

REPUBLIC OF NAMIBIA



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

CASE NO: I 2242/2015

In the matter between:

**CENTRAL TECHNICAL SUPPLIES (GEIGER) ENGINEERING
(PTY) LIMITED**

PLAINTIFF

and

**KHOMAS ALUMINIUM AND GLASS CC
HAUDANO BRICKS AND BUILDERS CC**

1ST DEFENDANT

2ND DEFENDANT

Neutral Citation: *Central Technical Supplies (Geiger) Engineering (Pty) Ltd v Haudano Bricks CC* (I 2242/2015) [2019] NAHCMD 226 (28 June 2019)

Heard: 22 March 2017; 16, 17, and 19, 20 October 2017; 14 November 2017; 1, 2, 3, 4, 5, 9 October 2018

Delivered: 28 June 2019

Flynote: Trial — Absolution from the instance at close of plaintiff's case — the test to be applied and the principles governing the proper approach to absolution considered – plaintiff discharging its onus – absolution refused with costs.

Summary: According to plaintiff, the 2nd defendant was appointed by the Ministry of Health and Social Services as the main contractor to build and upgrade the Okalongo Health Care Centre, in the Omusati Region. The 2nd defendant thereupon appointed the 1st defendant as a sub-contractor of the said project. The defendant averred that there was no sub-contractor agreement between the parties as alleged in the particulars of claim and that the plaintiff never, at any stage rendered any services to the 1st defendant as alleged by the plaintiff, or at all. The 1st defendant further alleged that the sub-contractor agreement was with an entity known as Huadano Bricks and Builders CC, the 2nd defendant.

The plaintiff alleges that it complied with all its obligations in terms of the agreement and despite sending invoices to the 1st defendant in the amount of N\$152,913.85, the latter has refused and/or neglected to make payment as required, hence the present claim.

It was at the close of the plaintiff's evidence that the defendant brought an application for absolution from the instance. The question for determination by the court was whether, it was appropriate, given the evidence led by the plaintiff, to grant an order for absolution.

Held that: The test that has consistently been applied in matters of absolution is the following: Is there any evidence led by the plaintiff, at the close of its case upon which a court, applying its mind reasonably, to such evidence, may or might find for the plaintiff?

Held further that: Certain principles have crystallised and which govern the proper approach to absolution from the instance. These include the following:

(a) The plaintiff should make out a prima facie case in the sense that there is evidence relating to all the elements of the claim;

(b) As far as inferences are concerned, on the evidence led, the inference relied on by the plaintiff must be a reasonable one and not the only reasonable one;

(c) The court, in dealing with the evidence adduced, must apply its own standard in deciding whether or not to grant the application. It should not rely on some phantom 'reasonable man' or 'person';

(d) Normally, the court does not, except in very exceptional circumstances, engage in the process of fully examining the evidence and deciding where the probabilities lie. The matter is approached from the position that the plaintiff's version is correct; and

(e) Applications for absolution will be granted sparingly, but where the occasion presents itself, the court should grant the application in the interests of justice.

Held that: The plaintiff discharged its task at this stage and that it has adduced evidence upon which a court, acting reasonably, may find for it.

Court consequently refusing the application for absolution with costs.

ORDER

1. The application for absolution from the instance is refused.
2. The First Defendant is to pay the costs of the application consequent upon the employment of one instructing and one instructed Counsel.
3. The matter is postponed to the case management roll of 18 July 2019 for the allocation of dates of continuation of the trial.

RULING

MASUKU J:

Introduction

[1] Serving before court for determination is one question – is the application moved by the defendants at the close of the case for the plaintiff, namely for absolution from the instance, appropriate, given the evidence led by the plaintiff, the legal issues arising considered *in tandem* with the legal test applicable thereto?

The parties

[2] The plaintiff is Central Technical Supplies (Geiger Engineering) (Pty) Ltd, a private company floated with limited liability according to the Company laws of this Republic. Its place of business is situate at NO. 13 Walter Street, Windhoek. The 1st defendant, on the other hand, is Khomas Aluminium and Glass CC, a close corporation established in terms of the laws of this Republic applicable to Close Corporations.

