REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3298/2009

In the matter between:

1.1.1.1. **THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA**
1.1.1.2. **(MINISTRY OF WORKS, TRANSPORT AND**
1.1.1.3. **COMMUNICATION)**
PLAINTIFF

and

THE AFRICAN CIVIL AVIATION AGENCY (PTY) LTD **DEFENDANT**

Neutral citation: Government of the Republic of Namibia (Ministry of Works, Transport and Communication) v The African Civil Aviation Agency (Pty) Ltd (I 3298/2009) [2014] NAHCMD 45 (12 February 2014)

Neutral citation:

Coram: SMUTS, J
Heard: 11, 12, 13, 14 and 19 March 2013
Delivered: 12 February 2014

Flynote: Claims and counterclaims arising from the Government terminating a service agreement with project promoters appointed to facilitate the establishment of headquarters for an international civil aviation authority in Namibia. The project promoters – defendant – claimed that the project had been extended by an agreement. The Government claimed that the agreement to extend was unenforceable and invalid on the grounds of a fraudulent misrepresentation, lack of authority and the failure to comply with formalities set in the agreement. The Government also contended that the agreement had come to an end when an international aviation authority was established in Namibia. The Government claimed the repayment of sums by way of a condictio indebiti or sine causa. The project promoter claimed sums which it alleged were owing under the agreement including a claim for severance. The principles concerning enrichment claims and interpretation of contract restated. Claims and counter claims partially successful.

ORDER

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a) Judgment in favour of the plaintiff in the sums of N$384 777 and N$740 396, 12;

b) Interest on these sums from the date of service of the summons to the date of payment at the legal rate of 20%;

c) The defendant is to pay the plaintiff's costs in proving these claims. These costs include those consequent upon one instructing and on instructed counsel and amount to two thirds of the time spent in the trial;

d) Judgment in favour of the defendant in the sums of N$641 689, 27; N$14 369 and N$479 675, 22;

e) Interest on these sums at the legal rate of 20% a tempore morae until date of payment;

f) No order as to costs is made in respect of the defendant's counterclaims;

JUDGMENT

SMUTS, J

[52]

[2] The defendant, a consulting company, initiated a project to establish a new international entity to be known as the African Civil Aviation Authority which would have its headquarters in Windhoek, Namibia. The Government of Namibia supported this initiative. Its Cabinet authorised the Ministry of Works, Transport and Communication ("the Ministry") to enter into agreements to engage the defendant to provide professional services as project promoter to achieve this objective. These parties then entered into a written agreement on 6 January 2004 to this effect.

[3] The defendant proceeded to render services under the agreement to the Government, the plaintiff in this action. The Government however cancelled the agreement with effect from 13 July 2008 in a termination notice dated 13 June 2008. This action concerns the parties' competing claims arising from this relationship.

[4]

[5] The Government has three claims in the sums of N$69 569, 24; N$740 396, 12 and N$1 793 505 with an alternative to the third claim in the sum of N$384 777. It essentially reclaims alleged double payments in claim 1 and the further sums which it alleges were either incorrectly calculated or paid in error.

[6]

[7] The defendant denies these claims and instituted three counterclaims. The first is for expenses incurred prior to the termination of the agreement in the sum of N$1 011 162.53. The second is for an underpayment on invoices in the sum of N$14,639. The third claim is substantial and is for severance payment in respect of fees and expenses in the sum of some N$20 144 746, 20. The Government denies that these amounts are payable.

[8]

[9] In respect of the substantial severance payment, the defendant relies upon an amendment to the agreement which was signed by an under-secretary of the Ministry and the defendant's two principals in June 2007. The amendment to the agreement essentially extended the agreement by five years and provided for a substantial increase in the defendant's fees.

[10]

[11] The Government denies that the amendment is valid and enforceable. It contends that it was induced by a fraudulent misrepresentation. It also denies that the formalities relating to an amendment of the agreement were followed and also denies that the under-secretary had the requisite authority to enter into the amending agreement.

[12]

[13] The Government also pleads that the 2004 agreement had in any event came to an end despite its cancellation of the agreement. It contends that this occurred when the objective set out in the agreement, namely the establishment of the headquarters of the African Civil Aviation Authority in Namibia, had been achieved.

[14] The terms of the agreement are thus of importance to the respective claims and counterclaims of the parties. It is first referred to. The salient issues raised in the pleadings are next set out together with the disputed amending agreement of 2007. The evidence at the trial is then referred to. The competing contentions of the parties are then dealt with in analysing the evidence and in reaching the findings made in respect of the issues in dispute especially whether the 2004 agreement had come to an end and the validity of the amending agreement and the claims and counterclaims.

