NOT REPORTABLE

CASE NO: I 394/2005

IN THE HIGH COURT OF NAMIBIA

HELD AT WINDHOEK

In the matter between:

FACTCROWN LIMITED **PLAINTIFF**

and

NAMIBIA BROADCASTING CORPORATION (PTY) LTD
DEFENDANT

CORAM: **HOFF, J**

Heard on: 07 – 11 June 2010; 14 June 2010; 03 May 2011;
05 – 06 May 2011; 09 May 2011;

Delivered on: 10 May 2011

Reasons on: 13 December 2011

JUDGMENT

HOFF, J: [1] The claim of plaintiff against the defendant for specific performance of a contract appears from the particulars of claim which reads as follows:

On or about the 12th of December 2001 the plaintiff and defendant entered into a written agreement, annexed hereto marked "A", of which the express terms were the following:

The plaintiff shall supply and deliver to the defendant FM, TV and other `electronic equipment (the equipment) for defendant's stations at Okongo, Omega, Kongola, Kamanjab, Sesfontein, Gam, Bethanie, Maltahohe and Aus.

Such supply and delivery to take place at anytime before the expiry of 10 years from the date of the agreement and in any event within 6 months from date of receipt by plaintiff of the first down payment of the contract price.

Further it was an implied term of the agreement between the parties that defendant would place orders for the equipment with the plaintiff to the exclusion of other suppliers in respect of the equipment; whereupon only the obligations of the plaintiff to supply and deliver would be triggered.

Plaintiff is and was at all material times ready and able to comply with its obligations under the contract and had called upon defendant to comply with its obligations under the contract.

Despite demand, defendant refuses to comply with its obligations under the contract; specifically refusing to place orders with plaintiff for the delivery of the equipment, to the exclusion of other suppliers.

WHEREFORE PLAINTIFF CLAIMS:

(a) An order that defendant take all necessary steps to comply with its obligations under the agreement; specifically, that defendant places orders with plaintiff for the delivery of the equipment to the exclusion of other suppliers.

(b) Costs of suit.

(c) Such further and alternative relief as to the Court seems fit.

[2] The defendant in an amended plea pleaded as follows on the merits:

AD PARAGRAPHS 1 – 5 THEREOF:

The defendant admits that the agreement marked annexure A, was signed by Dr Ben Mulongeni ("Mulongeni"), the erstwhile Director General of the defendant and Mr Setima Benebo on behalf of the plaintiff on 12 December 2001.

The defendant admits that it refuses to place any orders with the plaintiff in terms of this agreement and has never done so.

The defendant pleads that the agreement is not enforceable for the following reasons:

Mulongeni, who signed the agreement when he was the duly appointed Director-General of the defendant, did not have the authority of the defendant's Board of Directors (which Board is established in terms of the Namibian Broadcasting Act, No. 9 of 1991) to conclude the agreement with the plaintiff.

Mulongeni accordingly acted *ultra vires* his powers as Director-General of the defendant at the time.

Mulongeni further signed this agreement with the plaintiff despite specific instructions from the defendant's Board of Directors that the agreement should not be concluded without express Board approval.

On 16 November 2001 Mulongeni in his capacity as Director-General of the defendant cancelled a previous agreement concluded on 29 January 2001 between defendant and Harris Corporation (a corporation duly registered and incorporated in accordance with the applicable laws of the United Kingdom with registered address at Eksdale Road, Wokingham, Berkshire, UK), which terms and conditions were made applicable in the agreement with the plaintiff, despite the express instructions from the defendant's Board of Directors that the agreement between Harris Corporation and the defendant be honoured. A copy of the agreement with Harris Corporation is annexed hereto and marked "N1".

The defendant is an organ of the State, and the terms of the agreement sought to be enforced by the plaintiff is contrary to public policy for the reasons advanced in paragraph 4 of the plea.

The defendant is accordingly not bound by the terms of this agreement which is not enforceable in the circumstances.

The defendant further pleads that the agreement is also not enforceable between the plaintiff and the defendant for the following reasons:

The plaintiff never tendered for the supply and delivery of the FM and TV and other electronic equipment for the stations: Okongo, Omega, Kongola, Kamanjab, Sesfontein, Gam, Bethanie, Maltahohe and Aus.
The plaintiff never complied with any of the tender procedures or specifications required by the defendant in terms of Tender 25/2/1998 for the supply of FM and TV broadcasting equipment.

The defendant called for tenders (Tender 25/2/1998) for the supply and delivery of various FM and TV and other electronic equipment for the stations Okongo, Omega, Kongola, Kamanjab, Sesfontein, Gam, Bethanie, Maltahohe and Aus on 5 February 1998.

The defendant awarded the tender to Harris Corporation as per offer No. Harris 949622, after Harris Corporation's tender was considered and accepted by the defendant's Tender Committee and Board of Directors. The award was communicated to Harris Corporation on 11 January 1999. A copy of the defendant's award is annexed hereto and marked "N2"

Mr Setima Benebo, acting on behalf of plaintiff, and previously a representative of Harris Corporation was at all material times aware that Mulongeni was not entitled to conclude the agreement with the plaintiff without approval by the defendant's Board and without following the necessary tender procedures of the defendant.

