

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**RULING**

Case No: HC-MD-CIV-ACT-CON-2020/02695

In the matter between:

<b>THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA</b>	<b>1<sup>st</sup> PLAINTIFF</b>
<b>MINISTER URBAN AND RURAL DEVELOPMENT</b>	<b>2<sup>nd</sup> PLAINTIFF</b>

and

<b>FERUSA CAPITAL FINANCING PARTNERS CC</b>	<b>1<sup>st</sup> DEFENDANT</b>
<b>NELSON NDELIMOMO NAPEJE AKWENYE</b>	<b>2<sup>nd</sup> DEFENDANT</b>
<b>TOBIAS AKWENYE</b>	<b>3<sup>rd</sup> DEFENDANT</b>

**Neutral citation:** *The Government of the Republic of Namibia v Ferusa Capital Financing Partners CC* (HC-MD-CIV-ACT-CON-2020/02695)  
[2024] NAHCMD 52 (13 February 2024)

**Coram:** RAKOW J  
**Heard:** 27 November 2023  
**Delivered:** 13 February 2024

**Flynote:** Civil procedure – Application for absolution from the instance – Test to be applied at this stage is whether there is evidence upon which a Court, applying its mind reasonably to such evidence could or might find for the plaintiff and whether the

plaintiff has made out a prima facie case – Court satisfied that a prima case has been made out against the first defendant and therefore dismisses absolution application, however, Court not satisfied that the second and third defendants conducted business in a fraudulent, negligent and reckless manner to be held personally liable. The second and third defendants' application for absolution from the instance is granted.

**Summary:** In this matter, the first defendant was awarded a contract to construct houses by National Housing Enterprises (NHE). Subcontracts were concluded with two other companies.

NHE started having financial difficulties and could not pay the first defendant. First defendant informed the other two companies to suspend work, however, the Government of the Republic of Namibia entered into a new construction agreement with the first defendant.

It is alleged that the first defendant breached the new construction agreement as they refused to complete the houses and failed to ensure the completion of the project within the timelines as contemplated in the agreement.

It is further alleged that they conducted themselves in such a manner that the subcontractors obtained a lien on the construction site. Further, the failure to complete the construction of the houses timeously caused the plaintiffs damages due to vandalism and weather damages.

It is argued that the plaintiffs failed to pray for cancellation of the new agreement and since they are claiming for damages, the plaintiff should have prayed for cancellation of the agreement.

It is further argued that the loss claimed by the plaintiffs must be directly linked for the defendants' alleged breach of contract. It was further argued that the claim for vandalism is not attributable to the defendants as well as the claim for the weather damages is not due to the defendants' breach. Further, the claim for escalation, is without merit and baseless thus the defendants cannot be held accountable.

It was argued that the second and third defendants were negligent in the running of the business of the first defendant resulting in the plaintiffs suffering loss and therefore should be held personally liable.

The second and third defendants argued that a close corporation is a juristic person, and that the allegations of fraudulent, reckless and negligent conduct must be proven and in this instance it was not proven.

*Held that*, the test to be applied at this stage, is whether there is evidence upon which a Court, applying its mind reasonably to such evidence could or might find for the plaintiff and whether the plaintiff has made out a prima facie case.

*Held further* the Court is satisfied that evidence was presented for breach of the new agreement and that the plaintiffs suffered damages. However, the Court is not satisfied that plaintiffs made out a case against the second and third defendants, that they conducted business in a fraudulent, negligent and reckless manner. The Court therefore dismisses the first defendant's absolution from the instance application and grants the second and third defendants' absolution from instance application.

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### **ORDER**

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1. The first defendant's absolution from the instance application is dismissed.
2. The second and third defendants' absolution from the instance application is granted.
3. Costs to be costs in the cause.

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### **JUDGMENT**

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RAKOW J:

Introduction

[1] The first plaintiff is the Government of the Republic of Namibia duly constituted in terms of the Constitution of the Republic of Namibia represented by the Minister of Urban and Rural Development. The second plaintiff is the Minister of Urban and Rural Development appointed as such in terms of Article 32(3)(i)(dd) of the Constitution.

