

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no: **HC-MD-CIV-ACT-CON-2018/04675**

In the matter between:

**GRAND TRADING CC**

**PLAINTIFF**

and

**ZHONG-MEI ENGINEERING (PTY) LTD**

**DEFENDANT**

**Neutral citation** *Grand Trading CC v Zhong Mei Engineering (Pty) Ltd* (HC-MD-CIV-ACT-CON-2018/04675) [2021] NAHCMD 93 (05 March 2021)

**Coram** Schimming-Chase, AJ

**Heard** **9 November, 10 November, 7 December, 15 December 2020**

**Delivered** **5 March 2021**

**Flynote** Contract – Onus - Plea of payment of claimed amount - When a defendant sets up a plea of payment of money, the onus rests upon the defendant, and the defendant must satisfy the court on a balance of probability that payment was made as alleged in the plea. The defendant on the evidence has not satisfied the court that it made payment of the amount as alleged. Judgment must be given in favour of the plaintiff.

**Summary** Plaintiff instituted action against the defendant for payment of an amount due and payable in terms of a written consultancy agreement concluded between the

parties. The conclusion of the consultancy agreement, the plaintiff's performance in terms thereof, as well as the obligation to pay the amount claimed was common cause between the parties. The defendant pleaded that the full amount claimed was paid to the plaintiff.

The evidence of both parties left much to be desired, and did not assist the court any further. However on the evidence presented, and given the pleadings, as well as the onus on the defendant to establish that it made payment of the specified amount, the defendant failed to discharge its onus to prove the payment alleged to have been made.

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### ORDER

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1. The defendant is ordered to pay to the plaintiff the amount of N\$4,054,008.69.
2. The defendant is ordered to pay interest on the aforesaid amount to the plaintiff at the rate of 20% *a tempore morae* from today's date until date of final payment.
3. The defendant is ordered to pay the plaintiff's costs of suit, such costs to include the costs of one instructing and one instructed counsel.

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### JUDGMENT

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SCHIMMING-CHASE, AJ

#### Introduction

[1] The issue to be determined in this matter is whether the defendant has paid the plaintiff a consultancy fee emanating from a written agreement concluded between the

parties.

[2] On 2 November 2014 and at Windhoek, the plaintiff, represented by its main member Bernard Mumbashu, and the defendant, represented by Meng Aijun, concluded a written consultancy agreement. In terms of this agreement, the plaintiff was required to

“negotiate the tendering process to perfection, acquire, complete and submit the above mention (*sic*) project TENDER document as local partners on behalf of ZME”.<sup>1</sup>

[3] The consultancy agreement related to a tender for which the defendant applied, for the upgrading to bitumen standard of the district road from Oshakati to Ohangwena (Contract No RA/DC-CR/13-2013) valued at N\$216,800,289.87 (“the Oshakati Ohangwena Road”).

[4] In the event that the tender was awarded to the defendant, the consultancy agreement provided that the defendant would remunerate the plaintiff the value of 3% of the tender, being N\$6,504,008.69 (excluding VAT).<sup>2</sup>

[5] The tender was awarded to the defendant, and it accordingly obliged the defendant to pay to the plaintiff the amount of N\$6,504,008.69 in terms of the consultancy agreement.

[6] The above facts are common cause.

[7] This amount claimed was reduced at the commencement of the hearing to N\$5,054,008.69 when the plaintiff confirmed that it received payment of the amount of N\$1,450,000 from the defendant. N\$ 1,150,000 was paid on 28 October 2015, and a further payment of N\$300,000 was made on 15 December 2015.

[8] The plaintiff's case is that the defendant has failed to make payment of the

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<sup>1</sup> ZME was an acronym used in the agreement for the defendant.

<sup>2</sup> VAT was not added or claimed in the particulars of claim.

aforementioned amount. The defendant's case as pleaded, is that it paid the full amount owed to the plaintiff through bank transfers nominated by Mr Mumbashu of the plaintiff, to the account of Joevani Properties CC ("Joevani Properties") another duly registered Namibian close corporation, also solely owned by Mr Mumbashu, or in cash to Mr Mumbashu directly. These payments were alleged in the plea to have been made between 27 November 2014 and 24 May 2016 on instructions of Mr Mumbashu.

### **The evidence**

[9] Plaintiff and defendant each called one witness to testify.

[10] With regard to the amounts already paid by the defendant to the plaintiff, Mr Mumbashu testified that on 27 October 2015, an invoice was transmitted to the defendant by Joevani Properties for payment of an amount of N\$1,150,000<sup>3</sup> for "Grand Trading contractual agreement".<sup>4</sup>

[11] On 28 October 2015, Mr Mumbashu authorised the defendant to:

'transfer the funds reflecting in the contract between Zhong Mei Engineering Group with Grand Trading to Joevani Properties in the account reflecting on the invoice.'

