



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2460/2010

In the matter between:

JOHANN MANFRED OLIVIER t/a OLIAS BUILDERS

PLAINTIFF

and

**THE DEFENCE FORCE FOUNDATION t/a MILE 4
CARAVAN PARK**

DEFENDANT

Olivier v The Defence Force Foundation (I 2460/2010) [2013] NAHCMD 80 (27 March 2013)

Coram: SMUTS, J

Heard: 20-26 February 2013

Delivered: 27 March 2013

Flynote: Action by a building contractor for balance due to him for building works. Plaintiff not establishing a contractual basis for his claim.

ORDER

[1] The plaintiff's claim is to be dismissed with costs. These costs include those consequent upon the engagement of one instructing and one instructed counsel.

JUDGMENT

SMUTS, J

[2] In this action the plaintiff, a building contractor, claims N\$513 363,30 in respect of building works performed by him, alleging that this amount is owing by the defendant to him. The defendant denies liability for this or any sum and pleads that it has paid the plaintiff in full for the work performed by him.

The pleadings

[3] It is common cause that the defendant put out for tender certain building work how. It related to two blocks containing ablution and other facilities at a caravan park.

[4] The plaintiff submitted a quotation to the defendant in response to the tender in the total amount of N\$668 850.00. That quotation lists 16 items. But the plaintiff alleges in his particulars of claim that he was only obliged to complete the work specified in paragraphs 1, 2,3,4,6 and 16 of the quotation. He further alleges that he did so and that the defendant only paid him an amount of N\$25 486, 70. The balance claimed by him was arrived at after deducting certain payments made during the course of the project.

[5] In the defendant's plea, the defendant confirms that it entered into an agreement with the plaintiff in terms of which the plaintiff would complete certain improvements to the two blocks and that the agreement was based upon the

acceptance of the plaintiff's quotation in response to the tender for the work in question.

[6] The defendant admitted making a final payment in the sum of N\$25 486.70 and a prepayment of the N\$130 000.00 to the plaintiff and pleaded that the plaintiff had been paid in full for the building works. The further amounts contained in the plaintiff's quotation, in addition to the sums paid to the plaintiff, were represented by amounts which were paid to specified or nominated sub-contractors by the defendant on the plaintiff's behalf. The defendant thus pleaded that it had made these payments to the plaintiff's suppliers on his behalf at his instance and that these payments were set off against monies owed to the plaintiff for the work contemplated by the tender.

The trial

[7] At the trial, plaintiff was represented by Mr Z Grobler and the defendant by Mr M Wylie.

[8] The plaintiff gave evidence and called another witness, Mr Glen-Spyron. The plaintiff testified that he was an experienced building contractor and responded to the tender put out by the defendant for the works in question (the works). He testified that he submitted his quotation in response to the tender on 5 August 2009 and that it had been accepted by the defendant.

[9] The terms of the quotation are relevant to the plaintiff's claim. I accordingly quoted in full:

'Description	TOTAL
<p><u>Ref: Quotation for adding of complete bathrooms, 1 additional room & old bathrooms & kitchen convert into 2 more rooms BLOCK A & BLOCK B</u></p> <p>1) Add 1 new room & bathrooms, shower, toilet, wash basin to existing building;</p> <p>2) Digging of foundations as on plant</p> <p>3) Casting of foundations</p> <p>4) Building up of walls as on plans (all building works & material)</p> <p>5) Complete of roof with big 6 asbestos sheets</p>	<p>N\$ 384, 850.00</p>

[10] The plaintiff testified that the sum of N\$384 850, entered adjacent to item 4, was tendered in respect of the items specified in the paragraphs 1 to 4 of the tender. He further stated that he tendered N\$31 000 in respect of a roof although the N\$31 000 contained in the quotation would appear to have been specified in respect of item 6 which concerned “aluminium bronze windows” as indicated on the “plan”. He further pointed out that he had inserted the sum of N\$253 000 in respect of kitchen cupboards which were to be supplied by a nominated supplier, named as Kesla Kitchens as was required by the tender.

