REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title:		**Case No:**
SUPECO TRADING CC	PLAINTIFF	HC-MD-ClV-ACT-CON-2019/04471
and		**Division of Court:** Main Division
S. P. BRICK WAREHOUSE CC	1st DEFENDANT	**Heard on:** 5 December 2022, 7 December 2022, and 8 December 2022.
NICKELBACK BRICKS CC	2nd DEFENDANT	
Heard before: Honourable Lady Justice Rakow, J		**Delivered on:** 3 March 2023

Neutral citation: *Supeco Trading CC v S.P. Brick Warehouse CC and another (*HC-MD-ClV-ACT-CON 2019/04471) [2023] NAHCMD 88 (3 March 2023)

Order:

1. The application for absolution is dismissed.
2. Cost of the application to be cost in the cause.
3. The matter is postponed to 14 March 2023 at 15h30 to fix a date for the continuation of the trial.

Reasons for order:

RAKOW, J:

Introduction

[1] This is an application for absolution from the instance at the end of the plaintiff's case. The plaintiff is Supeco Trading CC, a close corporation duly registered and incorporated in

accordance with the close corporation laws of the Republic of Namibia. The first defendant is S. P. Brick Warehouse CC and the second defendant is Nickelback Bricks CC, both these CC's registered in terms of the laws of the Republic of Namibia.

[2] The main claim in these proceedings was instituted against the first defendant and in the alternative, a claim was instituted against the second defendant should an assignment of rights and obligations from the first defendant be transferred to the second defendant.

Background

[3] During October 2016, the plaintiff and a representative of the first defendant entered into a partly written, partly oral agreement regarding the production and delivery of 472 680 x 80mm pavers with a strength of 35mpa and 130 200 x 60mm interlock pavers also with a strength of 35mpa. The plaintiff would pay the first defendant the amount of N$2 309 195,41 in two equal installments, the first to be paid during October 2016 and the second installment as soon as half of the pavers were delivered. The plaintiff paid over N$1 154 597, 71 on 14 October 2016 and provided the first defendant with proof of payment. It is further not disputed that 62300 x 80 mm pavers and 4200 x 60 mm pavers were delivered.

[4] At the time that the plaintiff contracted the first defendant, the plaintiff, and Intek Construction CC were in a joint venture where they were contracted to build the Agricultural Technology Centre in Ongwediva, in Northern Namibia. It was further also the case that the first defendant was at the time the parties entered into an agreement, the property of Mr. Erwin Paulus. It was however sold some time after the agreement was concluded to Mr. Mark Wylie, who is also the owner of the second defendant.

The relief

[8] The particulars of claim ask for the following relief:

1) An order confirming the cancellation of the agreement;
2) Payment in the amount of N$874 995.90;
3) Interest on the aforesaid amount at the rate of 20% per annum *a tempora morae;*
4) Payment in the amount of N$451 710.83;
5) Interest on the aforesaid amount at the rate of 20% per annum from date of judgement to date of final payment;

6) Cost of suit, including the costs of one instructing and one instructed counsel.

The evidence led by the plaintiff

[9] Two witnesses testified on behalf of the plaintiff. The first one, Mr. Shilongo testified that the plaintiff and Intek Construction CC entered into a joint venture for the construction of the Agricultural Technology Centre in Ongwediva. Each of the members of this joint venture was responsible for certain parts of the project and the plaintiff was responsible for the sourcing and supply of interlock pavers. It also bears the risk of profit and loss in obtaining the said pavers. The plaintiff obtained a quotation from the first defendant for the production and delivery of 472 680 x 80mm pavers and 130200 x 60mm pavers. Both these were to be 35 mpa pavers. The agreement was that the plaintiff would pay half of the contracting price, being N$2 309 195, 41, upfront and the second part after the delivery of half of the order of pavers. He further testified that it was a term of the agreement that delivery of the first half of the pavers will commence within three weeks or less from the date of the first payment. The delivery will be done over a period of two weeks.

