

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-DEL-2017/01335

In the matter between:

APB PROPERTY SERVICES

1ST PLAINTIFF

ALBERT BROCKERHOFF

2ND PLAINTIFF

and

MUNICIPAL COUNCIL OF WINDHOEK

1ST DEFENDANT

MANAGEMENT COMMITTEE OF MUNICIPAL

COUNCIL OF WINDHOEK

2ND DEFENDANT

CHAIRPERSON OF THE MANAGEMENT COMMITTEE OF THE

MUNICIPAL COUNCIL OF WINDHOEK

3RD DEFENDANT

TENDER BOARD OF MUNICIPAL COUNCIL OF WINDHOEK

4TH DEFENDANT

Neutral Citation: *APB Property Services v Municipal Council of Windhoek* (HC-MD-CIV-ACT-DEL-2017/01335) [2023] NAHCMD 759 (24 November 2023)

CORAM: **PRINSLOO J**

Heard: 29-30 March 2023 and 24 July 2023

Delivered: 24 November 2023

Flynote: Action Proceedings – Contract – Parties are bound to the terms of the contract and the consequences thereof – Plaintiffs went beyond the scope of the agreement out of their own volition – Plaintiffs in breach of contract.

Summary: The plaintiffs by way of summons issued out of this court instituted action against the defendants, which action is defended by the defendants in this matter. In June 2012, the first plaintiff, represented by the second plaintiff, was awarded tender no. M 20.2012, which tender was awarded by the first and fourth defendants. In terms of the tender award, the plaintiffs were tasked and required by the defendants to carry out an interim valuation of all rateable properties within the newly extended boundaries of the City of Windhoek at the contract price of N\$848 700.

During the implementation and execution of the tender agreement, it became apparent that some of the properties, as set out in List A, were subdivided into new and smaller properties. Consequently, the properties required for valuation increased by 305 properties. The plaintiffs conducted valuations for the initial list of properties and the additional properties set out in Annexure 2. The defendants deny that they mandated the plaintiffs to value the additional properties.

Held that the plaintiffs in this matter were not following the terms of the contract as set out in Exhibit 'B' from the onset. This proposition is amplified by Mr Brockerhoff's evidence that he pointed out that Estate Finkenstein and Herboth's Blick were not included in List A but were 'supposed' to be part of the contract.

Held that Mr Brockerhoff conceded that he received List A and a map clearly marked with the boundaries. The plaintiff was fully aware of his contractual obligations, yet he proceeded to value additional properties which were not part of the contract.

Held that parties are bound to the terms of the contract and the consequences thereof.

Held that the plaintiffs failed to discharge the onus of proving that they were contracted initially or during the execution of the contract to attend to the valuation of additional properties which were not on List A. Therefore, the plaintiffs' claim must fail.

ORDER

1. The plaintiffs' claim is dismissed.
 2. The plaintiffs must pay the first defendant's cost of suit jointly and severally, the one paying the other to be absolved.
 3. The matter is finalised and removed from the roll.
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JUDGMENT

PRINSLOO J:

Introduction

[1] The plaintiffs instituted summons against the defendants for payment in the amount of N\$1 830 000 plus costs and interest a tempore morae.

The parties

[2] The parties are as follows:

(a) The first plaintiff is APB Property Services, a Close Corporation registered in terms of the company laws of Namibia, with registration number Reg. D/2015/2077 and with its business address situated at Erf no. 47, Hercules Street, Dorado Park, Windhoek.

(b) The second plaintiff is Albert Brockerhoff, a major male person, self-employed and residing at Erf no, 47 Hercules Street, Dorado Park, Windhoek.

(c) The first defendant is the Municipal Council of Windhoek, a juristic person established in terms of s 3 of the Local Authorities Act 23 of 1992, situated at the corner of Garden and 9 Independence Avenue, Windhoek.

(d) The second defendant is the Management Committee of the first defendant established in terms of s 21 of the Local Authorities Act 23 of 1992 and is situated at the same address as the first defendant.

(e) The third defendant is the Chairperson of the first defendant's Management Committee, established in s 25 of the Local Authorities Act 23 of 1992, and is situated at the same address as the first defendant.