Pursuant to the award of the tender, the defendant concluded annexure "N1" with Harris Corporation based on its accepted tender specifications on 21 January 2001.

The agreement between plaintiff and defendant, however, records that the parties had come to an understanding for the plaintiff to deliver the

equipment and services to the defendant on the same terms as Annexure "N1", alternatively the Tender.

The agreement between the plaintiff and defendant does not comply with the terms agreed as per Annexure "N1", alternatively the Tender in material respects, and in particular does not comply with the following terms:

The contract sum in terms of the Harris agreement was the amount of US$11,528,633,89, BEAMA rates excluded, including all costs pertaining to taxes, transport and insurance to and in Namibia;

The BEAMA rate would become applicable from 7 July 1999;

Payment by defendant would be undertaken in the form of an irrevocable letter of credit or a bank guarantee for a minimum of 50% and a maximum of 70% of the defendant's yearly Government allocated capital funds which are earmarked for the transmitter network expansion for that specific financial year.

The supplier of the equipment would be Harris Corporation.

The defendant accordingly pleads that in any event, there was no acceptance by the defendant of the terms of the agreement signed by Mulongeni.

The defendant pleads, in any event, that there was a further term and condition precedent to the operation of the contract as a whole, which term was that the plaintiff would be required to obtain the necessary funding to be allocated towards the performance of this contract, alternatively that the defendant would assist in obtaining the said funding for the following reasons:

the tender called for by the defendant which gave rise to and is contained in the preamble to the contract stated specifically that it concluded an invitation to submit a technical and financial proposal for the expansion of the defendant's transmitter network (see annexure "**A**" hereto);

the plaintiff represented by Mr Benebo was at all material times aware that the contract would come into operation only once the necessary funding

was received by the defendant, hence the inclusion of a financial proposal in the tender;

it was the common intention of the parties that the operation of the contract was dependent upon the allocation of the funds;

Mr Benebo acting on behalf of the plaintiff attempted to consult with various cabinet ministers in order to assist with the obtaining of the necessary funds as per tender requirement;

the plaintiff has not sought to enforce the contract for a period of approximately two years from date of conclusion thereof because Mr Benebo was aware of the difficulties experienced by the defendant to obtain the necessary funding;

the defendant has to date not been able to obtain the necessary funds as a result of which this term has not been fulfilled and the contract is void.

AD PARAGRAPH 6 THEREOF:

The defendant admits demand but denies that it is bound by the agreement for the reasons advances.

WHEREFORE the defendant prays for an order dismissing the plaintiff's claim with costs.

[3] The plaintiff called three witnesses namely Mr Setima Benebo, Dr Ben Mulongeni, and Mr Vitura Kavari.

At the closure of its case the defendant applied for absolution of the instance on the basis that there is insufficient *prima facie* evidence on which this Court could find for the plaintiff on the basis of the replication of estoppel.

[4] The plaintiff in its replication *inter alia* pleaded that in the event of it being found by this Court that Dr Ben Mulongeni acted without authority and/or

approval of the defendant's Board of Directors, and/or contrary to the Board's express instructions and/or *ultra vires* his powers as Director-General of the defendant at the relevant time that on numerous occasions prior to and after entering into the Factcrown agreement between the plaintiff and the defendant, the defendant by words and/or conduct intentionally, alternatively negligently presented to plaintiff through its officials, inclusive of Dr Ben Mulongeni, that Dr Ben Mulongeni had the authority to enter into the Factcrown agreement on behalf of the defendant with plaintiff.

[5] In addition plaintiff pleaded that at the relevant time plaintiff was *bona fide* in dealing with the defendant in concluding the Factcrown agreement was and unaware that Dr Ben Mulongeni required the authority and/or approval of the defendant's Board of Directors, and/or was acting contrary to the Board's express instructions and/or was acting *ultra vires* his powers and/or mandate as Director-General of the defendant and that plaintiff was accordingly entitled to assume that the defendant's internal requirements referred to in paragraph 3 of the defendant's amended plea had been properly and duly complied with when the Factcrown agreement was concluded and thus the defendant is accordingly bound by the Factcrown agreement concluded with plaintiff, irrespective of the fact that defendant's internal requirement had not been properly and duly complied with.

[6] This Court was referred to the case of *Bidoli v Ellisron t/a Ellistron Truck and Plant* 2002 NR 451 HC at 453 D et seq where Levy AJ restated the test to be applied in an application for absolution of the instance at the close of plaintiff's case as follows:

> "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 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.
>
> Mr *Dicks* argued that the plaintiff in the instant case had made out a *prima facie* case. I doubt whether a plaintiff has to go that far to escape absolution.
> If a reasonable Court keeping in mind the pleadings and the law applicable, considers that a Court 'might' find for the plaintiff, then absolution from the instance must be refused."