Agreement

[15] The agreement commences with a preamble which refers to a Cabinet resolution supporting negotiations for the establishment of the headquarters of the African Civil Aviation Authority (referred to by all in this case as "Afro-CAA") in Namibia and authorised the Ministry to sign agreements to achieve this. The objective of the agreement is then set out as securing the professional services

of the defendant to give effect to this Cabinet decision.

[16]

[17] The agreement is thus a services agreement, engaging the defendant as a project promoter to carry out the tasks set out in the agreement in order to achieve its objective.

[18] The defendant's obligations are listed as advising the Government in relation to the project and securing agreements to ensure that the headquarters of Afro-CAA are established in Namibia. The defendant further undertook to exercise reasonable skill, care and diligence in discharging the services listed in the agreement and to provide progress reports to the Government at regular intervals in accordance with procedures to be agreed upon by exchange of letters.

[19]

[20] The duration of the agreement is of importance to this action. It is dealt with in Article 5. Article 5.5 provides:

> 'This agreement shall be valid for the client's financial years 2003/2004 to 2008/2009 and shall be renewable by a separate exchange of letters for a further five years.'

[21] Article 5.3 provides for the termination of the agreement in the following way:

> 'If at any time the Client decides to terminate this contract and the terms of this Agreement, he shall by notice in writing, given 30 days in advance, so inform the project promoter and pay such severance expenses as are stipulated in paragraph 7.2 below. Such severance payment shall be for the costs to be incurred by the project promoter (who shall retain this capacity exclusively) in seeking new sites for and relocating the project headquarters.'

[22] Article 6 of the agreement deals with payments. It requires the Government as client to be responsible for the payment to the project promoter of all fees and recoverable expenses stipulated in Article 7. Clause 6.5

provides:

[23]

> [24] 'The terms of remuneration shall be reviewed and where necessary revised annually but mutually by exchange of letters between the parties.'

[25] Article 7 is entitled "professional fees". It provides for a monthly professional fee for the financial year 2003/2004 to be N$84 000per month. This clause also provides that funds received for the project from donors as a result of joint efforts by the client and project promoter would be deposited in an escrow (trust) account approved by Treasury. These funds were to be apportioned between the parties, with 60% of donated funds to be utilised by the project promoter for setting up regional offices whilst the remaining 40% would be for the use of the Government for the full establishment of the headquarters including the purchasing of immovable and other property. The parties further agreed that other funds received for the project by either party would be used to cover that party's expenses for work paid out on the project.

[26] Article 7.2 provides for a severance payment and is central to these proceedings. It provided:

> 'The severance payment so stated in paragraph 5.3 above shall be remuneration paid at the terms of the remuneration during the client's financial year at the time of determination for 50% of the remaining time period of the contract.'

[27] The agreement further provides in Article 8 for the promoter's travel costs to be paid by the Government. It further states that travelling costs would be reimbursed in accordance with current rules applicable to international professional consultants travelling locally and abroad.

[28] The parties further agreed in Article 12 that if either of them wanted to amend the agreement, that party would be entitled to request consultations for that purpose.

[29] The parties further agreed in Article 12.2:

> 'Any amendment to this agreement which may be agreed upon between the parties shall come into force after it has been confirmed by an exchange of notes wherein these amendments are set out.'

The Government Claims

[30] The Government's first claim is for double payments made to the defendant. It was initially in the sum of N$64 569, 24. At the outset of the trial, the defendant admitted that it had received double payments in the sum of N$49 249, 24. This was accepted by the plaintiff in respect of claim 1. It is thus entitled to judgment in that sum.

[31] The Government's claim 2 is in the amount of N$740 396, 12. The plaintiff alleged that at a meeting of 17 January 2007 representatives of the parties met to review the defendant's remuneration and to consider possible amendments to the existing agreement. The plaintiff further alleges that the meeting agreed upon an increase in the defendant's professional fee – originally set at N$84 000 per month – by 10% per annum to be backdated with effect from the second year of the agreement, running from 1 April 2005 and for further increases of 10% for the two subsequent financial years starting 1 April 2006 and 1 April 2007 respectively.

