

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case Number: HC-MD-CIV-ACT-CON-2021/00406

In the matter between:

GREENTEAM CONSULTANTS CC

PLAINTIFF

and

MINISTER OF AGRICULTURE, WATER, AND LAND REFORM

DEFENDANT

Neutral citation: *Greenteam Consultant CC v Minister of Agriculture, Water, and Land Reform* (HC-MD-CIV-ACT-CON-2021/00406) [2023] 722 (10 November 2023)

Coram: PRINSLOO J

Heard: 15-16 February 2023 and 13 June 2023

Delivered: 10 November 2023

Flynote: Action – Contract - Plaintiff performed its mandate adequately in respect of the Inception Report – Is entitled to the payment of the 30 per cent – Retained by the Ministry. Plaintiff partially successful in its claim.

Summary: The plaintiff issued summons against the defendant on 9 February 2021, claiming the following relief: 1. Payment in the amount of N\$311 250 for phase 1; 2. Payment in the amount of N\$3 112 500.00 for the remainder of the agreement; 3. Interest on the aforesaid amount at a rate of 20% per annum from the date of judgment until the date of final payment and 4. Cost of suit. In amplification of its claim, the plaintiff pleaded that the plaintiff and the Ministry of Agriculture, Water and Land Reform ('the Ministry') entered into a written agreement on 30 March 2017 in terms of which the plaintiff would create an Integrated Regional Land Use Plan ('IRLUP') for the Omusati Region at the cost of N\$4 150 000. The defendant defended the matter and pleaded, amongst other things, that the plaintiff had to appoint competent and experienced personnel but breached the terms of the Consultancy Agreement by recruiting incompetent staff members to work on the project.

Held that the Ministry treated the inception report, which is meant to be introductory, as a final report.

Held that having considered the conspectus of the evidence in respect of the inception report, the court is of the view that the plaintiff performed its mandate adequately in respect of the inception report and is entitled to the payment of the 30 per cent which was retained by the Ministry.

Held that the plaintiff took a calculated risk by not applying for an extension of the contract resulting in the contract terminating due to the effluxion of time and not as a result of breach of contract.

Held that the plaintiff would not be entitled to the payment of the remainder of the contract amount for the remaining phases and that part of the plaintiff's relief stands to be dismissed.

Held that the plaintiff partially succeeds in its claim.

ORDER

1. The defendant is liable for payment in the amount of N\$311 250 for Phase 1.
 2. Interest on the aforesaid amount at the rate of 20% per annum from the date of judgment until date of final payment.
 3. The plaintiff's claim for the amount of N\$3 112 500 for the remainder of the agreement is dismissed.
 4. Each party to pay its own costs.
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JUDGMENT

PRINSLOO J:

The parties

[1] The plaintiff before me is Greenteam Consultants Close Corporation, a close corporation incorporated under the applicable laws of the Republic of Namibia, under registration number CC/2014/11056 and whose principal place of business is situated at Pasteur Street no.59, Windhoek, Republic of Namibia.

[2] The defendant is the Minister of Agriculture, Water, and Land Reform, a Minister duly appointed in terms of the applicable provisions of the Namibian Constitution, in the care of the Government Attorneys, Second Floor of the Sanlam Building, Independence Avenue, Windhoek, Republic of Namibia.

The pleadings

The plaintiff's particulars of claim

[3] The plaintiff issued summons against the defendant on 9 February 2021, claiming the following relief:

- '1. Payment in the amount of N\$ 311 250.00 for phase 1;
2. Payment in the amount of N\$ 3 112 500 for the remainder of the agreement;
3. Interest on the aforesaid amount at a rate of 20% per annum from the date of judgment until the date of final payment;
4. Cost of suit; and
5. Further and/or alternative relief.'

[4] In support of the relief claimed the plaintiff pleaded that the plaintiff and the Ministry of Agriculture, Water and Land Reform ('the Ministry') entered into a written agreement on 30 March 2017 in terms of which the plaintiff would create an Integrated Regional Land Use Plan ('IRLUP') for the Omusati Region at the cost of N\$4 150 000.

[5] The terms of the agreement were that:

- a) The plaintiff would produce an IRLUP for the Omusati Region;
- b) The plaintiff would establish a Regional Planning GIS, which could be used for the monitoring and implementation of IRLUP for the Omusati Region and a wide range of other land use planning tasks, including regular plan updating;
- c) The project would be carried out in three main phases, and these phases are detailed and described in the Terms of Reference.
- d) The duties of the plaintiff were the following:
 - a. The plaintiff would undertake the study in accordance with the Consultancy Agreement and in conformity with sound and acceptable professional practice and standards;
 - b. The plaintiff would appoint competent and experienced personnel to conduct the study;

- c. The plaintiff would provide a summary report every second month documenting its activities and progress made during the preceding two months, to be discussed between the parties in bi-monthly meetings.
- e) The duties of the Ministry were the following:
 - a. The Ministry must pay the plaintiff the total amount of funds per clause 9.4 of the agreement;
 - b. The defendant would invite and organise the logistics of the stakeholder meetings and workshops in Windhoek and the Region;
 - c. Avail the Deputy Director of the Division of Land Use Planning and Allocation and Chief Development Planner of the sub-division Integrated Regional Land Use Planning to be the permanent contact person for clarification and ad hoc problems and questions.

[6] The plaintiff claims it fulfilled all its obligations and duties for Phase 1 of the project and received 70 per cent of the amount due. The plaintiff only received this percentage because the Ministry had concerns regarding the plaintiff's report and requested that the plaintiff address these issues before the remaining 30 per cent could be paid.

[7] The plaintiff claims that it addressed all of the Ministry's comments on the Phase 1 report and submitted corrected drafts, yet 30 per cent of the Phase 1 amount, N\$311 250, remains outstanding and is due for payment. However, the Ministry has not paid the outstanding amount as it refused to approve the report despite the plaintiff completing it satisfactorily.