(d) The fourth defendant is the Tender Board of the first defendant as established in terms of section 94A of the Local Authorities Act 23 of 1992 and is situated at the same address as the first defendant.

The background

[3] On or about 1 June 2012, the first plaintiff, represented by the second plaintiff, was awarded and subsequently accepted tender no. M 20.2012, which tender was awarded by the first and fourth defendants. In terms of the tender award, the plaintiffs were tasked and required by the defendants to carry out an interim valuation of all rateable properties within the newly extended boundaries of the City of Windhoek at the contract price of N\$848 700.

[4] The plaintiffs plead that they performed their contractual obligations as per the tender agreement and timeously completed the valuation of properties as per List A¹. During the implementation and execution of the tender agreement, it became apparent that some of the properties, as set out in List A, were subdivided into new and smaller properties. Consequently, the properties required for valuation increased by 305 properties.

¹ List consisting of 123 properties in Registration Division K provided by City of Windhoek.

[5] The plaintiffs conducted valuations for the initial list of properties and the additional properties set out in Annexure 2.² The defendants deny that they mandated the plaintiffs to value the additional properties.

Plaintiff's case

Albert Brockerhoff

[6] As indicated in the preceding paragraphs of the judgment, Mr Brockerhoff is the second plaintiff in this matter and the sole owner of APB Property Services. He testified that he is a property valuer by profession and has been in this trade for 20 years.

[7] He holds the following qualifications:

7.1 Diploma in Real Estate (Property Valuations) obtained via the University of South Africa.

7.2 Bachelor of Technology in Real Estate (Property Valuations) obtained via the University of South Africa.

7.3 He served as a member of the Executive Committee of the Namibian Institute of Valuers.

7.4 He served as a Namibian Council for Property Valuers Profession member from November 2013 to November 2017.

[8] He testified that he was employed in the City of Windhoek (Council of the Municipality of Windhoek) in the Valuation Division for ten years (from 1994 to 2004) as valuer-in-training. In 2000, he was appointed as acting manager for nine months, and his duties at the time entailed the following:

8.1 To establish the Valuation Roll and maintenance thereof by doing inspections of properties and valuations on a day-to-day basis.

² As per second plaintiff's letter dated 18 February 2013 including Herboth's Blick Estate and Finkenstein Estate.

8.2 The General Valuation Roll is done every five years, and interim valuations are done as needed to update the current Valuation Roll.

8.3 The main functions of the Manager are to supervise staff members and advise the Municipal council and other divisions on valuation matters.

[9] Mr Brockerhoff testified that the valuation process consists of the following:

9.1 Arrange an inspection date with the owner. He, however, added that the defendant's provided list was without any contact details or contact person(s).

9.2 Visit the site/property.

9.3 Measuring structures.

9.4 Make notes regarding the condition, finishes, improvements, etc, on a field sheet.

9.5 Open a field card for each property and make sketches to determine the structures' sizes.

9.6 Do market research on land prices and development costs for structures in accordance with the Local Authorities Act, 1992.

9.7 Calculation of values.

9.8 Compilation of Valuation Roll from the information of field card.

9.9 The valuation should contain the following details – Farm/Plot name and number, name of owner, size of farm/plot, land value and improvement value.

9.10 Defend valuations in the Valuation court should the need arise.

[10] Mr. Brockerhoff provided additional testimony regarding the function of the Valuation Court. According to him, the Valuation Court is a specialised court responsible for reviewing and determining the values included in the Valuation Rolls. This process involves taking into account objections from owners. Once the Provisional Valuation Roll is complete, the Municipality advertises its inspection in two daily newspapers for

stakeholders to provide objections and also advertises the court date. The appointed valuer is then required to defend any objections in court.

[11] According to the second plaintiff, in April 2012, the Local Tender Board for the City of Windhoek placed a tender invitation for the valuation of properties in the newly extended boundaries of the City of Windhoek.

[12] On 1 June 2012, the plaintiffs were awarded Tender No. M20.2012 by the Municipality of Windhoek. The tender included carrying out an interim valuation of rateable properties within the newly extended Municipality of Windhoek's boundaries at the contract price of N\$848 700. According to Mr Brockerhoff, the plaintiffs timeously completed the valuations of the listed properties. However, during the implementation and execution of the tender agreement, it became clear that some of the properties were subdivided into new and smaller properties. Consequently, the properties to be valued increased by 305 properties.

