

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

CASE NO.: HC-MD-CIV-ACT-CON-2019/01115

In the matter between:

NAMIBIA ELECTRICAL SERVICES CC

PLAINTIFF

and

SILAS-KISHI SHAKUMU & COMPANY INC

DEFENDANT

Neutral citation: *Namibia Electrical Services CC v Silas-Kishi Shakumu & Company Inc* (HC-MD-CIV-ACT-CON-2019/01115) [2022] NAHCMD 667 (07 December 2022)

Coram: RAKOW J,

Heard: 27 – 29 April 2022; 31 May 2022; 23 September 2022; 3 October 2022; 4 October 2022.

Order: 29 November 2022

Reasons: 07 December 2022

Flynote: Civil Practice – Law of contract – Freedom of contract – Court will enforce an agreement that expresses the intention of the parties, however absurd the consequences may be.

Breach of contract – Interpretation of contracts – Process of attributing meaning to the words used in a document, having regard to the context – Consideration given to the language used in light of the ordinary rules of grammar and syntax.

Joinder – It is necessary to join as a party to litigation any person who has a direct and substantial interest in any order which the court might make in litigation.

Summary: The plaintiff instated a claim for an amount still outstanding of N\$ 128 183.69 for various works done to a property consisting out of a house and an outside flat situated at 37 Bach Street Windhoek West, which is the principle place of business of the defendant.

Held – that, the court finds that the defendant signed more than one quotation.

Held- that, it is clear that the instruction of the client changed from time to time, which resulted in the change of the total price of some of the items in the final invoice.

Held further – that, the parties agreed to this terms forming part of the agreement and it should therefore be understood and interpreted by giving an interpretation to the simple meaning of the words.

Held further – that the obligation to bring an application for the joinder of the “new” firms rests with the defendant, which the defendant did not do and that party was therefore not before court.

ORDER

1. Judgment is granted for the plaintiff in the amount of N\$119 121.91.
2. Interest at a rate of 2.5% per month as from 2 February 2019 until date of judgement.
3. Interest on the aforesaid amount at the rate of 20% per annum from the date of judgment to the date of payment.
4. Cost of suit.

JUDGMENT

RAKOW, J:The parties and their representation

[1] The plaintiff is Namibian Electrical Services CC, a closed corporation duly incorporated in terms of the Closed Corporation Act 26 of 1988 and the defendant is Silas-Kishi Shakumu & Company Inc, a company with limited liability, duly incorporated in terms of the company laws of the Republic of Namibia.

[2] During these proceedings the plaintiff was represented by Ms Mondo and the defendant by Mr. Silas-Kishi Shakumu. Mr. Shakumu is a legal practitioner and represented himself during these proceedings.

Background

[3] The plaintiff instituted a claim for the amount still outstanding being N\$128 183.69 for various works done to a property consisting out of a house and an outside flat situated at 37 Bach Street Windhoek West. This is also the principle place of business of the defendant. It is alleged that Mr. Petrov presented a quotation to the defendant for the amount of N\$47 422,75 to perform certain works at the request of the defendant to the said property. It was alleged that the terms of the agreement was as follows:

- a. Upon approval of the quotation, an 80% deposit of the price quoted for the material and work had to be paid to the plaintiff prior to the commencement of the works;
- b. The work would be completed within 2 weeks upon payment of the 80% deposit;
- c. Final invoice would be issued upon completion of the works;
- d. Payment of final invoice would be payable within 30 days from issuance of the invoice;
- e. A monthly interest of 2.5% would be charged on overdue payments;
- f. All materials and equipment installed would remain property of the Plaintiff until the full quoted price was paid;

- g. Any additional works outside the scope of the quotation required by the Defendant would be charged separately;
- h. All quantities would be provisional and final invoice would be issued on final measurement;
- i. The works carried out by the Plaintiff would have a 12 month guarantee on the workmanship.