[8] The plaintiff pleads that the Ministry verbally placed the project on hold, on account of there being new members in the plaintiff's team, who were not approved. The plaintiff pleads that this verbal hold on the project was in breach of clause 15.2 of the agreement as it had not been done in writing. As a result of this hold, in breach of the agreement, a planned field trip to the region had to be cancelled.

[9] In the early stages of the contract, there were delays on the part of the Ministry, which affected the project's completion date. As a result, the parties entered into an addendum to the contract, extending the agreement to 31 July 2020. The plaintiff pleads that due to continued delays by the Ministry, the plaintiff demanded that the agreement between the parties be extended for another year and that the plaintiff be allowed to move on to the next phase and finalise the project in terms of the contract. However, the Ministry did not intend to continue with the contractual relationship with the plaintiff. It indicated that it would only pay the remaining 30 per cent regarding the project's inception phase if all the outstanding matters had been attended to.

[10] The plaintiff pleads that despite a meeting between the parties, the issues could not be resolved as the Ministry regarded the contract as expired. The Ministry, however, failed to indicate on what basis the contract could not be extended and refused to have the matter referred to arbitration. The plaintiff pleads that as a result of the conduct of the Ministry, unnecessarily delaying the project from the onset and eventually verbally putting a hold on the project, amounts to a breach of contract.

[11] As a result of the breach by the Ministry, the plaintiff claims the relief set out above. The relief claimed includes the balance of the inception project and the balance of the remaining phase, constituting the loss of profit as damages suffered by the plaintiff.

The defendant's plea

[12] The Ministry pleads that the State budgeted the amount of N\$1 037 500 for the preparation, submission and finalisation of the inception report (i.e. the first phase of the contract sum).

[13] The Ministry further pleads that the plaintiff had to appoint competent and experienced personnel but breached the terms of the Consultancy Agreement by recruiting incompetent staff members to work on the project.

[14] When the plaintiff recruited a new team without the consent of the Executive Director of the Ministry of Land Reform in September 2019, it was advised to seek the approval of the Executive Director in respect of its new team, which was done, and the request was approved. However, during the preparation and planning for the commencement of the second phase of the project, the plaintiff circulated another list with the names of its consultancy team, which were different from the names approved by the Executive Director and as a result, the Ministry suspended the commencement of the second phase of the development of Omusati IRLUP.

[15] The Ministry further pleads that the payment to the plaintiff was due in four payment releases, in different percentages based on the phases completed. As a result, the total payment could only be made once the project was completed and all four phases were finalised.

[16] According to the Ministry, the plaintiff submitted an incomplete inception report, and the plaintiff was requested to correct the inception report. The plaintiff, however, failed to adhere to this request since 19 November 2019 and persists in its refusal to correct the inception report therefore, the amount of N\$311 250 is not due and payable to the plaintiff. The Ministry pleads that it had no option but to invoke clause 11.5.3 of the Consultancy Agreement.¹

[17] The Ministry denies the allegation that it did not intend to continue with the contractual relationship. The Ministry pleads to the contrary that it was the plaintiff who,

¹ 11.5 Unsatisfactory or incomplete work.

In the event that the Ministry considers any work done by the Consultant to be wholly or partially unsatisfactory or incomplete or fails to conform to the conditions set out above, the Permanent Secretary on the advice of the Deputy Director of the Division Land Use Planning and Allocation, reserves the right to:

11.5.1 not applicable.

11.5.2 no applicable.

11.3 Terminate the Contract.

in July 2020, indicated its intention to discontinue the contractual relationship when the Ministry offered to extend the contract. The meeting between the parties proved futile as the plaintiff was not interested in agreeing to complete phase one of the project but expected payment thereof.

[18] The Ministry avers that it engaged the plaintiff in terms of the dispute resolution clause of the agreement and was prepared to attend arbitration proceedings if need be.

Evidence adduced

The plaintiff's case

[19] The plaintiff called three witnesses. These witnesses included the managing member of the plaintiff, Mr Sackaria Nalusha, and two experts, Ms Linea Hamukwaya and Dr John Mendelsohn.

Sackaria Nalusha

[20] Mr Nalusha testified that the primary services of the plaintiff are:

- a) Land Use Plans (Urban and rural planning);
- b) Mining exploration and geological consultations;
- c) Hydrological investigation (borehole drilling and sitting);
- d) Water Network System Modelling;
- e) Environmental Impact Assessments Consultation and Environmental Management Plans;
- f) GIS² Spatial Database Development and
- g) Marine specialist studies.

² Geographical Information System.

[21] Mr Nalusha also enumerated the projects the plaintiff has been involved in to date. The value of these projects ranges between N\$40 000 and approximately N\$580 000.

[22] He testified that in 2016, the Ministry placed an advert in the local newspaper inviting bids for the Integrated Regional Land Use Planning for the Omusati Region. The plaintiff submitted its bid and was chosen as the successful bidder.

[23] On 30 March 2017, the plaintiff, represented by Mr Nalusha, and the Ministry, represented by Mr Peter Amutenya, entered into a written agreement to develop the IRLUP for the Omusati Region for N\$4 150 000. Mr Nalusha confirmed the terms of the agreement as pleaded in the particulars of claim, which I will not replicate.

[24] Mr Nalusha testified that the plaintiff complied with its obligations for phase one of the project and was paid 70 per cent of the amount due to the plaintiff. However, despite continuous corrections, the Ministry had repeated queries regarding the inception report of Phase 1. This resulted in the Ministry failing to make payment in respect of the remaining 30 per cent of Phase 1, in the amount of N\$311 250, which remains due and payable to the plaintiff.

