



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: HC-NLD-CIV-ACT-CON-2017/00180

In the matter between:

OMAKA MINING AND ENGINEERING CC

PLAINTIFF

and

**OMUSATI REGIONAL COUNCIL
TEOFELUS SHIGWEDHA**

**FIRST DEFENDANT
SECOND DEFENDANT**

Neutral citation: *Omaka Mining and Engineering CC v Omusati Regional Council*
(HC-NLD-CIV-ACT-CON-2017/00180) [2021] NAHCNLD 17 (22
February 2021)

Coram: ANGULA DJP

Heard: 1 December 2020

Delivered: 22 February 2021

Flynote: Civil proceedings – Claim for building work done and material supplied, defendants refuses to compensate the plaintiff after work was done – Plaintiff alleged verbal agreement to construct a building identical to the first building – The defendants and their legal practitioners barred from leading evidence due to non-compliance with the rules – Court proceeded in terms of rule 98(1) – Court found that the plaintiff had proved the first written agreement but failed to prove the alleged

additional oral agreements and grant absolution from the instances in respect of work done and material supplied in respect of the alleged oral agreement.

Summary: The plaintiff claimed an amount of N\$2 100 000 which he alleges emanated from a breach of a building contract entered into between it and the first defendant following a tender award.

The plaintiff alleged that on or about 11 October 2016 the plaintiff and the defendants entered into a written agreement in terms of which the plaintiff would construct two bachelor flats which would be housed in one Unit at Pendukeni High School, situated in Omusati Region, for a consideration N\$1 305 000. In terms of that written agreement the plaintiff would supply labour, material and machinery. The plaintiff further alleged that during the construction his foreman of site was approached by the second defendant, an employee of the first defendant, who instructed him to construct additional two similar bachelor flats on the same terms and conditions as the initial written agreement for a similar consideration. To which the plaintiff agreed.

After plaintiff completed the first two flats and the last two flats were about 98 per cent completed the defendant breach the agreement by refusing to pay the plaintiff for the construction of the additional verbal agreement.

Court held that; on the admissible evidence before court, the plaintiff had proved the written agreement and is entitled to be compensated for the amount agreed. The court found that in respect of the alleged second oral agreement, in that on the foreman's own admission he did not have prior authority from his principal to conclude the alleged oral agreement. Furthermore given the fact that the written agreement was preceded by a tender invitation it was highly improbable that the construction of two additional flats could have been done without a tender proses and without a further written agreement been concluded between the parties. The court accordingly granted an order for the absolution from the instance against the plaintiff in respect of the two additional flats.

ORDER

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1. The first defendant is to pay the plaintiff a sum of N\$1 305 000 in consideration for work done and material supplied in respect of the written contract to construct two bachelor flats.
 2. Absolution from the instance is granted in respect of the alleged additional work done and material supplied.
 3. The first defendant is to pay interest on the aforesaid amount of N\$1 305 000 at the rate of 20 per cent per annum calculated from 24 March 2017 on which the defendants acknowledged in writing its indebtedness to the plaintiff to date of final payment.
 4. Costs of suit.
 5. The matter is removed from the roll and is considered finalized.
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JUDGMENT

ANGULA DJP:

Introduction

[1] The plaintiff claimed an amount of N\$2 100 000 emanating from a breach of a written building construction contract, through a tender awarded to the plaintiff by the first defendant to construct initially two identical bachelor flats and further two additional identical flats in terms of an oral agreement.

[2] The plaintiff is Omaka Mining and Engineering, a close corporation duly incorporated in accordance with the laws of the Republic of Namibia. The first defendant is Omusati Regional Council, a Regional Authority established in terms of s 2 of the Regional Councils Act 22 of 1992. The second defendant is Teofelus

Shigwedha a major male, building inspector employed by the Omusati Regional Council. The second defendant is cited in his capacity as an employee of the first defendant and no relief is sought against him. Where reference is made in this judgment to the plaintiff and the defendants jointly, they shall be referred to as the 'the parties'.

[3] The plaintiff was represented by Mr Ndaitwah, while the defendants were represented by Mr Tibinyane, who was not in attendance at the trial.