[4] The defendant made a deposit of N\$30 000 (instead of N\$37 938.20 which would have been 80%) on 12 March 2018, which then formed the acceptance of the quotation of 7 March 2018, made by Mr. Petrov. On 19 March the plaintiff presented the defendant with an amended quotation for the amount of N\$133 521 upon the request of the defendant, as the defendant wanted the plaintiff to supply certain material and carry out electrical installation works, building works, plumbing installation, repairs to an electrical fence and installation of an alarm system. On 20 March 2018 and 9 April 2018 the quotations were further amended with additional work being requested by the defendant. The terms of these quotations however remained the same as set out above.

[5] These terms either express terms, or alternatively tacit terms, of the quotations of 9 April 2018 were inter alia as follows and mostly appeared from the face of the quotation:

- a. Upon approval of the quotation the defendant was required to pay a 50% deposit of the price quoted for the material and work, to plaintiff prior to the commencement of the works;
- b. Once the works reached a completion stage of 90%, the defendant was required to pay 40% of the remaining amount of the quoted amount before the plaintiff could proceed with the final works;
- c. The work would be completed within 3 weeks upon payment of the deposit;
- d. Final invoice would be issued upon completion of the works;
- e. Payment of final invoice would be payable within 30 days from issuance of the invoice;
- f. A monthly interest of 2.5% would be charged on overdue payments;
- g. All materials and equipment installed would remain property of the Plaintiff until the full quoted price was paid;

- h. Any additional works outside the scope of the quotation required by the Defendant would be charged separately;
- i. All quantities would be provisional and final invoice would be issued on final measurement;
- j. The plaintiff guaranteed to the defendant a 12 month guarantee on the workmanship.

[6] The plaintiff was requested on 12 April 2018, by the defendant that the quotation should be made out to another company called Shakumu, Hoveka & Samuel Inc. This is a company that the defendant's representative, Mr Silas Kishi-Shakumu owned with his proposed business partners. A copy of this quotation was attached to the pleadings. On 28 May 2018, the quotation of 12 April 2018 was amended at the request of the defendant that the quotation be made out to the defendant, as opposed to Shakumu, Hoveka & Samuel Inc.

[7] The plaintiff accepted payments from the defendant in the following amounts:

- a. N\$ 30 000.00 paid on 12 March 2018;
- b. N\$ 50 000.00 paid on 20 March 2018;
- c. N\$40 000. 00 paid on 31 March 2018;
- d. N\$ 30 000.00 paid on 7 May 2018;
- e. N\$ 75 000.00 paid 1 June 2018; and
- f. N\$4984.20 paid on 3 June 2018.

[8] It is the case of the plaintiff that the work should have been completed in 2 weeks but because he received continuous variations on the request for the work that needs to be performed, the defendant delayed making the required deposits, and there was some disagreement with the defendant and the new business they wished to be established.

[9] There is further an application from the plaintiffs for filing their heads of argument belatedly which is condoned.

The pre-trial order

[10] The pre-trial order was made an order of court on 26 April 2021 and it reads as follows:

‘ALL ISSUES OF FACT TO BE RESOLVED DURING THE TRIAL;

- 1 Who are the parties to the agreement?
- 2 What were the terms of the agreement?
- 3 How much money was paid to Plaintiff for his services?
- 4 Did Plaintiff fulfill its obligations in terms of the agreement?
- 5 If Defendant was a party to the agreement, was Defendant in breach of its obligations in terms of the agreement?
- 6 Is Defendant indebted to Plaintiff?
- 7 If Defendant is indebted to Plaintiff, what is the amount due?
- 8 Did Plaintiff properly carry out additional work for Defendant on 3 July 2018, and if so, what is the amount due?;
- 9 Did Plaintiff properly carry out additional work for Defendant on 27 July 2018, and if so, what is the amount due?;
- 10 Did Plaintiff properly carry out additional work for Defendant on 30 July 2018, and if so, what is the amount due?;

ALL ISSUES OF LAW TO BE RESOLVED DURING THE TRIAL;

- 1 Is Defendant liable to pay Plaintiff for additional work to be done on 3 July 2018?
- 2 Is Defendant liable to pay Plaintiff for additional work to be done on 27 July 2018?;
- 3 Is Defendant liable to pay Plaintiff for additional work to be done on 30 July 2018?;
- 4 Is the Plaintiff entitled to the amount claimed from the Defendant?’