[2] The first defendant is Ferusa Capital Financing Partners CC, a closed corporation, duly registered in accordance with the Close Corporation Act 26 of 1988, as amended. The second defendant is Nelson Ndelimomo Napeje Akwenye, an adult male businessman who is also a member of the first defendant, holding 50% of the membership of the first defendant and by virtue of the aforesaid position also the accountable member of the first defendant. The third defendant is Tobias Akwenye, a major male person with full legal capacity who resides in the United States of America. He is also a member of the first defendant and holds 50% of the membership in the first defendant and by virtue of the aforesaid position, also the accountable member of the first defendant.

### Background

[3] On 1 May 2014, the first defendant was awarded a contract by the National Housing Enterprise (NHE) to construct six hundred houses in Swakopmund, Republic of Namibia. The total value of the project amounted to N\$165 666450, including VAT. Although prohibited in the contract and without prior approval, the defendants subsequently concluded sub-contracting agreements for the construction of the houses with Strauss Group and later Desert Paving and Construction CC, and New Era Investments (Pty) Ltd.

[4] During the period of construction, the NHE ran into financial difficulties which in turn caused some financial troubles for the first defendant also as they were not being paid. During that time the first defendant gave notice to New Era Investments (Pty) Ltd and Strauss Group to cease or suspend works. Following negotiations, the Government of Namibia entered into a compromise which resulted in a New Construction Agreement under the Mass Housing Development Programme.

[5] It is alleged that the defendants breached this agreement in that they refused to complete the houses subject to the New Construction Agreement and that they failed to ensure the completion of the project in accordance with the timelines as contemplated in the agreement. They further conducted themselves in such a manner that the subcontractors obtained a lien on the construction site which is the subject matter of the New Construction Agreement since 2015. The failure of the first defendant, alternatively second and third defendants to complete the construction of the houses timeously further caused the plaintiffs to suffer further damages due to vandalism and weather damages.

#### The evidence led at the trial

[6] The plaintiffs called three witnesses to testify. In particular Mattheus Theodill de Klerk, Lesley Hindjou and Cornelius Merrow Thaniseb.

[7] Mr de Klerk testified that he worked at the NHE as a Contract Administrator. His division was tasked with the implementation of the mass housing project in Swakopmund. One of the entities awarded a contract was Ferusa Capital Financial Partners. They were given two blocks to start with, block 9 with 275 houses and block 10 with 230 houses. This was therefore in total 505 houses. He further testified that the defendants appointed two subcontractors, being New Era Investments (319 houses) and Strauss Group (186 houses). There were different types of houses, Social houses – 270 and credit link houses – 235. Credit linked houses were again divided into two groups being core – 110 houses and conventional – 125 houses. Social houses were paid for by the Ministry Urban Rural Development (MURD) and Credit-Linked houses by NHE. The result was that every month, three Payment Certificates were prepared for the Project.

[8] NHE started having money issues in November/December 2014 but all social housing claims were paid to the contractors until the project was stopped in June 2015. Ferusa's first claims were in August 2014 and the last claims in May 2015. The core houses claim for November 2014 was the first claim that was not paid by NHE due to money issues. The total amount outstanding to Ferusa at the project stoppage was N\$13 926 259,03. NHE was instructed on 27 May 2015 by the then Minister of MURD to stop the Mass Housing Project. Messieurs. Richard Franklin

and Partners were appointed by the Ministry of Works to measure all the work done. After this, there were negotiations with all the contractors to settle the outstanding amounts owed to them. These negotiations were handled by the Attorney General's office. Ferusa signed their settlement contract with MURD on 9 October 2015 and signed further new contracts for the completion of the houses.

