

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-CON-2019/03413

In the matter between:

DEWALD VAN DER MERWE T/A

MARIENTAL VERKOELING & SATELLIETDIENSTE

PLAINTIFF

and

OCTANT INVESTMENT (PTY) LTD

DEFENDANT

Neutral citation: *Dewald Van Der Merwe t/a Mariental Verkoeling & Satellietdienste v Octant Investment (Pty) Ltd* (HC-MD-CIV-ACT-CON-2019/03413) [2021] NAHCMD 370 (13 August 2021)

Coram: USIKU, J

Heard: 08 – 09, 11 March 2021 and 15 April 2021

Delivered: 13 August 2021

Flynote: Contract – Terms and conditions – Mutually destructive versions relating to terms and conditions of the contract – Applicable principles applied.

Summary: The plaintiff claims payment from the defendant in the amount of N\$610 700.50. The action is founded on an oral agreement in terms of which the

plaintiff was required to erect a storage facility on Farm Kachas, Mariental district. The parties disagree on whether they agreed on a contract price. The court held that the parties agreed on a contract price and that the plaintiff failed to discharge *onus* on him that he is entitled to the relief he seeks. Plaintiff's claim dismissed.

ORDER

1. The plaintiff's claim is dismissed.
 2. The plaintiff is ordered to pay the defendant's costs of suit.
 3. The matter is removed from the roll and is regarded finalised.
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JUDGMENT

USIKU, J

Introduction

[1] This is an action by the plaintiff against the defendant for payment of N\$610 700.50, plus interest and costs of suit.

[2] The action is founded on an oral construction agreement concluded between the parties on or about 1 January 2018, at Mariental, Namibia. In terms of the agreement, the plaintiff was required to erect a storage facility on Farm Kachas, in Mariental district.

[3] The parties agree on:

- (a) the existence of the oral agreement,
- (b) that plaintiff started to erect the storage facility on or about 1 January 2018, and,
- (c) that the plaintiff stopped the construction activities before completion of the storage facility.

[4] The parties differ on what were the terms and conditions of agreement. According to the plaintiff, the defendant breached the agreement in that it failed or neglected to pay the full and outstanding amount of N\$610 700.50 to the plaintiff.

According to the defendant, the plaintiff breached the agreement in that he failed to complete the construction work.

[5] Initially, the plaintiff had two claims against the defendant. However during trial, the plaintiff abandoned the second claim and adjusted the amount of the first claim, from N\$635 529.52 to N\$610 700.50.

[6] The plaintiff testified himself and called no further witnesses. The defendant called one witness, namely Abdukadir Saleh (“Mr Saleh”), the managing director of the defendant.

The evidence

Plaintiff's version

[7] The plaintiff testified that he is a businessman at Mariental. He is a sole proprietor and trades under the name Mariental Verkoeling and Satelietdienste.

[8] The terms of the agreement between the parties, according to the plaintiff, were that:

- (a) the plaintiff shall build a storage facility on Farm Kachas, Mariental;
- (b) the plaintiff shall issue invoices to the defendant for the services rendered and construction costs incurred by the plaintiff;
- (c) the defendant will effect payment to the plaintiff in respect of the invoices issued, on presentation thereof, and;
- (d) the plaintiff shall have a contractor's lien over the erected storage facility.

[9] The plaintiff testified further that he duly complied with all his obligations under the agreement. He started to erect the storage facility on or about 1 January 2018. According to the plaintiff, the defendant breached the agreement in that he intentionally failed or neglected to pay the plaintiff the full and outstanding amount.

[10] According to the plaintiff, the parties did not agree on the contract price for the construction of the storage facility. Furthermore, the parties did not agree on the

duration of the construction work. The plaintiff left the construction site after the defendant failed to pay him.

The defendant's version

[11] On behalf of the defendant, Mr Saleh testified that the parties agreed that the plaintiff shall erect the storage facility at a cost not exceeding N\$1 000 000. He stated that the parties explicitly agreed that the plaintiff will only be paid once the entire work was completed and not by progressive payments.

[12] Mr Saleh averred further that in spite of the agreement, the plaintiff started demanding payment immediately after commencing the construction work, citing that he has cashflow problems. According to Mr Saleh, the defendant acceded to the plaintiff's demands and made payments totaling N\$950 000 in a space of five months, so that the plaintiff completes the work.

