REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REASONS

CASE NO: I 2242/2015

In the matter between:

CENTRAL TECHNICAL SUPPLIES (GEIGER) ENGINEERING (PTY) LIMITED **PLAINTIFF**

and

KHOMAS ALUMINIUM AND GLASS CC **1ST DEFENDANT**

HAUDANO BRICKS AND BUILDERS CC **2ND DEFENDANT**

Neutral Citation: *Central Technical Supplies (Geiger) Engineering (Pty) Limited v Khomas Aluminium and Glass CC* (I 2242/2015) NAHCMD 537 (18 November 2021).

CORAM: MASUKU J

Heard: **22 March 2017, 16, 17, 19 and 20 October 2017, 14 November 2017; 27 February 2018; 1, 2 3, 4, 5 and 9 October 2018; 13, 14, 16 July 2020 and 29 July 2020.**

Delivered: **22 April 2021**

Reasons: **18 November 2021**

Flynote: Civil action – the existence of a contractual relationship between the parties – Law of Evidence – resolution of factual disputes – factors that the court is to take into account when faced with factual disputes to resolve same.

Summary: The plaintiff in this matter claimed that it entered into a sub-contract agreement which revolved around the installation of an incinerator and accessories by the plaintiff at Okalongo Health Centre. The plaintiff contended that it carried out its obligations and complied with its undertakings in terms of the contract. It alleged that the defendant failed to comply with its obligations as per the contract so entered into. This is so because it has failed to make good on payment of the outstanding invoices. The defendant contrary to this position, contends that at no point had it entered into a sub-contract agreement with the plaintiff, this is the bone of contention in this matter. The court having been tasked with making a decision regarding the existence or otherwise of the contract, found as follows;

Held: that there is a disparity in the versions of the parties which cannot be reconciled. When the court is faced with this difficulty reference is to be made to the approach taken by the court in the matter of *JA SFW Group and another v Martell EtCie and Others* 2003 (1) SA 11 (SCA) where the technique employed in resolving factual disputes was the consideration of the following factors: (a) the credibility of the factual witnesses, (b) their reliability, and (c) the probabilities.

Held that: the record revealed that there was a contract, though not in the traditional and formal sense, where a written contract is placed before the parties and they append their respective signatures thereto.

Held further that: it is apparent from the testimony of the plaintiff's witnesses that though the contract remained in the name of the 2nd defendant, the 1st defendant was the one that completed the work. This being evident from the meeting minutes that was conducted on the site.

Held: other factors that corroborate the evidence that the 1st defendant was appointed as a subcontractor in the project was a performance bank guarantee issued by Nedbank and in favour of the 1st defendant.

Held that: the evidence showed inexorably that the money claimed by the plaintiff was paid into the account of the 2nd defendant when the 1st defendant's sole witness was in charge of that account and his close corporation was involved in the project as a sub-contractor to the 2nd defendant.

The court found that the plaintiff had discharged its onus on a balance of probabilities and that a contract was entered into between the plaintiff and the 1st defendant. The 1st defendant was thus found to be liable to pay the amount claimed.

ORDER

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1. The Plaintiff's claim against the Second Defendant for payment of N$ 152,912.85 succeeds.
2. The Second Defendant is ordered to pay interest on the amount stated in paragraph 1 above, at the rate of 20% per annum from the date of judgment to the date of payment.
3. The Second Defendant is ordered to pay the costs of the action consequent upon the employment of one instructing and one instructed legal practitioner.
4. The matter is removed from the roll and is regarded as finalised.

REASONS

MASUKU J:

Introduction

[1] This is an action that has occupied the court for some time. Two judgments, one being a special plea, and another one, a ruling on the question of absolution from the instance, have already been delivered by this court. The current judgment is on the merits of the trial, both the special plea and the application for absolution from the instance having been dismissed with costs.

[2] On 22 April 2021, I issued an order granting judgment in favour of the plaintiff in the amount claimed. I undertook therein to deliver the reasons for the order. Because of personal circumstances that were explained to the parties, I was unable to deliver the reasons as undertaken and I apologise to them for the delay occasioned and the implications of the delay on their respective sets of rights. The reasons for the order issued, follow below.

