

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2019/03769

In the matter between:

SISI CONSULTANCY AND TECHNICAL SERVICES CC

PLAINTIFF

and

NACIO CONSTRUCTION CC

DEFENDANT

Neutral citation: *Sisi Consultancy and Technical Services CC v Nacio Construction CC* (HC-MD-CIV-ACT-CON-2019/03769) [2023] NAHCMD 471 (4 August 2023)

Coram: USIKU J

Heard: 4 & 6 April 2023

Delivered: 4 August 2023

Flynote: Contract – Breach – Defendant failing to pay certain amounts of moneys over to the Plaintiff contrary to provisions of written agreement concluded by the parties – Court ordering the Defendant to pay those amounts to the Plaintiff.

Summary: The plaintiff instituted action against the defendant claiming payment of certain amounts of moneys, arising from a written construction agreement. The court

found that the defendant is liable to pay those amounts to the plaintiff. The court, therefore, granted judgment in favour of the plaintiff against the defendant.

ORDER

1. The court grants judgment in favour of the plaintiff against the defendant in the following terms:
 - (a) payment in the amount of N\$142 000;
 - (b) interest on the aforesaid amount at the rate of 20 percent per annum calculated from the date of judgment to the date of final payment;
 - (c) costs of suit.
 2. The defendant's counterclaim is dismissed.
 3. The defendant is ordered to pay the costs of the plaintiff occasioned by the counterclaim.
 4. The matter is removed from the roll and is regarded finalised.
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JUDGMENT

USIKU J:

Introduction

[1] In this matter, the plaintiff instituted an action against the defendant seeking an order for payment of certain amounts of moneys, in respect of claims arising from a written construction agreement. The defendant subsequently instituted a counterclaim against the plaintiff seeking an order for payment of moneys in respect of a claim arising from the same construction agreement.

Background

[2] On 12 March 2014, the Ministry of Health and Social Services ('the Ministry') entered into a written agreement ('the principal agreement'), with the defendant in terms of which the defendant agreed to construct, for the Ministry, a clinic and staff

accommodation, at Ngoma village in Zambezi Region. The Ministry appointed Prinsloo Loubser Architects as the 'principal agent'.

[3] On 10 July 2017, the plaintiff and the defendant entered into a written agreement, in terms of which the plaintiff agreed to construct a conservancy tank for the Ngoma Clinic. This agreement stipulates that it shall be read in conjunction with the principal agreement.

[4] In terms of the agreement between the plaintiff and the defendant, read in conjunction with the principal agreement, the parties agreed that:

(a) the construction period of the conservancy tank would be for three months commencing on 28 July 2017 and ending on 27 September 2017, with a provision that if there is a delay in the works for reasons set out in clause 20 of the principal agreement, the plaintiff may apply to the principal agent for extension of time for the completion of the works;

(b) if the plaintiff applies for extension of time, the principal agent shall notify his decision within 28 days of the application being submitted failing which the principal agent shall be deemed to have refused to grant the extension of time in respect of that application;

(c) if no extension of time is granted, the plaintiff shall pay the defendant a penalty of N\$500 per calendar day for non-completion; and

(d) the defendant shall pay to the plaintiff the amounts due to the latter, within 14 days of receipt of payment from the Ministry, as shall be reflected on the interim certificates, failing which the defendant shall pay to the plaintiff a penalty payment of N\$500 for each day of non-payment.

[5] The plaintiff commenced the construction of the conservancy tank on 28 July 2017 and completed it on the 26 September 2018.

[6] The principal agent had issued two interim certificates, and the Ministry paid the defendant N\$96 461,76 on 22 February 2018 and N\$95 641,16 on 18 October

2018, based on the two interim certificates issued. The defendant did not pay those amounts to the plaintiff.

[7] The plaintiff asserts that it is entitled to payment of the aforesaid amounts, plus the penalty payment of N\$500 per day calculated from 8 March 2028 (14 days after receipt by the defendant of the first amount) and from 1 November 2018 (14 days after receipt by the defendant of the second amount).

[8] The plaintiff avers that it was duly granted extension of time for the completion of the works, by the principal agent. The plaintiff, however, acknowledges that there is a period of 80 days in respect of which there was no required approved extension, which amounts to N\$40 000 and which the plaintiff tenders to the defendant.

[9] On 21 August 2019, the plaintiff instituted the present action against the defendant seeking relief in the following terms:

'AD CLAIM 1

1. Payment in the amount of N\$361 461.76;
2. N\$500 per day from the 20 of August 2019 to date of full and final payment by the defendant to the plaintiff;

AD CLAIM 2

3. Payment in the amount of N\$241 614.16;
4. N\$500 per day from the 20 of August 2019 to date of full and final payment by the defendant to the plaintiff;

AD BOTH CLAIMS

5. Interest on the aforementioned amounts at the rate of 20% per annum a *tempore morae* from date of judgment to date of final payment;
6. Costs of suit on an attorney and own client scale;
7. Further and/or alternative relief.'

[10] The defendant entered appearance to defend.

