REPORTABLE

CASE NO.: SA 22/2004

IN THE SUPREME COURT OF NAMIBIA

IN THE MATTER BETWEEN:

ANTERO DA CUNHA QUEIROZ t/a STEEL CONSTRUCTION AND MAINTENANCE REPAIR — APPELLANT

AND — RESPONDENT

NAMIBBETON (PTY) LTD

CORAM: Shivute, C.J., O'Linn A.J.A. *et* Chomba, A.J.A.

HEARD ON : 06/10/2005

DELIVERED ON: 21/04/2006

APPEAL JUDGMENT

CHOMBA, A.J.A: This appeal emanates from the judgment of Hannah, J, who in the court below adjudged that the appellant herein, Antero Da Cunha Queiroz, was liable personally to satisfy the reliefs claimed by the respondent, Namibbeton (Pty) Ltd. These two parties were the defendant and plaintiff respectively in the *court a quo*. In this judgment I shall, as a matter of convenience, refer to Namibbeton (Pty) as the plaintiff or plaintiff company, and to Antero Da Cunha Queiroz as the defendant.

Before summarizing the facts whereupon the said adjudication was premised, it is convenient, at this stage, to reproduce the parties' pleadings pertinent to the issues which I propose to consider and resolve in this appeal.

In the particulars of claim the plaintiff pleaded, inter alia, as follows:

> " Para. 3. During or about the middle of 2001 and at Rundu, the plaintiff – being duly represented by D.C. Badenhorst and/or I.A. Maraun – and the defendant entered into a partly written and partly oral agreement. The relevant written portion of the agreement is annexed hereto as annexure "A ". The following were express, alternatively implied in the further alternative tacit terms of the aforesaid agreement:
>
> 3.1 The defendant appointed plaintiff to repair and/or construct for and on behalf of the defendant a certain section of road of some 118 km in Angola and to render certain related services to and in respect thereof as more fully appears from annexure "A" hereto ("the work")'
>
> 3.2 The remuneration payable by the defendant to the plaintiff with regards to the performance of the work set out in paragraph 3.1 supra amounted to N$24,000.00 per kilometer of the road completed;
>
> 3.3 The aforesaid amount was payable by the defendant to the plaintiff in four equal instalments of which the first instalment was payable immediately, whereas the second instalment was payable after the completion of the first quarter of the extent of the work, the third instalment after completion of one half of the extent of the work and the fourth instalment after completion of three quarters of the extent of the work;
>
> 4. After the conclusion of the said agreement and during 2001 the aforesaid agreement was orally amended to the extent that the plaintiff would only repair and/or construct 75km of the aforesaid road (further subject to the same terms as set out in paragraphs 3.1 to 3.3 above).
>
> 5. The plaintiff duly complied with its obligations in terms of the aforesaid agreement (as amended) on 8 December 2001 to the extent that it is entitled to payment to and in respect of 74km of the road completed under the aforesaid agreement.

6. In the alternative to paragraph 5, supra, and in the event of it being found that the plaintiff did not fully comply with its obligations in terms of the aforesaid agreement, plaintiff avers that:

6.1 plaintiff substantially complied with its obligations in terms of the aforesaid agreement by completing in excess of 74 km of the aforesaid 75 km of road by 8 December 2001;

6.2 defendant accepted the aforesaid 74 km of the road completed by the plaintiff;

6.3 the completion of the remaining extent of the road (which is less than a kilometer), was rendered objectively impossible and/or it was dangerous or unsafe to complete same due to landmines being situated over the aforesaid stretch of less than a kilometer;

6.4 as of 8 December 2001, plaintiff (*sic*) still owed the defendant (*sic*) an amount of N$506,000.00 which was in breach of paragraph 3.3 (read with paragraph 4) of the agreement between the parties;

6.5 by virtue of all, alternatively one or more of the facts and circumstances set out in paragraphs 6.1 and 6.4, plaintiff could not have been reasonably expected to complete the remainder of the road of less than a kilometer and therefore is entitled to payment for the 74 km of the road completed by plaintiff."