[25] It is his testimony that the plaintiff had completed the report as required by the Ministry. The plaintiff had also addressed the Ministry's comments and suggestions and made the necessary changes, resulting in the submission of seven drafts to the Ministry. However, after each submission, Mr Petrus Nangolo, the Deputy Director of Land Reform, would return the report with additional comments, resulting in a never-ending cycle of comments. Mr Nalusha stated that this practice was inconsistent with the standard of a preliminary report, which should not be considered a final report.

[26] Mr Nalusha further testified that Mr Nangolo's conduct regarding the inception report was contradicted by correspondence from Mr Christoph Mujetenga, Deputy

Director of the Division of Land Use, Planning and Allocation. According to an email dated 19 November 2019 Mr Mujetenga expressed his satisfaction regarding the report.

[27] During his testimony, Mr Nalusha stated that he and his team were prepared to commence Phase 2 of the project in the Omusati Region. However, on 6 July 2020, he received a call from Mr Mujetenga conveying an instruction from Mr Nangolo to put the project on hold. The reason for the decision was that there were new members in the plaintiff's team, even though the team had already been presented to the Ministry officials on 11 June 2020.

[28] He stated that the conduct was against clause 15.2 of the agreement, which indicated that any such action was to be communicated in writing. As a direct consequence of this hold, the scheduled field trip to the Omusati Region had to be cancelled.

[29] After the project was put on hold, Mr Nalusha requested approval for a new team, but the Ministry did not respond. Later, the Ministry refused the request, citing the lack of a GIS and Database specialist on the new team. However, Mr Nalusha claims two such specialists were on the team. He believes the hold on the project and the Ministry's refusal were without merit.

[30] It was further his testimony that delays in the Ministry's internal procurement process caused an extension of the contract to 31 July 2020. As the contract's end date approached, Mr Mujetenga suggested that the plaintiff should request an extension of the contract. According to Mr Nalusha, the plaintiff demanded through its legal representative that the Ministry extend the contract. Despite initially asking the plaintiff to request an extension, the Ministry declined to continue the contractual relationship without giving specific reasons.

[31] Mr Nalusha has reported that due to the Ministry's continuous concerns with the inception report, the plaintiff felt compelled to hire a land use expert and a language

editor to assess the report. Both experts deemed the report to be satisfactory and acceptable. As a result, the plaintiff believes they are entitled to the remaining 30 per cent of phase 1 that remains unpaid, as well as the outstanding balance of the remaining phases. The plaintiff is seeking damages for loss of profits as a result of this situation.

[32] During cross-examination, it was established that none of the previously completed projects listed by the plaintiff were similar to the project in question. Mr Nalusha conceded that the plaintiff had not done an inception report worth one million Namibian Dollars.

[33] Mr Nalusha admitted that they did not address some of the concerns raised by the Ministry. He mentioned that he provided a document explaining why they did not comply with the comments for the second draft. However, this document was not presented to the court.

[34] He also indicated that he no longer persisted with the argument that the Ministry was in breach of clause 15.2 of the agreement by verbally informing the plaintiff on 6 July 2020 that the team should not travel to Omusati Region for the project's second phase.

[35] Mr Nalusha testified that the plaintiff had informed the Ministry in writing about the reasons for not seeking an extension, but this document was not presented in court. The plaintiff made a strategic decision not to apply for an extension as it would classify them as incompetent. Mr Nalusha confirmed that not requesting an extension was not considered a risk as the delays had been caused by the Ministry.

Linea Hamukwaya

[36] Ms Hamukwaya is employed as a copy editor by the New Era Publication Corporation and holds a PhD in General Linguistics and a Master of Arts in English

Studies. She further holds a Post-Graduate Diploma in French and a Bachelor of Education in English and French.

[37] Ms Hamukwaya has been a copy editor since 2019 and, prior to that, lectured/taught English since 2013. Ms Hamukwaya's main fields of expertise are copywriting or editing, research, and lecturing.

[38] She testified that Mr Nalusha approached her in October 2021 to provide him with an expert opinion on the Omusati Integrated Regional Land Use Plan Inception Report drafts 6 and 7. She perused the two drafts and assessed the level of grammar and correctness of the use of the English language in the two drafts.

[39] In the assessment, the witness employed the Correspondence Consistency Correctness Model for Text Analysis methodology to critique and assess the document's language and grammatical principles. The various methods allowed for micro and macro-level error analysis to arrive at conclusions. Ms Hamukwaya testified that she used the model adopted by the professional editor's guild.

[40] Having examined the two drafts, she concluded that:

- a) The English language in the two drafts is adequate.
- b) The grammar used in the two reports (drafts six and seven) is of acceptable English standards.
- c) On the language proficiency level, the language used in the two drafts should be classified as level 3 - professional working proficiency.
- d) The errors are on a micro level; hence, they do not affect the text quality because there are no errors of correspondence, consistency, or correctness.

[41] During cross-examination, Ms Hamukwaya testified that she received the two drafts of the inception report in October 2021 and perused them but did not edit them. She noted the main areas in the documents when she assessed them. The assessment

was done with track changes, but the documents with track changes were not presented to the court.

John Martin Mendelsohn

[42] Dr Mendelsohn holds B.Sc and B.Sc (Honours) degrees as well as a PhD in Zoology and is the Executive Director of the Ongava Research Centre and is the owner and founder of the Research and Information Services of Namibia ('RAISON').

[43] He testified that his fields of expertise are:

- a) Socio-economic processes and characteristics of rural areas in Namibia and southern Angola;
- b) The management and use of rural land, especially in northern Namibia and
- c) Mapping and analysis of geographical features, as published in various books.

[44] It is his testimony that Mr Nalusha approached him on 2 December 2021 and provided him with the seventh draft of the Inception Report for the Omusati IRLUP. This draft was submitted to the Ministry on 7 July 2020. The witness stated that his brief was to peruse the seventh draft of the report and to indicate, based on his expertise and experience, whether or not the inception report was adequate when one had regard to the agreement, including the terms of reference.

