



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 4009/2011

In the matter between:

MARTIN ROBERT HEINRICH SCHMIDT

PLAINTIFF

and

DR PEINGONDJABI TITUS SHIPOH

DEFENDANT

Neutral citation: *Schmidt v Shipoh* (I 3757/2012) [2017] NAHCMD 126 (28 April 2017)

Coram: KAUTA, AJ

Heard: 9, 10, 13, 18, 19, 23 February 2015 and 23 March 2015

Delivered: 28 April 2017.

Flynote: Law of Contract – Construction and improvement on residential home of defendant – Part payment done but final payment withheld – Defence of poor workmanship and defence of *exceptio non-adimpleti contractus* raised – Mutually destructive versions – Court held that the aim is to do justice between two parties – Version of plaintiff as regards scope and value of work done accepted – Version of defendant in regards defects equally probable – Set-off done against the amount due – Defendant liable to plaintiff for the difference.

ORDER

1. Payment in the amount of N\$ 75 540.11;
 2. Interest on the amount of N\$ 75 540.11 at the rate of 20% from the date of judgment to date of payment;
 3. 50% of costs of suit, such costs to include the costs of one instructing and one instructed counsel.
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JUDGMENT

KAUTA, AJ:

[1] I should have delivered this judgment timeously and record my sincere regret for the delay. I apologise to the parties.

Introduction

[2] The Plaintiff, Mr Martin Schmidt, is in the construction and renovation business. On the 24th November 2009, he was contracted by the defendant, Dr Shipoh, to execute certain renovation and construction works at his residence at No. 16 Gous Street, Pioneers Park, Windhoek.

[3] The basis and scope of the contract between the parties is in the form of a quotation completed by the plaintiff for the works to be undertaken by the plaintiff which was submitted to and approved by the defendant in the sum of N\$ 801,122. Subsequent to the above and during the course of construction of the works agreed and quoted for, the parties entered into a further oral agreement in terms whereof the plaintiff was required to perform additional works. Plaintiff claims that the value of additional work he rendered is N\$ 208 599.20. The defendant disputes this.

[4] As matters stand, plaintiff alleges that an amount of N\$ 148, 852.37, is due and payable to him being the outstanding balance for the agreed and additional

works. The defendant raised the *exceptio non adimpleti contractus* and also counter sued the plaintiff in the sum of N\$ 97, 946.65, being the sum necessary to rectify defective works.

Pre-Trial order

[5] On 03 April 2013, the parties crisply identified and agreed to the issues of fact that this Court must resolve. On 10 April 2013, the Pre-Trial order was made an order of court.

[6] It is important at the outset to set out in full the issues that the parties agreed must be determined at trial in view of the approach adopted by the defendant in his plea and eventually at trial. The issues for determination were:

- '8.1 The scope and the value of the additional buildings works completed by the plaintiff.
- 8.2 The terms of payment agreed to between the parties.
- 8.3 Whether the plaintiff failed to complete the building work in a professional and work manlike manner.
- 8.4 Whether there are any defects or shortcomings to the work and if so, whether it was caused by plaintiff or was brought to his attention.
- 8.5 Whether plaintiff was prevented by the defendant to remedy any defects, if found to exist.'

Status Report

[7] On 07 August 2013, the parties in a status report sought to limit the issues for determination by this Court even further. The parties agreed, in that status report, that their respective expert witnesses meet at the defendant's premises for an inspection *in situ*. At this inspection, the experts were required to discuss and attempt to reach an agreement of the outstanding building works which still had to be completed by the plaintiff. It was further agreed by the parties, that a joint list of works be compiled by the experts and be given to three different contractors, with ten years' experience, to provide a quotation for completion. As a matter of fairness it was agreed that plaintiff be one of the three contractors. If the accepted quotation is

less than N\$ 148 852.37 the plaintiff claimed, it was agreed that the difference be paid to plaintiff immediately.