In his plea the defendant's response to the foregoing were pertinently as follows:

" 2 AD PARAGRAPH 2 THEREOF

2.1 The allegations herein contained are denied as if specifically traversed and the plaintiff is put to proof thereof;

2.2 The defendant pleads that he was at all times relevant hereto acting as agent for and on behalf of the Government of the Republic of Angola and that such fact was at all times relevant hereto disclosed to and within the knowledge of the plaintiff;

2.3 It is consequently pleaded that the defendant is misjoined as a party and therefore non-suited as a party to these proceedings;

2.4 It is furthermore pleaded that the plaintiff should have sued the Government of the Republic of Angola and a special Plea of non-joinder is also entered herewith.

WHEREFORE IT IS PRAYED THAT THE PLAINTIFF' S CLAIM BE DISMISSED WITH COSTS

PLEA ON MERITS

AD PARAGRAPH 3 THEREOF

The allegations herein contained are denied as if specifically traversed and the plaintiff is put to proof thereof;

3.1 The defendant repeats paragraphs 2.2 to 2.4 hereinbefore as if specifically incorporated and pleaded herein;

3.2 Subject to what is stated above, the defendant admits the contents of annexure "A" and states that payment in respect of annexure "A" was to be effected by the Government of the Republic of Angola and not by the defendant as alleged.

AD PARAGRAPH 4 THEREOF

4.1 The allegations herein contained are denied as if specifically traversed and the plaintiff is put to proof thereof

4.2 The defendant pleads that the plaintiff unilaterally refused to continue with the construction and/or repairs to the road.

4.3 It is consequently pleaded that the plaintiff breached the agreement by having refused to continue with construction and/or repairs to the road.

AD PARAGRAPH 5 THEREOF

5.1 The allegations herein contained are denied as if specifically traversed and the plaintiff is put to the proof thereof.

5.2 The defendant repeats the allegations made in sub-paragraphs 4.2 and 4.3 hereinbefore.

5.3 As a result of the plaintiff' s breach of contract as stated, it is pleaded that the plaintiff is not entitled to any payment as alleged or at all.

AD PARAGRAPH 6 THEREOF

6. The allegations herein contained are denied as if specifically traversed for the reasons stated above and the plaintiff is put to the proof thereof."

Suffice it to state that the plaintiff requested for further particulars in order to except or replicate to the defendant's plea. In providing the said further particulars the defendant stated, inter alia, as follows in paragraph 11:

" 11. Ad subparagraph 2.6 thereof.

The Government of Angola would have made payment in four equal instalments of which the first instalment was payable immediately whereas the second instalment was payable after the completion of the first quarter of the project. The third instalment would have been paid after completion of half of the project and the fourth instalment after completion of the project as a whole."

SUMMARY OF THE UNDISPUTED FACTS

The short facts which were common cause in this matter were the following. The defendant operated a company styled as Steel Construction and Maintenance in Rundu. Sometime in the year 2001 that company was doing some construction work in Katuitui. That was on the Angolan side of the common border between Namibia and Angola. The defendant hired the plaintiff, a company which also operated in Rundu, Namibia, to perform some work at Katuitui. The latter work entailed land clearing or constructing a parking area and also constructing a road at the border post. That work was done and payment for it was effected. There then followed another hiring between the parties. This time the plaintiff company was requested by the defendant to perform road construction work. In this connection one of the two directors of the plaintiff company, a Mr. D.C. Badenhorst (Badenhorst), submitted to the defendant a quotation in writing as per annexure "A" referred

to in the pleadings and which was produced as an exhibit in the *court a quo*. The quotation was couched in the following terms:

> "Roads in Angola.
>
> Herewith our quotation as follows:
>
> The rate is N$ 24,000.00 per km. This includes for bush clearing on the first 14 km and thereafter filling in trenches that cross the road due to water run-off with gravel material. The quantity of trenches at (+ or -) 3 per km. Any other work for example pipe culverts will be extra.
>
> All above is subject to the area being safe and sound without any danger to people and equipment. If equipment is to be lost due to riot or warlike acts they will be replaced and be paid under the contract. Also that we can use the bulldozer at the border post free of charge if we use our own diesel and operator.
>
> We hope you find the above in order."

The quotation was sent by facsimile dated 11 June 2001. The distance of road to be constructed and/or repaired was 118 km.

After acceptance of the quotation the plaintiff commenced construction of the road. That was towards the end of June or beginning of July 2001. When work was in progress, by oral consensual arrangement, the initial distance of 118 km was reduced to 75 km while the remainder was assigned to another contractor.

