

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
RULING ON ABSOLUTION

Case No.: HC-MD-CIV-ACT-CON-2020/04172

In the matter between:

KAYOFA INVESTMENT HOLDINGS (PTY) LTD

PLAINTIFF

and

GOVERNMENT OF THE REPUBLIC OF NAMIBIA

FIRST DEFENDANT

MINISTER OF URBAN AND RURAL DEVELOPMENT

SECOND DEFENDANT

Neutral citation: *Kayofa Investment Holdings (Pty) Ltd v Government of the Republic of Namibia & Another* (HC-MD-CIV-ACT-CON-2020/04172) [2023] NAHCMD 365 (29 June 2023)

Coram: SIBEYA J

Heard: 6 – 10 February 2023 and 19 June 2023

Delivered: 29 June 2023

Flynote: Practice - Absolution from the instance – Plaintiff instituted a contractual claim for damages based on repudiation of a building contract – Test for absolution from the instance restated – Absolution should be granted where the plaintiff has not established its case and proceeding with a trial constitutes a waste of time – Plaintiff *prima facie* established that upon being notified as the successful bidder to complete the construction of uncompleted houses in Opuwo, the Government and accounting officer extended the period within which to sign the contract and provide a performance guarantee which was accepted – The failure to surrender the site for

the construction to be effected on the ground that the contract signed was invalid and unenforceable found to *prima facie* lack merit – Absolution from the instance refused.

Summary: The matter is centered on a bid that was published by the defendants for the completion of constructed but incomplete houses at Opuwo. The plaintiff submitted the bid and was notified that the defendants intended to award the building contract to the plaintiff subject to certain conditions being fulfilled.

The plaintiff claims that a building contract was concluded between the parties on 17 January 2019 to complete the uncompleted houses for N\$6 743 178.53 and which contract would come into force on the date of submission of an irrevocable Performance Guarantee of 10 percent of the contract amount to the Ministry. The Government would then hand over the site to the plaintiff to execute the contract within a reasonable time.

The building site was not handed over to the plaintiff to execute the contract. The defendants are alleged to have repudiated the contract. The plaintiff, as a result, claims damages for the alleged repudiation. It is the legality and enforceability of the contract that forms the subject matter of this case.

The plaintiff claims damages in the amount of N\$2 649 756.63 constituting the contract amount of N\$6 743 178.53 minus output value-added tax of N\$879 545.03; contingency amount for unforeseen items of N\$250 000; provision for price increase of N\$240 000; saving on costs of materials of N\$2 749 840.52; plus input value-added tax on wasted material costs of N\$25 963.65. The plaintiff further claims the return of the original Performance Guarantee which was submitted to the defendants pursuant to the agreement.

The defendants, in their plea, alleged that the contract relied on by the plaintiff is unenforceable, and null and void, due to the fact that the parties did not conclude the contract prior to 22 October 2018 or within 30 days prescribed under clause 39.2 of the Bidding Documents.

The defendants further allege that the conclusion of the contract was subject to the fulfillment of the suspensive condition that the plaintiff furnishes the defendants with an irrevocable Performance Security or Bank Guarantee not later than 22 October 2018, alternatively within the time prescribed in the Bidding Documents, which the plaintiff failed to do. The defendants, therefore, denies the breach of contract and damages claimed by the plaintiff

During the trial and at the close of the plaintiff's case, the defendants applied for absolution from the instance arguing that the plaintiff failed to lead sufficient evidence which could *prima facie* satisfy its claim.

Held, the plaintiff is required to make out a *prima facie* case regarding all the elements of the claim, in the absence of such evidence, absolution must be granted.

Held that, during the assessment of the evidence led for the plaintiff at this stage, it is an established principle that, such evidence is accepted as true unless it is inherently improbable as to be rejected outright. The rationale behind this approach is that, before court, is only the plaintiff's evidence and there is no other evidence to gainsay it.

Held further that, on a *prima facie* basis, the accounting officer or the Government was empowered after notifying the plaintiff as the successful bidder, to extend the date to sign the contract and for the plaintiff to provide a performance guarantee in the exercise of his or its discretion and this, the Government and or the accounting appears to have done.

Held further that, in respect of the defendants' complaint about the difference in figures and calculations as in regards to the damages claimed by the plaintiff, evidence was nonetheless led.

The plaintiff's evidence established on a *prima facie* basis the relief sought. The result thereof is that absolution from the instance ought to be refused.

ORDER

1. The application for absolution from the instance is refused.
2. The defendants must pay the plaintiff's costs of opposing the application for absolution from the instance including costs of one instructing and one instructed legal practitioner, jointly and severally, the one paying the other to be absolved.
3. The matter is postponed to 6 July 2023 at 08h30 AM for allocation of dates for continuation of trial.

RULING

SIBEYA J:

Introduction

[1] This court is seized with an opposed application for absolution from the instance brought by the defendants at the end of the plaintiff's case.