[13] On 18 February 2014, after perusing the Deeds Records for the above-mentioned subdivisions he provided the office of the Manager: Property Valuations of the Municipality of Windhoek, Mr Hendjala, with a list of the subdivided properties together with an invoice indicating the financial implications to include the properties on the Interim Valuation Roll. According to the plaintiff, that was the first letter to Mr Hendjala regarding the additional properties. He enquired from Mr Hendjala about the course of action concerning the additional properties, and Mr Hendjala directed him to proceed. Mr Hendjala further indicated that he would discuss the issue with Mr L Narib, from Strategic Executive of Urban Planning and Property Management³.

[14] Mr Brockerhoff testified that he notified Mr Hendjala well in advance about the additional properties before the Valuation Court sitting in August 2013. When the number of properties he valued was placed on the Valuation Roll by the Presiding Officer, there was no objection from the Municipality of Windhoek representatives as

³ Also a member of the second defendant, the Management Committee of the Municipal Council of Windhoek.

they were present in Court. Subsequently, the Valuation Roll, including the valuation for the additional properties, was approved. According to Mr Brockerhoff, the Valuation Court approved the total number of 441 properties.

[15] On 10 September 2013, Mr Brockerhoff submitted an invoice to Mr Hendjala for the payment of the valuation of the additional properties. He testified that based on the defendant's previous conduct and his subsequent letter to the defendants informing them of the additional properties, they either tacitly or expressly agreed to the valuation of the additional properties.

[16] Mr Brockerhoff testified that the costs of the valuation of the additional properties are calculated by multiplying the 305 properties with the unit price of N\$6 000. Therefore, the plaintiffs are entitled to N\$1 830 000 worth of costs for the valuation of the additional properties. On 23 January 2014, he received a letter from Mr Narib rejecting his claim for the valuation of the additional properties. He approached the Municipality of Windhoek to arrange a meeting with Mr Narib, which was scheduled for 10 April 2014. According to the plaintiff, the matter should have been referred to the Local Tender Board for their decision.

[17] Mr Brockerhoff testified that during the meeting on 10 April 2014, he made the submission to Messrs Narib and Hendjala that Farm Finkenstein and Herboth's Blick were part of the initial contract on List A, but the subdivisions of these farms were not included in the List. The meeting was postponed to 14 April 2014 for further discussions surrounding his scope of work as there was no clarity at that stage. According to the plaintiff, on 14 April 2014, after discussing the additional properties, Mr Hendjala agreed that the City of Windhoek was liable to the plaintiff, but only for 20 additional properties. Mr Brockerhoff disputed the payment of only 20 properties and maintained that the Municipality of Windhoek was liable for all the valuations he conducted.

[18] Upon enquiring from Mr Hendjala about the criteria used to accept the valuation of 20 properties, Mr Narib intervened and referred the matter to the Local Tender Board,

which was responsible for allocating the tender in the first place. According to the plaintiff's testimony, Mr Narib asked him to prepare a written submission for the Local Tender Board, which he did and submitted to the Municipality of Windhoek on 16 April 2014. This submission was intended to be forwarded to the Local Tender Board for consideration and a decision on the additional properties and their compensation.

[19] The plaintiff received a rejection letter on 30 July 2014 from the Chairperson of the Tender Board of the Municipality of Windhoek, denying his claim for payment. He further testified that due to the absence of an adjudication clause in the agreement, he approached various offices to resolve the issue, but it took several months to receive a response. Despite submitting the invoice on 10 September 2013, he has not received payment for N\$1 830 000.

Cross-examination of Mr Brockerhoff

[20] During cross-examination, the witness admitted that one of the requirements of the tender process was for the participants to familiarise themselves with the scope of work to be done. When asked whether he complied with that requirement, he stated that he did not but tried to justify his failure to do so. Mr Brockerhoff testified that three crucial documents were meant to guide the tender's execution once it was awarded. These documents include, firstly, the letter of award given to the plaintiffs as proof of the defendants' acceptance of the tender. The award was granted in the sum of N\$848 700, including VAT, which was paid in full by the defendants.