[9] Lesley Hindjou testified that he is the Principal Agent on the Swakopmund housing project since February 2017. He is employed at messieurs. Richard Frankle and Partners who is the principal agent on the project. He was responsible for the handling of the day to day affairs of the plaintiffs in the implementation of the agreement between the plaintiffs and Ferusa Capital Financial Partners CC. After he took over his first task, there was the first site meeting which he chaired, between the employer, contractor and sub-contractors being Desert Paving and Construction CC to co-ordinate the project. At the time that he came onto the project, the plaintiffs had paid Ferusa an amount of N\$21 836 471, 43, whilst the budget for the project was N\$132 307 471,43 which meant that they received about 17% of the whole budget.

[10] Ferusa raised further payments certificates 6,7 and 8 during August 2017 but an amount of N\$3 471 279,33 was deducted by the plaintiffs from these payment certificates for the failure to show out materials on hand at the site as well as other material on hand on another site that the defendants indicated some stock was stored. This material on site formed part of the settlement agreement that was reached between all the parties on 9 October 2015. This was therefore treated as an over-payment. The witness further testified that the project came to a standstill from May 2017 as Ferusa, despite Principal Agent notices containing instructions, failed to perform further construction on the project. There were several letters written from the Principal Agent titled "Principal Agent Instructions to Ferusa" pointing out various instances of default, but no response was received from them until the letter received on 11 May 2020 from Ferusa where they objected to the termination of the contract.

[11] Due to the lien against the property by the sub-contractor of Ferusa, New Era Investment (Pty) Ltd obtained in court, the government and Principal Agent and their representatives were no longer able to access the site. Ferusa failed to perform its

duties and obligations under the agreement as it did not secure the site and as a consequence, some of the houses were vandalized. This is contrary to Ferusa's obligation in terms of clause 13 of the agreement which obligated Ferusa to protect and secure the site and goods against damage. The vandalism became so bad that the Principal Agent engaged security services in June 2019 in order to stop the continuing damage to the structures that was going on at that stage.

[12] During May 2019, an audit team gained access to the site and proceeded to draw up a report setting out the damages that were done to the houses. They also took some photos which were included in the report. The report further deals with the payment certificates issued by the first defendant and indicates that payments were made to the tune of N\$21 836 471.43 to the defendants. The witness further testified that three Principal Agents' Instructions and two Notices of Default were written before the Determination of the Contract which happened on 5 May 2020. At the time of giving evidence, the witness testified that work of N\$110 346 265.55 excluding VAT, should be done to complete the 505 houses. This includes work to repair the vandalism, theft and damages by the weather.

[13] Cornelius Merrow Thaiseb then testified that he has been in the employ of the plaintiffs as from 1 March 2012. He was the representative of the MURD on the government team lead by the Attorney General during the 2015 - 2016 settlement negotiations between government and various contractors, including Ferusa Capital Financing Partners CC. He largely dealt with the Government's Principal Agent, Mr. Hindjou. MURD has paid all the payment certificates that were due and payable to Ferusa and as certified and verified by the Principal Agent as monies payable to Ferusa. The project has stood still since the later part of 2017 and the structures have suffered significant damage due to deterioration, vandalism and theft. The plaintiffs will have to incur significant costs to remedy the aforementioned damages to the structures and to deal with the escalated costs due to the delay in the completion of the project by Ferusa. The project was to be completed within 15 months.

The grounds for absolution raised by the defendants

FAILURE TO PRAY FOR CANCELLATION

[14] For the defendants, it was argued that the plaintiffs' failed to allege, prove and pray for cancellation of the 'New Agreement'. The plaintiffs plead breach of contract and seek damages allegedly suffered in consequence of the breach. The form of the breach although not clearly expressed in the particulars of claim appears to be positive malperformance, and incomplete performance in particular on the part of the defendants. The plaintiffs had an election between seeking specific performance on the one hand and cancellation of the agreement and contractual damages on the other.

