

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: I 118/2012

In the matter between:

DAVEY'S MICRO CONSTRUCTION CC

PLAINTIFF

and

JUNIAS NGEDE

DEFENDANT

Neutral citation: *Davey's Micro Construction CC v Ngede* (I 118/2012) [2013]
NAHCMD 370 (06 November 2013)

Coram: **UEITELE J**

Heard: **5-6 November 2013**

Delivered: **06 November 2013**

Reasons: **Released on 06 December 2013**

Flynote:

Practice: - Trial - Absolution from the instance at close of plaintiff's case - Test to be applied - Test was whether evidence could or might lead a Court, applying its mind reasonably, to find for plaintiff - Evidence to be considered in relation to pleadings and law applicable to particular case.

Summary: This is an action, in terms of which the plaintiff instituted action against the defendant. The plaintiff claims an amount of Seventy-Two Thousand, Nine Hundred and Fifty-eight Namibian Dollars and Fifty Cents (N\$72,958.50) in respect of work done and materials delivered.

The defendant, defended the action and filed his plea. The defendant also instituted a counterclaim. The basis of his counterclaim is that the plaintiff used inferior or defective material to renovate the house of the defendant and failed to do the work in a professional and workmanlike manner. Defendant further claims that he did not accept the defective work of the plaintiff and on 23 August 2011 in writing cancelled the agreement with immediate effect. The defendant thus claimed an amount of N\$103 924, 11 from the plaintiff.

Mr Tjituri who appeared for the plaintiff closed the plaintiff's case, after he had called four witnesses to testify, whereupon Mr Grobblers who appeared for defendant applied for absolution from the instance.

Held that when absolution from the instance is sought at the end of the plaintiff's case, the test to be applied 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.

Held further that, pleadings are supposed to elucidate and define the issues between the parties and not obfuscate them so as to leave either the parties or the Court to guess at what the true issues are.

Held, further that the particulars of claim do not comply with the requirements of Rule 18(4) which reads that: 'every pleading shall contain a clear and concise statement of the

material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.'

Held, further that the plaintiff failed to prove that, he is entitled to an additional amount of N\$ 72 958-50 over and above the amount of N\$ 45 000 that he received.

Held, further that there is no admissible evidence on record that, the plaintiff performed work to the value of N\$ 18 000 between 12 August 2011 and 18 August 2011. Furthermore, there is no indication, that the value of the material left at the site by the plaintiff is N\$ 54 000. For all these reasons no reasonable Court could or might give judgment in plaintiff's favour and absolution from the instance is thus granted with no order to costs.

Held, that the defendant has to pay the plaintiff's cost in respect of the counterclaim which it withdrew in terms of Rule 42 (1) of this court's rules.

ORDER

1. That absolution from the instance is granted, but I make no order as to costs.
2. The Court accepts the defendant's withdrawal of his counterclaim, but the defendant is ordered to pay plaintiff's costs.

JUDGMENT

UEITELE, J

INTRODUCTION

[1] In this matter the defendant has applied for absolution from the instance at the end of the plaintiff's case. The plaintiff is represented by Mr Tjituri and the defendant is represented by Mr Grobler.

[2] I find it is necessary to set out the material allegations in the pleadings before, I analyze the evidence adduced by and for plaintiff. On 17 January 2012 the plaintiff commenced proceedings against defendant for-

- (a) payment of the amount of N\$72 958-50;
- (b) payment of interest on the amount of N\$72 958-50 at the rate of 20% per annum *a tempore morae*;
- (c) costs of suit.

THE PLEADINGS

[3] In its particulars of claim, plaintiff alleged that on 27 April 2011, it provided the defendant with a written quotation for the renovation of the defendant's house situated at erf 1303 Delta Street, Khomasdal, Windhoek. The quotation provided for the following work (I quote verbatim from the particulars of claim):

'Cement Work:

- 4.1 Extended boundary wall (5.4 X 1.2), build cover wall for sliding gate, extend front face wall; building binding wall at braai area for sliding door; plaster on side upper side of boundary wall; repair all interior cracks; insert 110 pcv piping for water drainage on front boundary wall; laying of interlocks on open area.

Roofing

- 4.2 libr roofing for car port area, facer, down pipe and gutters to be replaced and fitted; replace damaged cornices in toilet.