During the performance of work on the first 14 km landmines were encountered on a stretch covering 1 km. In fact some landmines were detonated and these damaged the bulldozer which was being operated on that stretch. It had to be repaired. Save for the 1 km aforesaid which had landmines, the rest of the 14 km was completed. Work proceeded up to the 75

km point as per the amended contract. The work actually done covered a distance of 74 km.

As the agreed charge was N$ 24,000.00 per km, the total charge for the 74 km actually completed was N$ 1,776,000. Out of that the amounts paid by instalments were the following:

1) On 7 September 2001, N$ 420,000
2) On 17 October 2001, N$ 420,000
3) On 8 December 2001, N$ 430,000

Thereafter payment stalled until 15 October 2002 when another amount of N$52,400 was paid.

It is necessary to highlight the fact that the parties were, as reflected in the pleadings, at one regarding payment of the first instalment. That was to be made immediately at the execution of the contract. As it is common cause that the performance of the contracted work began in June or beginning of July 2001 it stands to reason that the initial instalment was due either in June or early July.

FACTS IN DISPUTE

On the basis of both the pleadings and evidence there was a dispute regarding the capacity in which the defendant contracted. Whereas the plaintiff's main witnesses, Badenhorst and I.A. Maraun (Maraun), testified, in confirmation of the plaintiff's pleadings that the plaintiff contracted with the defendant

personally, Mr. Queiroz on the contrary swore that he contracted as an agent of the Angolan Government. As to stage payments the evidence on behalf of the plaintiff was that these were to be made in advance, with the first instalment being due immediately on conclusion of the agreement and the second, third and fourth instalments preceding commencement of all the four stages of contract work. Needless to record that the defendant's evidence was that while the first instalment was payable as pleaded and testified to on behalf of the plaintiff, the other three instalments were payable only after the completion of the stages of the construction.

The integrity of the contract is another bone of contention. The defendant charged that in as much as 1 km of the agreed 75 km road construction was not done, the plaintiff was in breach of the contract. Consequently the defendant's position was that the plaintiff's breach disentitled it to payment of the unpaid balance of the contract price. On the other hand the plaintiff counter-charged that the defendant was the party in breach. To buttress its position in this regard the plaintiff contended that it was a condition of the contract that the work place in which the performance of the contract was to be carried out had to be safe and sound, without posing danger to people or equipment. That condition notwithstanding, the defendant did not make the 1 km stretch free of the landmines which had even occasioned damage to equipment when work over that stretch was in progress. By 8 December 2001 when the plaintiff evacuated from the work place after reaching the 75 km peg, the landmines had not been removed to make the place safe as per the condition. Most importantly in as far as the plaintiff was concerned, its claim was for the price of the work actually done, namely road building or repair covering a distance of 74 km. The plaintiff contends that there was substantial

performance and therefore the failure or refusal by the defendant to pay was unjustified.

FACTS IN ISSUE

From the foregoing disputed and undisputed facts the issues which, in my view, ensue and fall to be determined are as hereunder listed:

1) Whether or not the defendant contracted in the capacity of an agent of the Angolan Government;

2) If the defendant acted as such agent, whether or not he disclosed to the plaintiff's representatives, Badenhorst and/or Maraun, at the time of negotiating the contract, that the defendant so acted as an agent;

3) Whether or not the agreed instalment payment scheme was that payments be made in advance of each stage performance, as the plaintiff contended, or in arrear, as the defendant claimed;

4) Whether or not, by reason of the fact that a one-kilometer stretch was undone, the defendant was discharged from his obligation to pay for that stage in which the one kilometer fell.

THE ARGUMENTS ON APPEAL AND MY EVALUATION OF FACTS

I must at the outset pay tribute to Messrs Mouton and Tötemeyer, Counsel respectively for the appellant and respondent. It is quite evident from the

state of the heads of argument they prepared for their clients and submissions they made before us that each of them put in considerable industry in their endeavour to assist this court arrive at an equitable settlement of this hotly contested judicial tussle. We are indebted to both of them.

In evaluating the facts of this case, it is important to stress that the issue of the defendant's status in the contract making process requires determination. This is because, firstly, it was raised in the defendant's special plea (see paragraph 2.2 thereof), and secondly because it was the subject of argument and submissions when we heard the appeal.

