REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 842/2011

In the matter between:

DJV CONSTRUCTION CC **PLAINTIFF**

and

PETRO GELDENHUYS **DEFENDANT**

Neutral citation: *DJV Construction CC v Geldenhuys* (I 842/2011) [2013] NAHCMD 158 (11 June 2013)

Coram: PARKER AJ
Heard: **25 – 27 February 2013; 1 March 2013; 5 March 2013; 11 April 2013**
Delivered: **11 June 2013**

Flynote: Practice – Trial – Notice of offer without prejudice in terms of rule 34 of rules of court – Such notice should not be served on the registrar.

Flynote: Costs – Costs may not follow event where a party has not been successful substantially in its claim.

Flynote: Practice – Trial – Dispute as to total indebtness of the defendant (employer) to the plaintiff (contractor) arising from a building contract – Plaintiff refused or failed to explain to defendant how the total amount was arrived at – Consequences of such failure or refusal to explain.

Summary: Practice – Trial – Notice of offer without prejudice in terms of rule 34 of rules of court – Notice served on the registrar and included in court papers that were paginated and indexed – Such notice should not be served on registrar – Both parties equally blamed for oversight – Accordingly court refused to award costs against the plaintiff.

Summary: Costs – Judgment granted for plaintiff – Court refused to apply the general rule that costs follow the event because the plaintiff has not been successful substantially in its claim arising from the building contract.

Summary: Practice – Trial – Dispute as to total indebtedness of the defendant (employer) to the plaintiff (contractor) arising from building works carried out by the plaintiff under the contract – Plaintiff failed or refused to explain to the defendant how the plaintiff arrived at the total amount still owed by the defendant to the plaintiff on the contract – Plaintiff only gave such explanation in his evidence in court – Court held that it was too late in the day for the explanation to have relevance and credibility – Court rather accepted the version of the defendant about the amount she owed that was communicated to the plaintiff before the trial and confirmed in her examination-in-chief-evidence and tested under cross-examination during the trial – Accordingly, court granted judgment for the plaintiff but only in the amount admitted by the defendant (less retention money) and accepted by the court.

ORDER

(a) Judgment is for the plaintiff in the amount of N$68 622,50, plus interest thereon at the rate of 20 per cent per annum calculated from the date of this judgment to date of final payment.

(b) There is no order as to costs.

JUDGMENT

PARKER AJ:

[1] The instant case concerns basically a building contract in which the plaintiff, represented by Ms Visser, instituted action against the defendant, represented by Mr Small, for the payment of an amount of N$106 340,00 for ‘the supply of materials and provision of building services’ (‘the building works’) by the plaintiff respecting a dwelling house belonging (at the material time) to the defendant in terms of a ‘partly oral and partly written contract’ between the parties. Thus, this matter raises in essence the question of how much amount of money the defendant is liable to pay the plaintiff in terms of the contract. The plaintiff contends that the defendant’s indebtedness to it is in the amount of N$106 340,00. The defendant admits liability towards the plaintiff, but only in the amount of N$83 493,50 minus an amount of N$52 077,75, which the defendant avers, she spent on another builder who was contracted by the defendant to carry out repairs necessitated by the plaintiff’s poor workmanship.

[2] There is also the question of the defendant’s conditional counterclaim. It is characterized ‘conditional counterclaim’ for it is pursued as such only if the defendant’s plea of set-off is unsuccessful. The amount put forth in this regard by the defendant is N$52 077,75 which according to pleadings is ‘as a result of the plaintiff’s poor workmanship’. Thus, the defendant says she ‘had to employ an independent building contractor to remedy and repair the foundations of the defendant’s dwelling house to the amount of N$52 077,75’. The plaintiff denies that it is liable to the defendant for the payment of the N$52 077,75. Mr Vosloo (plaintiff witness in the trial) acted for the plaintiff in these contractual dealings between the plaintiff and the defendant.

[3] It is my view that every civil case that comes to the court for adjudication has its own indwell idiosyncratic features, apart from the legal issues that may be at play. This case is not different. Apart from the issues of law and facts that divide the parties and which this trial is to resolve, this case displays features of pomposity and self-aggrandizement on the part of Mr Vosloo. In this regard, two particular pieces of

evidence of the defence witnesses, ie the defendant and her son Nicholas, which remained unchallenged at the close of the defence case, are opposite.

