REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2021/02257

In the matter between:

KERII ARCHITECTS & DESIGNERS **PLAINTIFF**

and

NICE CONSULTING ENGINEERS (PTY) LTD **DEFENDANT**

Neutral citation: *Kerii Architects & Designers v Nice Consulting Engineers (Pty) Ltd* (HC-MD-CIV-ACT-CON-2021/02257) [2024] NAHCMD 190 (24 April 2024)

Coram: PARKER AJ
Heard: **12** and **19 February 2024**
Delivered: **24 April 2024**

Flynote: Contract – Proof of – Onus on party alleging existence of contract to prove such allegation – Court finding valid oral agreement existed between the parties.

Summary: The defendant was appointed through a tender process by the employer, Ministry of Higher Education, Training and Innovation, for the provision of transaction advisory service for the procurement of a private developer in connection

with a student village development project. The defendant is a firm of engineers. The project required the professional services of a duly registered architect to offer architectural services therefor. This led to the defendant and the plaintiff entering into an oral agreement whereby the plaintiff's professional profile and the curriculum vitae (CV) of Mr Kerii, the head architect of the plaintiff, being included in the tender bidding documents that were submitted to the employer. The contract contained a suspensive condition. The parties agreed that the contract would be enforced only if the defendant's tender bid was successful. The defendant's bid was successful and so the contract became enforceable. The court found that the plaintiff succeeded in proving the existence of the contract upon the ground of reasonable reliance. The court accepted the fees claimed by the plaintiff because the supporting document laid out concisely the hours worked and the specific activities that were carried out by the plaintiff, and, above all, the fees were based on statutory tariffs.

Held, there are two fundamental grounds upon which a person proves the existence of a contract, namely, 'consensus' and 'reasonable reliance'.

Held further, the law of contract is primarily concerned with external manifestations by parties of their minds.

ORDER

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1. Judgment for the plaintiff in the amount of N$200 160,64, plus interest on the said amount at the rate of 20 per cent per annum calculated from 8 June 2021 to date of full and final payment.

2. The defendant shall pay the plaintiff's costs of suit.

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

JUDGMENT

PARKER AJ:

[1] In the instant action, the plaintiff seeks the relief set out in the particulars of claim. The plaintiff sues the defendant for contractual damages suffered by the plaintiff upon the defendant's repudiation of an alleged oral agreement concluded between the parties. Mr Tjiteere represents the plaintiff and Mr Shimutwikeni represents the defendant.

[2] It is important to note the following at the threshold: The defendant had been barred by an earlier court order from filing any witness statement, and the defendant did not ask this trial court to exercise its discretion, on good cause shown, to permit defence witnesses to give oral evidence at the trial even though such witnesses had not served witness statements in terms of rule 93(5) of the rules of court. The result was that only Mr Javier Kerii, the managing director of the plaintiff, gave evidence in support of the plaintiff's case. Kerii was cross-examined by Mr Shimutwikeni for the defendant and was re-examined by Mr Tjiteere for the plaintiff, bringing the hearing of evidence to an end.

[3] Both counsel filed individual heads of argument for use at the hearing of oral submissions. Thereafter, Mr Shimutwikeni filed what he called 'defendant's supplementary heads of argument' after the event without the leave of the court. That was labour lost.

[4] Although the defendant did not give oral evidence at the trial, to succeed the plaintiff bore the onus to prove its case on the preponderance of probability. It follows that unless plaintiff has admitted an averment in the defendants' plea, the court is entitled to accept the plaintiff's version as the truth, unless of course, such version is so improbable that no reasonable court acting judicially would accept it as the truth.[1] Furthermore, it has been held -

'Now it is trite law that, in general, in finding facts and making inferences in a civil case, the Court may go upon a mere preponderance of probability, even though its so doing

[1] *Standard Bank of Namibia Ltd v Schameerah Court Seven CC* [2018] NAHCMD 378 (27 November 2018) para 5.

does not exclude every reasonable doubt…for, in finding facts or making inferences in a civil case, it seems to me that one may… by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one'.[2]

[5] That is the manner in which I consider the evidence. The determination of the action turns on a very narrow and short compass. The burden of the court is to determine first, whether the plaintiff, who relied on an agreement, has proved the existence of such agreement and the terms thereof and second, whether the defendant repudiated the agreement and if so, when. Of course, the second question does not arise if the plaintiff failed to prove the existence of the agreement upon which it instituted action in terms of the first question.