[12] The defendant then paid the amount of N\$1,150,000 into the bank account of Joevani Properties, as requested, on 28 October 2015.

[13] On 15 December 2015, a further payment was made by the defendant to the plaintiff in the amount of N\$300,000. This payment was made to the personal bank account of Mr Mumbashu. In his evidence, Mr Mumbashu referred to an email in which he indicated to the defendant's Meng Aijun that he wished payment of the moneys owed to the plaintiff to be made to his personal account. In the response, it was indicated by the defendant that the amount of N\$300,000 was payment in respect of the consultancy agreement.<sup>5</sup>

<sup>3</sup> This invoice included VAT.

<sup>4</sup> Joevani Properties, on the evidence presented by the parties, also concluded at least one separate agreement with the defendant,.

<sup>5</sup> Referred to as the "D3609 charge".

[14] Apart from the above amounts, Mr Mumbashu testified that no further payments were made in reduction of the amount owed to the plaintiff in terms of the consultancy agreement.

[15] It became apparent at the trial that an amount of approximately N\$7,474,000 had been paid by the defendant either to Mr Mumbashu personally, in cash or via electronic transfer to his personal account; or to the bank account of Jovevani Properties, via electronic transfer. These payments were made between 27 November 2014, and 24 May 2016. These transactions, according to the testimony of Mr Chongyuan Jiang<sup>6</sup> were proof of payment of the amounts owed in terms of the consultancy agreement.

[16] Mr Mumbashu testified that the other payments made by the defendant were not in respect of the consultancy agreement, but related to separate work done for the defendant on other construction projects by Jovevani Properties.

[17] Mr Mumbashu further testified that invoices were submitted to the defendant by Jovevani Properties for those services, and that the defendant made payments to Jovevani Properties. Some payments were made directly into the bank account of Jovevani Properties, and some payments were made directly in cash to Mr Mumbashu, or to his personal bank account, as per his instructions at the time.

[18] Mr Mumbashu stated that there were numerous business dealings between Jovevani Properties and the defendant on approximately 4 construction projects. Initially, Jovevani Properties was appointed by the defendant as a consultant, and later Jovevani Properties became a local partner to the defendant for the submission and execution of various tenders over a period of time. After the award of the tender for the Oshakati Ohangwena road to the defendant, the plaintiff continued its relationship with the defendant as a consultant, and Jovevani Properties remained the local partner with the defendant for tendering purposes, and additionally provided construction related services such as vehicles and labour in execution of these tenders, where necessary.

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<sup>6</sup> The defendant's Managing Director since 15 January 2015.

[19] Mr Mumbashu further testified that as there were several dealings between Jovevani Properties and the defendant, the payments made by the defendant to him directly were not only in respect of the consultancy agreement between the plaintiff and the defendant but also in respect of the dealings the defendant had with Jovevani Properties.

[20] He referred the court to a written joint venture agreement concluded between the defendant and Jovevani Properties on 9 September 2014, for purposes of executing the construction of Phase 2 of the Head office of the Ministry of Fisheries and Marine Resources. This particular project was worth approximately N\$42 million.

[21] In terms of this joint venture agreement, Jovevani Properties was to receive 70% from the proceeds of the Tender Project, and the defendant, 30%. The joint venture would for such purpose, and in respect of the construction of Phase 2 of the head office, *inter alia* provide and obtain all finance necessary, provide equipment to execute the works, and manage all finance and progress payments in respect of the works.

[22] According to Mr Mumbashu, further oral consultancy agreements were also concluded between Jovevani Properties (represented by him) and the defendant, represented by Meng Aijun, particularly in respect of the construction of the Swakopmund-Uis road (worth approximately N\$735 million) and a project in Katima Mulilo.<sup>7</sup> The defendant and Jovevani Properties had many dealings with the plaintiff because he became good friends with the people working there, in particular Meng Aijun. Ms Aijun suddenly stopped communicating with him during March 2016. When he went the defendant to enquire about this, he was informed by Mr Jiang that she no longer worked for the defendant, and that the defendant had paid for everything in full. According to Mr Mumbashu, Jovevani Properties also eventually “quit” from the Phase 2 Project of the Ministry without giving notice. In this regard Mr Mumbashu testified that the defendant also still owed Jovevani Properties some money, and he reserved Jovevani Properties rights to institute action for recovery of the money.

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<sup>7</sup> Under cross-examination Mr Mumbashu admitted that the Katima Mulilo project did not get off the ground. The defendant tendered for this on its own but was not awarded the tender.

