

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
RULING ON ABSOLUTION FROM THE INSTANCE**

Case no: I 1883/2015

In the matter between:

**WILLEM MATTHIAS THOMAS**

**PLAINTIFF**

and

**K & G BRICKS CC**

**FIRST DEFENDANT**

**TATAMUTSI & SONS CONSTRUCTION CC**

**SECOND DEFENDANT**

**JOINT VENTURE CONSTRUCTION PROGRAMME**

**THIRD DEFENDANT**

**Neutral citation:** *Thomas v K & G Bricks CC* (I 1883/2015) [2018] NAHCMD 221 (19 July 2018)

**Coram:** USIKU, J

**Heard on:** 20<sup>th</sup> and 22<sup>nd</sup> March 2018 and 26 April 2018

**Delivered:** 19 July 2018

**Flynote:** Contract – Breach – Claim for profit-share derived from a Joint Venture – The alleged Joint Venture involving reciprocal obligations – Party claiming payment must prove that he fulfilled his obligations – Absolution from the instance granted in favour of the Defendants.

**Summary:** The Plaintiff instituted action against the Defendants for payment of money in respect of profit-share derived from a tender awarded by the Municipal Council of Henties Bay to K&G Bricks/Tatamutsi and Sons Construction Joint Venture, on 03 September 2014.

Prior to the award of the aforesaid tender, the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant had on 05 August 2014 entered into a joint venture agreement with the Plaintiff in which they agreed to carry out certain obligations in anticipation of the award of the tender to their joint venture.

The Plaintiff is not a party to the joint venture that was ultimately awarded the tender in question. The Plaintiff also did not discharge any of the reciprocal obligations as set out in the Joint Venture he entered into between the 1<sup>st</sup> the 2<sup>nd</sup> Defendants. After the plaintiff closed his case the Defendants applied for absolution from the instance. Court granted absolution in favour of the Defendants.

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### ORDER

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1. Absolution from the instance is granted in favour of the Defendants;
2. The Plaintiff is ordered to pay the costs of the First and Second Defendants;
3. The matter is removed from the roll and regarded finalized.

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## REASONS IN TERMS OF PRACTICE DIRECTIONS 61 (9)

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USIKU J:

### Introduction

[1] The Plaintiff instituted an action against the Defendants for, inter alia, the payment of N\$ 381 343.74 in respect of profits – share, derived from a tender awarded by the Municipal Council of Henties Bay to K&G Bricks/Tatamutsi and Sons Construction Joint Venture on 03 September 2014. It is common cause that the Plaintiff is not a party to the Joint Venture that was awarded the tender by the aforesaid Municipal Council. The suit by the Plaintiff is based on a written agreement entered into by the Plaintiff and the First and Second Defendants, dated the 05 August 2014. In the agreement entered into between the Plaintiff and the First and Second Defendants, the parties had set out certain reciprocal obligations, in anticipation that the tender would be awarded to their Joint Venture. By agreement between the parties the court granted an order deleting the words “for the period of June – July 2014” as they appear in Article 1, of the aforesaid agreement, in order to reflect the intention of the parties.

[2] The said agreement purports to set out the rights and obligations of the parties thereto. Some of the obligations set out require the parties jointly to:

- a) contribute in equal proportions in order to obtain a performance bond in the amount of N\$ 640 000;
- b) facilitate a bridging finance from a financial institution;
- c) render administrative / financial expertise to the enterprise etc;

[3] In return for carrying out such obligations, the parties shall be entitled to share in the profits generated from the venture in proportions of:

- (a) 34% for the First Defendant;
- (b) 33% for the Second Defendant; and
- (c) 33% for the Plaintiff.

[4] The agreement further makes the following provisions:

- a) The agreement is subject to a suspensive condition that the Municipality of Henties Bay awards the tender to the joint venture of the Plaintiff and the Defendants. It is common cause that the tender was not awarded to this particular joint venture;
- b) The agreement shall remain in effect until completion of the project; and
- c) The agreement is subject to the arbitration clause, such arbitration to be mutually agreed upon by the parties, failing which the issue shall be decided upon by the President of the Law Society of Namibia (Article XIII of the agreement).

[5] The test at this stage is, whether or not the Plaintiff has succeeded in adducing sufficient evidence upon which a reasonable court may find in his favour. The court will refuse to grant absolution from the instance if there are several reasonable inferences or probabilities, arising out of the evidence one of which favours the Plaintiff's version of events.

[6] For the Plaintiff to succeed, he must at this stage, set out that:

- a) the relevant suspensive conditions have been fulfilled;
- b) he performed his part of the bargain, as set out in the agreement; and
- c) he has fulfilled other requirements set out in the agreement.

[7] In the present matter, the Plaintiff has not set out evidence that:

- a) the suspensive condition as set out in para [4] (a) above, was fulfilled and indeed he conceded that it was not fulfilled;
- b) he contributed his proportion to obtaining a performance bond;
- c) he rendered administrative / financial management expertise;
- d) he took part in facilitating a bridging finance from a financial institution.

[8] It is apparent from the provisions of the agreement that the agreement involved reciprocal obligations as more fully set out in para [2] hereof (above). On his evidence, the Plaintiff has not discharged any of the obligations set out in para [2] above, and therefore cannot claim payment in respect of any profits generated from the venture.

[9] Furthermore, there is no evidence that profits were derived from the project, as a result of the joint efforts of the parties, to which Plaintiff is entitled to share.

[10] All in all, I am not satisfied that the Plaintiff has made out a prima facie case upon which a reasonable court may find in his favour.

[11] It is for the foregoing reasons that I grant absolution from the instance in favour of the Defendants. In the result, I make the following order:

1. Absolution from the instance is granted in favour of the Defendants;
2. The Plaintiff is ordered to pay the costs of the First and Second Defendants;
3. The matter is removed from the roll and regarded finalised.

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B Usiku  
Judge

## APPEARANCES

PLAINTIFF : AN Hans-Kaumbi  
of Ueitele & Hans Inc., Windhoek

DEFENDANT: J Diedericks  
of Diedericks Inc., Windhoek