[45] Mr Nalusha provided Dr Mendelsohn with the written comments of the Ministry in response to the third and fourth draft inception reports, who informed him that only verbal comments were received in response to the fifth and sixth drafts, which dealt with the need for minor changes to specific maps and to remove the plaintiff's logo and address from these maps. Regarding the seventh draft, no comments were supplied to the plaintiff despite the fact that the seventh draft was submitted 15 months before the discussion between Mr Nalusha and the witness.

[46] Having considered the documents presented to him, Dr Mendelsohn concluded as follows:

- a) The inception report was more than adequate, given the fact that it reflected the work done during the first six weeks of the contract period.
- b) The inception report reflects the considerable work done, which ran into 155 pages and contained 36 maps, many presenting detailed information.
- c) The draft compares favourably with other inception reports approved by the Ministry for similar regional land use plans, such as Kavango East and West, as well as Omaheke and Otjozondjupa.
- d) The draft Inception Report adequately paves the way for the remaining work required of the Land Use Plan. It identified major geographical features and processes in Omusati Region that influence land use.
- e) With a few exceptions, the comments regarding the third and fourth drafts concerned either trivial points or are pedantic to the extent that suggests that the author(s) of the comments sought to be obstructive and damaging to the plaintiff's reputation. Many of the comments related to grammar, and although these drafts contained grammatical errors, Dr Mendelsohn contended that it could not be compared to the poor grammar used by the Ministry in its comments, thereby raising doubts regarding the purpose of the Ministry's criticism of the language.
- f) Notwithstanding the adequacy of the seventh draft of the inception report, the draft could be improved.

[47] This concluded the case for the plaintiff.

The defendant's case

[48] Two witnesses were called on behalf of the Ministry, namely Messrs Christoff Mujetenga and Petrus Canisius Nangolo.

Mr Christoff Mujetenga

[49] Mr Mujetenga testified that he is employed with the Ministry of Agriculture and Land Reform as a Deputy Director of Land Use Plan and Allocation and is stationed in Windhoek.

[50] He testified that his department, amongst other things, allocates land and is responsible for integrated regional land use plans for the entire country.

[51] According to the witness, the tender was awarded to the plaintiff on 8 December 2016 by the Tender Board of Namibia, and the plaintiff and Ministry entered into a contract on 30 March 2017.

[52] Mr Mujetenga testified that the commencement of the contract was delayed while awaiting the approval of the Program for the Communal Land Development Procurement Procedure. The commencement of the project was eventually launched on 14 June 2019. In the intervening period, numerous letters were directed to the plaintiff explaining the delay. As a result, a contract addendum was signed on 22 November 2018 between the plaintiff and the Ministry. The addendum extended the project completion date to 31 July 2020.

[53] The plaintiff submitted its first inception report on 22 October 2019. The report was sent back to the plaintiff with inputs from the Ministry on 19 November 2019. The report was resubmitted on 21 November 2019. The Ministry reviewed the report and re-submitted it to the plaintiff on 5 December 2019 for corrections and further input. The plaintiff returned the report to the defendant on 12 December 2019, but the proposed corrections and inputs were not addressed, and the report was referred back to the plaintiff on 23 December 2019 for correction.

[54] The draft report was exchanged several times between the parties involved. After a meeting, a further draft with corrections was submitted to the Ministry on 12 February 2020. On 18 March 2020, the inception report was conditionally approved, allowing them to address deficiencies not addressed in the report and required physical verification in the Omusati region while working on activities of the second phase. The plaintiff received 70 per cent of the total contract amount for the inception phase, and the remaining 30 per cent would be paid when the report is completed to the satisfaction of the Ministry.

[55] Mr Mujetenga testified that on 16 June 2020, the Ministry received a report from the plaintiff without any indication of how the issues raised were addressed. The report contained errors that were referred to in the preceding report. A meeting was convened between him and Mr Nalusha on 2 July 2020 to discuss the report compiled by the plaintiff on 16 June 2020. On 7 July 2020, the plaintiff submitted another draft of the report.

[56] Mr Mujetenga stated that the second phase, which was planned to commence between 12 and 31 July 2020, was cancelled due to the plaintiff's decision to bring in new experts without the approval of the Executive Director. As a result, the plaintiff was advised to submit a formal request to the Executive Director seeking approval for the new team. The plaintiff complied and submitted a request for the latest team's approval.

[57] Additionally, the plaintiff was advised to request an extension of the contract before its expiry date on 31 July 2020. On 30 June 2020, the Ministry received a letter from the plaintiff indicating that they 'are not in the position to request an extension of the contract'.

[58] While considering the request for the approval of the new team, the plaintiff's legal practitioner wrote a letter to the Ministry on 30 July 2020, demanding a contract extension, among other things.

[59] During cross-examination, Mr Mujetenga testified that the comments on the different drafts of the report were made by a team from the Ministry and not only by him or Mr Nangolo. Mr Mujetenga testified that the Ministry accepted the plaintiff's decision not to request a contract extension in a letter dated 23 October 2020.

[60] The witness was confronted concerning the team of experts, and Mr Mujetenga indicated that he did not have the authority to approve the plaintiff's team of experts. He further testified, when confronted with the team's qualifications, that although he does not take issue with the team's qualifications, he considered the PLUP³ roles and nowhere on the list are the GIS and Data Base specialists reflected.

Petrus Canisius Nangolo

[61] Mr Nangolo testified that he is employed by the Ministry of Agriculture and Land Reform as the Director of Land Reform stationed in Windhoek.

[62] He testified that he is responsible for the Directorate of Land Reform: Land Use Planning. This Directorate, amongst other things, allocates land and is responsible for integrated land use plans for the entire country.