[7] See also *Aluminium City CC v Scandia Kitchens & Joinery (Pty) Ltd* 2007 (2) NR 494 at 496.

[8] The question for determination is whether at this stage there is evidence to at least have the potential for a finding in favour of the plaintiff.

Background

[9] It is common cause that after the Namibian Broadcasting Corporation (NBC) had called for tenders (Tender 25/2/98) for the supply and delivery of various FM and TV and other electronic equipment for certain stations a contract was signed in terms of which Harris Corporation would provide the equipment as per NBC Tender 25/2/98.

In terms of this contract signed on 29 January 2001 the contract period was 10 years, the contract price was US$11 528 633.89 and the payment by NBC would be done in the form of an irrevocable letter of Credit or a Bank Guarantee for a minimum of 50% and a maximum of 70% of their yearly government allocated capital funds which were earmarked for the Transmitter Network Expansion for that specific financial year.

[9] The first letter of credit or Bank Guarantee for the financial year 2001/2002 would be established soon after April 2001 to purchase part of the equipment required by NBC.

[10] The supplier of the equipment would be Harris Corporation.

[11] Mr Benebo was the representative of Harris Corporation in Namibia at that stage.

[12] Subsequent to the signing of the contract in January 2001 there was a exchange of correspondence between Harris Corporation and Setima Benebo and in a letter dated 4 April 2001 Harris Corporation informed the NBC that there was no international dealer agreement between the company Factcrown Ltd and Harris Corporation and that Factcrown Ltd could not legally act as the Harris Dealer.

There seems to have been a dispute between Harris Corporation and Mr Benebo regarding commission that was due to Mr Benebo. There was also an exchange of letters between NBC and Harris Corporation on this issue. There was also an exchange of letters between the NBC Board and Dr Ben Mulongeni on the same issue.

[13] The minutes of a NBC Board meeting reflected that on 8 October 2001 the Board resolved that it was legally bound to honour the agreement with Harris Corporation signed in January 2001 and that all payments due to Harris Corporation should be paid with immediate effect.

[14] In a letter dated 16 November 2001 and signed by Dr Ben Mulongeni in his capacity as Director-General of the NBC Harris Corporation was informed that the "Memorandum of Agreement" signed on 29 January 2001 was terminated due to the apparent failure on the part of Harris Corporation to find an amicable solution to the dispute between Factcrown Ltd and Harris Corporation.

[15] In a letter dated 10 December 2001 and addressed to the Prime Minister of Namibia Harris Corporation appointed Factcrown Ltd as a distributor for Harris Broadcast equipment in Namibia.

[16] In a letter dated 12 December 2001 Harris Corporation informed Dr Ben Mulongeni that Harris Corporation was in agreement that Factcrown enters into an agreement with NBC for the supply of Harris equipment for the transmitter expansion project and that the agreement of 29 January 2001 was to be considered to be cancelled.

[17] On 12 December 2001 the NBC as represented by Dr Ben Mulongeni entered into a contract with Factcrown Ltd in which the parties agreed that Factcrown Ltd would use its best endeavours to provide the equipment to NBC as per NBC Tender 25/2/98 "on the terms and conditions of this contract".
It provided *inter alia* that Factcrown shall deliver the equipment within a period of 6 months from the date of the first down-payment of the contract price.

The contract price was the amount of US$12 million including all costs pertaining to taxes, transport and insurance to and in Namibia.

[18] Furthermore payment by NBC to Factcrown would be done by transfer of an amount equivalent to the value of the equipment advised by Factcrown from time to time as being ready for delivery.

[19] In addition Factcrown was required to deliver the equipment of the type described in the tender document form any manufacturer whose equipment meets the description of the equipment as defined in the Tender document.

[20] On 21 January 2002 the NBC Board resolved that the Director-General may not sign the "new NBC/Harris contract" without the expressed permission in writing from the Board.

[21] On 31 October 2003 the Director-General of the NBC at that stage Mr Gerry W Munyama addressed a letter to Mr Benebo in which he was informed that the agreement entered into between NBC and Factcrown was regarded by the NBC as null and void and on 6 November 2003 the legal practitioners acting on behalf of Factcrown Ltd demanded performance from the NBC in terms of the contract concluded between the parties on 12 December 2001.

[22] The first issue which in my view needs to be considered is whether Dr Ben Mulongeni when he signed the Factcrown contract on behalf the NBC, he acted without approval or authority of the defendant's Board of Directors or *ultra vires* his powers or mandate as Director-General of the defendant and the plea raised by plaintiff that the defendant by words or conduct intentionally or negligently

represented to the plaintiff through its officials including Dr Ben Mulongeni that he had the authority to enter into the Factcrown agreement on behalf of the defendant and the plea of estoppel.

[23] It was not denied by Mr Benebo that he was aware at that stage that the NBC had a Board of Directors. Mr Benebo however testified that from his experience Boards of Directors are concerned with the formulation of policies and that top management which would include the Managing Director of a company would execute policies. Mr Benebo also testified that his understanding of a letter dated 26 November 1998 and addressed to him from the office of the Director-General of the NBC was that in respect of tenders it was the NBC Board which has to make a decision to whom to allocate a tender and not the Director-General, Dr Ben Mulongeni.