[15] It was argued that it is trite that since the plaintiffs elected to claim damages, they should have simultaneously sought an order for this court to cancel the New Construction Agreement. It is submitted that the plaintiffs' cannot competently claim for breach of contract and damages consequential thereto, without first seeking to cancel the agreement. It was accordingly submitted that the plaintiffs are not entitled to claim damages of any sort without first lawfully cancelling the agreement. The claim for damages accordingly hinge upon the cancellation first. The plaintiffs' failure to plead and claim cancellation of the new agreement is fatal.

#### NO FACTUAL CAUSATION PROVED AS THE PLAINTIFFS' LOSS IS NOT LINKED TO THE DEFENDANTS' BREACH

[16] It was further argued that it is trite that the loss claimed by the plaintiff must be directly linked to the defendants' alleged breach of contract (factual causation). It was submitted that the plaintiffs' claim for vandalism, is by no means attributable to the defendants. Secondly, the plaintiffs' claim for weather damages is equally not a consequence of the defendants' apparent breach. Thirdly, the plaintiffs' claim for escalation is not alleged or proven to be linked to the defendants' alleged breach. This ground is accordingly raised in respect of three (3) different claims by the plaintiffs, each to be considered individually.

[17] Vandalism: In terms of the vandalism claim, the plaintiffs' witness, Mr. Lesley Hindjou, testified that when Desert Paving had vacated the site, he within a day, being in charge of the daily operations, noted the abandonment of the site by the Sub-contractor. The Principal Agent, Mr. Hindjou, testified under cross examination



that he immediately notified the principal and that they arranged for security on the site. He testified specifically that the securities were appointed and were on site by June 2019. Mr. Thaniseb testified that the site was vacated by September 2017. It is therefore the evidence before this court that the site was accordingly unmanned for a period of two years. Mr. Hindjou confirmed under cross examination that the only period upon which they claim the vandalism was between the period of site abandonment and the appointment of the security.

[18] The plaintiffs did not lead evidence that the defendants were aware that the site was abandoned. It is accordingly submitted, in line with the plaintiffs' duty to mitigate loss that they should have acted reasonably and procured the security earlier as they were fully aware of the potential vulnerability of the site. The plaintiffs were also fully aware that Desert Paving was on site as a sub-contractor and endorsed it as such. The defendants cannot be held liable for the conduct of a 3rd party and due to the plaintiffs' failure to mitigate their loss. It was argued that the defendants are accordingly not liable to pay for the vandalism as the defendants' were not aware of the site abandonment and relied on Desert Paving to secure the site.

[19] Weather Damages: In respect of the weather damage, it is submitted that same can by no means be attributed to the defendants' alleged breach. The plaintiffs led no evidence that cements that the defendants' ought to be held liable for same or that same was occasioned purely due to the incomplete construction. The defendants cannot be held liable for normal wear and tear which is mainly resultant from the geographical location of the site. No liability should factually and legally be attributed to the defendants' in this respect.

[20] The claim for escalation: It was argued that this claim is without basis and merit and should not be for the account of the defendants. The plaintiffs failed to lead evidence on the nexus thereof, factually and legally.

FAILURE TO ALLEGE AND PROVE THE PERSONAL LIABILITY OF THE 2ND AND 3RD DEFENDANTS

[21] For the defendants, it was argued that the plaintiffs allege in their particulars of claim that the 2nd and 3rd defendants were negligent in the conduct of the business of the 1st defendant resulting in the plaintiffs suffering loss and hence personally liable. The 2nd and 3rd defendants will briefly summarise the reasons why the court should find that the plaintiffs failed to prove that the 2nd and 3rd defendants were negligent in the conduct of the business of the 1st defendant and that they should be held liable in their personal capacities.

21.1. A close corporation is a juristic person, able to contract in its own name and incur debts and liabilities in its own name. A close corporation's juristic personality is separate from its members.

21.2. It is trite that the plaintiffs having made allegations of fraudulent, reckless, and negligent conduct bear the onus to prove such conduct. These are serious allegations and require strong evidence to back them up.