Plaintiff's case

Martin Robert Heinrich Schmidt

[8] Plaintiff testimony is that, he received a call from the defendant requesting a quotation for renovations and buildings at his house. He visited the defendant's house, itemised what needed to be done and provided the quotation shortly thereafter. The quotation he gave was in the sum of N\$ 801,122 which was accepted by the defendant. After the acceptance of the quotation, the building and renovation works commenced. While on site busy with the works the defendant suspended the works pending the approval of building plans. After about four weeks the works commenced unhindered. During the work stoppage the plaintiff was requested by defendant to perform additional works.

[9] The *modus operandi* adopted by the plaintiff with respect to additional work was that upon request by the defendant on an *ad hoc* basis to do specific additional works, he would perform the works daily and then inform the defendant. The rate he used to determine the value of the additional work was the same as that embodied in the original quotation. The only exception was with respect to the wine cellar and bar because these works involved third parties. In order to make it easier for the defendant to follow the amounts due in respect of additional works, the plaintiff testified that the additional works were specifically inserted in an updated quotation and marked in blue while the cost of the original works was marked in black. The items subject to VAT were marked in red.

[10] Plaintiff testified that he gave the above quotation to the defendant during late February 2011. On the 28th February 2011, defendant informed him that payment was available including payment for the additional work for the wine cellar. He accordingly started to demand payments from the 26th May 2011, from the defendant. As to the poor workmanship of the works, plaintiff testified that he met the defendant at his house after he completed the works and they compiled a

detailed defect list on the 26th May 2011 of works to be finalised. Unfortunately, he was prevented access by defendant or relatives to gain entry to the premises in order to finalise the works on this defect list.

[11] After various failed attempts by plaintiff to obtain payment from the defendant, they resolved that an accountant of the defendant reconcile all payments made to plaintiff in order to determine the correct sum due to him. Nothing came of this reconciliation because there was no meeting between the parties.

[12] When his counsel, Adv Schneider, asked the plaintiff to comment on the sum of N\$ 97,946.65 being the value put by defendant for the outstanding works, plaintiff disagreed with that value because the work on the defect list was minimal. Another list of apparent defects showing poor workmanship prepared by Marley Tjitjo was handed up in evidence. Plaintiff testified that this list contained work he had not done but was nevertheless prepared to rectify these defects upon payment of the sum due to him.

[13] Plaintiff further testified that the report of Mr Moyo, is irrelevant to this matter because it differed from that of Marley Tjitjo, the architect. In cross-examination, plaintiff conceded the defect list prepared by Mr Tjitjo and agreed that he was not entitled to payment unless the works were completed to standard. Plaintiff, further agreed with the inspection of Mr Tjitjo of 15 January 2012 especially with respect to:

- 24.1 The paintwork on outside of house and on the boundary wall.
- 24.2 There being significant blistering in the paintwork either due to the new paintwork not bonding to the existing, or alternatively, due to loose plasterwork to walls.
- 24.3 The existing double swing steel door – frames and leaves which were left unpainted and burglar proofing to doors not painted.
- 24.4 The remnant of an old carpet that was removed was left in between burglar doors and old sliding doors.
- 24.5 Leakages between the existing house and new additions occurring in various areas of the house, including the new entertainment area due to inadequate flashing and counter flashing of roofs.

- 24.6 The new landscaped forecourt, the artificial grass which was not cut and lined properly.
- 24.7 Cornices against wall in entertainment area which were removed and not re-installed properly.
- 24.8 Newly installed aluminium windows to study not closing.
- 24.9 Door handle to new toilet outside being broken off and not fixed.
- 24.10 Moisture appearing on inside of house to newly renovated walls.'

[14] Another aspect taken up in cross-examination was why VAT was not charged on the original quotation when the amount was known. Plaintiff's explanation on this score was that this aspect was drawn to the attention of the defendant with a covering letter. The covering letter was not submitted into evidence before the Court, at this stage. However, the defendant read it into the record when he testified.

