

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

Practice Directive 61

Case Title: SUPECO TRADING CC and S.P. BRICK WAREHOUSE CC NICKELBACK BRICKS CC	 PLAINTIFF 1 st DEFENDANT 2 nd DEFENDANT	Case No: HC-MD-CIV-ACT-CON-2019/04471 Division of Court: Main Division Heard: 5 December 2024
Heard before: Honourable Lady Justice Rakow	Delivered: 24 May 2024	
Neutral citation: <i>Supeco Trading CC v S.P. Brick Warehouse CC</i> (HC-MD-CIV-ACT-CON-2019/04471) [2024] NAHCMD 246 (24 May 2024)		
Order: 1. The claim of the plaintiff is dismissed with costs, costs to include the costs of one instructing and one instructed legal practitioner. 2. The matter is removed from the roll and is regarded as finalised.		
Reasons for order:		
RAKOW J:		

Introduction

[1] The plaintiff is Supeco Trading CC, a close corporation duly registered and incorporated in accordance with the close corporation laws of the Republic of Namibia. The first defendant is S. P. Brick Warehouse CC and the second defendant is Nickelback Bricks CC, both these close corporations registered in terms of the laws of the Republic of Namibia.

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

Background

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

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

The relief

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

- '1) An order confirming the cancellation of the agreement;
- 2) Payment in the amount of N\$874 995.90;

- 3) Interest on the aforesaid amount at the rate of 20% per annum a tempora morae;
- 4) Payment in the amount of N\$451 710.83;
- 5) Interest on the aforesaid amount at the rate of 20% per annum from date of judgement to date of final payment;
- 6) Cost of suit, including the costs of one instructing and one instructed counsel.'

The evidence led by the plaintiff

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

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

[8] Upon a request as to when they will receive all the pavers covered by the first payment, Ms Mvula indicated that it is to be received before the close of business in December 2017 but this did not happen. Further exchange of emails took place and at some stage, the delivery date of the remainder of the first order's pavers were given as of 15 June 2018, which date also came and went without receiving the outstanding pavers. After about, just less than two years from the

initial payment, during August 2018, the plaintiff decided to source the remainder of the first order's pavers and the second order from another supplier. The plaintiff received a total of 62 300mm of the 80mm pavers at N\$4,55 per paver and 4200 of the 60mm pavers at N\$3,61 per paver, inclusive of VAT.

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

Evidence lead by the defendant

[10] The defendant also called two witnesses. Mark Thomas Wylie testified that he is the sole member of SP Bricks Warehouse CC, the first defendant. He is also the sole member of the second defendant, Nickelback Brick CC. He was approached by the then owner of the first defendant somewhere during the second half of 2016 with a proposition for the sale of the first defendant. He proceeded to buy the members interest in the first defendant by way of a deed of sale concluded on 14 December 2016 and became the sole member of the first defendant on 25 January 2017. Before entering into the sale agreement he was made aware that the first defendant was approached by Mr Penda Shilongo of Intech-Supeco JV for a quote for the manufacturing and delivery of interlock pavers to a site in Ongwediva. Mr Shilongo accepted the quote on 10 October 2016 and indicated that they will pay the quoted amount in two instalments of N\$1 154 597,71. He did not confirm this arrangement as he had no position in the first defendant at that stage. The total amount of the contract was N\$2 309 195,41.

[11] He further testified that time was not of the essence in the agreement. The plaintiff testified that the pavers were to be delivered as from 4 November 2016, but a certain Abel Nekwaya indicated to Mr Wylie and John Nashidengu, an employee of the first defendant that they are not ready to receive the interlock pavers and as they had no secure place to store the pavers they were told to keep the delivery on hold. They saw no point to stockpile the interlock pavers and

delivered them to other clients. These pavers were integrated in the stock of the second defendant. At all relevant times the first defendant tendered delivery of these pavers. He also testified that the only person who could agree to an assignment was himself and he did not do so.

[12] If they ran at full capacity it would have taken them about fourteen days to fill half of the order. At no time was there timelines agreed. It was further testified that the calculation of the costs for the pavers included transportation costs of the delivery. After 2017 holidays to January 2018, they were unable to make any deliveries of pavers as the Ministry of Environment and Tourism abruptly stopped all sand mining in most of the northern regions. They further had large orders from existing and long standing clients and their resources were stretched to keep up with the delivery of all concern. After 14 June the plaintiff further refused delivery. At all times they dealt with the joint venture.

[13] During cross-examination he admitted that there were numerous emails and some whatsapps between the second defendant and the plaintiff regarding delivery with promises made about time lines, which was not kept. He also referred to a close relationship between the two defendants in that the second defendant bought over the machines of the first defendant and in turn serviced the bank loans of the first defendant. The witness also agreed that in eight and a half months they only gave the plaintiff three days' worth of production.