[11] The plaintiff stated in his affidavit that he did not tender for item 6, being the aluminium framed windows although referred to in the particulars of claim. He also denied tendering for all electrical, plumbing and paint works supplied by Paint Logic (item 9), rhino board ceiling built, (item 10), the installation of geysers (item 11), the installation of microwave ovens in all rooms (item 15). He also stated in his affidavit which was provided as evidence in chief and confirmed by him, that Mr Vernooy on behalf of the defendant had asked him to do all the labour in respect of items 6 to 16 and that he would be paid for that labour whilst the defendant would provide all the materials for that work. He testified that this labour would constitute extra work and that after he had completed this project, he had submitted a revised account to the defendant

claiming to be paid for such work.

[12] The plaintiff gave evidence that the paint, kitchen cupboards, tiles and microwave ovens had been provided by the defendant and that the plaintiff had installed or utilised these items. He stated that he had never tendered to supply those materials because the defendant was to do so. He pointed out that the defendant had however deducted these costs from his quotation amount. He further testified that his revised account was in the sum of N\$1 013 005 and that he had received a progress payment of N\$130 000 and a final payment of N\$25 486, 70 thus leaving an outstanding balance of N\$884 004. But this sum had not been claimed by him.

[13] The plaintiff pointed out that there was an agreement to do additional work and when the defendant had refused to pay the revised account, he submitted another account. He testified that his claim was pursuant to the tender documentation and deducted the progress payment and the final payment from the tender amount which left the sum of N\$513 362, 30 as claimed in the particulars of claim. He testified that the defendant had refused to pay this sum. This plaintiff accepted that this sum represented the payments to CTM for tiles (in the sum of N\$170 766, 37), Paint Logic (in the sum of N\$66 587, 18), microwave ovens (in the sum of N\$23 776, 20) and Kesla Kitchens (in the sum of N\$252 233, 44), thus adding up to N\$513 363, 33.

[14] The plaintiff testified that he had not agreed with the defendant that those materials should be deducted from his account and that this constituted his claim.

[15] When he amplified his affidavit in his evidence in chief, he stated that the sum of N\$31 000 had however been tendered for in respect of the windows in item 6 and not item 5 as was stated in his affidavit, and that he had in fact not quoted for the roof. He stated that his quotation was only in respect of what he termed the wet works of the project, a term widely used in the building industry. He said that he had not quoted for what he termed additional works, namely all work in addition to the wet works. He stated that he did not have sufficient

financing to do so and that he had, after being awarded the tender, approached the defendant to provide the materials in question. He further testified that he had borrowed the sum of N\$211 000 from Mr Glen-Spyron in order to perform the project works.

[16] During cross-examination he stated that his experience as a building contractor meant that he understood how a tender process worked. The tender specified that it was in respect of adding a private bathroom to each room with a shower, wash basin and toilet, tiling up the bathrooms, one additional room and kitchen converted to two rooms. He further accepted that the tender price must be the final invoice price and further specified that the tender must be for both A block and B block at the caravan park/backpackers facility. The plaintiff stated that he had accepted the terms of the tender.

[17] During cross-examination, he conceded that he had first tendered the sum of N\$525 000 for the works. He stated that the defendant's Mr Vernooy had, after he received of this first tender, and before the closing of tenders, called him in to enquire as to whether it was for one block or for both blocks as that had not been specified on this tender. The plaintiff then withdrew the first quotation and submitted his second quotation which formed his tender. The plaintiff said that he had prepared his quotation in a hurry.

[18] When asked whether it would have been reasonable assumption to consider that his quotation was in respect of all items, he stated that he had not intended to do so. He referred to his quotation and pointed out that several of the items of work did not have prices specified against them and that he had not intended to price for the work reflected in those items. He conceded that he had not contacted the specified suppliers but had inserted the sum provided to him by the defendant in respect of Kesla Kitchens. He insisted that his quote had not included obtaining the materials from specified suppliers.