21.3. It is submitted that the alleged fraudulent and negligent conduct was not proven. In fact, the only witness that testified on personal liability is Mr. Cornelius Merrow Thaniseb, whose evidence is wholly insufficient for the court to find sufficient grounds for holding the 2nd and 3rd defendants personally liable for the debts of the 1st defendant. Holding members of a corporation liable has to be made by way of a substantive application for a declaratory order that the members of the close corporation be held jointly and severally liable for the debts of the corporation. Such declaratory order must first be granted before a member of a close corporation may be sued personally for the debts of the close corporation. All the witnesses confirmed that the contract was concluded between the plaintiffs and the 1st defendant and the parties are ad idem as regards this fact. They further confirmed that there was no suretyship agreement in which the 2nd and 3rd defendants indemnify the 1st defendant against liability.

[22] The 2<sup>nd</sup> and 3<sup>rd</sup> defendants record from the onset that the contract which the plaintiffs rely on for their claim against the defendants only bears the name of one contractor, being Ferusa Capital Financing Partners CC, being the 1st defendant in this matter. Furthermore, the plaintiffs did not seek a declaratory order that the 2nd and 3rd defendants be found to have acted fraudulently, recklessly and negligently and that they, as a consequence be held jointly and severally liable for the debts of

the 1st defendant. The plaintiffs' witnesses did not lead sufficient evidence for the court to find that the 2nd and 3rd defendants acted fraudulently, recklessly or negligently in the conduct of the business of the 1st defendant. The only witness that led evidence on the grounds to impute personal liability on the 2nd and 3rd defendants is Mr. Thaniseb, who only made bare allegations that were not supported by concrete evidence and wholly subtracted from the plaintiffs' particulars of claim and hence to be disregarded.

#### THE ARGUMENTS OF THE PLAINTIFFS

[23] Regarding the argument for alleged lack of prayer for cancellation of the new contract as a prerequisite for the damages claim, it was submitted that such a contention is not born out of proper consideration of the agreement and the facts of this matter. The plaintiffs witness – Mr Hindjou, testified that the new contract was ended by the employer, the plaintiff and that proper notices were given to the defendants and this fact was not disputed at all by the defendants.

[24] There is further no legal proposition cited by the defendants in their heads that the judicial declaration of cancellation is a prerequisite for a claim of contractual damages. One of the most important terms of a contract is the *lex commissoria* or 'cancellation clause', which sets out the process to be followed when an innocent party elects to either cancel the contract or enforce the contract in the event of a breach. Although the *lex commissoria* of every contract will be dependent on the terms of the specific contract, the factual circumstances under which the contract was concluded and the specific statutory formalities prescribed, it is important that the correct procedure as determined in the cancellation clause is followed when terminating the contract.

[25] Regarding the defendants' alleged lack of causation for the damages, it is submitted that the evidence before the Honourable Court is clear that Ferusa was the contractor contracted by the plaintiffs per the new agreement. Ferusa, without complying with the new agreement subcontracted the works to third parties. There was no agreement between the plaintiffs and those third parties. They facilitate a situation where their disputes with their own subcontractors degenerated into chaos on the construction site. Their subcontractors obtained judgments against Ferusa

and / or exercised a lien over the entire construction site. Ferusa and its members were aware that time – 15 months to fully construct and complete 505 the houses – was of essence in the agreement. Ferusa being a contractor was aware that the costs would escalate if the project was delayed. Ferusa simply did nothing to complete the houses.

26] It was further argued that Ferusa failed to provide security (guards) for the site to prevent theft and vandalism despite being under an obligation to do so and being paid by the plaintiffs to secure the site and the houses (structures) on site. During cross-examination, the defendants were at pains to elicit from the plaintiffs' witnesses whether there was a delay on the part of the plaintiff to secure the construction site. The testimonies of the plaintiffs' witnesses is that within a reasonable time after the plaintiffs became aware that Ferusa's own sub-contractor – Desert Paving had abandoned the site. Insofar as the weather damage is relevant for the defendants' liability, it is submitted that since 2017 Ferusa and its subcontractors used "access" to the construction site as their 'battle ground'. Ferusa was under an obligation to provide access to the site at all reasonable times but failed to do so. Notices constituting the Principal Agent's instructions were communicated to Ferusa to no avail.