The pleadings

[3] According to the plaintiff's particulars of claim, the 2nd defendant was appointed by the Ministry of Health and Social Services as the main contractor to build and upgrade the Okalongo Health Care Centre, in the Omusati Region. The 2nd defendant thereupon appointed the 1st defendant as a sub-contractor of the said project.

[4] The plaintiff avers further that on 5 March 2010, the 1st defendant, duly represented by one Mr. Chuan-Kuo, and the plaintiff duly represented by its Managing Director, Mr. Frank Biederlack, entered into an oral sub-contract agreement, whose express, alternatively, implied and further alternatively, tacit terms were the following:

- (a) the plaintiff would install an incinerator and accessories at the Okalongo Health Centre as appointed by the Ministry of Health and Social Services (MOH);
- (b) the plaintiff would supply and deliver goods required and effect installations and conduct training of the personnel of the Okalongo Health Centre regarding the new installations;
- (c) the 1st defendant would provide a performance guarantee of 10% of the contract value as would be approved by the project engineer in respect of the supply, testing and commissioning of the incinerator at the Health Centre;
- (d) the plaintiff shall provide to the 1st defendant 10% performance guarantees for the due performance of all the plaintiff's obligations in terms of the agreement *inter partes* and the payment of all damages or other amounts due by the plaintiff to the 1st defendant;
- (e) the 1st defendant would compensate the plaintiff for goods and services mentioned above as per payment certificates to be issued by the quantity surveyor (QS) appointed by the Ministry of Works and Transport (MOWT); and
- (f) the plaintiff would only invoice the 1st defendant once the 1st defendant had received payment from the MOH in respect of the payment certificates.

[5] The plaintiff avers in line with the above terms of the agreement, the 1st defendant duly complied by providing a payment guarantee in the amount of N\$44,477 on 12 July 2010. For its part, the plaintiff, on 18 August 2010, provided the 1st defendant with the performance guarantee as undertaken. The plaintiff further averred that on 8 July 2011, it, duly represented by its Managing Director Mr. Biederlack was instructed by a Mr. Joshua Chiwambu of Jacobs Engineering, to provide and install laundry machines at the Health Centre. It was the plaintiff's further averral that it duly complied with all its obligations as recorded above.

[6] It is further alleged by the plaintiff that on 27 June 2011, payment certificate no. 18 in the amount of N\$ 93,684.39 in respect of the incinerator was issued by the QS, but that notwithstanding, the 1st defendant did not effect payment to the plaintiff. Furthermore, it alleges that on 7 February 2012, payment certificate No. 19 in the amount of N\$ 61,684.39 was issued by the QS but that amount remains unpaid to the plaintiff. Lastly, the plaintiff alleges that it complied with all its obligations in terms of the agreement and despite sending invoices to the 1st defendant in the amount of N\$152,913.85, the latter has refused and/or neglected to make payment as required, hence the present claim.

[7] The defendant, in its plea, initially raised a special plea which was dismissed and reasons therefor were delivered on 29 March 2018. Nothing more needs be said about the special plea in the circumstances. In its defence on the merits, the defendant averred that there was no sub-contractor agreement between the parties as alleged in the particulars of claim and that the plaintiff never, at any stage rendered any services to the defendant as alleged by the plaintiff, or at all. The defendant further alleged that the sub-contractor agreement was with an entity known as Haudano Bricks and Builders CC.

[8] The plaintiff, in proof of its claim, led the evidence of its Managing Director Mr. Frank Werner Biedelack and Mr. Joshua Makanga Chiwambo, a qualified electrical engineer. At the end of their respective pieces of evidence, the plaintiff closed its case. It is at that juncture that the defendant moved an application for absolution from the instance. It is this application that this ruling is concerned with.

The law applicable to absolution from the instance

[9] The law reports and the electronic reports of this court on its website, are replete with pronouncements as to the principles that apply in cases where an application from the instance has been launched. I therefore do not need to address this issue to any great length as the applicable law can be said to be trite. Furthermore, it appears that both parties are *ad idem* regarding the applicable principles. Where the disparity may arise is regarding the application of the principles applicable, to the facts at hand.