Plaintiff's case

[11] Mr. Petrov testified on behalf of the plaintiff. He is the sole member of the plaintiff and represented the plaintiff during the negotiations of the contract which form the basis of this claim. He was telephonically contacted by Mr. Shakumu on 7 March 2018 and requested that the plaintiff performs some electrical installation work

at 37 Bach Street, Windhoek. He prepared a quotation and sent it to one Miguel who he previously worked with regarding the property as he is in charge of the property and related to the owner Ms Virginia Malute. When Miguel did not respond to his email, he forwarded the same quotation to Mr. Shakumu on 12 March 2018, which was then signed by Mr. Shakumu on 13 March 2018. This quotation was addressed to Miguel.

[12] He further testified that he spoke to Mr. Shakumu on that day and enquired as to who would be responsible to pay for the installation of the electrical works and he was informed that the defendant will pay for such work. He afterwards contacted Miguel and confirmed that the defendant will be responsible for the payment. The defendant then also made a deposit of N\$30 000 instead of N\$37 938.20, which is 80% of the contract value, as required per the quotation, but he accepted the quotation and as such a contract was agreed upon between the parties. The other terms as set out above, formed part of the quotation and upon acceptance, the contract.

[13] The quotation was then further amended on 20 March 2018 and 9 April 2018 as the instructions of the defendant changed. All these quotations were made out to the defendant. The terms of the quotation of 9 April 2018 changed slightly in that it provided for a 50% deposit, when the work reach a completion stage of 90% the defendant had to make a progress payment of an additional 40% of the quoted price, which will then take the payments made up till 90% of the quoted price, upon which the plaintiff would proceed with completion of the work. The final invoice would then be prepared at completion of the work, which would be payable 30 days after delivery of the invoice. All quotations were provisional and the final invoice would be calculated upon measuring the works.

[14] On or about 12 April 2018 he was requested to change the defendant's name on the quotation to Shakumu, Hoveka and Samuel Incorporated by Mr. Kamuhanga who was a business partner of Mr. Shakumu and whom, according to what the plaintiff heard, was going into a partnership, together with Ms Samuel. This document was then signed by both Mr Kamuhanga and Ms Samuel on 17 April 2018. On 28 May 2018 Mr. Shakumu however requested the plaintiff to change the

name back on the quotation to that of the defendant. This quotation was then also the final document signed by Mr. Shakumu on behalf of the defendant. The defendant further effected payments towards the deposit with the last payment made on 1 June 2018 bringing the amount paid to a total of N\$225 000.00. It further seems if Mr. Petrov received instructions from a number of persons regarding the colour of paint to use and what tiles to install, etc. but he testified that he was told by Mr. Shakumu to work with these people.

[15] At this time the volume of the work completed was over 90% and the defendant had to make a further progress payment and the amount of N\$4 984.20 was outstanding. He followed that up with Mr Shakumu and that amount was then paid on 4 June 2018. At all times these payments reflected from the Bank Windhoek Transaction Information sheets as being made by Kishi Shakumu and Company Inc. It seems that there was some delays in finalizing the work to be done, mainly because instructions seemed to have changed and no final instructions regarding the work to be done to the flat was received. It also seems that a final inspection with the owner of the building was also still outstanding. In the result the plaintiff provided the defendant only with a final account dated 3 October 2018 in the amount of N\$116 548.46. Mr Petrov testified that he accepted an invitation by Mr Shakumu to meet with him and the landlord on 11 October 2018 but when he arrived for the meeting Mr. Shakumu and the landlord was not present at the premises.