[10] There were various emails exchanged between the plaintiff and Mr. Paulus on behalf of the first defendant, and Mr. Wylie was copied in these emails as the plaintiff was informed that he acquired the first defendant. The witness testified that the expected date of the start of the delivery was on or about 4 November 2016. He and Mr. Nekwaya engaged with Mr. Wylie and/or Ms. Mvula, who was employed at either one of the defendants, from time to time, inquiring as to when delivery of all the pavers would be made. These were handed in as exhibits including copies of cell phone text messages. During November 2017, the witness requested and received a quotation for the second half of the paver order. The amounts quoted in this quotation were similar to the amounts quoted for pavers in the first half's quotation.

[11] Upon a request as to when they will receive all the pavers covered by the first payment, Ms. Mvula indicated that it is to be received before the close of business in December 2017 but this did not happen. Further exchange of emails took place and at some stage, the delivery date of the remainder of the first order's pavers were given as of 15 June 2018, which date also came and went without receiving the outstanding pavers. After about just less than two years from the initial payment, during August 2018, the plaintiff decided to source the remainder of the first order’s pavers and the second order from another supplier. The plaintiff received a total of 62 300 of the 80 mm pavers at N$4,55 per paver and 4200 of the 60mm pavers at N$3,61 per

paver, inclusive of VAT.

.[12] Mr Nekwaya then testified that he was the site agent at the time for the joint venture project. He also testified about the delays in the delivery of the pavers as well as attempts made to get expected dates for the delivery of all the pavers covered in the first half of the order. He further testified that the initial quotation was received on the letterhead of the first defendant but the subsequent quotation requested and dated 21 November 2017 was received from the second defendant. Because the defendants could not deliver all the pavers as agreed, the plaintiff had to seek alternative quotations which were more expensive than the quotations received from the defendants to be able to complete the project without incurring penalties for late completion. The value of the paves that were delivered was N$298 631, 20.

The arguments by the parties

[13] The defendants listed several reasons in support of their application for absolution from the instance. These were identified and include the plaintiff's claims and the basis of these claims, the contracting parties, the incompetent relief sought, the alleged assignment and the alleged cancellation, the repayment claim, and the damages claim. Regarding the alternative claims against the second defendant, which only arise in the event that there was an assignment of the rights and obligations of the first defendant in terms of the agreement to the second defendant. The defendants further argue that it was the first defendant that made the offer to supply pavers, not the second defendant, and this offer was accepted by Mr. Shilongo on behalf of the joint venture and not on behalf of the plaintiff. It was also the joint venture that paid for the pavers. The joint venture, therefore, had to either sue as a joint venture or both parties to the joint venture as plaintiffs.

[14] Regarding the assignment, one of the requirements for assignment is that the other contracting party must agree to that, which was not the case in the current matter as the plaintiff never agreed to it. It was further argued that there is no evidence from the plaintiff that it in fact did cancel the agreement on 5 July 2018. The position of the defendants was put to Mr. Shilongo that after the last delivery was made on 14 June 2018, the joint venture refused to further engage with the first defendant, and the first defendant was not allowed to make any further deliveries. This was disputed and the court was referred to further WhatsApp communications. Regarding the repayment of the claim, it was argued that the money cannot be repaid to the plaintiff as the payment initially came from the bank account of the joint venture.

The calculations made by Mr. Nekwaya regarding the amount for the repayment amount also did not take into account the transportation costs of the pavers that were delivered. Concerning the damages claim, it was argued that the plaintiff did not show that it had suffered damages as the payment to Henning Crushers was made by the joint venture. There is also no evidence in support of the amount of damages claimed that will allow the calculation of the amount of N$451 710,83 being the amount that the plaintiff alleged that it paid more than what the quotes from the defendants were.

[15] On behalf of the plaintiff, it was argued that the admitted facts as per the pre-trial order were that the first defendant and the plaintiff entered into a partly written, partly oral agreement and that certain terms were implied in the terms of the agreement including that the first defendant would produce, transport, supply and deliver the goods as set out in the particulars of claim at the Ongwediva Agricultural Technology Centre. The evidence of Mr. Shilongo was that the quotation handed to him was addressed to the plaintiff and the postal address on the quote also reflects this. The tax invoice handed in as exhibit C gave as a reference, the name of the plaintiff. It is also true that the delivery notes which were issued to the plaintiff were issued in the name of the second defendant.

