

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case number: HC-MD-CIV-ACT-CON-2022/03243

In the matter between:

EDISON BUILDING ENTERPRISE CC

PLAINTIFF

and

GOVERNMENT OF THE REPUBLIC OF NAMIBIA

FIRST DEFENDANT

REPRESENTED BY MINISTER AND OR

EXECUTIVE DIRECTOR IN THE MINISTRY OF

WORKS AND TRANSPORT

BURMEISTER AND PARTNERS (PTY) LTD

SECOND DEFENDANT

Neutral citation: *Edison Building Enterprise CC v Government of the Republic of Namibia represented by Minister and or Executive Director in the Ministry of Works and Transport (HC-MD-CIV-ACT-CON-2022/03243) [2024] NAHCMD 159 (8 April 2024)*

Coram: DE JAGER AJ

Heard: 12, 13, 14, 15 and 20 February 2024

Delivered: 8 April 2024

Flynote: Evidence – Whether all work was quantified – Contradictory secondhand evidence not accepted and firsthand evidence, as supplemented by further testimony evidencing a joint quantification did not take place and the final account remains unresolved, accepted – Final account not compiled from last site meeting – Work not quantified for final account at last site meeting – Final account not shared with plaintiff – Revised final account not shared with plaintiff – Undisputed process followed on the ground to determine if payment was due to plaintiff was a joint process and plaintiff was to finalise the final account with the quantity surveyor – Joint quantification did not take place – Final account must have been discussed with plaintiff but it was not – Final account remains unresolved – Claim for quantification succeeds.

Pleadings – Causes of action relied on not pleaded – Damages claim resulting from breach of contract – Must allege and prove the contract, the breach, damages suffered, a causal link between the breach and damages and the loss was not too remote – General or intrinsic damages are those that flow naturally and generally from the breach in that because the law presumes that such damages fell within the parties' contemplation as a probable result of the breach, they are not regarded as too remote – Special or extrinsic damages are those not regarded as too remote if, in the special circumstances in the conclusion of the contract, the parties actually or presumptively contemplated such damages would probably result from the breach – Plaintiff did not allege or prove causal link between the breach pleaded and the damages, nor that the loss was not too remote – Facts do not support a causal link between the breach pleaded and the damages – Plaintiff failed to make a case for its monetary claim.

Costs – Basic rule costs are in court's discretion – General rule costs follow the event – Applying general rule but whereas plaintiff succeeds only partially, court awards plaintiff only part of its costs.

Summary: The plaintiff and the first defendant were parties to a written contract concluded on 9 October 2014, whereby the first defendant contracted the plaintiff to perform construction services upgrading Fonteintjie Fish Farm.

The second defendant was the principal agent. Prior to concluding the contract, the plaintiff had to provide a performance guarantee, which it did on 23 September 2014. A payment dispute arose about payment certificate 24 issued in October 2017, leading to the plaintiff terminating the contract in August 2019 and demanding the return of the performance guarantee. The plaintiff alleges any further payments that would be due, owing and payable to it would be determined by a joint quantification thereof, alternatively, a determination thereof by the second defendant. The plaintiff claims that after payment certificate 28 was issued in March 2019, it continued to render services, but despite the plaintiff's additional work, no other payment certificates were issued. The plaintiff claims it is entitled to a quantification of the amounts due, owing, and payable to it and payment of N\$2 490 631 for costs incurred in securing the performance guarantee. The first defendant admits the plaintiff terminated the contract, but disputes it was because of the first defendant's breach. The first defendant claims a double payment resulted from payment certificates 23A and 23B which was set off against payment certificate 24. The first defendant further claims there was a site meeting on 26 November 2019, attended by the plaintiff, with the purpose of quantifying the work which translated to a final account that was forwarded to the plaintiff. The first defendant disputes liability for costs incurred in securing the performance guarantee as N\$35 000 was agreed to and included in the contract as the cost to obtain the performance guarantee. The first defendant further claims the performance guarantee was returned to the plaintiff in November 2019 despite the work not being completed by the plaintiff, there being no certificate of completion and the plaintiff not being entitled to its return.

Held that Garcia's and Nel's contradictory secondhand testimony that all work was quantified is not accepted as evidence that all work was indeed quantified. Kapuuo's testimony, as supplemented by further testimony evidencing a joint quantification did not take place and the final account remains unresolved, is accepted as firsthand evidence of whether additional work was done that was not quantified at the last site meeting of 26 November 2019.

Held that the final account was not compiled as a result of the site meeting on 26 November 2019, and the work was not quantified for the purpose of the final account at the site meeting of 26 November 2019.

Held that the first defendant failed to rebut Kapuuu's evidence that the final account was not shared with the plaintiff, and there is furthermore a revised final account that was not shared with the plaintiff.

Held that the undisputed process followed on the ground to determine whether payment was due to the plaintiff was a joint process and not a unilateral one by the professional team, and according to clause 13 of the notes to tenders in the bills of quantities, the plaintiff was to finalise the final account with the quantity surveyor. A joint quantification did not take place. The final account must have been discussed with the plaintiff and that was not done. The final account remains unresolved. In those circumstances, the plaintiff's claim for quantification succeeds.

Held that the first defendant's alleged breach of contract to pay the P&G's for the years 2017 to 2019, was not pleaded, nor was it included in the pre-trial order. The only breach pleaded by the plaintiff is the first defendant's failure to satisfy payment certificate 24. It was not pleaded that, in the event of a termination of the contract, the first defendant would be liable for damages in respect of costs incurred for the performance guarantee, nor that the contract contemplated 'any damages' suffered by the plaintiff because of a termination owing to the first defendant's breach, or that once the contract was terminated, the first defendant was obliged to return the performance guarantee.

Held that a party wishing to claim damages resulting from a breach of contract must allege and prove the contract, the breach of the contract, that it suffered damages, a causal link between the breach and damages and that the loss was not too remote. For the last-mentioned requirement, there are two principles. The first principle is that the damages must flow naturally and generally from the kind of breach in question in that because the law presumes that such damages fell within the parties' contemplation as a probable result of the breach, they are not regarded as too remote. Such damages are general or intrinsic damages.

The second principle is that if the damages do not fall within the first category, they are not regarded as too remote if, in the special circumstances in the conclusion of the contract, the parties actually or presumptively contemplated such damages would probably result from the breach. Such damages are special or extrinsic damages. The plaintiff did not allege or prove a causal link between the breach pleaded and the damages suffered, nor that the loss was not too remote, and the facts do furthermore not support a causal link between the breach and the damages. The plaintiff failed to make a case for its monetary claim.

Held that the basic rule is that costs are in the court's discretion, and the general rule is that costs follow the event. Applying the general rule, and whereas the plaintiff is only partially successful, the court exercises its discretion by awarding the plaintiff only part of its costs.

ORDER

1. The first defendant is ordered, within 21 days of this order, to:
 - (a) place before the second defendant, together with the plaintiff, for purposes of quantification, all material related to the work done by the plaintiff under the contract in their possession (if any); and
 - (b) attend to Fonteintjie Fish Farm in the presence of the parties and/or their representatives to quantify the work done by the plaintiff until November 2019.
2. The first defendant shall, within 21 days of the quantification, pay the plaintiff the determined (quantified) amount if it is more than what the plaintiff was already paid.
3. The first defendant shall pay the plaintiff interest on the amount in the preceding paragraph, if any, at the rate of 20 per cent per annum from the date of determination until the date of final payment.

4. The plaintiff's claim for damages in prayers 4 and 5 of the particulars of claim is dismissed.

5. The first defendant shall pay one half of the plaintiff's costs of suit, such costs to include the costs of one instructing and one instructed legal practitioner.