[24] It is common cause that after the cancellation of the Harris agreement no fresh tender was invited by the NBC in respect of the supply of equipment referred to in Tender 28/2/98 and consequently Factcrown Ltd never placed a tender for the supply of the said equipment prior to concluding a contract between NBC and Factcrown Ltd.

[25] It is clear from Exhibit BH that during a Board meeting held on 10 September 2001 during a discussion of the NBC/Harris contract that Dr Ben Mulongeni had informed the meeting that he had “instructed the Controller: Finance to withhold payment to Harris until the dispute between the latter and Mr Benebo has been resolved”.

During the same meeting the Board subsequently decided that NBC was bound to honour the agreement with Harris signed on 29 January 2001 and that all payments due to Harris should be paid with immediate effect.

[26] There is no evidence that the Board subsequently at any stage authorized Dr Ben Mulongeni to cancel the agreement with Harris Corporation or that the Board authorised Dr Ben Mulongeni that he may enter into a new contract with Mr Benebo of Factcrown.

[27] The defendant requested further particulars to the plaintiff's replication namely on exactly which occasions prior to the conclusion of the agreement between Factcrown and the NBC were the representations as alleged made and exactly who the officials were and what words were used by those officials indicating that Dr Ben Mulongeni had the authority to enter into the contract without the approval of the Board.
The response of plaintiff was that the particulars requested were not strictly necessary to enable the defendant to plead and/or tender amount in settlement and were thus refused.

[28] In paragraph 2.2.2.1 of the replication plaintiff pleaded that the officials of the defendant including Dr Ben Mulongeni never indicated that the authority of defendant's Board of Directors was required before any agreement was entered into between plaintiff and the defendant and in paragraph 2.2.2.4 plaintiff pleaded that Dr Ben Mulongeni, as the Director-General, Chief Executive Officer and member of the Board of Directors of the defendant in a very senior position with a high level of authority entrusted to him in such a position by the

defendant – made the express representation in signing the Factcrown agreement that in so doing he acted on behalf of the defendant.

[29] During cross-examination in response to a question whether Dr Ben Mulongeni did not tell him that the Board of Directors wanted him (i.e. Dr Ben Mulongeni) to honour the NBC/Harris agreement Mr Benebo replied that he could not remember Dr Ben Mulongeni told him that but added that he knew that Dr Ben Mulongeni faced a lot of pressure from different quarters over that project. Mr Benebo further testified that he was aware of a reorganisation in the NBC and that Dr Ben Mulongeni informed him that they (i.e. NBC) was trying to work an exist strategy for Dr Ben Mulongeni but that he (Dr Mulongeni) was not going to leave quietly.

[30] Mr Benebo was also cross-examined regarding the occasions on which representations were made to him that Dr Ben Mulongeni had the authority to enter into the Factcrown agreement his response was that it occurred on various occasions and in particular referred to an occasion in the office of Dr Ben Mulongeni in the Northern Industrial area though he could not remember the date when Dr Ben Mulongeni told him that he (i.e. Dr Mulongeni) was a fighter, that they fought for the independence of Namibia, that he
(i.e. Dr Mulongeni) would see that the project is carried out, that NBC was committed to the project and that he (i.e. Mr Benebo) should not worry about it.

[31] The response of Mr Benebo to the question which words were used and which conduct indicated that the defendant and its officials made intentional or negligent representations prior to the conclusion of the Factcrown agreement he testified that he could not remember the different occasions, but that Dr

Mulongeni would call Mr Kavari and Mr David Sitter to his office and that they would talk about the contract and that they wanted the project to go ahead and that NBC would get the Harris equipment.

When asked to relate to the occasions after entering the agreement where it was represented to him through the NBC's officials that Dr Ben Mulongeni had the authority to conclude the agreement with Factcrown Ltd, Mr Benebo replied that Dr Ben Mulongeni said that the project would go ahead but that there was restructuring and that he (i.e. Dr Mulongeni) was likely to leave the NBC but that he (i.e. Mr Benebo) should have no fears because they (i.e. NBC) would honour their agreement.

[32] Dr Ben Mulongeni testified, with reference to the Board meeting minutes which reflected that he was not to sign a new NBC/Harris Corporation contract without the express permission in writing from the Board, that there was a disagreement to honour agreement as per tender and that he did not need internal permission from the Board to sign a new contract since he had the authority to sign a new contract based on the original tender and that there was no other tender.

Dr Ben Mulongeni did at one stage concede during cross-examination that where the Board approves that a tender is awarded to a successful applicant it would flow from this that the Board would also approve that the contract be signed with the successful applicant.

During further cross-examination with reference to the NBC/Harris contract which stated that Dr Mulongeni was "duly authorised" he conceded that he was authorised to sign the contract by the Board.

During cross-examination Dr Mulongeni was asked whether he had the authority of the Board to sign a contract with Factcrown which was a separate legal entity he replied as follows: (p. 604 of the record).