Plumbing

- 4.3 Insert copper piping for water supply to zinc in outside cottage.

Electrical

- 4.4 Electrical supply to outside lights at car port; electrical supply to garage and sliding gate.

Plumbing

- 4.5 Painting of exterior boundary wall where not painted; painting of new cornices and wall where not painted and repaired.

Tiling

- 4.6 Tiling of main bedroom toilet roof level, tiling of in house toilet to roof level and tiling of kitchen wall 1.8 m in height.

Carpentry

- 4.7 Build in cupboards in main bedroom to be extended; one side in cupboard inside kitchen fit and supply; build in cupboard in small room.

Steelwork

4.8 Company supply and install a garage door (electrical); steel sliding gate to be fixed and electrical; inserted sliding door of 3m at braai area; insert build in stove.'

[4] The plaintiff alleged furthermore that-

- (a) it was a specific term of the quotation that, the labour provided and the material needed for the work set out in the quotation will be provided by the plaintiff to the defendant at an amount of N\$ 150 522;
- (b) the defendant accepted the quotation on 27 April 2011 and requested the plaintiff to proceed with the work and undertook to pay the plaintiff the amount of N\$ 150 522 on completion of the work. The plaintiff commenced with the work on 25 July 2011.
- (c) upon plaintiff arriving on site he performed the following work; inserted 110 pvc pipe for water drainage in front of the boundary wall ; laid interlocks in an open area; replaced damage cornices in the toilet; inserted copper piping for water supply in zinc in the outside cottage; provided the electric supply to the outside lights at the car port; an electric supply to garage door; painted the exterior boundary walls; painted the cornices; tiled the kitchen wall to 1.8 in height; supplied all carpentry material; supplied and installed Coroma garage door and supplied material for sliding door of 3m at braai area.

[5] The plaintiff furthermore alleged that, on 23 August 2011 the defendant informed the plaintiff that there was certain work that he would do himself and that, the plaintiff should halt the work and provide the defendant with its final invoice. The plaintiff provided the defendant with an invoice of N\$ 72 958-50, which the defendant has failed to pay.

[6] On 25 April 2012 the defendant pleaded to the plaintiff's particulars of claim and simultaneous with the plea filed a counter claim. The essence of the plea is that the defendant admitted receipt and acceptance of the quotation and the request for the plaintiff to proceed with the work as quoted. The defendant, however, alleged that the plaintiff used inferior or defective or both inferior and defective material and also failed to perform the work in a professional and workmanlike manner. As a result of that he cancelled the agreement and ordered the plaintiff to leave the site.

[7] The essence of the defendant's counterclaim is that the plaintiff accepted the cancellation of the agreement between it and the defendant. Defendant furthermore alleged that as a result of the use of the inferior or defective or both inferior and defective material by the plaintiff and poor workmanlike work, he engaged another contractor, who completed the work in a professional manner at a cost of N\$103 924-11. He thus claimed that amount from the plaintiff as damages he allegedly suffered.

THE EVIDENCE

[8] The plaintiff called four witnesses. The first to testify was a certain Mr Shilunga, who is the managing member of the plaintiff. He testified that-

- (a) during April 2011, he representing the plaintiff and the defendant acting in his personal capacity entered into an agreement for the renovation of the defendant's house.
- (b) the plaintiff purchased super bricks, sand, gray stones, brick force and cement. Plaintiff thereafter completed building work, extended the cover wall, build binding wall, and filled existing cracks in the walls;
- (c) plaintiff inserted gutters, replaced damaged cornices in the toilet, completed the roofing of the house;

- (d) after completing the tiling work he, on behalf of plaintiff, requested progress payment. The defendant consented to the progress payment and on 06 August 2011, Standard Bank Namibia (Pty) Ltd went to the site, valued the work performed and on 11 August 2011 paid out an amount of N\$ 45 000; and
- (e) he did not insert the copper piping because he was told by the defendant to leave the site. He further testified that he did not supply the material.

[9] Mr Shilunga further testified that, after the evaluation was done and first payment effected the plaintiff still performed other functions such as plastering of the boundary wall, completion of the front face door, steel wall roof and build in braai. He testified that it was while, the plaintiff was busy with these works, that it was ordered off the site. He testified that the plaintiff obliged and left the site. He testified that when the plaintiff left the site, it left all the material (such as cement, sand, sliding door, super bricks all the material for the build in cupboards, down pipes, drain pipe fitting and pva under coat paint) that, it purchased and brought to the site on the site. He later sent an invoice for the amount N\$ 72 958-50, in respect of the work performed after the first progress payment and for the material left on site, to the defendant.