[27] Ferusa and its members negligently, intentionally and/or fraudulently misrepresented to the plaintiffs their intentions or ability to implement their part of the new agreement when they knew or ought to have known that they were unable to do so. There is therefore, a basis for either personal liability as they were directing minds of Ferusa when the misconduct relied upon by the plaintiffs in this matter to please. The fact that an entity is registered and has juristic personality does not absorb its members from acting in good faith where they conduct themselves in a manner pleaded by the plaintiffs. There is a basis for personal liability. The manner in which the first and second defendants dealt with the plaintiffs under the guides of Ferusa clearly provides a basis for the Honourable Court to act in a manner claimed in this matter. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants were the controlling minds of Ferusa in their dealings with the plaintiffs and their obligations regarding the new contract at the very list, abused the corporate juristic of personality of Ferusa to their own ends. The defendants have proffered no explanation whatsoever as to what they did with the

+N\$87 million and why they failed to pay their subcontractors or at least refer their disputes to a speedy dispute settlement mechanisms.

### Legal considerations

[28] The test to be applied by the court at this stage of the trial is: is there evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff?<sup>1</sup> Another approach is to enquire whether the plaintiff has made out a prima facie case.

[29] In the case of *Bidoli v Ellistron T/A Ellistron Truck & Plant*<sup>2</sup> this Court of Namibia stated and approved the following test for absolution from the instance, at 453D-F:

'In *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) the Court of Appeal held that when absolution from the instance is sought at the end of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff established what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff. The phrase 'applying its mind reasonably' requires the Court not to consider the evidence *in vacuo* but to consider the admissible evidence in relation to the pleadings and in relation to the requirements of the law applicable to the particular case.'

[30] In *Ramirez v Frans and Others*,<sup>3</sup> this court dealt with the application and the principles applicable. Concerning case law, the following principles were extracted:

'(a) (T)his application is akin to an application for a discharge at the end of the case for the prosecution in criminal trials i.e. in terms of s 174 of the Criminal Procedure Act — *General Francois Olenga v Spranger*<sup>4</sup> ;

<sup>1</sup> *Gascoyne v Paul & Hunter* 1917 TPD 170. In *Gordon Lloyd Page & Associates v Riviera* 2001 1 SA 988 (SCA).

<sup>2</sup> *Bidoli v Ellistron T/A Ellistron Truck & Plant* 2002 NR 451 HC.

<sup>3</sup> *Ramirez v Frans and Others* [2016] NAHCMD 376 (I 933/2013; 25 November 2016) para 28. See also *Uvanga v Steenkamp and Others* [2017] NAHCMD 341 (I 1968/2014; 29 November 2017) para 41.

<sup>4</sup> *General Francois Olenga v Spranger* (I 3826/2011) [2019] NAHCMD 192 (17 June 2019), *infra* at 13 para 35.

(b) the standard to be applied is whether the plaintiff, in the mind of the court, has tendered evidence upon which a court, properly directed and applying its mind reasonably to such evidence, could or might, not should, find for the plaintiff — *Stier and Another v Henke*<sup>5</sup>

(c) the evidence adduced by the plaintiff should relate to all the elements of the claim because, in the absence of such evidence, no court could find for the plaintiff — *Factcrown Limited v Namibian Broadcasting Corporation*,<sup>6</sup> .

(d) in dealing with such applications, the court does not normally evaluate the evidence adduced on behalf of the plaintiff by making credibility findings at this stage. The court assumes that the evidence adduced by the plaintiff is true and deals with the matter on that basis. If the evidence adduced by the plaintiff is, however, hopelessly poor, vacillating, or of so romancing a character, the court may, in those circumstances, grant the application — *General Francois Olenga v Erwin Spranger*,<sup>7</sup>

(e) the application for absolution from the instance should be granted sparingly. The court must, generally speaking, be shy, frigid, or cautious in granting this application. But when the proper occasion arises, and in the interests of justice, the court should not hesitate to grant this application — *Stier and General Francois Olenga v Spranger (supra)*.’