[14] The next witness which was called was Johannes Nashidengu. He was an employee of the second defendant till November 2022 and worked as the general manager. He was responsible for the operational side of the second defendant. Before being employed by the second defendant he was the production foreman of the first defendant. He was aware of the contract with the Joint Venture and to his knowledge there was no fixed term for the delivery of the pavers in terms of the contract. They received a go-ahead in August 2017 to start delivering the interlock pavers to the site which was about 70km away from the defendants' premises. In July 2018, they were told not to deliver interlock pavers at the site anymore.

Issues for determination

[15] Various issues were identified that needs determination. Some of these are the ones relating to the contracting parties and the issue of whether assignment took place or not. Also whether and when the contract was cancelled and the damages claimed by the plaintiff.

The contracting parties

[16] It was the plaintiff's evidence that the plaintiff, instead of the joint venture was a contracting party. It was explained that although the plaintiff was part of the joint venture the supply of the interlock pavers was for the plaintiff's account. This is however disputed by the defendants in that they pleaded that it was indeed the joint venture with whom the contract was concluded and not the plaintiff.

[17] The offer to supply pavers was received from the first defendant and not the second defendant. At that stage Mr Wylie has not yet purchased the first defendant's shares and he was only made aware of the supply agreement of the interlock pavers as he was at that stage negotiating a possible sale of the first defendant. Mr Shikongo, according to his emails, for Intek/Supeco JV (joint venture) accepted the offer of the plaintiff. He testified that he does not have an automatic electronic signature for the joint venture, he had to insert it himself. The acceptance of the quotation of the first defendant was thus intentional by Mr Shikongo on behalf of the joint venture.

[18] The joint venture further paid for the interlock pavers from the joint account. It was also the testimony of Mr Shikongo that they would pay the initial half of the quoted amount as soon as a payment of the client was received. This payment was surely to the joint venture. This payment was made to the first defendant, the second defendant was not involved at this stage.

[19] Mr Shikongo further sent out emails marked for Intek/Supeco JV on 8 November 2017 (exhibit H2), 21 November 2017 (exhibit I2), and 3 April 2018 (exhibit K2).

[20] The elements of a contract includes that it must appear ex facie the particulars of claim that the plaintiff and defendant are parties to the contract. In this instance it is clear that the second defendant was not a party to the initial contract. Mr Shikongo further testified that a joint venture is not a juristic person. In *Chico/Octagon Joint Venture vs Road Authority and Others*,¹ the Supreme Court stated that a joint venture is not a legal entity distinct from the parties to the joint

¹ *Chico/Octagon Joint Venture vs Road Authority and Others* Case number SA81/2016, delivered 21 August 2017.

venture agreement. It stated that it is a partnership between those entities. In this case both the parties agreed to institute review proceedings and the Supreme Court stated that it is neither here nor there whether the institution of proceedings was done by the two joint venture parties as to joint litigants or in the name of the joint venture. The opposite then is also true, either both parties must sue in their own name or the name of the joint venture meaning that one party to a joint venture cannot sue on its own. A joint venture can be described as a partnership for a specific purpose and it should therefore sue as a partnership. In law, therefore, the parties to the joint venture being the plaintiff and Intek Construction CC will be co-creditors of the first defendant.

[21] There is a presumption that co-creditors are jointly entitled to the claim and unless otherwise agreed upon, the entitlement is joint and the rights are held in common.² This presumption was not rebutted, as the only evidence lead regarding the agreement between the joint venture parties was that he was responsible for the payment of the interlock pavers as it came from his share. This is not sufficient evidence to rebut the presumption in light of the evidence referred to above regarding the contracting on behalf of the joint venture. The oral agreement which was testified to was not pleaded by the plaintiff and it can as a result not rely on it as it will prejudice the defendants. The pavers were further delivered to the construction site which was in control of the joint venture as well as delivery accepted by Mr Nekwaya on behalf of the joint venture.

[22] The members of Intek Construction CC, either Mr Steven Ruan or Felix Kaziya were involved in many emails (five to be exact) relating to the interlock pavers but they were never called to testify that Intek Construction CC had no interest in the matter.

[23] The result of this finding is that the correct parties were not before court and the plaintiff should have instituted its action either in the name of the joint venture or should have included Intek Construction CC as a plaintiff. For these reasons, the claim of the plaintiff stands to be dismissed and the defendant should be successful. I, will therefore, not deal with any of the further issues raised in the matter.

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

1. The claim of the plaintiff is dismissed with costs, costs to include the costs of one

² Christie *Law of Contract in South Africa*, 5th edition p 257 – 258; *De Pass v Colonial Government* (1886) 4 SC 383 at 390.

instructing and one instructed legal practitioner.

2. The matter is removed from the roll and is regarded as finalised.

Judge's signature	Note to the parties:
E RAKOW Judge	Not applicable
Counsel:	
Plaintiff(s):	Defendant (s):
T Chibwana (with him M Angula) Monika Angula & Associates Incorporated, Windhoek	B De Jager (with her H Ahrens) Kinghorn Associates, Windhoek