[32]

[33] The plaintiff claimed that the defendant was requested to submit an invoice reflecting these increases for the period 1 April 2005 to 2007. An invoice was subsequently submitted on 18 January 2007 by the defendant and it was approved to pay the defendant a sum of N$1 388 288, 12. The plaintiff alleged that the Permanent Secretary of the Ministry approved the payment in that amount believing that it was due to the defendant pursuant to what was agreed at the meeting of 17 January 2007. But the plaintiff pleads that the defendant was not entitled to charge interest of 12% over the years in question as the plaintiff was not in *mora* and that, after a recalculation was done, only the sum of N$647 892 in increased professional fees was payable to the defendant. The

plaintiff thus claimed the difference between that amount and the sum of N$1 388 288, 12 which had been paid to the defendant, thus making the second claim in the sum of N$740 396, 12.

[34] The plaintiff's third claim is premised upon the contention that the object of the agreement had been achieved with the establishment of the Afro-CAA on 28 June 2007. Despite this, the plaintiff had continued to pay professional fees and make other payments to the defendant in the alleged mistaken but reasonable belief that the defendant was entitled to those payments from the date of establishment to June 2008 when the plaintiff cancelled the agreement. The plaintiff claims that the amount repayable to it in this way is N$1 711 482. In addition to this sum, the plaintiff alleges that the defendant was paid a professional fee of N$139 145 per month between April and June 2007. This was the amount set in the amending agreement which the plaintiff contends was invalid and unenforceable and alleges that the increase for that financial year was an agreed 10%. A further sum of N$82 023 is claimed under this head, bringing the total claimed in claim 3 to N$1 793 505.

[35] The plaintiff's fourth claim is an alternative to the third. In this claim, the plaintiff seeks to recover the increase in fees paid to the defendant (in terms of the amending agreement) from April 2007 to June 2008 when it cancelled the agreement.

[36] In the defendant's plea, a special plea of prescription was raised against a portion of the plaintiff's first claim. This point is no longer relevant after the admission was made in respect of claim 1.

[37] As to the Government's second claim, the defendant pleaded that the difference between the professional fees and the further sum paid to it (and reclaimed by the Government) represents recoverable expenses to which it was entitled under the 2004 agreement and which it says the Government had agreed to pay.

[38] The defendant also denied any liability in respect of claims 3 and 4 and

stated that it was entitled to those payments pursuant to the amending agreement which the defendant pleaded was valid and enforceable. The defendant further pleaded that the plaintiff was estopped from raising the invalidity of the amending agreement by making payments pursuant to it without demur.

[39] **The defendant's counter claims**

[40] The defendant's first counterclaim is in the sum of N$1 011 162, 53. The defendant contended that these sums were in respect of professional services and recoverable expenses which were incurred by it in the constituting amounts of N$480 037, 35, N$240 569, 82, N$226 394, 07 and N$64 161, 29. The defendant further alleges that the Government had acknowledged its indebtedness to the defendant in these amounts and thus claimed their aggregate.

[41] The defendant's second claim is in the sum of N$14 639 which it states were in respect of four separate invoices in the sums of N$600, N$39, N$4 000 and N$10 000 which were incorrectly calculated.

[42] The defendant's third counterclaim is for severance under the 2004 agreement and based upon the extension of the term of the agreement in terms of the disputed amending agreement.

[43] For this claim the defendant relies upon clause 5.3 of the agreement read with article 7.2. Article 5.3 of the agreement quoted above provides for severance, as stipulated in article 7.2, upon termination of the agreement by the Government in advance of its expiration.

[44] Article 7.2 under the heading of "professional fees" also quoted above sets severance at 50% of remuneration for the remaining time of the period of the contract.

[45] The defendant relies upon the amending agreement for claim 3 by

alleging that the agreement would only become terminated by effluxion of time on 31 March 2014.

[46] The defendant further referred to the termination of the agreement with effect from 13 July 2008 and claimed the sum of N$6, 823,934 in respect of professional fees which it claims were calculated pursuant to the severance provision, reflecting 50% of the remaining fees which would be due to it for the duration of the contract. A further sum of N$13 320 812, 20 was also claimed as severance. But this sum was in respect of 50% of the defendant's projected recoverable expenses for the duration of the contract, thus bringing claim 3 to the total sum of N$20 144 746, 20.

The evidence

[47] With exception of the former DCA, Mr Mujetenga, the witnesses called by both the Government and defendant had provided statements or affidavits to constitute their evidence-in-chief. These were received as exhibits and in some circumstances witnesses supplemented their statements in their evidence-in-chief before being cross-examined.