[63] During the trial, the witness testified that the former Executive Director, Mr Peter Amutenya, had signed a written Consultancy Agreement with the plaintiff. The agreement required the plaintiff to create an Integrated Regional Land Use Plan (IRLUP) for the Omusati Region. The State had allocated N\$4 150 000 for the entire project, which was to be completed within the 12 month duration of the agreement. The project was divided into three phases, with each phase requiring the submission of reports or documents. These phases were as follows:

- a) Phase 1 consisted of the inception report, which would have lasted for two months. The contract sum for the first phase was N\$1 037 500;

³ Participatory Land Use Plan(ing).

- b) Phase 2 was divided into two parts, i.e., the draft land use plan and the sub-regional and local use plan for critical and promising areas.
- c) Phase 3 was divided into three parts: (i) the Final Integrated Regional Land Use Plan, (ii) the Final GIS database, and (iii) the Final process and GIS documentation.

[64] The consultant had to submit progress reports every two months and special activity reports after major events. The Ministry approved these deliverables for payment, which would only be made once the project's phases were completed. Conditional approval for the inception report was granted on 18 March 2020, and a payment of 70 per cent of the contract sum for Phase 1 was made. However, the Ministry identified errors and deficiencies in the report, which the plaintiff was required to correct and edit before resubmitting it. The remaining 30 per cent of the payment was withheld until these issues were addressed.

[65] Mr Nangolo testified that on 16 June 2020, the Ministry received a further draft of the report from the Plaintiff without any indication as to how the report was corrected.

[66] He further raised an issue regarding the team of experts appointed by the plaintiff to comply with its mandate. According to the witness, the plaintiff was obliged, in terms of the agreement, to appoint competent and experienced personnel subject to the approval of the Executive Director of Land Reform.

[67] As a result of the delay in the commencement of the project, the plaintiff applied to the Ministry to approve its new team on 30 September 2019. This team, which was different from the 2017 one, was approved by the Executive Director. However, during the preparations and planning of the project's second phase, the plaintiff circulated a list with names of its consultancy team, which was different from the list approved by the Executive Director in 2019. This was brought to the attention of the plaintiff.

[68] Mr Nangolo testified that on 6 July 2020, the plaintiff submitted a further request for the approval of the plaintiff's new team of experts. The new team was recruited without the consent of the Executive Director, and the Ministry took issue with the competency of some of the team members as the new team of experts did not include GIS and Database specialists as per the provision of the agreement, nor were the certified copies of the qualifications and curricula vitae of the experts attached. The Ministry only received a list of names. On 23 November 2020, the Executive Director responded to the request for approval and indicated that due to the plaintiff's unwillingness to apply for an extension of the contract, which expired on 31 July 2020, the Ministry accepted the stance of the plaintiff and the new team of experts were not approved.

[69] During cross-examination, it was put to Mr Nangolo that the team was duly qualified for the projects and Messrs Sheya and Shatipamba met the requirements of the Ministry. Mr Nangolo testified that no qualifications or curricula vitae for these persons were attached to the team list and that the Ministry was not obligated to seek clarification regarding their qualifications. Mr Nangolo added that it is not clear on the team list who the GIS or the Data Base specialists were if one considers the different roles of the teams on the team list.

[70] It was put to Mr Nangolo that the plaintiff was of the view that the obligation was on the Ministry to, out of its own motion, seek an extension of the agreement as a result of the extended delays in the past because of the Ministry and that the letter of 30 June 2020 did not mean to convey that the plaintiff was unwilling to continue with the agreement. Mr Nangolo stated that from his reading of the letter, it was clear that the plaintiff had no intention of continuing with the agreement when it stated it was not in a position to request an extension. Mr Nangolo emphasised that this was not an issue of semantics, and the plaintiff should have said what it meant.

[71] Mr Nangolo conceded that the Ministry did not respond to the seventh draft of the inception report since it was evident that the plaintiff had lost interest in the project and was no longer interested in continuing with the contract.

[72] When confronted with the evidence of Dr Mendelsohn, Mr Nangolo stated that Dr John Mendelsohn is not an expert in land-related matters, but he studied vertebrates and worked in museums as he was a curator, and if there was involvement by Dr Mendelsohn as far as land is concerned it is not integrated land use plans.

[73] This concluded the case for the defendant.

Closing arguments

On behalf of the plaintiff

[74] Mr Shimakeleni submitted that the evidence of the plaintiff's experts stands uncontradicted as the Ministry failed to call any experts to refute this evidence, which must be accepted.

[75] Mr Shimakeleni further argued that the Ministry's actions were unlawful, unfair and unreasonable for the following reasons:

- a) The plaintiff was instructed not to proceed to Phase 2 of the project on the basis that the team had been changed, and when leave was sought, the Ministry took four months before it decided on the new team.
- b) In the letter dated 23 November 2020, the reason advanced for not approving the team was that there were no GIS and Database specialists and that certified copies of the qualifications were not attached. According to counsel, this is flawed as the team consisting of these specialists can be gauged from the members' qualifications, and the Ministry did not attempt to seek clarity on the new team or request further information or documents.

- c) In addition, the Ministry refused or failed to comment on the plaintiff's final report. Mr Nangolo indicated that he did not see a need to provide a response. However, the plaintiff is entitled to a response about the final draft, especially when the Ministry refuses to pay the remaining 30 per cent.

[76] Mr Shimakeleni referred the court to *Singh v McCarthy Retail Ltd (t/a McIntosh Motor)*⁴ wherein the court held that:

'The test, whether the innocent party is entitled to cancel the contract because of malperformance by the other, in the absence of a *lex commissoria*, entails a value judgment by the Court. It is, essentially, a balancing of competing interests - that of the innocent party claiming rescission and that of the party who committed the breach. The ultimate criterion must be one of treating both parties, under the circumstances, fairly, bearing in mind that rescission, rather than specific performance or damages, is the more radical remedy. Is the breach so serious that it is fair to allow the innocent party to cancel the contract and undo all its consequences?'

[77] Mr Shimakeleni argued that the plaintiff fulfilled its obligations per the principles above. The plaintiff's witnesses' testimony was credible, and evidence shows the inception report is complete. If incomplete, the Ministry should have sent a letter indicating in what regard it is incomplete.

