REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2115/2015

In the matter between:

GEOMAR CONSULT CC **PLAINTIFF**

and

CHINA HARBOUR ENGINEERING COMPANY LTD NAMIBIA **FIRST DEFENDANT**

NAMIBIAN PORTS AUTHORITY (NAMPORT) **SECOND DEFENDANT**

THIRD DEFENDANT

Neutral citation: *Geomar Consult CC v China Harbour Engineering Company Ltd Namibia* (I 2115/2015) [2021] NAHCMD 455 (5 October 2021)

Coram: PARKER AJ

Heard: **7, 8, 9, 15, 27, 28, 30 April, 5 August 2021**

Delivered: **5 October 2021**

Flynote: Contract – Proof of – Onus of proof on party relying on existence of contract – Opposing party generally bearing no burden to prove contract not existing – Court finding valid oral agreement existed.

Held, there are two fundamental grounds upon which a person proves the existence of a contract, namely, 'consensus' and 'reasonable reliance'.

Held, where court finds that there is an express or implied promise to pay for services rendered but the agreement is silent on the amount, quantum meruit lies.

Summary: Contract – Plaintiff relying on oral agreement to perform certain named services for first defendant, a bidder of a contract of works, during the pre-tendering stage and during post award stage if first defendant was successful – First defendant was successful but refused to pay plaintiff's remuneration in respect of pre-tendering stage and post award stage on the ground that no valid agreement exists between plaintiff and first defendant – Court finding that on the ground of reasonable reliance a valid contract existed in respect of pre-tendering stage but no sufficient and satisfactory evidence was placed before court to establish a fixed amount of remuneration – Court finding an express or implied promise to pay existed but agreement silent on amount – Consequently, court finding quantum meruit existed – Court able to sufficiently certainly fix a reasonable and fair amount – Court finding further that no valid agreement existed in respect of post award stage.

ORDER

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1. Judgment for plaintiff in the amount of N$200 000, plus interest at the rate of 20 per cent per annum, calculated from 7 February 2020 to date of full and final payment.
2. There is no order as to costs.
3. The matter is finalized and removed from the roll.

JUDGMENT

PARKER AJ:

Introduction

[1] The present matter concerns the tender for the designing and construction of the new container terminal at the Port of Walvis Bay in the Erongo Region. First defendant was one of the bidders of the tender. In the course of events, first

defendant became the successful bidder and was awarded the tender. The employer is the Namibian Ports Authority (NAMPORT) (the second defendant). It is noted at the outset that second defendant does not take part in the proceedings. In any case, no order is sought against second defendant. The value of the tender works ('the project value') is N$2 700 000 000 (2.7 Billion Namibia Dollars). As will become apparent shortly, plaintiff's claim is bifurcated into Claim 1, which concerns the pre-tendering stage, and Claim 2, which concerns the post award stage.

[2] The matter presently before us is one of a kind. It concerns a claim for contractual damages. Claims for contractual damages in themselves are commonplace in the court; and on their own would not conjure phenomenal surprise. But in the instant matter, the claim does conjure phenomenal surprise, considering the colossal amount plaintiff claims as contractual damages based solely on an alleged oral agreement. I shall now refer to 'plaintiff' and 'Martin' interchangeabl, as the context allows.

[3] I should say this at the threshold. Although the matter has stood on the court's roll for some six years, and a great deal of documents were discovered, coupled with 82 pages of heads of argument by plaintiff's counsel, Mr Phatela, and 18 pages of heads of argument by first defendant's counsel, Mr Brockerhoff, the determination of the matter turns on a very short and narrow compass; and the compass is based essentially on basic principles of contract and of evidence and the rules of court. In virtue of the pleadings, it behoves me to lay out the relevant basics regarding the applicable principles of law and rule 45 (7) of the rules of court. I now proceed to consider those basic principles and the rule.