[48]

[49] The first witness for the Government was its current Director: Civil Aviation (DCA) within the Ministry, Ms Angeline Simana Paulo. Her office was responsible for administering the contract with the defendant. But she assumed her position on 1 September 2007, after a number of developments relevant to this case had occurred. Soon after assuming her position, Ms Paulo questioned the large payments being made to the defendant in view of the fact that the objective of the project promotion agreement had, according to her, been achieved with the establishment of the AFRO-CAA in Windhoek. She also considered that exorbitant sums were paid out to the defendant with little or no benefit to the Government, stressing that her obligation as a civil servant was to vigilantly oversee Government expenditure as if it were her own expenditure.

[50]

[51] Ms Paulo said she raised her concerns with Mr Kauaria, her immediate senior as Under-secretary: Transport within the ministry to whom she reported.

But he dismissed them. She then raised them with the Permanent Secretary.

[52]

[53] Ms Paulo further said that after she had assumed her position, the defendant's claims or invoices were however not channelled through her. They were submitted to a junior clerk who would clear them, to be signed off by Mr Kauaria and then payments would be made. Her explanation for this was that the defendant's principals were regarded by many within the ministry as insiders (with special access) as they had worked for the Ministry for some time. Ms Paulo said that when she stumbled upon this, she began questioning the payments and then drew the file and noticed a reference in the 2004 agreement to the defendant's obligation and duty to attend meetings relevant to AFRO-CAA with the client's DCA and to report to the DCA. She said she never received any such report from the defendant. She then looked at previous reports of the defendant which had referred to her predecessor, Mr Mujetenga or the DCA always having been. She was not however consulted or briefed as should have occurred in the agreement but noticed 'tremendous' expenses incurred by the defendant with little or no benefit to the Ministry and decided to investigate the position. After Mr Kauaria's brushing aside of her concerns, not challenged in cross-examination, she took the matter up with the Permanent Secretary. Advice was thereafter obtained and the agreement was terminated in June 2008.

[54] After the termination of the agreement, Ms Paulo had caused a forensic audit to be performed by PKF Chartered Accountants of payments made to the defendant. This audit uncovered double payments to the defendant and concluded that the defendant had also been overpaid in the sum of N$740 396, 12 as claimed in claim 2.

[55] Ms Paulo further testified that the inauguration of the AFRO-CAA was held in Windhoek, as was proclaimed and promulgated in the Government Gazette on 1 November 2007 by the President of Namibia.[1] In terms of the Gazette, the President announced the signing of the agreement establishing the AFRO-CAA on 28 June 2007. He did so under Art 32(2) of the Constitution.

[1]Government Notice 17 of 2007 Gazette No. 3928.

[56] Five states attended the inauguration – Nigeria, Libya, Cameroon, Ethiopia and Namibia – and an international agreement was signed between them establishing the AFRO-CAA with its headquarters in Windhoek. That occurred on 28 June 2007. A term of that agreement was that the defendant would administer the secretariat of the authority during an initial transitional period of up to a maximum of 1 year as from 28 June 2007 (the date of signature of the agreement). The agreement also provided that the headquarters of the authority shall be Windhoek. This agreement establishing the AFRO-CAA, also established a secretariat which was to report to a board of the authority, also established under the agreement. This agreement was not only signed by representatives of the five member states, but also by the defendant – with its principals signing on its behalf.

[57] Ms Paulo testified that, following the establishment of the AFRO-CAA, the defendant no longer provided services to the Government as a project promoter but was an agent of the new authority. Despite this, the defendant continued to claim and was paid professional fees and reimbursed for expenses by the Government. Ms Paulo testified that the objective of the 2004 agreement had been achieved on 28 June 2007. She submitted that the 2004 agreement then came to an end as a consequence and that the 2004 agreement would have then come to an end because its objective had been achieved. Despite this, the defendant claimed and was paid N$1 711 482 in fees and expenses after 28 June 2007. Ms Paulo averred that this sum was mistakenly paid to the defendant and that the Government was reasonable in doing so.

[58] Ms Paulo referred to the 2007 amending agreement. She contended that it was invalid on the basis of the evidence to be led by Mr Philip Amunyela. The monthly sum of professional fees set out in the amendment agreement was N$139 145 which had been paid to the defendant from 1 April 2007. The fees according to her should only have been N$111 804, taking into account the 10% increase agreed upon at the meeting of 17 January 2007. The overpayment in fees for the period April to 28 June 2007 was thus N$82 023. This sum was also claimed in claim 3.