[6] To answer the first question, we should go to the basics. First and foremost, in our law there are two fundamental grounds upon which a person **X** can prove the existence of a contract, namely; 'consensus' and 'reasonable reliance'. As to the first ground, **X** must establish that there has been an actual meeting of minds of the parties, that is, **X** and **Y** were *ad idem* (ie consensus *ad idem*). If that was established, the validity of the contract is put to bed, not to be awoken. If, however, there was not an actual meeting of minds, that is, **X** and **Y** were never *ad idem*, the question to answer is whether **X** or **Y** by their words or conduct led the other party into the reasonable belief that consensus was reached; that is 'reasonable reliance'.[3]

[7] The second relevant basic principle is this. An 'oral agreement made seriously and deliberately with the intention that a lawful obligation should be established and has a grounded reason which is not immoral or forbidden' is valid and enforceable.[4]

[8] The third relevant basic principle is that the onus of establishing that a contract exists rests squarely on the party who alleges the existence of the contract. He or she may establish the existence of the contract on the ground of consensus *ad idem* or on the ground of reasonable reliance. That is not all. That party must also

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[2] *M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz Megabuilt v Kurz* 2008 (2) NR 775 (SC) para 31.
[3] Dale Hutchison (Ed) *et* Chris-James Pretorius (Ed) *The Law of Contract in South Africa* 2ed (2012) at 19 – 20.
[4] *DM v SM* 2014 (4) NR 1074 (HC) para 23.

prove the terms of the contract. Generally, the opposing party bears no burden to prove that no contract existed.[5]

[9] The reasonable reliance doctrine is predicated upon the principle that-

'The law does not concern itself with the working of the minds of parties to a contract, but with the external manifestation of their minds. Even therefore if from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement. This is the only practical way in which Courts of law can determine the terms of a contract.'[6]

[10] Having considered the uncontradicted evidence placed before the court and having gone upon a mere preponderance of probability,[7] I found that the plaintiff has succeeded in establishing the existence of a valid contract between the parties upon the grounds of reasonable reliance.[8] The undisputed pieces of evidence discussed in paras [11]-[21] below support this conclusion.

[11] It was agreed orally between the parties that the plaintiff and the defendant shall associate and collaborate with one another to apply for a tender whereby they would partner with the Ministry of Higher Education, Training and Innovation ('the Ministry') during the procurement phase of a project to provide new and modern student accommodation facilities that could accommodate 3000 beds.

[12] The project required the collaboration of professionals, consisting of architects, engineers, Public-Private-Partnerships (PPP) specialists, town planners and environmentalists. Hence, the inclusion of the plaintiff which is an outfit of architects and architect assistants. In that regard, the curriculum vitae ('CV') of Mr Javier Kerii (the managing director of the plaintiff) and the plaintiff's letter-head were used in the submission of tender documents to the employer of the tender (ie the Ministry).

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[5] *Geomar Consult CC v China Harbour Engineering Company Ltd Namibia* [2021] NAHCMD 455 (5 October 2021) para 4.
[6] *Acasia Resorts (Pty) Ltd v Rehoboth Town Council* [2021] NAHCMD 154 (13 April 2021) para 13.
[7] See para [4] above.
[8] See paras [6]-[9] above.

[13] The contract contained a suspensive condition. The parties agreed that the performance of obligations under the contract would not be enforced until the fulfilment of the condition that the defendant's tender bid was successful.[9] Mr Fillemon Hasheela of the defendant informed the plaintiff that their tender bid had been successful. That being the case, the parties were liable to perform their individual obligations under the contract.

[14] Thereafter, the plaintiff and the defendant had a pre-stakeholder's meeting to discuss the scope of work and attendant fee structure. Subsequent to the said meeting, on 10 November 2020, Kerii forwarded the plaintiff's fee structure per stages of the project to the defendant. On or about 24 November 2020, a stakeholder's familiarization meeting was held at the offices of the defendant.

[15] The purpose of the 24 November 2020 meeting was to announce the list of relevant stakeholders, including the plaintiff, and to inform the stakeholders that they could start carrying out their individual duties in terms of the project scope. After the said meeting, the plaintiff was orally instructed to prepare a brief formulation and design in line with the town planners' framework. The town planners formed part of the professional team of stakeholders.

[16] The plaintiff was required to work collaboratively with the town planners because the aforementioned brief formulation formed an integral part of the initial process of the aforesaid design.

[17] In the performance of its obligation under the contract, the plaintiff had three meetings with the town planners to discuss the town planning framework. Those meetings were held in the absence of the defendant but copies of exchanges of emails conducted by the plaintiff and the other stakeholders, particularly the town planners, were sent to the defendant to keep the defendant abreast of developments regarding the progress of work. In that regard, as Mr Tjiteere submitted, the service rendered by the plaintiff involved conceptualization of the project and feasibility

[9] Dale Hutchison (Ed) et Chris-James Pretorius (Ed) *The Law of Contract in South Africa* footnote 1 at 249-250.

studies. At the relevant stage the project did not involve cement, sand and steel and wood.

[18] Granted, there was some misunderstanding between the plaintiff and the defendant regarding the fee structure and hours of work involved. But that did not mean that there was no valid contract and that the plaintiff did not perform its obligations under the contract. Indeed, the evidence is undisputed that the defendant was aware of the service that was being rendered by the plaintiff; otherwise, it is inexplicable that the defendant would send an email to the defendant on 18 January 2021, with a copy thereof to the town planners with whom, as I have found previously, the plaintiff worked collaboratively.