Principles of law and rule 45 (7) of the rules of court

[4] First and foremost, in our law there are two fundamental grounds upon which a person **X** can prove the existence of a contract, namely, 'consensus' and 'reasonable reliance'. As to the first ground, **X** must establish that there has been an actual meeting of minds of the parties, that is, **X** and **Y** were *ad idem* (ie consensus *ad idem*). If that was established, the validity of the contract is put to bed, not to be awoken. If, however, there was not an actual meeting of minds, that is, **X** and **Y** were never *ad idem*, the question to answer is whether **X** or **Y** by their words or conduct

led the other party into the reasonable belief that consensus was reached; that is 'reasonable reliance' (Dale Hutchison (Ed) *et* Chris-James Pretorius (Ed) *The Law of Contract in South Africa* 2nd ed (2012) at 19-20). The second relevant basic principle is this. An 'oral agreement made seriously and deliberately with the intention that a lawful obligation should be established and has a grounded reason which is not immoral or forbidden' is valid and enforceable (*DM v SM* 2014 (4) NR 1074 (HC) para 23), as Mr Phatela submitted. The third relevant basic principle is that the onus of establishing that a contract exists rests squarely on the party who alleges the existence of the contract. He or she may establish the existence of the contract on the ground of consensus *ad idem* or on the ground of reasonable reliance. That is not all. That party must also prove the terms of the contract. Generally, the opposing party bears no burden to prove that no contract exists.

[5] And as regards the rules of court; if the contract relied on is a written contract, then the party must, in terms of rule 45(7) of the rules of court, annex a true copy thereof or of the part relied on to his or her pleading. If, on the other hand, the contract relied on is an oral contract, as is alleged in the instant matter, then the party must state in his or her pleading 'when, where and by whom' the contract was concluded.

[6] Rule 45 provides:

> '(7) A party who in his or her pleading relies on a contract must state whether the contract is written or oral and when, where and by whom it was concluded and if the contract is written a true copy thereof or of the part relied on in the pleading must be annexed to the pleading.'

[7] When interpreting rule 45(7) in *Ehoro Investment CC v Randall's Meat Close Corporation* NAHCMD 379 (27 August 2020), I stated there that 'the word "where" requires a definite location and not alterative unsure locations …; and "when" requires a definite date or dates'.

[8] Keeping the discussion on the basic principles of law and the interpretation of rule 45(7) in my mind's eye, I proceed to consider the pleadings and the evidence. It

is important as a prelude to make these crucial observations regarding the manner plaintiff pleaded his case.

Plaintiff's multiplicity of particulars of claim

[9] Plaintiff filed five separate particulars of claim ('POC') on diverse occasions as follows:

(a) first, on 30 June 2015,
(b) second, on 7 March 2016,
(c) third, on 6 October 2017,
(d) fourth, on 8 August 2019, and
(e) fifth, on 5 February 2020.

[10] In that regard, this must be said. If the number of POCs filed by plaintiff were in a competition at the just ended Tokyo Olympic Games, Martin would have won a Gold, outgunning our much-admired silver medallist Mboma.

[11] The question is, all things being equal, can it really be said that Martin knew what his claim was as of 30 June 2015 when he instituted the proceeding and when the facts of the case were naturally fresh in his mind; and mind you, Martin has had legal representation at all relevant times. And, *a fortiori*, what is involved is not the kind of amendment of pleadings discussed so insightfully by Petrus T Damaseb in his work *Court-Managed Civil Procedure of the High court of Namibia: Law, Procedure and Practice* 1st ed (2020) at 141-147; and so, plaintiff cannot be thankful of the considerations put forth by the full court in *IA Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC* NAHCMD 306 (17 October 2014), which a court considering an application to amend pleadings ought to take into account. Plaintiff's change of mind at every turn to improve the nature and make-up of its claim must be seen for what it is: It must be seen as plaintiff not telling the court the truth, the whole truth, about what really happened, as Mr Brockerhoff appeared to suggest.