I shall now consider the submissions, together with the pertinent heads of argument on the first of the facts in issue listed above. That is the issue on whether or not the defendant contracted as an agent. In reviewing the submissions on this issue it is necessary first to refer to the rule of law which states that he who asserts the affirmative must prove. That is to say that the burden of proof rests on the party who substantially asserts the affirmative of the fact in issue.

In the present case the defendant averred in his special plea that he was an agent. He is thus the party who asserted the affirmative. The burden therefore rested on him to establish or prove that he acted as an agent at the material time. Mr. Mouton stated in his heads of argument the following:

> “D. Grounds of Appeal
>
> 6. It is submitted that his Lordship Mr. Justice Hannah, erred in having found that-

6.1 The agreement was concluded between the appellant and respondent as contractor and sub-contractor respectively.

7. The above submission by his Lordship Mr. Justice Hannah despite the following:

7.1 that exhibit "I" is a clear repetition and/or confirmation of the quotation given by the appellant to the respondent as embodied in annexure "A";

7.2 that Smeer being in the employ of the Respondent as a civil engineer and having been the site foreman and/or in charge of the construction of the road in Angola said his application for a work visa (exhibit "D") that the contracting institution is the Angolan Government. This is very relevant especially if one has regard to the fact that Smeer was also at times present during the negotiations that lead (sic) to the conclusion of the agreement."

Then in heading "E. Deduction of the facts" the following was stated on the defendant's behalf:

> "12. It is especially submitted that the Respondent was all along aware of the fact that the employer and/or principal was the Angolan Government or at least someone other than the Appellant himself."

In the first place, the judge in the court *a quo* showed in his judgment that he was fully cognisant of the contents of exhibit "I" and annexure "A". Annexure "A" was what was referred to in the plaintiff's particulars of claim as the written part of the contract (see para 5 of the particulars of claim). Annexure "A" was the facsimile dated 11th June 2001, addressed to the defendant and was signed by Badenhorst. It set out the charge rate for the work to be done, described what the work entailed and finally specified the condition that the work place had to be "safe and sound without danger to people and equipment." On the other hand exhibit "I" was the letter dated 1st August 2001 written by the

Angolan Consul at Rundu, Namibia. It was addressed for the attention of the defendant and its heading was " Re Budget." There was in it a reference to the plaintiff. Its content was in effect that there was a budget for the road construction work to be done between Katuitui and Candelele. It stated further that the distance to be covered was 118 km and that the charge was to be N$24,000 per km.

The trial judge considered the two documents. It was urged upon him that the one, Annexure "A", was the offer and the other, exhibit "I", the acceptance of the offer. The judge rejected that submission. He held that in fact the contract was concluded in June on the basis of annexure "A" and oral discussions held between the representatives of the plaintiff and the defendant. He also found it as a proved fact that the performance of the contract on the part of the plaintiff commenced at the end of June or at the beginning of July 2001. That finding of fact was consonant with the common ground between the parties. I consequently cannot see any justification for faulting the judge' s factual finding in this connection. The trial judge' s finding was, moreover, in keeping with the settled law that a contract comes into existence as soon as an offer has been accepted. In other words the plaintiff could only have started at the end of June or beginning of July because the offer in annexure "A" had been accepted. If exhibit "I" was the acceptance of the offer in annexure "A", then the commencement of performance by the plaintiff would have taken place on or after 1st August 2001.

It is granted that sometimes an offer is accepted "subject to contract." This is so, for example when a party to whom an offer has been made gives an acceptance, but states that he first wishes to seek the advice of his legal

practitioner before affirming his acceptance. But the mere qualifying of the acceptance in that way would give a warning signal to the offeree that he should hold back until clearance is given after the legal practitioner's advice has been sought. In other words, the offeree would not even in this qualified acceptance situation commence performance lest he should be informed later that the legal practitioner's advice was adverse.

In casu, the evidence given on behalf of the plaintiff was to the effect that the acceptance was given by the defendant directly. But the defendant testified that after receiving the offer as per annexure “A”, he first went to the Angolan Consul to seek instructions before conveying the acceptance. The trial judge factually held that that assertion by the defendant was not mentioned to the plaintiff’s representatives with whom the defendant was negotiating the contract.

It is therefore not surprising that the trial judge rejected the contention that exhibit “I” was the acceptance of the offer contained in annexure “A”. Consequently I hold that this was not even a case in which the acceptance was given subject to a contract to be formalized later. I endorse the factual finding of the trial judge that acceptance was given orally before commencement of the road construction work.