Francois Jacobus Swart

[15] Mr Swart, is a qualified quantity surveyor with 30 years standing at the time. He testified as plaintiff's expert witness with respect to the reasonable value to be attached to Mr Tjitjo's defect list. He also scrutinised the quotation provided to the defendant by K Construction to remedy the defects and to determine the real costs He found major discrepancies between the defects lists of Mr Tjitjo and that of Mr Moyo. The latter's defect list was used by K Construction to determine what they would charge to remedy the defects.

[16] Ms Shifotoka, counsel for defendant, during the evidence in chief of this witness informed the Court that defendant no longer relied on the quotation of K Construction but will solely rely on the defect list of Mr Tjitjo. As a result, Mr Swart, was constrain to deal with Mr Moyo's expert opinion with respect to the value that he attached to a defect list he prepared and Mr Tjitjo's defect list.

[17] Mr Swart, testified that he had the work appearing in Mr Tjitjo's defect list measured by a trainee in his employment. This was done in order to quantify and determine the value of the works. According to him, the best practice in quantification of the work is to measure it from the approved drawings. Once quantified in that

manner, a unit per square metres is arrived at. To determine value he then relies on his experience of comparable projects in the same area to determine the reasonable costs by gleaning the rates of those projects to the current project.

[18] In his opinion the fair and reasonable costs of all the defects appearing in Mr. Tjitjo's defects list amount to N\$15,755 excluding VAT. Mr Swart further implored the court to follow a method of adjudication not specifically agreed between the parties. He proposed that the sum due be retained pending completion of the defect list.

[19] As regards to the defect list prepared by Mr Moyo's, Mr Swart testified that Mr. Moyo was not qualified to give an opinion on the quality of the works. Only Mr Tjitjo, the architect, was qualified to do so. He further testified that as Mr Moyo only did his inspection on 18 July 2013, more than a year after Mr Tjitjo list was made, his inspection has no value because the property was in use and the apparent defects could have been caused by fair wear and tear.

[20] In conclusion, Mr Swart proposed that the best solution was to get quotations from different contractors to do the work, because he only provided estimates, and to use these quotations as the correct price for the defects.

[21] It emerged in cross-examination that Mr Swart had not read the whole report of Mr Moyo, especially the portion relating to the latent defects mentioned in that report and the eventual quantities he established.

Defendant's case

Marley Tjitjo

[22] Mr Tjitjo is a qualified architect, of 14 years standing at that time having registered as such with the relevant authorities in 2001. He was responsible for drawing the plans to the defendant's house in 2009. However, he was subsequently only consulted on an *ad hoc* basis by the defendant with respect to the construction and renovations. The mandate between him and the defendant did not include supervision of the works performed by the plaintiff.

[23] As an architect, he is familiar with quality control, management of the construction process and its administration. He visited the defendant's residence and drew the defect list for practical completion purposes. According to Mr Tjitjo most of the works on the defect list were as a result of poor workmanship by plaintiff.

[24] In cross-examination, Mr Tjitjo was emphatic that his opinion about poor workmanship of the works by the plaintiff is not affected even if the plaintiff meant to return later and rectify the defects.

Dr P.T. Shipoh

[25] Mr Shipoh is the defendant. His testimony is that he asked the plaintiff to give him a quotation for certain renovations and construction works at his house. He received the quotation and agreed that the work be done for the total sum of N\$ 801,122.

[26] A letter which accompanied the quotation of the plaintiff clearly stated that the sum of N\$ 801,122 was exclusive of VAT. His evidence was that the payment terms agreed with plaintiff was that a 60% deposit was required at commencement of the works and the balance was payable as the works progressed. Interest was payable to the plaintiff at the prevailing banking rate if payment was not made on due date.

[27] Subsequent to the agreement, the defendant paid a sum of N\$ 150,000 on the 24th November 2009 to the plaintiff to commence with the works. This payment was to procure the material. Defendant admits that there was additional work which he required the plaintiff to perform. These additional works related to the cellar, bar, interlocks and sprinkler system. However, he testified that he separately paid for each. Accordingly, he paid N\$ 50,000 on the 15th April 2010, in respect of the additional works relating to the wine cellar and further paid N\$ 50,000 for the bar, which was additional work on 19th July 2010.

