

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between: Case no: HC-MD-CIV-ACT-CON-2020/02894

BUCHTER BRICKS & BLOCKS CC

PLAINTIFF

and

OKAKOVERUS BUILDING BLOCKS CC

FIRST DEFENDANT

RIO ENGINEERING AND CONSTRUCTION CC

SECOND DEFENDANT

Neutral citation: *Buchter Bricks & Blocks CC v Okakoverus Building Blocks CC*
(HC-MD-CIV-ACT-CON-2020/02894) [2023] NAHCMD 596 (26
September 2023)

Coram: MILLER AJ

Heard: 17-18 July 2023; 11 August 2023

Delivered: 26 September 2023

Flynote: Civil practice – Factual disputes – Evidence on a balance of probabilities – Most of the plaintiff's evidence is common cause. The defendants made some allegations which were mere bare denials. The court is of the view that the evidence presented by the defendants were false, contradictory and improbable. Court finds the version of the plaintiff more probable than the version of the defendants and rejects the defendants' version.

Summary: The first and second defendants were a joint venture. The plaintiff and defendants entered into a contract that the plaintiff would provide the defendants with construction material and services from time to time.

The defendants then failed to pay the plaintiff for the material supplied and services rendered. The plaintiff instituted action and the matter was then defended.

The defendants allege that the amounts due to the plaintiff were to be paid by the Lüderitz Town Council and not the defendants. In the counterclaim, the defendants allege that they suffered damages as a quantity of soil delivered by the plaintiff did not meet the required standards and that the soil that was delivered was G6 and G7 soil instead of G5 soil.

The defendants further disputed that all the items invoiced were delivered and received.

Held that, the issues raised in respect of the claims and the plea thereto are factual issues which requires a determination of the evidence of the various witnesses who testified, with reference to their credibility or otherwise, the circumstances surrounding the case, and the probabilities of the case.

Held that, the evidence tendered on behalf of the plaintiff is common cause. The allegation by the defendants that all the items invoiced were not delivered and received is a bare denial which was not supported by any concrete evidence to support the allegation.

Held that, the evidence by the defendants that the Council assumed responsibility for the amounts due to the plaintiff is in the court's view false, contradictory and improbable. There is nothing to support any agreement to the effect that the Council had agreed to pay the debts of the defendants. The Council made payment to the plaintiff in the sum of N\$301 225,01, it was a payment made in respect of work the plaintiff had done for the Council. The work was done after the Council appointed the plaintiff in terms of a separate agreement to perform certain work the defendants did not complete. Contrary to what the defendants allege, payment was not one in settlement of the defendants' debts.

Held that, the counterclaim can be dispensed of simply on the basis that in order to substantiate the claims some expert testimony was necessary to support the allegations and such testimony was not forthcoming.

Held that, the court accepts the evidence of the plaintiff's witnesses as correct and rejects the evidence of the defendant's witness and grants judgment in favour of the plaintiff against the defendants jointly and severally, the one paying the other to be absolved.

ORDER

1. I grant judgment in favour of the plaintiff for:
 - 1.1 Payment in the amount of N\$74 582,51 in respect of claim 1.
 - 1.2 Payment in the amount of N\$22 042,48 in respect of claim 2.
 - 1.3 Payment in the amount of N\$75 253,06 in respect of claim 3.
 - 1.4 Payment in the amount of N\$3000,01 in respect of claim 4.
 - 1.5 Payment in the amount of N\$25 880,20 in respect of claim 5.
 - 1.6 Payment in the amount of N\$6 339,25 in respect of claim 6.
 - 1.7 Payment in the amount of N\$2 678,01 in respect of claim 7.
 - 1.8 Payment in the amount of N\$2 886,02 in respect of claim 8.
 - 1.9 Interest at the rate of 20 per cent per annum *a tempora morae* to date of payment.
2. The counterclaim is dismissed.

3. The defendants are ordered to pay the plaintiff's costs, jointly and severally, the one paying the other to be absolved.
4. The matter is finalised and removed from the roll.

JUDGMENT

MILLER AJ:

[1] By virtue of a written agreement, the first and second defendants, formed a joint venture. The purpose thereof was to fulfil their obligations to the Lüderitz Town Council (the Council), in terms of a tender awarded to them to upgrade a portion of Diaz Street in Lüderitz.

[2] In order to do the required work, it became necessary from time to time to contract with the plaintiff to provide construction materials and services. It is not in dispute that an agreement to that effect was concluded between the plaintiff and the defendants. Likewise it is not disputed that the plaintiff supplied goods, equipment and services from time to time to the defendants.

