

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: HC-MD-CIV-ACT-CON-2021/03143

In the matter between:

**JOEL SHIKONGO NATANGWE KATOMA**

**FIRST PLAINTIFF**

**EVELINA GETRUD KATOMA**

**SECOND PLAINTIFF**

and

**JOE JOE ENGINEERING CC**

**FIRST DEFENDANT**

**JOSEF NDJADILA**

**SECOND DEFENDANT**

**Neutral citation:** *Katoma v Joe Joe Engineering CC* (HC-MD-CIV-ACT-CON-2021/03143) [2023] NAHCMD 515 (18 August 2023)

**Coram:** MILLER AJ

**Heard:** 31 July 2023 & 1 August 2023

**Delivered:** 18 August 2023

**Flynote:** Civil Practice – Trial – Absolution from the instance – Whether there is evidence upon which a court acting reasonably may find for the plaintiff – In this matter, the evidence presented does not support the issues and in some respects the evidence is contrary to the issues – The Court is of the view that no Court acting reasonably may find for the plaintiff.

**Summary:** The first plaintiff and the first defendant entered into an agreement, whereby, the first defendant had to construct a borehole for the first plaintiff. The first defendant provided the plaintiff with quotations which in total amounted to N\$210 480. The borehole was constructed but the plaintiffs were not satisfied with the result and instituted action against the defendants, whereby an amount of N\$121 037,50 is claimed with interest and costs.

Many issues were raised in the pre-trial report that had to be dealt with at trial.

At trial, an expert witness was called by the plaintiff. He testified that he examined and tested the borehole. He measured the depth of the borehole and found it to be 102 meters deep. He found silt at the bottom of the borehole and that could have been the reason for the depth being reduced to 102 meters. He also testified that the borehole was unsuccessful.

The first plaintiff testified that he pointed out the location where the borehole was to be drilled, however, the defendants elected to drill at another location. He further testified that, an entity known as Namibia Solar Solutions CC provided him with a quotation of the amount of N\$121 037,56 to cure the defective work of the first defendant, such quotation was based on what he told them.

The Court is faced with the determination whether on the evidence presented, a court acting reasonably may find for the plaintiff.

This Court took the issues identified in the pre-trial order into consideration and the evidence presented and is of the view that the evidence does not support the issues.

*Held that*, in some respects, the evidence is contrary to what was the issue and the evidence falls short of establishing the issues.

*Held that*, the evidence discloses that some of the items claimed or work not done did not form part of the agreement.

*Held that*, no reliance can be placed on the information contained in the quotation provided by the Namibia Solar Solutions CC as it is based on the information provided by the first plaintiff which is also incorrect.

*Held that*, no court acting reasonably may find for the plaintiff, absolution is therefore granted with costs.

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### ORDER

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1. The application for absolution from the instance is granted with costs.
2. The matter is finalized and removed from the roll.

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### JUDGMENT

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MILLER AJ:

[1] During August 2018, the first plaintiff concluded an agreement with the first defendant. In terms of that agreement, the first defendant undertook to construct a borehole for the plaintiff at a place called Omakange 2, in the Omusati Region in Namibia.

[2] The first defendant provided the first plaintiff with written quotations, Exhibit "C" and "F" respectively. The total amount quoted was the sum of N\$210 480.

[3] It is common cause that, firstly, the first defendant proceeded to construct a borehole and, secondly, the borehole so constructed did not produce the desired result of providing sufficient water for the plaintiff's livestock and the people who reside there.

[4] The first and second plaintiffs then instituted an action against the first and second defendants. They claim the following relief:

4.1 Payment of the amount (sic) of N\$121 037-50.

4.2 Payment of interests (sic) on the above-mentioned (sic) amount at 20%, per annum, from the date of judgment to the date of full and final judgment. (sic)

4.3 Costs of suit.

[5] The claim is based upon the alleged breach of the agreement by the first defendant in certain respects. These were formulated in paragraph 3 of the pre-trial order dated 25 April 2023.

1.1 Whether or not, the borehole drilled by the first defendant is 42 meters or 110 meters deep.

1.2 Whether or not the parties contractually agreed that the first defendant was to conduct a feasibility study to identify the area where adequate water was/is.

