

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Practice Directive 61

<p><b>Case Title:</b> Garden Plaza Investments CC Jimmey Construction (Pty) Ltd  and  The Council for the Municipality of Windhoek</p>	<p>1<sup>st</sup> Plaintiff 2<sup>nd</sup> Plaintiff    Defendant</p>	<p><b>Case No:</b> HC-MD-CIV-ACT-CON-2019/04219</p> <p><b>Division of Court:</b> High Court, Main Division</p>
<p><b>Coram:</b> Coleman J</p>	<p><b>Heard:</b> 8 -11 and 12 August 2022</p> <p><b>Delivered:</b> 29 September 2022</p>	
<p><b>Neutral citation:</b> <i>Garden Plaza Investments CC v The Council for the Municipality of Windhoek</i> (HC-MD-CIV-ACT-CON-2019/04219) [2022] NAHCMD 514 (29 September 2022)</p>		
<p><b>Order:</b></p>		

1. The defendant is ordered to pay the first plaintiff N\$ 800 000.
2. Interest is payable on the said amount at the rate of 20% per annum calculated from 25 August 2017.
3. Defendant is ordered to pay first plaintiff's costs to include one instructing and one instructed counsel.
4. The matter is removed from the roll and regarded as finalized.

**Reasons for orders:**

COLEMAN J:

Introduction

[1] This is a claim for the balance of the costs of construction of a street (referred to in the particulars of claim as 'the Lossen street road extension' in Windhoek. First plaintiff purchased Erf 8870, Windhoek, from defendant. In essence, the first plaintiff and defendant agreed that instead of paying for the property, first plaintiff would construct a road extension on behalf of the defendant. The dispute here essentially concerns payment of the increased costs of this construction which exceeds the agreed purchase price.

Plaintiffs' case

[2] In short, first plaintiff's case is that in terms of an oral agreement with the defendant, the latter would pay first plaintiff any amount with which the construction of the road exceeds N\$1 039 380, being the purchase price for Erf 8870, Windhoek. The second plaintiff constructed the road on behalf of the first plaintiff.

[3] Due to delays and other factors, the costs of the construction of the road extension ended up being N\$ 1 958 757, 91, leaving a balance of N\$ 919 377, 91, which the first plaintiff says the defendant owes it in respect of the construction of this road extension.

[4] One witness was called on behalf of the plaintiffs. He confirmed the existence of the oral agreement and referred to various documents that were introduced as exhibits.

#### Defendant's case

[5] In its plea, the defendant admits the purchase of the property by the first plaintiff. It also admits the arrangement that was made that, instead of paying for the property, the first plaintiff will cause the road extension to be constructed on behalf of the defendant. However, the defendant denies the existence of the oral agreement that the defendant would pay the first plaintiff for the costs of construction exceeding the agreed purchase price. No issue of authority or any other special plea was raised.

[6] One witness was also called on behalf of the defendant. He is the Chief Engineer: Planning, Design and Traffic Flow, in the Department of Urban and Transport Planning of the defendant.

[7] Under cross-examination this witness conceded that it was always the intention to compensate the developer for the road and that an expectation was created that it would be compensated. He said nothing about lack of authority to bind the defendant or any related issue.

#### Conclusion

[8] In my view, first plaintiff proved the oral agreement that it would be compensated for the construction of the road as alleged. The only question that remains is to what extent?

[9] I do not understand the Chief Engineer, defendant's witness, denying the existence of the oral agreement relied upon by the first plaintiff. He also confirms that he sent an email on 2 February 2016 (Exhibit "R") to the representatives of the plaintiffs where he stated that he has approval for N\$800 000 to fund the shortfall. He also conveyed to them that he had to go back to Council for approval to increase this amount.

[10] Based on the evidence of the defendant's witness, I am satisfied that liability was accepted for N\$800 000. This witness made it clear in Exhibit "R" referred to above. He also made it clear that defendant's approval had to be obtained for anything more. This was never obtained.

[11] Counsel for the defendant raised a number of issues ranging from lack of authority to the rescission of the resolution by defendant providing for the N\$ 800 000 as well as non-variation. Not one of these issues are raised in defendant's plea. It simply denies the existence of the oral agreement. Therefore, I am not considering any of the issues not pleaded.

[12] Both counsels are in agreement that costs should include costs of one instructing and one instructed counsel. The letter of demand herein was sent on 22 July 2017, but counsel for the plaintiffs submitted that interest should run from 25 August 2017. I accept that.

[13] Consequently, I make the following order:

1. The defendant is ordered to pay the first plaintiff N\$800 000.
2. Interest is payable on the said amount at the rate of 20% per annum calculated from 25

August 2017.

3. Defendant is ordered to pay first plaintiff's costs to include one instructing and one instructed counsel.
4. The matter is removed from the roll and regarded as finalized.

<b>Judge's signature</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Plaintiff</b>	<b>Second defendant</b>
<p>C Van der Westhuizen          Instructed by Dr Weder, Kauta and          Hoveka Inc., Windhoek</p>	<p>E Shifotoka          Instructed by Uanivi Gaes Inc., Windhoek</p>