

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: 1586/2016

In the matter between:

BUILDHARD SERVICES (PTY) LTD

T/A E HARD-BUILD CENTRE

PLAINTIFF

and

CHRECHEN MUUKUA

DEFENDANT

Neutral citation: *Buildhard Services (Pty) Ltd t/a E Hard-Build Centre v Muukua* (1586/2016) [2018] NAHCMD 335 (23 October 2018)

Coram: UNENGU, AJ

Heard: 4 – 5 April 2018, 19 June 2018 and 11 September 2018

Delivered: 23 October 2018

Flynote: Civil Practice – Judgment and orders – Plaintiff claiming from the defendant – payment of N\$100 000-00 arising from an undertaking the defendant signed – Court held that in law an agreement is binding on the parties to it alone – That third parties not parties to such agreement acquire no personal rights arising from such agreement – therefore, no obligation on such parties to perform in terms of such agreement – Judgment granted in favour of plaintiff.

Summary: Civil practice, Judgment and orders. The plaintiff sued the defendant for payment of N\$100 000-00 which defendant in a written agreement undertook to pay the plaintiff. The defendant's defence is that she was released from her obligation under the agreement to pay the plaintiff by Mr Siegfried Katjiseua.

However, the Court disagreed and held that the defendant is liable to pay the amount claimed as Mr Siegfried Katjiseua is not a party to the agreement. Further, the court granted judgment with costs in favour of the plaintiff.

ORDER

1. Judgment granted in favour of the plaintiff in the following terms:
 - 1.1 Payment in the amount of N\$100 000-00 (one hundred thousand Namibia dollars).
 - 1.2 Interest on the amount of N\$100 000-00 (one hundred thousand Namibia dollars) at a rate of 20% (twenty percent) per annum as from date of service of summons until date of final payment.
 - 1.3 Costs of suit which costs to include costs of one instructing and one instructed counsel.

JUDGMENT

UNENGU AJ:

[1] The Plaintiff, the Buildhard (Pty) Ltd t/a E Hard-Build Centre is claiming from the Defendant, Ms Chrechen Muukua, an amount of N\$100 000-00 resulting from a written undertaking by defendant to settle the credit amount of Mr Siegfried Katjiseua with the plaintiff. This is to the maximum amount of N\$100 000-00 for the purchase of materials for the construction of the defendant's house, interest on the said N\$100 000-00 at a rate of 20% per annum as from date of service of summons until date of final payment; and costs of suit, including the costs of one instructing and one instructed counsel with further or alternative relief.

[2] In her plea to the plaintiff's particulars of claim, the defendant, in addition to the plea on the merits of the claim, also tendered a special plea of non-joinder of Mr Siegfried Katjiseua as an interested party to the suit and prayed for the dismissal of the plaintiff's claim with costs.

[3] On the merits of the claim, the defendant denied that she was indebted to the plaintiff in any amount, but admitted the agreement between herself and Ms Timm and added that she paid the sum of N\$98 342-05 to the plaintiff in compliance with her obligations under the said agreement.

[4] The background facts of the matter are straightforward. The defendant obtained a loan with the Standard Bank of Namibia to build a house for herself in the town of Swakopmund. She then appointed Mr Katjiseua a builder to build the house for her. It would appear though that it was not the only house Mr Katjiseua was building. Meanwhile, Mr Katjiseua had a credit account with the plaintiff where he bought building materials.

[5] On its part, the bank paid the money from the defendant's account directly into Mr Katjiseua's bank account for the work done on the defendant's house. This was done, in my view, to compensate Mr Katjiseua for the work done on the house. Therefore, once the money was paid from the loan account of the defendant into Mr Katjiseua's account, the money was his for services rendered no longer the defendant's money. Mr Katjiseua would then use the money to pay his own debts and salaries for the people who were helping him to build the house.

[6] That being so, an amount of N\$98 342-05 was paid by Mr Katjiseua into his credit account with the plaintiff. It is this amount the defendant is now claiming to have been paid by Mr Katjiseua on her behalf to release her from the obligation under the agreement with the plaintiff, the claim the plaintiff has denied.

[7] The matter, like other cases, was case managed by a Managing Judge. It went through all steps of the judicial case management processes including a pre-trial conference.

[8] In the proposed pre-trial order¹, the parties under paragraph (a) 1 to 6 proposed all issues of facts and law to be resolved during the trial while those in paragraph (b) of the order, were indicated as facts not in dispute in the form of a statement of agreed facts.