[2] The matter is centered on a bid that was published by the defendants for the completion of constructed but incomplete houses at Opuwo. The plaintiff submitted the bid and was notified that the defendants intended to award the building contract to it subject to certain conditions being fulfilled. The contract was eventually signed in terms of which the plaintiff expended resources. The building site was not handed over to the plaintiff to execute the contract. The defendants are alleged to have repudiated the contract. The plaintiff, as a result, claims damages for the alleged repudiation. It is the legality and enforceability of the contract that forms the subject matter of this case.

The parties and legal representation

[3] The plaintiff is Kayofa Investment Holdings (Pty) Ltd, a company duly registered and incorporated according to the laws of the Republic of Namibia, with its principal place of business situated at 83 Ruhr Street, Northern Industrial Area, Windhoek.

[4] The first defendant is the Government of the Republic of Namibia, a juristic person with address of service situated at the Office of the Government Attorney, 2nd Floor, Sanlam Building, Independence Avenue, Windhoek. The first defendant shall be referred to as 'the Government'.

[5] The second defendant is the Minister of Urban and Rural Development, a Minister duly appointed in terms of the Namibian Constitution whose address of service is c/o the Office of the Government Attorney, 2nd Floor, Sanlam Building, Independence Avenue, Windhoek. The second defendant shall be referred to as 'the Minister'.

[6] Where reference is made to the first and second defendants jointly they shall be referred to as 'the defendants' whilst where reference is made to the plaintiff and the defendants jointly, they shall be referred to as 'the parties'.

[7] The plaintiff is represented by Mr Steyn while the defendants are represented by Mr Namandje.

Background

[8] The defendants invited bids for completion of the commenced but uncompleted houses in Opuwo. The closing date and time for submission of the bids was 15 August 2018 at 11h00 AM.

[9] The plaintiff submitted the bid and was notified that it is the successful bidder with a total amount of N\$6 743 178.53. The standstill period, in terms of the Public Procurement Act, 15 of 2015 ("the PPA") was said to be from 11 to 18 October 2018.

[10] On 10 October 2018, Mr Daniel Nghidinua, the Executive Director in the Ministry of the Urban and Rural Development (“the Ministry”) notified the plaintiff that the Ministry intended to award the tender to the plaintiff. Mr Nghidinua further wrote that in terms of s 55(6) of the PPA, and in the absence of an application for review, the plaintiff was required to sign a contract at the offices of the Ministry by no later than 22 October 2018. In the same letter, the plaintiff was further urged to submit an irrevocable Performance Guarantee of 10 percent of the contract value on the date of signature of the contract in order for the contract to be effective.

[11] On 2 November 2018, Mr Nghidinua again wrote to the plaintiff requiring the said Performance Guarantee to be provided not later than 7 November 2018.

[12] On 15 November 2018, the plaintiff delivered a copy of the Performance Guarantee. On 6 December 2018, Mr Leonard Kayofa, the director of the plaintiff, signed the building contract. The copy of the Performance Guarantee was delivered to the Ministry as proof that the Development Bank of Namibia (“DBN”) was prepared to provide the plaintiff with an original Performance Guarantee after the Ministry signs a cession of the income of the contract.

[13] On 17 January 2019, Mr Nghidinua signed the building contract which was earlier signed by Mr Kayofa on 6 December 2018.

[14] On Friday, 25 January 2019, while Mr Kayofa was travelling from Windhoek to Opuwo for a site handover expected to be executed on Monday, 28 January 2019, he was informed by Ms Anna David, an employee of the Ministry, that the site would not be handed over until further notice. The site was never handed over to the plaintiff. This led to the present dispute between the parties.

The pleadings

[15] In the amended particulars of claim, the plaintiff claims that a building contract was concluded between the parties on 17 January 2019 to complete the uncompleted houses at Opuwo for a contract amount of N\$6 743 178.53 and which contract would come into force on the date of submission of an irrevocable Performance Guarantee of 10 percent of the contract amount to the Ministry. The

Government would then hand over the site to the plaintiff to execute the contract within a reasonable time.

[16] The plaintiff alleged that it duly and timeously complied with all conditions to which the contract was subjected to. The plaintiff alleged further that the Government repudiated the contract. Due to the alleged repudiation, the plaintiff cancelled the contract.

[17] The plaintiff claims damages in the amount of N\$2 649 756.63 constituting the contract amount of N\$6 743 178.53 minus output value-added tax of N\$879 545.03; contingency amount for unforeseen items of N\$250 000; provision for price increase of N\$240 000; saving on costs of materials of N\$2 749 840.52; plus input value-added tax on wasted material costs of N\$25 963.65. The plaintiff further claims the return of the original Performance Guarantee which was submitted to the defendants pursuant to the agreement.

