised.	

Reasons for the order:**MUNSU AJ:**Introduction

[1] The plaintiff is Mr. Erastus Enguwa a male pensioner and resident of Oshakat, Oshana Region, Republic of Namibia.

[2] The first defendant is Mr. Dennis Valombola a major male person residing at Eenhana, Ohangwena Region, Republic of Namibia and sole member of the second defendant.

[3] The second defendant is Poundland Trading CC, a Close Corporation incorporated in accordance with the laws of the Republic of Namibia with its principal place of business situated at Eenhana, Ohangwena Region, Republic of Namibia.

[4] The plaintiff instituted action against the defendants for breach of the agreement entered into between the parties.

The pleadings

[5] The plaintiff alleges in his particulars of claim that on or about November 2017, the plaintiff and the second defendant, duly represented by the first defendant, entered into a written agreement in terms of which the second defendant undertook to construct a house for the plaintiff.

[6] The express, alternatively, implied terms of the agreement were as follows:

6.1 The second defendant would construct the house as specified in the building plan.

6.2 The plaintiff would pay the second defendant the amount of N\$ 110 000, payable as follows:

6.1.1 N\$ 70 000 deposit prior to commencement of the construction.

6.1.2 N\$ 40 000 upon completion of the house and delivery thereof.

- 6.3 The plaintiff would provide the materials for the construction of the house.
- 6.4 The second defendant was to carry out the construction in a professional and workmanlike manner.
- 6.5 The second defendant was to complete the construction within a reasonable time.

[7] It is alleged that during November 2017, the plaintiff, in accordance with the agreement, paid the deposit of N\$ 70 000 to the first defendant who received it on behalf of the second defendant.

[8] The plaintiff further alleges that the second defendant established the site and immediately thereafter abandoned the site. As a consequence, the second defendant is in breach of a material term of the agreement and the plaintiff was entitled to cancel the agreement and demand repayment of the N\$ 70 000 deposit.

[9] Furthermore, the plaintiff alleges that on or about March 2018, the plaintiff cancelled the agreement and demanded the repayment of the deposit of N\$ 70 000. It is alleged that, notwithstanding demand, alternatively summons constituting demand, the second defendant refuses and has failed to repay the deposit of N\$ 70 000. In the premises, the plaintiff alleges that the defendants are liable and indebted to the plaintiff in the amount of N\$ 70 000.

The defendants' plea

[10] The defendants' plead that the written agreement relied upon by the plaintiff is not valid as same was only signed by the first defendant and not the plaintiff as he refused to sign the agreement.

[11] The defendants admit that the agreed amount on completion was N\$ 110 000 on condition that the plaintiff was going to pay cash. In the event that the plaintiff was to pay in the second defendant's bank account, the plaintiff would have to add 15% payable as VAT. The defendants state that the plaintiff breached the agreement by failing to pay the amount for VAT.

[12] The defendants agree that the amount of N\$ 70 000 was paid. However, they state that the delays in the construction were caused by the plaintiff who bought materials at times convenient to him. In addition, they state that the rain also delayed the project as the trenches got flooded during the first week of construction.

[13] The defendants state that they did not abandon the site but were informed by the plaintiff that he was no longer willing to continue working with them and he informed them to leave his premises. According to the defendants, this happened at the time the plaintiff was failing to supply materials for the roof.

[14] The defendants plead that the work done is equivalent to the money paid. They state that the house in question is a 4-bedroom house with a double garage, open plan, storeroom and two bathrooms. They state that the work was done up to 65%. Therefore the plaintiff, according to the defendants, cannot claim the whole amount. Furthermore, the defendants plead that 15% of the deposit paid would be claimed by Inland Revenue.

The evidence

[15] The plaintiff testified in support of his case. On the other hand, the first defendant did not testify. However, he led evidence of two witnesses on behalf of the defendants.

The plaintiff's evidence

[16] The plaintiff testified that the parties entered into a written agreement in terms of which the second defendant would construct a house for the plaintiff. It was agreed that the plaintiff would pay N\$ 110 000 to the second defendant. The said amount was to be paid in two parts, firstly, an initial deposit of N\$ 70 000 and secondly, an amount of N\$ 40 000 upon completion.

[17] The plaintiff further testified that the parties agreed that the plaintiff would buy the materials to be used for the construction. It was the plaintiff's testimony that the second defendant undertook to build the house in a professional and workmanlike manner and complete the building within a reasonable time.

[18] Furthermore, the plaintiff testified that during November 2017, he paid the deposit of N\$ 70 000 to the second defendant. He testified that during December 2017, the defendants established the site but soon thereafter and more in particular around March 2018, the defendants left the site and never returned. In an attempt to get the defendants to comply with the agreement, the plaintiff reported the matter to the police who on numerous occasions summoned the first defendant to the police station. The plaintiff testified that the defendants would agree to resume with work the following day but never did. During March 2018, the plaintiff cancelled the agreement and demanded refund of the deposit paid.