> "Can I tell you why that is the situation ? Because when I signed I still signed to honour Harris tender that is the contract with Factcrown is a contract not a tender. I will never go to Factcrown to tender. We never opened, because you want to see there is a new tender, there is no new tender because the tender still remained that one which was signed with Harris and then they start fighting among each other, Benebo still the same person then they turned back, they went together and then we signed with Factcrown because it is representing Harris …"

[33] During cross-examination reference was made to the minutes of the Board dated 4 July 2000 (Exhibit BE) in which it appeared that a Namibian company claimed to provide the same equipment at half the price Harris Corporation tendered and that the Board should now investigate and explore the possibility of cancelling the Harris contract and also how much it will cost the NBC to tender. Dr Mulongeni's reply (at p. 609 - line 18) was as follows:

> "How am I going to give this job to the meanwhile company at half price, through what channel ? So for me that Board too was doing the wrong thing to award jobs without tender, that is how this inside contradiction came from."

and further on (p. 618- line 6) Dr Mulongeni said the following:

> "Yes, but the Board does not sign, they have to instruct me to sign to terminate it and I think it is unlawful.
>
> Yes what is unlawful about that, the Board asking you to explore the possibility of cancelling / --- I did explore. As I said I did explore he went

> back with the management and I said once again I was advised that was a dangerous thing to do.
>
> Were you advised it was unlawful ? --- Yes, because already the tender was won by one company and I cannot turn around and give the work to SATCOM without tender. I do not want to ask those questions.
>
> But you turned around and gave the agreement, the contract to Factcrown an outside company --- No, the tender was already awarded to Harris because Factcrown was going to work with Harris that was my understanding, yes that is it."

[34] Dr Mulongeni was aware of the fact that once a tender has been cancelled new tenders would need to be invited. He testified as follows on pp. 627 and 628 of the record:

> "I was suppose to cancel the Harris tender and award it, not even award it and just give job to SATCOM without going on tender. If I have to cancel the Harris tender, Your Lordship understand I was going to call again on tender if that was viable, if that was allowed."

[35] The Board minutes of 8 October 2001 reflect that the CEO should honour the agreement with Harris Corporation.

Dr Ben Mulongeni when confronted with the question who gave him the authority to cancel the Harris agreement by way of a letter dated 16 November 2001, was very evasive and could give no plausible explanation except to state that he had the authority to write to people who are fighting to tell them that the fighting should come to an end.

[36] Dr Ben Mulongeni in a further attempt to explain why in spite of the fact that the Board had ordered him to honour the Harris agreement he subsequently terminated the contract between NBC and Harris Corporation testified that he did

not cancel the Harris agreement but only warned Harris Corporation about their "dirty dealing" (p. 716).

[37] Dr Ben Mulongeni also could give no answer why he failed to inform the Board that he had signed a contract with Factcrown on 12 December 2001.

[38] Mr Kavari testified that under normal circumstances the Board should be kept informed of any change in the status of a contract.

[39] Mr Victor Kavari who inter alia served as Head of the Department of Auxiliary and Support Services and later as Head of the Department Administration and Human Resources testified that there existed grey areas between the three structures of the NBC leadership viz. line Ministry, the Board and the Executive Management and that for the ten years he had been employed by the NBC there was no consensus as to the interpretation of what the Board controls and manages in respect of the NBC affairs, that it was a contentious issue and that they could have informed Mr Benebo about this situation.
Mr Benebo knew that there were some intrigues in the NBC and that Dr Mulongeni had problems with the NBC Board.

[40] Mr Kavari further testified that he did not tell Mr Benebo that Dr Mulongeni was authorised to conclude an agreement with Factcrown without any recourse to the Board.

[41] Dr Mulongeni's justification for not complying with the instructions of the Board that the Harris agreement should be honoured is misplaced, without any foundation and is devoid of any logic.

[42] Dr Mulongeni testified that he needed not follow the instructions of the Board because the Board tried to do something illegal. The illegality referred to according Dr Mulongeni was the possibility of cancelling the Harris agreement in view of the suggestion that SATCOM could provide the same equipment at half the price. This instruction was given quite some time *prior* to the direction by the Board that the Harris agreement should be honoured.

It appears to me that Dr Mulongeni's reasoning was as follows: The NBC Board illegally in the past tried to award the tender to SATCOM; therefore he is not obliged to even comply with a lawful and legitimate request from the Board of the NBC !.

[43] It appears from the evidence led on behalf of the plaintiff that Dr Mulongeni had no authority from the NBC Board of Directors to cancel the Harris agreement and had no authority to conclude any contract with Factcrown.

[44] I was unable to conclude from the evidence led on behalf of the plaintiff that the defendant generally or in specific instances conducted itself as if Dr Mulongeni had the required authority to conclude the Factcrown agreement on behalf of the defendant, neither that the plaintiff was induced to its detriment to enter into the Factcrown agreement with the defendant holding out that Dr Mulongeni had the necessary authority to enter into such agreement on behalf of the defendant.