[19] It should be remembered, 'The law does not concern itself with the working of the minds of parties to a contract but with the external manifestation of their minds'.[10] 'That is the only practical way in which Courts of law can determine the terms of a contract.[11] The Supreme Court put it succinctly thus: 'The law is primarily concerned with the external manifestations by the parties of their minds.'[12]

[20] I find that the nature of the project required the professional services of a statutorily registered architect; otherwise, why would the defendant include in its tender-bid documents it submitted to the employer Ministry Kerii's CV. I dare say, if the defendant had mentioned in its tender-bid documents that the defendant would not require the services of an architect and that the architectural aspect of the project would be done by engineers of the defendant, the defendant would have been disqualified. It is fallacious and self-serving to argue that in Namibia a registered engineer can be allowed to practise professionally as an unregistered architect.

[21] By the aforementioned 18 January 2021 email, the defendant unequivocally commanded the plaintiff to desist from doing any more work or offering a professional service relating to the implementation of the contract. Accordingly, I find and hold that the sending of the said email constituted an act of repudiation of the contract. By that email, the defendant did 'evince an intention no longer to be bound

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[10] Loc cit.
[11] *Ácasia Resorts (Pty) Ltd v Rehoboth Town Council* footnote 6 loc cit.
[12] *Standard Bank Namibia Ltd v Karibib Construction Services CC* [2019] NASC (9 October 2019) para 19.

by the contract'.[13] The defendant acted in a way as to lead a reasonable person in the shoes of the plaintiff to the conclusion that the defendant did not intend to fulfil its part of the contract.[14]

[22] Consequently, I can see no legal impediment against the defendant paying for the services rendered by the plaintiff under the contract before the repudiation of the contract by the defendant. The plaintiff accepted the repudiation and sued for damages.

[23] The next level of the enquiry is, therefore, to consider the question of damages claimed by the plaintiff. In his examination-in-chief-evidence and cross-examination-evidence, Kerii testified as to how he arrived at the amount of N$200 160,64. The plaintiff pleaded that it suffered damages in that amount for services rendered and unremunerated therefor before the act of repudiation. The amount included fees for Kerii, as the plaintiff's Lead Architect, and for Ms Itewa, as the plaintiff's Architectural Technologist.

[24] I accept Kerii's explanation as to the involvement of Ms Itewa in the implementation of the project. Kerii explained further that the fees claimed were statutory tariffs in terms of Regulations made under the Architects and Quantity Surveyors Act 13 of 1979; an Act which regulates the professional conduct of architects and quantity surveyors in Namibia.

[25] The court is prepared to accept the fees as presented since they are statutorily prescribed fees and were not contradicted by the defendant. I also accept Mr Shimutwikeni's submission that the plaintiff is not entitled to charge fees that related to any service rendered after 18 January 2021.

[26] I accept the undisputed evidence established clearly by Exhibit D1 wherein the plaintiff has laid out a summary of work done by Kerii and Itewa, including a description of the work involved and the date and hours of work. The hours of work came to 169, from 19 November 2020 to 11 January 2021.

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[13] *Schlinkmann v Van der Walt* 1947 (2) SA 900 (E) at 919.
[14] *Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd* 1994 (3) SA 673 (A) at 684I-685G.

[27] Similarly, I accept the uncontradicted evidence established clearly by the Exhibits D2, D3 and D4, indicating the total amount of fees for design and tender stage. They show clearly the actual activity carried out by Kerii and Itewa and the fees for the activities. The total amount of fees is N$200 160,64. That is, the amount claimed by the plaintiff in the particulars of claim.

[28] The plaintiff has alleged and proved the contract in question and has proved that the defendant repudiated the contract.[15] Furthermore, the plaintiff has alleged and proved that it has suffered damages and has established that the damages flowed naturally from the repudiation of the contract and that there was a causal link between the repudiation and the damages suffered.[16] That being the case, I have no good reason to deny the plaintiff judgment.

[29] Based on these reasons, I hold that the plaintiff has proved its case and is entitled to judgment. In the result, I order as follows:

1. Judgment for the plaintiff in the amount of N$200 160,64, plus interest on the said amount at the rate of 20 per cent per annum, calculated from 8 June 2021 to date of full and final payment.

2. The defendant shall pay the plaintiff's costs of suit.

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

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C Parker

Acting Judge

[15] *Novick v Benjamin* 1972 (2) SA 842 (A).
[16] *Holmdene Brickworks (Pty) v Roberts Construction Co Ltd* 1977 (3) SA 670 at 687.

APPEARANCE:

PLAINTIFF:	M Tjiteere Of Dr Weder, Kauta & Hoveka Inc., Windhoek
DEFENDANT:	H Shimutwikeni Of Henry Shimutwikeni & Co Inc., Windhoek