[18] The defendants, in their plea, alleged that the contract relied on by the plaintiff is unenforceable, and null and void, due to the fact that the parties did not conclude the contract not later than 22 October 2018 or within 30 days prescribed under clause 39.2 of the Bidding Documents.

[19] The defendants further allege that the conclusion of the contract was subject to the fulfillment of the suspensive condition that the plaintiff furnishes the defendants with an irrevocable Performance Security or Bank Guarantee not later than 22 October 2018, alternatively within the time prescribed in the Bidding Documents, which the plaintiff failed to do. The defendants, therefore, denies the breach of contract and damages claimed by the plaintiff.

[20] The defendants filed a counterclaim against the plaintiff where they claim that the parties concluded a purported procurement contract on 17 January 2019 oblivious of the fact that such contract was null and void or unenforceable for not being executed within the period of time stipulated in the Bidding Documents. The contract is further said to have been concluded while the suspensive conditions were not fulfilled, rendering it unenforceable. The defendants, as a result, seek declaratory

relief that the purported contract concluded on 17 January 2019 be declared null and void and unenforceable.

[21] The plaintiff, in the plea to the counterclaim, denies the allegations that the contract is null and void, and further denies that the contract was subject to a suspensive condition.

[22] In the pre-trial memorandum dated 12 September 2022 which was made an order of court on 22 September 2022, the parties listed the following issues in dispute to be determined at trial:

‘1. Whether on a proper interpretation of the Public Procurement Act 15 of 2015 ..., the Public Procurement Regulations and the Bidding Documents:

1.1. the tender awarded to the plaintiff on 10 October 2018 lapsed, because the plaintiff failed to sign the contract or provide the performance guarantee on or before 22 October 2018 or 8 November 2018;

1.2. the contract on which the plaintiff relies is therefore void.

2. Whether on a proper interpretation of the Public Procurement Act, the Public Procurement Regulations and the Bidding Documents, the written notice which the Ministry of Urban and Rural Development (the Ministry) gave to the plaintiff on 10 October 2018 constituted a binding contract between the plaintiff and first defendant, the material express, implied or tacit provisions of which were:

2.1. That the first defendant contracted the plaintiff to execute the work for which the plaintiff tendered at the contract price of N\$6 743 178.53.

2.2. That the contract was subject to the suspensive condition that no review application as contemplated in section 55(5) of the Public Procurement Act by any other bidder against the award of the tender to the plaintiff be made successfully from 11 October 2018 to 18 October 2018.

2.3. That the plaintiff was obliged to sign the formal contract in the prescribed form and furnish the performance guarantee on or before 8 November 2018.

2.4. That the defendant's officials pleaded by the plaintiff had the power and authority to extend in their discretion the time limit mentioned in the last subparagraph above, for which no form was prescribed.

3. Whether on a proper interpretation of the Public Procurement Act, the Public Procurement Regulations and the Bidding Documents, the defendants' officials pleaded by the plaintiff had the power and authority (and/or whether or not in law they could on the facts pleaded) in terms thereof to extend the time limit for:

3.1. the signature of the contract by the plaintiff to 17 January 2019 or 6 December 2018;

3.2. the furnishing of the performance guarantee by the plaintiff to 23 January 2019 or 13 November 2019.

4. Whether or not on the facts and the law the counteraction by the defendants must succeed?

5. Whether the defendants and the Ministry duly extended the time limits as claimed by the plaintiff and mentioned in the last paragraph above.

6. The *quantum* of the plaintiff's damages claim.'

Evidence led

[23] The plaintiff led the evidence of Mr Leonard Kayofa who testified, *inter alia*, that he is the sole shareholder and director of the plaintiff. He testified further that the plaintiff submitted a bid for the completion of commenced but not yet completed houses at Opuwo in response to the advertised invitation to the bid number W/ONB//17-1/2018 issued on 20 July 2018 by the Ministry. The bid was submitted before the closing date and time. The total amount for the bid was N\$6 743 178.53 for the completion of 24 houses at Opuwo.

[24] Mr Kayofa testified further that on 10 October 2018, the Ministry published the Executive Summary of the Bid Evaluation Report in terms of s 55(4) of the PPA and Regulation 39 of the Public Procurement Regulations 'the Regulations' and notified the plaintiff that its bid was the best evaluated bid for the total amount of N\$6 743 178.53 and that the standstill period was from 11 to 18 October 2018. He testified further that on the same date, 10 October 2018, the Ministry provided a written notice to the plaintiff in terms of s 55(4) of the PPA that:

- (a) it intended to award the tender to the plaintiff at a total amount of N\$6 743 178.53;
- (b) in terms of s 55(6) of the PPA, the plaintiff was required to sign a contract at its offices no later than 22 October 2018 in the absence of an application for review;
- (c) the plaintiff was urged to submit an irrevocable performance guarantee of 10 percent of the contract value on the date of signature of the contract in order for the contract to be effective.