6. The matter is finalised and removed from the roll.

JUDGMENT

DE JAGER AJ:

Introduction

[1] The plaintiff and the first defendant were parties to a contract whereby the first defendant contracted the plaintiff to perform certain construction services. The second defendant was the principal agent. Prior to concluding the contract, the plaintiff had to provide a performance guarantee, which it did.

[2] A payment dispute arose, leading to the plaintiff terminating the contract and demanding the return of the performance guarantee. The plaintiff alleges any further payments that would be due, owing and payable to it would be determined by a joint quantification thereof, alternatively, a determination thereof by the second defendant.

[3] The plaintiff claims that after the last payment certificate was issued, it continued to render services, but despite the plaintiff's additional work, no other payment certificates were issued. It claims it is entitled to a quantification of the amounts due, owing, and payable to it and payment of N\$2 490 631 for costs incurred in securing the performance guarantee.

[4] The first defendant admits the plaintiff terminated the contract, but disputes it was because of the first defendant's breach. The first defendant

claims there was a double payment which was set off against the following payment certificate. The first defendant further claims there was a site meeting, attended by the plaintiff, with the purpose of quantifying the work, which translated to a final account that was forwarded to the plaintiff. The first defendant disputes liability for costs incurred in securing the performance guarantee as N\$35 000 was agreed to and included in the contract as the cost to obtain the performance guarantee. The first defendant further claims the performance guarantee was returned to the plaintiff despite the work not being completed by the plaintiff, there being no certificate of completion and the plaintiff not being entitled to its return.

The parties

[5] The plaintiff is Edison Building Enterprise CC, a registered close corporation. The first defendant is the Government of the Republic of Namibia, represented by the Minister and or Executive Director of the Ministry of Works and Transport. The second defendant is Burmeister and Partners (Pty) Ltd, an incorporated company. No relief is sought against the second defendant, but it was cited in so far as it may have an interest in the matter and its outcome.

The pleadings and the pre-trial order

[6] The pre-trial order, read with the pleadings, reflects the following.

[7] The plea admits the cause of action arose within the court's jurisdiction.

[8] The following facts are recorded as undisputed in the pre-trial order:

(a) The parties' citations.

(b) The plaintiff and the first defendant, duly represented by Edison Kapuuo and Andrew K. Mwazi, respectively, concluded a written agreement on 9 October 2014 at Windhoek, whereby the plaintiff would render construction services to the first defendant by upgrading Fonteintjie Fish Farm situated at Keetmanshoop for a total consideration of N\$20 492 704,61 (the contract).

(c) Under clause 17.1, and prior to the commencement of the work envisaged under the contract, the plaintiff had to furnish the first defendant with a performance guarantee of N\$2 049 270,46 (10 per cent of the project's total consideration), which the plaintiff provided on 23 September 2014. The performance guarantee was from Bank Windhoek.

(d) It was in the contemplation of the plaintiff and the first defendant that the plaintiff was to secure a performance guarantee.

(e) The plaintiff commenced the work envisaged by the contract in early 2015.

(f) The plaintiff terminated the contract in August 2019.

(g) The plaintiff sues for damages resulting from charges for securing the performance guarantee.

[9] According to the pre-trial order, the issue of law to be resolved is whether the plaintiff is entitled to payment of N\$2 490 631 for costs incurred in securing the performance guarantee, and the issues of fact to be resolved are as follows:

(a) Whether consequent to the termination of the contract, any further payments that would be due, owing and payable to the plaintiff were to be determined consequent to a joint quantification (final account), alternatively, under the contract. In the particulars of claim, the plaintiff relies on letters dated 7 October 2019 and 27 August 2020, and it alleges the alternative determination would be done by the second defendant. The first defendant pleads as follows. The plaintiff was paid all money due to it, and the first defendant is not indebted to it. A site meeting where the plaintiff and both defendants were represented took place on 26 November 2019 with the purpose of quantifying the work done for the compilation of the final account hence the reference in the letter of 27 August 2020 to the final account. By 27 August 2020 the final account was compiled, finalised and forwarded to the plaintiff by email on 27 April 2020, and it was also forwarded to the second defendant and the user ministry. The final account, as compiled following that site meeting and the contract's termination, does not indicate any payments owed to the plaintiff. The reconciliations by the

quantity surveyor and principal agent indicate the plaintiff owes the first defendant penalties and costs occasioned by delays in completing the work, the first defendant paid all payment certificates, and there are no outstanding amounts to which the plaintiff is entitled.

(b) Whether the plaintiff is entitled to any further payments or a joint quantification of a final account to determine any further payment. The plaintiff alleges it is entitled to N\$2 490 631 for costs incurred in securing the performance guarantee. The first defendant denies liability for that amount and further pleads as follows.

(i) Under the bills of quantities agreed by the plaintiff and the first defendant, the plaintiff priced the fee it would cost to obtain the performance guarantee at N\$35 000, which was included in the total contract amount awarded to the plaintiff.

(ii) The plaintiff fails to allege what the amount of N\$2 490 631 is comprised of, how it is computed, and that it is claimable under the contract seeing it is not included in the bills of quantities nor agreed to by the first defendant as part of the total contract amount.

(iii) Under the contract, the first defendant is not liable for the plaintiff's obligations arising from separate arrangements or agreements with third parties who are not parties to the contract and which obligations the first defendant never had knowledge of nor gave its prior approval.

(iv) The first defendant returned the performance guarantee to the plaintiff on 29 November 2019 despite the plaintiff not having completed the works, a certificate of completion not having been issued, and the plaintiff not having been entitled to the performance guarantee being returned to it. The first defendant alleges the returned performance guarantee sets off the plaintiff's claim (if proved).

(c) Whether there is any amount due and payable to the plaintiff for work not quantified.

(d) Whether the first defendant paid all money due for work completed under the contract.

(e) Whether the first defendant honoured payment certificate 24.

(f) Whether a site meeting took place on 26 November 2019, and whether the parties were represented at that meeting.

(g) Whether a final account was compiled and finalised from the site meeting of 26 November 2019.

[10] The plaintiff alleges the contract was terminated because of the first defendant's unlawful (and breach of its obligations under clauses 23 and 25 of the contract) failure to satisfy payment certificate 24. The first defendant denies the contract's termination was due to unlawful conduct on its part, as the plaintiff's claims were often for work the first defendant found unsatisfactory. It further pleads as follows. Payment certificate 24 was honoured. There was an error in that two payment certificates numbered 23 were issued. Payment certificate 23A was for N\$504 167,82, which erroneously overpaid the plaintiff because it included N\$399 517,82 as part of the retention money in addition to N\$104 650 for work done. Payment certificate 23B was for N\$104 650, which was also paid to the plaintiff. The plaintiff was overpaid by N\$504 167,82 and the error was corrected by withholding that N\$504 167,82, which the plaintiff was not entitled to, from the total amount of N\$732 716,39 of payment certificate 24.

[11] The plaintiff seeks the following relief against the first defendant:

(a) The first defendant is ordered, within 21 days of the order, to:

(i) place before the second defendant, together with the plaintiff, for purposes of quantification, all material related to the work done by the plaintiff under the contract in their possession (if any); and

(ii) attend to Fonteintjie Fish Farm in the presence of the parties and/or their representatives to quantify the work done by the plaintiff until November 2019.¹

(b) The first defendant shall pay the plaintiff the determined (quantified) amount within 21 days of the quantification.

(c) The first defendant shall pay the plaintiff interest on the amount in the preceding paragraph at the rate of 20 per cent per annum from the date of determination until the date of final payment.

(d) The first defendant shall pay the plaintiff N\$2 490 631.

(e) The first defendant shall pay the plaintiff interest on the amount in the preceding paragraph at the rate of 20 per cent per annum from 31 August 2019 until the date of final payment.

(f) The first defendant shall pay the plaintiff's costs, including the costs of one instructing and one instructed legal practitioner.

