

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: HC-NLD-CIV-ACT-CON-2020/00291

In the matter between:

KRISTIAN DAVID

PLAINTIFF

and

LUCIA KANDUME

DEFENDANT

Neutral citation: *David v Kandume* (HC-NLD-CIV-ACT-CON-2020/00291) [2024]
NAHCNLD 06 (25 January 2024)

Coram: MUNSU J

Heard: 02 November 2023

Delivered: 25 January 2024

Flynote: Contract – Breach of agreement – Damages allegedly sustained as a result of the Defendant’s unlawful repudiation of the agreement.

Summary: The parties entered into an agreement in terms whereof the plaintiff would construct a house for the defendant. It was alleged that, subsequent thereto, the parties entered into an ‘additional agreement’ in respect of extra work which was to be carried

out by the plaintiff for an additional amount. The plaintiff alleged that, while he complied with the terms of the agreements, the defendant breached the agreements in that she did not pay the entire amount agreed in both agreements, and that she chased the plaintiff off the construction site, thereby repudiating the agreements. In respect of the initial agreement, the defendant contended that she did not pay the entire amount because the plaintiff failed to perform as was agreed. The defendant disputed having chased the plaintiff off the site. She further disputed the existence of the additional agreement. During pre-trial proceedings, the parties did not ask the court to decide the issues pertaining to the additional agreement.

Held, that the court could only decide the issues raised in the pre-trial order.

Held, that the parties agreed during pre-trial proceedings on facts not in dispute, among others that the defendant drove the plaintiff off the site with the help of the police.

Held, that the issue for determination was whether the defendant breached the agreements when she ejected the plaintiff off the site.

Held, that the contradictions in the defendant's case made the defendant's case less credible.

Held, that the defendant failed to adduce sufficient evidence to show that the plaintiff failed to comply with terms of the agreements entitling the defendant to terminate the agreement.

Held, that the repudiation of the agreements by the defendant was premature and unjustified. Consequently, the defendant breached the agreements between the parties and thereby caused the plaintiff to suffer damages in respect of the outstanding amount.

ORDER

Judgement in favour of the Plaintiff against the Defendant in the following terms:

1. Payment of the amount of N\$ 7 000.
2. Interest at the rate of 20 percent from the date of judgment to the date of final payment.
3. Costs of suit
4. The matter is removed from the roll: Case finalised.

JUDGMENT

MUNSU J

Introduction

[1] This matter concerns a claim for damages instituted by the plaintiff against the defendant, arising from alleged breach of a partly written and partly oral agreement entered into by the parties on or about 27 September 2017. The action was defendant.

Particulars of claim

[2] The plaintiff alleged that the material terms of the agreement were that the plaintiff would build the defendant a house. It was allegedly agreed that the plaintiff would demolish parts of the existing structure on the defendant's premises and then build the house. It was alleged that the defendant would supply the materials for the construction, and would pay the plaintiff the amount of N\$ 100 000 for the work.

[3] The plaintiff further alleged that between October 2017 and January 2018, the parties agreed that the plaintiff would fetch water from the lake close to the defendant's residence, and would retrieve bricks and concrete stones intended for the construction from the location they were dropped off to the construction site. The plaintiff claimed

that the defendant would pay the plaintiff the amount of N\$ 25 000 for the additional work.

[4] Furthermore, the plaintiff claimed that in spite of demand, the defendant only gave him the 'building plan', but not the roof plan. It was further alleged that the plaintiff duly complied with all the terms of the agreements in that he completed all the building works by 30 April 2018.

[5] The plaintiff claimed that the defendant breached the material terms of the agreements in that she only effected payments totaling N\$ 93, 000. Furthermore, it was alleged that the defendant failed to effect payment of the amount of N\$ 32, 000.

[6] The plaintiff further alleged that on 30 April 2018, the defendant, with the aid of the Namibian police chased the plaintiff away from the construction site, thereby repudiating the agreements between the parties, which repudiation, the plaintiff accepted.