[59] Ms Paulo testified that claim 4 was in the alternative claim 3. It represented the difference between the increased fee of N$139 145 paid to the defendant and what had been agreed upon at the meeting of January 2007, namely N$111 804, in line with the 10% increase agreed upon there.

[60]

[61] Ms Paulo also referred to the fact that the secretariat reported to the board of the authority in terms of the international agreement. Ms Paulo also referred to workings of the board and the progress reports provided by the defendant to it.

[62]

[63] Ms Paulo stated that the letter of cancellation by the Ministry on 13 June 2008 was pursuant to a decision of the Cabinet to terminate the agreement with the defendant in terms of article 5.3 of the 2004 agreement and thus on 30 days written notice which was then given by the Ministry to the defendant.

[64] According to Ms Paulo, the 2007 amendment agreement did not follow the procedures outlined in the agreement for amending agreements. She also stated that Mr Amunyela was called in to explain his signature to it.

[65] As to the defendant's counter claims, she denied claims 1 and 2 and said these claims were submitted after termination and denied they were payable. She also dismissed the claims for severance in claim 3. She did however state that when cancelling the agreement, she had thought that severance may be payable until the end of the five year term set out in the 2004 agreement.

[66]

[67] Under cross-examination, Ms Paulo pointed out that the delay in appointing forensic auditors was because the office of the Auditor-General first needed to advertise that appointment. She also referred to inaccuracies and deficiencies in respect of the defendant's service and progress reports. But these were not taken up by her with the defendant because Namibia's safety record at the time required extensive and pressing remedial action on the part of the Directorate of Civil Aviation which required her oversight and ongoing attention.

[68] Ms Paulo also confirmed that she had not attended the meeting of 17 January 2007 between the Ministry and the defendant. She pointed out that the increases were agreed upon at that meeting and that interest would not have been payable on the increased professional fees as they had only been agreed upon then (at that meeting).

[69]

[70] Ms Paulo further said that the forensic audit confirmed her worst fears of over payment. She said that the agreement had yielded no benefits whatsoever for Namibia and had only benefitted the defendant and its two principals as promoters. She considered that the Ministry had paid exorbitant fees and expenses to the promoters and received nothing of value in exchange, referring to it as a ghost project which she considered to be a financial drain upon the Ministry.

[71]

[72] Ms Paulo also said that the Ministry expected good faith and trust with regard to cost sharing which had not occurred. She referred to clause 7 of the agreement, which provided for an escrow account to be set up for certain cost sharing. She pointed out that according to the records, there was no suggestion on the part of the defendant to set up such an account. She subsequently raised this with the defendant's principals who replied that no other country (apart from Namibia) had contributed 'to the purpose why we wanted to establish the authority.' Ms Paulo was not cross-examined on this statement.

[73]

[74] Ms Paulo also complained of an unsatisfactory service by the defendant.

[75] Ms Paulo explained that the decision to terminate was made to limit expenses and because of irregularities. As for the latter she referred to the increase to N$139 145 which she pointed out was considerably in excess of the 10% increase agreed upon at the 17 January 2007 meeting.

[76] As to the Government's first and second claims, Ms Paulo stated that the amounts paid to the defendant were not supported by documentation. As for claim 3, Ms Paulo said that the defendant would have rendered any professional services to the new authority as secretariat and not to the Government and that

the money in question paid to the defendant was not owing to the defendant.

[77] Concerning the defendant's counterclaims, Ms Paulo said that after the ministry's cancellation letter, the defendant submitted the four large claims which made up claim 1. These were first approved by Mr Kauaria, Under Secretary in the Ministry. Ms Paulo said that he should not have signed for them. She questioned them as they were all submitted after termination, in the context of the defendant having regularly submitted invoices. She said they should not be paid until the forensic audit had been finalised and that they needed to be verified because of what she termed inflated allowances claimed.

[78] In re-examination, Ms Paulo was referred to reports delivered after the authority was established. These were not on the defendant's own letterhead but on that of the authority.

[79] Mr Phillip Amunyela was then called by the Government. He is an under-secretary in the Ministry. He was tasked by the Permanent Secretary to chair the meeting between the Ministry and the defendant which was held on 17 January 2007. Its purpose was to review the defendant's professional fee and amending clauses of the agreement. Mr Amunyela did not administer the agreement within the Ministry (and was not conversant with its provisions and its operation). The DCA, then Mr B.T. Mujetenga, was charged with that. He was also present at the meeting as was Ms Ngaaruka from the Ministry's accounts department. The defendant was represented by its two principals, Mr Kamau and Mr Eggersweiler.