[25] Mr Kayofa testified that on 2 November 2018, Mr Ngidinwa wrote to the plaintiff stating that:

- (a) in terms para 40 of the Bidding Documents the plaintiff was required to furnish the Ministry with a performance guarantee for 10 percent of the contract amount within seven days;
- (b) the plaintiff was given a final notice to furnish the Ministry with the performance guarantee within five days or by 7 November 2018;
- (c) failure by the plaintiff to furnish the performance security described within the prescribed period would constitute grounds for the annulment of the award of the tender to the plaintiff.

[26] Mr Kayofa testified further that on 15 November 2018, he submitted the performance guarantee to the Ministry in the prescribed form and the Ministry raised no objection. He further stated that on 6 December 2018, he signed the contract on

behalf of the plaintiff and delivered it to the Ministry without protestation from the Ministry.

[27] Mr Kayofa testified further that the Ministry did not receive any application for review during the standstill period of 11 to 18 October 2018 in terms of s 55(5) of the PPA. He further stated that the defendants and Mr Nghidinua had the authority to extend the 30 day time limit within which the plaintiff could sign the contract and deliver the performance guarantee. He also said that the notice of 10 October 2018, to the plaintiff that it was awarded the tender constituted a binding contract between the plaintiff and the Government for the plaintiff to carry out the work tendered for at the contract amount of N\$6 743 178.53, provided that no application for review was launched during the standstill period. He stated further that the plaintiff was obliged to sign the contract on or before 8 November 2018, but the defendants and Mr Nghidinua had the authority to extend the time limits.

[28] Mr Kayofa testified further that by 18 October 2018, no application for review was made. On 17 January 2019, Mr Nghidinua signed the contract on behalf of the government. He testified further that by signing the contract, the defendants extended the time limit for signature of the contract to 17 January 2019, and the time to furnish the performance guarantee to 13 January 2019, being within seven days of the contract signed on 17 January 2019. He, however, maintained that the plaintiff already furnished the performance guarantee on 13 November 2018.

[29] Mr Kayofa testified further that the material express, implied or tacit terms of the contract were that:

- (a) the plaintiff was contracted to complete 24 uncompleted houses at Opuwo at a total amount of N\$6 743 178.53;
- (b) the contract would come into force on the date of submission of an irrevocable performance agreement of 10 percent of the contract amount within seven days of signature of the contract;

(c) the Government would give possession of the building site to the plaintiff for work to be executed according to the contract within seven days after 17 January 2019.

[30] Mr Kayofa testified that he signed an agreement of cession on behalf of the plaintiff on 13 November 2018, DBN signed same on 13 November 2018 and Mr Nghidinua signed on 18 January 2019.

[31] Mr Kayofa testified that on or about 17 January 2019, Ms Anna David representing the Government orally agreed with him that the Government would give possession of the building site to the plaintiff on 28 January 2019. He testified further that on Friday, 25 January 2019, while travelling to Opuwo, he received notification from Ms David that the site handover scheduled for Monday, 28 January 2019, was postponed until further notice.

[32] Mr Kayofa testified that in July 2019, the plaintiff instituted arbitration proceedings in terms of the contract claiming specific performance against the Government. In response, the Government contended that the contract was void. Mr Kayofa stated that, as a result, the Government repudiated the contract. Consequently, the cession signed was cancelled.

[33] Mr Kayofa testified further that on 6 August 2020, the plaintiff demanded from the Government to purge its repudiation of the contract failing which it would cancel the contract and sue the Government for damages for breach of contract. The demand was not heeded to and the plaintiff cancelled the contract. Mr Kayofa said that the Government is, therefore, obliged to return the original performance guarantee issued by DBN. It was his testimony further that for DBN to issue the required performance guarantee, the plaintiff entered into an insurance contract with Hollard Insurance Company of Namibia Ltd (Hollard) where the plaintiff paid N\$10 290.67 for the policy.

[34] Mr Kayofa testified further that on 14 November 2018, the plaintiff and DBN entered into a loan agreement where DBN advanced an amount of:

- (a) N\$1 594 785.25 to purchase materials in order to execute the work in terms of the contract;
- (b) N\$527 514.75 to purchase a Hino Truck to be used to execute the work of the contract and in respect of this transaction an instalment sale transaction was concluded with DBN for N\$524 228.43;
- (c) N\$674 317.85 to pay for the fee required for the performance guarantee which the plaintiff provided to the Government.

[35] Mr Kayofa testified further that a building site was established at Opuwo in anticipation of carrying out work in terms of the contract to the cost of N\$300 000. He further stated that the plaintiff purchased materials amounting to N\$199 054.99; took out a short term insurance with Santam at a cost of N\$11 609.99; incurred transport costs in the amount of N\$43 200; accommodation costs in the amount of N\$10 000; incurred expenses in respect of an environmental and social management plan in the amount of 10 000; obtained a loan from DBN for N\$524 225.43 and incurred expenses regarding salaries and wages in the amount of N\$1 154 932.