[16] It was further argued that in terms of the initial agreement, delivery was to take place on 4 November 2016. It is common cause that the first delivery only took place on 27 September 2017 with the last delivery on 14 June 2018. Both the defendants breached several undertakings made by them concerning remedying the breach of the delivery terms and as such, they were in *mora ex re.*

<u>The basis for absolution from the instance</u>

[17] The process for the application for absolution from the instance is set out in rule 100 of the High Court Rules but it however does not set out what needs to be considered. The test for granting absolution from the instance at the end of a plaintiff's case is set out in *Claude Neon Lights (SA) Ltd v Daniel*[1] where Miller AJA said:

'(W)hen absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff.'

[1] *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G – H.

[18] In *Ramirez v Frans and Others,*[2] this court dealt with the application for absolution and the principles applicable. Concerning case law, the following principles were extracted:

'(a) (T)his application is akin to an application for a discharge at the end of the case for the prosecution in criminal trials i.e in terms of s 174 of the Criminal Procedure Act — *General Francois Olenga v Spranger*[3];

(b) the standard to be applied is whether the plaintiff, in the mind of the court, has tendered evidence upon which a court, properly directed and applying its mind reasonably to such evidence, could or might, not should, find for the plaintiff — *Stier and Another v Henke*[4] "

(c) the evidence adduced by the plaintiff should relate to all the elements of the claim because in the absence of such evidence, no court could find for the plaintiff — *Factcrown Limited v Namibian Broadcasting Corporation*;[5].

(d) in dealing with such applications, the court does not normally evaluate the evidence adduced on behalf of the plaintiff by making credibility findings at this stage. The court assumes that the evidence adduced by the plaintiff is true and deals with the matter on that basis. If the evidence adduced by the plaintiff is, however, hopelessly poor, vacillating, or of so romancing a character, the court may, in those circumstances, grant the application — *General Francois Olenga v Erwin Spranger;*[6]

(e) the application for absolution from the instance should be granted sparingly. The court must generally speaking, be shy, frigid, or cautious in granting this application. But when the proper occasion arises, and in the interests of justice, the court should not hesitate to grant this application — *Stier and General Francois Olenga v Spranger (supra).'*

Discussion

[19] At this stage, the court must look at the evidence adduced by the plaintiff and decide whether they indeed proved their claims or not. The court at this stage is not required to evaluate the evidence produced in order to make credibility findings. When evaluating the

[2] *Ramirez v Frans* [2016] NAHCMD 376 (I 933/2013; 25 November 2016) para 28. See also *Uvanga v Steenkamp and Others* [2017] NAHCMD 341 (I 1968/2014; 29 November 2017) para 41.
[3] *General Francois Olenga v Spranger* (I 3826/2011) [2019] NAHCMD 192 (17 June 2019), infra at 13 para 35.
[4] *Stier and Another v Henke* 2012 (1) NR 370 (SC) at 373.
[5] *Factcrown Limited v Namibian Broadcasting Corporation* 2014 (2) NR 447 (SC).
[6] *General Francois Olenga v Erwin Spranger* (I 3826/2011) [2019] NAHCMD 192 (17 June 2019) and the authorities cited therein.

evidence produced, the court is of the opinion that the plaintiff indeed has made some case that requires an answer from the defendants and as such, the allegations and evidence produced by the plaintiff might be sufficient to prove at least part of the claims. The question regarding the calculations of the claim amounts can also be addressed by a simple calculation as it is possible to calculate the transport costs per paver as these costs were initially quoted separately. It is further possible to calculate the damages amount from the amounts tendered into evidence.

[20] For these reasons, I find that the plaintiff indeed tendered evidence upon which a court, properly directed and applying its mind reasonably to such evidence, could or might find for the plaintiff and accordingly the application for absolution is dismissed.

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

1. The application for absolution is dismissed.
2. Cost of the application to be cost in the cause.
3. The matter is postponed to 14 March 2023 at 15h30 to fix a date for the continuation of the trial.

Judge's signature	**Note to the parties:**
E RAKOW Judge	Not applicable
Counsel:	
Plaintiff:	**Defendant**:
Ms Angula Of AngulaCo Inc., Windhoek	Adv De Jager Instructed by Kinghorn and Associates, Windhoek