[11] On 20 January 2020, the plaintiff applied for summary judgement alleging, amongst others, that the defendant has no *bona fide* defence to the action and that the notice of intention to defend had been delivered solely for the purpose of delay.

[12] The application for summary judgment was partially successful and on 6 July 2020, the court ruled in the following terms:

'The court hereby grants summary judgement in favour of the plaintiff in the following terms:

1 Claim 2

- 1.1. Payment in of sum of N\$10 102.92 (N\$192 102.92 – N\$182 000);
- 1.2. Payment of N\$500 per day calculated from 1 November 2018 to date of final payment;
- 1.3. Interest a tempore morae at the rate of 20% per annum from date of judgment to date of final payment;
2. The Defendant is granted leave to defend claim 1 and the remaining amount of N\$85 538.24 of claim 2 of the plaintiff's particulars of claim.
3. The costs to be cost in the cause.
4. The parties must file a joint case plan on or before 24 July 2020.
5. The matter is postponed to 29 July 2020 at 14h15 for case planning conference hearing.'

[13] Thereafter, the defendant delivered its plea and a counterclaim.

[14] In its counterclaim the defendant disputes that the plaintiff was granted an extension of time for the completion of the works and alleges that the total period of delay amounts to 364 days amounting to a penalty of N\$182 000. The defendant therefore, seeks relief in the following terms:

- '1. Payment in the amount of N\$182 000;
2. Interest on the aforesaid amount at the rate of 20% per annum calculated from the date of judgment until the date of final payment;
3. Costs of suit;
4. Further and/or alternative relief.'

[15] At trial, two witnesses testified for the plaintiff, namely Eric Siseho Sisamu ('Mr Sisamu') and Lanel Wenhold Kotze ('Mr Kotze'). One witness testified for the defendant, namely Venacio Sandjondjo Homba ('Mr Homba').

Plaintiff's case

[16] In his testimony, Mr Sisamu states that he is the sole member and managing director of the plaintiff. He confirms the terms and conditions of the agreement entered into between the plaintiff and the defendant. He avers that the amount of N\$96 461,76 was received by the defendant on 29 January 2018 from the Ministry. In terms of the agreement, the defendant was obliged to have paid the amount over to the plaintiff on or before 8 March 2018. The defendant did not do so. As a result of such failure, states Mr Sisamu, the defendant is liable to pay a daily penalty of N\$500, to date of final payment. Furthermore, the defendant is also obliged to pay to the plaintiff the amount of N\$96 46,76.

[17] Mr Sisamu testified further that the defendant received N\$95 641,16 on 18 October 2018. The defendant was obliged to pay that amount to the plaintiff on or before 1 November 2018. The defendant failed to do so. As a result of such failure the defendant is liable to pay the plaintiff a daily penalty of N\$500 to date of final payment, and also pay the amount of N\$95 641,16.

[18] As regards the defendant's counterclaim, Mr Sisamu avers that:

- (a) the plaintiff submitted the first request for the extension of time on 29 August 2017. The request was granted verbally by Mr Kotze (on behalf of the principal agent) within 28 days of receipt of the request.
- (b) another request for extension of time was forwarded to the principal agent on 28 November 2017. The request was granted verbally within 28 days from the date of the request; and
- (c) a further request for extension of time was submitted on 23 March 2018. Similarly, that request was granted verbally within 28 days.

[19] Mr Sisamu denies that the plaintiff is indebted to the defendant in the amount of N\$182 000. However, Mr Sisamu acknowledges that the principal agent has determined that the plaintiff is indebted to the defendant in the amount of N\$40 000 as penalty in respect of the delay for which the plaintiff was not granted extension of time.

[20] Mr Kotze testified that he is employed by the principal agent and personally oversaw the project regarding the construction of the conservancy tank. To a large extent Mr Kotze corroborated the testimony of Mr Sisamu to the effect that the plaintiff had sought and was duly granted extension of time.

[21] Mr Kotze also testified that he had a meeting with the plaintiff and the defendant on 29 April 2019, and thereafter addressed a letter, dated 12 August 2019, to them, in which he determined that:

(a) the defendant is indebted to the plaintiff in respect of the two payments which were received by the defendant on 22 February 2018 and 18 October 2018 which the defendant was obliged to pay over to the plaintiff but failed to do so, plus a penalty payment of N\$500 per day in respect of each day the defendant was in default; and that;

(b) the plaintiff is indebted to the defendant in the amount of N\$40 000 in respect of the unapproved delay in the completion of the project. This delay is computed in respect of the period between 1 March 2018 and 23 March 2018, amounting to 22 days, and the period between 31 July 2018 and 26 September 2018, amounting to 58 days. The total days of the delay are therefore, 80 days, multiplied by N\$500, equalling N\$40 000.

The defendant's case

[22] For the defendant, Mr Homba states that he is the managing member of the defendant. He asserts further that he was never informed of any extension of time in regard to the construction of the conservancy tank. He, however, states that he discovered that the extension of time granted to the plaintiff was not granted within 28 days of the application for extension. Having discovered this, he realised that the defendant has a counterclaim against the plaintiff, because the plaintiff is in breach of agreement between the parties.