[12] For example, the 30 June 2015 POC, when, as I have said previously, the facts of the case were naturally still fresh in Martin's mind, Martin does not say 'where' and 'when' Martin and Vincent entered into the alleged oral agreement. And as to Claim 2 plaintiff states that first defendant (represented by Vincent) 'orally contracted the services of plaintiff as a professional consulting engineer' and plaintiff accepted the contract, and plaintiff's remuneration was orally agreed to be 2.5 per cent of the project value which comes to N$67 500 000; and plaintiff would have earned a profit of 25 per cent of the subcontract price of N$67 500 000, being N$16 875 000. Regarding Claim 1, plaintiff claims N$44 000 000; and about Claim 2 plaintiff claims N$16 875 000.

[13] Fast forward; as respects the further, further, and further amendment of the POC (ie the fifth and last POC), Martin then in February 2020 remembered that the oral agreement was entered into 'On or about September/October 2010 and at Johannesburg, South Africa' by Martin (for plaintiff) and Vincent (for defendant). I now proceed to consider Claim 1 (which concerns the pre-tendering stage) and Claim 2 (which concerns the post award stage); and in doing so, I shall apply the principles of law and the interpretation of rule 45(7), discussed above, to the facts of the case as I found them to exist.

Application of the principles of law and the interpretation of rule 45 (7) to the facts of the case

[14] Martin was the only witness for the plaintiff; so, did first defendant also rely on the testimony of only one witness in the person of Mr Feng Yuan Fei, Civil Engineer and Project Manager of first defendant. Much of Feng's testimony is, with respect, of no probative value. His evidence consists largely of a litany of self-praise of first defendant and generalities about the practice of tendering in the construction industry. That is not surprising. Feng was not a player in first defendant's affairs relevant to the instant matter at the relevant time. Moreover, Feng's evidence shows a tincture of a display of lack of knowledge of Namibia's law of contract. Feng's most piercing tune in his testimony is that as far as defendant was concerned, 'Any agreement must be in writing'.

[15] According to Martin, an oral agreement was entered into between plaintiff (through Martin, plaintiff's managing member) and first defendant (represented by Mr Weinjie Liu ('Vincent')). Martin's testimony was that the terms of the oral agreement were principally that plaintiff shall provide certain pleaded services to first defendant during the bidding or pre-tendering stage of the tender and provide engineering services for first defendant if first defendant became the successful bidder and was employed for the job (the post award stage).

Claim 1

[16] Having considered all the evidence, leaving nothing out (see *Mashale Paulo Malapane v The State* Case No. CA 58/2001), and applying the principles of law and the interpretation of rule 45 (7), discussed previously, to the facts, I conclude that as respects this claim plaintiff has failed to establish the existence of an oral contract between plaintiff and first defendant on the ground of consensus *ad idem* (see para 4 above). But on the conspectus of the evidence, I conclude that plaintiff has succeeded in establishing the existence of an oral agreement on the ground of reasonable reliance (see para 4 above). But I do not find that plaintiff placed before the court fixed and unchanging terms as to the amount of money plaintiff shall receive for services rendered during the pre-tendering stage, as I demonstrate below. Those services are the following, verbatim:

> '5.1 **PRE-TENDER STAGE** ("Preaward stage") (pre-tendering stage)
>
> 5.1.1 provide local industry advise (advice) and consulting services;
>
> 5.1.2 assist in the provision of all logical services such as visas, transportation of staff, etc;
>
> 5.1.3 advise on the local engineering industry and council requirements;
>
> 5.1.4 attend at various meetings of the team;
>
> 5.1.5 advise and assist in the recruitment of other local service providers to form part of the tender proposal;

5.1.6 assist in the preparation of the tender proposal.'

[17] In his witness statement, Martin says clearly that plaintiff seeks compensation for work it performed during the pre-tendering stage that facilitated the award of the tender to first defendant in the first place. Martin did not mention any specific figure. Indeed, in plaintiff's pleading in the fifth and last POC, plaintiff pleads that it was agreed that 'in respect of services in para 5.1 (see para 16 above), 'the first defendant would pay plaintiff for the services it actually rendered and would reimburse it (ie plaintiff) for any expenses incurred in rendering the services'. That is in para 4.4.3.1 of that POC.

