



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2017/00339

In the matter between:

MWAMBA JUSTIN MWANAKATWE

PLAINTIFF

and

TUJAKULA CC

DEFENDANT

Neutral citation: *Mwanakatwe v Tujakula CC* (HC-MD-CIV-ACT-CON-2017/00339)
[2019] NAHCMD 251(16 July 2019)

Coram: TOMMASI, J

Heard: 1 - 4 April 2019

Delivered: 16 July 2019

Flynote: Civil Practice – Terms of Contract – Performance in terms of contract – Repudiation: Where a party to a contract clearly shows an intention not to be bound by the agreement, it amounts to a repudiation of the agreement.

Summary: Plaintiff instituted action against the defendant for repayment of monies it had paid to defendant as deposit, in terms of an agreement entered into by the parties.

The defendant entered a notice of intention to defend, filed a plea and counterclaim. The plaintiff claims to have performed in terms of the agreement and alleged that defendant repudiated the agreement by refusing to install the cupboards as agreed between the parties. The defendant on the other hand, pleaded that plaintiff breached the agreement by not paying the remaining money as agreed.

Court held: Where a party to a contract clearly shows an intention not to be bound by the agreement, it amounts to a repudiation of the agreement. This may be either an indication not to perform the obligations imposed, or by conduct disabling such party or the other party from performing.

Court held further: That the failure by plaintiff to place the water and electrical points where the defendant insists it must be, does not make it impossible for defendant to perform in terms of the contract. It is furthermore not an essential term of the contract and plaintiff ultimately bears the risk and liability for the connection of water and electricity. Therefore defendant failing and refusing to perform as agreed, amounts to repudiation. Plaintiff is therefore entitled to a refund of the deposit in the sum of N\$213 772. 32 paid to defendant.

ORDER

Plaintiff's claim:

1. Payment in the amount of N\$213 772.32;
2. Interest on the aforesaid amount at the legal rate of 20% per annum from 20 February 2018 to date of refund;
3. Cost of suit (Main Action).

Defendant's counterclaim:

1. Payment of the amount of N\$800.00 per month from 1 September 2016 to 20 February 2018;
2. Interest on the aforesaid amount from date of judgment to date of payment;
3. Cost of Suit (Counterclaim);
4. Matter is removed from the roll: Case Finalized.

JUDGMENT

TOMMASI J:

[1] The parties hereto entered into a written agreement on 17 June 2016. Plaintiff, an architect by profession, required defendant to install kitchen cupboards, shelves and bedroom cupboards at his house. Defendant drew up the design and plans for the cupboards and same was accepted and signed by plaintiff. Plaintiff at the time represented himself and defendant was represented by Ms Iilling, the sole member of the defendant.

[2] In terms of the written agreement, the plaintiff had to pay 60% of the quoted amount as a deposit, 20% when the material was loaded in Hamburg and 10% when it arrived in Walvisbay. The remaining 10% was to be paid after installation. The plaintiff paid 60% of the quoted amount. From the evidence adduced it appears that the material was loaded in Hamburg on 09 August 2016 and it was to arrive at its final destination in Walvisbay on 29 August 2016.

[3] During August 2016, the parties communicated with each other via e-mail. The defendant requested 20 % payment when the material was loaded and the further 10% payment after the arrival of the material. The plaintiff required further or tangible proof that it was indeed his material before making further payments. Defendant invited

plaintiff to enquire from the persons who dispatched the material but plaintiff's concern was that he was not furnished with a complete element list. Plaintiff insisted on delivery of the materials on site i.e. at his house and defendant insisted on payment as per the agreement. The plaintiff clearly distrusted defendant and was only satisfied during trial that the material which was in the defendant's possession was indeed the material for his cupboards.

[4] A year later, during February 2017, plaintiff instituted action against defendant for repayment of N\$213 772.32, the deposit he paid to defendant. Plaintiff claimed to have performed in terms of the agreement and alleged that defendant repudiated the agreement by refusing to install the cupboards. Defendant pleaded that plaintiff breached the agreement by not paying the 30% as agreed.

[5] The matter was referred for mediation. A settlement was reached but despite this fact, plaintiff filed an amended particulars of claim on 4 April 2018. Plaintiff claimed that the parties agreed that he would deposit the full outstanding balance into the trust account of his legal practitioner and defendant in turn would install the cupboards and shelves once this is done. He pleaded that defendant refused to perform in terms of the agreement despite the fact that he paid the outstanding balance as agreed on 20 February 2018.

[6] Defendant pleaded that the site was not ready as agreed. Defendant was prepared to install the cupboards once the site was ready. Defendant also instituted a counterclaim for the storage of the material at the rate of N\$800 per month from end of August 2016 to date of installation.

