



REPORTABLE

CASE NO: SA 73/2016

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

PRESTIGE PROPERTIES CLOSE CORPORATION

Appellant

and

N A CONSTRUCTION CLOSE CORPORATION

Respondent

Coram: MAINGA JA, HOFF JA and FRANK AJA

Heard: 12 March 2018

Delivered: 03 April 2018

Summary: The appellant and respondent entered into a written contract on the 8 October 2009, whereby the latter undertook to effect certain building works to the appellant's guesthouse. Between 9 October 2009 and 21 September 2010, the respondent executed certain of the building works as per the agreed contract and the quantity surveyors issued five valuation certificates for payments to the respondent. Appellant paid less on certificate no. 2 and disputed certificate no. 5 and it was returned for revaluation. While the building works were still in progress, the appellant allegedly cancelled the contract and the respondent accordingly sued

the appellant for the total amount of N\$827,548.63 together with interest at the rate of 20% per annum from 23 March 2011 to date of payment. The appellant counter-claimed, claiming penalties and damages.

The court a quo dismissed both counter-claims with costs in favour of the respondent. In respect of the claim for damages, the court a quo held that the manager of the appellant, who was the only witness called to testify on all the counter-claims, lacked the necessary competence to testify as an expert witness on such claims. With respect to the claim for penalties, the court a quo found that in terms of clause 19 of the contract, penalties only become payable upon issuance of a certificate by an architect to the effect that in the opinion of such architect the work should reasonably have been completed within the time provided for, and no such architect was employed to perform such functions and no such certificate was issued either by the architect or by the manager of the appellant, who testified that he himself performed the role of the architect as provided for by the clause. It is against this backdrop that the appellant now appeals to this court.

It is clear from the submissions by counsel for the appellant that the only issue remaining in dispute is that of penalties and costs in that regard, meaning that the issue of damages has been abandoned.

Held that the parties contracted on the basis of clause 19 and the interpretation thereof is clear.

Held, that it was common cause that no certificate was issued as required by clause 19. Appellant cannot claim penalties in terms of clause 19 without having met the obligations imposed by the said clause.

Held further that the appellant failed to inform Mr Gudi of the respondent and the quantity surveyor that no architect would be required as per the contract and that Mr Schmidt of the appellant would fulfill the role of such architect.

Held further that the court a quo was correct in finding that Mr Schmidt lacked the necessary expertise to formulate the necessary opinion required in terms of clause 19 and that Mr Schmidt, being the son of the owner of the appellant or the manager of the appellant, was an interested party, not a professional and it is highly unlikely that respondent would have then agreed that appellant could be a judge in his own cause.

Held further that all other issues raised by counsel was not necessary to consider as the interpretation of clause 19 was a decisive factor in the appellant's case.

Held further that costs should follow the cause.

Appeal is accordingly dismissed with costs.

APPEAL JUDGMENT

MAINGA JA (HOFF JA and FRANK AJ concurring):

Introduction

[1] This appeal is against part of the High Court judgment and order dismissing the counterclaim in penalties and damages, defendant, as plaintiff in reconvention (now appellant), had instituted against the respondent (plaintiff) in the High Court and the cost order.

[2] On 8 October 2009, the appellant, Prestige Properties CC and the respondent, NA Construction CC, entered into a written contract. The latter undertook to effect certain building works to the appellant's guesthouse, Erf No 2398, Conrad Rust Street, Ludwigsdorf, Windhoek. According to the respondent the agreement was expressly, alternatively impliedly, further alternatively, tacitly augmented or varied that the role of MPW Associates Architects as per the contract would be fulfilled by Jordaan Oosthuizen Nangolo Quantity Surveyors during the construction period. The Quantity Surveyors would issue and value payment certificates. It was further, according to the respondent, an express, alternatively, implied, further alternatively tacit term of the contract that respondent would carry out the works in terms of the contract and further, according to instructions of the Quantity Surveyors.