The evidence

[12] Under the contract, the first defendant was the employer, the plaintiff was the contractor, and the second defendant was the principal agent.

[13] Mr Edison Kapuuu (Kapuuu), the plaintiff's 'sole owner', was its only witness. The first defendant's witnesses were Mr Dawid Nel (Nel), the quantity surveyor of Dawid Nel Quantity Surveyors Incorporated (DNQS), and Ms Begoña Garcia (Garcia), a civil engineer employed by the principal agent (the second defendant, a firm of consulting engineers and project managers) in the capacity of project manager and associate director. Garcia was called in her capacity as project manager, not as an expert witness.

[14] The evidence presented included the following.

¹ The plaintiff, during its opening statement, moved an amendment for the date 'November 2017' in prayer 1.2 of the particulars of claim to be substituted with 'November 2019'. The first defendant had no objection to the amendment sought. The amendment sought was granted.

[15] According to Nel, DNQS was appointed for the full scope of quantity surveying services on the project, namely preparing cost estimates and tender documents (including bills of quantities), contract administration and preparing and agreeing on the final account.

[16] Garcia said the second defendant's scope of work was principal agent and civil and structural engineers from designs and tender documentation to work construction supervision and it was required to monitor all quality and progress of the work. She and Mr Cronje Loftie-Eaton (Loftie-Eaton) were the authorised engineers to supervise the plaintiff's work. She explained that Loftie-Eaton signed some letters she testified about, but they were a team and they worked together, and she was aware of the letters signed by him and also correspondence by the structural engineer, Abrie Swanepoel. The plaintiff submitted the contents of the letters not authored by Garcia are inadmissible hearsay evidence. The first defendant did not agree with that submission.

[17] Kapuuu, Nel and Garcia said the performance guarantee was a prerequisite to signing the contract. Nel further said the plaintiff was to maintain it for the duration of the contract until 60 days after practical completion, and if it lapsed during the contract period, the first defendant could cancel the contract. Garcia added it was to remain in force for that period unless the first defendant, within that period, would inform the bank of its intention to institute claims.

[18] Kapuuu applied for a bank guarantee from Bank Windhoek Ltd, which was approved in favour of the plaintiff on 23 September 2014. Garcia said the guarantee was for N\$2 049 270,46, 10 per cent of the contract amount of N\$20 492 704,61. She further said that under the guarantee, the plaintiff was the applicant and, as such, liable for the payment of any charges thereto.

[19] Kapuuu testified the construction site was handed over to the plaintiff after he fulfilled 'the prerequisite' and signed the contract. Garcia testified the site was handed over on 21 October 2014, and the contractual completion date was 15 February 2016.

[20] According to Kapuuo, progress payments were made to the plaintiff as follows, and all transactions followed that process until the issuance of payment certificate 24 in October 2017:

(a) The plaintiff submits its valuation report for work done and materials procured within the specified month to the quantity surveyor for verification and approval recommendation for the preparation of a payment certificate by the second defendant.

(b) The quantity surveyor verifies and evaluates the work done and materials procured for a specific month.

(c) The quantity surveyor sends the valuation report to the second defendant, who prepares the payment certificate from the valuation report.

(d) The second defendant issues a payment certificate to the first defendant.

(e) The first defendant confirms the payment certificate, and payment is made to the plaintiff.

(f) Upon receipt of payment, the plaintiff pays the subcontractors.

[21] Garcia said correspondence was exchanged about the lack of progress and the absence of realistic and feasible work programs since 3 March 2015. In a letter dated 12 March 2015, the second defendant recommended to the first defendant to terminate the contract. Garcia signed both letters dated 3 and 12 March 2015.

[22] Garcia testified about workmanship issues that resulted in certain work having to be redone, which affected the project completion and cash flow. That was recorded in a letter dated 24 August 2015, signed by Lofty-Eaton. Having regard to Garcia's role in the project, the court accepts the aforesaid evidence presented by her, but not that the entire contents of the letter of 24 August 2015 are correct.

[23] On 26 May 2016, when the contract completion date of 15 February 2016 had long lapsed, the second defendant reported to the first defendant that

58 per cent of the project was completed. On 30 May 2016, the plaintiff was advised to apply for an extension of time, and it was advised about the penalty deduction to which the first defendant was entitled at the time. Loftie-Eaton signed the letters of 26 and 30 May 2016. The court does not accept the entire contents of those letters as correct, but due to Garcia's role in the project, the court accepts her testimony that, by 26 May 2016, when the contract completion date of 15 February 2016 had long lapsed, the project was not near completion, the plaintiff was advised to apply for an extension of time, and the first defendant was entitled to penalty deductions at the time.

[24] The dispute that led to the plaintiff terminating the contract, arose from payment certificate 24.

[25] Kapuuu said that under payment certificate 24, the amount due to the plaintiff was N\$732 716,39, but the first defendant only paid the plaintiff N\$228 548,57. Hence N\$504 167,82 remains outstanding, which was due to a nominated subcontractor and materials on site. Garcia testified that that amount was paid in the first payment certificate 23.

[26] The following facts led to that dispute.

[27] Kapuuu said since 2017 there was an issue with the release of some of the retention money to facilitate completion of the work. Garcia said the plaintiff failed to understand that the retention money could not be released to facilitate completion of the work. She testified the work must be completed to have the retention money released, and all defective works must furthermore be rectified.

[28] Kapuuu testified the first defendant wrote to the Ministry of Fisheries and Marine Resources (the user ministry) on 23 March 2017 that it resolved to release N\$300 000 of the retention money to assist with completion of the work.

[29] Garcia said that on 3 April 2017, the second defendant sent a letter to the first defendant confirming the release of payment certificate 23 but explaining its reservations about issuing payment certificate 23, which included the partial release of retention money and payment of non-compliant works not approved

by the second defendant. She said at that stage, N\$302 972,35 was deducted as penalties due to late completion.

[30] Kapuuu testified that on 26 May 2017, the first defendant, in a letter to the second defendant, reversed its decision of 23 March 2017 and cancelled payment certificate 23 issued on 3 April 2017. The letter stated that the first defendant took the decision and instructed the second defendant to partially release the retention money without knowledge of the existence of a cession agreement between the user ministry and the plaintiff's guarantor, Namibia Procurement Fund (NamPro Fund), and in light thereof the decision was reversed.

[31] The first payment certificate 23 (23A) was cancelled, and on 22 June 2017, a second payment certificate 23 (23B) was issued. Garcia said payment certificate 23B was for N\$104 650 without the partial release of retention money and non-compliant works but by then, payment certificate 23A for N\$504 167,82 was already processed and both were paid to the plaintiff and therefore, the first defendant reversed the payment with the next payment certificate 24 of N\$732 716,39 and paid the plaintiff N\$228 548.57 for it, being the difference between payment certificate 24 and payment certificate 23A. Garcia said the user ministry made the payments, not the first defendant who decided to cancel payment certificate 23A, and due to a communication delay, both certificates were paid.

[32] Nel said payment certificate 23A for N\$504 167,82 was paid to the plaintiff on 22 August 2017, and it erroneously included N\$399 517,82 for part of retention money requested by the plaintiff to assist its cash flow. At the same time, N\$104 650 for work done, excluding the N\$399 517,82 for retention money, was paid to the plaintiff under payment certificate 23B. In total, he said, the plaintiff was paid N\$608 817,82 while it was only entitled to N\$104 650. The erroneous payment was revised and corrected when payment certificate 24 was submitted for payment in the amount of N\$732 716,39 and N\$504 167,82 was withheld to reconcile the overpayment. Hence N\$228 548,57 was paid for payment certificate 24. He explained the payment to Electro Blitz, a subcontractor, was repeated and the intention was that payment certificate 23B

replaces 23A. The overpayment of N\$504 167,82, consisting of N\$104 650 for Electro Blitz and N\$399 517,82 for retention money, occurred because both certificates were paid. Nel said a small amount of payment certificates 23A and 23B was for work done, and under cross-examination, he agreed that N\$47 406,80, which was part of the amount of N\$399 517,82, should not have been deducted as it was for work done. It also transpired that the quantity surveyor was not instructed to deduct the erroneous payment from payment certificate 24.

