



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no.: HC-MD-CIV-ACT-CON-2019/03064

In the matter between:

SPESBONA CONSTRUCTION AND RENOVATIONS CC

PLAINTIFF

and

ALUTECH NAMIBIA CC

DEFENDANT

Neutral citation: *Spesbona Construction and Renovations CC v Alutech Namibia CC* (HC-MD-CIV-ACT-CON-2019/03064) [2021] NAHCMD 141 (31 March 2021)

Coram: PARKER AJ

Heard: 29 March 2021

Delivered: 31 March 2021

Flynote: Contract – Breach – Action on contract – Claim based on moneys paid for works but works not done in return – Defendant failing or refusing to perform its obligation under oral contract – Court satisfied defendant’s refusal and failure amounted to breach of contract – Consequently, plaintiff entitled to return of amount paid to defendant.

Summary: Contract – Breach – Action on contract – Plaintiff contractor paid moneys to subcontractor defendant as advanced payment for defendant to execute works at a project site in terms of oral contract – Defendant failed or refused to perform its obligation under the contract – Court satisfied plaintiff has proved breach – Consequently, defendant ordered to pay amount back to defendant.

ORDER

1. Plaintiff succeeds in its claim.
2. Defendant's counter claim is dismissed.
3. Defendant shall pay to plaintiff N\$358 776.09, together with interest on this amount at the rate of 20 per cent per annum a tempore morae calculated from the date of issuance of summons until date of full and final payment.
4. Defendant shall pay plaintiff's costs of suit, and such costs shall include costs of one instructing counsel and one instructed counsel (in respect of what instructed counsel was employed for).
5. This order is unaffected by any liquidation application that defendant might have filed after 11H00 on Friday, 26 March 2021.
6. The matter is considered finalized and is removed from the roll.

JUDGMENT

PARKER AJ:

[1] This case involves construction and installation works in a project for the construction of the Regional Headquarters in Eenhana in the Ohangwena Region of the then Ministry of Agriculture, Water and Forestry. The matter involves plaintiff which was awarded tender No. T12.2014 for the project as the main contractor, the defendant as the sub-contractor of the project for the supply and installation of all aluminium windows, shopfronts and doors in connection with the project, and

Stauch and Partners (Architects) as the Principal Agent for the project. Stauch and Partners are not parties to the instant matter.

[2] Mr Davids represents the plaintiff and Mr Karsten represents the defendant. At the commencement of the trial, Mr Davids placed on record that counsel for defendant who had appeared for last Friday's Civil Roll Call informed the presiding judge that defendant would want to launch a voluntary liquidation application. The presiding judge instructed counsel to file papers at or before 11H00 on that Friday, 26 March 2021. The application was not instituted at or before the aforementioned time and date. It was filed the morning of today, 29 March 2021. That being the case, this court ruled that as far as the court was concerned no liquidation application had been filed with the court; and so, the trial should proceed as set down.

[3] The court found that the defendant who has instituted a claim in reconvention had not filed any witness statements. The result was that no witness could give evidence in support of defendant's claim in convention and claim in reconvention. Accordingly, Mr Karsten closed defendant's case in respect of the claim in convention, as well as the claim in reconvention. It follows that defendant's claim in reconvention stood unproved and, therefore, ought to be dismissed. The court instructed plaintiff to prove its case. (See *Workers Advice Centre and Others v Mouton* 2009 (1) NR 357 (HC).)

[4] In support of its claim, plaintiff called only one witness, Mr Benito Stanley Groeneveldt, the managing member of plaintiff, a close corporation. Groeneveldt's evidence was briefly this. In September 2014 plaintiff was awarded the tender described previously. In December 2015 Stauch and Partners instructed plaintiff to appoint defendant as the sub-contractor for the works described previously.

[5] On 19 January 2016, plaintiff provided defendant with a letter of appointment, and defendant accepted its appointment via email; whereupon, plaintiff and defendant concluded an oral subcontractor agreement. The following were the terms of the subcontractor agreement:

7.1 the defendant agreed to supply and install aluminium and glass external and internal doors and frames for the plaintiff as part of the Project (“works”);

7.2 The defendant agreed to execute and complete the works in a thorough and workmanlike manner;

7.3 The plaintiff agreed to pay the defendant the amount of N\$1,759,011.16 upon completion of the works;

7.4 should the plaintiff make any advance payments during the execution of the works, plaintiff would be entitled to deduct the advanced amount from the amount of N\$1,759,011.16 when that sum becomes payable;

7.5 The defendant agreed to complete the works in accordance with the contract program and time schedule provided to the defendant by the plaintiff from time to time and agreed to by the parties.’

[6] In May 2016, plaintiff made an advanced payment, upon defendant’s request, of N\$358 776.09 to defendant. Despite Groeneveldt’s best efforts to persuade defendant to attend at the project site to complete the works in performance of defendant’s obligation under the subcontractor agreement, defendant failed or refused to perform such of its obligation under the subcontractor agreement. On 10 October 2016, plaintiff accepted defendant’s repudiation and cancellation of the agreement. This led to the Principal Agent instructing plaintiff to appoint a subcontractor to replace defendant.

[7] Defendants refused, upon request by Groeneveldt, to hand over to plaintiff any materials defendant might have purchased or any completed product in order for plaintiff to give them to the new subcontractor so as to cut down on cost and so as not to waste funds. Since plaintiff was under pressure to complete the project the new subcontractor had to purchase new materials for the project.

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[8] In due course, plaintiff demanded from defendant the return of the money it had paid to defendant. Defendant failed or refused to return that amount.

[9] Plaintiff’s evidence remained unchallenged at the close of plaintiff case, even though Mr Karsten had cross-examined the plaintiff witness. And the court does not find the evidence of plaintiff to be improbable or unsatisfactory. Consequently, I have

accepted plaintiff's evidence and I conclude that plaintiff has made out a case for the relief sought.

[10] In the result, I order as follows:

1. Plaintiff succeeds in its claim.
2. Defendant's counter claim is dismissed.
3. Defendant shall pay to plaintiff N\$358 776.09, together with interest on this amount at the rate of 20 per cent per annum a tempore morae calculated from the date of issuance of summons until date of full and final payment.
4. Defendant shall pay plaintiff's costs of suit, and such costs shall include costs of one instructing counsel and one instructed counsel (in respect of what instructed counsel was employed for).
5. This order is unaffected by any liquidation application that defendant might have filed after 11H00 on Friday, 26 March 2021.
6. The matter is considered finalized and is removed from the roll.

C PARKER
Acting Judge

APPEARANCES:

PLAINTIFF: O Davids
Instructed by Engling, Stritter & Partners, Windhoek.

DEFENDANT: L KARSTEN
Of Louis Karsten Legal Practitioner, Windhoek