[36] Mr Kayofa testified further that due to non-payment resulting from the repudiation of the contract, DBN called up the short term loan, cancelled the instalment sale agreement and recovered the Hino Truck. Outstanding from the short term loan, according to Mr Kayofa, is N\$657 547.27 plus interest at the rate of 12.5 percent per year calculated from 30 September 2019 to date of payment, whilst in respect of the instalment sale agreement the outstanding amount is N\$413 071 plus interest at the rate of 12.5 percent per year calculated from 31 March 2019 to date of payment. The above amounts bring the total wasted expenses claimed to N\$3 150 357.47.

[37] Mr Kayofa testified that resulting from the breach of contract by the Government, the plaintiff suffered damages in the amount of N\$2 649 756.63.

[38] The plaintiff further led the evidence of Mr Taurai Witman Chinwaramusee, who testified, *inter alia*, that he is a qualified Quantity Surveyor following his registration with the Namibia Council of Architects and Quantity Surveyors on 27 September 2019 in accordance with the Architects and Quantity Surveyors' Act 13 of

1979. Mr Chinwaramusee testified that he, however, has nine years practical experience extending to part of the period before his registration. He testified that during 2018 and 2019, he obtained the cost price at which the completion of the uncompleted 24 houses at Opuwo in terms of the contract signed on 17 January 2019 could be executed, together with the profit margins and the reasonable market related tender prices for the work.

[39] Based on his academic, professional and practical training, and the contract, including the bill of quantities and calculations made, Mr Chinwaramusee, opined that the profit due to the plaintiff after output and input value-added tax is N\$1 748 048.77 plus wasted expenses resulting in the total damages amounting to N\$2 341 503.42.

[40] Mr Kayofa and Mr Taurai Witman Chinwaramusee were subjected to extensive cross-examination by Mr Namandje.

[41] At the close of the plaintiff's case, the defendants applied for absolution from the instance. Mr Namandje argued that the plaintiff failed to lead sufficient evidence which could *prima facie* satisfy its claim. Mr Steyn argued contrariwise. The court should, therefore, determine as to who, of the protagonists, can be said to be correct.

The law on absolution

[42] Damaseb JP in *Dannecker v Leopard Tours Car & Camping Hire CC*¹ said the following regarding the legal principles applicable to absolution from the instance:

'The test for absolution at the end of plaintiff's case

[25] The relevant test is not whether the evidence led by the plaintiff established what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff. The reasoning at this stage is to be distinguished from the reasoning

¹ *Dannecker v Leopard Tours Car & Camping Hire CC* (I 2909/2006) [2015] NAHCMD 30 (20 February 2015).

which the court applies at the end of the trial; which is: 'is there evidence upon which a Court ought to give judgment in favour of the plaintiff?'

[26] The following considerations are in my view relevant and find application in the case before me:

- (a) Absolution at the end of plaintiff's case ought only to be granted in a very clear case where the plaintiff has not made out any case at all, in fact and law;
- (b) The plaintiff is not to be lightly shut out where the defence relied on by the defendant is peculiarly within the latter's knowledge while the plaintiff had made out a case calling for an answer (or rebuttal) on oath;
- (c) The trier of fact should be on the guard for a defendant who attempts to invoke the absolution procedure to avoid coming into the witness box to answer uncomfortable facts having a bearing on both credibility and the weight of probabilities in the case;
- (d) Where the plaintiff's evidence gives rise to more than one plausible inference, anyone of which is in his or her favour in the sense of supporting his or cause of action and destructive of the version of the defence, absolution is an inappropriate remedy;
- (e) Perhaps most importantly, in adjudicating an application of absolution at the end of plaintiff's case, the trier of fact is bound to accept as true the evidence led by and on behalf of the plaintiff, unless the plaintiff's evidence is incurably and inherently so improbable and unsatisfactory as to be rejected out of hand'

[43] I accept that the plaintiff is required to make out a *prima facie* case regarding all the elements of the claim, as in the absence of such evidence, the court will not find in favour of the plaintiff.²

[44] During the assessment of the evidence led for the plaintiff at this stage, it is an established principle that, such evidence is accepted as true unless it is inherently improbable as to be rejected outright. The rationale behind this approach is that, before court, is only the plaintiff's evidence. Consequently, in the absence of evidence to gainsay it, or such evidence being inherently improbable, there is good reason to accept such evidence as true, after all that is the only evidence available.

[45] Mr. Namandje argued that the bid validity period was 90 days calculated from the closing date of 15 August 2018, in accordance with s 49(1) of the PPA, and therefore, the time to sign the contract could not be extended beyond such bid validity period.

² *Factcrown Ltd v Namibia Broadcasting Corporation* 2014 (2) NR 447 (SC) para 72.