[45] In my view it does not appear from the evidence led on behalf of the plaintiff that Mr Benebo was unaware that Dr Mulongeni required the authority or approval of the defendant's Board of Directors to enter into the Factcrown agreement, or that he (i.e. Dr Mulongeni) was acting *ultra vires* his powers as Director-General.

[46] Mr Beneb must have been aware of the fact that Dr Mulongeni did not have the authority to enter into the Factcrown agreement and must have been aware of the fact that Dr Mulongeni could be acting *ultra vires* his mandate for the following reasons:

firstly, he knew that Factcrown did not tender in respect of the tender invitation 28/5/98 and that logically the Board of the NBC did not approve any tender in favour of the plaintiff.

secondly, the Factcrown agreement which was signed was not on the same terms and conditions as the Harris agreement (e.g. there was an increase in the purchase price, there was no bid bond security by the plaintiff, there was no need to supply Harris manufactured equipment).

thirdly, he was aware of the existence of "grey areas" in respect of the powers of the NBC Board, the line Ministry and the Director-General.

fourthly, he was aware of the fact that Dr Mulongeni faced a lot of pressure from different quarters over the project.

fifthly, that Mr Benebo was a seasoned international businessman and

sixthly, regarding the relationship between Mr Benebo and Dr Mulongeni with regard to certain private business interests to the extent that Mr Benebo was permitted to draft certain letters for Dr Mulongeni in his capacity as Director-General it is highly likely that they had

discussed the intrigues and the problems Dr Mulongeni had with the Board in much more detail that they would have the Court to believe.

[47] It is trite law that the onus to establish estoppel is on the party who pleads it.

[48] In *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others* 2002 (1) SA 396 (SCA) at 411 H the following appears:

> "Where a principal is held liable because of the ostensible authority of an agent, agency by estoppel is said to arise. But the law stresses that the appearance, the representation, must have been created by the principal himself."

and at 411 I – J to 412 A the following appears:

> "It is also necessary that the representee should have acted reasonably in informing that impression: *Connock's (SA) Motor Co Ltd v Sentraal Westelike Ko-operative Maatskappy Bpk* 1964 (2) SA 47 (T) at 50 A – D."

In *Connock's* case at 51 A the following appears:

> "The effect of all those decisions is that the reasonable man postulated by our law in estoppel based on unintentional conduct must have regard not only to the representee's but also the representor's circumstances."

[48] In the *NBS Bank* case the requirements which must be met for estoppel to operate were enumerated as follows on p. 412 C – E:

"(a) a representation by words or conduct,
(b) made by the principal and not merely the agent that he had the authority to act as he did,
(c) a representation must be in a form that the principle should reasonably have expected that outsiders would act on the strength of it,
(d) reliance by the representee on the representation,
(e) the reasonableness of such reliance, and
(f) consequent prejudice to the representee.

[49] In *Glofinco v Absa Bank Ltd t/a United Bank* 2002 (6) SA 470 (SCA) at 481 C – D the court expressed itself as follows regarding the question of representation:

> "The appointment by a bank of a branch manager implies a representation to the outside word. The representation, to the knowledge of the bank is that the branch manager is empowered to represent the bank in the sort of business (and transactions) that a branch of the bank and its manager would ordinarily conduct. The notion of 'ordinarily' in turn implies a qualification in the form of a limitation: that the branch manager is *not* authorised to bind the bank to a transaction that is not of the ordinary kind. What the ordinary kind of business of the branch is remains a matter of fact and hence of evidence."

[50] In *Big Dutchman (South Africa) v Barclays National Bank Ltd* 1979 (3) SA 267 (WLD) at 280 B the following was said:

> "But the principle laid down in *Biggerstaff's* case is subject to this proviso, that the person relying on the authority of the managing director of a company has seen or heard nothing to put him on enquiry as to the validity of his assumption as to that authority. In this case, the mandate states the contrary, namely, that no one could have the powers of the Board to amend the terms contained therein."

and on p. 284 H the following was said regarding the authority of managing director

> "Where he is doing something beyond the authority which he normally would have, the other party is protected only where he can set up all the requisites of an estoppel."

[51] I have indicated (*supra*) that there is no evidence that the defendant had made any representation that Dr Mulongeni had the necessary authority to act as he did.

In addition one must have regard to the position of the representee namely, whether the reliance by the representee, Mr Benebo, in the circumstances was a reasonable one. My conclusion is that having regard to the fact that Mr Benebo was aware of the intrigues at the NBC, of the different roles and powers of the Board of Directors, the line Ministry and the Director-General, of the fact that Dr Mulongeni faced a lot of pressure from different quarters, and his own standing as a seasoned international businessman that he should have in the first instance have been aware that a contract of the magnitude entered into between Factcrown and the NBC was certainly not what may be characterised as ordinary business regarding the authority of Dr Mulongeni and, secondly, cannot be said on the evidence presented that Mr Benebo had seen or heard nothing to put him on enquiry as to the validity of the authority Dr Mulongeni to enter into such a contract with Factcrown.