[16] For the plaintiff it was further testified that it was called out on 3 July 2018 to fix an installation fault at the offices of the defendant. The costs associated with this call out was N\$1005.10. The plaintiff was further called out on 27 July 2018 to fix a fault on the electric fence and its invoice in the amount of N\$1005.10 was forwarded to the plaintiff. He was again called out to replace a damaged insulator on the electric fence of the defendant, which call out was billed to the defendant in the amount of N\$562.35. He explained that these repairs were not a “come-back” on work he did but that it was on parts of the instalment of people before him where things were no longer functioning. The total for this work done is N\$2 572.55. The total amount the plaintiff is therefore indebted to the defendant is N\$119 121.91.

[17] He further explained that the final invoice differed from the amount quoted because some of the amounts quoted for specific items changed. Some items were further not charged for as they were not installed. The biggest change was in the square meters for painting. He explained that he was initially asked to paint only the building but was then requested to also paint the boundary wall. He measured it and then calculated the amount by using the rate that he initially quoted per square meter, which was N\$75.50. Initially the plaintiff quoted for 300 square meters which then increased in the invoice to 795.38 square meters. Similarly, he initially quoted for 200 square meters at N\$52.23 to paint the interior walls and the ceilings which then increased to 1048.31 square meters in the final invoice.

Defendant's evidence

[18] For the defendant Mrl Shakumu testified and stated that the defendant is not a party to the agreement relied on by the plaintiff for this claim. At all relevant times the agreement was between the law firm of Shakumu, Hoveka and Samuel Incorporated. He further testified that he had no dealings with the plaintiff in his personal capacity nor as the representative of the plaintiff. When he entered into an agreement with the plaintiff, he was doing so as representative of Shakumu, Hoveka and Samuel Incorporated. This is also clear from the request to change the name on the quotation of the plaintiff to Shakumu, Hoveka and Samuel Incorporated on 12 April 2018, which was then so done by the plaintiff.

[19] Mr. Shakumu further testified that he signed a quotation on 3 June 2018 on behalf of the Shakumu, Hoveka and Samuel Incorporated. He signed no other quotations, as these were signed by other directors of the "new" firm. The quotation he signed in June 2018 further differs from the invoice he received in October 2018 in that the amounts for the painting of the outside walls, inside walls and ceilings were significantly more. At no point did he or any of the other directors approved this highly inflated square meters in any quotation. The plaintiff further refused to carry out any work if not paid, therefore when 90% of the work was done, he made a progress payment for that specifically and the amount which they worked on was not the amount in the invoice.

[20] It was further testified that the other two members of the “new” partnership abandoned the partnership on 25 May 2018, which was the week they moved into the new offices. When the plaintiff demanded a progress payment, there was no money in the trust account of the “new” firm and because the plaintiff refused to connect the electricity until such time as the outstanding money was paid, and he had to move into the building, the defendant had to foot the bill. He therefore needed an invoice in the name of the defendant for book-keeping purposes.

The submissions by counsel

[21] On behalf of the plaintiff it was submitted that the defendant is indeed the correct party in these proceedings, and that the defendant was the party with whom the Plaintiff contracted with. Mr Petrov testified that when the defendant’s Mr Kishi approached him in early March 2018, he approached him by representing that the defendant was the party the plaintiff was contracting with; Mr Shakumu further provided the defendant’s name as the party to address the quotations to. It is also important to note that all payments made to the plaintiff for the renovations were made by the defendant.

[22] In addition to the above evidence Mr Petrov further testified that on or about 12 April 2018, the quotation of 9 April 2018 was amended at the request of one Mr Kamuhangu, who more specifically requested that Mr Petrov should add next to defendant’s name in brackets, the name Shakumu, Hoveka & Samuel Inc, alternatively to issue an invoice with name Shakumu, Hoveka & Samuel Inc. Mr Kamuhangu was a business partner of Mr Shakumu. At that stage believe Mr Petrov believed that Mr Shakumu, Mr Kamuhangu and one Ms Alvine Samuel were planning to start a firm. Mr. Petrov testified that:

‘I assume this request was made so that they could split the payment. Their internal agreements however did not concern me. The contact person was always Mr Kishi (*Mr Shakumu*) and it was the defendant (*his entity*) that made all payments.’

