

“ANNEXURE 11”
Practice Directive 61

IN THE HIGH COURT OF NAMIBIA

Case Title: Sisi Consultancy and Technical Services v Nacio Construction CC	Case No: HC-MD-CIV-ACT-CON-2019/03769
	Division of Court: MAIN DIVISION
Heard before TOMMASI J	Date of hearing: 16 June 2020
	Delivered on: 6 July 2020
Neutral citation: <i>Sisi Consultancy and Technical Services v Nacio Construction CC</i> (HC-MD-CIV-ACT-CON- 2019/03769) [2020] NAHCMD 271 (6 July 2020)	
Results on merits: .	
The order: The court grants Summary Judgment in favour of the plaintiff in the following terms: <ol style="list-style-type: none">1. Claim 2<ol style="list-style-type: none">1.1. Payment in of sum of N\$10 102.92 (N\$192 102.92 – N\$182 000);1.2. Payment of N\$500 per day calculated from 1 November 2018 to date of final payment;1.3. Interest a <i>tempore morae</i> at the rate of 20% per annum from date of judgment to date of final payment;2. The Defendant is granted leave to defend claim 1 and the remaining amount of N\$85 538.24 of claim 2 of the plaintiff’s particulars of claim.3. The cost to be cost in the cause.4. The parties must file a joint case plan on or before 24 July 2020.5. The matter is postponed to 29 July 2020 for case planning hearing.	
Reasons for orders:	

TOMMASI J,

[1] On 10 July 2017 the plaintiff (the contractor) entered into a written agreement with the defendant (the employer) for the construction of a conservancy tank for the Ngoma Clinic. This agreement is an addendum to the Principle Agreement. The Principle agreement is between the Defendant (the contractor) and the Ministry of Health and Social Services (the employer). The Principal Agent of the Minister of Health and Social services is Loubsher Prinsloo Architects t/a International Consulting The agreement between the parties stipulates that is to be read in conjunction with the principal agreement.

[2] The plaintiff herein applied for Summary Judgment which is opposed by the Defendant. A reading of the plaintiff's particulars of claim and the opposing affidavit of the defendant reveals that the following facts are not in dispute:

- The Plaintiff would construct the conservancy tank for the amount of N\$428 042.57;
- The construction period would be for a period of three months commencing on 28 June 2017 and ending on 27 September 2017, with the provision that if there is a delay in the works for reasons enumerated in clause 20.1 and 20.2 of the Principal Agreement, the contractor (Defendant) may apply for a reasonable extension of time;
- If no extension is granted the defendant would be entitled to claim a penalty of N\$500 per day for non-completion;
- The date of practical completion was 26 September 2018 one day short of one year after the agreed date for the completion of the work;
- The Principal Agent issued two interim certificates which represents a reasonable estimate of the total value of the work duly executed and assessed. The Ministry of Health and Social Services paid the defendant N\$96 461.76 on 22 February 2018 and N\$95 641.16 on 18 October 2018 based on the two interim certificates issued by the Principal Agent.
- In terms of the agreement between the parties the Defendant shall pay the plaintiff within 14 days of receipt of the amount stated in the interim certificate and plaintiff would be entitled to penalties of N\$500 per day for each day of non-payment.

[3] The plaintiff claims the two amounts which were paid to the defendant in respect of interim certificates issued as well as the penalty of N\$500 per day from 18 March 2018 (14 days after receipt of the first payment) and 1 November 2018 (14 days after receipt of the second payment) as penalties for non-payment. The plaintiff aver that certain extensions were granted and attached a letter from the Principal Agent in support hereof. In terms of the said letter the period of non-completion without the required extension totals 80 days. This amounts to a penalty of N\$40 000. The plaintiff tendered this amount in its particulars of claim.

[4] The defendant however disputes the plaintiff's averment that extensions were granted to the plaintiff and avers that the period of delay totaled 364 days amounting to a penalty of N\$182 000. In support for the averment that no extension was granted the defendant attached a letter by the Principal Agent addressed to the defendant which is dated 6 October 2016 i.e prior to the conclusion of the agreement between the parties. This annexure is therefore unhelpful. The defendant is thus raising a counterclaim as a defence.

[5] It is trite that an unliquidated counterclaim constitutes a *bona fide* defence to plaintiff's liquidated claim provided that full particulars of the material facts are provided.¹

[6] The material facts for the defendant's counterclaim is common cause between the parties. The period between the practical completion date agreed upon by the parties and the actual completion date is in fact 364 days. The agreement makes provision for a penalty of N\$500 per day for non-completion. This is the crux of the defendant's counterclaim. I am satisfied that the defendant succeeded in part to show that it has a *bona fide* defence.

[7] This defendant, after practical completion of the work by the plaintiff on 26 September 2018 had received a total payment of N\$192 102.92 in February and October

¹ (see *Viviers v Ireland* (HC-MD-CIV-ACT-CON-2018/03932) [2019] NAHCMD 148 (10 May 2019 par 21)).

respectively, leaving a balance of N\$10 102.92 in favour of the plaintiff. This balance became due and payable within 14 days of receipt payment i.e on 1 November 2018.

[8] The agreement provides that the interim certificate is for work evaluated and assessed. The defendant offers no defense for failing to pay the balance after deducting the amount of N\$182 000 in penalties. In light of the defendant's failure plaintiff would be entitled to payment of N\$10 102.92 together with penalties of N\$500 per day after 1 November 2019 until date of payment.

[9] In terms of Rule 60 (8)(b) & (8) (b)(ii) the court must give leave to defend to the defendant as to part of the claim when it appears that the defendant is entitled to defend a part of the claim, and enter judgment against him or her as to the balance of the claim.

[10] In the premises the following order is made:

The court grants Summary Judgment in favour of the plaintiff in the following terms:

1. Claim 2
 - 1.1. Payment in of sum of N\$10 102.92 (N\$192 102.92 – N\$182 000);
 - 1.2. Payment of N\$500 per day calculated from 1 November 2018 to date of final payment;
 - 1.3. Interest *a tempore morae* at the rate of 20% per annum from date of judgment to date of final payment;
2. The Defendant is granted leave to defend claim 1 and the remaining amount of N\$85 538.24 of claim 2 of the plaintiff's particulars of claim.
3. The cost to be cost in the cause.
4. The parties must file a joint case plan on or before 24 July 2020.
5. The matter is postponed to 29 July 2020 for case planning hearing.

Judge's signature:	Note to the parties:
	Not applicable.

Counsel:	
Applicant	Respondent
H Ntelamo-Matswetu Of Ntelamo-Matswetu & Associates Windhoek	K Kamwi Of K Kamwi Law Chambers Windhoek