[7] The plaintiff asserted that as a result of defendant's breach, he suffered damages in the amount of N\$ 32, 000 being the amount still due and payable by the defendant.

The plea

[8] The defendant denied the allegation that the parties agreed that the plaintiff would demolish parts of the existing structure on the defendant's erf. She pleaded that the parties agreed that the plaintiff would construct the dwelling in a workmanlike manner in accordance with the building plan, within a reasonable period.

[9] Furthermore, the defendant pleaded that the amount of N\$ 100 000 would be paid in full only upon completion of all the works agreed.

[10] The defendant denied that the parties agreed for the plaintiff to fetch water from the nearby lake, nor collect bricks and concrete stones as alleged by the plaintiff. She pleaded that during the entire period of the construction, there had been running tap

water on the premises and that no additional amount was agreed between the parties. The defendant further pleaded that all the super bricks and concrete stones used for the construction were procured from and delivered to the premises by Henning Crusher.

[11] The defendant pleaded that she provided the plaintiff with one plan, inclusive of the roof plan, which the plaintiff failed to execute, resulting in a defective roof structure of poor workmanship. It was pleaded that the same plan was utilised by a different contractor who rectified the defects created by the plaintiff.

[12] The defendant further pleaded that the plaintiff failed to complete the agreed work, including beam filling, plumbing and plastering of the kitchen, and failed to rectify the defect in the roof, including refitting of trusses, purlins and ceilings.

[13] It was further pleaded that the remaining N\$ 7 000 (N\$ 100 000 minus N\$ 93 000) was not paid to the plaintiff because he failed to do plumbing work and complete the work as agreed.

[14] The defendant denied having chased the plaintiff away from the site. She pleaded that the plaintiff abandoned the work, vacated the site in the company of police officers, which vacation the defendant accepted.

[15] The defendant pleaded that she is the one who suffered damages, arising from the plaintiff's breach, in respect of which she obtained a default judgment against the plaintiff on 29 April 2019 in the amount of N\$ 83 400.

Evidence on behalf of the plaintiff

Kristian David

[16] The plaintiff, Mr. Kristian David testified that during September 2017, he agreed with the defendant to demolish part of the defendant's existing structure, and construct walls, including a roof, as well as boundary wall and plumbing work. According to the plaintiff, the parties agreed that the defendant would pay the plaintiff the amount of N\$ 100 000.

[17] The witness related that, the parties further agreed that the plaintiff would fetch water from a close by lake, as well as collect bricks and concrete stones from the distance they were dropped off. For that, the defendant would pay the plaintiff a further N\$ 25 000.

[18] The plaintiff further testified that the defendant provided him with a 'building plan', but failed to provide a roof plan.

[19] According to the plaintiff, he duly complied with the terms of the agreement, however, the defendant repudiated the agreement when she chased him from the site, which repudiation he accepted.

[20] Furthermore, the plaintiff recounted that an amount of N\$ 32 000 is still due, which amount represents the amount of damage the plaintiff suffered due to defendant's repudiation.

Matias Nghinyengulwa

[21] He stated in his testimony that the plaintiff employed him and other individuals. He narrated how, on 01 October 2017, they arrived at the construction site. He went on to say that when the plaintiff asked the defendant why she intended to build on the precise location of the existing house rather than somewhere else, the defendant said that the old house was not built properly and needed to be demolished.

[22] According to the witness, the defendant and her husband said to the plaintiff that: 'You must break down the old house and also fetch water from the dam because the tap is not running.' He stated that the plaintiff informed the defendant that this was extra work, which would have to be paid for, to which the defendant agreed. He stated that the plaintiff compiled a list of the extra work and gave it to the defendant, who agreed to pay N\$ 25 000 (for the extra work).

[24] It was his testimony that he noticed that Henning Crusher were dropping off the bricks and other building materials at a distance. According to the witness, the defendant insisted that they should also transport same to the site.