[10] The test that has been consistently been applied in matters of absolution is the following: Is there any evidence led by the plaintiff, at the close of its case upon which a court, applying its mind reasonably, to such evidence, may or might find for the plaintiff?¹

[11] In dealing with the statement above, certain principles appear to have crystallised and which govern the proper approach to absolution from the instance. These include the following:

- (a) The plaintiff should make out a prima facie case in the sense that there is evidence relating to all the elements of the claim;
- (b) As far as inferences are concerned, on the evidence led, the inference relied on by the plaintiff must be a reasonable one and not the only reasonable one;
- (c) The court, in dealing with the evidence adduced, must apply its own standard in deciding whether or not to grant the application. It should not rely on some phantom 'reasonable man' or 'person';
- (d) Normally, the court does not, except in very exceptional circumstances, engage in the process of fully examining the evidence and seeking where the probabilities lie. The matter is approached from the position that the plaintiff's version is correct; and
- (e) Applications for absolution will be granted sparingly, but where the occasion presents itself, the court should grant the application in the interests of justice.

¹ *Stierv Henke* 2012 (1) NR 370; *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A); *Okorusu Fluospar (Pty) Ltd v Tanaka Trading CC* 2016 (2) NR 486.

Synopsis of the evidence led

[12] It is fair to state that it is common cause that in 2009, the 2nd defendant, Haudano Bricks and Builders CC (Haudano), was appointed by the Ministry of Health and Social Services as the main contractor in the upgrading, renovation and addition of the Okalongo Clinic in the North of this Republic.

Mr. Frank Biederlack

[13] As earlier intimated, this witness, to whom I shall refer as "PW1", testified that he is the Managing Director of the plaintiff. It was his evidence that in 2009, the 2nd defendant was appointed by the MOH as the main contractor to build and upgrade the Okalongo Health Centre. The 2nd defendant appointed the 1st defendant as a subcontractor in relation to the said project and in terms of which the latter would manage the project on the former's behalf.

[14] PW1 further testified that on 5 March 2010, at Windhoek, the 1st defendant, duly represented by Mr. Chuan-Kuo and the plaintiff, duly represented by himself, entered into an agreement whose terms have already been pleaded above. I will, for that reason, not repeat same. PW1 further testified that the plaintiff complied with all its obligations under the said contract as recorded in the preceding paragraphs.

[15] PW1 further testified that having complied with all its obligations in terms of the agreement, it transmitted invoices to the 1st defendant on 19 March 2014, in the total amount of N\$ 152,913.85 but these were not honoured by the 1st defendant. His further evidence was to the effect that in March 2014, it came to the plaintiff's attention that the 1st defendant had received payments from the MOH but had, that notwithstanding, not paid the amounts received to the plaintiff. Lastly, it was his evidence that

notwithstanding demand, the defendants failed and/or neglected to pay the amount claimed. The plaintiff, accordingly sued both defendants jointly and severally, the one paying the other to be absolved, he concluded his evidence.

Mr. Joshua Maganga Chiwambu

[16] Mr. Chiwambu, referred to as PW2 henceforth, testified that he is a male of Malawian extraction and a qualified electrical engineer. It was his evidence that from 2009 to 2014, he was in the employ of Jacobs Consulting Engineering and that from 2014, he commenced working for his own account, under the style, Joshua Consulting Engineers.

[17] It was his evidence that in 2009, his erstwhile employer was appointed by the Ministry of Works and Transport as the engineer in the project to renovate, do additions to and upgrade of the Okalongo Health Centre in the Omusati Region of this Republic. In this regard, the 2nd defendant was appointed by the Ministry of Health and Social Services to as the main contractor in respect of the works at the Okalongo Health Centre. It was his evidence that he represented his former employer as the representative engineer in respect of the project in question.

[18] He was responsible for the non-nominated mechanical subcontractor appointments in respect of the project. He set out the procedure which was followed in the appointments and I will not repeat it. He further testified that on 1 April 2010, during a site meeting the 2nd defendant announced that it had appointed 1st defendant as the sub-contractor to manage the project in question.