It appears to me that Mr Benebo deliberately closed his eyes (figuratively speaking) to a very real possibility that Dr Mulongeni could not have had the authority from the NBC Board to enter into the Factcrown agreement.

[52] In *City of Tswane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008(3) SA (SCA) at p 5F – 6A the following was said regarding estoppel:

> "It is important at the outset to distinguish between two separate, often interwoven, yet distinctly different 'categories' of cases. The distinction ought to be clear enough conceptually. And yet, as the present matter amply demonstrates, it is not always truly discerned. I am referring to the distinction between an act beyond or in excess of the legal powers of a public authority (the first category), on the one hand, and the irregular or informal exercise of power granted (the second category), on the other. That broad distinction lies at the heart of the present appeal, for the successful invocation of the doctrine of estoppel may depend upon it. (See *T E Dönges v L de van Winsen Municipal Law* 2ed (1953) 38-41).
> In the second category, persons contracting in good faith with a statutory body or its agents are not bound, in the absence of knowledge to the contrary, to enquire whether the relevant internal arrangements or formalities have been satisfied, but are entitled to assume that all the necessary arrangements or formalities have indeed been complied with (see for example *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958(2) SA 473 (A); *Potchefstroom se Stadsraad v Kotze* 1960 (3) SA 616 (A)). Such persons then rely on estoppel if the defence raised is that the relevant internal arrangements or formalities were not complied with.
>
> As to the first category: failure by a statutory body to comply with provisions which the legislative has prescribed for the *validity* of a specified transaction cannot remedied by estoppel because that would give validity to a transaction which is unlawful and therefore *ultra vires.*
> (See for example *Strydom v Die Land- en Landboubank van Suid Afrika* 1972(1) SA 801 (A); *Abrahamse v Connock's Pension Fund* 1963(2) SA 76 (W); and *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53(C))."

[53] Mr. Benebo knew that there was a tender procedure in place and that Factcrown had not submitted any tender prior to the conclusion of the agreement between Factcrown and the NBC.

[54] If the first category (referred to in the case of City of Tswane) is applicable in the present case then estoppel cannot be raised, because that would give validity to a transaction which is unlawful and therefore *ultra vires.*

[55] If the second category (referred to in City of Tswane) is applicable then estoppel cannot be raised successfully because Mr. Benebo had knowledge of the fact that NBC's tender procedure had not been complied with.

[56] Regarding the plea of the defendant that the contract as not enforceable on the ground that it is contrary to public policy the following was said in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) by Smallberger JA at p 7I – J p 8 and p 9A – G.

> "Our common law does not recognize agreements that are contrary to public policy (*Magma Alloys and Research SA (Pty) Ltd v Ellis* 1984(4) SA 874(A) at 891(G). This immediately raises the question what is meant by public policy, and when can it be said that an agreement is contrary to public policy. Public policy is an expression of 'vague import' (per Innes CJ in *Law Union and Rock Insurance Co Ltd v Carmichael's Executor* 1917 AD 593 at 598), and what the requirements of public policy are must needs often be a difficult and contentious matter. Wessels *Law of Contract in South Africa 2nd ed vol 1 para 480* states that '(a)n act which is contrary to the interests of the community is said to be an act contrary to public policy'. Wessels goes on to state that such acts may also be regarded as contrary to the common law, and in some cases contrary to the moral sense of the community. The learned author '*Aquilius'* in one of a series of articles on 'Immorality and Illegality in Contract' in 1941, 1942 and 1943 SALF defines a contract against public policy as
>
> > 'one stipulating performance which is not per se illegal or immoral but which the Courts, on grounds of expedience, will not enforce, because performance will detrimentally affect the interest of the community'
>
> (1941 SALF 346). Wille in his *Principles of South African Law* 7th ed at 324 speaks of an agreement being contrary to public policy 'if it is opposed to the interests of the State, or of the public'. The interests of the community or the public are therefore of paramount importance in relation to the concept of public policy. Agreements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the

grounds of public policy, not be enforced. (Cf Chesfire, Fifoot and Furmston's *Law of Contract* 11th et at 343).

Writers generally seem to classify illegal or unenforceable contracts (apart from those contrary to statute) into contracts that are *contra bonos mores* and those contrary to public policy (see eg De Wet and Yeats *Kontraktereg en Handelsreg* 4th ed at 80*; Wille (op cit* at 321; Joubert (ed) *Law of South Africa* vol 5 para 151). Some, like *Wessels* (*op ci*t), include an additional classification, viz those contrary to the common law. These classifications are interchangeable, for as '*Aquilius*' in 1941 SALF at 344 puts the matter, 'in a sense ..... all illegalities may be said to be immoral and all immorality and illegality contrary to public policy'. That the principles underlining contracts contrary to public policy and *contra bonos mores* may overlap also appears from the judgment of this Court in *Ismail v Ismail* 1983(1) SA 1006(A) at 1025G. These classifications may not be of importance in principle, for where a court refuses to enforce a contract it ultimately so decides on the basis of public policy (see *Kuhn v Karp* 1948(4) SA 825 (T) at 839). Nonetheless it is convenient to deal with unenforceable contracts, as most writers do, under various heads (see eg Christie *The Law of Contract in South Africa* at 335 et seq). in the *Magma Alloy's case supra* Rabie CJ stated at 891H:

> 'Omdat opvattings oor wat in the openbare belang is, of wat die openbare belang vereis nie altyd dieselfde is nie en van tyd tot tyd kan verander, kan daar ook geen *numerus clauses* wees van soorte ooreenkomste wat as strydig met die openbare belang beskou kan word nie.'