Regarding the role of Smeer, it is suggested on the defendant’ s behalf, that he participated in the negotiations of the contract. For that reason it was submitted that his statement in the visa application form that the Angolan Government was a contracting institution was evidence supporting the contention that that Government was the principal, vis-à-vis the contract and

that the defendant was its agent. The trial judge equally considered that argument, but he was not persuaded by it. Neither am I.

Mr. Smeer was asked whether the defendant's evidence that he disclosed expressly his status as an agent of the Angolan Government was drawn to his, Mr. Smeer's, attention. His answer was an emphatic NO. He was also asked whether he was concerned as to the identity of the parties to the subject contract. His reply was " I had actually nothing to do with any paper work whatever." These answers cannot be said to have been made by a witness who was stating a categoric fact, when he indicated in the visa application form, that the Angolan Government was a contracting party. In fact he explained the reason for his indication in the application form. He said that he stated that the Angolan Government was a contracting institution solely to facilitate his entry into Angola to perform the road construction.

It has been noted elsewhere in this judgment that in giving the requested further particulars the defendant averred that the fact of his being an agent was disclosed to a servant or official of the plaintiff company. The only servants of the plaintiff who gave evidence in the court *a quo* were Smeer himself and one Gideon Mandundu, the bulldozer driver during the road construction. None of these two gave evidence supportive of the defendant's averment on this point. It is therefore again not surprising that the learned trial judge discounted the defendant's contention to that end.

Another piece of evidence which Mr. Mouton sought to rely on in establishing that there was privity of contract between the plaintiff and the Angolan Government was in relation to reference No. 018. The submission was that in

his letter, exhibit “I”, the author thereof, namely the Angolan Consul had used “ Order No. 018.” Coincidentally and for an unexplained reason, the letter dated 15th August, 2002, from the plaintiff’s directors, was captioned “ Repair Maqueda-me Road, Order Number 018.” The effect of Mr. Mouton’s submission, as I understood it, was that the plaintiff’s reference to Order No. 018 was an affirmation of privity of contract between the Angolan Government and the plaintiff. That argument, in my judgment, was speculative. Even assuming that that reference was at the centre of the negotiations for the contract, the mere reference to it by the Consul in exhibit “I” and the repetition of it in Maraun’s letter aforementioned does not *per se* give a clue as to the parties to the contract under consideration. In fact there was no evidence placing Order No. 018 at the centre of the contract.

Much capital was also placed on that piece of evidence by Badenhorst that exhibit “I” showed that the defendant had taken the quotation in Annexure “A” further, which observation, it was contended on the defendant’s behalf, meant that the defendant, as an agent, took the matter further to his principal. In my view nothing much turns on that piece of evidence. The trial judge held that just as in the Katuitui border post works the defendant was the main contractor and the plaintiff the sub-contractor, the same relationship existed between the parties when the road construction was being consummated. I believe that on the recorded evidence in its entirety that holding by the judge was based on solid ground and correct. I agree with the judge. Indeed in a contractor and sub-contractor relationship there is an employer common to both the contractor and sub-contractor. It is the last named who, in the ultimate, pays not only the main contractor, but also the sub-contractor. In this type of relationship, therefore, it is not unusual that a sub-contractor should

express satisfaction when he learns that the main contractor had taken the sub-contractor's quotation to the employer.

On the totality of the recorded evidence the defendant was a lone voice in asserting that he acted as an agent of the Angolan Government when he contracted with the plaintiff's representatives. On the other hand, all the plaintiff's witnesses, Badenhorst, Maraun and Smeer, gave evidence the effect of which was that the defendant never at any time, expressly or by implication, disclosed that he was an agent. It is a matter of comment adverse to the defendant that, whether deliberately or through inadvertence, he failed to call a potential witness who might have affirmed the averment in the special plea that the defendant was truly a mere agent of the Angolan Government. In his testimony the defendant asserted that on a number of occasions during the negotiations he went to the Provincial Governor of Angola to seek instructions. I believe that that was same Governor who attended the meeting at the Safari Court Hotel when the dispute relating to the unpaid balance of the contract price was discussed. One would have thought that when it became critical to enlist the Governor's evidential assistance, at the time of the trial of the action in the court *a quo* and when the defendant was striving to establish that he was an agent, he would have called the said Governor as his witness. Why was the Governor never called, if I may ask a rhetorical question?