[19] On 19 February 2010, the tender for the incinerator was formally awarded to the plaintiff. It was his further evidence that the plaintiff duly complied with its obligations in terms of the tender. On 9 September 2010, he further testified, payment certificate no. 13, in the amount of N\$ 293,447.47, was issued for progress payment in respect of the incinerator. This payment was issued by the quantity surveyor. In this regard, he testified that the 1st defendant effected payment of the amount in question as set out in the payment certificate.

[20] He testified further that on 24 May 2010, the tender for the installation of the laundry machines was also awarded to the plaintiff. In this regard, he duly instructed the plaintiff to proceed with the installations in terms of the tender awarded. It was his further evidence that the plaintiff duly complied with its obligations thereunder and that on 27 May 2011, payment in the amount of N\$ 91,684.39 was issued by the quantity surveyor in respect of the incinerator. It was his further evidence that he was personally aware of the payment of the said amount to the 1st defendant by the Ministry of Health. His numerous efforts to obtain proof of this payment, however proved futile. He further testified.

[21] PW2 further adduced evidence to the effect that on 7 February 2012, another payment of N\$61,229.45 was issued by him to the quantity surveyor, via certificate of payment No. 19. This payment was also made to the 1st defendant by the Ministry of Health. It was his further evidence that the 1st defendant was supposed to have paid the said amount within 10 days of receipt of the payment from the aforesaid Ministry to the plaintiff.

[22] During March 2012, he further testified, the 2nd defendant withdrew from the project vide its letter dated 7 March 2012. During a site meeting on 17 October 2012, the architect advised that the contract in question was valid until the end of the project notwithstanding the withdrawal of the 2nd defendant therefrom. As a result of the

withdrawal of the 2nd defendant, the project continued but under the stewardship of the 1st defendant. It was his evidence that the 1st defendant was heavily involved in the project and pushed same to finalization.

[23] Finally, PW2 testified that the 1st defendant continuously had a representative on site in the entirety of the duration of the contract who monitored the contract and the work associated therewith. That was the extent of his testimony. It is fitting that I mention that all the documents in support of the allegations made above, including payment certificates, minutes of site meetings and letters written in support of the events testified about were included in this witness' statement.

[24] This was the extent of the plaintiff's evidence. Needless to say, both witnesses were subjected to long and sometimes brutal cross examination by Mr. Diedericks for the defendants. Because of the nature of the present application, and the stage at which it is brought, I will not consider the nature and extent of the cross-examination in any detail, save where and to the extent it is deemed necessary. In that event, the exercise will be geared towards answering the questions that arise for determination at this half-way stage of the proceedings.

Bases of the application for absolution and the argument advanced

[25] The defendant's principal bases for the application, from the heads of argument filed appear to be the following there is no evidence that there was any contractual obligation which was enforceable against the 1st defendant by the plaintiff such that the plaintiff has not made out a case for the relief sought against the 1st defendant. The second basis is that the agreement between the parties is unenforceable for the reason that it contravenes the provisions of the Tender Board of Namibia Code of Procedure

read with Government Notice No. 180 of 2010. I will deal with each of these issues in turn.

Was a contract concluded between the plaintiff and the 1st defendant?

[26] Mr. Dierdericks, argued that the evidence adduced shows that there was contract between the plaintiff and the 2nd defendant. This, he maintains, is because the 2nd defendant was the main contractor in terms of the tender and that any liability that arose in respect of that agreement, could not be properly brought to the door of the 1st defendant, which was not a party.

[27] Captivating as that argument may seem at first blush, I am of the considered view that it fails to take into account certain important aspects of the plaintiff's evidence. PW1 testified that after the contract for the installation of the incinerator was awarded, he received a previously unknown visitor in the person of Mr. Kuo at his office. The latter informed him that that the 1st defendant had taken over the project and payments from the 2nd defendant.

[28] It was PW1's further evidence that Mr. Kuo also offered to provide the plaintiff with a payment guarantee and simultaneously requested a 10% performance guarantee from the plaintiff, which was given. It was the evidence of PW1 that Mr. Kuo asked him to make the guarantee in the name of the 1st defendant and he complied in that regard. PW1 further testified that Mr. Kuo informed him that he, Mr. Kuo had been granted the carte blanche, so to speak, over the 2nd defendant's bank account and that he had appointed Mr. Jerry Claasen as the project coordinator on the 1st defendant's behalf in respect of the project.