Pleadings

[4] The plaintiff alleges in its particulars of claim that on or about 11 October 2016 the plaintiff and the defendant entered into a written agreement in terms of which plaintiff would construct two bachelor flats which would be housed in one unit at Pendukeni High School, situated in Omusati Region for the amount of N\$1 305 000. In terms of the agreement, the plaintiff would provide all the labour, material, machinery and everything necessary for the construction of such flats.

[5] The plaintiff further alleges that during the site hand over, the plaintiff, represented by his site-foreman and the second respondent orally agreed that the plaintiff would construct two additional similar bachelor flats on the same terms and conditions as the first two flats for the same amount as the first two flats.

[6] On or about 24 October 2016, the plaintiff commenced with the construction of the two bachelor flats in accordance with the written agreement. On 18 November 2016, the second defendant instructed the plaintiff's site foreman to construct two additional bachelor flats which should be a mirror images of the first two flats on the same terms and conditions.

[7] The plaintiff alleges that the first and second defendants are in breach of the said agreements in that they failed and or refused to compensate it in respect of work done and material supplied.

[8] The first defendant admits in its plea that it entered into a written agreement with the plaintiff for the construction of two bachelor flats at Pendukeni High School,

for the amount of N\$1 305 000 as alleged by the plaintiff. It however denies that it entered into an oral agreement with the plaintiff for the construction of two additional bachelor flats and put the plaintiff to the proof thereof.

The parties' non-compliance with the rules

[9] There have been numerous non-compliances with the Rules of Court by both parties in this matter. For instance, on 29 January 2019 the matter was struck from the roll by the Judge-President for want of prosecution. Thereafter, the plaintiff brought an application for re-instatement and the matter was accordingly re-instated.

[10] The parties yet again failed to file their respective witness statements and were sanctioned by this court. The plaintiff complied with the sanctions order and was thereafter allowed to file its witness statements. The defendants on the other hand failed to satisfy the court on their failure to file their witness statements timely and as a consequence they were barred from filing and using witness statements at trial.

[11] When the matter was called for hearing on 30 November 2020, the defendants brought an application to postpone the trial. After considering the application for postponement, the court dismissed the application. As Mr. Nyambe who stood in for Mr. Tibinyane who acted on behalf of the defendants had no further instruction to proceed with the trial he asked for leave to be excused from the proceedings. His request was granted. The court thereafter considered the defendants to be in default and proceeded in terms of rule 98(1), in the absence of the defendants.

[12] Rule 98(1) provides:

'If a trial is called and the plaintiff appears and the defendant does not appear in person or by his or her legal practitioner, the plaintiff may prove his or her claim insofar as the burden of proof lies on him or her and judgment must be given accordingly insofar as he or she has discharged such burden, but, if the claim is for a debt or liquidated demand no evidence is necessary unless the presiding judge otherwise orders.'

[13] The court wishes to reiterate that it will not tolerate or condone the parties' flagrant non-compliance with its rules and will in future non-suit parties who fail to comply with its rules.

The plaintiff's case

[14] Mr Erkki Kandjamba testified that he is the sole member of the plaintiff and that on 11 October 2016, on behalf of the plaintiff. Following being awarded the tender, he entered into a written agreement with the first defendant, duly represented by the second defendant, in terms of which the plaintiff would construct two bachelor flats at Pendukeni High School designed into a single dwelling for the amount of N\$1 305 000 as compensation. He handed in evidence a copy of the Bill of Quantity and the letter of the plaintiff's appointment by the first respondent as a contractor.

[15] Prior to commencement with the construction work, a site hand over was conducted. During that site hand over, the second defendant informed the plaintiff's foreman that they would have to construct two additional flats, identical to the flats in in respect of the written contract. The foreman agreed.

[16] Plaintiff's foreman relayed the communication in respect of the extra work to Mr Kandjamba and further advised that due to the extra work and the fact that they were required to finalised the construction of the two additional flats during the same period as the first two flats, they would require additional resources in the form of machinery and employees. According to Mr Kandjamba, he acted promptly by supplying additional machinery and employees to the construction site.

[17] Kandjamba further testified that January 2017 his foreman informed him that they required more material to complete the work whereupon he informed his foreman that there was no money and they need to submit a claim for 'progress payment' to the first defendant. He then contacted second defendant and request for payment in respect of the work done that far. The second defendant advised him that a formal written request was needed by the first defendant. Mr Kandjamba then addressed a written request for payment to the first defendant however for months no response was received. Thereafter, the second defendant visited the site and gave instruction that the construction work be stopped.