[28] With respect to the staircase, the defendant testified that he is not liable for the N\$ 37 000 because the drawings was for a spiral staircase but as the plaintiff

could not build that and opted for a square staircase this additional cost must be for the plaintiff's account. The defendant did not agree with the value given in the defect list by Mr Swart. As far as he is concerned it is unfair to give weight to plaintiff's expert witness report when it uses rates which were lower than that of the plaintiff. He urged the court to adopt the expert report of Mr. Moyo, because that was thorough.

[29] In cross-examination, defendant stressed that the additional work for which plaintiff was entitled to charge were those which were not included in the initial quotation. He was emphatic that additional work for which the plaintiff was contracted was limited.

[30] The defendant paid a total sum of N\$ 907,448.55 to the plaintiff.

[31] The defendant, further in cross-examination, was unbending that the report of Mr Tjitjo was not conclusive because it was based on a perfunctory scrutiny of the renovations and construction works. This was the reason why he called Mr Moyo, to do a full and complete list.

Tendai Ismael Moyo

[32] Mr Moyo holds a B. Honours degree in quantity surveying and was employed as a quantity surveyor in training at the time with Jordaan, Oosthuysen and Nangolo. On the 18th July 2013, he visited the residence of the defendant to verify and quantify defects there. At the end of his visit, he completed a report which was admitted into evidence.

[33] Mr Moyo, testified that as project manager he was qualified to ascertain the quality of work on construction projects. He was in possession of the report by Mr. Tjitjo but was not bound by it because defendant was at the site during his inspection and he pointed out each and every defect on his list to him. In his opinion the defects can only be remedied at a costs of N\$ 92, 000.00. He arrived at this value by measuring each and every item pointed out to him by the defendant.

[34] In his opinion, the report of Mr Swart is not reliable because it did not include all the defect works as it appears on his report. This factor, according to him, is apparent with how Mr Swart quantified the works especially in connection with the boundary wall.

[35] In cross-examination, Mr Moyo was confronted with the fact that quality control and assurance in construction are matters which are exclusively reserved for architects and not quantity surveyors. Mr Moyo differed and was unyielding. He testified that normally the architect as principal agent on the project would be entitled to assess the quality of the work but that did not preclude the client from appointing the quantity surveyor as principal agent in which event quality and assurance will lie squarely with the quantity surveyor.

The Law

[36] The versions of the parties are mutually destructive. In *Von Wielligh v Shaumbwako (I 2499/2014) [2015] NAHCMD 168 (22 July 2015)* Ueitele J, at paragraph 16 relied on the approach set out in *National Employers' General Insurance Co Ltd v Jagers*¹ how a Court should determine the issues where the version presented by the parties are mutually destructive.

'(The plaintiff) can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

¹ 1984 (4) SA 437 (E) at H 440E – G; Also see *Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR at 556.

[37] Masuku J, in *Ndabeni v Nandu* (I 343-2015)[2015] NAHCMD 110 (11 May 2015) at paragraph [26] opined that:

‘The question is, how should the court approach the issues so as to make a finding on the disputed issues? In *SFW Group Ltd and Another v Martell Et Cie and Others* 2003 (1) SA 11 (SCA) at page 14H – 15E Nienaber JA suggested the following formula, which has been adopted as applicable even in this jurisdiction in the case of *Life Office of Namibia Ltd v Amakali* 2014 NR 1119 (LC) page 1129-1130:

“The technique generally employed by our courts in resolving factual disputes of this nature may conveniently be summarized as follows. To come to a conclusion on the disputed issues, a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’s candour and demeanour; (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (vi) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra-curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events . . .”’

