



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2017/03060

In the matter between:

EDCON CONSTRUCTION CC

PLAINTIFF

and

RED INVESTMENT HOLDING COMPANY (PTY) LTD

DEFENDANT

Neutral citation: *Edcon Construction CC v Red Investment Holding Company (Pty) Ltd* (HC-MD-CIV-ACT-CON-2017/03060) [2019] NAHCMD 137 (7 May 2019)

Coram: PARKER AJ

Heard: 25, 27 March 2019; 2, 16, 18 April 2019

Delivered: 7 May 2019

Flynote: Contract – Offer and acceptance – Plaintiff making offer to defendant and defendant accepting offer and imposing material conditions against the offer – Such unequivocal acceptance resulting in major lack of correspondence between acceptance and offer – Accordingly, court concluding that no valid contract existed for court to protect plaintiff's contractual rights thereunder – Consequently, court dismissing plaintiff's claim for contractual damages.

Summary: Contract – Offer and acceptance – Plaintiff making offer to construct houses to defendant – Defendant accepting offer but imposing material conditions against offer – A critical condition was passing of Resolution by defendant's Directors without which there would be no authorization to sign Agreement between plaintiff and defendant – Court rejecting plaintiff's argument that that condition no longer existed because contract based on a Quotation not bill of quantities – Court finding that no evidence was placed before it tending to prove defendant's abandonment or removal of the material conditions – Court finding that in the absence of such Agreement there is no basis for plaintiff to urge the court to conclude that there was a valid contract between plaintiff and defendant for construction of houses for defendant – Court concluding that plaintiff has failed to discharge the onus cast on it to prove existence of a valid agreement on which plaintiff relies to prove its claim – Consequently, plaintiff's claim for contractual damages dismissed with costs.

ORDER

1. Plaintiff's claim is dismissed with costs.
2. The matter is regarded as finalised and is removed from the roll.

JUDGMENT

PARKER AJ:

[1] This matter concerns the construction of houses in Khoab, Extension 2 in the Otjozondjupa Region. Both counsel submitted that this is not a complex action. I agree. Indeed, as I see it, the resolution of the dispute therein turns on an extremely short and narrow compass: It turns primarily on the existence or non-existence of a valid and enforceable contract that would bind plaintiff the prospective employee

(contractor) and defendant (the prospective employer). It is to this that I now direct the enquiry. I use 'prospective' advisedly, as will become apparent in due cause.

[2] Mr Ipumbu, counsel for plaintiff, submitted with gusto the following:

'3. In their joint pre-trial report, the parties requested this Honourable Court to adjudicate on specific factual and legal issues. In this regard, it is important to note that there was an interlocutory application in a form of an exception which the Defendant lodged. Central to the exception was, according to the Defendant, a conditional acceptance which cannot bring a contract into being and accordingly, the particulars of claim lack necessary averments to support the cause of action.'

[3] It is Mr Ipumbu's submission that the dismissal of the exception on that point put the matter of existence of a valid contract to rest. There are several obstacles in the way of Mr Ipumbu's submission; the chief of which is that it is based on a misapprehension of Uusiku J's judgment. The *ratio decidendi* on the issue of that judgment is simply that a cause of action not clearly raised on the pleadings is not incurably expiable because plaintiff may be able to adduce evidence in the trial that would raise a cause of action and which would be capable of calling on defendant to meet. On that basis, Uusiku J found that there was a cause of action, and, accordingly, rejected defendant's exception on the issue. But that decision cannot on any pan of legal scales be said to lead to the conclusion that Uusiku J held that a valid contract existed without more between plaintiff and defendant on the basis of exhibit A4, as plaintiff contends. The fact that defendant did not appeal Uusiku's decision matters tuppence as far as the issue of existence or non-existence of a valid and enforceable contract is concerned. The failure to appeal from that decision cannot, therefore, assist plaintiff's case.

[4] I accept submission by Mr Kamanja that no cogent evidence was led by plaintiff which prove that a valid contract whereby plaintiff was contracted to construct 15 low cost houses in Khoab Ext. 2 in Otjozondjupa Region at the contract price of N\$5,800,000 existed. Yes, defendant accepted the offer by plaintiff in the form of a Quotation, but defendant imposed material conditions against the offer when it accepted the offer. Thus, the offer was accepted equivocally as the acceptance was subjected to these material conditions (Exh. A4):

'Duly instructed by Red Investments Holdings Company (RIHC) Board, I am pleased to inform you that your revised offer dated 10 March 2016 for the Construction of 15 Low Cost Housing at Khoab extension 2 in the Otjozondjupa Region for the Contract amount of Five Million Eight Hundred Thousand Namibian Dollars (N\$5'800'000.00), is hereby accepted to the following Conditions being complied with.