[18] Mr Kandjamba further testified that the only work that remained to be completed in respect of the two additional flats were the installation of the electricity; cupboards, doors; and septic tank. Other than that, the two separate flats were completed.

[19] Mr Kandjamba handed into evidence, a letter from the first defendant dated 24 March 2017 addressed to the plaintiff. In the letter, the first defendant stated and admitted that the plaintiff was entitled to a payment of N\$1 305 000. The letter was admitted into evidence and was marked 'Exhibit E'. According to this witness, the defendants have to date not paid the plaintiff for the work done and as a result the first defendant is indebted to the plaintiff in the sum claimed in the summons.

[20] The plaintiff then called the second witness for the plaintiff, the plaintiff's site-foreman, Mr Paulus Ismael. He basically confirmed what was testified by Mr Kandjamba. In particular he testified that he was instructed by the second respondent during the site hand over that the plaintiff construct two additional identical flats for the same price. He testified that he enquired from the second respondent why the material for the additional two flats had not been included in the bill of quantity as the plaintiff had already ordered the material in respect of the first two flats. The second respondent ordered him to abide by his instruction.

[21] Mr Ismael further testified that he thereafter informed Mr Kandjamba, his principal, about the new additional work required by the respondents and requested that he be furnished with additional resources to which his principal positively responded. Thereafter he sent a request to Mr Kandjamba for additional material. The latter informed him that there was no money anymore and that they should submit a claim in respect of work already done. The claim was submitted but was rejected. Thereafter the second respondent visited the site and instructed him to stop with all constructions work.

[22] Mr. Ismael further testified that he did not have any general or prior authority from his principal to accept or conclude the verbal agreement for the construction of the additional two flats.

Defendants' case

[23] No evidence was led on behalf of the defendants due to non-compliance with the rules of court. As pointed out earlier in this judgment, when summarising the parties pleadings, the defendants admit in their plea, the plaintiff's allegation with regard to the conclusion of the agreement to construct the first two bachelor flats and that as a consideration the plaintiff would be paid a sum of N\$1 305 000. It follows therefore that, that claim is not in dispute.

Analysis of evidence

[24] It is settled law that he who alleges bears the burden of proof of such allegation to prove that allegation on a balance of probabilities in order to sustain his or her claim. In discussing the burden of proof Damaseb JP in *Dannecker v Leopard Tours Car and Camping Hire CC*¹ stated the following:

[44] It is trite that he who alleges must prove. A duty rests on a litigant to adduce evidence that is sufficient to persuade a court, at the end of the trial, that his or her claim or defence, as the case may be should succeed. A three-legged approach was stated in *Pillay v Krishna* 1946 AD 946 at 951-2 as follows: The first rule is that the party who claims something from another in a court of law has the duty to satisfy the court that it is entitled to the relief sought. Secondly, where the party against whom the claim is made sets up a special defence, it is regarded in respect of that defence as being the claimant: for the special defence to be upheld the defendant must satisfy the court that it is entitled to succeed on it. As the learned authors Zeffert *et al South African law of Evidence* (2 ed) at 57 argue, the first two rules have been read to mean that the plaintiff must first prove his or her claim unless it be admitted and then the defendant his plea since he is the plaintiff as far as that goes. The third rule is that he who asserts proves and not he who denies: a mere denial of facts which is absolute does not place the burden of proof on he who denies but rather on the one who alleges. As was observed by Davis AJA, each party may bear a burden of proof on several and distinct issues save that the burden on proving the claim supersedes the burden of proving the defence.'

¹ *Dannecker v Leopard Tours Car and Camping Hire CC* (I 2909/2006) [2016] NAHCMD 381 (5 December 2016) at para 44-45.

[25] It is apparent from the evidence that the version of the plaintiff and that of the defendants in respect of the claim for N\$1 305 000 do not completely differ which makes this court's duty to adjudicate somewhat easier.

[26] At the outset, it is important to set out facts that are common cause between the parties, which are the following:

- (a) That a tender was awarded to the plaintiff under tender number OMRC/35/2016;
- (b) This tender was to construct two bachelor flats at Pendukeni High School, Etayi Circuit, for the amount of N\$1 305 000;
- (c) One bachelor flat is containing two rooms;
- (d) Construction of the said bachelor flats commenced on 24 October 2016;
and
- (e) The plaintiff would be compensated for his works and material in the sum of N\$1 305 000.