[38] On the other hand, the defendant raised the *exception non adimpleti contractus* as his defence. Maritz, J (as he then was) held that:

‘The *exceptio non adimpleti contractus* as a defence in an action for specific performance is inextricably linked to the principle of reciprocity under a bilateral contract – as Jansen JA remarked after extensive analysis of the Roman law and Roman Dutch common law in *BK Tooling (Edms) Bk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at 417H, the *exceptio* is a companion of the principle of reciprocity. It is only if and when there are reciprocal obligations contemplated a contract...that the *exceptio* may afford a defence to a claim for specific performance.’²

² *Ndjavera v Du Plessis* 2010 (1) NR 122 (SC) at 130H-J.

[39] As Corbett J (as he then was) in *Ese Financial Services (Pty) Ltd v Cramer* held that:

‘In other words the obligations, though inter-dependent, fall to be performed consecutively. An example of this would be a *locatio conductio operis* whereunder the conductor operis is normally obliged to carry out the work which he is engaged to do before the contract money can be claimed. In such a case the obligation to pay the money is conditional on the pre-performance of the obligation to carry out the work, but, of course, the converse does not apply.’

[40] The purpose of pleadings are to define the issues upon which the court will be called upon to adjudicate. To enable the parties to prepare for trial on the issues defined; to serve as a record of the respective claims, counterclaims, admissions and defences which may be relevant in any other or future litigation between the parties and to set the parameters within which the proceedings will be conducted and evidence admitted and excluded.³ With the advent of case management rules, the issues, which may be canvassed at the trial, are limited to those in the pre-trial order. Rule 37(14) provides that:

‘Issues, evidence and objections not set out in the managing judge’s pre-trial order are not available to the parties at the trial or hearing.’

[41] In *Jin Casings & Tyre Supplies CC v E Hambabi t/a Alpha Tyres*⁴, Parker AJ at para [12] on the above issues said:

‘It follows that in my judgment the defendant is bound by the pre-trial conference order; and if the order is not to the defendant’s liking the defendant has no one to blame but himself.’

Analysis

[42] To do justice between the parties it is important that I limit this judgment to the issues the parties referred to the court for determination. These issues I set out

³ Herbstein & Van Winsen *The Civil Practice of the High Courts of South Africa*, (5th ed) at 559.

⁴ (I 1522/2008) [2014] NAHCMD 73 (6 March 2014).

above. This means that I am duty bound to ignore any evidence which is not relevant to the determination of these issues.

[43] The starting point in determining the matter lies in a conceptus understanding of the second quotation. This is the quotation that details in blue the additional works agreed to between the parties.

[44] I use the word quotation deliberately because the document which was handed up in court is not an invoice as testified to by the plaintiff. This document further includes the VAT amount in the sum of N\$46 579.64. The scope and value of the work in issue from the quotation relates to:

62.1	Tiling cost difference –	N\$2 011.94
62.2	Chop old crack floors –	N\$1 000.00
62.3	New concrete and reinforcing –	N\$7 164.80
62.4	Tile braai and front of slab –	N\$3 123.00
62.5	Installation of down lighters –	N\$1 980.00
62.6	Down lighters	N\$1 685.00
62.7	Install lights	N\$540.00
62.8	Move spotlight	N\$360.00
62.9	Additional spot light –	N\$123.56
62.10	Plugs in wall at bar –	N\$284.00
62.11	Cabling	N\$432.00
62.12	Tiling of floor above washing basin	N\$715.00
62.13	Installation of light switch, cable, conduit	N\$433.00
62.14	Installation of light fitting and light –	N\$163.56
62.15	Spiral stair case (price difference) –	N\$10 336.70
62.16	Painting of stairs	N\$1 895.00
62.17	Concrete foundation	N\$652.00
62.18	Shower door	N\$4 500.00
62.19	Shower trap, bath trap etc.	N\$2 036.52
62.20	Installation new basin cabinet	N\$450.00
62.21	Modification of pipes	N\$ 250.00
62.22	Paint ceiling	N\$248.00

