**IN THE HIGH COURT OF NAMIBIA**

**‘ANNEXURE 11”**

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| **Case Title:** Shikongo Law Chambers vs Anhui Foreign Economic Construction Group Corporation Limited and Another. | **Case No:** HC-MD-CIV-ACT-CON-2018/03463 |
| **Division of Court:**High Court, Main Division |
| **Heard before:**Honourable Justice Herman Oosthuizen | **Date of hearing:**5 June 2020 |
| **Delivered on:** 3 July 2020 |
| **Neutral citation:** *Shikongo Law Chambers v Anhui Foreign Economic Construction Group Corporation Limited* (HC-MD-CIV-ACT-CON-2018/03463) [2020] NAHCMD 264 (3 July 2020) |
| **Result on merits:**Defendants' exception succeeds |
| **The Order:**Having heard **Ms Jason**, counsel for the plaintiff and **Mr Stoan Horn,** counsel for the defendants:**IT IS ORDERED THAT:**[1] The exception of defendants that the amended particulars of claim of the plaintiff does not sustain or disclose any cause of action, succeeds.[2] The amended particulars of claim is therefor struck.[3] Plaintiff shall pay the costs of suit of the defendants.[4] The case is finalised and removed from the roll. |
| **Reasons for Orders:** |
| [1] Plaintiff filed an amended particulars of claim against the defendants ‟for payment of the sum of N$3 225 000 in respect of professional services rendered by the plaintiff to the Defendants at the Defendants' special instance and request during the period 30 March 2016 until March 2017”.[2] Plaintiff allege that the whole cause of action arose within the jurisdiction of the High Court of Namibia.[3] Plaintiff pleaded that the aforestated sum of money represents 50% of an amount invoiced jointly by Tjombe-Elago Inc and plaintiff.[4] Plaintiff pleaded that at all material times the plaintiff was represented by Mr Shikongo and first and second defendants by a duly authorised representative.[5] Plaintiff pleaded that a written agreement, annexure ‟A” to its amended particulars, was concluded between Tjombe-Elago and the defendants. Plaintiff was not a party to the written agreement (it pleaded) since it was already agreed that plaintiff would provide services jointly with Tjombe-Elago (plaintiff does not plead when and where and by whom). Plaintiff pleaded that it does not rely on the written agreement but on a verbal agreement with the same terms and conditions (as the written agreement).[6] Sub-paragraph 6.7 and paragraphs 7 to 9 of the amended particulars are quoted in full: “6.7 The salient terms of the aforementioned written agreement are the following. The plaintiff reiterates that its claim is not based on the written agreement, but on a verbal agreement with the same terms and conditions: 6.7.1 In consideration of the legal services provided by the Plaintiff, the Defendant would pay an amount equivalent to 1.5% of the direct costs of construction of the upgrade to the Hosea Kutako International Airport. At the time of entering the agreement that amount was US$477,854,350.00, less VAT and levies chargeable by the Government of the Republic of Namibia. This amount excluded amounts disbursed by the Defendant to the Plaintiff during the impending litigation. 6.7.2 The Defendant would pay the legal fees described in paragraph 6.7.1 above upon commencement of the construction, alternatively upon payment by the Namibia Airports Company of the deposit in terms of the contract to be signed between the Defendant and Namibia Airports Company, whichever event occurred first. The payment would be made directly into a designated account. 6.7.3 Should the action not be successful, the Defendant would only pay the actual disbursements, travel expenses and administration expenses together with other legal expenses either actually incurred during the impending litigation. 6.7.4 The Plaintiff complied with its obligations in terms of the agreement by providing the legal services, in collaboration with Tjombe-Elago Inc, to the Defendants at their special instance and request and in accordance with the verbal agreement. 6.7.5 In particular the Plaintiff, at the specific instance and request of the Defendant, attended to all consultative sessions and court appearances jointly with Tjombe-Elago Inc. These attendances include legal expenses actually insured, were jointly invoiced under cover of an invoice issued by Tjombe-Elago Inc in accordance with the verbal agreement between the Plaintiff and Defendants. 7. The Defendants had duly paid all the legal fees, disbursements and travel costs of the Plaintiff as indicated on the joint invoice furnished by Tjombe-Elago Inc as verbally agreed. This agreed state of affairs continued until September 2017 when the Defendants suddenly refused and/or failed and/or neglected to pay the full amount of the joint invoice in question. This invoice was for the amount of N$6 360 184.70. The defendants instead only paid the portion of the invoice due to Tjombe-Elago Inc, leaving the portion due to the Plaintiff in the amount of N$3 180 092.35 outstanding. The said invoice is attached hereto marked Annexure ‟B”. 