[33] Nel further said money is retained from each payment as surety against defective workmanship and the use of wrong materials and to ensure the contractor returns to the site to rectify defects that may become evident during the liability period, which was 12 months in the matter at hand. The maximum is 5 per cent of the contract value, which reduces to 2,5 per cent at practical completion, and the last 2,5 per cent is released at final completion. Using retention money puts the employer at risk. As practical completion and final completion certificates were not issued, the first defendant is entitled to the retention money, and it was contractually incorrect for the first defendant to release part of it.

[34] According to Kapuuu, the plaintiff carried out the work in payment certificates 23A and 23B and it was valued and quantified under the contract. He said no amounts were unduly paid in respect of those payment certificates.

[35] Kapuuu testified the plaintiff continued rendering services while correspondence was exchanged between the parties about payment certificate 24. Garcia disagreed with that statement. She said payment certificate 24 was issued on 17 October 2017, and the plaintiff made little progress on the project.

[36] Payment certificate 25 was issued for N\$38 572,15 on 28 November 2017, and the first defendant honoured it.

[37] On 23 March 2018, Kapuuu wrote to the first defendant requesting payment of the outstanding amount for payment certificate 24. The first defendant did not heed the demand. Garcia said, in that letter, the plaintiff,

unbeknown to the second defendant, requested the first defendant 'for the retention money and penalties for the completed works', and she, on behalf of the second defendant, responded to the first defendant with a letter dated 27 March 2018, copying the plaintiff in via email, displacing some of the contents of the plaintiff's letter of 23 March 2018 and providing clarity on payment certificate 24 and stating that no payment was due to the plaintiff.

[38] Garcia said on 29 March 2018, the plaintiff sent a notice of dispute to the first defendant, and on 5 April 2018 the second defendant sent the first defendant a letter requesting a meeting with the plaintiff and the first defendant to solve the dispute.

[39] Payment certificates 26, 27 and 28 were issued in May 2018, August 2018, and March 2019, respectively, and they were all honoured by the first defendant.

[40] On 5 March 2019, the user ministry wrote to the first defendant, and its executive director informed the first defendant that its objection to releasing retention money was reversed. The first defendant was to proceed to issue a certificate for the partial release of the retention money.

[41] In compliance with those instructions, the first defendant instructed the second defendant, on 8 March 2019, to release 50 per cent of the retention money to the plaintiff, to which the second defendant had reservations.

[42] On 11 March 2019, the first defendant mitigated the second defendant's reservations by stating that the performance guarantee should suffice as leverage and security for the plaintiff to fulfil its obligations, and the plaintiff was aware the performance guarantee would be called up. According to the plaintiff, it was clear the first defendant required it to obtain a performance guarantee of 10 per cent of the contract value, and the first defendant relied on it to make its decision to release some of the retention money. Kapuuo said the first defendant would not have allowed the plaintiff to carry out the work with a performance guarantee to the value of N\$35 000, which is only 0,17 per cent of the contract value. Garcia said Kapuuo was conflating issues. She said the

N\$35 000 was the amount to be paid to the plaintiff to cover the cost of the guarantee, it was not the guarantee itself.

[43] Nel said all payment certificates were paid to the plaintiff. Garcia said the plaintiff was paid all money certified and due to it for work valued and completed as at the termination of the contract, and all works completed have been assessed and paid. She referred to the proof of payment provided by the user ministry of all payment certificates. She said there is thus no need for a quantification and assessment.

[44] Kapuuo said that after payment certificate 28 was issued, the plaintiff continued to render services, but despite the plaintiff having carried out additional work, no other payment certificates were issued. Garcia referred to the second defendant's letter dated 15 April 2019 (which is not before the court), wherein the first defendant was informed the bulk of the works to be completed relied on Electro Blitz, who was not going back to the site to complete the work unless it received payment and therefore there was no progress on the site after payment certificate 28. Moreover, she said, payment certificate 28 was the release of 50 per cent of the retention money to assist the plaintiff with cash flow.

[45] On 8 July 2019, Kapuuo addressed a registered notice of determination of the contract to the first defendant. He addressed the non-payment of payment certificate 24. He said its purpose was to inform the first defendant that if the dispute about payment certificate 24 is not resolved, the plaintiff would proceed to terminate the contract. The first defendant did not respond. Garcia said the date of the notice is 18 July 2019. That is incorrect, the date is 8 July 2019. Garcia said the second defendant responded to the plaintiff's notice with a letter dated 13 August 2019 (which is not before the court) by addressing the plaintiff's allegations of breach of contract and again recommending to the first defendant to terminate the contract itself as, in the second defendant's view, there were no grounds for the plaintiff's termination.

[46] On 29 August 2019, Kapuuo again wrote to the first defendant, terminating the contract and proposing a site handover meeting at the

construction site to determine the work completed and the material and equipment on site. The plaintiff would thereafter have the site handed over to the first defendant. The first defendant was also requested to release the performance guarantee. Garcia said it appears the main issue was the non-payment of payment certificate 24.

[47] The first defendant responded on 1 October 2019 by declaring a dispute about the plaintiff's termination of the contract and indicated the matter would be referred to the second defendant for resolution. On 16 October 2019, the plaintiff responded to the first defendant's letter of 1 October 2019 by requesting that the performance guarantee be released and informing the first defendant that, should it not be released, the plaintiff would incur interest.

[48] In a letter dated 7 October 2019, the plaintiff indicated to the first defendant it was no longer on the site and it deems the site to have been handed over by virtue of the proposed meeting in its letter of 29 August 2019. The plaintiff requested the immediate release of the performance guarantee and the settlement of all outstanding accounts. Garcia said the second defendant did not receive the plaintiff's letter of 7 October 2019.

[49] On 15 October 2019, the second defendant wrote to the plaintiff and the first defendant in response to the dispute declared by the first defendant. It directed the first defendant to provide a formal submission elaborating on the reasons for the dispute within seven days and the plaintiff to respond thereto within seven days. On 25 October 2019, in response to the second defendant's letter of 15 October 2019, the plaintiff sought clarity about the second defendant's directions. In a letter dated 1 November 2019 to the second defendant, the plaintiff stated the first defendant failed to submit its formal submission and requested the second defendant to direct the first defendant to release the performance guarantee and settle the outstanding claims.

[50] The first defendant finally responded to the plaintiff on 7 November 2019 that it would proceed to prepare the final account.

[51] In a letter dated 25 November 2019, the first defendant informed the plaintiff that a site meeting would be held on 26 November 2019 to quantify the work done by the plaintiff and all subcontractors, and the second defendant would then prepare a final account.

[52] Kapuuu said that on 26 November 2019, he, on behalf of the plaintiff, and a representative of the second defendant attended the first defendant's proposed site meeting, but the first defendant failed to attend. According to Kapuuu, in the absence of representation for the first defendant, the meeting and quantification could not have proceeded.

[53] Nel said his firm was present at the 26 November 2019 site meeting together with other consultants on behalf of the first defendant (architects, the principal agent and the electrical engineer). He said the architects provided a closeout report. When Kapuuu was referred to the closeout report, he said he never received it, and he pointed out only one individual compiled it, while such reports were usually signed by all who inspected the site.