[19] He was then asked as to why item 9 of his quotation stated that 'paint work supplied by Paint Logic included'. He stated that this has been specified on his quotation because he had been told to do so. He stated that he did not

conduct a full site inspection before tendering and only attended for about 5 minutes on the site and that he had completed his quotation in great haste. It was put to him that the suppliers had specially displayed the designated items at their premises, namely tiles at CTM, the selected paint at Paint Logic and the kitchen cupboards at Kesla Kitchens and that prospective tenders were invited to inspect those displays at those suppliers in preparing their tenders. The plaintiff stated that he had not been to any of these suppliers.

[20] It was also put to the plaintiff that his particulars of claim did not raise a claim for additional work, although this was raised in his testimony. He was further referred to his own quotation which stated that 'no additional work or changes will be accepted unless agreed in writing'. He was unable to provide a coherent answer to clarify his own quotation and his own testimony that he had agreed with the defendant Mr Vernooy to perform additional work.

[21] The plaintiff proceeded to admit that the sum N\$253 000 should be taken into account as this had been specified in his tender in respect of Kesla Kitchens. He further stated that he had not tendered for items 5, 9,10,11,12 and 15 in his quotation when he was asked why had he not expressly stated in his quotation that he had tendered for all wet works. It was pointed out to him that item 14 comprised wet work. He stated that this item was thus included in his work and in the quotation, although conceding the fact that no amount had been stated adjacent to this item and that it was not referred to as being included when explaining his quotation in his evidence in chief.

[22] The plaintiff was vague as to the communications which had occurred at the time of the submission of his quotation and the closing of the tender. It was put to him that when the tender went out on 27 July 2009, Mr Vernooy had sent a text message to him to invite him to tender but he could not recall that. He referred to the item of work which including breaking out all the tiles in every room and in the ablution blocks but stated that he had not tendered for the tiling of floors.

[23] He conceded that he had made a mistake by not including item 14 in his

affidavit or referring to it even though it comprised wet works. He could not explain why the amount in respect of Kesla Kitchens included in his quote had not been deducted from his claim. When pressed on this item, he referred to the fact that he had done a considerable amount of additional work even though his claim did not refer to this.

[24] The plaintiff was then referred to the varying claims he made after he received the final payment. They had differed in their makeup and in the sums claimed. In one such invoice he claimed approximately N\$1.2 million. This claim did not however make provision for the progress payment he had received and the amount which had been paid to Kesla Kitchens. He conceded that these items should not have been included in that claim and that he had thus claimed double in those respects. When asked for an explanation for this error he stated that he was under pressure at the time to pay sub-contractors and workers and had been confused and had also made mistakes.

[25] He was also referred to a letter at the time which he had signed in support of his claims but he said it had been drafted by someone else, certain Mr Groenewald. This letter also included statements which were at variance with his testimony and his pleadings. It was put to him that it purposefully inflated claims which he had submitted to the defendant and that he had sought to mislead the defendant. He denied this but admitted that there had been double claims and accepted the claims had been inflated. His evidence on his claims and on his correspondence was contradictory and entirely unsatisfactory. His answers were repeatedly evasive. He did not impress me at all as a witness. He repeatedly conceded that he had made mistakes when contradictions were pointed out to him. He eventually acknowledged that he had under quoted for the project. He was also obliged to concede that not only did his claims include duplication but the invoices which he had supplied in discovery in support of some of these claims had included material which was not even utilised in the project. There was a reference to items where a delivery address had differed from project address and another invoice which included material which he acknowledged was not utilised on the project.

[26] When asked as to whether the tender documentation would form the work for the project, and be covered by his quotation he answered that he thought that he would tender from his side and that the defendant would supply what was needed.

[27] Mr Glen-Spyron confirmed that he had advanced an amount of N\$211 000 to the plaintiff to complete the building works, but that the loan had not been repaid when the plaintiff had only received the sum of N\$25 233.55 at the end of the project. His further evidence was not relevant or material to the issues in dispute.

[28] The plaintiff had given notice to call a quantity surveyor, Mr Burger, setting out his evidence had been provided. Mr Burger was not however available and the plaintiff's case was closed without calling him.

[29] The defendant called Mr Vernooy, another building contractor, Mr Fokkens who had unsuccessfully tendered for the work and Mr Labuschagne on behalf of Kesla Kitchens whose evidence was not disputed.