[18] But in the same fifth and last POC we find this:

'7A.1 On or about October 2013 and in Windhoek, the Plaintiff and the First Defendant orally agreed to further amend the term of the Agreement relating to payment for services rendered during the pre-Tender award stage.

7A.2 In terms of the amendment, in addition to the First Defendant paying Plaintiff 1.5% of Project Tender Price for the services it had and would render as set out in paragraph 5.1 (above), the First Defendant would build a house for the Plaintiff in Swakopmund at a cost of N$3 500 000.00.'

[19] Plaintiff does not say 'when' that amended oral agreement was concluded, within the meaning of rule 45(7) of the rules of court. 'On or about October 2013' is not 'a definite date'. (*Ehoro Investment CC v Randall's Meat Close Corporation* para 5). Besides, as I have shown, there are different versions in the various POCs, even in the same fifth and last POC, regarding what was agreed orally between the parties about the amount of money that defendant shall pay to plaintiff for services rendered by plaintiff during the pre-tendering stage. It would seem, I dare say, with respect, that the different legal practitioners who drafted plaintiff's five POCs decided to sanitize plaintiff's claim as they went along in a clumsy and plainly self-serving manner. It appears those different legal practitioners ingratiated themselves to Martin's dangerous and untenable cause. And what do we see? We see in the end a monumentally and superlatively clumsy, confusing, and contradictory pleading and at times contradictory evidence, especially about the nature and form of payment for

plaintiff's services, as demonstrated. Accordingly, on the law and the facts, I feel no doubt in rejecting the existence of an amended oral agreement that, as plaintiff says, provided that in addition to first plaintiff paying plaintiff an amount equal to 1.5 per cent of the project value, first defendant would build a house in Swakopmund for plaintiff at the cost of N$3 500 000 or pay that amount to him in lieu thereof.

[20] The court accepts that it is a term of the oral agreement that plaintiff shall be paid for services rendered during the pre-tendering stage (see para 16 above) and shall be reimbursed for proved expenses incurred by plaintiff in the performing of those services. In my view, any reimbursement of expenses reasonably incurred in the performance of agreed services requires proof in the form of invoices or suchlike documentary proof. But, in the present matter, no such proof was placed before the court by plaintiff, as Mr Brockerhoff submitted.

[21] Be that as it may, on the evidence, I find that plaintiff placed before the court satisfactory and sufficient and uncontradicted evidence to establish that he attended a series of meetings with named personnel of first defendant necessary for the compilation of first defendant's bid documents. Martin also assisted in the provision of logistical services such as the acquisition of visas for first defendant's personnel. He gave advice on, and assisted in, the recruitment of local personnel to work for first defendant. Furthermore, Martin obtained information pertaining to the Namibia Engineering Council. In his cross-examination-evidence, Martin testified, in response to Mr Brockerhoff's question about what he did for first defendant at the pre-tendering stage, that he advised on the sourcing of local content for the project, and he sourced local subcontractors and instructed first defendant about what bid documents to prepare for presentation as part of first defendant's bidding documents.

[22] Similarly, plaintiff's profile was used by first defendant in satisfaction of the requirement prescribed by the employer that there should be an indication of 5 per cent local input in the carrying out of the works under the tender. In that regard, plaintiff's name was recorded in the first defendant's bidding documents as a local consulting engineer. I consider that as constituting an assistance in the preparation of tender documents under para 5.1.6 (see para 16 above). I accept that plaintiff

carried out those activities in fulfilment of plaintiff's obligation under the oral agreement respecting the pre-tendering stage. And what is more; it should be noted that these pieces of evidence stood unchallenged – that is, unchallenged sufficiently satisfactorily – at the close of plaintiff's case.