[31] In the matter of *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*<sup>8</sup>, the requirements for damages in the case of breach of contract have been articulated as follows by Corbett, J.A:

‘The fundamental rule in regard to the award of damages for breach of contract is that the sufferer should be placed in the position he would have occupied had the contract been properly performed, so far as this can be done by the payment of money and without undue hardship to the defaulting party said that to ensure that undue hardship is not imposed on the defaulting party the sufferer is obliged to take reasonable steps to mitigate his loss or damage and, in addition, the defaulting party's liability is limited in terms of broad principles of causation and remoteness, to

(a) those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach, and

(b) those damages that, although caused by the breach of contract, are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from its breach I have in this matter found that the

<sup>5</sup> *Stier and Another v Henke* 2012 (1) NR 370 (SC) at 373.

<sup>6</sup> *Factcrown Limited v Namibian Broadcasting Corporation* 2014 (2) NR 447 (SC).

<sup>7</sup> *Supra*.

<sup>8</sup> *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A).

defendant's failure to excavate the trenches for the foundations on firm natural ground amounts to breach of contract. It thus follows that the plaintiff has discharged the onus with respect to the first namely that the defendant has breach the contract.'

[32] The plaintiff must proof that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants acted fraudulently, recklessly or negligently in the conduct of the business of the 1<sup>st</sup> defendant. The relevant provision in the Close Corporations Act is section 64<sup>9</sup> which reads as follows:

' (1) If it at any time appears that any business of a corporation was or is being carried on recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose, a Court may on the application of the Master, or any creditor, member or liquidator of the corporation, declare that any person who was knowingly a party to the carrying on of the business in any such manner, shall be personally liable for all or any of such debts or other liabilities of the corporation as the Court may direct, and the Court may give such further orders as it considers proper for the purpose of giving effect to the declaration and enforcing that liability.

(2) Without prejudice to any other criminal liability incurred where any business of a corporation is carried on in any manner contemplated in subsection (1), every person who is knowingly a party to the carrying on of the business in any such manner, shall be guilty of an offence.'

### Discussion

[33] Evidence was presented to this court in detail regarding the breach of the new agreement as well as the damages suffered. The court further conducted an inspection in loco and observed firsthand the destruction that affected some of the houses that were close to completion. It was further clearly observed that the New Era site which was fenced in and had permanent employees attending to the site during this whole time and the Dessert Paving site, where the site was abandoned and security services only arranged at a later stage differed vastly in the amount of damage that was caused. The New Era site did not suffer the same level of destruction that was visible at some of the houses on the Dessert Paving site. The court is satisfied that a case has indeed been made out against the first defendant.

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<sup>9</sup> Section 64 of the Close Corporations Act 26 of 1988.

[34] Regarding the second and third defendants, the plaintiffs had to show that business of a corporation was or is being carried on recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose. This is the case that the plaintiffs should have made out in order for the second and third defendants to be held liable jointly and severally with the first defendant for the debt of the first defendant. I find that no such case was made out. The first defendant failed to meet its commitments and incurred possible damages but no evidence was presented that the second and third defendants indeed carried on the business of the first respondent recklessly nor grossly negligent nor with the intent to defraud anybody or for a fraudulent purpose. Their application for absolution from the instance must therefore be successful.

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

1. The first defendant's absolution from the instance application is dismissed.
2. The second and third defendants' absolution from the instance application is granted.
3. Costs to be costs in the cause.

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E RAKOW  
Judge



## APPEARANCES

1 & 2

Plaintiffs: T Phatela (with him G Gawises)  
Instructed by Office of the Attorney-General, Windhoek

1, 2 & 3

Defendants: E Shikongo (with him A Brendell)  
Of Shikongo Law Chambers, Windhoek