[29] The further evidence was to the effect that Mr. Claasen did in fact start participating in the project and that at the site meeting of 1 April 2010, the 2nd defendant's representative explained that it had subcontracted the works to the 1st defendant and in future, Mr. Kuo would attend site meetings. The site minutes of 24 May 2010 also confirm that Mr. Kuo and Mr. Claasen had undertaken to rescue the project. This evidence was also confirmed by PW2, Mr. Chiwambu.

[30] In the premises, I am of the considered view that the plaintiff has, by admissible evidence, shown on a prima facie basis that the centrality of Mr. Kuo and the subsequent events, including the performance guarantee given to the 1st defendant suggest that there is some liability that might be held to exist against the 1st defendant. There is also evidence suggesting that Mr. Kuo, for the 1st defendant, was in charge of the 2nd defendant's bank account and that money although payable to the 2nd defendant would, for all intents and purposes, be available to Mr. Kuo and the 1st defendant.

[31] In this regard, it would be precipitous to grant the application without affording Mr. Kuo, who appears to be a central figure in this imbroglio, an opportunity to testify and shed light of his role in this matter. The documents filed as exhibits, appear to corroborate the evidence of both PW1 and PW2. Properly and carefully considered, one can say without diffidence that a prima facie case pointing to the liability of the 1st defendant can, on the evidence, be said to have been made by the plaintiff. I accordingly find that the 2nd defendant's argument to the contrary, should fall flat on its face.

Provisions of the Tender Board Code of Procedure

[32] Mr. Diedericks argued that the claim sought to be enforced by the plaintiff against the defendants is unenforceable for the reason that there appears to have been a

breach of the provisions of the Tender Board of Namibia Act². In particular, much store has been laid on the provisions of s. 23 which outlaws the surrender of a project or part thereof which forms part of a tender to another party, without the prior written approval of the Tender Board.

[33] I must preface my remarks in regard to this argument by stating that when one has regard to the pre-trial report, which was subsequently made an order of court, the issue of the provisions of the Tender Board Act was never identified as one for determination. More importantly, it was not even pleaded by the defendants at any stage, so as to afford the plaintiff a fair opportunity to deal with same.

[34] The approach of the defendants in this regard amount to nothing short of a trial by ambush, which should not be allowed. Even if it may be said that the defendants had an epiphany about this point of law, proper steps should have been timeously taken to place the matter on the menu as it were, for proper ventilation and adjudication.

[35] It must be mentioned that our rules frown upon trial by ambush. In this connection, rule 26(10) provides the following:

'Issues and disputes not set out in the pre-trial order will not be available to the parties at the trial, except with the leave of the managing judge or court granted on good cause shown'.

[36] It must first be reiterated that the issue came up like a sudden rash – with no warning at all. In the instant case, at no time did Mr. Diedericks apply for leave to include this issue as one for determination. As a result, there is no cause shown at all, whether good or not, for the matter to be sprung upon the court and the defendant in

² Act No. 16 of 1996.

what can be described as a knee-jerk reaction. There is also no court order made allowing the defendants to place this case on the menu, as it were.

[37] I am accordingly of the considered view that this is a matter that should not be entertained by the court as it comes into focus through the backdoor. It must accordingly be consigned to rejection and held not available for consideration in this matter. The rules encourage a situation where relevant legal and factual issues for determination are not interned in the deep recesses of a party's safe, to be chanced and detonated in the face of the opponent and the court at any time they choose appropriate, thus upsetting the applecart of the trial, as it were.