[3] Between 9 October 2009 and 21 September 2010, the respondent executed certain of the building works as per the contract, during which period the Quantity Surveyors issued to respondent and the appellant five valuation certificates for payment dated 26 January, 19 March, 28 April, 17 June and 4 August 2010. Appellant refused to pay to the respondent, or paid less N\$170, 270.84, in respect of certificate no. 2 dated 19 March 2010 and disputed the amount of the certificate

no. 5 dated 4 August 2010, which amounted to N\$811, 278.97. The certificate was returned for revaluation. The subsequent revaluation with the concurrence of the appellant confirmed that the certificate was overvalued by N\$226, 052.45, leaving the amount of N\$585, 226.52 as payable. With the building works still in progress, appellant allegedly terminated the contract on 20 or 21 September 2010. The respondent sued appellant for the total amount of N\$827, 548.63, plus interest at the rate of 20% per annum from 23 March 2011 to date of payment. The respondent's claim comprised of the shortfall of N\$170, 270.84 on valuation certificate no. 2, N\$585, 226.52 of the valuation certificate no. 5 and an amount of N\$72, 053.27 which is the retention amount referenced in valuation certificate no. 5.

[4] The appellant counter-claimed, claiming penalties and damages. That counter-claim in reconvention is in this form:

'DEFENDANT'S AMENDED CLAIM IN RECONVENTION

1. Defendant refers to paragraphs 1, 2 and 3 plaintiff's Particulars of Claim as amplified and qualified by defendant's plea filed simultaneously herewith and pleads that same be read as if specifically incorporated herein.
2. Defendant pleads that the terms and conditions of the written portion of the agreement are incorporated herein as if specifically traversed and pleaded.
3. It was further expressly, alternatively impliedly, in the further alternative tacitly agreed between the parties that.
 - 3.1 Defendant would fulfil the role, as described in the written agreement, of MPW Associates Architects and act as the project manager;

- 3.2 Plaintiff would complete the building works in a professional and workmanlike manner;
 - 3.3 Plaintiff would not damage any of the property belonging to defendant; and
 - 3.4 Plaintiff would make use of its own equipment and supply all materials to be used in the building works.
4. When the agreement was concluded plaintiff was aware of the following facts, and the agreement was entered into on the basis of these facts:
 - 4.1 Defendant intended to operate a bed-and-breakfast style business from the building site once the building works had been completed; and
 - 4.2 Should the building works not been completed within the agreed deadline, defendant would suffer financial and/or income losses due to the fact that the business could not commence on time and as planned.
 5. Defendant duly complied with its obligations as set out in the agreement.
 6. Despite plaintiff's obligation to do so, plaintiff has breached the contract in that it has:
 - 6.1 Failed to complete the building works as required and set out in the written part of the agreement.
 - 6.2 Only completed the building works 184 (one hundred and eighty four) days after the agreed deadline;
 - 6.3 Failed to stay within the agreed parameters and/or amounts and/or calculations and/or measurements as set out and agreed in the Provisional Bill of Quantities;
 - 6.4 Failed to complete the building works in a workmanlike and professional manner;

- 6.5 Damaged parts of the building works, damages which defendant has had to subsequently remedy;
- 6.6 Used equipment belonging to defendant; and
- 6.7 Failed to supply materials for the building works and even removed materials, belonging to defendant, from the building site.

AD CLAIM 1

- 7. As a result plaintiff's breach, defendant has suffered damages in the amount of N\$592 014,19 (five hundred and ninety two thousand and fourteen Namibian dollars and nineteen cents), calculated as follows:

7.1	Damage to kitchen cupboards	N\$ 55 000,00
7.2	Poor Workmanship	N\$ 92 000,00
7.3	Damage to swimming pool	N\$ 20 000,00
7.4	Loss of income and interest up to 16/08/11	N\$312 000,00
7.5	Materials removed from site	N\$ 20 000,00
7.6	Shuttering used by plaintiff	N\$ 35 000,00
7.7	Reparation of collapsing floor	N\$ 58 014,19

- 8. In the premises plaintiff is liable to defendant in the amount of N\$592 014,19 (five hundred and ninety two thousand and fourteen Namibian dollars and nineteen cents) being the damages suffered by defendant due to plaintiff's breach as set out hereinabove and which amount is due, owing and payable to defendant.
- 9. Notwithstanding proper demand to be paid the amount due and payable plaintiff fails and/or refuses and/or neglects to pay defendant the amount due and payable or any part thereof.

AD CLAIM 2

10. In terms of clause 19 and CI 19 of the agreement as set out hereinabove, defendant is entitled to penalties for the late or non-completion of the building works by plaintiff.
11. Plaintiff had to, subject to any extension granted by defendant, complete the building works on or before the 09th day of February 2011.
12. The penalty for non-completion by the agreed deadline is N\$1100 (one thousand one hundred Namibian dollars) per calendar day.
13. Plaintiff only completed the building works 184 (one hundred and eighty four) days after the agreed deadline.
14. In the premises plaintiff is liable to defendant in the amount of N\$202 400,00 (two hundred and two thousand and four hundred Namibian dollars) being the penalties due to defendant due to plaintiff's breach as set out hereinabove and which amount is due, owing and payable to defendant.
15. Notwithstanding proper demand to be paid the amount due and payable plaintiff fails and/or refuses and/or neglects to pay defendant the amount due and payable or any part thereof.