62.23	New tiles	N\$5 028.24
62.24	Toilet roller holder	N\$219.90
62.25	Removal and installation of new toilet –	N\$750.00
62.26	New wall tiles (price difference) –	N\$249.93
62.27	Building basin stand and install –	N\$2 365.00
62.28	Open waste –	N\$ 1 476.10
62.29	Shower set –	N\$1 128.10
62.30	Mosaic basin stand –	N\$2 504.70
62.31	Tiling on front and inside basin –	N\$699.30
62.32	Installation of shower –	N\$2 136.45
62.33	Hang fittings –	N\$150.00
62.34	Mirror –	N\$450
62.35	Mosaic around mirror –	N\$156.00
62.36	Roof repair (price difference) –	N\$19 531.00
62.37	Sand and paint metal door –	N\$635.00
62.38	Neon lamps –	N\$737.47
62.39	Neon bulbs –	N\$737.47
62.40	Spotlights outside door –	N\$660.00
62.41	One light	N\$163.50
62.42	Three neon lamps	N\$1 106.20
62.43	Ring beam (price difference)	N\$4 237.00
62.44	Layout garden and install	N\$10 695.00
62.45	Easy wall stones	N\$9 856.00
62.46	Irrigation fittings	N\$2 639.00
62.47	Labour and installation –	N\$1 236.00
62.48	Interlocks with fan cobblers –	N\$16 987.00
62.49	Labour and installation –	N\$3 265.00
62.50	Turf area –	N\$4 568.00
62.51	Electrical installation –	N\$3 250.00
62.52	Wine racks –	N\$15 689.00
62.53	Paint all external garden walls –	N\$24 433.92

[45] The scope of the work amounts to N\$ 178 124.36. This scope constitute the additional work testified to by the plaintiff. The amounts in paragraph 44 above are marked in blue on the quotation.

[46] On the evidence between the parties, I have no difficulty accepting that the plaintiff has proved the scope and value of the work. This finding is based on the fact there was no serious challenge to the fact that the parties agreed that all the works in the quotation was done. The challenge of the defendant in evidence was that the plaintiff was not entitled to pay in respect of defective work. In addition, the defendant was confused by the manner in which the plaintiff submitted his calculations. I agree with the defendant that the quotation is confusing and muddled because it is littered with amounts in blue which are identical to the original amounts in black. To avoid confusion, I added all the amounts in blue which did not differ from those in black and included the difference to arrive at the total sum of N\$ 178 124.36 exclusive of VAT.

[47] There is no confusion with respect to the terms of payment. Any confusion, which may have existed, was obliterated by defendant's testimony above. The fact though is that the parties from the outset did not implement the terms of payment they agreed to. That much appears clearly from the fact that a sum of N\$ 150 000 was paid by electronic transfer and accepted when it was not 60% of the N\$ 801 122 agreed price. I accept defendant's version on this score that this initial payment was for purchase of material. The parties further agreed that interest was payable on the sum due but their testimony establish that around 26 May they postponed the due date of payment pending a reconciliation of the sum due by the defendants accountants. The reconciliation never took place and the sum due was thus never settled. Interest is not claimable in these circumstances especially when the works had not been finalised.

[48] To determine liability therefore, it is best to keep in mind the amount claimed less the sum due for defects. What complicates this matter is that despite the agreement to the contrary, the parties did not obtain three quotations as agreed to in the status report. As a result of their failure, the plaintiff took the sure route of accepting and quantifying the practical completion report of Mr Tjitjo. On the other

hand, the defendant having realised that Mr Tjitjo's report does not include all defective items, engaged the services of Mr Moyo. The difficulty that I have with Mr Moyo's report is that it was made more than a year after Mr Tjitjo's. As a result, I agree with the criticism that it may very well include items, which were not defective at practical completion. Another difficulty for the defendant is that Mr Moyo made no attempt whatsoever to quantify the report of Mr Tjitjo. I reject his evidence that he was not bound by it because Mr Tjitjo's report is the basis for the defendant's claim for defective work as set out in his plea.