On the issue of agency, I started by recalling the statement of law to be found in Halsburys Laws of England that facts in issue which are necessary to establish a claim by a party, or in some cases the defence, and which have been alleged by one side but disputed by the other side are facts in issue. In the majority of cases such issues are determined by substantive law or depend

on pleadings. They require to be proved by the party who asserts them affirmatively. *In casu*, the agency issue was affirmatively asserted by the defendant. He was, therefore, the one on whom the burden of proof rested. The issue was forcefully asserted in the further particulars, but the evidence in support of it fell far short of the requisite standard of proof on a balance of probabilities. I therefore hold that the defendant did not succeed in proving that at the time of contracting with the plaintiff company' s representatives he was acting as an agent.

The determination I have arrived at would ordinarily strike a *coup de grace* against the defendant's special plea. The case would have ended at this stage, but in order to leave no stone unturned I shall nevertheless proceed to consider the remaining issues which are listed above as those needing to be determined. Accordingly the next issue I propose to deal with is whether or not, if the defendant was an agent, he disclosed to the plaintiff's representatives at the time of negotiating the contract, that he was so acting as an agent.

Reproduced hereunder are the further particulars which the defendant pleaded when he was requested to give further particulars as to whom, when and where he disclosed that he was acting as an agent.

> "1. Ad sub-paragraph 1.1 thereof
>
> The said fact was disclosed to the plaintiff during 2001, alternatively, was at all times relevant within the plaintiff's knowledge and/or was disclosed to the plaintiff by one of its own authorized employees and/or officials.
>
> 2. Ad sub-paragraph 1.2 thereof

> The said fact was disclosed to the plaintiff in Namibia, alternatively (in) Angola. It is stated that such fact was at all times relevant within the knowledge of the plaintiff alternatively, disclosed to the plaintiff by one of its own authorized employees and/or officials.
>
> 3. Ad sub-paragraph 1.3 thereof
>
> The defendant, alternatively a duly authorized official and/or agent of the Angolan Government, disclosed such fact to the plaintiff. It is stated that such fact was at all times relevant within the knowledge of the plaintiff and/or disclosed to the plaintiff by one of its own authorized employees and/or officials."

It suffices to state that in the said further particulars the defendant also added that he acted personally when the fact was disclosed to the plaintiff, adding further that the fact was disclosed both orally and in writing.

The same special plea was repeated in the defendant's heads of argument and subsequently in the submissions made by his counsel before this court. The following aspects were also included in Mr. Mouton's submission: the alleged linkage between annexure "A" and exhibit "I" ; the fact that the bull dozer used in executing the road construction was known by the plaintiff to have belonged to the Angolan Government. The foregoing were submitted as further indicators of the plaintiff having at all times relevant known that the defendant was acting as an agent.

In fact the arguments relied on in regard to the issue of disclosure of the defendant's status as an agent are intertwined with those relating to the first issue dealt with earlier herein. It is necessary in my view to evaluate the same arguments as they specifically relate to the second issue. It can be stated, however, that all the evidence given by the defendant aimed at proving that the plaintiff knew all along that the defendant was acting as an agent was

emphatically denied and refuted by the plaintiff's witnesses. Moreover, the argument referring to the Angolan Government as having been known to be the employer and/or principal can be a trap to the unwary and can lead to confusion.

An employer in the present context is not to be equated to a principal. For example all the plaintiff's witnesses knew very well that the Angolan Government was the employer: it was the one for the benefit of which the road was being constructed. But the plaintiff's witnesses, particularly Badenhorst and Maraun, testified that they knew that the Angolan Government was the employer in the context of contractor and sub-contractor scenario. These two witnesses expressly denied having known the Angolan Government as the principal for whom the defendant had been acting as an agent.

The trial judge considered this issue at great length in his judgment. It was the one issue which he considered to be critical and pivotal. In this regard he considered the law of principal and agent as stated in the ***Law of South Africa***, Volume I at paragraph 233 of the second edition. In accordance with that law, if an agent acts for an undisclosed principal, such agent may be sued in his own name, instead of that of the principal. It is evident from the judgment of the judge that the position of the Angolan Government as an employer was a known factor, but the judge held that the claim that the Angolan Government was the principal for whom the defendant acted as an agent was never disclosed to the plaintiff, not even to the plaintiff's directors, namely Badenhorst and Maraun.