Background

[3] The plaintiff is Central Technical Supplies (Geiger) Engineering (Pty) Ltd, a company floated with limited liability in accordance with the laws of this Republic. It instituted an action against Khomas Aluminium and Glass CC, being the defendant and Haudano Bricks and Builders CC for the payment of an amount of N$ 152,912.85, together with interest and costs.

[4] The action was defended by the 1st Defendant, which will be referred to as such, alternatively as 'Khomas Aluminium'. The 2nd defendant, Haudano Bricks and Builders CC did not defend or participate in the proceedings. To that end, its fate is sealed by its non-opposition and the judgment will have to follow against it as night follows day.

[5] The dispute, for that reason, is between the plaintiff and the defendant. The plaintiff called two witnesses in support of its claim, namely, Mr. Frank Werner Biederlack and Mr. Joshua Chiwambu. For its part, the defendant, after the dismissal of its application for absolution from the instance, called only one witness, namely, Mr. Chuan-Kuo.

[6] I shall refer to Mr. Biederlack, the plaintiff first witness as ‘PW1’ and to Mr. Chiwambu, as PW2. Mr. Kuo, the defendant’s witness, will be referred to as ‘DW1.’

The pleadings

[7] In its particulars of claim, as amended, the plaintiff alleged that it entered into an oral sub-contract agreement with the defendant. The plaintiff was represented by PW1, whereas the defendant, was represented by DW1. The contract revolved around the installation of an incinerator and accessories by the plaintiff at Okalongo Health Centre. This was a project under the Ministry of Health and Social Services.

[8] The plaintiff alleged that in terms of the said agreement, it undertook to:

(i) supply and deliver the goods required to effect the installations and to undertake the training of the personnel in respect of the installed goods;
(ii) the defendant would provide a 10% guarantee of the contract value as approved by the project engineer in respect of the supply, installation, testing and commissioning the incinerator at the said Health facility. The defendant provided a performance guarantee in the amount of N$ 44,477.00;
(iii) the plaintiff would provide a 10% performance guarantee for the due and timeous performance of its obligations arising from the agreement in question. The plaintiff did provide such guarantee on 18 August 2010;
(iv) the defendant would compensate the plaintiff for the goods and services provided as per payment certificates to be issued by the quantity surveyor appointed by the Ministry of Works and Transport; and
(v) the plaintiff shall invoice the defendant once either the defendant, or Khomas Aluminium had received payment from the Ministry of Health in respect of payment certificates.

[9] The plaintiff alleges in its particulars of claim that it complied with all its obligations as stipulated above. In this regard, it was paid by the defendant in the

amount of N$ 293,447.47, vide certificate no. 13. It was thereafter engaged to provide laundry machines by DW2 on terms similar to the first installation.

[10] The plaintiff avers that it again complied with its undertakings and that on 27 June 2011, payment certificates number 18 and 19 in the respective amounts of N$ 91,684.39 and N$ 61,229.45 was issued by the quantity surveyor but which amounts remain outstanding. It is these amounts that form the subject matter of these proceedings. In this regard, the plaintiff claims that although the said amounts were paid to 2nd defendant as the main contractor, such amounts have not been paid to the plaintiff notwithstanding its performance in relation to the works in question.

[11] The defendant, for its part denied the plaintiff's averrals. The mainstay of its defence is to be found in the denial of the plaintiff's principal allegations. In pursuance of its denial, the defendant alleged the special plea of prescription, which as indicated earlier, was dismissed by the court.

[12] Furthermore, the defendant denied that it was appointed by Haudano as a sub-contractor to manage the said project. Whilst acknowledging the supply of the 10% guarantee and the performance, as alleged, the defendant pleads that the said documents were supplied and received in accordance with its capacity as the one rendering financial assistance to Haudano. In this regard, so contended the defendant, any liability to compensate the plaintiff in relation to the project in question, lies with Haudano for the reason that the defendant was never, at any stage, substituted as the main contractor with the Ministry of Health.