[30] Mr Vernooy testified that he was currently self employed but at all material times had been the defendant's manager. He referred to the tender and its terms. He stated that in terms of the tender all parties who had wanted to tender were required to make use of predetermined suppliers. He said that various tenderers expressed interest and that a meeting on site was held during early august with all parties who wished to tender. The plaintiff attended that meeting. He said that in the course of that meeting he made it clear to all of the prospective tenderers that the material and other costs must be included in their quotations and also that they were required to make use of materials from predetermined suppliers, to be included in their quotations. He informed interested parties that the predetermined suppliers had displayed the materials, thus making them available for inspection in preparing their quotations.

[31] Mr Vernooy confirmed that the plaintiff provided an original written quotation for N\$525 000. He then contacted the plaintiff and enquired whether

both blocks were included as this had not been stated in that first quotation. The plaintiff then withdrew that quotation and submitted a new quotation which was accepted by the defendant as the successful tender for the project. Upon acceptance of the plaintiff's tender, a letter was sent to the plaintiff confirming that. In the letter of acceptance, it was made clear that the final invoice must be the same as the tender amount and furthermore that any additional work or extras would need to be set apart and would only be accepted if approved by the defendant.

[32] He testified that the plaintiff had difficulties from the outset in obtaining financing to perform the project work. He had been asked to sign as a surety on behalf of the plaintiff which he had declined on behalf of the defendant. As the plaintiff was experiencing difficulties obtaining credit from the predetermined suppliers, they had then approached the defendant to pay the suppliers as he did not have the funds to do so.

[33] Mr Vernooy said that the defendant then paid certain of the suppliers directly on the plaintiff's behalf and at his instance. He confirmed an interim payment was made to the plaintiff in the sum of N\$130 000 and that the remaining amounts requested had been paid to suppliers directly, leaving the final amount of N\$25 480.70 which was paid to the plaintiff (after the amounts which had been paid to suppliers had been set off). He confirmed the plaintiff's unhappiness with this sum and referred to the various invoices and claims which then followed from the plaintiff in different amounts. Mr Vernooy confirmed that the amount contained in the plaintiff's quotation was in respect of the entire works as a whole and not for a part of the work in question. He on behalf of the defendant understood that the quotation thus reflected that the plaintiff had tendered for the entire work and all the building work. His testimony for the large part remained unshaken after thorough and extensive cross-examination by Mr Grobler.

[34] The evidence of Mr Labuschgne on behalf of Kesla Kitchens was not placed in issue. He confirmed that he had been approached regarding the joinery works for the project and that he had provided a detailed quotation. He

confirmed that the joinery works had been performed by his firm and that the sum referred to in the plaintiff's quotation had been paid to his firm.

[35] The defendant also called Mr Fokkens. He testified that he is a building contractor in Swakopmund and had also tendered for the works. He was also a qualified mining engineer and quantity surveyor. His tender had been unsuccessful. He confirmed that at the site meeting for tenderers, Mr Vernooy had explained what was expected from a successful tenderer and that materials were to be obtained from pre-arranged suppliers as stipulated in the tender document and that these were then to be included in the tenders submitted by tenderers. He then proceeded to obtain prices from CTM in respect of tiles and Paint Logic in respect of paint and from Kesla Kitchens. He also testified that it was not uncommon for a tender to specify suppliers.

[36] The defendant then closed its case.

[37] Mr Grobler argued that the plaintiff's quotation was only in respect of 'wet works', and that the amount of N\$384 850 was in respect of paragraphs 1 to 4. He did however concede that the plaintiff had in the cross-examination considered that item 14 would also fall within a category of wet works. He submitted that item 14 should also then be included in that quotation. He submitted that items 5, 9, 10, 11, 12, 15 and 16 constituted works that needed to be done to complete the renovation after the building work had been completed and that these items would not be classified as building work, relying on a definition for building work contained in the concise Oxford Dictionary. He submitted that his client had not tendered for those items.