[7] The issues in the main action is whether defendant's refusal to install the cabinets either in total or in part amounts to a repudiation of the agreement and whether the defendant was lawfully excused from performing in terms of the agreement. The issues in respect of the counterclaim is whether the defendant is entitled to recover

storage costs for the material and whether the defendant had adequately proven the quantum of damages.

[8] *In McLaren NO and Others NNO v Municipal Council of Windhoek and Others 2018 (1) NR 250 (SC)* Frank AJA (Mainga JA and Hoff JA concurring) at paragraph 44, page 262, states the following:

‘Where a party to a contract unequivocally evidences an intention not to be bound by the agreement, it amounts to a repudiation of the agreement. This may be either an indication not to perform the obligations imposed, or by conduct disabling such party or the other party from performing. As stated in the Datacolor case (para 17)

“a repudiatory breach may be typified as an intimation by or on behalf of the repudiating party, by word or conduct and without lawful excuse, that all or some of the obligations arising from the agreement will not be performed according to their true tenor.” ‘

[9] Defendant clearly indicated that it would not perform in terms of the contract unless certain conditions are met. The reasons advanced is that the water points and electrical points are not situated in accordance with the agreed plans and one window in the kitchen must be made smaller (built up) in order for her to attach the hanging cupboard. According to Ms lilling, the wall surface above the window is not sufficient to fit the hanging cupboard. Plaintiff testified that the wall was 450 cm and the cupboards were 600cm in length. According to plaintiff 150 cm would hang over the window. According to Ms lilling the cupboards are designed and manufactured in Germany and it requires additional wall space to properly fit the cupboards. According to her it is not possible to fit the cupboards under the prevailing circumstances. She reasoned that plaintiff, an architect by profession, could see from the plans that there are 3 water points which is also a point for electricity. It was her testimony further that defendant, as a rule, does not want to partially install but only install all the cupboards at the same time.

[10] Plaintiff agreed that the points are not where they are supposed to be but he reasoned that the water and electrical points are not the concern of the defendant. He reasoned that it is his obligation to ensure that the water and electrical works fit the cupboards. It was put to Ms Lilling that plaintiff could drill holes in the cupboards if need be. This suggestion was not well received by Ms Lilling who was of the view that it would destroy the cupboards.

[11] It was not disputed that the living room and the bedrooms were ready for the installation of the shelves and bedroom cupboards. The kitchen site was the contested space. The one contested point was the water and electrical points. An inspection *in loco* revealed that a freshly installed water point was installed but it was not at the place where it was indicated on the agreed plans

[12] Mr Vaatz, counsel for the Plaintiff submitted that the contract does not specify where the points should be and a proper reading of the contract indicates that the water and electricity supply is the responsibility of plaintiff. He further submitted that the bricking up is not part of the agreement. He submitted that defendant's refusal to install the living room shelves and bedroom cupboards is an indication that defendant has no intention of installing the cupboards.

[13] Mr Muller, counsel for defendant, conceded that the bricking up of the window is not part of the contract but that the situation of the water and electrical points are part of the agreement and it also formed part of the drawing. He submitted that defendant must guarantee the quality of the work and it has an interest in the proper installation of the cupboards.

[14] The following were the material terms of the agreement:

- a) Payment of 60% of the quoted amount is payable on date of approval of this estimate with the signed order of same;
- b) Payment of 20 % when the container is loaded in Hamburg;

- c) Payment of 10% when the container arrives in Walvisbay;
- d) Payment of 10% after the Installation in done.

The following terms relate to the disputed water and electrical points and I quote these terms verbatim:

'14. Please be advised that Tujakula will only start installations when the site is lockable, electrical points are situated and water points;

15. Please note that Tujakula CC will not be reliable (sic) for water leakages and electrical shortage.

16. Please note that Tujakula Cc will not be reliable (sic) for electrical connections and water connections.'

[15] Paragraph 14 of the agreement is the clause which gives rise to defendant's refusal to install the cupboards. If there has been non-compliance with this provision then the clear wording of the contract suggests that installation cannot take place. Plaintiff's interpretation is that as long as he made provision for water and electrical points he has complied with the provisions of the agreement. Defendant's interpretation of this clause is that the water and electrical points must be situated as per the plan which was signed by plaintiff. According to Ms lilling, not only did plaintiff agree to it but he also knows how to read the plans, given his profession.

[16] The court must give the wording of clause 14 of the agreement its ordinary meaning. The construction of the sentence is not grammatically correct but it is evident that it was meant that the water and electricity points must be "situated". The ordinary meaning of situate is to put/place something in a particular place or position. The position of these points was indicated on the plan. Plaintiff was fully aware of the position where the water points had to be placed but opted to put the points at a different position. Plaintiff relied on the further understanding that he would ultimately be

liable for the connection of the water and electricity and this should not be a lawful excuse for defendant to refuse the installation of the built-in cupboards.