[49] Most concerning aspect of this matter is that both parties did not attempt to quantify the defect list, which the parties made on the 26 May. This list serves, as the best admission by plaintiff that works was and remain outstanding. I find Adv Schneider's submission that the plaintiff tendered to rectify the defective work attractive. But decline to follow that route because it will necessitate the court setting terms relating to retention that the parties did not envisage when they contracted. The best cause is to determine the value of the defective work and deduct it from the amount due as diminished contract price.

[50] The evidence of Mr Swart, on this score, is helpful as a guide because as he testified the best evidence would have been from a contractor who is going to perform the work. That is so because his evidence is an estimation. The further reason I accept this approach is that it will by necessary implication exclude the defect list prepared by Mr Moyo but include that prepared by the parties on the 26 May and Mr Tjijio's.

[51] Ms Shifotoka, submitted that the onus rest on the plaintiff to prove the scope of work, its value and as there was no agreement, the plaintiff is not entitled to claim. Her argument further was that the only additional work agreed to by the defendant was with respect to the wine cellar, entertainment area, sprinkler system and interlocks and turf area. This argument with respect contradicts the defendant's plea and I reject it. As a result of Ms Shifotoka's concession that the defendant no longer relies on the quotation by K Construction there is no merit in the defendants counterclaim and I dismiss it.

[52] From the defendant's testimony I accept that the sprinkler system, interlocks and turf area were defectively constructed and he has not had use and enjoyment thereof. His evidence in this regard was not seriously contested.

[53] Having set out the scope and the value of the work, I must determine what is due to the plaintiff in the form of a diminished amount caused by his admitted defective workmanship. In my view the list of defective works of the parties of 26th May and Mr Tjitjo's practical completion list is determinative of this issue. The defendant's testimony is that the items below are defective or the plaintiff is not entitled to these amounts. Most of these items are also on both defect list This relates to:

72.1	Plugs in wall at bar	N\$284.00
72.2	Installation of light fitting and light	N\$163.56
72.3	Spiral stair case (price difference)	N\$10 336.70
72.4	Painting of stairs	N\$1 895.00
72.5	Toilet roller holder	N\$219.90
72.6	Irrigation fittings	N\$2 639.00
72.7	Labour and installation –	N\$1 236.00
72.8	Interlocks with fan cobblers –	N\$16 987.00
72.9	Labour and installation –	N\$3 265.00
72.10	Turf area	N\$4 568.00
72.11	Paint all external garden walls –	N\$24 433.92

[54] The spiral staircase is not on the defect list, but I accept the defendant's version that the plaintiff cannot seek to benefit from his inability to construct a spiral staircase and that amount therefore must be deducted from the amount claimed. The other items appear on either Mr Tjitjo's practical completion list or the 26 May defect list and in the absence of another quotation, it is only fair to use the rates quoted by the plaintiff and agreed to between the parties.

[55] The total value of the defects I find is therefore N\$66 028.08. This is exclusive of VAT in the sum of N\$7 284.18. These amounts must therefore be

deducted from the plaintiff's claim of N\$148 852.37. What is due to the plaintiff is therefore N\$75 540.11.

[56] For reasons advanced above, I find that the defendant is indebted to the plaintiff in the sum of N\$75 540.11. I further order that the defendant pay interest on this sum at the rate of 20% from date of judgement to date of payment. As to costs of suit, the usual rule is that costs follows suit. However in this matter the plaintiff succeeded only to the extent of 50 percent of his claim. I therefore order that the defendant pays 50 percent of the costs of the plaintiff on the scale of one instructing and one instructed counsel.

Order

[57] In the result, the following order is made in favour of the plaintiff as against the defendant:

4. Payment in the amount of N\$ 75 540.11;
5. Interest on the amount of N\$ 75 540.11 at the rate of 20% from the date of judgment to date of payment;
6. 50% of costs of suit, such costs to include the costs of one instructing and one instructed counsel.

P. U. KAUTA
Acting Judge

APPEARANCES:

PLAINTIFF:

Adv Schneider

Instructed by: Francois Erasmus, Windhoek

DEFENDANT:

E Shifotoka

Of Conradie & Damaseb, Windhoek