

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: I 857/2014

In the matter between:

MULTI ENGINEERING CONTRACTORS (PTY) LTD

PLAINTIFF

and

DE VRIES COOLING SERVICES CC

FIRST DEFENDANT

MR B ZAARUKA t/a BENZ BUILDING SUPPLIES

SECOND DEFENDANT

Neutral citation: *Multi Engineering Contractors (Pty) Ltd v De Vries Cooling Services CC & Mr B Zaaruka t/a Benz Building Supplies (I 857/2014) [2018] NAHCMD 50 (08 March 2018)*

Coram: UNENGU, AJ

Heard: 14 February 2018

Delivered: 08 March 2018

Flynote: Practice – Judgment and Orders – Objection to content of some paragraphs in the witness statement of second defendant – Objection against para

21 dismissed whereas objection against paras 26, 27, 30, 35, 37 and 39 with annexures sustained – Content thereof invalid and to be disregarded.

Summary: Practice Judgment and Orders – Plaintiff’s objection to content of some paragraphs and annexures in the witness statement of the second defendant. Court refuses to sustain the objection raised against para 21 of the witness statement at this stage of the proceedings but rule in favour of the plaintiff in respect of objection raised against para 26, 27, 30, 35, 37 and 39 as well as annexures attached thereto.

ORDER

- (i) The objection made against the content of para 21, of the witness statement of the second defendant is dismissed.
 - (ii) The objection made against the content of paras 26, 27, 30, 35, 37 and 39 with annexures attached thereto is sustained and the content of such paras and such annexures are invalid and inadmissible.
 - (iii) There is no costs order made.
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RULING

UNENGU AJ:

[1] In this matter, the court has to rule on a few objections raised by Mr Obbes counsel for plaintiff Multi Engineering Contractors (Pty) Ltd against paragraphs 21, 26, 27, 30, 35, 37 and 39 of the second defendant’s witness statement. Mr Obbes objected on behalf of his client that the evidence in the paragraphs above should not be read by the second defendant into record to form part of his evidence in-chief given under oath as provided for in the High Court Rules¹, on the basis of such

¹ Rule 93 (4).

evidence being irrelevant or inadmissible opinion evidence, hearsay, or expressions of inadmissible opinion of an expert witness who will not testify in the proceedings.

[2] At the start of trial, I allowed witnesses called by the plaintiff to read their witness statements into record without interruptions and tell the court thereafter if there was anything in their statements not true or inaccurate and to state the true and correct facts. I ordered the same arrangement to apply to witnesses to be called by the second defendant.

[3] Now I deal with the objections raised by Mr Obbes starting with para 21 of Mr Zaaruka's witness statement.

3.1 The objection is directed against the entire paragraph. According to counsel the context thereof suggests that the plaintiff has not complied with a design requirement of the sprinkler system. He said that the word "design" has not been pleaded by the second defendant so much so that the word "design" does not feature in para 11 of the second defendant's counter-claim which particularises issues he will rely upon during the trial. Therefore, to introduce design in para 21 of the witness statement, Mr Zaaruka has introduced a matter not contained in the pleadings to warn the plaintiff beforehand what the second defendant's case is all about so that plaintiff is not taken by surprise. Accordingly, Mr Obbes argued that as "design" was not pleaded by the second defendant, the evidence is irrelevant in the context of the pleadings. Counsel, as a result therefore, requested the whole para 21 in the witness statement of the second defendant be disregarded.

3.2 Mr Obbes also objected against the reading into the record of proceedings paras 26 and 27 to form part of witness Mr Zaaruka's evidence in-chief because, according to counsel, the evidence contained in the paragraphs are in-admissible opinion evidence of which Mr Zaaruka being a layperson does not possess the expertise in the field he embarked upon. As a result therefore, counsel requested the court to either strike out or disregard the evidence due to its irrelevancy. Para 26.1 the last sentence thereof.

- 3.3 The objection raised against paragraph 30 and all other paragraphs, includes annexures attached to the paragraphs. Paragraph 30 is dealing with an inspection conducted by somebody else who will not be called as a witness to testify in the proceedings therefore the evidence regarding the inspection of the system is hearsay and inadmissible. According to Mr Obbes, the piece of evidence is not only hearsay in nature but also inadmissible opinion evidence.
- 3.4 Paras 35 and 37 in Mr Zaaruka's witness statement are also attacked on the basis of being hearsay evidence, inadmissible opinion evidence and irrelevant as the word "design" was never pleaded by the second defendant. The discovery item 68 is also objected to because the author of the quotation will not testify to confirm the contents of the quotations in particular the issue of whether the amount quoted was reasonable amount or not and how the amount of the quote was computed. The same goes with the inspection report of ASIB inspector (discovery item 7) who will not testify as a witness in the proceedings.
- 3.5 Only part of para 39 of the witness statement starting from the words "I have no other choice but to source until" as per my counter-claim", is objected to on the ground of being expression of inadmissible opinion evidence.

[4] The core of the objection by the plaintiff to the paragraphs referred to a above is premised on the fact that the second defendant in para 11 of his amended plea has defined the breaches which breaches do not include a breach of the design of the system which was not complied with. In summary, the objection of Mr Obbes with regard the word "design" is that design does not feature in para 11 of the second defendant's counter-claim.

[5] Mr Narib, counsel for the second defendant on the other hand though, argued that design of the sprinkler system was a term of the agreement not put in issue by the plaintiff. It is a common cause issue between the parties, he says.

[6] I have carefully considered the objection raised by the plaintiff against design not particularized in para11 of the counter-claim which, according to Mr Obbes may cause prejudice to his client if allowed to stand. Equally, I am of the view that the

second defendant will also suffer prejudice if the objection is sustained at this stage of the proceedings. The word “design” appears on the official order (MEC 3) sent to the plaintiff together with an e-mail (MEC2) on 28 June 2012 in reaction to the latter’s proposal letter. It follows therefore that the plaintiff was aware *ex facie* the order that the second defendant paid the contract amount not only for the manufacturing, supply and installation of sprinkler system but also for the design thereof. Therefore, the objection raised against para 21 of the second defendant’s witness statement, is dismissed.

[7] That being so, the same cannot be said about objection raised towards paras 26, 27, 30, 35, 37 and 39 of the witness statement. The evidence contained in these paragraphs including annexures attached are not facts of which the second defendant bears personal knowledge. The paragraphs are replete of hearsay stories, opinions inferred from reports drawn up by or expressions by people who will not testify in the proceedings making such evidence irrelevant and inadmissible. Accordingly, objection against paras 26, 27, 30, 35, 37 and 39 and parts thereof including the annexures attached is sustained and as such the content therefore are invalid and inadmissible and will thus be disregarded.

[8] In the result the following order is made:

- (i) The objection made against the content of para 21, of the witness statement of the second defendant is dismissed.
- (ii) The objection made against the content of paras 26, 27, 30, 35, 37 and 39 with annexures attached thereto is sustained and the content of such paras and such annexures are invalid and inadmissible.
- (iii) There is no costs order made.

EP UNENGU

Acting Judge

APPEARANCES

PLAINTIFF:

D Obbes

Instructed by Koep & Partners, Windhoek

DEFENDANTS:

G Narib

Instructed by Weder, Kauta & Hoveka Inc.,
Windhoek