[13] Mr Saleh further related that when he received plaintiff's statement of account, (marked as Annexure "A", to the particulars of claim) he noticed that plaintiff was charging an amount in excess of N\$1 000 000, inclusive of interest. Such amount according to Mr Saleh, was not agreed upon. Furthermore, the parties did not agree on payment of interest and no interest was due.

[14] Mr Saleh indicated further, that the parties agreed that the construction work shall be completed before the harvesting season of the dates – fruits. The construction work was to be conducted from January 2018 to March 2018. The harvesting season is during March 2018.

[15] The last time that the plaintiff worked, according to Mr Saleh, was in October 2018. The plaintiff left the construction site in October 2018 without completing the work.

Arguments

[16] At the end of the trial the parties' legal practitioners made closing submissions. Mr Liebenberg, on behalf of the plaintiff, submitted that the plaintiff has proved that

the defendant is indebted to the plaintiff in the amount of N\$610 700.50 which is due and owing and that the court should grant judgment in favour of the plaintiff.

[17] Mr Nanhapo, on behalf of the defendant, submitted the plaintiff has failed to prove his claim and that his claim should be dismissed with costs.

Legal principles

[18] The technique generally used in resolving factual disputes is aptly set out in *SFW Group Ltd and Another v Martell and Others*¹ in the following terms:

'To come to a conclusion on the disputed issues a court must make findings on:

- (a) the credibility of the various factual witnesses;
- (b) their reliability; and
- (c) the probability or improbability of each party's version on each of the disputed issues.

In light of the assessment of (a), (b) and (c), the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be a rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors equipoised, probabilities prevail'.

[19] In *National Employers' General Insurance Co Ltd v Jager*² the court remarked as follows:

'... where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff then the court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

¹ *SFW Group Ltd and Another v Martell and Others* 2003 (1) SA 11 (SCA) at 14-15.

² *National Employers' General Insurance Co Ltd v Jager* 1984 (4) SA 437 at 440-441.

Analysis

[20] From the evidence, it appears to me that the gist of the dispute between the parties is whether they agreed on a contract price in the amount not exceeding N\$1 000 000 or merely agreed that the plaintiff shall issue invoices in respect of the construction costs and services rendered and that the defendant shall effect payment on presentation thereof.

[21] The dispute between the parties is a factual one. There are two mutually destructive versions before court on what the parties agreed on in relation to the contract price. The plaintiff says the parties did not agree on any contract price. The defendant says the parties agreed on a contract price. The version of the plaintiff is irreconcilable with that of the defendant. Accepting one version implies a rejection of the other.

[22] I find it hard to believe that in the context of a contractual relationship, involving building operations, the parties would agree to a building contract without reference to a contract amount. Generally, where there is agreement for services to be rendered or goods sold, the parties thereto would indicate estimated costs for the same. In the present matter, the defendant testified that the parties agreed that the plaintiff will perform the construction works at a cost not exceeding N\$1 000 000. The version of the defendant is more probable than that of the plaintiff.

[23] Applying the principles set out in *National Employer's General Insurance Co Ltd v Jager (supra)*, I am of the opinion that the probabilities in this matter favour the defendants' version. I am therefore satisfied that the defendant's evidence is true that the parties agreed on a contract price of N\$1 000 000. The plaintiff's version that the parties did not agree on any contract price is rejected as false.

[24] It is common cause that the defendant has paid a total amount of N\$950 000 to the plaintiff. It is also common cause that the building works were not completed. In view of my finding that the parties did agree on a contract price of N\$1 000 000, I am of the view that the plaintiff has not discharged the *onus* of proving that he is

entitled to the relief he seeks. For that reason, the plaintiff's claim stands to be dismissed.

[25] As for the issue of costs, the defendant has been successful in its defence against the plaintiff's claim and is, therefore, entitled to costs.

[26] In the result, I make the following order:

1. The plaintiff's claim is dismissed.
2. The plaintiff is ordered to pay the defendant's costs of suit.
3. The matter is removed from the roll and is regarded finalized.

B USIKU
Judge

APPEARANCES:

PLAINTIFF:

PJ Liebenberg
Of Van Heerden, Liebenberg & Co.
Mariental

DEFENDANT:

T Nanhapo
Of Brockerhoff & Associates Legal Practitioner
Windhoek