8. Insofar as the Defendants were not successful in securing the agreement as envisaged, the Defendants are liable to the Plaintiff only in respect of actual disbursements and legal fees incurred during the impending litigation. 9. The Defendants are accordingly indebted to the Plaintiff in the amount of N$3 180 092.35 being the actual legal fees and disbursements invoiced during the period in question.”[7] Annexure ‟A”, which according to plaintiff embody the verbal agreement it relies on, consisted of an introductory part with three numbered paragraphs under the word ‟WHEREAS” and three numbered paragraphs under the recordal of the agreement.[8] Paragraphs (1) and (2) in the introductory part clearly mention the provision of legal services and legal fees for legal services.[9] The third introductory part refer to letters dated 6 and 16 February 2016 ‟in respect of such fees as contingent on the outcome” of the legal action to be instituted.[10] Paragraph 1 of the agreement recordal (which according to plaintiff is reflecting its verbal agreement's terms), is clear: 1.5% of direct construction costs of the upgrade, will be the consideration for legal services.  (*in excess of N$100 million*)[11] The conclusionary part of paragraph 2 of the agreement recordal, is evenly clear: “The payment of 1.5% will only be made when the firm is successful in the impeding litigation of the Hosea (sic) Kutako International Airport.” “Should the firm not be successful, the client will only pay the actual disbursement, travel expenses and administrative expenses and other fees actually incurred during the impeding litigation.”  (Note the difference with sub-paragraph 6.7.2 of the amended particulars of claim)[12] Applying the principles for interpreting contracts as set out in *Total Namibia v OBM Engineering and Petroleum Distributors* 2015 (3) NR 733 (SC)[[1]](#footnote-1), it is clear that Annexure “A” to the amended particulars of claim and consequently the verbal contract of plaintiff on the same terms, provide for two distinct payment scenarios: [12.1] The first is for the payment of legal or professional fees if the plaintiff is successful, calculated on 1.5% of the direct construction costs payable into any account designated by the firm (plaintiff). [12.2] Secondly, and in the event the firm is unsuccessful in the litigation, only payment of actual disbursements, travel expenses, administrative expenses and other fees actually incurred during the impeding litigation into the trust account of the firm. [13] *Total Namibia*[[2]](#footnote-2) makes it clear that the construction and interpretation of a contract remains ‟a matter of law, and not of fact, and accordingly, interpretation is a matter for the court and not for witnesses”.[14] Paragraph [24] of *Total Namibia*[[3]](#footnote-3) reads: “The approach adopted here requires a court engaged upon the construction of a contract to assess the meaning, grammar and syntax of the words used, as well as to construe those words within their immediate context, as well as against the broader purpose and character of the document itself. Reliance on the broader context will thus not only be resorted to when the meaning of the words viewed in a narrow manner appears ambiguous. Consideration of the background and context will be an important part of all contractual interpretation”.[15] In the premises the parties to the contract have clearly made provision for legal fees in the event of plaintiff being successful in the impeding litigation and if unsuccessful only for payment of actual disbursements, travel and administrative expenses and other fees actually incurred during the litigation. The parties to the agreement are clearly only the firm (plaintiff) as instructing legal practitioner and defendants. Instructed counsel or counsel to be instructed were not parties to the agreement.[16] The second scenario was clearly aimed at preventing the firm (plaintiff) of being out of pocket concerning actual disbursements, travel and administrative expenses and other fees actually incurred. Other fees notably would include fees raised by instructed legal practitioners.[17] Plaintiff's cause of action requires a finding by the court that ‟other fees actually incurred” during the litigation is inclusive of legal or professional fees by instructing counsel who, as party to the agreement, has opted for legal fees, only if successful, on 1.5% of construction costs.