[25] He further related that he used the plaintiff's vehicle to transport the water and the building material to the site. He also stated that in a day, he would drive about four trips to fetch water.

[26] In addition, the witness testified that by February 2018, they stopped fetching water as the cement mixing was no longer needed because the walls were completed.

Matheus Haimbodi

[27] He testified that he is a cubist and worked with the plaintiff on building constructions. Like the previous witness, he similarly testified that the plaintiff was engaged for additional work of putting down the wall, fetching of water as well as fetching bricks and concrete stones dropped by Henning Crusher at a distance of about 100 m away from the construction site.

[28] It was his testimony that they did not know beforehand that they would have to do the extra work as it was only mentioned on 01 October 2017 when they got to the site.

Evidence on behalf of the defendant

Lucia Kandume

[29] The defendant Ms. Lucia Kandume testified that during August 2017, she and her husband gave the plaintiff a building plan and requested for a quotation. She stated in her testimony that after they were provided with the quotation (referred to by the plaintiff), they bought the materials which were transported to the residence by Henning Crusher.

[30] She further related that they have running water at their residence, which water was used for the construction.

[31] The witness further recounted that the plaintiff failed to finish the roof, and did not do plumbing work. It was her testimony that, when her husband enquired from the plaintiff if he was still able to put up the roof as agreed, the latter became angry and an argument ensued. She further testified that the plaintiff packed up his construction tools and left.

[32] In addition, the witness testified that during May 2018, she hired Michelin Construction CC to finish the construction of the roof.

[33] The witness concluded that she honoured the quotation which was given to her and that if it was indeed the case that they owed the plaintiff, he would not have waited for long to approach lawyers to institute legal action.

Matias Kandume

[34] He is the husband to the defendant. His testimony was that, they provided the plaintiff with a building plan and requested for a quotation, which the latter provided and to which they agreed. They then bought the building materials which were transported to the site by Henning Crusher. He also confirmed that they have running water at their residence, which water was used for the construction.

[35] According to the witness, the plaintiff failed to complete the building. He stated that the plumbing work was not done and the plaintiff struggled to put up the roof. He further recounted that upon his enquiry whether the plaintiff was still able to execute the roof as agreed, the latter became angry and an argument erupted and thereafter he packed his construction tools and left.

[36] The witness concluded that they had to hire someone to finish the construction of the roof and rectify all the poor construction.

The issues

[37] In terms of the pre-trial order, the issues for determination were narrowed down by the parties to the following:

- (a) Whether the defendant breached the agreement between the parties when she ejected the plaintiff from the site, and whether the plaintiff suffered the damages claimed.

[38] The issue of law to be resolved is whether the defendant was by law entitled to terminate the plaintiff's services and thereby also the agreement between the parties.

Submissions by the parties

[39] The parties agree that the issues for determination are limited to those captured in the pre-trial order and that the court is not entitled to decide issues outside the pre-trial order.

[40] Mr. Kandara for the plaintiff argued that the pre-trial order impacts on both agreements in this matter. Also, he contended that the pre-trial order demonstrates the defendant's concession that she drove the plaintiff out of the construction site. He went on to say that the defendant was required to show that she had a just cause to eject the plaintiff, which she was unable to do. For instance, counsel drew attention to the fact that no pictures of the purportedly poor work were presented.

[41] Ms. Shailemo for the defendant contended that the defendant never acknowledged chasing the plaintiff from the construction site. She urged the court to consider the evidence and decide whether the defendant expelled the plaintiff from the site. She argued that the versions put out by the parties are mutually destructive and that, in order for the plaintiff to succeed, he must satisfy the court that his version is true and acceptable and that the version advanced by the defendant is false or mistaken and falls to be rejected.

[42] Counsel argued that since the work was virtually completed, and the defendant had paid for most of the work, it was unlikely that she would have driven the plaintiff off

the property. Or else the defendant would have had to pay more to hire someone to finish the work, which would also delay completion of the work. Counsel concluded by submitting that the defendant's version is more probable and reliable than that of the plaintiff.