1.3 Whether or not the plaintiffs were quoted for and paid the first defendants to conduct a feasibility study to identify the area where adequate water was/is.

1.4 Whether or not the first defendant had to install strips around the elevated water tank and at what level strips had to be installed, if at all.

1.5 Whether or not the plaintiffs paid the first defendant to install strips around the elevated water tank.

1.6 Whether or not the first defendant had a contractual obligation to install a control circuit box to indicate water levels.

1.7 Whether or not the plaintiffs were quoted for and paid for the installation of a control circuit box.

1.8 Whether or not the first defendant had a contractual obligation to paint the steel tank with anti-rust paint to minimize corrosion/rusting.

1.9 Whether or not the plaintiffs were quoted for and paid for the painting of the steel tank with anti-rust paint by the first defendant.

1.10 Whether or not the first defendant performed its obligations efficiently and in a workmanlike manner.'

[6] The issues that remained for determination at the trial were those formulated in paragraphs 2.1.1 to 2.1.4 of the pre-trial order. Paragraphs 2.1 reads as follows:

'2.1.1 The first defendant breached the terms of the oral agreement in the form of mal-performance or incomplete performance.

2.1.2 The plaintiffs suffered contractual damages in the amount of N\$121,037-50.

2.1.3 The first defendant is liable to pay the plaintiffs damages in the amount of N\$121,037-50.

2.1.4 Whether or not the second defendant is jointly and several liable to the plaintiff with the first defendant.'

[7] When the trial commenced the plaintiff called two witnesses namely, Mr Liam Mbako and the first plaintiff. Mr Mbako was called as an expert witness. Mr Mbako examined and tested the borehole in question. He measured the depth of the borehole and found it to be 102 meters deep. He testified that the accumulation of silt at the bottom of the borehole reduced the depth to 102 meters and that it was possible that the initial depth was 110 meters. In his opinion the borehole was "unsuccessful".

[8] The evidence of the first plaintiff is to the effect that he had identified the location where the borehole was to be drilled. According to him, second defendant elected to drill the borehole at some other location, despite his instruction to drill the borehole at the place identified by the first plaintiff. He testified further that, he later visited an entity he knows as Namibia Solar Solutions CC, who provided him with a quotation in the amount of N\$121 037,56 to apparently cure the defective work of the

first defendant. The quotation provided by Namibia Solar Solution CC was based purely on what was said to them by the first plaintiff.

[9] The defendants applied for absolution from the instance once the plaintiff had closed their case. Ultimately the issue to be determined is whether on the evidence presented thus far, a court acting reasonably may find for the plaintiff. Counsel referred me to several dicta in previous judgments in which the test in an absolution application was formulated. The test and the courts approach is trite. No purpose will be served by referring to the various cases I was referred to. In applying that approach I refer to the issues identified by the parties in that pre-trial order I mentioned earlier.

[10] A perusal of the evidence tendered by the plaintiff in relation to the identified issues reveal that the evidence does not support the issues. In some respects the evidence is contrary to what was in issue. In this regard I refer to the depth of the borehole and the pleaded feasibility study which the first defendant allegedly undertook to do. In other respects the evidence falls short of establishing the issues, such as the alleged strips around the water tank. In other respects the evidence discloses that some of the items claimed or work not done did not form part of the agreement. This relates to the control circuit box and the painting of the steel tank.

[11] Finally no reliance can be placed on the information contained in the quotation provided by Namibia Solar Solutions CC. It was based upon information provided by the first plaintiff and is clearly incorrect in some respects. I point out only that they quoted the sum of N\$91 800 in respect of 68 meters of drilling which is clearly based upon the factually incorrect assertion by the first plaintiff that only 42 meters were drilled initially.

[12] I conclude that in the result no court acting reasonably may find for the plaintiff. I make the following orders:

1. The application for absolution from the instance is granted with costs.
2. The matter is finalized and removed from the roll.

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P J MILLER  
Acting Judge

APPEARANCES

PLAINTIFFS:

T Ipumbu  
Of Titus Ipumbu Legal Practitioners, Windhoek

DEFENDANTS:

E Katjaerua  
Of Katjaerua Incorporated,  
Windhoek