[38] I should mention, in any event, that the argument advanced on behalf of the defendants in this regard, is met squarely by the plaintiff by reference to the now celebrated case of *Claude Bosch Architects CC v Auas Business Enterprises No. 123 (Pty) Ltd*³, the Supreme Court endorsed the approach taken in *Standard Bank v Estate Van Rhyn*⁴, where the following is recorded:

'In the leading case on determining the effects of acts done in conflict with a prohibition, *Standard Bank v Estate Van Rhyn*, Solomon JA held (Innes CJ and Wessels JA concurring):

"The contention on behalf of the respondent is that when the Legislature penalizes an act it impliedly prohibits it, and that even the effect of the prohibition is to render the act null and void, even if no declaration of nullity is attached to the law. That, as a general proposition, may be accepted, but is not a hard and fast rule universally applicable. After all, what we have had to get at is the intention of the Legislature, and, if we are satisfied in any case that the Legislature did not intend to render the act invalid, we should not be justified in holding that it was. As Voet (1.3.11116) puts it – "but that which is done contrary to law is not *ipso facto jure* null and void, where the law is content with a penalty laid down against those who contravene it." Then, after giving some instances in illustration of this principle, he proceeds: "The reason of all this is I

³ 2018 (1) NR 155 SC Para 53.

⁴ 1925 AD 226 .

take to be that in these and the like cases greater inconveniences and impropriety would result from the rescission of what was done, than would follow the act itself done contrary to the law.’

[39] I agree with the plaintiff that it is a party that has been caught in the cross fire as it were. It appears to have acted in a *bona fide* manner and rendered goods and services in relation to a tender. It would work great hardship, in my view to allow the 1st defendant to benefit from this transaction and at the same time, not allow the plaintiff, which on first principles, appears to have carried out the work not to reap where it has sowed. In any event, there is no indication that s. 23 renders the contract procured in its contravention null and void.

[40] In closing, the 1st defendant, in urging the court to find for it and contemporaneously against the plaintiff submitted as follows in its heads of argument:⁵

‘It is in the interest of justice that the application be granted. The Plaintiff has not made out a clear case against the First Defendant and no court could find for the Plaintiff against the First Defendant.’

[41] I make two remarks in relation to this statement by the 1st defendant. It appears to me that the said defendant and it is this: it has raised the bar or threshold too high. I say so for the reason that the authorities on absolution do not require of a plaintiff to make out “a clear case”. If that were so, it would seem that the standard would even be higher than the standard generally applicable in civil cases, namely, on the preponderance or balance of probability.

⁵ Page 12 under G: Conclusion

[42] The second point is well made by Cilliers *et al*⁶. I do not wish to do violence to the pure statement of the law made therein and will, for that reason, quote it verbatim. The learned authors say:

'If the defence is something peculiarly within the knowledge of a defendant and the plaintiff has made out some case to answer, then the plaintiff should not lightly be deprived of a remedy without first hearing what the defendant has to say. A defendant who might be afraid to go into the witness-box should not be permitted to shelter behind the procedure of absolution from the instance.'

[43] In *United Air Charters (Pvt) v Jarman*⁷, Gubbay CJ stated the applicable standard as follows regarding the correct standard to apply at absolution stage:

'A plaintiff will successfully withstand such an application if, at the close of his case there is evidence upon which a court, directing its mind reasonably to such evidence, could, or might (not should or ought) to find for him.'

I am of the considered view, in the light of the foregoing, of the considered view that the plaintiff has discharged its task at this stage. I find that it has adduced evidence upon which a court, acting reasonably, might find for it. The ball has now been served into the 1st defendant's court, so to speak, for it to canvass its own case in its defence.

Conclusion

[44] In the premises, and for the foregoing reasons, I have come to the considered view that the application for absolution from the instance should fail.

⁶ Herbstein & Van Winsen, *The Civil Practice of the High Courts of South Africa*, 5th ed, Vol 1, p 922.

⁷ 1994 (2) ZLR 341 (SC).

Order

[45] The order to be granted in the circumstances, is the following:

4. The application for absolution from the instance is refused.
5. The First Defendant is to pay the costs of the application consequent upon the employment of one instructing and one instructed Counsel.
6. The matter is postponed to the case management roll of 18 July 2019 for the allocation of dates of continuation of the trial.

T.S. Masuku
Judge

APPEARANCES:

PLAINTIFF: H. Kirsten-Garbes

Instructed by Engling, Stritters & Partners

DEFENDANTS: J. Diedericks

Of Diedericks Inc.