[54] Garcia said the whole professional team (architects, engineers and quantity surveyor), of which she was a part, the plaintiff, the second defendant and representatives of the user ministry were present at the 26 November 2019 site meeting. She referred to the closeout report, which reflected the progress of the work. She explained they went through the site, visiting the structures, and each discipline took care of its responsibility, and so the final account was compiled. Garcia further said the first defendant's presence was not required for the site meeting. She said the final account is done by the technical team, not the first defendant. Under cross-examination, Garcia said payment certificates are interim, and if there is an issue one day, it can be corrected the next day, and the final account regulates those things. According to the plaintiff, the reversal of payment certificate 23 had to be dealt with and recovered in the final account and should not have been taken from payment certificate 24. Garcia did not agree, but she also said there is nothing in the contract entitling deductions to be made from payment certificates, but she further said that is not what happened. She said one payment certificate was issued and cancelled.

[55] The first defendant released the performance guarantee on 29 November 2019, but Kapuuu said that at that point, the plaintiff already suffered damages. The monetary claim for the performance guarantee is for interest accrued for the plaintiff's failure to return it as demanded. The evidence presented was as follows.

[56] Kapuuu said because of the first defendant's failure to timely release the performance guarantee to the plaintiff, the plaintiff suffered damages of N\$2 490 631, which are the subject of pending litigation by NamPro Fund against the plaintiff and Kapuuu himself, wherein the first defendant is also cited as a defendant while no relief is sought against it. Kapuuu referred to a performance guarantee issued by NamPro Fund and said when the first defendant failed to release the performance guarantee, NamPro Fund charged him the amount of N\$2 490 631,39.

[57] During cross-examination, Kapuuu confirmed the performance guarantee by Bank Windhoek Ltd was the one taken out by the plaintiff for the contract, it was issued by Bank Windhoek Ltd, the first defendant was the beneficiary, the plaintiff was the applicant, and the first defendant was not a party to the contract between the plaintiff and Bank Windhoek Ltd for the performance guarantee. Kapuuu was asked to read out parts of the performance guarantee, including the part that the plaintiff was liable for the charges of the cost relating to the performance guarantee.

[58] Under re-examination, Kapuuu clarified some issues pertaining to the performance guarantee. The tender was awarded on the condition that a performance guarantee be provided. The plaintiff approached NamPro Fund and applied for a facility to assist with the performance guarantee. NamPro Fund required security, Kapuuu's uncle's farm was given as security, and Bank Windhoek Ltd issued the performance guarantee. The project had challenges and NamPro Fund demanded the return of the performance guarantee. NamPro Fund took the plaintiff to court for money borrowed from it and not paid. Kapuuu was referred to paragraph 21 of the particulars of claim in that pending litigation which reads as follows:

'Whilst the judgment amount in 19.1 and 19.2 above have been settled in full (by the third defendant), the return of the performance guarantee as ordered by the court, was not complied with. In fact, the first defendant only returned the performance guarantee on 18 February 2020 whereby interest continued to accrue on the performance guarantee amount. Thus, leaving an outstanding amount of N\$ 2 490 631.39 as at 21 November 2021.'

[59] Kapuuu was cross-examined and re-examined on the pending litigation. The practical completion date should have been 15 February 2016, and the performance guarantee was to be released 60 days after practical completion, but there was no date of practical completion. Kapuuu testified he asked for its release before the first letter of determination of 8 July 2019. Kapuuu explained the project was supposed to run for fourteen months, but it was prolonged because of unforeseen circumstances, and the plaintiff had to keep the performance guarantee for about six years, while NamPro Fund continued charging the plaintiff for the performance guarantee and that accrued until there was a meeting with the first defendant. NamPro Fund wanted to change the performance guarantee, but the first defendant rejected that request, and NamPro Fund continued charging the plaintiff. He said there was an agreement that the plaintiff would pay NamPro Fund monthly.

[60] Kapuuu testified while the project was running, he serviced the performance guarantee at NamPro Fund until the employer stopped paying 'P&G's' for the years 2017, 2018 and 2019, and then he became indebted and unable to service the performance guarantee. He further said once the court grants the prayer for quantification, P&G's would be calculated and cover the cost of the performance guarantee. Under re-examination, Kapuuu explained P&G's are payments made each month on a project and he used that to service the performance guarantee.

[61] Kapuuu said the damages for the performance guarantee would fall under clause 23.2.5 of the contract as he was charged for keeping the performance guarantee longer than the time within which it was supposed to be released.

[62] Under cross-examination, he confirmed that the plaintiff's damages for the first defendant's failure to release the performance guarantee appear on NamPro Fund's statement for charges by NamPro Fund from 31 July 2016 to 21 November 2021.

[63] Nel referred to clause B1.7 of the preliminaries in the final account, which reads as follows:

'CLAUSE B1.7 - Performance guarantee by the Contractor:

The full security for the due fulfilment of all obligations under this contract is to remain in force for sixty days after practical completion.

No guarantee containing any clause that allows the financial institution providing such guarantee to either withdraw from their undertaking before sixty days after practical completion or that stipulates an expiry date is acceptable.

Said guarantee must be from the same Institution that has issued the letter of intent to provide a guarantee as referred to in Section C (Specific Preliminaries).

Notwithstanding the above, the guarantee will only be returned to the contractor after receipt of satisfactory proof that the contractor has met all his obligations under any and all selected and nominated sub-contract agreements applicable to this contract.'

[64] Under B1.7, an amount of N\$35 000 was included. Nel said that in terms of the bills of quantities, the plaintiff priced the performance guarantee at N\$35 000 as the fee it would cost the plaintiff to raise the performance guarantee. The N\$35 000 is not the value of the guarantee itself which is never a cost to the project. He said the guarantee is like insurance, and the N\$35 000 can be seen as the premium and not the actual guarantee value, and the amount of the guarantee is the insured value which the insurer (the contractor) should pay the insured (the employer) in case the contractor fails to complete the project to the required specifications and it guarantees compensation in such event. According to Nel, no other amount was proved for the performance guarantee, and it is unclear how the amount of N\$2 490 631 is computed and what it comprises. He says the only payment due to the plaintiff would be the N\$35 000 under clause B1.7.

[65] Nel testified the contractor was only entitled to receive the performance guarantee back 60 days after practical completion in terms of clause B1.7, and

in the matter at hand, the first defendant had every right to call up the guarantee as the plaintiff failed to perform under the contract. He said the first defendant was under no obligation to return the performance guarantee, and therefore, there could not have been a set date for its return, and it was up to the first defendant to decide when to return it if it chose to return it. He said the absence of a certificate of practical completion is proof that the plaintiff failed to perform under the contract. So, he said, the plaintiff cannot claim the guarantee was returned late. Nel agreed on the date when the performance guarantee was returned, but said it was returned despite there being no practical completion of the project on the plaintiff's part.

[66] Garcia said the first defendant was never responsible for the performance guarantee payment to the plaintiff, and that was always the plaintiff's responsibility. She said the contractual completion date was in 2016, and P&G's were paid, but the plaintiff was responsible for the delays, and the first defendant was not obliged to pay extra P&G's unless the plaintiff could prove the first defendant was responsible for the delays. She said the first defendant is not liable for the plaintiff's alleged damages. She testified a term of the guarantee was that the plaintiff would be liable for all charges relating to it. Garcia said the plaintiff priced the N\$35 000 when submitting its bid, and if, due to delays in the project completion attributable only to the plaintiff, the amount was insufficient to cover the cost of the guarantee, that was the plaintiff's own doing and responsibility.

[67] The court now continues to deal with the evidence on the final account.

[68] On 9 December 2019, the first defendant informed the plaintiff that the second defendant was busy with the costing of the final account and the plaintiff would be notified once the process was complete. Kapuuo said the plaintiff never received any feedback or final account from the first defendant.

[69] In May 2020, the plaintiff, through its former legal representatives, requested a meeting to discuss the unresolved final account, but on 9 June 2020, the first defendant refused to have a meeting and indicated that the matter was to be handled by the Government Attorney.