[38] He was unable in argument to explain the several inconsistencies in the testimony of the plaintiff as well as with his pleadings and contemporaneous correspondence and invoices. He however urged me to accept the plaintiff's version that he had only tendered for the building work in respect of item 1 to 4 and 14 and the windows (item 6) in the amount of N\$31 000 and the kitchen cupboards to be supplied by Kesla Kitchens in the amount of N\$253 000. He accordingly submitted that the work which the plaintiff had performed in respect

of items 5, 9, 10, 11, 12 and 15 was done as extra work and had not been included in his quotation. His submission did not account for or explain the inconsistency with respect to item 14 which is not specified in the quotation or in the plaintiff's evidence in chief. Yet on the plaintiff's version, it constituted wet work. He was also unable to explain the inconsistent versions of the plaintiff in respect of the differing accounts and claims submitted by him.

[39] Mr Wylie referred to Christie *The Law of Contract in South Africa*¹ where the learned author refers to the calling for tenders. The learned author points out that a call for tenders can result in an offer which an employer may accept or reject and that, in the absence of wording to the contrary, any tendered documents such as plans, specification, bills of quantities and the like are provided for information of the tenderers to enable them to work out the terms of their offers. Upon acceptance of the offer, a contract would then be created. This is what occurred in this instance.

[40] I turn to the tender documentation. It did not invite tenders in respect of a part of the works but instead in respect of the works as a whole, indicating that the final invoice price must equate to the tender price. There was also the uncontroverted evidence concerning designated suppliers from whom materials were to be purchased. These were to be included in the tender. The plaintiff's tender had after all expressly stated in his quotation that item 7 included paint supplied by the designated supplier and in item 9 tiles, supplied by CTM. Yet he inexplicably said that these should not form part of his tender. He also stated in respect of the kitchen cupboards to be supplied by the designated supplier. The plaintiff's quotation was not qualified to exclude any items of work or stating that it only was in respect of certain of the items contained in the quotation. His own quotation also expressly stated that additional work would need to be agreed upon in writing. The plaintiff's evidence was entirely to the contrary by stating that he had agreed to perform additional work without any written agreement or confirmation as would have been required by his own quotation and by Mr Vernooy.

¹ 6th (ed) at 44-45.

[41] In considering whether I am to prefer the plaintiff's version as to his part tender over that of Mr Vernooy's evidence, I take into account, as I have already indicated, that the plaintiff did not impress me at all as a witness. There were several internal inconsistencies in his evidence as well as with his prior contemporaneous conduct and the claims he had made and correspondence generated on his behalf. This was also inconsistent with his pleadings. He was evasive on several occasions and was not in my view a credible witness. He struck me as willing to vary his version if it could possibly secure more money for the work he had performed than was set out in his tender. He conceded that he had under tendered for the project. It would seem to me that his conduct afterwards and in particular at the end of the project and thereafter in his varying claims which also varied further in the particulars of claim as well as during his testimony that he was prepared to vary his version in a bid to secure more money for the work he had performed because he had under quoted for it. His evidence was thus not only internally inconsistent, but inconsistent with his own quotation, his correspondence and claims at the time with his pleadings.

[42] On the other hand, the evidence of the defendant's main witness, Mr Vernooy was not plagued with the evasiveness and lack of credibility which characterised the plaintiff's testimony. The minor inconsistencies in Mr Vernooy's evidence were immaterial and did not detract from the version of the defendant which had been consistent from the outset, namely that the tender involved all the works specified in it and that quotations were invited in respect of those works and that the plaintiff's quotation had been accepted on that basis. The defendant's consistent version also accorded with the tender documentation and contemporaneous conduct and correspondence in stark contrast with the plaintiff's unprincipled testimony which was inconsistent with all of these. I have no hesitation in rejecting the plaintiff's version where it conflicted with that of the defendant.

[43] The plaintiff had the onus to establish his entitlement to the amount claimed. On the evidence before me, he has dismally failed in his claim.

[44] It follows that the plaintiff's claim is to be dismissed with costs. These costs include those consequent upon the engagement of one instructing and one instructed counsel.

D SMUTS

Judge

APPEARANCES

PLAINTFF:

Z. Grobler

Instructed by Grober & Co.

DEFENDANT:

T. Wylie

Instructed by Theunissen, Louw & Partners