[18] The words used in the contract in the context thereof do not favour the plaintiff. Payment scenario one makes provision for the consideration of legal services if successful. Payment scenario two makes provision for other related activities i.e. disbursements, travel and administrative expenses and other fees actually incurred if unsuccessful. It does not include legal or professional fees of instructing counsel. If it was the intention of the parties to include legal or professional fees of instructing counsel under other fees, they could have explicitly and unambiguously contracted on those terms. They did not. The reason is clear. Being a contingency agreement, instructing counsel is only entitled to his/its legal fees if successful. Instructing counsel is not entitled to its legal fees if unsuccessful.[19] The interpretation and meaning given to plaintiff's verbal agreement with the same terms and conditions as the written agreement attached to the amended particulars of claim are supported by the last sentence of clause 1 in the recordal of the written agreement[[4]](#footnote-4) concerning the consideration for the legal services.[20] It is also supported by clause 3 of the recordal concerning the disbursements incurred during the proceedings payable into the Trust account. The court also point out, *ex abundante cautela*, that the very last page of Annexure “B” to the amended particulars of claim, the alleged joint invoice, clearly show that defendants have paid the disbursements (scenario two) already.[21] The court shall not decide the issue of the legality of the contingency fee agreement. The research and submissions by counsel for the parties on the issue were not comprehensive. Plaintiff in essence evaded the issue on the submitted basis that the issue does not arise, which is not satisfactory at all.[22] The conclusion which the court has reached regarding the meaning of the words “other fees” however made it unnecessary to decide the issue of the legality of an agreement which clearly is a contingency agreement.[23] Plaintiff's pleaded cause of action for payment of its professional or legal fees is not supported by its verbal agreement with defendants. In other words the amended particulars of claim does not disclose a cause of action.[24] In view of the above finding it is not necessary to pronounce on the exceptions that the amended particulars of claim is vague and embarrassing save to say that paragraphs 6, 6.1, 6.4, 6.5, 6.6, and 7 of the amended particulars of claim are indeed vague and embarrassing due to plaintiff's non-compliance with Rule 45(5) and (7). [25] In respect of plaintiff's alternative claim of enrichment, it is found that paragraph 11 refer to paragraphs 11 to 13 which are part of its alternative claim; refer to legal services rendered by plaintiff in pursuance of its verbal agreement with defendants and with the purpose to benefit from the agreed lucrative 1.5% consideration calculated on actual construction costs for the upgrade of the Hosea Kutako International Airport in the event plaintiff was successful with the impeding litigation; were not rendered *sine causa* and in error but in pursuing success in terms of plaintiff's verbal agreement; success which only could be assessed upon finalisation of the litigation.[26] Plaintiff's alternative claim based on unjust enrichment of the defendants, in the premises, is not available to it.[27] *Van Straten NO and Another v Namibia Financial Institutions and Another*[[5]](#footnote-5) of the Supreme Court is compelling authority where an exception is taken on the grounds that no cause of action is disclosed or is sustainable on the particulars of claim. Applied to the case under consideration and in conjunction with the findings of this court, no cause of action is disclosed or is sustainable on the amended particulars of claim.[28] In the premises the following orders are made: [28.1] The exception of defendants that the amended particulars of claim of the plaintiff does not sustain or disclose any cause of action, succeeds. [28.2] The amended particulars of claim is therefor struck. [28.3] Plaintiff shall pay the costs of suit of the defendants. [28.4] The case is finalised and removed from the roll. |
| **Judge’s signature:** | **Note to the parties:** |
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| **Counsel:** |
| **Plaintiff(s)** | **Defendant (s)** |
| Ms Jason Shikongo Law ChambersWindhoek | Mr Stoan HornDe Klerk Horn & Coetzee Inc.Windhoek |

1. Vide *Total Namibia v OBM Engineering and Petroleum Distributors* 2015 (3) NR 733 (SC) paragraphs [18], [19] [20], [21], [22], [23] and [24] at 739-741. [↑](#footnote-ref-1)
2. Op cit, paragraph [23] at 741 E. [↑](#footnote-ref-2)
3. Op cit, 741 F and G. [↑](#footnote-ref-3)
4. ‟The amount payable is also to exclude any amounts disbursed by the client to the firm during the impeding litigation”. [↑](#footnote-ref-4)
5. 2016 (3) NR 747 (SC), paragraph 18. [↑](#footnote-ref-5)