WHEREFORE defendant prays for judgment against plaintiff in the following terms:

AD CLAIM 1

1. Payment in the amount of N\$592 014,19 (five hundred and ninety two thousand and fourteen Namibian dollars and nineteen cents);
2. Interest *a tempore morae* calculated on the aforesaid amount at the rate of 20% per annum;

AD CLAIM 2

3. Payment in the amount of N\$202 400,00 (two hundred and two thousand and four hundred Namibian dollars);

4. Interest *a tempore morae* calculated on the aforesaid amount at the rate of 20% per annum;

AD BOTH CLAIMS

5. Costs of suit, including the costs of one instructing and one instructed counsel; and
6. Further and/or alternative relief.'

[5] To the appellant's counterclaim, the respondent had pleaded as follows:

- '5.1 the building site was handed over 10 days late;
- 5.2 the building plan had not been approved by the City of Windhoek, requiring the plaintiff to stop with construction until the plans had been approved;
- 5.3 the plans for the roof had been changed by the defendant; and such plans have not been approved by the City of Windhoek requiring the plaintiff to stop with the construction for 12 days;
- 5.4 the defendant ordered changes to the structure, which changes were not set out on the building plans, thus requiring the plaintiff to demolish some of the structures built in accordance with the building plans, to introduce the changes ordered by the defendant;
- 5.5 the bill of quantities was under estimated by almost N\$ 1 million, particularly as a result of the changes ordered by the defendant;
- 5.6 engineer's drawings were not at hand timeously;
- 5.7 the drawings in respect of the roof was not approved by the City of Windhoek and the defendant could not provide plaintiff with approved plans;

- 5.8 defendant did not provide the plaintiff with the revised layout of the bathroom for the main bedroom;
- 5.9 defendant did not provide the plaintiff with the layout of the water outlets for the solar geezer;
- 5.10 the slope of the external screed could not be determined because there were no drawings;
- 5.11 the defendant did not provide the plaintiff with showerheads, hand basins and bath mixers for the plaintiff to fix these into the relevant structures;
- 5.12 defendant refused and/or failed and/or delayed to pay the plaintiff in accordance with the duly issued certificates of payments.'

[6] The appellant's claims, particularly that relating to penalties which is the only claim this court is now seized with (as I will show *infra*), is premised on clauses 18, 19 and 20 of the contract which provides as follows:

'18. Dates for possession and practical completion.

Possession of the site shall be given to the Contractor on or before the date/s stated in the attached schedule and the Contractor shall thereupon and forthwith begin the Works and regularly proceed with, bring to practical completion and hand over whole or part/s of the Works, on or before the date/s stated in the attached schedule, subject nevertheless to the provisions for extension of time hereinafter contained.

19. Penalties for non-completion.

If the Contractor fails to bring to practical completion and hand over the Works or the several parts thereof on or before the date/s stated in the attached schedule, or within any extended period or periods under clauses 17 and/or 20 and the Architect certifies in writing that in his opinion the same

ought reasonably so to have been completed, the Contractor shall pay or allow to the Employer, as penalty/ies for non-completion, the sum or sums stated in the attached schedule for the period or periods during which the said Works or parts thereof shall so remain or have remained incomplete and the Employer may deduct such penalty/ies from any monies due or to become due to the Contractor under this contract.

20. Delay and extension of time.

If the Works be delayed by an act of God, *vis major* or by reason of any exceptionally inclement weather, or be reason of directions given by the Architect consequential upon disputes with neighbouring owners or by reason of Architect's instructions given in pursuance of clause 1, or in consequence of the Contractor not having received in due time necessary instruction from the Architect for which he shall have specifically applied in writing, or by reason of civil commotion, local combination of workmen, strike or lock-out affecting any of the trades employed upon the Works, or by delay or in respect of either or both of which the Contractor has, in the opinion of the Architect, taken all practical steps to avoid or reduce, or by the Works of other persons engaged by the Employer on work not included in this contract, or delay due to any other causes beyond the control of the Contractor and which he could not have foreseen at the signing of the contract and which the Architect may consider sufficient; then in such case the Architect shall allow a fair and reasonable extension of time for the completion of the Works.