[9] On the 2nd day of May 2017, the proposed pre-trial order was made an order of court and in paragraph 1 thereof, the court directed the parties to trial on the issues as formulated in paragraphs (a) 1 to 6 of the joint pre-trial proposal of 21 April 2017. These are:

'(a) All issues of fact and law to be resolved during the trial:

1. Ad Defendant's Plea

Defendant raised a special plea on joinder in the matter, which she requests the court to determine before the hearing of the merits hereof.

2. Was the payment made on the 2nd day of September 2014 at Swakopmund and at Plaintiff's principal place of business in the amount of N\$98, 342-05 and by Mr Siegfried Katjiseua in complete performance of defendant's obligations in terms of the admitted agreement?

3. Was there an outstanding balance left on the account?

4. Did Mr Annegret Timm, an employee of plaintiff, accept the aforesaid payment in satisfaction and discharge of defendant's obligations in terms of the admitted agreement?

5. After said payment, is defendant still liable for any further amounts on the credit account of Siegfried Katjiseua?

6. If there is an amount owing in terms of the admitted agreement, what is this amount?'

I shall come back to these issues later in my judgment.

¹ Rule 26 (6).

[10] The plaintiff was represented by Mr Wylie and the defendant by Mr Andima during the trial. It is also only the representative of the plaintiff Ms Annegret Timm and the defendant, Chrechen Muukua who testified in the matter. Both Ms Timm and Ms Muukua were subjected to lengthy cross-examinations by counsel.

[11] It was apparent from the testimonies of both witnesses and the cross-examinations that the bone of contention between the parties is the issue of whether the payment in the amount of N\$98, 342-05 by Mr Katjiseua to the plaintiff on 2 September 2014 was made for and on behalf of Ms Muukua or not releasing her from the obligation under the agreement to pay the plaintiff not exceeding N\$1000 000-00 should there be an outstanding balance on the credit account of Mr Katjiseua he had with the plaintiff.

[12] Mr Andima, on behalf of the defendant, applied for an absolution from the instance after the plaintiff's case. However, on 08 May 2018, I dismissed the application with costs and found that the plaintiff placed evidence on the record upon which the court, applying its mind reasonably, could or might find for the plaintiff.²

[13] As pointed out already Ms Timm testified for the plaintiff and Ms Muukua testified on her own behalf as the defendant. The defendant admitted liability to the plaintiff in the amount of N\$100 000-00 which she undertook to pay in the agreement. However, in her testimony the defendant failed to lead evidence that Mr Katjiseua agreed to pay the plaintiff on her behalf.

[14] The defendant also admitted exhibit "B" and the terms thereof. It is further common cause and trite law that an agreement is only legally binding on the parties to such an agreement. Third parties who are not parties to an agreement acquire no personal rights from such agreement and no obligations, as a result, may be imposed on them arising from such agreements. Therefore, in law, Mr Katjiseua was under no obligation to pay the plaintiff on behalf of the defendant. The money paid by Mr Katjiseua to the plaintiff was paid for his own debts he had with the plaintiff. The defendant therefore, is wrong to think she was released from her obligation to perform in favour of the plaintiff in terms of the agreement.

² *The Buildhard Services (Pty) Ltd t/a E Hard-Build Centre v Chrechen Muukua* (I1586/2016) [2018] NAHCMD 120 (08 May2018).

[15] That being the case, and for reasons stated herein before, I conclude that the issues in paragraph 2 to 6 of the pre-trial order the parties agreed to be resolved during the trial are resolved in favour of the plaintiff and find that the plaintiff's claim must succeed.

[16] Accordingly the following order is made:

1. Judgment granted in favour of the plaintiff in the following terms:
 - 1.1 Payment in the amount of N\$100 000-00 (one hundred thousand Namibia dollars).
 - 1.2 Interest on the amount of N\$100 000-00 (one hundred thousand Namibia dollars) at a rate of 20% (twenty percent) per annum as from date service of summons until date of final payment.
 - 1.3 Costs of suit which costs to include costs of one instructing and one instructed counsel.

E P UNENGU
Acting Judge

APPEARANCES

PLAINTIFF : T M Wylie
instructed by Theunissen, Louw & Partners, Windhoek

DEFENDANT: T Andima
of Van Der Merwe-Greef Andima Inc., Windhoek