[23] I found previously that plaintiff does not plead a specific amount of money it was agreed defendant shall pay plaintiff for performing the services referred to in para 16 above; and plaintiff has not placed before the court sufficient and satisfactory proof of expenses plaintiff reasonably incurred in rendering those services for reimbursement. It is my view, therefore, that as respects the pre-tendering stage, there is an express or implied promise to pay but the agreement is silent on the amount. That being the case a *quantum meruit* lies (R H Christie *The Law of Contract in South Africa* 3rd ed (1996) at 474); and I am satisfied that the agreement to remunerate fairly or reasonably for that service is to be implied, and on the evidence, the court is able to sufficiently certainly fix a reasonable and fair amount. (*Middleton v Carr* 1949 (2) SA 374 (A) at 386) In the circumstances, I think an amount of N$200 000 is a fair and reasonable amount.

Post award stage

[24] Recalling the discussions and conclusions in paras 4-7 above, and considering all the evidence, leaving nothing out (see *Mashale Paulus Malapane v The State loc cit*), regarding the post award stage, I feel no doubt in my mind in holding that plaintiff has not established the existence of any valid agreement pertaining to this stage either on the ground of consensus *ad idem* or on the ground of reasonable reliance (see para 4 above). In that regard, it must be remembered, I concluded there that there was an agreement between the parties on the ground of the reasonable reliance only. As respects the post award stage, plaintiff did nothing – nothing at all – to be thankful of the reasonable reliance ground; and plaintiff has failed to prove that plaintiff and first defendant were *ad idem* (see para 4 above). This is important. If the parties were *ad idem* respecting the post award stage, why would Martin concede in his cross-examination-evidence that the draft agreement that was sent to him for his comments constituted an offer. Indeed, an offer it was, whether he conceded that it is or not; otherwise, why would Martin bother to

comment on the draft and seek further information from first defendant in order to submit further comments on the draft. In his cross-examination-evidence Martin said pointedly, 'More comments were to come' from him to first defendant; hence the need for more and further information from first defendant. Accordingly, I accept Mr Brockerhoff's submission that as respects Claim 2, the parties were engaged in negotiations.

[25] Common sense (see *S v Jaar* 2004 (8) NCLP 52) and common human experience (see *Bosch v The State* [2001] 1 BLR (Court of Appeal)) tell me that when Martin received the draft agreement from first defendant, if there was already in existence an oral agreement respecting the post award stage, Martin would have returned the draft to first defendant with the words: 'A valid oral agreement is in existence covering the parties' transaction respecting the Post award stage,' or words to that effect. Martin did not do that but sought further information to enable him to comment further on the draft agreement, because he knew quite well that no valid oral agreement existed regarding the post award stage.

[26] I find that the evidence clearly shows that there was no such valid oral agreement respecting this stage, hence Mr Martin's sustained and persistent effort to comment on the draft agreement and to seek further information from first defendant, as I have said. As I have found, plaintiff and first defendant were in discussions and negotiations, but it cannot seriously be argued that plaintiff and first defendant were *ad idem* regarding the post award stage: They were never *ad idem*; neither can it be said, for the reasons given, that an agreement existed on the ground of reasonable reliance. Consequently, I conclude that plaintiff has failed to prove its claim in respect of the post award stage (Claim 2); whereupon that claim stands unproven, and is rejected.

[27] As to costs; I should say, plaintiff has not chalked substantial success all around. (*Hydraulic Brakes Truck & Trailer CC v Mutual and Federal Insurance Co of Namibia* Case No. I1923/2006) Plaintiff is successful with regard to Claim 1 but unsuccessful with regard to claim 2. The parties have, therefore, shared the honours equally. Consequently, it is fair and reasonable that no costs order is awarded to any of the parties. In my discretion, therefore, there should be no order as to costs.

[28] Based on these reasons, I order as follows:

1. Judgment for plaintiff in the amount of N$200 000, plus interest at the rate of 20 per cent per annum, calculated from 7 February 2020 to date of full and final payment.
2. There is no order as to costs.
3. The matter is finalized and removed from the roll.

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C Parker

Acting Judge

APPEARANCES:

PLAINTIFF: T.C PHATELA
Instructed by Murorua Kurtz Kasper Inc., Windhoek

FIRST DEFENDANT: T BROCKHOFF
Of Brockhoff & Associates, Windhoek