While mindful of the admonition of Cave J in *Re Mirams* [1891] 1QB 594 at 595 that 'Judges are more to be trusted as interpreters of the law than as expounders of what is called public policy', it must nevertheless be left to the Courts to determine, in any given case (apart from matters dealt with by statute), whether a contract is contrary to public policy. This is in keeping with what was said by Innes CJ in *Eastwood v Shepstone* 1902 TS 294 at 302, viz:

> 'Now this Court has the power to treat as void and to refuse in any way to recognize contracts and transactions which are against pubic policy or contrary to good morals. It is a power not to be hastily or rashly exercised; but when once it is clear that any arrangement is against public policy, the Court would be wanting in its duty if it hesitated to declare such an arrangement void. What we have to look to is the tendency of the proposed transaction, not its actually proved result.'

No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should, however, be exercised

sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness. In the words of Lord Atkin in *Fender v St John-Mildmay* 1938 AC 1 (HL) at 12 ([1937] 3 All ER 402 at 407B-C),

> 'the doctrine should nonly be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds'.

(See also *Olsen v Standaloft* 1983 (2) SA 668 (ZS) at 673 G). Williston on *Contracts* 3rd ed para 1630 expresses the position thus:

> 'Although the power of courts to invalidate bargains of parties on grounds of public policy is unquestioned and is clearly necessary, the impropriety of the transaction should be convincingly established in order to justify the exercise of the power.'

In grappling with this often difficult problem it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammeled by restrictions on that freedom.

> '(P)ublic policy demands in general full freedom of contract; the right of men freely to bind themselves in respect of all legitimate subject-matters'

(per Innes CJ in *Law Union and Rock Insurance Co Ltd v Carmichael's Executor* (*supra* at 598) – and see the much-quoted aphorism of Sir George Jessel MR in *Printing and Numerical Registration co v Sampson* (1875) LR 19 Eq 462 at 465 referred to *inter alia, Wells v South African Alumenite Company* 1927 AD 69 at 73. A further relevant, and not unimportant, consideration is that 'public policy should properly take into account the doing of simple justice between man and man' – per Stratford CJ in *Fajbhay v Cassim* 1939 AD 537 at 544. It is in the light of these principles that the validity of the deed of cession must be considered."

[57] The question is whether the agreement between NBC and Factcrown could be characterised s one which is contrary to public policy.

In this regard one should look at some factors which may influence the validity of this contract.

[58] Firstly, it is common cause that the NBC is a parastatal which receives funding from Parliament through its line Ministry and NBC thus needs to account for the usage of public money.

[59] Secondly, although it was testified that the Factcrown /NBC contract would be on the same terms and conditions as that of the Harris/NBC contract, this was not the case. The purchase price was increased in the subsequent contract and Factcrown was alloed to provide equipment sourced from suppliers other than Harris.

[60] Thirdly, and most importantly, Harris Corporation and Factcrown Limited are two distinct legal entities. The NBC/Harris contract had been signed after the tenders as per tender regulations had been invited from the public and the Board of the NBC had awarded the tender to Harris Corporation.
The NBC/Factcrown contract was signed after the NBC/Harris had been unilaterally cancelled by Dr Mulongeni, and without following the required tender procedure, anew. The letter in which Harris Corporation had indicated that a contract may be entered into with Factcrown did not obviate the necessity to comply with tender regulations.

[61] Fourthly, the purchase price is a substantial amount.

[62] I am of the view having considered the principles referred to in *Sasfin (supra)* and the factors referred to, that the NBC/Factcrown agreement is a clear example of a contract which is against the interest of the Namibian community and therefor against public policy.

It is a contract which was the product of the arbitrary use of power by the Director-General of the NBC. It is a contract which came to exist mainly because of the non-compliance with tender regulations. This was never disputed.

[63] I accordingly do not have the slightest hesitation in declaring the NBC/Factcrown contract as being against public policy and thus unenforceable.

[64] Returning to the test referred to in *Claude Neon Lights* I am of the view that the evidence presented on behalf of the plaintiff (and having considered the pleadings and the applicable law) was not evidence on which this Court could or might find in favour of the plaintiff.

[65] These are the reasons why the application for absolution of the instance was successful.

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HOFF, J

ON BEHALF OF THE PLAINTIFF: **ADV. CORBETT**

Instructed by: **VAN DER MERWE-GREEFF INC.**

ON BEHALF OF THE DEFENDANT: **ADV. SCHIMMING-CHASE**

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