[46] Mr Namandje argued that the building contract did not come into force on 17 January 2019 as alleged by the plaintiff and did not become enforceable as the plaintiff did not accept the offer in accordance with the prescribed manner and mode provided for in Mr Nghidinua's letters of 10 October and 2 November 2018 respectively.

[47] Mr Namandje argued that no evidence was led that the plaintiff provided the performance guarantee and signed a contract with the parties prior to 7 November 2018. This, he argued is fatal to the plaintiff's case as it renders the contract signed on 6 December 2018 and 17 January 2019, invalid.

[48] Mr Namandje argued further that the plaintiff did not plead fictional fulfilment of the conditions for acceptance of the contract by the defendants. In the absence of such averments, he argued further that, the failure to comply with the conditions stated in the letters of 10 October and 2 November 2018 rendered the signing of the contract on 17 January 2019 of no effect in law.

[49] Mr Namandje argued that both the letters of 10 October and 2 November 2018 provided that in case of inquiries the plaintiff must contact Mr Peyependa Nghaamwa, but no evidence was led that the plaintiff contacted the said Mr Ngaamwa.

[50] Mr Namandje argued in the alternative that the plaintiff did not make out a case for the alleged damages suffered as there is a mismatch between the different kinds of damages testified to by Mr Kayofa compared to his expert Mr Chinwaramusee. He argued further that no damages were proven, and any expenses incurred were unnecessary and unreasonable in view of the plaintiff being informed prior that there will be no site handover.

[51] It was further argued that the plaintiff was not entitled to prospective profit as it was bound to suffer losses.

[52] Mr Steyn argued the contrary, pound for pound, as it were. He argued that the contract between the parties contained no suspensive condition the basis where its non-fulfilment will render the contract void.

[53] Mr Steyn argued that the Government contracted the plaintiff to complete the uncompleted 24 houses at Opuwo when it awarded the bid to the plaintiff on 10 October 2018. He argued further that the only suspensive condition was that the contract will be signed provided no bidder applied for a review of the award during the standstill period of 11 to 18 October 2018, and no application for review was made. Mr Steyn argued that the failure by the plaintiff to sign the building contract and return it to the Minister and the failure to submit the performance agreement prior to 7 November 2018 did not render the contract invalid but provided the Government with a right to cancel the contract or extend the time lines.

[54] Mr Steyn conceded that the plaintiff failed to submit the original performance guarantee within 30 days of 10 October 2018 or 7 November 2018, but argued that the Government, on 17 January 2019, concluded the contract as it was entitled to do.

Analysis

[55] It is common cause between the parties that the plaintiff submitted the bid and was selected as the successful bidder and was informed accordingly in a letter dated 10 October 2018. The plaintiff was further informed that in the absence of an application for review during the standstill period of 11 to 18 October 2018, the plaintiff would be required to sign a contract no later than 22 October 2018. The plaintiff was further urged to submit an irrevocable performance guarantee of 10 percent of the contract value on the date of signature of the contract.

[56] On 2 November 2018, Mr Nghidinua on behalf of the defendants addressed another letter to the plaintiff where he stated that the Ministry still awaited the performance guarantee and provided the plaintiff with a final notice to furnish such performance guarantee within five days or by the latest 7 November 2018, failing which shall constitute sufficient grounds for annulment of the contract. The plaintiff

delivered a copy of the performance agreement on 15 November 2018 and signed a building contract on 6 December 2018.

[57] Regulation 38(4) of the Regulations which Mr Kayofa quoted in his witness statement reads:

‘(4) [If] A bidder to whom a procurement contract is awarded fails to sign a contract or to provide the required security of the performance of the contract within a period of 30 days from the date of the notification of the award or such further period as may be extended by the public entity, the public entity must select another bidder from amongst the remaining valid bidders as contemplated in section 55(7) of the Act.’

[58] Section 49 of the PPA provides for the validity of the bid validity period and it reads:

‘(1) A bid remains valid for the period as indicated in the bidding documents which may not be more than 180 days.

(2) The validity period of a bid may be extended only with the agreement of the bidder concerned.

(3) A bidder who agrees to an extension of the validity period of his or her bid must furnish a corresponding extension of his or her bid security, if security was required for the original bid submission.’

[59] The bid validity period *in casu* was 90 days. There is no evidence on record that the bid validity period was extended. To the contrary the record reveals that the building contract was signed by the plaintiff on 6 December 2018 and by Mr Nghidinua on 17 January 2019 respectively.

[60] The Supreme Court in *Arandis Power (Pty) Ltd v President of the Republic of Namibia and Others*³ remarked as follows at para 58-60:

‘[58] Mr Budlender relied upon a trilogy of cases in South Africa as to the consequence of a tender award after the expiry of the tender validity period. Those three

³ *Arandis Power (Pty) Ltd v President of the Republic of Namibia and Others* 2018 (2) NR 567 (SC) para 58-60.

decisions concerned the legal consequence of a failure by a public body, to accept, within the stipulated validity period for the (tender) proposals, any of the proposals received. The same issue arises in this review.