Discussion

[43] In her plea, the defendant disputed the alleged 'further agreement' on the extra work pertaining to fetching of water from the close by lake and fetching of bricks and concrete stones from the distance they were allegedly dropped off. There were no concessions made by the defendant regarding the alleged extra work.

[44] During the pre-trial proceedings, the parties chose not to include for determination, the issues pertaining to the so called extra work. In other words, the court was not asked to decide whether the parties entered into an additional agreement relating to extra work, and whether the defendant breached that agreement. That being said, anything to do with the alleged additional agreement is not available to the parties. The court can only decide the issues raised in the pre-trial order.

[45] In any case, the plaintiff would not succeed with the claim relating to the extra work because same was not quantified. Everything was lumped together without specifying the amount claimed for the fetching of water and the fetching of bricks and concrete stones. The court would have had to speculate on the amount to award in the event one of the claims was to fail. There was no indication of the amount claimed for example, in respect of the labour or fuel etc.

[46] In terms of the joint pre-trial report, which was made an order of court, the parties agreed on the relevant facts not in dispute. It was recorded:

'(iii) That the Defendant had the Plaintiff chased off the property as aforementioned with the help of the local police.'

[47] There was overwhelming evidence that the defendant chased the plaintiff off the site with the assistance of the police. The issue for determination is whether the defendant breached the agreement between the parties when she drove the plaintiff out of the site.

[48] The fact that the defendant's version was contradictory on the issue makes it less credible. The defendant and her husband denied having chased the plaintiff from the site. However, during pre-trial proceedings, it was agreed as a matter of fact that the defendant drove the plaintiff off the construction site. In any event, the defendant's denial is discredited by the fact that the police were called to the site. There was overwhelming evidence that the police assisted the defendant to drive off the plaintiff from the site.

[49] The defendant claimed that the plaintiff was struggling to put up the roof. On the other hand, the plaintiff maintained that the defendant failed to provide him with a roof plan and that he had to rely on his experience to put up a roof. He stated in his testimony that the defendant had only given him a top plan, which was useless because it did not include information about the roof's dimensions or materials etc. The defendant could not take this issue any further as she acknowledged that she could not read or understand building plans.

[50] According to the plaintiff, there was nothing wrong with the roof he had installed and that at the time he was chased by the defendant, he was virtually finalising all the work. The defendant did not call the individual she allegedly hired to complete the work as a witness to clarify the nature of the work he performed and whether he needed to make any corrections. No other evidence was presented, for instance, photographs of the alleged defective roof.

[51] The plaintiff went on to say that it was illogical that, while the defendant claimed that the plaintiff was having difficulties with installing the roof during the period December 2017 and April 2018, the defendant nevertheless still continued to pay the plaintiff amounts of N\$ 30 000 during March and N\$ 13 000 in April 2018.

[52] I find that the defendant failed to adduce sufficient evidence to prove that the plaintiff failed to comply with terms of the agreement entitling the defendant to terminate the agreement. Under the circumstances, I find that the repudiation of the agreement by the defendant was premature and unjustified. Consequently, the defendant breached the agreement between the parties and thereby caused the plaintiff to suffer damages in respect of the outstanding amount of N\$ 7 000.

Costs

[53] The general rule is that costs follow the event. That is, the successful party or the party that enjoys substantial success is entitled to costs from the losing party. I find no reason why the defendant should not be ordered to pay the plaintiff's costs.

The order:

[54] For these reasons, I make the following order:

Judgement in favour of the Plaintiff against the Defendant in the following terms:

1. Payment of the amount of N\$ 7 000.
2. Interest at the rate of 20 percent from the date of judgment to the date of final payment.
3. Costs of suit
4. The matter is removed from the roll: Case finalised.

D C MUNSU
JUDGE

APPEARANCES

PLAINTIFF:

L Kandara
Of Kandara Incorporated.
Ongwediva.

DEFENDANT:

T Shailemo
Of Shailemo and Associates.
Ongwediva.