The judge in the court *a quo* also considered the credibility of the witnesses, all the witnesses, he saw and heard regarding disclosure. He roundly rejected the defendant's evidence, and consequently found the defendant less credible than the plaintiff's witnesses.

It has often been stated that an appellate court does not have the same advantage which a trial judge enjoys of seeing and hearing witnesses as they give evidence in a trial. He is therefore in a better position to assess the credibility of such witnesses. Appellate judges should therefore be slow in interfering with a trial judge's assessment of witnesses' credibility, unless such assessment is found to be patently wrong.

Applying the foregoing standard to the present case, I entertain no cause to justify interference with the evaluation as to credibility which the judge in the court below made. I think that he dealt with the credibility issue competently. I therefore uphold his finding that the defendant did not disclose his claimed status as an agent of the Angolan Government. I consequently resolve the second issue in the plaintiff's favour.

The third issue is whether or not the agreed instalment scheme was that payments be made in advance of each stage performance, or in arrears. On this issue it is common cause that the payment was to be effected in four equal instalments, with the first instalment being made immediately upon execution of the contract. Unfortunately there was a dearth of evidence as to when the stages of performance were commenced or completed, save for the commencement of the first stage which was said – and this is common cause – to have been at the end of June or beginning of July, 2001. It is further

common cause that the first instalment was paid on 7th September 2001, which meant that on the agreed terms, the first payment was not made immediately upon execution of the contract. There being no evidence as to when the second and subsequent stages were commenced or completed it is not possible to determine precisely when the second and remaining instalments fell due for payment.

The averment that instalment payments were payable in advance was pleaded by the plaintiff. Therefore the burden to prove that averment rested on the plaintiff. However, because of there being no evidence of when the stages of performance began or ended, I hold that the plaintiff did not discharge its burden in this regard. I hasten to add, however, that the third issue is inconsequential as regards the overall result of this appeal.

The fourth and last issue to be considered and determined is whether or not, by reason of the fact that a one kilometer stretch of road was not constructed and/or repaired, the defendant was discharged from his obligation to pay for that stage in which the one kilometer stretch fell.

There can be no doubt in this case that according to the contract which was executed by the parties, the plaintiff was required to construct and/or repair 118 kilometers of the Maqueda-me road between Katuitui and Candelele in Angola. However it is common cause that during the performance of the works aforesaid, by an oral amendment the distance to be covered was reduced to 75 kilometers. The remaining stretch of 43 kilometers was allocated to another contractor. It is also common cause that the plaintiff completed work stretching over 74 kilometers.

The reason for not completing the one kilometer has already been alluded to and I shall only concisely refer to this presently. For the time being it is necessary to mention that the plaintiff's claim is for the price of work actually done on the 74 kilometers.

The contract concluded between the parties was subject to a condition mentioned in annexure "A". Performance of the contract "was subject to the area being safe and sound, without any danger to people and equipment." It is undisputed that during the performance of work on the first 10 or 14 kilometers the bulldozer being used by Gideon Mandundu, the plaintiff's driver, struck landmines. This happened three times. In the process the bulldozer was put out of action and had to be replaced. By mutual agreement the one kilometer landmined area was temporarily abandoned. Work continued on the remainder of the road until the 75 kilometers peg was reached. That was towards the end of November 2001. The plaintiff did not leave the site until about 8th December.

At the time of skipping the one kilometer landmined stretch it was agreed, according to the evidence, that work would be concluded there after the landmines were removed and the place made safe and non-dangerous. The learned trial judge held as a fact that by the time the plaintiff evacuated from the site on or about 8th December the one kilometer stretch had not been cleared of the landmines. That finding of fact was not impugned in the submissions made on behalf of the defendant in this court. I therefore accept that the defendant did not sweep or cause to be swept the landmines which had constituted danger to people and equipment. The defendant's duty to

ensure that such safety was guaranteed was a cardinal condition of the contract.