[59] In each of those cases, the same conclusion was reached. In the first of the trilogy, Southwood J in *Telkom SA Ltd v Merid Training (Pty) Ltd and Others; Bihati Solutions (Pty) Ltd v Telkom SA Ltd and Others*⁴ concluded:

'The question to be decided is whether the procedure followed by the applicant and the six respondents after 12 April 2008 (when the validity period of the proposals expired) was in compliance with s 217 of the Constitution. In my view it was not. As soon as the validity period of the proposals had expired without the applicant awarding a tender the tender process was complete — albeit unsuccessfully — and the applicant was no longer free to negotiate with the respondents as if they were simply attempting to enter into a contract. The process was no longer transparent, equitable or competitive. All the tenderers were entitled to expect the applicant to apply its own procedure and either award or not award a tender within the validity period of the proposals. If it failed to award a tender within the validity period of the proposals it received it had to offer all interested parties a further opportunity to tender. Negotiations with some tenderers to extend the period of validity lacked transparency and was not equitable or competitive. In my view the first and fifth respondent's reliance only on rules of contract is misplaced.'

[60] This well-reasoned approach was followed by Plasket J in *Joubert Galpin Searle Inc and Others v Road Accident Fund and Others*⁵ in reaching a similar conclusion:

'By the time the tender validity period has expired, there is nothing to extend because, as Southwood J said in *Telkom*, the tender process has been concluded, albeit unsuccessfully. The result, in this case, is that the RAF had no power to award the tender once the bid validity period had expired and it had no power to extend the period as it purported to do. In the language of s 6(2)(a)(i) of the PAJA, the decision-maker — the board, in this instance — was not authorised to take the decision. Put in slightly different terms, there were no valid bids to accept, so the RAF had no power to accept the expired bids.'

[60] I find, on a *prima facie* basis, that the predicament that the defendants find themselves in is that, despite Mr Namandje arguing that the bid validity period had lapsed by the time of signing the contract, the defendants did not plead the lapse of

⁴ [2011] ZAGPPHC 1 (27974/2010; 7 January 2011).

⁵ *Joubert Galpin Searle Inc and Others v Road Accident Fund and Others* 2014 (4) SA 148 (ECP) para 74.

the bid validity period as part of the defences to the plaintiff's claim. The essence of the defendants' plea is that on 10 October 2018 they notified the plaintiff of the intention to award it with a contract subject to the parties concluding a written contract not later than 22 October 2018 or 30 days prescribed in clause 39.2 of the Bidding documents and that the parties did not conclude the contract within the said period or the period prescribed in the Bidding documents, therefore, the contract concluded afterwards is invalid. This stance, I, *prima facie* find, does not correlate with the argument of the lapse of the bid validity period.

[61] The defendants further contended in their plea that the contract was subject to a suspensive condition that the plaintiff provides an irrevocable performance guarantee not later than 22 October 2018.

[62] The argument raised by the defendants that the contract providing a performance guarantee constituted a suspensive condition can be disposed of without breaking a sweat. A suspensive condition suspends the operation of an obligation in a contract pending the occurrence or non-occurrence of a future specified event. If a suspensive condition is not fulfilled then the agreement is void as there would be no meeting of the minds between the parties.

[63] In *Babyface Civils CC JV Hennimma Investments CC and Others v //Kharas Regional Council and Others*,⁶ the Supreme court stated the following regarding suspensive conditions:

[36] In my view, the use of the word 'cancelled' by the architect must not be understood out of context and in the sense that a legal practitioner would use it, namely, to cancel an otherwise binding agreement. As the condition suspended the conclusion of an agreement, it had the effect of a normal suspensive condition, ie the rights of the parties remained in abeyance pending the fulfilment of the condition. Thus, upon non-fulfilment of the condition the appointment of the joint venture fell by the wayside. There was no need to cancel anything. Indeed, there was nothing to cancel once the condition was not fulfilled as the appointment of the joint venture automatically lapsed. The authority of the architect or the director to cancel is irrelevant as they did not cancel anything. The joint venture's appointment simply came to an end when it failed to provide the guarantee timeously.

⁶ *Babyface Civils CC JV Hennimma Investments CC and Others v //Kharas Regional Council and Others*, 2020 (1) NR (1) (SC) para 36.

Despite the use of the word 'cancelled' by the architect, it is clear what she intended to say was that there was non-compliance by the joint venture to adhere to the terms of the condition relating to the guarantee timeously and that is what led to the termination of the appointment.'