And a bit further Mr Petrov also testified:

‘Thereafter, it appears Mr Kishi (Mr Shakumu) and his business partners went their separate ways and he requested that the name on the quotation be changed once again to his entity the Defendant.’

[23] Furthermore, it was argued that Mr Shakumu, in an attempt to distance the defendant from the agreement, alleged that the defendant only got involved as a party with the renovations when the quotation of 28 May 2018 issued. He alleged that he only signed the 28 May quotation, and that previous quotations were signed by his partners. However, it transpired that during plaintiff's evidence that he also signed the quotation dated 7 March 2018 addressed to "Miguel" submitted as exhibit B1. The 7 March 2018 quotation was signed by Mr Shakumu on 13 March 2018.

[24] It was also submitted that Mr Petrov's testimony was that the plaintiff did all the work that it was contracted to do. The plaintiff tendered into evidence a time sheet that indicates that plaintiff's workers attended to the property from 12 March 2018 to 6 June 2018. Mr Shakumu in cross-examination was questioned with regards to whether he disputed the time sheet, his response was that he could verify it because it was not given to him to sign and he stated that he could not dispute that the workers were there, because the work was done. It was however alleged that the plaintiff had not done work in the outside office. During cross-examination, it became apparent that Mr Petrov on behalf of the plaintiff had repeatedly requested instructions from the defendant regarding the outside office and no instructions were forthcoming from the defendant. There was email submitted in as evidence that supported the Plaintiff's version. Due to the fact that no instructions were received on outstanding issues, the plaintiff issued its final invoice on 3 October 2018 to the defendant in term of the measurements that it had carried out in June 2018 and excluded some items related to the work in the outside office from this final invoice.

[25] On behalf of the defendant it was argued that the defendant pleaded that the plaintiff sued a wrong party. There was no agreement between Kishi Shakumu & Co and the plaintiff. The emails filed of record indicated that the plaintiff has been informed on various occasions that the relationship is between and Shakumu, Kamuhanga & Samuel. Throughout, the plaintiff dealt with all three directors in Shakumu, Kamuhanga & Samuel. Importantly, the only time the defendant came in the picture was in June 2018 when the partnership in Shakumu, Kamuhanga & Samuel Incorporated was dissolved with the full knowledge of the plaintiff. The request to change name on the invoice to Kishi Shakumu & Co in June 2018 was for

purposes of securing further funding from the commercial bank to pay the N\$ 79 000.00. At all material times this request to change the name on the invoice has never influence the relationship between the parties. It was merely for the convenience of the defendant.

[26] The defendant therefore argues that the partnership of Shakumu, Kamuhanga & Samuel should at least have been joined as parties. The plaintiff's witness was further not credible in various instances especially on the following:

- (a) that it rendered additional work without payment;
- (b) that it had a valid reason for the delay of 4 months before it issued a final invoice;
- (c) that it remeasured the surfaces (walls size);
- (d) that it was necessary to remeasure the quantities and measurements;
- (e) that it used its own materials while well admitting at the same time that it operated from the defendant's deposits.

Legal considerations

[27] The principle of freedom of contract was recognised by this Court in the matter of *Markus v Telecom Namibia Ltd*¹ where the court held that the courts will enforce an agreement that expresses the intention of the parties, however absurd the consequences may be. That court quoted with approval from decision of the South African Supreme Court of Appeal and said:

'There is a well-established legal principle (known as *pacta sunt servanda*) which requires that a contract, however informal it be, such contract must be enforced. The principle of *pacta sunt servanda* recognizes a person's right to enter into a contract and once having concluded the contract the parties to that contract have to live with the consequences arising from the contract so concluded.

[28] In order to determine whether or not a breach of this agreement occurred, we need to understand the concept of breach of contract and the requirements which

¹ *Markus v Telecom Namibia Ltd* (I 286-2008) [2014] NAHCMD 207 (23 June 2014).

need to be met in order to establish the breach. Christie² defines breach of contract as follows:

'The obligations imposed by the terms of a contract are meant to be performed, and if they are not performed at all, or performed late or performed in the wrong manner, the party on whom the duty of performance lay (the debtor) is said to have committed a breach of the contract or, in the first two cases, to be *in mora*, and, in the last case, to be guilty of positive malperformance.'