[10] Under cross examination Mr Shilunga was asked, how the amount of N\$ 72 958-50 was arrived at. He referred to the invoices that he submitted as evidence of the material that, he purchased and replied that the cost of the material was N\$ 54 000 and the cost of labour N\$ 18 000.

[11] The second witness to testify on behalf of the plaintiff was a certain Simon Shikongo, who testified that he is contractor specializing in tiling. He furthermore testified that he was supplied with all the necessary materials such as cement, tiles and grout for him to commence with his work by Mr Shilunga on behalf of plaintiff. He furthermore testified that, by June of 2011, he commenced with his work and by the end of July 2011, he had completed the tiling of the main bedroom, the toilet, the two bedrooms floor and the common toilet and left out the kitchen, as the cupboards were not yet installed.

[12] Mr Shikongo furthermore testified that, during the tilling process of the toilets, it became clear that the tiles were big and would not fit under the toilets basins without being cut into pieces. He testified that, he discussed the issue with the defendant and suggested to the defendant that, the tilling must be left below the basins holder or the basins be removed to enable proper tilling to be done but the defendant insisted that, he should go ahead and tile the broken pieces underneath the water basins, as according to him "it was underneath and no one will see it". Mr Shikongo proceeded to testify that, on the instructions of the defendant, he proceeded to tile with the broken tiles and after he had finished with the tilling in the toilet, he examined the tiles and was satisfied that, they could be left as they are. He admitted, however, that on the face of it, the tilling work underneath the basins in the toilets looks sloppy.

[13] The third witness to testify on behalf of the plaintiff was a certain Angelo Helmut. He testified that, he has at least 8 years of experience in the Construction Industry, having been employed and worked as a Quantity Surveyor at Murray & Roberts (Namibia) Ltd and Roads Contractor Company Ltd over those years. Further that, he is therefore duly qualified to give expert opinion on the quality of materials supplied, the quality of the structure of the building and assessing if appropriate skills had been deployed in the building. He testified that, in connection with this matter, he had not personally visited the site and has not seen the material used on the site and specifically cannot say much about the standard of work exhibited on the property in question.

[14] In view of the evidence by this witness that, he did not visit the building site, I do not find his evidence to be helpful to the resolution of the dispute before me and will therefore not repeat the bulk of his evidence.

[15] The fourth witness to testify on behalf of the plaintiff was a certain Erikson Matheus who testified that-

- (a) during June or July 2011, he was privately approached and hired by Mr Shilunga on behalf of the plaintiff to install cupboards at the house of the defendant;
- (b) the plaintiff again through Mr Shilunga bought wood boards (he testified that he accompanied Mr Shilunga to buy the material) from which, the cupboards were to be made and those material were delivered at the building site (i.e. erf 1303 Delta Street, Khomasdal, Windhoek);
- (c) towards the end of August 2011, he observed that, most of the persons working for the plaintiff left the site. The defendant, however, requested him to remain behind on site;
- (d) the defendant instructed him to complete the work on the cupboards. Mr Matheus furthermore testified that, after he completed installing the cupboards, the defendant inspected the work and after he (defendant) was satisfied with the quality of the work, he paid him (Matheus) for the work that he had done.

APPLICATION FOR ABSOLUTION FROM THE INSTANCE

[16] Mr Tjituri closed plaintiff's case, after he had called the four witnesses to testify, whereupon Mr Grobblers applied for absolution from the instance (argued his case) and Mr Tjituri replied thereto. After that, I granted absolution from the instance. I will pause here to briefly give reasons for my decision.

[17] In *Claude Neon Lights (SA) Ltd v Daniel*¹ the Court of Appeal held that, when absolution from the instance is sought at the end of the plaintiff's case, the test to be applied 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. This test has been approved and applied in a line of cases by this Court and the

¹ 1976 (4) SA 403 (A).