[64] In light of the above authorities and discussions, I find that the requirement of a performance agreement did not constitute a suspensive condition but a contractual obligation. This position finds further support from the letter of 2 November 2018 addressed to the plaintiff by Mr Nghidinua, giving the plaintiff an extension and a final notice to furnish the guarantee within five days or not later than 7 November 2018, failing which will constitute sufficient grounds to cancel the award. This, in my further view, is indicative that the Government did not intend to have the requirement of a performance agreement as a suspensive condition but rather as a contractual obligation, failing compliance thereof will grant the Government the right to cancel the contract. The later part of the condition means that the plaintiff's failure to provide a performance guarantee does not render the contract void but affords the Government the right to cancel the contract if it so elect. I, therefore agree with Mr Steyn that, the above means that the Government may as well elect to extend the date of receipt of the said performance guarantee even if such guarantee is not provided on the set date. I find that the argument raised by the defendants that the requirement to provide a performance guarantee constitutes a suspensive condition lacks merit.

[65] What remains for consideration is the nature of the contract signed by the plaintiff on 6 December 2018 and the Government on 17 January 2019. It is common cause between the parties that the letter of 2 November 2018 referred to above, extended the furnishing of the performance guarantee to 7 November 2018. This has to be considered with the legal position that by 16 November 2018, being 90 days after the closing date of the bid on 15 August 2018, the bid validity period would lapse if no successful bidder was awarded the bid.

[66] In *casu*, the plaintiff was informed of being the successful bidder on 10 October 2018. I find, on a *prima facie* basis that after 18 October 2018, the last day for the application for the review of the selection of the successful bidder, the contract had to be awarded to the plaintiff as the successful bidder. I further *prima*

facie find that the delay to sign the contract with the plaintiff after the plaintiff was already selected and informed that it is the successful bidder, does not nullify the award but as put by Mr Nghidinua, it entitles the Government the right to cancel the award if it so elects. This finding is supported by s 55(7) of the PPA,⁷ which does not oblige the Government to cancel the award of the successful bidder for failure to sign the contract or to provide the performance guarantee, but provides Government with a discretion to select another bidder. The interpretation of the said clause, in my *prima facie* view, is that the failure to sign the contract or provide the performance guarantee when due, means that the Government may select another bidder or extend the period to enable such successful bidder to sign the contract or provide the performance guarantee.

[67] The above finding, in my view, resonates with the provisions of clause 40.2 of the Bidding Documents which reads that:

‘Failure of the successful Bidder to submit the above-mentioned Performance Security or sign the Contract Agreement within the prescribed delay shall constitute sufficient grounds for the annulment of the award and forfeiture of the bid security.’

[68] It follows, in my *prima facie* view, that the award of the bid to the plaintiff did not lapse when the plaintiff failed to sign the contract or provide the performance guarantee by 8 November 2018, as the Government, the Ministry and/or the accounting officer, Mr Nghidinua has the authority to extend the date to sign the contract and to be provided with a performance guarantee. It is stated hereinabove that the Government accepted a copy of the performance guarantee after the earlier set date without objection and the plaintiff signed the contract on 6 December 2018, without protestation from the defendants.

[69] I find on a *prima facie* basis, that the accounting officer or the Government was empowered after notifying the plaintiff as the successful bidder, to extend the date to sign the contract and for the plaintiff to provide a performance guarantee in the exercise of his or its discretion. This, the Government and or the accounting appears to have done.

⁷ See also Regulation 38(4) of the PPA Regulations.

[70] In respect of the defendants' complaint about the difference in figures and calculations between the evidence of Mr Kayofa and Mr Chinwaramusee, I *prima facie* find that despite a few discrepancies between the evidence of the two, the quantum was testified to. I am further mindful of the legal position that credibility plays a minor role at this stage. I was also not invited by Mr Namandje to find that any of the witnesses for the plaintiff was not credible.

Conclusion

[71] I am mindful that I am not required at this stage of the proceedings to make conclusive findings and I leave myself open to persuasion after considering the defendants' case and further arguments.

[72] In view of the findings and conclusions made hereinabove, I am of the opinion that the plaintiff's evidence established on a *prima facie* for the relief sought. The result thereof is that absolution from the instance ought to be refused.

Costs

[73] It is settled law that costs follow the result. No reasons were advanced to depart from this well-beaten principle. Accordingly, costs for the absolution will be awarded to the plaintiff.

Order

[74] In the premises, it is ordered that:

1. The application for absolution from the instance is refused.
 2. The defendants must pay the plaintiff's costs of opposing the application for absolution from the instance including costs of one instructing and one instructed legal practitioner, jointly and severally, the one paying the other to be absolved.
 3. The matter is postponed to 6 July 2023 at 08h30 for allocation of dates for continuation of trial.
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O S SIBEYA
JUDGE

APPEARANCES:

PLAINTIFF:

H Steyn
Instructed by Fisher, Quarmby & Pfeifer,

Windhoek.

DEFENDANTS:

S Namandje

Instructed by the Office of the Government Attorney,

Windhoek