[80]

[81] Mr Amunyela confirmed the correctness of the minutes of the meeting which were handed in as an exhibit. He also referred to handwritten notes taken at the meeting. The defendant proposed a 40% increase in the fee set in the 2004 agreement. This would reflect an annual increase of 13.33%. The Ministry's team rejected this proposal, stating that it exceeded the inflation rate and counter proposed 10% per annum. This was accepted by the defendant and it was requested to resubmit its invoice and breakdown based upon this annual increase over the 3 year period.

[82] As to the second item placed on the agenda by the defendant to amend the agreement by extending it, Mr Amunyela confirmed what was stated in the minutes that the discussion on this item was postponed pending the launch of the AFRO-CAA – then scheduled for March 2007. The meeting further accepted that the Permanent Secretary would be briefed on the outcome of the consultations. The minutes were prepared and were signed on 18 and 19 January 2007. The minutes also accorded with the brief handwritten notes taken at the time.

[83] Mr Amunyela further testified that some months subsequently and on 6 June 2007, he signed the amending agreement. He said that Capt Eggersweiler intentionally misled him to sign the agreement by representing that the amending agreement was an attachment or addendum to the minutes which he should sign as chairman and that it reflected what was agreed upon at the meeting of 17 January 2007. Mr Amunyela said that he had no mandate or authority to sign what was in fact contained in that agreement and that Capt Eggersweiler knew that he (Mr Amunyela) would not have any authority to sign any agreement outside his mandate of the issues agreed upon at the meeting. He pointed out that both Mr Kamau and Mr Eggersweiler had worked for the Ministry before, knew its structures and would have known that he would not have had the authority to sign what was in the amendment. Mr Amunyela said that he signed the amending agreement without reading it because it was presented to him on the basis as to what was decided at the 17 January meeting which he chaired and trusted Capt Eggersweiler when the latter assured him to that effect. He accepted that it was an addendum to the minutes as he was not Under-Secretary for Transport, the immediate senior to the DCA but Under-Secretary for Administration whose only involvement was chair that solitary meeting and sign off the minutes of that meeting.

[84] He said he was not authorised to extend the agreement and that only the Permanent Secretary or acting Permanent Secretary at the time could do so. He said that this item had been touched upon at the meeting and was to be discussed at an unspecified later stage.

[85]

[86] The amending agreement was short. It did not expressly refer to the agreement being extended in so many words. It merely referred to the article number (5.5) in the original agreement (which provided for renewal) and referred to it as being renewed (in clause 2.1). The amending agreement is quoted in full. It provided as follows:

'AMENDMENT A

MEMORANDUM OF AGREEMENT BETWEEN THE MINISTRY OF WORKS, TRANSPORT & COMMUNICATION AND THE AFRICAN CIVIL AVIATION AGENCY (PTY) LTD.

PREAMBLE

1.1 Article12 of the above referenced Agreement, which came into force on 06th January 2006, forms the basis of the Amendment which shall form part of the said Agreement.

1.2 Pursuant of Article 12.1 of the said Agreement, a meeting was held between the parties on 17th January 2007 in which this Amendment was mutually agreed upon as set hereunder.

1.3 The definitions in Article 1 of the said Agreement apply to this Amendment.

AMENDMENT

2.1(A) Pursuant of Article 3.4, 5.5, 6.5 and 7.1(d) it was mutually agreed that the said Memorandum of Agreement has been reviewed, renewed and revised as set in those here-said Articles.

(b) With reference to paragraph 2.1(a) of this Amendment the Client shall pay the Project Promoter a monthly fee of one hundred and thirty nine thousand, one hundred and forty five Namibian Dollars (N$139 145) effective from the Client's financial year 2007/8.

(c) The Project Promoter's fee increase per annum thereafter shall be 10% unless otherwise mutually agreed in writing.

(d) The Government of the Republic of Namibia shall be fully reimbursed for all Project Promotion expenses incurred under this Agreement, by the new organization AFRO-CAA, as agreed by participating States. The schedule of reimbursement shall be made after the inauguration of the AFRO-CAA.

2.2 Further amendments to the said Memorandum of Agreement shall be made by

mutual written agreement between the Parties, after the inauguration of the AFRO-CAA.