[3] Certain amounts which became due were unpaid. The plaintiff then instituted this action in which it claims the following relief:

- a) Payment in the amount of N\$74 582,51 in respect of claim 1.
- b) Payment in the amount of N\$22 042,48 in respect of claim 2.
- c) Payment in the amount of N\$75 253,06 in respect of claim 3.
- d) Payment in the amount of N\$3000,01 in respect of claim 4.
- e) Payment in the amount of N\$25 880,20 in respect of claim 5.

- f) Payment in the amount of N\$6 339,25 in respect of claim 6.
- g) Payment in the amount of N\$2 678,01 in respect of claim 7.
- h) Payment in the amount of N\$2 886,02 in respect of claim 8.
- i) Interest at the rate of 20 per cent per annum *a tempora morae* to date of payment.
- J) Cost of suit.

[4] Each of the amounts claimed relates to an invoice tendered to the defendants which reflected what was supplied and delivered together with the amounts due. It became apparent during the course of the hearing that the amount claimed in claim 3 is erroneous and should read 'N\$75 253,06' and the amended Particulars of Claim is further amended to rectify the position.

[5] The defendants filed a plea and a counterclaim. In their plea, the defendants essentially allege that the amounts due to the plaintiff were to be paid by the Council and not the defendants. As far as the counterclaim is concerned the defendants allege that they had suffered damages, caused by the fact that a quantity of soil delivered by the plaintiff did not meet with the required standards. It was alleged that the soil to be delivered had to be G5 soil. Instead the soil delivered was G6 and G7 soil.

[6] The counterclaim can be dispensed of simply on the basis that in order to substantiate the claims some expert testimony was necessary to support the allegations. Such testimony was not forthcoming.

[7] The issues raised in respect of the claims and the plea thereto are factual issues. This requires a determination of the evidence of the various witnesses who testified, with reference to their credibility or otherwise, the circumstances surrounding the case, and the probabilities of the case.

[8] With reference to the evidence tendered on behalf of the plaintiff I take into account that much of that evidence is common cause. In their plea the defendants disputed that all the items invoiced were in fact delivered and received. That allegation remained a bare denial which was not supported by any concrete evidence to support the allegation.

[9] The evidence by the defendants which was to the effect that the Council assumed the responsibility for the amounts due to the plaintiff, is in my view false, contradictory and improbable. It is correct that the Council made payment to the plaintiff in the sum of N\$301 225,01. Contrary to what the defendants allege, payment was not made in settlement of the defendants' debts. Instead it was a payment made by the Council in respect of work the plaintiff had done for the Council. That work was done after the Council appointed the plaintiff in terms of a separate agreement to perform certain work the defendants did not complete.

[10] There is nothing to support any agreement to the effect that the Council had agreed to pay the debts of the defendants. Mr Hamunyela, who testified for the defendants, in his witness statement (Exhibit Q) states in paragraph 10 that 'I arranged with the Town Council of Lüderitz to make payment of the plaintiff's invoices directly to the plaintiff'. During the course of his evidence he had a different version. According to that version, he had agreed with the plaintiff to, without the knowledge of the Council, inflate as it were the plaintiff's invoices to the Council to also include the amounts due by the defendants. That would essentially constitute a fraud upon the Council. This version is patently false and does not accord with the undisputed facts.

[11] I reject the evidence of Mr Hamunyela as false. I accept the evidence of the plaintiff's witnesses as correct.

[12] In the result I make the following orders:

1. I grant judgment in favour of the plaintiff for:

1.1 Payment in the amount of N\$74 582,51 in respect of claim 1.

- 1.2 Payment in the amount of N\$22 042,48 in respect of claim 2.
 - 1.3 Payment in the amount of N\$75 253,06 in respect of claim 3.
 - 1.4 Payment in the amount of N\$3000,01 in respect of claim 4.
 - 1.5 Payment in the amount of N\$25 880,20 in respect of claim 5.
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 - 1.8 Payment in the amount of N\$2 886,02 in respect of claim 8.
 - 1.9 Interest at the rate of 20 per cent per annum *a tempora morae* to date of payment.
2. The counterclaim is dismissed.
 3. The defendants are ordered to pay the plaintiff's costs, jointly and severally, the one paying the other to be absolved.
 4. The matter is finalised and removed from the roll.

P J MILLER
Acting Judge

APPEARANCES

PLAINTIFF: G S G van den Heever
Instructed by Delpont Legal Practitioners,
Windhoek

1ST DEFENDANT: E Nangolo
Of Sisa Namandje & Co. Inc., Windhoek