1. You are to submit to the RIHC office on or before 21 March 2016 a fully priced extended and totalled quotation to comply with the above-mentioned Tender amount.
2. You are to provide sureties to our satisfaction as called for by RIHC.
3. You are formally to sign the Agreement of schedule of Conditions of Building Contract as soon as you have complied with terms 1 and 2 above. You are reminded that a Director's Resolution authorizing the signing of Contracts is required and must be lodged with RIHC at or prior to the actual signing of the Agreement.
4. You are to provide us satisfactory evidence that EDCON have insured the works, etc. with a copy of your insurance to be submitted to the RIHC offices on or before commencing of the project.
5. You are immediately to prepare a detailed program for the progress of the work for our consideration and records and to demonstrate thereby EDCON's ability to complete the Contract within the Tendered period of 6 Months calendar Months.'

[5] I accept Mr Kamanja's submission that no cogent evidence was led tending to establish that the conditions were removed or abandoned by defendant, save probably Condition number 1. In all this, it must be remembered that plaintiff was very much aware that there would be no valid contract between plaintiff and defendant because defendant's acceptance of plaintiff's offer does not 'exactly correspond with the offer' (see R H Christie, *The Law of Contract in South Africa*, 3rd edn (1996), pp 66-70); and the cases there cited) in virtue of the conditions imposed by the offeree defendant against the offer by plaintiff contained in Exh. A4 (quoted above). And what is more; the lack of correspondence in this matter is not minor

which 'can be brought within the ambit of the maxim *de minimus non curat lex*'. (Christie, *ibid.* p 66) It is by all account a major lack of correspondence. It is a major lack of correspondence of the acceptance with the offer because the conditions are material, in the sense that they go to the root of defendant's acceptance of the offer. Take, for example, Condition number 3 respecting the defendant's Director's Resolution.

[6] Plaintiff was indubitably aware that such a Resolution was critical for authorizing the signing of a valid Agreement; and that was why it was to 'be lodged with RICH (the defendant) at or prior to the *actual* signing of the Agreement (emphasis added). In the absence of such Agreement, I can see no basis – none at all – upon which plaintiff urges the court to come to the conclusion that there is a valid contract between plaintiff and defendant for the construction of the aforementioned houses.

[7] Based on these reasons, I hold that plaintiff has failed to discharge the onus cast on it to prove a valid contract on which he relies to prove its claim. This conclusion effectively destroys entirely the only plank on which plaintiff's case is built, namely, that there is a valid and enforceable contract which this court should enforce in order to protect plaintiff's contractual rights under it. In words of one syllable, there are no contractual rights for the court to protect.

[8] In all this, it must be remembered that plaintiff cannot even be thankful of the principle that, as a general rule, there is no such thing as all or nothing contract in our law (see *Workers Advice Centre and Others v Mouton* 2009 (1) WR 357 (HC)). In the instant case, I have found that there was no valid contract between plaintiff and defendant, binding the former to construct the houses; and so, plaintiff did no work at all, as Mr Kamanja submitted, for which he could be compensated on the bases of the *Mouton* principle.

[9] Furthermore, plaintiff does not establish by evidence that as a result of defendant's 'acceptance' of his offer he went ahead to incur debts with suppliers from whom he purchased equipment and materials required for the carrying out of the housing project and also cost of hiring labour for the project on the strength of Exh. A4. Indeed, in my view, the fact that plaintiff did not proceed to purchase

equipment and materials and did not proceed to employ workers for the project goes a long way in buttressing my aforementioned conclusion that plaintiff was clearly aware that there would be no valid contract between plaintiff and defendant whereby plaintiff would construct those houses in the absence of the Defendant's Directors Resolution authorizing the defendant to conclude a contract with plaintiff for that purpose.

[10] Mr Ipumbu submitted that Mr Inkumbi (defence witness) conceded that the Management in any organization can conclude contract with third parties, and, *a priori*, 'the conditional acceptance of the offer made on 11 March 2016, never provided that the Board of Directors must first pass a resolution'. With the greatest deference to Mr Ipumbu, I should say counsel misses the point. As I have found previously, no cogent evidence was placed before the court by plaintiff tending to prove that the conditions, including the crucial Directors' Resolution, were removed or abandoned. Having so concluded, it follows irrefragably that in my judgment there are no 'material terms', or any terms, 'of the agreement' which defendant could breach. In law and logic one cannot breach contractual terms where there is no contract whose terms could be breached.

[11] It remains to consider the matter of costs. Mr Ipumbu prayed for costs of suit, if plaintiff succeeds in its claim. Mr Kamanja argued contrariwise. Counsel submitted that whether or not defendant failed in its defence, the court should order costs against plaintiff for being responsible for the postponement in April. I decline to accept Mr Kamanja's submission. As Mr Kamanja reminded the court, plaintiff has already been mulcted in wasted costs for that postponement.

[12] Based on these reasons, I hold that plaintiff has failed to prove its case; whereupon, I make the following order:

1. Plaintiff's claim is dismissed with costs.
2. The matter is regarded as finalised and is removed from the roll.

C Parker
Acting Judge

APPEARANCES:

PLAINTIFF:

T IPUMBU

Of Titus Ipumbu Legal Practitioners, Windhoek

DEFENDANT:

A KAMANJA

Of Amupanda Kamanja Incorporated, Windhoek