[21] He testified that the second document presented to him was a map and a list of properties to be evaluated. When questioned about the plaintiffs' responsibility to evaluate only the properties listed on List A issued by the City of Windhoek, the witness acknowledged it was correct. However, he also mentioned that during a meeting on 10 April 2014, he had pointed out to either Mr Hendjala or Mr Ludiwick, or both, that Estate Finkenstein and Herboth's Blick were not included in List A, but they should have been.

The witness also stated that these properties were among the additional properties he valuated and which invoices were rejected by the defendants.

[22] Mr Brockerhoff confirmed that when he received List A and the map, it was clearly marked with the boundaries within which he was required to do the valuations. According to the witness, Herboth's Blick and Finkenstein Estates fall within that marked area and thus formed part of the properties to be valuated. Mr Tjiteere referred the witness to Annexure B,⁴ paragraph 3.5, which reads: 'the project areas is defined on the list and maps of properties to be valued here attached as Appendix AA3'. The witness confirmed same. He further confirmed that those were the terms of engagement. Mr Brockerhoff further confirmed that a further term of the agreement was that: 'where the property is missing from the map, the valuer must take all necessary steps to ascertain its location with the Surveyor General's office'.

[23] The witness confirmed that if a property is missing on the map but on the list received from the City of Windhoek, he had to request the Office of the Surveyor General to provide him with an updated map to plot and allocate that property. The plaintiff, however, testified that Mr Hendjala did not have knowledge of the properties to be valuated and even informed him (the plaintiff) to proceed with the valuations. He indicated that he would take up the matter with Mr Narib.

Defendants' case

[24] Mr Hendjala testified that he is employed by the first defendant as Manager: Valuation Services. He obtained the following qualifications: a Bachelor of Business Administration, a Baccalaureus Technologiae in Real Estate: Property Valuation from the University of South Africa, and a National Diploma in Land Management from NUST.

[25] Mr Hendjala confirmed that the letter by the plaintiff dated 14 April 2014 claiming payment for additional properties valued was received by the defendants, and in

⁴ The appendix to the conditions of the Tender.

response to it, it was made clear to the plaintiff that the defendants never requested nor varied the scope of the tender as set out in the original agreement. In their return correspondence, the defendants took the position that no payment for the additional valuations done by the plaintiffs – without any instruction from the City of Windhoek – can be made.

[26] He further testified that on 1 June 2012, the fourth defendant awarded the tender to the plaintiffs for valuing Properties in List A: N\$848 700 (VAT inclusive), subject to the condition that the tenderer would be paid according to the number of properties valued, that 25 percent of the total tender would be payable only after the Valuation Court is finalised and that the tenderer completes the provisional Valuation Roll before the end of August 2012. The appointment of the plaintiffs was further confirmed through correspondence from the Office of the Chief Executive Officer. The plaintiffs were also issued with the list of properties to be valued.

[27] He further testified that at a meeting with the second plaintiff on 10 April 2014, he accepted the second plaintiff's explanation that the first defendant might be responsible for the cost of 20 additional properties. However, the second plaintiff did not accept this position and reserved his response for a later meeting. Mr Hendjala further informed the second plaintiff that the plaintiffs had no claim because they had to study the scope of the work and that Finkenstein and Herboth's Blick were indeed included in the tender. According to the witness, the plaintiffs' admitted that 'it was totally impractical to carry out such exercise because it would have been time consuming and costly'. The plaintiff further admitted that he took the risk of submitting a tender amount without ascertaining the scope of work. According to the witness, these admissions made by the plaintiffs are fatal because it appears as if the plaintiffs made a unilateral mistake contrary to a direct condition of the tender as postulated in the tender invitation, more specifically, the project details as set out in clause 3.1 of the appendix to the conditions of the tender which reads as follows:

'3.1 Project Area:

The project area is defined as the lists and maps of properties to be valued attached as appendix AA3.

The number of properties on the lists and maps. Where the property is missing on the lists and maps, the Valuer must take all necessary steps to ascertain its location with the Surveyor General office.'

[28] He further testified that on 30 July 2014, the Chief Executive Officer of the first defendant wrote to the plaintiffs in response to the plaintiffs' demand for payment of additional properties valued and advised them that there was no request from the plaintiff's side to vary the scope of work and therefore no further payment will be effected.