[4] A meeting was convened for the purpose of resolving the difference between the parties, including as to how much the defendant was indebted to the plaintiff for the building works. The parties could not agree a figure. In the course of verbal exchanges between Vosloo and the defendant, the former uttered the words 'We shall see who has money!'.

[5] That is not all. When it became apparent to him that the defendant was not going to pay the plaintiff the amount of money claimed, which according to him the defendant still owed the plaintiff for the aforementioned building works, Mr Vosloo did this. He phoned the defendant in the odd hours of the night and uttered verbal threats to this effect. He told the defendant that he would break through the gates of the defendant's residence (the dwelling house) with his motor vehicle in order to remove and cart away the materials that Vosloo said the plaintiff used in carrying out the building works.

[6] The case also displays unsoothing intransigence on the part of the defendant. She held on steadfastly to her uncompromising position that Mr Vosloo and his workers could not just arrive at the gates of the dwelling house and demand to enter the premises in order to rectify and repair the defects that the defendant said she had detected after the completion of the building works in December 2007. The defendant's position was that Vosloo and his workers must make a prior appointment with her to enter the premises. The interestingly significant aspect of this standoff is that it was the defendant who in the first place had presented to Vosloo a list of items that needed the plaintiff's attention ('the snag list').

[7] Little wonder then that it came to a point where the egos of Mr Vosloo and the defendant stood in the way of their efforts to resolve their dispute outside the surrounds of the court. In my opinion, Vosloo's aforementioned show of pomposity and utterance of threats against the defendant and the defendant's aforementioned unsoothing intransigence made it impossible for the parties to see their way clear as

to how best to resolve their dispute themselves. Indeed, their attitudes also resulted in the adducing of a great deal of evidence and lengthy written submissions by counsel. Bereft of the uncompromising stands and egos of Vosloo and the defendant, determination of this case hinges on short and narrow frames.

[8] The first frame involves this factual finding. When requested to do so by the defendant, Vosloo refused or failed to explain to the defendant how the plaintiff had arrived at the figure of N$106 340,00 which the plaintiff demanded from the defendant. In my opinion, the defendant's request is on any pan of scale a legitimate and bona fide request. It is not an impudent or vexatious request in the circumstances of the ongoing discussion at the material time during the meeting that was convened by the parties – as I have observed previously – to find amicable ways and means of resolving their dispute; and what is more, she was entitled to an explanation.

[9] The second frame concerns this factual finding. The defendant submitted to Vosloo 'a snag list', indicating defects or incomplete works that needed to be rectified. Mr Vosloo attended to the items on the list, except 'Geyser outlet leaks a lot; must flow into gutter' (item 7) and 'The gate was wobbling and the intercom out of order' (item 14). Thus, Vosloo attended to items 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13 and 15. But as respects these items, too, the defendant was not satisfied with the works done because she says they had not been done properly. Mr Vosloo was prepared to put right the works that the defendant was not satisfied with. But Vosloo's attempts to rectify and repair all the items came to naught *only* because – and I emphasize *only* – Vosloo or Vosloo and his workers were denied access to the dwelling house by the defendant, as I have explained previously.

[10] Another significant factual finding in respect of this second frame is this. The defendant did not bring to the attention of the plaintiff (via Vosloo) cracks that the defendant said appeared in some of the walls of the house after the completion of the building works. It follows that she did not request the defendant to deal with the cracks. In any case, due to the aforementioned uncompromising attitude and ego of the defendant I do not see what Vosloo could have done to deal with the cracks. Of

course, the irrefragable and significant fact that remains is that the defendant did not inform the plaintiff about the cracks in some of the walls, let alone request the plaintiff to rectify such defect. Therefore, I do not think the principle of *mora creditoris* referred to the court by Ms Visser is applicable to the facts of this case. As respects the cracks; it cannot be argued that the plaintiff did tender 'proper performance' which the defendant failed to accept. The evidence of Vosloo (which, as I have said previously, I accept) is that the defendant did not inform the plaintiff about any cracks that had appeared in the walls for the plaintiff to offer to give 'proper performance' in respect of the defects.