[23] It was put to Mr Mumbashu that in respect of both the consultancy agreement and the joint venture agreement, all he had to do was “get the tender”, and that the defendant and its employees provided the material and performed the actual construction work. Mr Mumbashu denied this, asserting that in terms of the consultancy agreement concluded with the plaintiff, the express provision was that the plaintiff would “... negotiate the tendering process ... to acquire, complete and submit the ... project tender document as local partners ...” on behalf of the defendant.

[24] It is also noted that the contract expressly provided for payment into the plaintiff's bank account, however this seems to have been overtaken by the instruction requesting payment to be made into the Jovani Properties account. It is common cause in this regard, that the plaintiff did not invoice the defendant, nor did the defendant appear to insist on proper invoices.

[25] Mr Mumbashu was cross examined at length about each of the amounts paid by the defendant. He was also questioned about transfers made directly to him in cash, the main thrust of the cross examination being to show that the plaintiff had been paid in full for the consultancy agreement, and that although the business relationship between the defendant and Jovani Properties was not disputed, other business dealings with the defendant alleged to have existed by Mr Mumbashu, were non-existent. It was put to plaintiff that it was claiming much more than it was entitled to.

[26] Mr Mumbashu was also cross-examined on a number of issues relating to the dealings between the defendant and Jovani Properties, as well as the other construction projects that Mr Mumbashu alleged the parties worked on between 2014 and 2016. He was also cross-examined on his “turnabout” when he initially testified that he never instructed the defendant to pay him in cash, when he accepted a Schedule of payments made to him submitted as an exhibit, which showed cash transactions to have been made. Mr Mumbashu maintained that, apart from the payments received on 27 October 2015 and N\$300,000 on 15 December 2015, all other payments were made in respect of a separate agreement.

[27] Mr Mumbashu was also cross examined on a payment made on 3 March 2015,

in the amount of N\$1 million, where it was specifically stated in the receipt that Mr Mumbashu received this amount for “consultation on a project”. In this regard, Mr Mumbashu testified that this was in respect of another consultancy undertaken for the defendant by Joevani Properties, but apart from the joint venture agreement, Mr Mumbashu’s evidence that it related to another consultancy agreement of which he had no further particulars is not accepted. His evidence on this aspect is not accepted.

[28] Mr Jiang testified that he is the managing director of the plaintiff since 15 January 2015. He arrived in Namibia on 20 December 2014. He confirmed the consultancy agreement concluded between the plaintiff and the defendant, and that the defendant was properly represented by Meng Aijun when she signed the agreement on the defendant’s behalf.

[29] He admitted that the defendant making the payments to accounts other than that of the plaintiff was of its own making. In this regard Mr Chiang testified that during execution of the tender project for which the consultancy agreement was concluded, the defendant had cash flow issues because of a delay in payment from the client. In light of those circumstances Mr Chiang negotiated payment of the amounts due with Mr Mumbashu, on behalf of the plaintiff.

[30] He accepted that the consultancy agreement made specific provision that payment of the amount claimed would be made into the bank account of the plaintiff, held at Nedbank. The account details were expressly mentioned in the consultancy agreement. His explanation for where the payments were made, was that Mr Mumbashu instructed him to do so. This was not disputed by Mr Mumbashu.

[31] Mr Chiang stated that some time prior to April 2015, Mr Mumbashu instructed the defendant to make payments in respect of the consultancy agreement to his personal bank account, and not to the plaintiff’s bank account as stipulated in the agreement. The defendant adhered to those instructions and effected the following payments to the bank account of Mr Mumbashu held at First National Bank:

- N\$2,6 million on 10 April 2015<sup>8</sup>

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<sup>8</sup> Of this amount, Mr Chiang testified that the amount of N\$2,5 million, was to be allocated to the



- N\$100,000 on 1 June 2015
  - N\$420,000 on 15 June 2015
  - N\$195,000 on 1 July 2015
  - N\$300,000 on 15 December 2015
  - N\$2 million on 28 January 2016
- TOTAL: N\$5,615,000

The above payments<sup>9</sup> were made in respect of the consultancy agreement.

[32] He further testified that apart from the above payments to the personal bank account of Mr Mumbashu, the defendant also made the following cash payments to Mr Mumbashu, also on his instructions:

- N\$100,000 on 27 November 2014
- N\$100,000 on 29 November 2014
- N\$400,000 (N\$200,000 cash and cash cheque of N\$200,000) on 15 December 2015
- N\$1 million on 3 March 2015
- N\$100,000 on 1 January 2015

[33] The defendant also paid cash to Mr Mumbashu of N\$200,000 on 1 January 2015, N\$20,000 on 18 August 2015 and N\$30,000 on 4 May 2016.

[34] Mr Chiang testified that at least part of the cash payments were also made in respect of the consultancy agreement to make up the amount of N\$6,504,008.69.