[78] Regarding the reason for the cancellation of Phase 2, Mr Shimakeleni submitted that the plaintiff has demonstrated that the reason given regarding the inadequacy of the specialist team was unfounded as, indeed, the experts were part of the new team.

[79] The evidence also established that the project was delayed, and owing to the delays, opportunities came, and some people left to take on other employment. The team had been replaced before. The Ministry was therefore not entitled to reject the new team for an incorrect reason. If the Ministry was genuine, it would have sought

⁴ *Singh v McCarthy Retail Ltd (t/a McIntosh Motors)* (429/98) [2000] ZASCA 41; 2000 (4) SA 795 (SCA); [2000] 4 All SA 487 (A).

clarity regarding the new team. It, however, took the Ministry four months to work on what it could rely on as grounds for rejecting the new team.

[80] As a final point, Mr Shimakeleni argued that the plaintiff had not refused to extend the contract. The plaintiff always expected the defendant to request an extension as the plaintiff was not responsible for the delays in the project's completion. Moreover, the plaintiff had already demanded an extension through its legal representatives on 30 July 2020, well before the Ministry's statement that the plaintiff had refused to extend the contract. The Ministry responded on 7 August 2020, simply stating that it did not intend to extend the contract without any explanation.

[81] Counsel contends that the plaintiff discharged the onus to prove on a balance of probabilities that it is entitled to the payment of 30 per cent as well as the damages amount for the remainder of the project.

On behalf of the defendant

[82] Ms Hinda argued that clause 9.3, read in conjunction with clause 10.1 of the Consultancy Agreement, stipulates that the plaintiff will only receive payment upon the consultant's satisfactory completion of the work. In this case, the Ministry did not consider the project's first phase to be completed because the consultant did not adequately address the comments on the report.

[83] She argued that the plaintiff breached their contract by not fulfilling their obligations. The plaintiff failed to make the requested corrections or provide proof of certification. The language expert only assessed the language and grammar and did not rectify the reports. Dr Mendelsohn, the land expert, deemed the plaintiff's draft report as needing improvement. She, however, submitted that these witnesses were not of any appreciable assistance to the court.

[84] Ms Hinda contended that on Mr Nalusha's version, not all the comments were attended to as he believed it was unnecessary and informed the Ministry accordingly. This correspondence was, however, not placed before the court.

[85] It was further her submission that the contract included a non-variation clause, stating that changes must be in writing and signed by both parties. An addendum extended the contract from March 2018 to July 2020. The plaintiff notified the defendant of their intention not to apply for an extension of the contract in a letter dated 30 June 2020. The Ministry extended the contract due to delays beyond their control at the start. However, further delays were caused by the plaintiff's reports that required improvements. Due to the plaintiff's poor performance, the project was not completed on time, and the contract expired. The plaintiff refused to apply for an extension when offered.

[86] Finally, Ms Hinda submitted that the plaintiff was contractually obligated to appoint competent and reliable personnel, including GIS and Database specialists, to conduct the study. The plaintiff also needed approval from the Executive Director if any expert required to be replaced. However, the plaintiff did not seek approval when the team was changed, and when they finally did, the list did not include the required GIS and Database specialists.

Discussion

[87] For this judgment, carefully considering the pleadings and common cause facts is necessary. The plaintiff submitted that the versions placed before the court are mutually destructive. However, if the facts are stripped to the bone, then the following appears to be common cause:

- a) The terms and conditions of the agreement between the parties;

- b) There were various delays in the commencement of the project, which necessitated an extension of the completion date to 31 July 2020.
- c) The project commenced on 14 June 2019 with an approved team of experts. These experts were the second set of experts. Due to the delay in starting the project, many team members moved on, resulting in the plaintiff seeking approval for the team that the project kicked off with.
- d) Phase one of the agreement was to the value of N\$1 037 500, of which the plaintiff was paid 70 per cent upon the conditional acceptance of the inception report in March 2020.
- e) The inception report was submitted for consideration to the Ministry on 22 October 2019.
- f) The plaintiff submitted seven drafts of the inception report to the Ministry.
- g) The Ministry did not supply any response to the seventh draft. Each draft, except for the seventh draft, was returned to the plaintiff with the comments of the Ministry. The seventh draft of the report was not returned to the plaintiff, nor were any comments raised in this regard.
- h) The inception report was not edited as per the Ministry's requirements.
- i) The inception report contained both grammatical errors/issues as well as facts that needed to be referenced and information that required spatial orientation. Issues were also raised, like the plaintiff's company logo on all the maps produced and attached to the report.
- j) The plaintiff appointed a new team to assist in the project's second phase.
- k) The Executive Director did not approve this team, so the second phase of the project was put on hold in July 2020.
- l) Mr Mujetenga advised the plaintiff to seek approval of the new team and an extension of the project. The plaintiff sought the approval of the new team on 6 July 2020.

- m) The Ministry responded to the request for approval on 23 November 2020 and refused the said request for approval. The Ministry referred in the said letter to two reasons for the refusal, i.e.,
- i. The new team of experts did not include GIS and Database specialists;
 - ii. In its correspondence dated 30 June 2020, the plaintiff indicated that it was not in the position to seek an extension of the contract, and the Ministry accepted the plaintiff's stance on the extension of the contract.
- n) The plaintiff indicated in its written correspondence dated 30 June 2020 as follows:
- 'We have been requested by the Ministry to submit a request for an extension of the contract. However, this is out of our scope since the delays that got the contract to this stage are mainly from the Ministry. Therefore, we are not in a position to request an extension of the contract.'
- o) On 30 July 2020, via its legal practitioner, the plaintiff demanded that the agreement be extended for one year to enable the plaintiff to finalise the work in terms of the contract.