Supreme Court.² In *Tutalení Peter Reinholdt Shiimi v Mutual and Federal Insurance Company of Namibia*³ Frank, AJ said-

‘...I do not at this stage have to decide whether he has established a *prima facie* case in the sense that I would have to if the defendant had also closed its case (which it did not do). At this stage I take the evidence produced on behalf of the plaintiff at face value and decide whether based thereon if “there is evidence upon which a reasonable man might find for the plaintiff.”

[18] Levy, J said⁴ the phrase 'applying its mind reasonably' requires the Court not to consider the evidence in *vacuo* but to consider the admissible evidence in relation to the pleadings and in relation to the requirements of the law applicable to the particular case.

[19] Mr Grobler contends that the plaintiff has failed to discharge its burden of proof, thereby entitling the defendant to absolution. To bolster his contention, he submits, that the plaintiff has failed to establish, on a *prima facie* basis, that:

- (a) he is entitled to an additional amount of N\$ 72 958-50 over and above the amount of N\$ 45 000 that he received;
- (b) the plaintiff failed in any event to plead that, he was entitled to claim N\$72 958-50 over and above the amount of N\$45 000-00 that, he received;
- (c) the plaintiff failed to plead in its particulars of claim that, it was entitled to be compensated for material he left on the site;

²See *Bidoli v Ellistron t/a Ellistron Truck & Plant* 2002 NR 451 (HC); *Absolut Corporate Services (Pty) Ltd v Tsumeb Municipal Council and Another* 2008 (1) NR 372 (HC) *Stier v Henke* 2012 (1) NR 370 (SC) at 373 para [4]; *Aluminium City CC v Scandia Kitchens & Joinery (Pty) Ltd* 2007 (2) NR 494 (HC) at 496 [12]; *Lofty Eaton v Grey Security Services Namibia (Pty) Ltd* 2005 NR 297 (HC) at 302 C – E.

³ An unreported judgment of this Court case No. (P) I 2269/07.

⁴ *Supra* footnote 1 at 453.

(d) the plaintiff failed to specify the material and the value of the material.

[20] On the contrary, Mr Tjituri, argues that, *prima facie*, the plaintiff has discharged its *onus* of proof, because the plaintiff had proven that, an agreement was concluded between the parties, that the plaintiff has pursuant to the agreement performed work for the defendant and that, the plaintiff had purchased certain building material which he left on site, after he was ordered to leave the site. He further argued that, the defendant testified that, the value of the labour expended by the plaintiff was N\$ 18 000 and the value of the material was N\$ 54 000, as could be established from the receipts which the plaintiff submitted as exhibits.

[21] Before, I deal with the merits or demerits of both Mr Tjituri and Mr Grobblers' submissions, I find it appropriate to repeat the remarks that, have been made in this court as regards the purpose of pleadings. In *Makono v Nguvauva*⁵ Frank, AJ remarked that:

'To start off, pleadings are supposed to elucidate and define the issues between the parties and not obfuscate them so as to leave either the parties or the Court to guess at what the true issues are. Thus, the following has been said in this regard.

"1. The plaintiff shall state in concise terms what facts he intends to rely on and to prove and the defendant shall do the same so that on the day of trial neither party shall be taken by surprise and that it may not be necessary to have the case adjourned, thereby causing wasted expense to both litigants from which the State and the lawyers alone derive profit. It has therefore often been stated by our courts, and it cannot be too often stated, that the object of requiring the parties to file pleadings is to enable each side to come to trial prepared to meet the case of the other. (*Benson and Simpson v Robinson* 1917 WLD 126.)

⁵ 2003 NR 138 (HC).

2. The purpose of pleadings is to define the issues in the litigation and to enable the other party to know what case he has to meet. A litigant is not entitled to conceal material allegations in order to obtain the advantage of placing the onus on his opponent. The *onus* must be determined on genuine and not artificial allegations in the pleadings and if the *onus* should be on a particular party he must accept it. Litigation is not a game where a party may seek tactical advantages by concealing facts from his opponents and thereby occasioning unnecessary costs. Nor is a party entitled to plead in such a manner as to place the onus on his opponent if the facts as known to the pleader place the onus on him. (*Nieuwoudt v Joubert* 1988 (3) SA 84 (SE) at 84I - 85A)."