[29] The Supreme Court *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors*³ O'Reagan JA referred to the South African case *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁴ where Wallis JA usefully summarised the approach to interpretation as follows:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.

Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.'

[30] Regarding joinder, Damaseb JP in *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others*⁵ at 447, para 32 said the following:

² Christie R H: '*The Law of Contract in South Africa*.' 5th ed, LexisNexis Butterworths at 495.

³ *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors* (SA 9 of 2013) [2015] NASC 10 (30 April 2015).

⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

⁵ *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* 2011(2) NR 437

'The leading case on joinder in our jurisprudence is *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A). It establishes that it is necessary to join as a party to litigation any person who has a direct and substantial interest in any order which the court might make in the litigation with which it is seized. If the order which might be made would not be capable of being sustained or carried into effect without prejudicing a party, that party was a necessary party and should be joined except where it consents to its exclusion from the litigation. Clearly, the ratio in *Amalgamated Engineering Union* is that a party with a legal interest in the subject matter of the litigation and whose rights might be prejudicially affected by the judgment of the court, has a direct and substantial interest in the matter and should be joined as a party.'

Conclusion

[31] It is clear from the evidence that Mr. Petrov on behalf of the plaintiff engaged with the representative of the defendant, Mr Shakumu as early as March 2018 when he spoke to him on the telephone. It is also clear that the name of the defendant must have been provided to him at some time as the name which must be displayed on the quotation. The quotation was then also made out to the defendant when the request came to change the name displayed on the quotation. Although it is disputed by the Mr. Shakumu, the court finds that he indeed signed more than one quotation, in that he also signed the quotation of 7 March 2018 which was addressed to Miguel.

[32] What is further clear is that the instructions of the client changed from time to time as the initial quotation was only for electrical works, then on 20 March 2018 there is a quotation for a number of additional work, which was again reduced in the April quotation. The court accepts Mr. Petrov's evidence that the instructions changed from time to time as to what must be done, which resulted in the change in the total price of some items in the final invoice.

[33] The quotations, which form the basis of this contract is further very clear in that they specifically indicates that 'all quantities are provisional, Invoice to be issued on final measurement.' It is clear that Mr. Petrov took the final measurements and was even willing to re-take them in the presence of Mr. Shakumu and the landlord but when he arrived for this meeting, which was set up by Mr. Shakumu, Mr. Shakumu was not available. The parties agreed to this term forming part of the agreement and it should therefore be understood and interpreted by giving an

interpretation to the simple meaning of the words, which can be nothing else than that the quantities given in the quotation is provisional and an invoice will be issued after finally measurement.

[34] It is also clear from the evidence that the defendant made payment for each of the payments received, from it's own account. There was no payments made from the "new" firm of Shakumu, Hoveka and Samuel Incorporated. The final quotation, which was signed by Mr. Shakumu in June 2018 also refers to the name of the defendant. The court is therefore satisfied that the contract was between the plaintiff and the defendant and that the plaintiff performed the work required from it satisfactory.

[35] It is further true that the firm of Shakumu, Hoveka and Samuel Incorporated could have been joined to this matter because the defendant allege that they have an substantial interest in the matter. The plaintiff is not saying this, the defendant is alleging such interest and as such, the obligation to bring an application for the joinder of the "new" firm rests with the defendant, which the defendant did not do and that party was therefore not before court.

[36] In the result I make the following order:

1. Judgment is granted for the plaintiff in the amount of N\$119 121.91.
2. Interest at a rate of 2.5% per month as from 2 February 2019 until date of judgement.
3. Interest on the aforesaid amount at the rate of 20% per annum from the date of judgment to the date of payment.
4. Cost of suit.

E RAKOW
Judge

APPEARANCE

PLAINTIFF: R Mondo
Of Silungwe Legal Practitioners, Windhoek

DEFENDANT: S Kishi-Shakumu
Of Kishi Shakumu & Co.Inc, Windhoek