In extending the contract time for completion of the Works, the Architect shall in addition to all other factors, make such allowances as are reasonable in the circumstances for any and all building industry holidays, whether statutory or recognised generally as customary in the industry, in the event of any such holidays falling within such period of extension.

Upon the happening of a strike or lock-out the Contractor shall immediately give notice thereof in writing to the Architect, but he shall nevertheless constantly use his best endeavours to prevent delay and shall do all that may

reasonably be required to the satisfaction of the Architect to proceed with the Works.'

[7] The schedule to the contract provided for the date of possession of the site by the contractor as 9 October 2009, the date for practical completion by the contractor as 9 February 2010 and the penalties for non-compliance as N\$1,100 per calendar day. It is alleged that the contractor delayed the completion of the works by 184 days. Though, it is not apparent how the 184 days were compounded, the N\$1,100 multiplied by 184 days gives the amount of N\$202, 400.00 claimed under the penalties.

[8] The High Court per Miller AJ dismissed both claims with costs in favour of the respondent. In regard to the claim for damages, the court held that although Schmidt was the project manager of the works on behalf of the appellant and the only witness called on all the claims in reconvention, he lacked the necessary competence to testify as an expert witness on the claims, as the claims required testimony of that nature. In as far as the claim for penalties is concerned, the court a quo found that in the agreement concluded between the parties, the architect is defined as the practice or partnership of MPA Associates. Schmidt testified that at no stage did he engage an architect to perform any functions, but he instead performed the functions. That court went on to say, clause 19 of the agreement, penalties only become payable upon the issue of a certificate by the architect to the effect that in the opinion of the architect, the work should reasonably have been completed within the time provided for. No such certificate was issued, either by the architect or Schmidt himself. Consequently, the jurisdictional fact underlining the

recovery of penalties was amiss and therefore that claim failed as well. It is against the dismissal of the counterclaim and costs that the appellant has appealed.

[9] The appellant's notice of appeal appealed against paragraphs 3 and 4 of the order, namely:

3. The claims are dismissed.
4. The defendant shall pay the costs, of which shall include the costs of one instructing and one instructed counsel' and the notice went on to state that 'including such portions of the judgment underpinning the above portion, and in its stead seeking an order in favour of appellant for its counterclaim and costs, including the costs of one instructing and one instructed counsel.'

[10] The heads of argument filed on behalf of appellant are directed at attacking the order dismissing the claim for penalties only, and the cost order. Counsel for the appellant has confirmed that the appeal on the claim for damages is abandoned and nothing further need be said on that claim.

[11] Mr Wylie who appeared for the appellant contended that the court a quo erred:

- I. in finding that appellant required a certificate by an architect to the effect that in the opinion of the architect the work should reasonably have been completed within the time provided and that without this certificate appellant was not entitled to claim penalties in terms of the contract.

- II. When it failed to deal with the reasons for the lateness of the building works and the fact that respondent had no reasons for the delay and failed to comply with the terms of the building agreement by failing to timeously bring an application for extension of time.
- III. By finding that respondent's claim for work done could be allowed while respondent failed to comply with the requirements of a final certificate, but at the same time holding that appellant had to be held to the obligations of the agreement and due to the lack of a certificate, despite appellant being able to prove that respondent was late with the building works and failed to provide sufficient reasons therefore.

[12] Mr Narib, who appeared for the respondent, contends that the issue appellant foreshadows in its heads of argument is not raised in its notice of appeal and that it does not arise as an issue to be determined in this appeal, for the issue appellant relies on for its case, appellant disregards the fact that the court a quo in considering clause 19 of the contract, found that the architect or Schmidt himself also failed to issue the certificate contemplated in clause 19. He further contended that the mere fact that the works were not brought to practical completion by 9 February 2010 is by itself not sufficient, as clause 19 required that the architect issue a certificate in writing to the effect that he held the opinion that the work ought reasonably to have been completed by 9 February 2010. He thus submitted that the

court a quo was correct in finding that the jurisdictional fact underpinning the recovery of penalties is lacking and that the appeal should fail on that basis alone.