[70] The Government Attorney wrote to the plaintiff's former legal representatives on 27 August 2020 and requested a roundtable meeting to discuss the final account. That meeting never took place as the first defendant postponed it.

[71] Garcia said the professional team prepared the final account based on the work assessed during the last site visit in November 2019 (and no work was performed afterwards) for the two scenarios, namely determination by the plaintiff and by the first defendant because, in its view, there were no grounds for the termination by the plaintiff. She said both calculations were sent to the first defendant for consideration in May 2020. The second defendant received communication from the first defendant that it accepted the plaintiff's termination on 28 August 2020, and thereafter the second defendant submitted the updated final account for the determination of the contract by the plaintiff with the inclusion of the penalties for the late completion for the first defendant to decide if it wanted to apply it or not. Garcia testified the plaintiff was in debt to the first defendant for N\$2 044 465,33 as payments were done to the plaintiff for the special installations that the subcontractor never received. She said those payments would have to be deducted from the plaintiff's account and the amount due was without the penalties for late completion that amounted to N\$9 682 500 at the time which the first defendant was entitled to apply. She said the second defendant's termination as project consultant was contained in a letter dated 14 August 2020, and after their services were terminated, they were no longer involved in and or responsible for the final account. According to Garcia, it is not necessary for the plaintiff to participate in the final account, but once prepared, it must be discussed with him.

[72] Nel said the final account was compiled by DNQS employees visiting the site and doing on-site remeasurements. He said he sent his employees to go to the site, and he finalised the final account. Under cross-examination, he said he did not take the measurements. Nel testified the final account was submitted to the first defendant in the form of a PDF document for verification, and it was emailed to Kapuuu on 27 April 2020. He said there was no response from the plaintiff. According to Nel, during the preparation of the final account, he had a

few discussions with Kapuuo, and their main difference was the claims the plaintiff submitted for additional preliminaries, which required proof that the first defendant agreed to an extension of time based on claims submitted by the plaintiff which the plaintiff could not provide. He referred to an extract from the notes to tenders in the bills of quantities which provides that:

‘13. FINAL ACCOUNT

The Tenderer's attention is drawn to the fact that this is a Provisional Bills of Quantities and as such these Bills of Quantities are subject to variation and will be remeasured and adjusted at Schedule rates during the preparation of the Final Account.

Should the Tenderer not endeavour to finalise the Final Account with the Quantity Surveyor within three months after receipt of same, the final cost figures as reflected in the Quantity Surveyor's Final Account will be taken to be the final cost of the project and no further negotiations will be entertained by the Employer.’

[73] While Nel was under cross-examination, it transpired the first defendant had an issue with the bulk earthworks in the final account. Nel said the quantity surveyor had to certify it and include it in the final account, which was done, and Nel thought the corrected final account was submitted to the plaintiff. Nel said there was a meeting on site whereafter the quantity surveyor was relieved of the project, but the first defendant asked it to assist with the final account. He said hard copies were delivered to the first defendant, and the first defendant's representative would get hold of Kapuuo to present the documents to him, and he was not sure if they ever met. In re-examination, Nel said only the first defendant was involved in the revised final account; the plaintiff was not involved in it as, at that time, there was no discussion between him and Kapuuo. He said the first defendant took its time and did not want a final account for less than what was paid out. He said the plaintiff did not sign off on the revised final account in which the item in question was included, with which Nel did not agree.

[74] Nel said DNQS's appointment ended in September 2020.

[75] Under cross-examination about the email of 27 April 2020, Kapuuo tried to open his emails on his cell phone to show that he did not receive that email. He disputed having received that email and the final account.

[76] Still under cross-examination, Kapuuo was referred to a letter dated 2 September 2020 from the second defendant to the first defendant in response to a letter by the first defendant dated 28 August 2020 requesting the second defendant's submission of the final account for the determination by the plaintiff. The letter of 2 September 2020 referred to the second defendant's letters dated 18 May 2020 and 11 August 2020, wherein the calculations for both determinations (by the plaintiff and the first defendant) were included. Kapuuo said the letter dated 2 September 2020 was never sent to him. It was put to Kapuuo that it is the first defendant's case that a quantification was done after the 26 November 2019 site meeting, which translated to the final account by the quantity surveyor. Kapuuo noticed a discrepancy between the work valued in the final account and that paid to the plaintiff to date. Kapuuo indicated that the plaintiff was paid more than the work valued in the final account. Kapuuo said Nel was not at the site at any point in time, and he is surprised that he prepared the final account.

[77] Kapuuo said he was not involved in the preparation of any final account and it was done without the plaintiff's input. He said it was supposed to be prepared in the same process as the payment certificates were prepared set out above which process never took place in respect of the final account. If any final account was prepared, it was done without the plaintiff's input or consideration, so he said. The plaintiff seeks a quantification of the final account to be drawn up under the contract and established practice to resolve the dispute at hand.

[78] When Nel was asked under cross-examination whether Kapuuo participated in the preparation of the final account, he said no. When asked if Kapuuo participated in the measurements, he said the measurements for the final account were not done on 26 November 2019 and the plaintiff was not present when the measurements were taken. Nel, however, said the fact that the first defendant was absent on 26 November 2019, did not prevent the quantity surveyor from attending to it, and while the site was open, the quantity surveyor could arrange its own site meetings to verify the information on site and the final account could always be presented and discrepancies could be pointed out and if necessary, the site could be revisited.

[79] When asked about the purpose of the final account, Nel said it was to determine the final value of the contract, and the items must be remeasured to be final. He said he had someone else manage the project. He also said that for preparing the valuation reports, something was received from the contractor for most claims.

[80] On 8 October 2020, the plaintiff's former legal representatives wrote to the second defendant under clause 26 of the contract to resolve the dispute between the plaintiff and the first defendant. The second defendant responded that it was no longer obligated to act under the contract.

[81] On 18 March 2022 and under clause 26 of the contract, the plaintiff's legal representatives prepared a statement of claim and submitted it to the defendants. The defendants did not respond.

[82] Nel, however, said the plaintiff failed to exhaust the dispute resolution mechanisms provided for in clause 26 of the contract. In the same vein, he said the second defendant ceased to be the principal agent by October 2020 when the plaintiff's legal practitioner requested a written decision within three days and submitted its statement of claim in March 2022. He said clause 26.2 provides that, in such an instance, the dispute is to be referred for adjudication by an adjudicator and thereafter arbitration under clause 26.4, if need be.

[83] In a final notice issued on 22 July 2022, the defendants were informed that the plaintiff would institute legal proceedings.

[84] Under cross-examination, Kapuu said he is claiming a quantification from when payment certificate 28 was issued (26 March 2019) until the termination of the contract (29 August 2019), but he also said that the plaintiff carried out work from June 2018 to November 2019 that was not quantified. According to Garcia, there is no proof of work conducted from March 2019 to November 2019. Under cross-examination, she said the work was certified on 26 November 2019, and Mr Simasiku, who lives on the farm, told her no one was there. Whereas that hearsay evidence was solicited under cross-examination, it is admissible.

[85] Kapuuo said quantification is an exercise between the contractor and the quantity surveyor, and both must be part of the verification. Under cross-examination, he said that for work done from June 2018 to November 2019, he provided reports to the quantity surveyor, but he could not provide any during the trial. He explained they would go to the site, do an inspection, and based on the inspection, the plaintiff would issue a valuation report through various communications, sometimes it sent photographs so that payment could be made based on the photographs, and it was a 'fight' to do an inspection as some of the costs involved were challenging. During re-examination, Kapuuo was taken to an email dated 28 February 2018 as an example of photographs sent. Garcia testified that on 28 February 2018, she requested a photo report of the outstanding works so that a decision could be made at the next site meeting. That, she said, followed a meeting held on 22 February 2018 wherein it was discussed that the plaintiff would submit a proposal to the second defendant by 26 February 2018, which must include a work program, a cash flow plan and a plan to pay subcontractors. On 6 March 2018, Garcia requested proof of work done according to the minutes of the last site meeting to determine the next site meeting. However, according to the plaintiff's counsel, Kapuuo was under the impression that the work for March 2018 to November 2019 would be quantified in the final account.