[27] Thus essentially leaving one issue for the court to determine whether or not the plaintiff was awarded an additional tender separate from tender number OMRC/35/2016 for the construction of two additional bachelor flats at Pendukeni High School, Etayi Circuit, for the amount of N\$1 305 000 separate from the initial tender.

[28] The court raised two issues with Mr Kandjamba during his testimony. The first issue was the fact that there was only one bill of quantity handed up as an exhibit, whereas the plaintiff claimed that he was contracted to construct two additional flats. Second, was the fact that, on the plaintiff's case, there were still the installations of the electricity, cupboards, doors, and a septic tank to be completed in respect of the two additional flats, however the plaintiff failed to quantify the value of such unfinished work so that its value could be deducted from the amount claimed in respect of the two additional flats.

[29] Mr Kandjamba could not satisfactory explain the reasons why he did not request for a second bill of quantity and why he did not insists on signing a second written agreement in respect of the two additional flats.

[30] In this regard the court in *S v Holshausen*² stated that:

‘Oral or written statements made by persons who are not parties and are not called as witnesses are inadmissible to prove the truth of the matters stated . . .’

[31] Furthermore this court agrees fully with Damaseb JP³, when he stated that; ‘evidence of a statement will be hearsay only when it is intended to prove a fact in issue and as representing the truth. That is so because the truth depends upon the credit of the maker of the statement which, because he or she is not present in court, cannot be tested through cross-examination.’

Conclusion

[32] The court is satisfied that the plaitiff has proved that he is entitled to payment in respect of the first two flats. This claim has also been admitted by the first defendant both in writing and on the pleadings before court. It follows therefore that the plaintiff is entitled to payment of the sum of N\$1 305 000.

[33] The court finds that that the plaintiff has not proved its claim relating to the two additional flats. The court considers it highly improbable that the first defendant as a public body would act inconsitent by calling for a tender in respect of the first two flats and further concluded a written agreement but would not follow the same precEDURE in respect of the two additinal flats. It would appear that the plaintiff was hoodwinked into constructing the two additinal flats by the second defendant. This conclusion is supported by the fact that the first respondent is prepared to compensate the plaintiff in respect of the two first flats.

[34] It is clear that the plaintiff constructed the two additional flats whithout following the tender process followed in respect of the first two flats. In the

² *S v Holshausen* 1984 (4) SA 852 (A).

³ Damaseb P T 2020, *Court managed Civil Procedure of the High Court of Namibia* at paras 11-076, p 286-287.

circumstances, it would appear that on the information before court, the plaintiff has an enrichment claim against the first defendant in respect of the two additional flats, given the fact that the flats were constructed with the plaintiff's own material and labour.

[35] I should mention that, I found it rather disturbing and indeed unacceptable that a public institution such as the first defendant who, having admitted its indebtedness to a contractor in respect of the two flats, failed to honour its admitted contractual obligation to the plaintiff in respect of the first two flats. No explanation has been tendered for the first defendant's failure to pay the amount it has admitted it owes to the plaintiff. In the circumstances, I will order that plaintiff pays interest on the amount N\$1 305 000 calculated from 24 March 2017 being the date it acknowledged its indebtedness in respect of the said sum to the plaintiff.

Costs

[36] There is no reasons why costs should not follow the event. The plaintiff has succeeded, albeit partial, and is accordingly entitled to its costs.

Order

[37] I therefore make the following order:

1. The first defendant is to pay the plaintiff a sum of N\$1 305 000 in consideration for work done and material supplied in respect of the written contract to construct two bachelor flats.
2. Absolution from the instance is granted in respect of the alleged additional work done and material supplied.
3. The first defendant is to pay interest on the aforesaid amount of N\$1 305 000 at the rate of 20 per cent per annum calculated from 24 March 2017 on which the defendants acknowledged in writing its indebtedness to the plaintiff to date of final payment.
4. Costs of suit.

5. The matter is removed from the roll and is considered finalized

H Angula
Deputy-Judge President

APPEARANCES:

PLAINTIFF: N NDAITWAH
 Of Sisa Namandje & Co. Inc., Windhoek

FIRST AND SECOND
DEFENDANTS: L TIBINYANE
 Of Office of the Government Attorney, Windhoek