[13] The defendant further denied that it authorised PW2 to be involved in the project. This, it was averred was because any appointment under the tender in question could only be validly authorised by Haudano, the main contractor. The defendant accordingly denied that it was liable to the plaintiff for the payment claimed. Finally, the defendant denied that it was paid by the Ministry of Works.

The pre-trial order

[14] In terms of the pre-trial order issued by this court, the following issues were identified as ones for determination, namely:

(a) whether or not there exists a contractual relationship between the plaintiff and the defendant;
(b) whether or not the defendant was appointed as the main contractor to replace or substitute Haudano, the 2nd defendant;
(c) whether the defendant's involvement in the project was limited to financial assistance to Haudano;
(d) whether or not the defendant was sub-contracted on the project, and if so, whether on that basis the defendant could have concluded a sub-contract agreement with the plaintiff; and
(e) whether or not the 1st defendant is contractually liable to the plaintiff for the amount claimed.

The evidence

[15] The plaintiff called two witnesses to testify on its behalf. The first was Mr. Frank Biederlack, the plaintiff's managing director. It was his evidence that in 2009, the 2nd defendant was appointed by the MOH as the main contractor to build and upgrade the Okalango Health Centre. The 2nd defendant appointed the 1st defendant as a subcontractor in relation to the said project and in terms of which the latter would manage the project on the former's behalf.

[16] PW1 further testified that on 5 March 2010, at Windhoek, the 1st defendant, duly represented by Mr. Chuan-Kuo and the plaintiff, duly represented by himself, entered into an agreement whose terms have already been pleaded above. I will, for that reason, not repeat same. PW1 further testified that the plaintiff complied with all its obligations under the said contract as recorded in the preceding paragraphs.

[17] PW1 further testified that having complied with all its obligations in terms of the agreement, it transmitted invoices to the 1st defendant on 19 March 2014, in the total amount of N$ 152,913.85 but these were not honoured by the 1st defendant. His further evidence was to the effect that in March 2014, it came to the plaintiff's attention that the 1st defendant had received payments from the MOH but had, that notwithstanding, not paid the amounts received to the plaintiff. Lastly, it was his

evidence that notwithstanding demand, the defendants failed and/or neglected to pay the amount claimed. The plaintiff, accordingly sued both defendants jointly and severally, the one paying the other to be absolved. He concluded his evidence.

[18] The second witness called by the plaintiff was Mr. Joshua Maganga Chiwambu, an adult Malawian male. He is an engineer who had previously been in the employ of Jacobs Engineering Consulting from 2009 to 2014. At the time he testified, he had started his own practice, under the style and name Joshua Consulting Engineers.

[19] His evidence was that during the time that he was in the employ of his previous employer, he was in charge of a project in which his employer was appointed by the Ministry of Works and Transport as the engineer. The 2nd defendant had been appointed in the same project by the Ministry of health as the main contractor for renovations, additions, and upgrade of the Okalongo Health Centre, in the Omusati Region.

[20] It was his further evidence that he was personally in charge of the non-nominated mechanical subcontractor appointments in relation to the project. In explaining the process that was employed in the appointment, his evidence was the following: a list of subcontractors is sent to the builder, main contractor and Ministry of Works for approval before the tendering process; the bids or tenders are advertised and issued as per the list above; tender offers are received by him and sent to the Ministry of Works for appointment of the successful sub-contractor; the Ministry of Works issues an appointment letter to Mr. Chiwambu to inform the architect appointed on the project to instruct the builder to enter into an agreement with the specialist sub-contractor as per the letter from the Ministry of Works; the sub-contractor then commences its work once an agreement is entered into with the builder, who is the main contractor; the subcontractor procures the material and does the installation on the side and thereafter, the witness evaluates the work done to date and if satisfactorily done, he issues payment certificates.

[21] It was generally Mr. Chiwambu's evidence that the project fell behind because the 2nd defendant failed to carry out the works on schedule and that the architect at

one stage was considering determining the contract. The plaintiff was engaged as a sub-contractor in the project and that later, because of the failure by the 2nd defendant to proceed with the works on schedule, the 1st defendant came on board to proceed with the project.