Cross-examination of Mr Hendjala

[29] Mr Hendjala testified that all the properties to be valued were contained in appendix AA3 to the tender and that the tender was divided between the plaintiffs and a third party. The result was that List A, with the properties to be valued by the plaintiffs, was extracted from AA3. There were also properties on the aforementioned list that would be valued by the valuers of the City of Windhoek. Mr Hendjala further clarified that the issue raised regarding the valuation of the remainder of Finkenstein and Herboth's Blick, which appears on List A, should be distinguished from the valuation of Estates Finkenstein and Herboth's Blick. The remainder of Finkenstein and Herboth's Blick are farms, whereas Estates Finkenstein and Herboth's Blick are regarded as 'townships'. The 'townships' are governed by a town planning scheme. The latter was not part of the plaintiffs' list to be valued.

[30] Mr Hendjala further testified that the valuations of the 'townships' were done internally and not on tender. According to Mr Hendjala, the tenderers' mandate did not include Estates Herboth's Blick, Finkenstein or Elisenheim. Mr Hendjala denied that there was a duplication of valuations and if the plaintiffs did the valuation on Estate Herboth's Blick and Estate Finkenstein, they did so out of their own accord and in terms of the tender's mandate.

Plaintiff's submissions

[31] Mr Conradie submitted that the plaintiffs derived their authority and the scope of the work to value the additional properties from the tender specifications and, in particular, clause 3.1 of Exhibit B, which states that:

'The number of properties are indicated on the list and maps. Where the property is missing from the map, the Valuer must take all necessary steps to ascertain its location with the Surveyor General's office.' All land improvements on the property shall be valued (underlined for emphasis).

[32] He further submitted that the defendants did not explain why this underlined part of the clause was part of the tender and its impact. The only inference one can draw, according to Mr Conradie, is that the defendants were not fully aware of the extent of the boundaries that had to be valued. Mr Conradie submitted that that as a result of the services rendered, the defendants were enriched in the amount of N\$1 830 000, and subsequently, the plaintiff is therefore entitled to be paid the amount claimed.

[33] It is Mr Conradie's submission that the properties were adjudicated at the Valuation Court and approved and, therefore, form part of the rateable properties within the newly extended boundaries of the defendant. Further, these additional properties were approved in the valuation roll that served before the Valuation Court. Had this not been the case, the defendants would have presented evidence to support their defence and disprove the plaintiffs' case. According to Mr Conradie, the defendants did not dispute that these properties were all approved by the Valuation Court as alleged by the plaintiff.

[34] Mr Conradie argued that Mr Hendjala admitted in paragraph 33 of his witness statement that the first defendant could be responsible for the costs of 20 additional properties. According to Mr Conradie, this statement contradicts the defendant's claim that the valuation of additional properties was not part of the plaintiff's scope of work.

The first defendant's admission of responsibility to pay for the 20 additional properties constitutes an acknowledgement that the plaintiff conducted the valuation of additional properties as per the mandate outlined in Project Location (Exhibit B) and was authorised by the terms of the mandate.

[35] Mr Conradie argued that if the defendants claimed the plaintiff had no authorisation to value the additional properties and was therefore not entitled to payment, why did they take responsibility for the valuation of 20 other additional properties? He further stated that clause 3.1 of the appendix to the tender conditions is unambiguous, and it mandates the valuer to identify any property that does not appear on the maps and to value it. The purpose of this clause was to ensure that all land is valued, including those not on the maps, which should be included in the valuation since the City's boundaries have been extended for this purpose.

[36] Mr Conradie also submitted that the defendants were always aware that the second plaintiff valued additional properties. However, the defendants failed to submit documentary evidence to prove that they conducted the valuation of the additional properties itself. The first defendant being the owner or in charge of the valuation process, including the Valuation Court process, failed to provide evidence as to how it dealt with the properties it purportedly valued internally when such properties were presented at the Valuation Court and how it dealt with the properties valued by the second plaintiff during the valuation court proceedings. Its failure to present evidence indicates that the defendant did not conduct the valuation internally but only relied on the work done by the plaintiff.