[11] For all these reasons I fail to see the relevance of the testimony of Mr Augustyn (of Prima Renovations) (a defence witness) about the standard thickness of foundation for houses contracted in Windhoek. What is relevant for my present purposes is that the defendant did not give the plaintiff the opportunity to investigate the cause of the alleged cracks in some of the walls for the plaintiff to determine whether the cracks were as a result of its poor workmanship and therefore its liability to rectify the defect; and if so liable, be given reasonable time to rectify the defect. If the plaintiff was given such opportunity and time and it failed or refused to do anything, then in that event the defendant shall have been entitled and justified to obtain the services of another builder to do that which the plaintiff had failed or refused to do. That, in my opinion, is what any reasonable person in the position of the defendant would do. And in that event the plaintiff could not be heard to complain about the allegedly excessive cost charged by that other builder; in the instant case, Prima Renovations.

[12] Indeed, in presenting the so-called 'snag list' of certain defects to the plaintiff the defendant was in effect complaining to the plaintiff about certain defects she wanted the plaintiff to rectify. What was different about the cracks and the foundations? Mr Small does not say. With respect, there is no merit in Mr Small's submission that 'there is no duty on her (ie the defendant) in law to give the plaintiff the first opportunity to rectify the faulty foundations'. What Mr Small forgets is that the court is also a court of equity. Is it not just, fair and reasonable that in the circumstances the defendant should have complained to the plaintiff about the

alleged ‘faulty foundations’ – as she had done with regard to certain other alleged defects she had listed in the ‘snag list’ – and to have given the plaintiff reasonable time to rectify the alleged ‘faulty foundations’? I find Mr Small’s submission – with the greatest deference to counsel – to be so far overreaching and self-serving that it shocks the sense of justice and fairness of the court.

[13] The result of all this is that I find that Prima Renovations carried out some works in respect of the foundations of the dwelling house at the request of the defendant. In any case, it is not Vosloo’s testimony that Prima Renovations did not carry out any such works. Vosloo’s quarrel is rather that the amount charged by Prima Renovations is excessive. In this regard, it must be remembered that as a general rule there is no such thing as all or nothing contract in our law. (*Workers Advice Centre and Others v Mouton* 2009 (1) NR 357).

[14] I have applied the principle in *Mouton* which is predicated upon fairness and reasonableness and justice in dealings between parties to a contract to the facts of the present case. And having done that against the facts of this case and for reasons adverted to in paras 10–12, while I am not prepared to allow the entire amount of N$52 077,75, I think it is just and fair to allow a fair and reasonable amount for the works carried out by Prima Renovations in respect of the dwelling house. In that behalf, I have taken into account the testimonies of Vosloo and Augustyn and documentary evidence placed before the court, particularly Invoices 3 and 4 (issued by Prima Renovations). Accordingly, in my judgement it is fair and just to allow N$26 037,50 (representing 50 per cent of the amount claimed by the defendant) as the amount that could reasonably be the cost of the works carried out by Prima Renovations in respect of the foundations of the dwelling house.

[15] Accordingly, I decide that the amount of N$26 037,50 should be set off against the defendant’s indebtedness to the plaintiff. This determination disposes of the defendant’s conditional counterclaim, albeit the plea of set off succeeds to only the extent of an amount of N$26 037,50. This determination also vindicates Ms Visser’s submission that the retention money cannot stand in favour of the defendant, if regard is also had to the defendant’s uncompromising attitude of not giving access to

the plaintiff to enable the plaintiff to rectify any other defects or to redo those the plaintiff had already done but with which the defendant was not satisfied, as discussed in paras 9 and 10. This leads me to the next level of the enquiry.

[16] The plaintiff claims that the defendant is still indebted to the plaintiff in the amount of N$106 340,00 (apart from interest on the amount). I have found in para 8 that Vosloo refused or failed to explain to the defendant how he arrived at the figure of N$106 340,00. And, as I have said there, the defendant was entitled to the explanation and the plaintiff bore a duty to give the explanation as I have found in para 8. Vosloo only decided to give the explanation during the trial in his examination-in-chief evidence. On this issue, Mr Small submitted that Vosloo's 'testimony in this regard seems to be more than a fabrication included in his testimony as an afterthought'.

[17] I tend to accept Mr Small's argument. If the explanation existed at the time it was requested by the defendant what was so difficult about it which militated against it being given when the defendant requested it – and legitimately so, as I have found in para 8. Probably, Vosloo's failure and refusal, as aforesaid, are Vosloo's way of showing the defendant that he has more money than the defendant and he would only be prepared to give the defendant the explanation in court after dragging her into court because he has more money than the defendant and he can afford legal costs. That is what Vosloo has done, in my opinion.