[22] In the present matter the plaintiff claims an amount of N\$ 72 958-50 for work allegedly performed in terms of contractual obligation, but without amending its particulars of claim the plaintiff testified that, the amount consists of a portion(N\$ 54 000) of material supplied and left on the site. I must state that, the particulars of claim do not comply with the requirements of Rule 18(4) which reads as follows:

'Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.'

[23] I now turn to the merits of the case. For plaintiff to succeed, it must show that, it performed work and delivered material to the value of N\$ 72 958-50. Plaintiff has the onus of proof in this regard, which it must discharge on a balance of probabilities. According to plaintiff, it agreed to perform work and deliver material worth N\$ 150 522. The plaintiff further testified that, it performed work and delivered material to the building site and that on 11 August 2011, it was paid an amount of N\$ 45 000 for the work and material delivered but, the plaintiff did not break down the amount to indicate how much was in respect of the material and how much was in respect of labour. On 18 August 2011, the defendant terminated the agreement and ordered the plaintiff to leave the site.

[24] The plaintiff did not testify how many hours he spent on the work, after he received payment of the amount of N\$45000 on 11 August 2011. He also did not testify as to the value of the material he left behind on the site, after he was ordered to leave the site. The plaintiff submitted receipts of material it purchased, the total amount of the receipts that, the plaintiff submitted in evidence amounted to approximately N\$ 29 000 but it could not explain whether that, amount was included in the amount of N\$ 45 000 which was paid to it on 11 August 2011. As regards the amount of N\$ 18 000 the plaintiff did not explain what the agreed rate of labour was.

[25] I have no difficulty in finding merit in Mr Grobblers's submission to the effect that, the plaintiff failed to prove that, he is entitled to an additional amount of N\$ 72 958-50 over and above the amount of N\$ 45 000 that he received; the plaintiff failed to plead in its particulars of claim that, it was entitled to be compensated for material he left on the site; the plaintiff failed to specify the material and the value of the material that he left on site.

[26] To sum up, there is no admissible evidence on record that, the plaintiff performed work to the value of N\$ 18 000 between 12 August 2011 and 18 August 2011. Furthermore, there is no indication, that the value of the material left at the site by the plaintiff is N\$ 54 000. For all these reasons, no reasonable Court could or might give judgment in plaintiff's favour.

COSTS AND DEFENDANT'S COUNTERCLAIM

[27] The basic rule is that, except in certain instance where legislation otherwise provides, all awards of costs are in the discretion of the court.⁶ It is trite that, the discretion must be exercised judiciously with due regard to all relevant considerations.

⁶See *Hailulu v Anti-Corruption Commission and Others and China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC* 2007 (2) NR 674.

The court's discretion is a wide, unfettered and equitable one⁷. There is also, of course, the general rule, namely that costs follow the event, that is, the successful party should be awarded his or her costs. This general rule applies unless there are special circumstances present.⁸

[28] In the present matter, the only issue which the plaintiff failed to prove is the amount of N\$ 72 958-50 which he claimed. There is evidence that, he left some material which he bought on the site, the evidence further indicates that, Simataa Building & Renovation used some of that material to complete the project. I am therefore of the view that, it is just fair and equitable not to mulct the plaintiff with a cost order.

[29] After I granted the absolution from the instance Mr Grobler indicated that the defendant withdraws its counterclaim. I indicated that, the court will grant leave to the defendant to withdraw its counterclaim but, the defendant has to pay the plaintiff's cost in respect of the counterclaim which it withdrew. My reason for that order is based on the provisions, Rule 42 (1) of this court's rules reads as follows:

'42. (1)(a) A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he or she shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs, and the taxing master shall tax such costs on the request of the other party.

(b) A consent to pay costs referred to in paragraph (a), shall have the effect of an order of court for such costs.

(c) If no such consent to pay costs is embodied in the notice of withdrawal, the other party may apply to court on notice for an order for costs.'

⁷ See *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045.

⁸See *China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC* 2007 (2) NR 674.

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

1. The application for absolution from the instance is granted, but I make no order as to costs.
2. The defendant is granted leave to withdraw its counterclaim, but is ordered to pay the plaintiff's cost in respect of the counterclaim which it withdrew.

SFI Ueitele
Judge

APPEARANCES

PLAINTIFF:

Mr M Tjituri
Of Tjituri Law Chambers

DEFENDANT:

Mr Z J Grobler
Of Grobler & CO