ENTRY INTO FORCE

3.1 This Amendment entered into force on the 01st day of April 2007.'

[87] Mr Amunyela said he was not acting Permanent Secretary at that time. He concluded that the defendant was *mala fide* in representing that the agreement was a mere annexure to the minutes of the meeting and was what was agreed up there, knowing that he had no authority to agree to an extension and the further items contained in it. Mr Amunyela testified that clauses 2.1(a), 2.1(b) and 2.1(d) were not agreed upon at the meeting.

[88] It was put to him in cross-examination that both Capt Eggersweiler and Mr Kamau were present and had called upon him to sign the amending agreement and that his (Mr Amunyela's) words were to the effect 'gentlemen, this is what we agreed.' Mr Amunyela responded to this by stating that only Capt Eggersweiler was present and that if the then DCA, Mr Mujetenga had referred them 'higher up' on a new agreement, it would not have been to him as he was not Under Secretary for Transport to whom the DCA reported and who approved payments under the project and that he was Under-Secretary for Administration. His only involvement with the project was to chair the 17 January meeting and he signed the document on the basis that he was informed that it was what was agreed at that meeting.

[89] During cross-examination, he was also confronted by a submission to the Permanent Secretary for the payment of N$1 388 288, 12 (for payment to the defendant) of 23 January 2007 which the Government in claim 2 asserted included the sum alleged to be overpaid. It was put to him that the submission for payment was approved by the Permanent Secretary. Mr Amunyela said that the submission would not have come to him. He was not responsible for the administration of the project. His mandate was only to chair the meeting of 17

January 2007. After the minutes were brought to him the next day by Capt Eggersweiler, he signed them and his mandate to deal with further matters (over and above the meeting) was then terminated. He had also prior to that had no dealings with the project. He accepted that Capt Eggersweiler had prepared the minutes properly as he had previously worked at the Ministry, he knew him well and trusted him.

[90]

[91] In respect of the Government's claim 2, Mr Amunyela said that the sum of N$1 388 million had not been agreed at the meeting and only the 10% increase had been agreed. It was put to Mr Amunyela that the amending agreement had been brought to his office by Mr Kamau and Mr Eggersweiler as well as by the then DCA, Mr Mujetenga. Mr Amunyela said that he only recalled Capt Eggersweiler in his office. He also denied that he spent some 30 minutes going through the amending agreement before signing it.

[92] The former DCA, Mr Mujetenga, also gave evidence for the Government. He had also been served with a subpoena by the defendant. Neither side had provided a statement or affidavit comprising his evidence in chief. He had since retired from the Ministry. He was DCA from 1998 to 2012. From September 2007 to 2012, he had been seconded to an international organization based in Canada. He testified that he was tasked by the Minister to take responsibility for the implementation of the 2004 agreement on behalf of the Ministry. At that time he knew both principals of the defendant well. Mr Kamau had worked for more than 5 years for the Ministry as an aircraft accident investigator and had worked with him. He also knew Capt Eggersweiler well from ongoing dealings with his directorate.

[93] As to the meeting of 17 January 2007, Mr Mujetenga confirmed that he attended it and said that its purpose was to give effect to the provision in the 2004 agreement which provided for a mechanism for an annual increase in fees. He had been instrumental in having it convened after the defendant's principals had approached the Ministry for an increment. He had asked the Permanent Secretary to appoint a committee to look into the matter and to convene the meeting. He said that the meeting was solely for that purpose. He

said he took the minutes and prepared them subsequently. He confirmed their correctness. He also said that the defendant wanted a 40% increase but that this was not acceptable to the ministry which proposed an annual 10% increase which the defendant accepted.

[94] Mr Mujetenga said that he took the minutes with Capt Eggersweiler to Mr Amunyela's office for signature where the latter had signed them (in January 2007). Mr Mujetenga said that he had prepared the submission addressed to the Permanent Secretary on 23 January 2007 to approve payment of N$1 388 million. When he was asked if he received supporting invoices for this account or just the breakdowns, he replied that he only received the breakdowns, as appeared on the invoice attached to his submission. The breakdown included an amount referred to as interest at 12%. He said that he was comfortable with the 12% interest claimed because clause 6.3 of the 2004 agreement referred to interest on unpaid invoices. He accepted in the course of questioning that the increased fees only became payable after the agreement to that effect.

[95] Mr Mujetenga confirmed that his understanding at the time of the 2004 agreement was reflected in paragraph 3.16 of the submission in which he stated:

> 'Three sub-regional meetings for the establishment of the African Civil Aviation Authority took place and it was finally agreed that the Afro-CAA would be launched in Windhoek in March 2007 at which point Namibia ceases her obligations to fund the promotion of the Afro-CAA and that Namibia will be re-funded all funds spent thus far by the participating African States.'