Defendants' submissions

[37] Mr Tjiteere submitted that the relevant documents before the court are:

- a) the tender invitation (Exhibit A1),
- b) the appointment as valuer (Exhibit A2),
- c) the plaintiffs' letter setting out the additional valued dated 18 February 2012 (Exhibit A3),

- d) the tender invitation (Exhibit B),
- e) the award letter (Exhibit C) and
- f) List A: Properties to be valued (Exhibit D).

[38] Mr Tjiteere submitted that the plaintiffs were appointed in terms of Tender No: M 20.2012 to conduct the valuation of properties listed on a document titled List A: Properties to be valued. The terms binding the parties were set out in Exhibit B. The content of Exhibit A2 reads as follows:

'...your area of operation is as per here attached list of properties to be valued'.

[39] He submitted that during cross-examinations of the second plaintiff, it was established that the plaintiffs did not comply with the requirements of the Tender Process before submitting Tender Documents. Mr Brockerhoff testified that he had not acquainted himself with the scope of the work to be done before submitting the tender. The defendants submit that Mr Brockerhoff and/or the plaintiffs in this matter were not following the terms of the contract as set out in Exhibit B from the onset. This submission is amplified by Mr Brockerhoff's evidence that he pointed out that Estate Finkenstein and Herboth's Blick were not included in List A but were supposed to be part of the contract.

[40] According to Mr Tjiteere, Mr Brockerhoff conceded that when he received the instructions to attend to the Tender, he was aware that the Municipality's internal valuation department would value some of the properties. Further, he was aware that the Municipality instructed a third party to conduct valuations on the Municipality's behalf. Mr Brockerhoff conceded that he received List A and a map clearly marked with the boundaries.

[41] Mr Tjiteere submitted that during Mr Hendjala's testimony, he maintained that when the plaintiffs were awarded the tender, the instructions were clear that the properties to be valued by plaintiffs were listed on List A. They were further provided with the map for guidance, and as per Clause 3.1 of the Contract, the plaintiffs were

obligated to ascertain whether all the properties on List A were also on the map. Where the property is missing from the map, the Valuer must take all necessary steps to ascertain its location with a Surveyor General office. Mr Brockerhoff conceded that he did not go to the office of the Surveyor General as required by the Contract concerning the properties missing from the map. Mr Tjiteere submits that the defendants dispute that the City of Windhoek authorised the plaintiffs to value these additional properties.

[42] Defendants referred the court to Clause A15.3 of Exhibit B, which states that:

'Any verbal information given or perceived to have been given shall not be binding on the City of Municipality or its consultant.'

[43] He contended that the aforementioned clause clarifies that unless something is in writing, it is not binding on the defendants. He further submitted that the Municipality clearly set out that it does not assume any responsibility for any of its officers, agents or representatives before the execution of the tender contract unless such understanding or representations are expressly stated in the contract. Therefore, the plaintiffs are not justified to impose liability on the defendants merely as a result of some apparent discussions between Mr Brockerhoff and Mr Hendjala, discussions which Mr Hendjala denies.

[44] Mr Tjiteere submitted that the onus is on the plaintiffs to allege and prove that the Municipality contracted them to conduct the valuation of extra properties from the inception and/or during the execution of the contract. The plaintiffs ought to have established and/or pleaded variation of the contract terms to incorporate additional properties.

[45] The court was referred to *Total Namibia (Pty) Ltd v OBM Engineering & Petroleum Distributors CC*,⁵ wherein the court considered the principles of interpretation in other jurisdictions like South Africa and the United Kingdom. In South Africa, reference was made to the highly quoted judgement of *Natal Joint Municipal Pension*

⁵ *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC* 2015 (3) NR 733 (SC).

Fund v Endumeni Municipality.⁶ This matter usefully summarised the approach to interpretation as follows:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed, and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible, or businesslike for the words used.'

[46] Mr Tjiteere further referred the court to the matter of *Soroses v Gamaseb*,⁷ where the court held that it is a sound principle of law that when a man signs a contract, he is taken to be bound by the ordinary meaning and effect of the words which appear over his signature. However informal it is, the parties are bound to the terms of the contract and the consequences thereof.