[86] Kapuuo said the plaintiff made a case that a quantification of the amounts due to the plaintiff is required and that a final account be prepared and for payment of N\$2 490 631 because of the performance guarantee secured by the plaintiff in execution of the contract. According to Garcia, if the plaintiff is not in agreement with the quantification of the final account, the plaintiff must engage a third party at its own cost. She said as the work was not completed and the performance guarantee was returned, she failed to understand why the first defendant should be liable if the guarantee was returned before its due date and on which the first defendant had a valid claim.

The arguments and determination

[87] The court now deals with the arguments and determines the issues relevant to the relief sought.

[88] The plaintiff relied on clauses 23 and 25 of the contract. The relevant parts of those clauses read as follows:

'23. DETERMINATION BY CONTRACTOR

If the Employer does not pay the Contractor within the period stated in the Schedule, and thereafter for seven days after written notice from the Contractor fails to pay the amount due on any certificate of the Principal Agent, or if the Employer interferes with or obstructs the issue of any such certificate, or if his estate is sequestrated as insolvent or, in the case of a company, it is placed under voluntary or compulsory liquidation the Contractor may by written and registered notice to the Employer or Principal Agent determine the employment of the Contractor under this contract, and thereupon without prejudice to the accrued rights of either party, their respective rights and liabilities shall be as follows:

...

23.2 the Contractor shall be paid by the Employer:

...

23.2.5 any loss or damage caused to the Contractor owing to such determination as aforesaid:

...

25. CERTIFICATES AND PAYMENTS

25.1 The Contractor shall be entitled to receive from the Principal Agent, interim certificates at intervals not greater than one calendar month, a penultimate certificate and a final certificate (as more fully set out hereunder), stating the amount due to him and to payment of such amount by the Employer within the period set out in the schedule.

The Principal Agent shall notify the Employer of the date and amount stipulated in each certificate at the time of issue thereof. If, after expiry of the aforementioned period, the amount so certified has not been paid to the Contractor, the Employer shall be liable, without prejudice to any right the Contractor may have to determine his employment under this contract, to pay the Contractor interest on the amount so due, calculated at a rate of 2 per cent greater than the minimum lending rate charged by the Contractor's bank, which interest shall accrue as from the due date for payment if the Contractor has presented the certificate for payment within the period stipulated herein, or the date of presentation of the certificate by the Contractor, whichever date is the later.'

[89] The court first deals with the claim for quantification.

[90] The plaintiff's version is that no measurements were taken at the site meeting on 26 November 2019, and therefore, the final account could not have been prepared from that meeting. The plaintiff argued two mutually destructive versions emerged from the first defendant's two witnesses on the final account in that Garcia said the professional team prepared the final account based on assessments made during the site meeting of 26 November 2019, while Nel said the measurements relied on for the final account were taken by his team on a different occasion. It also argued that the author of the closeout report did not testify.

[91] The plaintiff further argued there is no evidence that the work completed was fully quantified, it was not proved that the final account was shared with the plaintiff, and the revised final account was never shared with the plaintiff. The plaintiff is aware that there is no documentary evidence of further work completed that was not quantified but argued Kapuuo testified further work was completed that was not quantified and there is no evidence refuting that testimony.

[92] According to the first defendant, the plaintiff did not prove the scope of work executed after payment certificate 28, which work was not quantified. The first defendant argued because the plaintiff did not prove that it performed work that was not quantified, the court cannot grant the relief sought for quantification, but the first defendant agreed that the final account was not disclosed to the plaintiff.

[93] The first defendant misunderstood the plaintiff's prayer for placing 'material' before the second defendant for quantification. During oral argument, the plaintiff's counsel confirmed that the reference to 'material' in prayer 1.1 of the particulars of claim does not refer to a quantification of building material in the first defendant's possession as understood by the first defendant.

[94] The issue before the court is whether the first defendant should be ordered to place before the second defendant, together with the plaintiff, for purposes of quantification, all material related to the work done by the plaintiff under the contract in their possession (if any), to attend to Fonteintjie Fish Farm in the presence of the parties and/or their representatives to quantify the work done by the plaintiff until November 2019, and to pay the plaintiff the determined (quantified) amount. The issue before the court is not the final account as such, nor whether, on its own, there is indeed further work that was not quantified. The final account and the quantification of the work go hand in hand. The final account cannot be resolved if the work is not quantified, and the plaintiff's case is that the quantification had to be performed jointly. In other words, the issue before the court is whether the plaintiff is entitled to a joint quantification of the amounts that are due, owing and payable to it for the work envisaged by the contract.

[95] Two dates emerged from Kapuuu's evidence as to the period from when a quantification is sought, namely June 2018 and March 2019. The plaintiff did not present evidence as to the nature of the work that was not quantified. Kapuuu simply testified that while correspondence was exchanged about payment certificate 24, the plaintiff continued to render construction services, and it continued to render construction services after payment certificate 28 was issued, and despite it having carried out additional work beyond payment certificate 28, no other payment certificates were issued. Payment certificate 28 was issued in March 2019.

[96] Under cross-examination, Garcia said that Mr Simasiku told her that there was no one at the site but she did not say which period Mr Simasiku referred to. Garcia herself also said that all work was quantified. Garcia was,

however, the principal agent, and said that, at the site meeting of 26 November 2019, the professional team went through the site, and each attended to their respective discipline. Garcia's testimony that all work was quantified is, therefore, not accepted as evidence that all work was indeed quantified. Garcia cannot testify on behalf of the other disciplines and what the representatives of those disciplines did or did not do at that site meeting, at least not by virtue of the evidence that she presented.

[97] Nel himself was not present at the site meeting of 26 November 2019. Furthermore, Nel did not take the remeasurements himself. His testimony is also not accepted as evidence that all work was indeed quantified. Moreover, Nel testified that the measurements that resulted in the final account were not taken at the site meeting of 26 November 2019. Nel's email of 27 April 2020 itself states that a separate site visit was undertaken to remeasure the work done.

[98] Kapuuo's testimony is accepted as firsthand evidence of whether additional work was done that was not quantified at the last site meeting but his evidence on the subject lacked particularity. Does that mean that the plaintiff's quantification claim should not succeed? No. The court says so for the following reasons.

[99] The final account was clearly not compiled as a result of the site meeting of 26 November 2019, and the court finds that the work was not quantified for the purpose of the final account at that site meeting.

[100] Nel testified that he emailed the final account to Kapuuo on 27 April 2020, but Kapuuo said he did not receive it. There is no reason why the court should not believe Kapuuo in that regard. The first defendant failed to rebut Kapuuo's evidence that the final account was not shared with the plaintiff. Moreover, it transpired there is a revised final account that was never shared with the plaintiff.

[101] Kapuuo testified about the process followed on the ground to determine whether payment was due to it. The evidence presented showed that the

process to determine whether further payments would be due to the plaintiff was a joint process and not a unilateral one by the professional team. That process is undisputed. The evidence further showed that Nel wanted to meet with the plaintiff about the final account. The email dated 27 April 2020 makes that plan. Nel himself agreed it must have been discussed with the plaintiff. The correspondence showed the first defendant was of the view that the final account was unresolved, and through its lawyers, the first defendant wanted to discuss the final account with the plaintiff. That is undisputed. The second defendant was of the view that once the final account was prepared, it had to be discussed with the plaintiff. The final account was, however, not discussed with the plaintiff as envisaged in the correspondence that was exchanged and the evidence presented, and it clearly remains unresolved. Moreover, the revised final account was not even given to the plaintiff. According to clause 13 of the notes to tenders in the bills of quantities which Nel referred to in his testimony, the tenderer (the plaintiff) is to finalise the final account with the quantity surveyor (Nel).