[22] The 1st defendant, for its part, called one witness, Mr. Chuan Kuo, who is the sole member of the 1st defendant. I shall refer to Mr. Kuo, as 'DW1). It was his evidence that at one point, the 2nd defendant was awarded the tender relating to the Okalongo Clinic. He testified that the 1st defendant was never, at any stage, appointed as a sub-contractor for the tender and that the performance under that tender at all times remained the responsibility of the 2nd defendant until it gave notice of its withdrawal from the tender on 7 March 2012.

[23] Explaining his involvement in the tender in question, DW1 testified that the 2nd defendant failed to provide the necessary performance guarantee under the tender in question. This guarantee was in the amount of N$ 834,753.85. It was DW1's evidence that in view of the 2nd defendant's predicament, the 1st defendant provided the guarantee on behalf of the 2nd defendant and at the latter's request. In order to secure repayment of the money it had provided for the 2nd defendant's performance guarantee, DW1 testified that he demanded that an irrevocable sole signatory power to the 2nd defendant's bank account be given to him and in terms of which he had access to the funds deposited in the 2nd defendant's account.

[24] It is the 1st defendant's case that it does not owe any money to the plaintiff and that in the beginning, around 23 September, 2014, the plaintiff issued a letter of demand against the 2nd defendant, only to later issue a summons against the 1st defendant as well. It is the 1st defendant's case that it was never appointed as a sub-contractor by the 2nd defendant and as such, there is no basis in law for the plaintiff to institute the action against it and as such, the claim against it should fail.

[25] DW1 further testified that the 1st defendant had not, at any stage, entered into a sub-contractor agreement with the plaintiff as alleged. He testified further that as he had the sole signatory powers to the 2nd defendant's account, he was convinced that his interests in getting back the money he had advanced for the guarantee were protected. Unbeknown to him, he further testified, the 2nd defendant was heavily

indebted to its bankers in overdraft facilities extended, resulting in the bank automatically off-setting the 2nd defendant's indebtedness to the bank to the 1st defendant's detriment.

[26] Lastly, DW1 testified that the plaintiff opted to try and recover the money from it rather than from the 2nd defendant because it could not get satisfaction of its claim from the 2nd defendant. In doing so, DW1 stated, the plaintiff was being opportunistic, unfair and acted in a bizarre manner. The 1st defendant had, as a result of the plaintiff's efforts, been placed on the blacklist in terms of credit facilities and as a result, his financial affairs had been placed in a chaotic state.

[27] It is apparent, from reading the pre-trial order and the highlight of the evidence adduced by both parties that there is a disparity in the versions of the parties and it cannot be reconciled. The proper approach by the court in such a scenario was charted by Nienaber JA *SFW Group and Another v Martell Et Cie and Others*.[1] This approach has commended itself in this jurisdiction as well and this can be seen from the judgments of *Life Office of Namibia Ltd v Amakali*[2] and *Ndabeni v Nandu*.[3]

[28] In the *SFW* case, the learned judge of Appeal stated the applicable principles where the parties' versions are diametrically opposed to each other as follows:[4]

'The technique generally employed by our courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues, a court must make findings on (a) the credibility of the factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That, in turn, will depend on a variety of subsidiary factors, not necessarily in order of importance, such as, (i) the witness's candour and demeanour; (ii) his bias, latent and blatant, (iii) internal contradictions with his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra-curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events.'

[1] *SFW Group and Another v Martell Et Cie and Others* 2003 (1) SA 11 (SCA).
[2] *Life Office of Namibia Ltd v Amakali* 2014 NR 1119 (LC) p 1129-1130.
[3] *Ndabeni v Nandu* (I 343/2013) [2015] NAHCMD 110 (11 May 2015).
[4] *Ibid* p 14H-15E.

[29] In my experience, there is hardly a case where the tests adumbrated above apply *holus bolus*. What will usually happen is that one or more of the manners of resolving factual disputes, but not all of them, present themselves as applicable and therefor necessary to help resolve the factual disputes. In that connection, the court will, in the instant case, identify and determine those that apply and employ them in making factual findings on the disputed issues.