[47] Finally, Mr Tjiteere submitted that the plaintiffs failed to discharge the onus of proving that they were contracted initially and/or through the execution of the contract to attend to the valuation of additional properties which were not on the A List. Accordingly, the plaintiffs' claims must be dismissed with costs.

Issue for determination

[48] The issue which this court needs to determine is whether the plaintiffs were tasked and required by the defendants to carry out an interim valuation of additional rateable properties not listed on the A list within the newly extended boundaries of the City of Windhoek.

⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

⁷ *Soroses v Gamaseb* (HC-MD-CIV-ACT-MAT-2020/00122) [2020] NAHCMD 530 (18 November 2020).

The applicable legal principles

[49] Before I answer the question I am called to determine, I find it imperative to look at the well-established principles in our law.

[50] In *Pillay v Krishna and Another*,⁸ the court held that he who alleges must prove. In this matter, the evidence demonstrates that the versions of the protagonists are mutually destructive. The approach that must then be adopted to establish which version to accept is set out in *National Employers' General Insurance Co Ltd v Jagers*⁹ as follows:

'(The plaintiff) can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

[51] In *Koolike Consultancy CC v Benguela Current Commission*¹⁰, Ueitele J referred to the matter of *Motor Vehicle Accidents Fund v Lukatezi Kulubone*¹¹ wherein

⁸ *Pillay v Krishna and Another* 1946 AD 946 at 951 – 952.

⁹ *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440E – G.

¹⁰ *Koolike Consultancy CC v Benguela Current Commission* (HC-MD-CIV-ACT-CON-2020/01354) [2023] NAHCMD 182 (11 April 2023) at para 37.

¹¹ *Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone* Case No SA 13/2008 (unreported) at 40 para 51.

Mtambanengwe, JA outlined the approach he adopts in determining which of two conflicting versions to believe as the approach advocated by Mr Justice MacKenna when he said:

'I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help. This is how I go about the business of finding facts. I start from the undisputed facts which both sides accept. I add to them such other facts as seem very likely to be true, as for example, those recorded in contemporary documents or spoken to by independent witnesses like the policeman giving evidence in a running down case about the marks on the road. I judge a witness to be unreliable, if his evidence is, in any serious respect, inconsistent with those undisputed or indisputable facts, or of course if he contradicts himself on important points. I rely as little as possible on such deceptive matters as his demeanour. When I have done my best to separate the truth from the false by these more or less objective tests I say which story seems to me the more probable, the plaintiff's or the defendant's.' (My emphasis)

[52] After considering the applicable legal principles above, I will address the relevant questions raised for consideration.

[53] Earlier in this judgment, I indicated that the plaintiff's and defendant's evidence are mutually destructive. As regards mutually destructive versions, the following trite legal principles are well settled in our law, namely:

- a) where the evidence of the parties is mutually destructive, the court must decide which version to believe based on probabilities and
- b) the approach that a court must adopt to determine which version is more probable is to start from the undisputed facts that both sides accept and add to them

such other facts as seem very likely to be true, for example, those recorded in contemporary documents or spoken to by independent witnesses.¹²

[54] It is common cause that the plaintiffs were appointed in terms of Tender No: M 20.2012 to carry out the valuation of properties listed on a document titled List A. Exhibit A2, which provides as follows:

‘...your area of operation is as per here attached list of properties to be valued’

[55] The terms binding the parties were set out in Exhibit B.

Clause 3.1 of Exhibit B reads:

‘The project area is defined on the lists and maps of properties to be valued here attached as appendix AA3.

The number of properties is indicated on the list and maps. Where the property is missing from the map, the Valuer must take all necessary steps to ascertain its location with the Surveyor General office.

All land and improvements on the property shall be valued. The date of valuation shall be 1st February 2010’.

[56] In the determination of this matter, it is equally imperative to look at Clause A15.3 of Exhibit B, which reads as follows:

‘Any verbal information given or perceived to have been given shall not be binding on the City of Windhoek or its consultant’.