Defendants' witnesses

[19] Mr. Valde Hamatwi was the first witness called by the defendants. He is the sole member of Hamatwi Construction CC. He testified that during the year 2017 he was sub-contracted to build a four bedroom house with storeroom, kitchen, lounge and double garage. He did the following work:

- Excavations.
- Foundation.
- Brick work for the whole house.
- Prime paint – white.
- Window frames
- Wall electrical PVC and installed DB 20mm.
- Copper plumbing pipes 15 mm.
- PVC 40 mm and 110 mm.

[20] The witness testified that he was told to leave the site as the plaintiff did not want to continue working with the defendants. It was his testimony that an amount of N\$ 45 000 was due to him for the work done. He testified that he was paid the amount of N\$ 45 000.

[21] Mr. Samuel Shapepa, the sole member of Ngenno Construction & Trading was the second witness for the defendants. He testified that he was hired to finish the plaintiff's house at an amount of N\$ 45 600. He testified that he did the following work:

- Building camber.
- Electrical installation.
- Painting of inside wall.
- Tiles.
- Plumbing.
- Roofing structure.
- Ceiling.
- Doors.
- Dividing wall between toilet and shower.
- Plastering.

[22] The witness further testified that he was only paid an amount of N\$ 41 000 and that an amount of N\$ 4 600 is still outstanding.

Evaluation

[23] The written agreement presented by the plaintiff was only signed by the first defendant acting on behalf of the second defendant. The first defendant managed to show during cross-examination that the plaintiff was not prepared to sign the written agreement. Consequently, the court finds that the agreement between the parties was oral.

[24] The terms of the oral agreement are common cause. The second defendant was to construct a house for the plaintiff at an amount of N\$ 110 000, comprising of N\$ 70 000 as deposit and an amount of N\$ 40 000 payable at the completion of the project. The issue of 15% payable as VAT was disputed by the plaintiff and the second defendant did not lead evidence to prove same. This issue was only raised in the defendant's plea.

[25] The agreement was between the plaintiff and the second defendant duly represented by the first defendant. The second defendant did not complete the construction of the house as a misunderstanding ensued between the parties.

[26] The plaintiff maintained that the second defendant breached the agreement by abandoning the site. As stated above, the first defendant did not testify. To this end, there is

only the version of the plaintiff as far as performance in terms of the agreement is concerned.

[27] However, the plaintiff was not a credible witness. He was evasive and contradicted himself on the issue of the breach of the agreement. While he testified on the one hand that he cancelled the agreement during March 2018, it was his evidence on the other hand that the agreement remained extant until June 2018. He could not recall for instance, when the building materials e.g. the bricks were purchased and delivered at the site.

[28] Over and above, the plaintiff's testimony is contrary to his pleaded case that the second defendant established the site and immediately thereafter abandoned it. The first defendant managed to show during cross-examination of the plaintiff that the second defendant did not abandon the site but was instructed by the plaintiff to leave the site. I am of the view that the plaintiff did not manage to prove on a balance of probabilities that the second defendant breached the agreement.

[29] The parties had a misunderstanding that resulted in the termination of the agreement. In terms of the agreement the second defendant was paid N\$ 70 000. The plaintiff is not entitled to the repayment of the entire amount as the second defendant partially fulfilled its obligations in terms of the agreement. The issue for determination is whether the work done by the second defendant is equivalent to the amount of N\$ 70 000 it received.

[30] The representative of the second defendant did not testify on the work done by the second defendant. The only evidence presented in this regard is by one Valde Hamatwi of Hamatwi Construction CC who was subcontracted by the second defendant. The work done by Hamatwi Construction CC is the work claimed to have been done by the second defendant. It is work ranging from excavation, foundation, plumbing, brick work, prime paint, wall electrical and window fitting. Mr. Hamatwi testified that the quotation for the work done by his entity is N\$ 45 000. This is the amount he was paid. In my view, this amount is justified.

[31] Ngenno Construction & Trading is the entity that completed the construction after the second defendant had vacated the site. In the premises, I find that the second defendant managed to prove work to the value of N\$ 45 000. This amount will be deducted from the N\$ 70 000 that was paid by the plaintiff as deposit and the balance should be repaid to the

plaintiff.

Costs

[32] The general rule is that the successful party should be awarded its costs. There is no reason, in this matter to depart from this established principle.

The order

[33] In the result, it is ordered as follows:

The court grants judgment in favour of the plaintiff against the defendants jointly and severally, the one paying the other to be absolved in the following terms:

1. Payment in the amount of N\$ 25 000.
2. Interest on the aforesaid amount of N\$ 25 000 calculated at a rate of 20% per annum from the date of judgment to the date of final payment.
3. Costs of suit.
4. The matter is removed from the roll: Case Finalised.

Judge	Comments:
MUNSU, AJ	NONE
Plaintiff: S. Aingura Of Aingura Attorneys, Oshakati.	1st & 2nd Defendants: In person