[88] The issue for determination is whether there was a breach of the agreement by either party and whether the plaintiff is entitled to the balance of the amount due for the inception report and the payment for the remainder of the project.

The law on breach of contract: positive malperformance

[89] Christie⁵ defines breach of contract as follows:

'The obligations imposed by the terms of a contract are meant to be performed, and if they are not performed at all, or performed late or performed in the wrong manner, the party on whom the duty of performance lay (the debtor) is said to have committed a breach of the

⁵ Christie R H: 'The Law of Contract in South Africa.' 5th ed, LexisNexis Butterworths at 495.

contract or, in the first two cases, to be in mora, and, in the last case, to be guilty of positive malperformance.'

[90] Where a party does perform in terms of the agreement but does so in a defective manner (i.e. by providing a substandard service), this is a breach of contract. For it to be a breach of contract, it need not be significant or related to a material term. Where the duty is to do something, positive malperformance occurs when the debtor duly performs but in an incomplete or defective manner.⁶

[91] The aggrieved party can then either cancel the contract, accept the defective performance, and claim damages, or reject the performance and demand specific performance or damages in lieu of performance.

[92] The plaintiff pleaded that the defendant delayed the project by 15 months by providing a late response and approval of the reports submitted to it by the plaintiff (not within 15 days as per the Terms of Reference). As a result of the delays and the lack of response, the parties entered into an addendum contract, at the same terms and conditions, annexed hereto as 'GTC 3'. This addendum extended the agreement to 31 July 2020.

[93] This does not appear to be the true reflection of what happened between the parties. It is common cause that the Consultancy Agreement was extended up to 31 July 2020. The Consultancy Agreement indicates the reason for the delay as a result of what the agreement describes as 'circumstances beyond the Ministry and KfW Basket Fund's control'. The aforementioned delay appears to have been limited to the commencement of the project and nothing more.

[94] The plaintiff further pleads that there were continuous delays on the part of the Ministry but does not plead what the continued delays entailed. However, based on Mr

⁶ Dale Hutchinson et al, The Law of Contract in South Africa 3rd Edition, Chapter 132 at 320.

Nalusha's evidence, it would appear that the delays refer to relate to the Ministry's comments regarding the inception report.

[95] The parties are at odds on whether the grammatical issues and specific factual issues would justify withholding the 30 per cent payment by the Ministry. The plaintiff believes that the Ministry's conduct was unreasonable, and the incessant comments and refusal to accept the inception report caused an unreasonable delay, which in turn caused a breach of the agreement. On behalf of the Ministry, it was maintained that the plaintiff was the cause of the subsequent delays due to its malperformance concerning the inception reports. The Ministry ultimately took the stance that due to the plaintiff failing to seek an extension of the contract, the contract lapsed due to effluxion of time.

[96] The plaintiff conveniently attributed all the blame for the delays to the Ministry, but Mr Nalusha conceded that the initial comments to the first draft of the report were fair. Subsequently, the plaintiff requested an extension for filing a redraft of the report and ultimately failed to seek approval for its new team prior to the commencement date of the second phase.

[97] The plaintiff further did not attend to the comments raised by the Ministry regarding the second draft and apparently provided the Ministry with reasons in writing as to why this was not attended to. The correspondence is, however, not before this court.

[98] In March 2020, after the submission of the fourth draft, the Ministry made a partial but substantial payment on the inception report on the condition that the plaintiff addressed the issues raised and conducted physical verification so required while attending to the activities of the second phase of the project.

[99] The Ministry raised substantial issues with the third draft of the report. It consisted of 11 pages of references and comments, and a large portion was attributed to grammar, which resulted in the Ministry insisting on the editing of the report.

The experts

[100] The sixth and seventh drafts were eventually provided to Ms Hamukwaya, who testified as an expert in this matter. Although she did not edit the reports, she assessed them and concluded that the use of the English language was adequate and of an acceptable English standard.

[101] Dr Mendelsohn, who had the benefit of considering earlier drafts of the report, i.e. the third and fourth drafts, was of the view that these earlier drafts contained many grammatical errors but believed that many of the comments raised were trivial or pedantic. Dr Mendelsohn also had the benefit of considering the seventh draft, and in his opinion, this draft could be improved, but he added that that is the case with most reports.

[102] In his view, the inception report accomplished what it set out to do as it is introductory in nature, yet the comments of the Ministry in the earlier drafts required a great measure of detail, which is not typically required in an inception report. Dr Mendelsohn opined that the Ministry should never have allowed the repeated drafting of the report for so long, i.e. seven drafts. The witness stated that the focus should have been to guide the substantive part of the work. The witness further noted that it is not common to have seven drafts on an inception report.

[103] Mr Nangolo criticised the expertise of Dr Mendelsohn, but in my view, Dr Mendelsohn and Ms Hamukwaya did what was required of them as experts, and that is to assist the court.

[104] In *CS v CS*,⁷ the Court accepted the view of Davis J in *Schneider NO & Others v Aspelung & Another*⁸ wherein he stated as follows:

'In short, an expert comes to Court to give the Court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the Court with as objective and unbiased opinion, based on his or her expertise, as is possible. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor give evidence which goes beyond the logic which is dictated by the scientific, knowledge which that expert claims to possess.'

[105] Regarding drafts five and six, the remaining issues were proof of grammar editing, resizing maps, and removal of the plaintiff's logo and address. In my view, the Ministry treated that inception report, which is meant to be introductory, as a final report.

[106] In terms of the Consultancy Agreement, the Inception Report aims to identify and map planned and ongoing programmes, projects and other relevant development activities and to communicate the concept and the process to the major stakeholders.

[107] If one considers the inception report submitted to the Ministry, it is my view that it is within the scope of the requirements of an inception report as set out in the Consultancy Agreement. It is common cause that the earlier drafts of the inception report were riddled with grammatical errors and mistakes. However, the plaintiff made the relevant corrections.