As to the 74 kilometers which were completed and handed over to the defendant, there was no dissatisfaction expressed as to the competence and standard of workmanship with which the plaintiff did its work. In English common law, as long as there is substantial performance by a contractor, the contractor is entitled to the stipulated price, subject only to a cross-action or counter-claim for omissions or defects in execution: See ***Bolton v Mahendra*** (1972) 2 ALL ER 1322. This same principle has been applied as part of South African Law. I reproduce hereunder a passage occurring at page 480 of ***Wille's Principles of South African Law***, 8th edition, authored by Dale Hutchison and three others:

> "*Incomplete or defective performance*
>
> Where the plaintiff has performed his reciprocal obligation but in an incomplete or defective manner he is guilty of a breach of contract, which gives rise to the normal contractual remedies, including cancellation of the contract in the shortfall or defect is sufficiently serious. If the defendant does not cancel the contract he is entitled to insist on complete and specific performance of the contractual obligation. He may therefore raise the *exceptio non adimpleti contratctus* to ward off a claim for counter-performance regardless of the extent of the shortfall or defect (subject only to the rule '*de minimis lex non curat*'; but he must then naturally afford the plaintiff an opportunity to rectify his performance. If the plaintiff is unable or unwilling to do so he has no automatic right to compensation for the defective performance that he has made; however, the court may in the interests of fairness relax the principle of reciprocity, refuse the *exeptio* and order the defendant to make a suitably reduced counter-performance (generally, the contract price less the amount necessary to remedy the defect or shortfall). The court may exercise its discretion to make such a reduced award even if the plaintiff knowingly and *mala fide* departed from the terms of the contract, but in all cases it will do so only if the plaintiff proves (i) that the defendant is utilizing the defective or incomplete performance; (ii) that circumstances exist making it equitable for the court to exercise its discretion in his

> favour; and (iii) the cost of remedying the defect or shortfall, so that the reduced counter-performance may be determined.
>
> The claim for a reduced counter-performance is based on the contract, not on enrichment, and can be brought only when the contract is not validly cancelled. Where the defendant cancels the contract and retains the benefit of the defective or incomplete performance the plaintiff may be able to recover compensation on the basis of unjustified enrichment."

In the present case, it is evident that the defendant accepted the incompletely constructed road. The cost of remedying the shortfall in the constructed road is mathematically calculable. This is because under the contract the price payable was N$24 000 per kilometer and the uncompleted road measured 1 kilometer. In point of fact the plaintiff has already taken into account the aspect of what it would cost the defendant to remedy the shortfall. This the plaintiff did by claiming payment only for the work actually done.

It is my considered opinion that circumstances do exist in this case making it equitable for the Court to exercise its discretion in the plaintiff's favour as the following facts show:

(a) the skipping of the one kilometer was mutually agreed because of the danger posed by the landmines.

(b) After completing the work actually done towards the end of November 2001, the one kilometer was still uncleared of the landmines.

(c) It was a cardinal term of the contract that the defendant had to ensure that the work place was safe and sound so as not to pose danger to people or equipment.

(d) The situation described in (b) above was still obtaining by 8th December when the plaintiff moved from the site.

In the light of the foregoing, the argument on the defendant's behalf that because the plaintiff did not complete the controversial one kilometer stretch the plaintiff should forfeit its right to the relief claimed runs counter to the principle enunciated by the authors of ***Wille's Principles of South African Law***, *supra*; it is indefensible. The defendant cannot have his cake and eat it: having accepted the actual work done it would be inequitable for him to refuse to pay for it. So refusing would amount to unjustified enrichment.

Before I conclude this judgment I must refer to the question which was raised *in limine* regarding whether or not this court should condone the defendant's non-compliance with the relevant rules of procedure applicable to the prosecution of appeals to this court. In the light of the fact that this court heard the appeal without first delving into the said preliminary question, it would be a mere academic exercise to purport to do so at this juncture. I need say no more on this question, therefore.

Adverting to the appeal, I hold, in the light of the conclusion I have come to, particularly on the principal issues raised by the special plea of the defendant, that this appeal lacks merit. I would dismiss it and in doing so I make the following orders:

1. The appeal is dismissed.

2. After giving credit for the payments which the defendant made before this cause was instituted in court, I grant the plaintiff's claim in the sum of N$453,000.

3. The defendant to pay :

3.1 Interest *a tempore morae* on the sum of N$506,000 at the rate of 20% per annum as from 9th December 2001 until 14th October, 2002;

3.2 Interest *a tempore morae* on the amount of N$453,000 at the rate 20% per annum as from 16th October, 2002 to the date of payment.

3.3 Costs of one instructing legal practitioner and one instructed counsel.

_____
CHOMBA, A J A.

I agree

_____
SHIVUTE, C J

I agree

_____

O’ LINN, A J A

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