[57] Clause B2.1 of Exhibit B reads as follows:

‘The contractor shall be responsible for having taken steps reasonably necessary to ascertain the nature and location of the work or cost thereof. Any failure by the contractor to do so will not relieve him or her of the responsibility for successfully performing the work without additional expense to the employer. The employer assumes no responsibility for any of its

¹² See *Kleophas v Minister of Safety and Security & Others* (HC-MD-CIV-ACT-DEL-2019/01902) [2021] NAHCMD 419 (19 August 2021) para 5.

offices, agents or representatives prior to the execution of this Contract unless such understanding or representations are expressly stated in this Contract.'

Discussion

[58] During cross-examination, Mr Tjiteere put to Mr Brockerhoff the following statement: '. . . it is my instructions and what the defendants before this Honourable Court are emphasising and pressing on are that your obligations in respect of this tender was to value the properties which were on the A list. What do you have to say to it?' Mr Brockerhoff responded: 'That is correct, My Lady'. This response demonstrates that Mr Brockerhoff, on his own admission, admitted that his obligations with respect to the tender were to value the properties on List A only.

[59] Based on the evidence before court, this court finds that the plaintiffs in this matter were not following the terms of the contract as set out in Exhibit 'B' from the onset. This proposition is amplified by Mr Brockerhoff's evidence that he pointed out that Estate Finkenstein and Herboth's Blick were not included in List A but were 'supposed' to be part of the contract. During his testimony, Mr Brockerhoff conceded that at the time when he received the instructions to attend to the Tender, he was aware that some of the properties were to be valued by the Municipality's internal valuation department. Further, he was aware that the Municipality instructed a third party to carry out a valuation on behalf of the Municipality. Mr Brockerhoff conceded that he received List A and a map clearly marked with the boundaries. This demonstrates that he was fully aware of his obligations in terms of the contract. Yet, he went ahead of his own accord and valued additional properties that did not form part of the contract between the parties.

[60] Mr Hendjala testified on behalf of the defendants. He stated that when the plaintiffs were awarded the tender, the instructions were clear that the properties to be valued by plaintiffs were listed on List A. The plaintiffs were further provided with the map for guidance, per Clause 3.1 of the Contract. In addition, the plaintiffs were obliged

to ascertain whether all the properties on the A List appeared on the map. Where the property is missing from the map, the valuer must take all necessary steps to ascertain its location with a Surveyor General's office. Mr Brockerhoff conceded, to his own detriment I might add, that he did not attend to the office of the Surveyor General as required by the Contract with respect to the properties that were missing from the map.

[61] However informal a contract is, the parties are bound to the terms of the contract and the consequences thereof.¹³ I associate myself fully with the preceding sentiment.

[62] One of the pillars on which the plaintiffs' claim rests is the allegation that the defendants expressly or tacitly permitted them to proceed with the valuation of the additional properties. Mr Brockerhoff's evidence is that when he asked Mr Hendjala what to do about the additional properties (Finkenstein and Herboth's Blick specifically), he was told to proceed, thereby implying that he should proceed with the valuation of these properties. This version was never put to Mr Hendjala during cross-examination to respond thereto. Considering that Mr Hendjala was taken under vigorous cross-examination regarding these properties.

[63] I presume that Mr Conradie knew what the response to such a line of questioning would be because Mr Hendjala testified in no uncertain terms that, firstly, there is a distinction between 'the remainder of Finkenstein and Herboth's Blick' and 'Estate Finkenstein' and 'Estate Herboth's Blick' and that the latter would be valued internally by valuers of the City of Windhoek. It would, therefore, make no sense for Mr Hendjala to give the plaintiffs the go-ahead to do a valuation of the estates.

[64] In my view, omitting cross-examination on this critical point was the final nail in the coffin of the plaintiffs' case.

[65] For the reasons mentioned above, the plaintiffs failed to discharge the onus of proving that they were contracted initially or during the execution of the contract to

¹³ *Soroses v Gamaseb* (HC-MD-CIV-ACT-MAT-2020/00122) [2020] NAHCMD 530 (18 November 2020).

attend to the valuation of additional properties not on List A. Therefore, the plaintiffs' claim must fail.

Order

[66] My order is as follows:

1. The plaintiffs' claim is dismissed.
2. The plaintiffs must pay the first defendant's cost of suit jointly and severally, the one paying the other to be absolved.
3. The matter is finalised and removed from the roll.

JS Prinsloo

Judge

For the Plaintiff:

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For the First Defendant:

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