Assessment of the evidence

[30] All the witnesses who testified were subjected to cross-examination by the opposing party's legal practitioner. I am of the considered view that the evidence adduced by the plaintiff's witnesses, by and large, went in unruffled. The witnesses, in my assessment, on the whole, stood up well to cross-examination and were, for the most part, consistent in their oral testimony, which was in some material parts, corroborated by documentary evidence. They, for the most part, and on the material issues, stuck to their versions like a postage stamp to an envelope.

[31] In particular, Mr. Chiwambu, was an impressive witness, who was well acquainted with the matter and had documentary proof to back up his evidence where applicable. He stood up well to cross-examination to which he was subjected to by Mr. Diedericks, for the defendant. In this regard, he was as unruffled as a Bishop presiding over a tea party. I note, in particular, and to his credit, that he is a professional and struck me as impartial. He does not appear to have anything to gain for having adduced evidence favourable to the plaintiff, except telling the court what he knew regarding the claim.

[32] The evidence of the defendant cannot be assessed in similar terms. The first issue of note, is that DW1 did not seem to differentiate himself from the 1st defendant. The *Salomon* principle, does not seem to have made any sense to him. As a result, there was an inconsistency regarding who was involved in the matter between the 1st defendant and DW1 in his personal capacity. The 1st defendant's erstwhile legal practitioner had put to the plaintiff that it was DW1 in his personal capacity that was involved and not the 1st defendant. DW1 testified otherwise on this critical issue.

[33] On the whole, DW1 was a witness who did not impress me as a credible witness. When placed in a corner during cross-examination, he overheated and tended to raise his voice. His explanation, for instance how the money was provided for the performance guarantee seems unbusinesslike. I say so because his evidence was that he did not know the 2nd defendant's member, Mr. Hamwele and had met him for the first time and was nonetheless willing to avail the amount in the excess of N$ 800 000 to him.

[34] When questioned about this and how it was unrealistic that he would behave in this fashion, he stated that in his culture and belief as a Taiwanese national, he had no reason to doubt the credibility of Mr. Hamwele because the latter had showed that there was a tender his close corporation had been awarded.

[35] Another issue, which was troublesome, related to the appointment of Mr. Paulus Ismael as the site foreman in the Okalongo project. It must be recalled that DW1's evidence was that the 1st defendant had no role to play in the project but that he participated in his personal capacity. In cross-examination on this issue, he could not explain why the letter of appointment was under the letterhead of the 1st defendant. The letter in point of fact states unambiguously that it was the 1st defendant that had appointed the said Mr. Paulus, thus seriously contradicting DW1's evidence.[5]

[36] When questioned by the plaintiff's counsel as to why he had used the 1st defendant's letterheads when drafting the letter since he was supposedly doing so in his personal capacity, DW1 stated that when he sent a fax or letter, he used the 1st defendant's letterhead. He could not explain why he could not have used his own personal letterheads.

[37] Again, the arrangement for the appointment of Mr. Paulus by the 1st defendant was confirmed in writing by the 2nd defendant in a letter dated 10 March 2011, signed by Mr. Hamwele. The letter stated that 'Now Khomas Aluminium and Glass has appointed Mr. Paulus Ismael, started on the 08/03/2011.'[6] The letter by the 1st

[5] Page 143 of the discovery bundle.
[6] Page 144 of the discovery bundle.

defendant, confirming same, is dated 8 March 2011, a few days earlier than the letter dated 10 March 2011, referred to above.

Determination

[38] It would appear that the major question for determination in this matter, and this appears on the pre-trial order, is whether there was a contractual arrangement between the plaintiff and the defendant regarding the tender involving the Okalongo Health Centre.

[39] It must be recalled that the onus, in this regard rests on the plaintiff, which is called upon to prove the existence of the contract on a balance of probabilities. It must be recalled in this regard, that the standard of proof in civil matters is much lower than it is in criminal matters, where the onus is normally on the State to prove the guilt of an accused beyond reasonable doubt. Should there be any scintilla of doubt, it inures to the accused's benefit.