[17] I am of the considered view that the failure by plaintiff to place the water and electrical points where the defendant insists it must be, does not make it impossible for defendant to perform in terms of the contract. It is furthermore not an essential term of the contract and plaintiff ultimately bears the risk and liability for the connection of water and electricity.

[18] Moreover, defendant further insists that plaintiff brick up the window. This requirement does not form part of the contract. Defendant's insistence that the window be bricked up before she installs the cupboards is not justified in terms of the agreement which she had entered into with plaintiff. The requirement to brick up the window involves a structural change to the house of plaintiff. It requires his explicit agreement which was not borne out of the evidence adduced.

[19] There was nothing impeding defendant to install the bedroom cupboards and shelves in the living room. This fact waters down defendant's tender to perform.

[20] In the circumstances defendant had no lawful excuse to refuse to install the cupboards and her continued persistence that the conditions are to be met, constitutes a repudiation of the agreement. Plaintiff is therefore entitled to a refund of the deposit in the sum of N\$213 772. 32 paid to defendant.

[21] Plaintiff initially did not pay the amounts which was due to defendant and was strictly speaking in breach of the agreement. At that stage defendant had a lawful excuse not to perform in terms of the agreement. Plaintiff claims interest at the legal rate on the amount paid to defendant from date of payment until date of refund. Plaintiff is responsible for the delay occasioned between 29 August 2016 and 20 February 2018 when he finally paid the outstanding balance into the trust account of his Legal

Practitioner. In light of this, plaintiff would only be entitled to claim interest at 20% from 20 February 2018 to date of refund.

The Counter claim

[22] Defendant claimed that, as a result of having procured the products as ordered by plaintiff, it is entitled to storage costs from the date the materials were received by defendant (end of August 2016) until final installation. Defendant testified that she had checked with different storage places and the rate of N\$800 was rather on the conservative side.

[23] Plaintiff pleaded that the non-installation is of defendant's own making and is accordingly not entitled to storage costs.

[24] Mr Vaatz submitted that defendant did not prove its damages and plaintiff in any event offered to keep the material at his house. Mr Mueller argued that it would be unwise for defendant to store the material at the residence of plaintiff given the dispute between the parties.

[25] Defendant is essentially claiming damages for plaintiff's breach of contract i.e. (a) failure to pay in accordance with the contract and (b) failure to secure the site is ready for installation. The latter issue has been dealt with above.

[26] The defendant, to my mind, sufficiently adduced evidence to satisfy this court that the material arrived on 29 August 2016. Plaintiff, according to the agreement, had to pay the 30% which became due after the material arrived in Walvisbay and it is evident that plaintiff did not want to pay this amount given the distrust which had developed between him and Ms Illing. The terms of the contract in this regard are clear and plaintiff's failure to perform by paying the 20% and 10 % when it became due as per the agreement, is a breach of the agreement. Defendant had a lawful excuse not to

perform further in terms of the agreement. However after payment of the money into the trust account of plaintiff's attorney, there was no further excuse not to install the cupboards and shelves.

[27] I have already indicated that the Plaintiff was in breach of the agreement by refusing to pay the additional 30% after the material arrived at Walvisbay and only paid the remaining sum into the account of his attorney on 20 February 2018. The Defendant stored the material for this period in her warehouse. The Defendant claims an amount of N\$800 per 30 days for the period from 1 September 2016 to date of installation. The Plaintiff gave adequate security that the amount would be paid on 20 February 2018 and the Defendant had to bring the material to the site as per the agreement. The Defendant therefore is only entitled to storage fees from 1 September 2016 to 20 February 2018 at the rate of N\$800.

[28] Ms Iilling, under oath, testified that she had enquired from other storage facilities what the storage fee would be for the storing of the material and she conservatively pegged her costs at N\$800 per month. I am satisfied, on the evidence adduced, that defendant indeed stored the material at her warehouse and that she had adequately proved her damages in the sum of N\$800 per month.

[29] In the result, the following order is made:

Plaintiff's claim:

1. Payment in the amount of N\$213 772.32;
2. Interest on the aforesaid amount at the legal rate of 20% per annum from 20 February 2018 to date of refund;
3. Cost of suit (Main Action).

Defendant's counterclaim:

1. Payment of the amount of N\$800.00 per month from 1 September 2016 to 20 February 2018;
2. Interest on the aforesaid amount from date of judgment to date of payment;
3. Cost of Suit (Counterclaim);
4. Matter is removed from the roll: Case Finalized.

M A TOMMASI

Judge

APPEARANCES

PLAINTIFF:

A VAATZ

Of Andreas Vaatz & Partners, Windhoek

DEFENDANT:

R MUELLER

Of Mueller Legal Practitioners, Windhoek