[23] Mr Homba asserts further that the defendant's counterclaim is premised on the fact that the plaintiff is in breach of the agreement in that it failed to reach practical completion on 27 September 2017 and only completed the works on 28

September 2018. Mr Homba therefore, avers that the plaintiff owes the defendant in the amount of N\$182 000.

Analysis

[24] Clause 16 of the agreement entered into by the parties on 10 July 2017, deals with penalties in respect of failure to complete the project within the agreed time, and provides as follows:

'If the contractor fails to bring to practical completion and hand over the works or any or all of the several parts thereof on or before the date/s stated in the attached schedule, or within any extended period of periods under clauses 16.4 and/or 20 and the principal agent certifies in writing that in his opinion the same ought reasonably so to have been completed, the contractor shall pay or allow to the employer, as penalty/ies for non-completion, the sum or sums stated in the attached schedule for the period or periods during which the said works or part of thereof shall so remain or have remained incomplete and the employer may deduct such penalty/ies from any monies due or to become due to the contractor under this contract.'

[25] From the foregoing clause, it appears that penalties only become payable upon:

(a) a failure to complete and hand over the works within the agreed time; and;

(b) the principal agent having issued a certificate to the effect that in his opinion the works ought reasonably to have been completed within the period provided for.

[26] In the present matter, it is common cause that the principal agent has not issued a certificate referred to above. The mere fact that the works were not brought to practical completion by 27 September 2017 does not by itself entitle the defendant to claim penalties in respect of the delay. In the absence of a certificate issued by the principal agent, it appears to me that the defendant's counterclaim cannot succeed. In any event, on the evidence adduced on behalf of the plaintiff, I am of the opinion that the plaintiff was granted the required extension of time and that the defendant's

counterclaim has no merit. It, therefore, follows that the counterclaim stands to be dismissed.

[27] It is not in dispute that the parties have agreed that the defendant shall pay the plaintiff the amount due to the plaintiff and received by the defendant from the Ministry, within 14 days of receipt of such amount. The defendant has failed to pay over to the plaintiff the amounts it received on 22 February 2018 and on 18 October 2018, respectively. The defendant is, therefore, liable to pay over those amounts to the plaintiff.

[28] In regards to the quantum of the amount payable by the defendant to the plaintiff, I have taken into consideration that the court has in the summary judgment of 6 July 2020, ordered that the defendant must pay the plaintiff:

(a) N\$10 102,92; and

(b) N\$500 per day, calculated from 1 November 2018 to the date of final payment, together with interest on the above amount.

[29] The N\$10 102,92 is therefore, to be deducted from the amount that is due to the plaintiff.

[30] Insofar as payment of penalties is concerned, the defendant has contended during closing arguments, that the penalties prayed for are excessive and that the court should exercise its discretion in terms of the provisions of s 3 of the Conventional Penalties Act 15 of 1962 and reduce the penalties to a period of one year, in the event that the court orders that the penalties be paid.

[31] I have taken into account that the defendant was already ordered, in the summary judgment, to pay penalties with effect from 1 November 2018. The total number of days calculated from 1 November 2018 to 6 July 2020 (when summary judgment was granted) are about 612 which would translate to penalties of about N\$306 000.

[32] In terms of s 3 of the abovementioned Act, the court is empowered to reduce a penalty to the extent that it may consider equitable in the circumstances, if it is of the opinion that such penalty is out of proportion to the prejudice suffered by the creditor.

[33] In the present matter, I am of the opinion that the penalty amount that was ordered in the summary judgment sufficiently addresses the prejudice suffered by the plaintiff, in the circumstances of the present case. I am, therefore, not going to order that further penalties be payable.

[34] I have also taken into consideration that the plaintiff is indebted to the defendant in the amount of N\$40 000 and the plaintiff has tendered to pay that amount. I am therefore, going to deduct N\$40 000 from the amount due to the plaintiff by the defendant.

[35] The total amount received by the defendant from the Ministry and which the defendant was obliged to pay over to the plaintiff is N\$192 000. From this amount I would deduct the N\$10 102,92 and N\$40 000. The total amount now due to the plaintiff by the defendant is N\$142 000. I shall, therefore, grant judgment in favour of the plaintiff against the defendant in that amount.

[36] As regards the issue of costs, the general rule is that the successful party is entitled to its costs. The plaintiff is the successful party. I shall therefore, make an order to that effect.

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

1. The court grants judgment in favour of the plaintiff against the defendant in the following terms:
 - (a) payment in the amount of N\$142 000;
 - (b) interest on the aforestated amount at the rate of 20% per annum calculated from the date of judgment to the date of final payment;
 - (c) costs of suit.
2. The defendant's counterclaim is dismissed.
3. The defendant is ordered to pay the costs of the plaintiff occasioned by the counterclaim.
4. The matter is removed from the roll and is regarded finalised.

APPEARANCES

PLAINTIFF : I Mainga
Of Mainga Attorney, Ongwediva

DEFENDANT: A Shimakeleni
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