[40] Ms. Garbers, for the plaintiff urged the court to find that on the evidence, the plaintiff had succeeded in proving on a preponderance of probabilities that there was a contractual relationship between the plaintiff and the 1st defendant. It was her further submission that as a result of the contract, the plaintiff was entitled to look to the 1st defendant to pay the amount which was clearly due to the plaintiff for its services in the contract. The latter is undisputed, it would seem to me.

[41] Mr. Bangamwabo, for the 1st defendant advanced argument which is a different kettle of fish altogether. It was his contention that on the evidence, there was no contractual relationship between the plaintiff and the 1st defendant. It was his submission that the evidence showed that the two contractants in the matter, were the plaintiff and the 2nd defendant. There was thus no basis in law for the plaintiff to have looked to the 1st defendant to pay the plaintiff's claim. The plaintiff was accordingly accused of barking the proverbial wrong tree. Is this submission correct and in line with the evidence adduced.

[42] Having had very close regard to the evidence on the record, I am of the considered view that Ms. Garbers is on the correct side of the law. The record

reveals that there was a contract, even though not in the traditional and formal sense, where a written contract is placed before the parties and they append their respective signatures thereto.

[43] The evidence of Mr. Chiwambu, in particular, to the effect that the 2nd defendant had entered into a subcontractor agreement with the 1st defendant in respect of the Okalongo Health Centre project, was not in any meaningful way discredited in cross-examination. This will be shown in material parts below. In this regard, it is necessary to have regard both to his evidence on the record and also to the annexures to which he referred and formed part of the discovered documents. I do so below.

[44] Mr. Chiwambu testified that the contractor, in the matter, was the 2nd defendant for official and formal purposes. In effect though, he further testified, the 2nd defendant, because of its failure and cash flow problems, engaged the 1st defendant to proceed with the contract and to finish it. In this regard, he said the following in cross-examination:[7]

'Do you agree?--- This is Haudano Bricks writing to the architect because of the correspondence from the architect. They are not allowed to give the entire project.

They are not allowed to?--- Yes, but there is still some more evidence which I will draw you to which shows that Khomas Aluminium was the subcontractor for the project.'

[45] At page159, the following exchange takes place between Mr. Diedericks and the witness, Mr. Chiwambu:[8]

'That was in support of you saying that this shows Khomas Aluminium was subcontracted. It is correct that not only is the reference to Mr. Quo (*sic*) to rescue the project, it is also conditional upon, page 60, conditional upon a final decision and approval by the Directorate of Works, correct?
Correct.

And until that happens it is of no effect.

[7] Page 158 of the record from line 10.
[8] Page 159 from line 1 to 20.

Correct.

No contractual effect?
Yes.

Did that happen?
Yes, that is the letter from the architect which you mentioned that they approved the subcontractors.

Show me. Sorry please indicate to the Court which document are you referring to---
If you refer to that page 117 which we discussed, form the architect again to the Ministry of Works, there he mentioned that that was the recommendation, that the contractor be allowed, the paragraph which I just read, that he be allowed to continue with his trend of subcontractors for the project to be finished and then also he was supposed to be granted 120 days, of which he was granted for the extension of time. So the architect proposed as such and then if you look at the letter on page 87, this is where now the architect stipulated that extension of time and also to allow the work to proceed.'

[46] Furthermore, at 160, the following is recorded, still in the battle of wits between Mr. Diedericks and the witness:[9]

'MR. DIEDERCIKS: Yes My Lord, so the document I am looking for that you said is somewhere here, is that approval by the Ministry?---
The Ministry communicates to the architect, the architect communicates to the team. Some of the documents which come to the architect, they are kept with the architect, they only inform the meeting that it has been approved and we need to proceed with the works. This was also minuted.

That is fine ---
So we did not dispute the architect and say "give us the letter from the Ministry of Works" which if you need that proof we can still request a file and get proof.'

[47] The last reference that I will make in this regard, and there are more, is the exchange between the two gentlemen at page 162, still on the same issue:[10]

[9] Page 160 line 5 -17.
[10] Page 162 line 20 -30.

'I will just ask you differently. There is no document in this courtroom where the principal agent relies on a contractual provision to warn Khomas to speed up, do you accept that?