[35] Mr Chiang did not dispute that the defendant and Jovani Properties were also involved in other projects. In respect of the projects with Jovani Properties, Mr Chiang alleged that the defendant effected the following payments to the bank account of Jovani Properties as agreed:

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consultancy agreement, and N\$100,000 for the Phase 2 Project as per the joint venture agreement with Jovani Properties.

<sup>9</sup> Barring the amount of N\$100,000.00 – see fn 7 above.

- N\$535,000 on 16 March 2015
- N\$580,250 on 8 May 2015
- N\$130,000 on 4 September 2015
- N\$53,000 on 11 October 2015
- N\$1,150,000 on 28 October 2015
- N\$200,000 on 24 May 2016

TOTAL: N\$2,648,250.

[36] In total, according to Mr Chiang, the defendant paid the amount of N\$7,565,000 to Mr Mumbashu and the amount of N\$2,648,250 to Joevani Properties. The defendant accordingly paid a total amount of N\$10,213,250. He submitted that payments to the personal bank account of Mr Mumbashu (N\$5,615,000) related to the consultancy agreement. He further submitted that the balance of N\$889,009.68, was paid in cash to Mr Mumbashu.

[37] Mr Chiang did not dispute that, apart from the amounts stated by Mr Mumbashu to have been paid to the plaintiff in respect of the consultancy agreement, and the proof of payment of N\$1 million dated 3 March 2015 alleged to have been paid by the defendant to the plaintiff in respect of the consultancy agreement - no record whatsoever, was kept by the defendant as to what each payment was allocated for. Not a reference number or any information pertaining to what the payments were for, was provided by the defendant, who alleged that it paid the plaintiff in full. The defendant's witness was also clearly confused as to how the amounts of N\$5,054,008.69 (owing and paid to the plaintiff) was made up and arrived at.

### **Applicable law**

[38] In *Pillay v Krishna and Another*<sup>10</sup> it was (*inter alia*) held that, when a defendant in the plea sets up a plea of payment of money the onus is upon the defendant, and if she fails to satisfy the court that there is a sufficiently strong balance of probabilities in her favour, judgment must be given for the plaintiff. This principle is now trite.

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<sup>10</sup> *Pillay v Krishna and Another* 1946 AD 946. See also *Taapopi v Ndafediva* 2012 (2) NR 599 (HC) at 607B-608C; See also *Oshry and Another* 2010 (6) SA 19 at 624D, footnote 2.

[39] The evidence of both Mr Mumbashu and Mr Chiang was weak in certain respects. Mr Mumbashu was less reliable. He was at times evasive with information on the exact numbers of projects and whether or not he asked for cash initially. He also struggled to provide cogent evidence on the number of different agreements concluded between Joevani properties and the defendant, but there were clearly at least 3, projects between the parties. It is also apparent from the evidence led on behalf of both the plaintiff and the defendant, that the plaintiff and Joevani Properties were in business together in the preparation, submission and execution of some high value tenders.

[40] Mr Chiang on the other hand, had significant problems proving payment of the specified debt to the plaintiff. There were many proofs of payments made, but unfortunately there was no corresponding documentation or indication of what the monies were paid for. Mr Chiang was also constrained to admit that he was not present when some of the agreements with Ms Aijun were made, and so he could not comment further on this aspect of Mr Mumbashu's evidence. His attempts to unilaterally allocate payments to different projects created even more uncertainty for the court.

[41] Mr Chiang sought to utilise his best recollection relating to the cash payments making up part of the balance, but again, his evidence was lacking and of no assistance.

[42] Considering the onus on the defendant, and its failure to create any form of record for regular payments of high amounts in cash to different bank accounts, and for different business related projects, the court is left, with having to determine this matter simply on the question the incidence of onus. The onus being on the defendant, the court finds that the defendant has not (barring the additional payment of N\$1 million made on 3 March 2015)<sup>11</sup> discharged its onus to prove payment of the specified debt.

[43] Accordingly the plaintiff succeeds, and costs follows the event.

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<sup>11</sup> See para [27] above.

[44] The following order is made:

1. The defendant is ordered to pay to the plaintiff the amount of N\$4,054,008.69.
2. The defendant is ordered to pay interest on the aforesaid amount at the rate of 20% *a tempore morae* from today's date until date of final payment.
3. The defendant is ordered to pay the plaintiff's costs of suit, such costs to include the costs of one instructing and one instructed counsel.

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EM SCHIMMING-CHASE  
Acting Judge

## APPEARANCES

## PLAINTIFF

Adv Tuhafeni Muhongo

Mr Jerome Gaya

Instructed by Fisher, Quarmby &amp; Pfeifer

## DEFENDANT

Mr Johan van Vuuren

Instructed by Kruger, Van Vuuren &amp; Co