[13] The obligations imposed upon the parties by clause 19 of the building contract are very clear. Clause 19 imposes upon the contractor the duty to bring the building works to practical completion on or before the date agreed upon by the parties, which in this case is the date stated in the schedule or within any extended period or periods as contemplated in clause 17 and/or 20. The clause goes further to state that 'and the architect certifies in writing that in his opinion the same [completion of the works] ought reasonably so to have been completed'. The clause goes further to state that if the contractor fails to bring the works to practical completion on or before the agreed date or within any extended period or periods, 'the contractor shall pay. . . penalties for non-completion the sum or sums stated in the attached schedule for the period or periods during which the said works or parts thereof shall so remain or have remained incomplete.' The clause still goes further to state that 'and the employer may deduct such penalty/ties from any monies due or to become due to the contractor under this contract.'

[14] Appellant contends that the court a quo erred when it held that the architect certificate contemplated in clause 19 was required before the appellant could claim penalties for non-completion of the works within the agreed period. The question which arises for determination is whether the architect's certificate was required. It is common cause that the certificate contemplated in clause 19 was not issued. Schmidt, the only witness who testified on behalf of the appellant, testified that appellant did not retain the services of the architect beyond the stage of the

submission of the building plans to the local authority. In cross-examination, he conceded that he did not inform Gudi of the respondent that the architect would not be required as per the contract. So was the Quantity Surveyor also not informed. Paragraph 3.1 of the appellant's amended claim in reconvention and para 7 of Schmidt's witness statement for the appellant, to the effect that it was agreed as between the parties, that Schmidt will fulfill the role of MPN Associates Architects as per the building contract is not correct.

[15] The written certificate by the architect is crucial for two reasons in my view, namely (1) the architect's opinion whether the works ought to have been completed within the agreed time, if not, (2) whether extension of time given the mandate of clause 20 should be given. Clause 19 should be read together with clauses 20 and 1. Clause 1 provides for the scope of the contract and it imposes the obligation on the contractor to carry out and complete the works in accordance with the contract in every respect and in accordance with the directions and to the reasonable satisfaction of the architect, who may in his absolute discretion and from time to time issue further drawing details; and/or written instructions, written directions and written explanations, collectively referred to as architect's instructions.

[16] Given the obligations, the contract in general and in particular clauses 1, 19 and 20 imposes on the architect, the court a quo was correct to find that Schmidt for the appellant, who in terms of Rule 36 (9)(b) of the High Court described himself as the Manager with appellant and it was pleaded and he testified that it was agreed by the parties that he would fulfill the role of MPW Associates Architects, lacked the necessary expertise to formulate the necessary opinion required by clause 19.

During Schmidt's testimony, he was asked whether he had the certificate contemplated in clause 19, which he denied. His explanation for not having the certificate was that, 'we did not require any information from the architect at that point in time because I was in charge of . . . managing the project at that point in time' and/or that the contractor unilaterally vacated the premises, they did not discuss the cause of the delay or go into arbitration and that thereafter the respondent sued the appellant and the respondent was not willing to entertain the appellant's counterclaim.

[17] The answer to the question to be determined turns on the interpretation of the contract, particularly clause 19. Clause 19 imposed an obligation on the architect or Schmidt who fulfilled the obligations of the architect under the contract to make the written opinion whether the works ought to have been completed within the agreed on/and or extended time. It was argued that it was agreed between the parties that Schmidt of the appellant would fulfill the role of the MPW Associates Architects. The parties contracted on the basis of clause 19 in its original form; the contract did not change language and hence the intention of the contracting parties is very clear. The contract is structured in such a way that the execution of the contract revolved around the architect and the contractor. The testimony of Schmidt that he would have fulfilled the role of the architect, he admitted, was not communicated to Gudi of the respondent and in that regard the contract between the parties remains in its original form. In any case, Schmidt being the son of the owner of the guesthouse or a manager in the appellant is an interested party and not a professional person and for the respondent to have tacitly accepted that the appellant would act as a judge in its own cause is highly improbable. The structure

of the contract required the caliber of an architect to monitor the progress of the works and form the opinion contemplated in clause 19.

[18] The interpretation of clause 19 being decisive of the appellant's case, I find it unnecessary to venture into the other issues raised by both counsel.

[19] To sum up, the appellant cannot claim penalties in terms of clause 19 without having met the requirements imposed by the said clause. Consequently the appeal should fail.

[20] The costs should follow the cause.

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

1. The appeal is dismissed.
2. The appellant is to bear the costs of this appeal and that of the High Court, which costs shall include the costs of one instructing and one instructed counsel.

MAINGA JA

HOFF JA

FRANK AJA

APPEARANCES:

Appellant:

T M Wylie

Instructed by Dr. Weder, Kauta &
Hoveka Inc., Windhoek

Respondent:

G Narib

Instructed by Theunissen, Louw &
Partners, Windhoek