[102] It clearly emerges a joint quantification did not take place and the final account remains unresolved.

[103] In those circumstances, the plaintiff's claim for quantification should succeed.

[104] The court now deals with the claim for damages allegedly suffered because of the performance guarantee.

[105] The court asked the plaintiff's counsel, with reference to the particulars of claim, what is the plaintiff's cause of action for its monetary claim. Asking to 'speak freely', the plaintiff's counsel explained that the monetary claim is for the first defendant's breach of contract for failing to pay the P&G's for the years 2017 to 2019 and as a result thereof, the plaintiff incurred interest charges because it could not service the performance guarantee.

[106] The plaintiff relied on clause 23.2.5 of the contract and argued that by virtue of that provision, the plaintiff suffered damages when the first defendant

refused to release the performance guarantee after the plaintiff was forced to terminate the contract owing to the first defendant's failure to satisfy payment certificate 24.

[107] The plaintiff further argued the damages suffered were in the contemplation of the parties. It argued the contract contemplated 'any damages' suffered by the plaintiff because of a determination owing to a breach by the first defendant, and, once the contract was terminated, the first defendant was obliged to return the performance guarantee but failed to do so, resulting in the plaintiff incurring interest charges.

[108] In respect of the plaintiff's reliance on clause 23.2.5 of the contract, the first defendant argued that the damages contemplated therein are restricted to the contract and the plaintiff failed to prove any of the three circumstances provided for in clause 23. The first defendant also argued the plaintiff failed to prove the breach by the first defendant to satisfy payment certificate 24, so the question of damages does not arise.

[109] The first defendant argued the cost for the performance guarantee agreed to by the parties was N\$35 000, and the plaintiff was responsible for any other costs relating to the performance guarantee, and the performance guarantee could not, and did not, create any obligations for the first defendant. The first defendant submitted that the plaintiff did not refute that position. It further argued the first defendant had no obligation to return the performance guarantee when it did and there was no delay in returning it as it was returned three days after the 26 November 2019 site meeting.

[110] The first defendant's alleged breach of contract to pay the P&G's for the years 2017 to 2019, was not pleaded, nor was it included in the pre-trial order. The only breach pleaded by the plaintiff is the first defendant's failure to satisfy payment certificate 24. The plaintiff pleaded it was in the parties' contemplation that a performance guarantee would be provided. It was not pleaded that, in the event of a termination of the contract, the first defendant would be liable for damages in respect of costs incurred for the performance guarantee, nor that the contract contemplated 'any damages' suffered by the plaintiff because of a

termination owing to the first defendant's breach. It was also not pleaded that once the contract was terminated, the first defendant was obliged to return the performance guarantee. The fact that the contract was annexed to the particulars of the claim and that there was some testimony on the subject cannot save the plaintiff as contended for on the plaintiff's behalf.

[111] A party wishing to claim damages resulting from a breach of contract must allege and prove the contract, the breach of the contract, that it suffered damages, a causal link between the breach and damages and that the loss was not too remote. For the last-mentioned requirement, there are two principles. The first principle is that the damages must flow naturally and generally from the kind of breach in question in that because the law presumes that such damages fell within the parties' contemplation as a probable result of the breach, they are not regarded as too remote. Such damages are general or intrinsic damages. The second principle is that if the damages do not fall within the first category, they are not regarded as too remote if, in the special circumstances in the conclusion of the contract, the parties actually or presumptively contemplated such damages would probably result from the breach. Such damages are special or extrinsic damages.²

[112] Assuming, for the moment, without deciding, that the plaintiff proved that the first defendant breached the contract in not satisfying payment certificate 24 and that it suffered damages, the plaintiff did not allege or prove a causal link between the breach pleaded and the damages suffered, nor that the loss was not too remote.

[113] The facts do furthermore not support a causal link between the pleaded breach and the damages. The breach pleaded (the first defendant's failure to satisfy payment certificate 24) led to the plaintiff terminating the contract in August 2019. The plaintiff claims damages incurred from 31 July 2016 to 21 November 2021. The date of 31 July 2016 precedes the date when the payment issue arose around October 2017 when payment certificate 24 was issued. Furthermore, the contract was only terminated and the return of the performance guarantee was only demanded in August 2019, and according to

² Harms *Amler's Precedents of Pleadings* 6 ed at 101 and the authorities cited therein.

the plaintiff's counsel, the first defendant was only liable to return the performance guarantee when the demand for its return was made in August 2019. Also, according to paragraph 21 of the particulars of claim in the pending litigation, which is still pending, the plaintiff only returned the performance guarantee on 18 February 2020, whereby interest continued to accrue, leaving an outstanding amount of N\$2 490 631,39. The damages claimed by the plaintiff from the first defendant include charges which accrued from 31 July 2016, long before the first defendant's liability, according to the plaintiff, arose (August 2019), and the damages claimed further include charges which accrued until 21 November 2021, long after the first defendant returned the performance guarantee to the plaintiff in November 2019.

[114] On the issue of the first defendant's failure to satisfy payment certificate 24, the following. According to Kapuuu, there was no double payment. He said no amounts were unduly paid in respect of payment certificates 23A and 23B, and same was valued and quantified under the contract. According to the first defendant's witnesses, a double payment resulted from payment certificates 23A and 23B. The plaintiff did not prove that payment certificates 23A and 23B related to different work. Based on the evidence presented by Garcia and Nel, the court accepts that payment certificates 23A and 23B related to the same work, resulting in a double payment. It is, however, unclear whether the first defendant was contractually allowed to set the double payment off from payment certificate 24. That issue should, however, be resolved by the final account and it is not necessary for the court to make a finding on that issue.

[115] The court finds the plaintiff failed to make a case for its monetary claim. Therefore, it is unnecessary to deal with the first defendant's case that the liability for costs in securing the performance guarantee was limited to N\$35 000, and the plaintiff was not entitled to have the performance guarantee returned to it.

[116] The basic rule is that costs are in the court's discretion, and the general rule is that costs follow the event.³ Applying the general rule, and whereas the

³ *Ayoub and Others v Januarie and Others and a Similar Matter* 2023 (4) NR 958 (HC) para 51.

plaintiff is only partially successful, the court exercises its discretion by awarding the plaintiff only part of its costs.

Conclusion

[117] The following order is made:

1. The first defendant is ordered, within 21 days of this order, to:
 - (a) place before the second defendant, together with the plaintiff, for purposes of quantification, all material related to the work done by the plaintiff under the contract in their possession (if any); and
 - (b) attend to Fonteintjie Fish Farm in the presence of the parties and/or their representatives to quantify the work done by the plaintiff until November 2019.
2. The first defendant shall, within 21 days of the quantification, pay the plaintiff the determined (quantified) amount if it is more than what the plaintiff was already paid.
3. The first defendant shall pay the plaintiff interest on the amount in the preceding paragraph, if any, at the rate of 20 per cent per annum from the date of determination until the date of final payment.
4. The plaintiff's claim for damages in prayers 4 and 5 of the particulars of claim is dismissed.
5. The first defendant shall pay one half of the plaintiff's costs of suit, such costs to include the costs of one instructing and one instructed legal practitioner.
6. The matter is finalised and removed from the roll.

B DE JAGER
Acting Judge

APPEARANCES

PLAINTIFF: V Kauta (assisted by N Ndaitwah)
Instructed by Ndaitwah Legal Practitioner
Windhoek

FIRST DEFENDANT: E Shifotoka (assisted by C T van der Smit)
Instructed by Office of the Government Attorney
Windhoek