My statement read that Khomas will not have appeared, the contract is between Haudano Bricks and the government. Khomas was the subcontractor. Even on the meeting minutes they are writing Haudano even for Claasen, even for Quo (*sic*), because they do not appear as the main contractor. So that statement, even the letter is writes to Haudano, they are the ones having the contract with the government, not Khomas.'

[48] In view of the foregoing exchange, Mr. Chiwambu was as constant as the northern star on his evidence that although the main contract remained in the name of the 2nd defendant, the 1st defendant came onto the scene to complete the works. This was shown in the minutes of the site meetings. A development in that regard, is that Mr. Kuo's name started to feature in the minutes, although he does not appear to have attended the site meetings.

[49] In this connection, and in further corroboration of the involvement of Khomas Aluminium, Mr. Kuo, on the 1st defendant's letter heads, addressed a letter to the 2nd defendant. In that letter dated 08 March 2011,[11] Mr. Kuo appoints a Mr. Paulus Ismael to be the foreman at Okalongo Health Centre, the very place where the project took place. Even more poignantly, Mr. Kuo, in the opening paragraph of the letter states that, 'I am pleased indeed on behalf of our company to appoint you Mr. Paulus Ismael…' He does not do so in his individual capacity, about which a lot was said in his evidence.

[50] A letter from the 2nd defendant, dated 10 March 2011, confirms the appointment of Mr. Ismael by the 2nd defendant.[12] In relevant parts, Mr. Hamwele, writing for the 2nd defendant, says in the letter, 'Now Khomas Aluminium and Glass has appointed Mr. Pualus Ismael, started on the 08 /03 2011', the date of the letter signed by Mr. Kuo and referred to above.

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[11] Page A142 of the discovery bundle.

[12] Page A144 of the discovery bundle.

[51] Other factors, which independently corroborate the evidence adduced by Mr. Chiwambu that the 1st defendant was appointed as a subcontractor in the project, include the performance bank guarantees that were issued to the plaintiff and this, Mr. Chiwambu testified about in his evidence, especially under cross-examination. A replacement guarantee, issued by Nedbank Namibia Limited, dated 18 August 2010, states in no uncertain terms that it is a guarantee by the plaintiff in favour of the 1st defendant.[13] I pertinently mention that Mr. Kuo's name, in his personal capacity or any other, does not feature.

[52] In this regard, there is also a letter from the architect, Bob Mould Architects, dated 2 December 2010, regarding the project.[14] The letter was addressed to the Ministry of Works. The second paragraph of the letter, reads as follows:

'On April 19th 2010 we expressed our opinion that the contract should have been determined. After further discussions and proposals by the Contractor it was suggested that the Contractor be allowed to proceed on the strength of him having sub-contracted the project to a third party. On August 31st we recommended the Contractor be granted 120 days Extension of Time Without costs.'

[53] A line further down the letter, states that, 'At this stage the project has virtually come to a standstill on site. It appears that the arrangements with Mr. Chang Kuo have not worked out satisfactorily as they have withdrawn most of their personnel from the site (apparently temporarily).' This shows that on an objective basis, everyone associated with the project, including the architect understood that Khomas was subcontracted by the 2nd defendant and this fact was not concealed from the Ministry of Works and Transport.[15]

[54] Last, but by no means least, the liability of the 1st defendant to pay the plaintiff lies in the role that Mr. Kuo placed himself in the financial affairs of the 2nd defendant.

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[13] Page A206 of the discovery bundle.

[14] Page A134 of the discover bundle.

[15] See also A68 of the discovery bundle, where the architect, writing to the Ministry of Works and Transport confirms that 'The contractor has sub-contracted the work to Chuan Kuo and nominated the project manager as Mr. Block. Mr. Block did not attend the site meeting nor has je been seen on site since the last meeting.'

The evidence is that the undated letter[16] in which the members of Haudano, the 2nd defendant, 'unanimously resolved to authorise Mr. I-chuan Kuo to solely transact and conduct all banking transaction on behalf of the aforesaid CC. None of the members are permitted or authorised to individually or jointly open and operate another transactional banking account at any Bank without the written authorization of Mr. I-chuan Kuo.'