[18] For all the aforegoing, I hold that Vosloo's explanation has come too late in the day to have any real relevance and credibility. I am rather prepared to accept the defendant's version contained in a letter, dated 23 February 2009 and addressed to Vosloo. She confirmed the contents of the letter in her examination-in-chief-evidence and was tested in cross-examination. In her version the defendant put forth how much she is indebted to the plaintiff and she gave an explanation as to how she had arrived at the total amount of N$83 493,50. But in virtue of what I have said in para 15 about the retention money, the amount of N$11 166,50 (being retention money appearing in the aforementioned letter) should not stand in favour of the defendant.

[19] On the evidence and for the aforegoing reasoning and conclusions, I find that the defendant is liable to pay to the plaintiff an amount of N$94 660,00 (N$83 493,50 plus N$11 166,50). And I have decided (see para 15) that an amount of N$26 037,50 should be set off against the defendant's total indebtedness to the plaintiff which I have decided is N$94 660,00. This leaves a balance of N$68 622,50. It follows that in my judgement the plaintiff's claim succeeds, but in the amount of N$68 622,50.

[20] Of the view I have taken of this case as demonstrated in the preceding paragraphs, it serves no purpose to deal with the issue of the plaintiff's lien as submitted by counsel on account of the fact that the defendant has sold the dwelling house. Suffice to say that at the time of the sale of the dwelling house the plaintiff was not in possession of it, and so I do not see how the submission by Mr Small assists the case of the plaintiff on the basis of a builder's lien on a property he builds. I, therefore, accept Ms Visser's submission on the point.

[21] I now proceed to consider the question of costs. The plaintiff has not been successful substantially in its claim. That being the case, in the exercise of my discretion I hold that costs should not follow the event. But the question of costs does not end there. Mr Small submits that on 9 November 2012 the defendant filed a notice in terms of rule 34, offering the amount of N$43 490,78 to the plaintiff in full and final settlement of the plaintiff's claim. And Mr Small says, that during the trial 'the plaintiff's disclosed the said rule 34 notice to this court' and 'counsel for the plaintiff attempted to cross-examine the defendant on the rule 34 notice'. Mr Small submitted further that such conduct is highly irregular. For these reasons, Mr Small invited the court to mulct the plaintiff in costs. I respectfully decline to accept Mr Small's invitation.

[22] The rule 34 notice found its way into the court's file that was allocated to the managing judge because the defendant's instructing counsel served it on the registrar when no rule enjoins the defendant to do so. Thus, if the defendant's instructing counsel had not served the notice on the registrar – when counsel was not required by any rule to do so – the plaintiff's instructing counsel would not have included it in the courts papers that were paginated and indexed and fastened

together. In this regard, it must be remembered that papers filed with the court become the court's papers and they fall under the control and custody of the registrar, and no party or a party's legal practitioner can remove any such paper from the court's file. It was up to the registrar to have removed the notice from the court file before handing the file to the defendant's instructing counsel for pagination and indexing. In any case, the registrar ought not to have accepted delivery of the notice in the first place when she is under no legal obligation so to do.

[23] For these considerations, I conclude that both parties must carry the blame for disclosure of the rule 34 notice to the court. (See *Prior t/a Pro Security v Jacobs t/a Southern Engineering* 2007 (2) NR 564.) But the matter does not rest there. It is Mr Small's further submission that the plaintiff's counsel attempted to cross-examine the defendant on the rule 34 notice. As Mr Small says, Ms Visser only attempted to do so; and in any case, the attempt cannot be divorced from the initial oversight of the rule as I have explained previously which I have put at the door of both parties. Moreover, even if the plaintiff has been successful in its claim it has been denied its costs. In the circumstances, I think that is enough loss for the plaintiff as far as costs are concerned.

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

(a) Judgment is for the plaintiff in the amount of N$68 622,50, plus interest thereon at the rate of 20 per cent per annum calculated from the date of this judgment to date of final payment.

(b) There is no order as to costs.

C Parker

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Acting Judge

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APPEARANCES

PLAINTIFF :	I Visser
	Instructed by Kirsten & Co. Inc., Windhoek
DEFENDANT:	A J B Small
	Instructed by MB De Klerk & Associates, Windhoek