

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2021/04206

In the matter between:

NDAPANDULA VERERANDA SHIIMII

PLAINTIFF

and

H.J COET BUILDING CC

FIRST DEFENDANT

STANDARD BANK NAMIBIA LTD

SECOND DEFENDANT

Neutral citation: *Shiimii v H.J Coet Building CC* (HC-MD-CIV-ACT-CON-2021/04206) [2024] NAHCMD 31 (5 February 2024)

Coram: MILLER AJ

Heard: 13 - 15 November 2023 & 12 December 2023

Delivered: 5 February 2024

Flynote: Law of Contract – Claim based on an alleged written agreement – Specific damages – Onus to prove damages.

Summary: This is a matter in which the plaintiff pursues a claim of specific damages against the first defendant based on a contract to construct a residential unit. The first defendant failed to complete the dwelling within the time frame agreed upon and eventually abandoned the work.

Held, that as a general principle in law the plaintiff was entitled to be placed in the same position she would have been had the first defendant not breached the agreement.

Held, that it was incumbent upon the plaintiff to discharge the onus of proving the quantum of the damages she is entitled to due to the breach of the agreement.

Held further, that the same onus rests upon the first defendant in proving its counterclaim.

ORDER

1. The claim and the counterclaim are dismissed.
2. There is no order as to costs.
3. The matter is finalised and removed from the roll.

JUDGMENT

MILLER AJ:

[1] The plaintiff and the first defendant entered into an agreement on 19 April 2018. In terms of that agreement the first defendant sold a vacant piece of land to the plaintiff. It was agreed that in addition to the sale, the first defendant undertook to construct a residential unit on the property.

[2] In order to finance the cost of the sale of the land and the construction of the dwelling, the plaintiff obtained a loan from the second defendant.

[3] It is common cause that the first defendant failed to complete the construction of the dwelling within the time frame agreed upon initially. The first defendant sought and was granted an extension of time in order to complete the construction of the dwelling house. As matters turned out, the first defendant failed to complete the construction of the house and eventually abandoned the work.

[4] The plaintiff obtained quotations from different entities to complete the construction of the house. Ultimately an entity known as Master Wood Trading CC submitted a quotation which was accepted and the construction of the house was completed.

[5] The plaintiff then instituted summons against the first defendant in which she claimed specific damages in the sum of N\$101 467.66 allegedly due to the breach of the agreement.

[6] The first defendant defended the matter. Apart from pleading over on the merits of the matter denying responsibility, it filed a counterclaim in the sum of N\$45 000. It was alleged that the amount claimed represents work executed during the course of the construction which was not paid.

The merits

[7] During the course of the trial, I heard the evidence of the plaintiff and the first defendant. In the totality of the evidence and the probabilities of the case, I am satisfied that the first defendant was in breach of the agreement which in turn entitles the plaintiff to recover the damages.

Damages

[8] As a general principle in law the plaintiff was entitled to be placed in the same position she would have been had the first defendant not breached the agreement. In essence that would be the fair and reasonable cost incurred to complete the work not done by the first defendant. Clearly the amount was quantifiable. It was incumbent upon the plaintiff to discharge the onus of proving that aspect of the case.

[9] The only evidence submitted in this regard was a copy of the quotation of Master Wood Trading CC that it provided to the plaintiff at the time. That evidence, if I may call it that, falls palpably short of discharging the onus resting on the plaintiff. It is and remains hearsay and inadmissible evidence to the correctness of the contents of the items specified in the quotation. It was not contended that a witness from Master Wood Trading CC was not available to testify and I must conclude as I do, that the failure to call the witness was due to an oversight. In this regard I had reference to and followed previous dicta by this court and other comparable jurisdictions.¹

[10] The same reasoning and conclusion apply to the counterclaim. The amount claimed is based solely on the say-so of the first defendant and his own subjective opinion of what the value of the works was.

[11] I conclude in the result that neither the plaintiff nor the first defendant discharged the onus resting upon them to prove the quantum of their damages. The following orders will accordingly be issued:

1. The claim and the counterclaim are dismissed.
2. There is no order as to costs.
3. The matter is finalised and removed from the roll.

PJ MILLER
Acting Judge

¹ *C D C Hauliers (Pty) Ltd v Chirundu Vally Motel* (1998) (PVT) Ltd. 1993 (3) SA 51ZS; *Dentry v Voigts* (HC-MD-CIV-ACT-DEL-2021/00916 NAHCMD 446).

APPEARANCES:

PLAINTIFF: J Andreas
Of Andreas-Hamunyela Legal Practitioners, Windhoek

1ST DEFENDANT: H J Coetzee
On behalf of the first defendant