[55] The evidence suggests that the money claimed by the plaintiff was paid into the account of the 2nd defendant when DW1 was the steward over the 2nd defendant's account. In dealing with this issue, Mr. Chiwambu's evidence, which was not dislodged is to the following effect:[17]

'And for that reason your testimony is to support the contention that Khomas Aluminium, because of the signatory rights is liable to pay the plaintiff. Is that correct?
If I understand you correctly, Mr Quo (*sic*) had the sole signatory rights, yes. Mr. Quo (*sic*) is the sole owner of Khomas Aluminium. Khomas Aluminium were appointed to run the project, they were subcontracted, that is what the meeting minutes say and also them being vested the power to operate the account, they were supposed to legally pay the money which was not due to them. If there was a problem in their bank account, they were supposed to notify the consulting engineer, which entails that Khomas Aluminium was involved in the project, like I mentioned, because they were supposed to effect payments, they were supposed to appoint site agents, which they appointed, which they did.'

[56] It is accordingly clear that when the money was paid by the Government into the 2nd defendant's account, DW1 was in charge of the account and his close corporation was also involved in the project as a sub-contractor to the 2nd defendant'.

[57] In view of all the aforegoing, I am of the considered view that the plaintiff has shown by admissible evidence that on a balance of probabilities, a contract was entered into between the plaintiff and the 1st defendant and it is on that premise that the 1st defendant is liable to pay the amount claimed by the plaintiff in this matter.

Conclusion

[16] B2 of the discovery bundle.
[17] Page 178 of the record of proceedings line 25 to 179 line 1 to 5.

[58] In *Muvangua v Hiangoro*[18] this court held that the onus of proving the existence of a contract is discharged by the adduction of evidence proving either consensus or reasonable consensus. I am of the considered view that consensus has been proved by the plaintiff in this matter on a balance of probability. In the circumstances, and in view of the conclusions reached above, it is my finding that the liability of the 1st defendant to the plaintiff has been established on a balance of probability.

[59] Accordingly, when one has regard to the pre-trial order, captured in paragraph 14 above, the first question, namely, whether or not there existed a contractual relationship between the plaintiff and the 1st defendant, must be answered in the positive, considering the findings made above. Regarding the question whether the 1st defendant was substituted for the 2nd defendant as the main contractor for the project, that question must be answered in the negative. Mr. Chiwambu's evidence is clear that the main contractor could not be changed and rather that subcontractors could be engaged to carry out the works. This according to Mr, Chiwambu, is what happened in this matter.

[60] The third question, namely, whether the involvement of the 1st defendant, was limited to financial assistance to the 2nd defendant, must be answered in the negative. It is clear that DW1, in his capacity as the sole member of the 1st defendant, participated in the running of the project, and the evidence of this, was his appointment of Mr. Ismael as the foreman for the project. Furthermore, Mr. Kuo's name also started featuring in the site minutes although it appears that he did not attend these meetings.

[61] All in all, I am satisfied that the plaintiff, as it was saddled with the onus to establish its entitlement to the order sought, has succeeded to do so on a balance of probabilities.

Order

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[18] *Muvangua v Hiangoro* (HC-MD-CIV-ACT-OTH-2019/00768) [2020] NAHCMD 292 (16 July 2020).

[62] In the premises, I am of the view that the 1st defendant is liable to the plaintiff in the amount claimed and which has been proven by admissible evidence. It was for the above reasons that I issued the order reflected below:

1. The Plaintiff's claim for against the Second Defendant for payment of N$ 152,912.85 succeeds.
2. The Second Defendant is ordered to pay interest on the amount stated in paragraph 1 above, at the rate of 20% per annum from the date of judgment to the date of payment.

3. The Second Defendant is ordered to pay the costs of the action consequent upon the employment of one instructing and one instructed legal practitioner.

4. The matter is removed from the roll and is regarded as finalised.

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T.S. Masuku

Judge

APPEARANCES:

PLAINTIFF:	H. Kirsten-Garbes
Instructed by	Engling, Stritters & Partners
DEFENDANTS:	J. Diedericks
Instructed by:	F. B. Law Chambers