⁷ *CS v CS* (HC-MD-CIV-ACT-MAT-2017/00179) [2021] NAHCMD 170 (12 April 2021) at para 145.

⁸ *Schneider NO & Others v Aspelung & Another* 2010 (5) 203 WCC at 211E-J to 212A-B.

[108] The Ministry was within its right as the client to raise relevant and substantive issues with the plaintiff without being unreasonable and pedantic. The persistent queries by the Ministry made it difficult for the plaintiff to finalise the inception report successfully, but I must add that it was not impossible. The plaintiff, in my view, also had to be more proactive, especially regarding the grammatical issues and have the report edited when persistent issues were raised regarding the grammar of the report. If they did, the report might not have gone to the lengths it did.

[109] Having considered the conspectus of the evidence in respect of the inception report, I am of the view that the plaintiff performed its mandate adequately in respect of the inception report and is entitled to the payment of the 30 per cent which the Ministry retained, and I find accordingly so.

Claim for damages as a result of alleged breach of contract

[110] The next question to determine is whether the plaintiff would be entitled to damages for the remainder of the agreement.

[111] *A plaintiff who wishes to claim damages for breach of contract must prove the following⁹:*

- a) *a breach of contract has been committed by the defendant;*
- b) *the plaintiff has suffered financial or patrimonial loss;*
- c) *there is a factual causal link between the breach and the loss; and*
- d) *as a matter of legal causation, the loss is not too remote a consequence of the breach.*

The new team of experts

⁹ Dale Hutchinson et al *The Law of Contract in South Africa* 3rd Edition, Chapter 13 at 362.

[112] The request for the approval of the new team of specialists was only done in July 2020, a few days prior to the start of the second phase, but also only a few days shy of the date that the agreement would terminate. The list setting out the team that the plaintiff sought approval for did not indicate their qualifications, and having regard to the list, one cannot determine which of these members were GIS or Database specialists as the list only indicated the PLUP roles.

[113] In terms of the PLUP roles, the team members who were, according to Mr Nalusha, the CIS and Database specialists (Messrs Simon Sheya and Fillemon Shatipamba) held the roles of Note Taker and Assistant Note Taker, respectively. Their qualifications were listed as Master of Science Geoinformatics and Bachelors (Hon) Population Studies Geography (in respect of Mr Sheya) and Bachelors (Hon) Geoinformatics (in respect of Mr Shatipamba). Although the curricula vitae of Messrs Sheya and Shatipamba were presented in court for the purposes of the hearing, it would appear that the qualifications of these team members were not presented to the Ministry at the time of the application for approval.

[114] It is the plaintiff's view that the Ministry should have asked for clarification of the team, however, it remained the plaintiff's obligation in terms of clause 8.4 of the contract to appoint experienced, competent, and reliable personnel to conduct the study. From considering the plaintiff's PLUP team, it is unclear who the GIS and Database specialist experts were. Mr Nangolo strongly disagreed that the Ministry had to seek clarification regarding the team.

[115] Interestingly, the plaintiff insists that the Ministry should have requested clarification regarding the new team's qualification (submitted on 7 July 2020) in the face of the plaintiff's indication that it did not intend to apply for an extension of the contract.

Extension of the contract

[116] Mr Nalusha authored a letter to the Ministry on 30 June 2020 indicating that it is not in the scope of the plaintiff to apply for an extension of the contract since the delays up to that point were mainly from the Ministry, and the plaintiff is, therefore, not in a position to request an extension of the contract.

[117] As discussed earlier, it is not factually correct that the Ministry was the sole reason for the delays in the matter.

[118] When Mr Nalusha was asked why the plaintiff did not ask for an extension of the contract, he responded that they decided against it as it would cause them to be professionally incompetent and regarded it as a strategic business move.

[119] Mr Nalusha further stated that the intention was not that the contract should not be extended but merely that they would not be asking for it. I am unsure what Mr Nalusha thought would happen if a letter in these terms were directed to the Ministry. What should the Ministry have done with this letter?

[120] The plaintiff knew the contract's end date was approaching but chose not to apply for an extension out of professional pride. It also did not directly express that it believed the Ministry was responsible for the delays and should extend the contract automatically, as it had done previously.

[121] During cross-examination, Mr Nalusha was pertinently asked if the plaintiff explained its position to the Ministry. Mr Nalusha stated that he did but conceded that no such document is before the court.

[122] The Ministry cannot be criticised for interpreting the plaintiff's letter as a repudiation of the agreement. This letter and the perceived non-compliance with the provision of the agreement that the plaintiff should appoint duly qualified personnel were the end of the matter for the Ministry, and it accepted the plaintiff's stance in not wanting to extend the agreement.

[123] When the legal practitioner of the plaintiff directed a letter to the Ministry on 30 July 2020, a day before the termination of the agreement, demanding an extension of the contract, it was too little too late.

[124] Considering the literal position that the plaintiff took in its letter to the Ministry, it is clear that it had no intention to proceed with the contract and the calculated risk the plaintiff took in an attempt to force the hand of the Ministry backfired on the plaintiff resulting in the contract terminating due to the effluxion of time and not as a result of a breach of contract.

[125] In light thereof, the plaintiff would not be entitled to the payment of the remainder of the contract amount for the remaining phases, and that part of the plaintiff's relief stands to be dismissed.

Order

[126] My order is as follows:

1. The defendant is liable for the payment in amount of N\$311 250 for Phase 1.
2. Interest on the aforesaid amount at the rate of 20% per annum from the date of judgment until date of final payment.

3. The plaintiff's claim for the amount of N\$3 112 500 for the remainder of the agreement is dismissed.
4. Each party to pay its own costs.

JS Prinsloo

Judge

Appearances:

Plaintiff:

A. Shimakeleni
Of Appolos Shimakeleni Lawyers,
Windhoek

Defendant:

J Hinda
Of the Office of the Government-
Attorneys
Windhoek