[96] The submission then stated under the heading: 'Financial implications', the following:

> 'An amount of N$1 388 288, 12 have been budgeted for during the 2006/2007 financial years to defray the cost of consultancy services for the establishment of the African Civil Aviation Authority (Afro-CAA).' (sic)

[97] The submission then recommended that approval be given to pay this amount to the defendant in terms of clause 6.5 of the agreement. Mr Amunyela

was later asked why he continued to recommend payment of fees to the defendant after its launch in June 2007 until he left for Canada in September 2007. He said that the defendant's principals convinced him that payments should continue until the authority was what they termed fully 'established' in the sense of having a headquarters, staff and money starting 'to pour in from donor countries or contributing states.'

[98]

[99] As to the amending agreement, Mr Mujetenga said that he was aware of a draft prepared by the defendant which was brought to him. He had informed the defendant's principals that he was not authorised to sign agreements and that he had referred them to Mr Amunyela or the Permanent Secretary. He said he was not even interested in looking at the draft and did not know the contents of that agreement. He pointed out that only the Permanent Secretary or an officer delegated by him could bind the Ministry in agreements.

[100] Mr Mujetenga said that the increased fee of N$139 145 had been agreed upon at the 17 January 2007 meeting. He said it was an oversight that it had not been included in the minutes. He attributed this to work pressure. He said that the handwritten notes of the meeting were his and could not explain why it had not been included in his written notes.

[101] In cross-examination, Mr Mujetenga said that the launch was postponed for logistical reasons. He reiterated that he did not go through the draft amending agreement and referred it to higher officers. Mr Mujetenga insisted that the minutes of the meeting reflected what was discussed. He confirmed that discussion on the possible extension or renewal of the agreement had not been agreed upon and had been deferred to a later date. He said that this was because the issue was "difficult to handle". The main issue for the 17 January meeting had been to adjust the defendant's fee. He also said that he did not dispute the defendant's invoices to the Ministry which formed the subject matter of the defendant's claims 1 and 2 in reconvention, but after September 2007, Mr Mujetenga said that he did not have anything further to do with the project.

[102] At the end of Mr Mujetenga's testimony, the plaintiff closed its case.

Defendant's witnesses

[103] The defendant called three witnesses – its two principals and Mr Kauaria, an Under-Secretary in the Ministry.

[104] Capt Harry Eggersweiler gave evidence that he was a 50% shareholder and director in the defendant along with Mr Kamau who held the remaining shares. He pointed out that the 2004 agreement had been signed by an under secretary in the Ministry on behalf of the Government.

[105] As to signing of the amending agreement, Mr Eggersweiler said that he had called upon Mr Amunyela with the draft together with Mr Kamau who was also present. He said they had been directed to Mr Amunyela by Mr Mujetenga. Capt Eggersweiler said that the amending agreement had been "discussed with him in full" (referring to Mr Amunyela). He said it was discussed between Mr Amunyela, Mr Kamau and himself. He did expand upon what was discussed.

[106] Capt Eggersweiler denied that he had misrepresented the amending agreement to Mr Amunyela, as alleged in the particulars of claim and in Mr Amunyela's evidence. He said that it was then honoured (in respect of the increased fee to N$139 145) by the Ministry until termination of the agreement without complaint. He denied misleading Mr Amunyela in any way at all. He considered that the claim of a misrepresentation had come as an afterthought.

[107] In cross-examination, Capt Eggersweiler said that he knew the officials within the Ministry well as he had been an aircraft accident investigator for 4 to 5 years with the Ministry, working at the time with Mr Kamau.

[108]

[109] When it was put to him that the object of the 2004 agreement had been achieved, he disputed that the AFRO-CAA had been established but said that it had merely been launched and inaugurated. When he was asked if it had come into existence, he first disputed this but was eventually constrained to accept that it had. He accepted that the defendant was appointed by the founding

States in the 2007 international agreement to administer the new authority, as its secretariat.

[110] When it was put to Mr Eggersweiler that the defendant proceeded to act on behalf of the authority, he denied that and insisted that the defendant was a project promoter. He was referred to reports prepared by the defendant which were sent on AFRO-CAA letterhead with the flags of the signatory states represented on it. But he insisted that the new authority was not fully established. He did however accept that its board was established and had elected a chairperson. When pressed about his denial that the defendant acted on behalf of AFRO-CAA as an authority or agency, his answers were evasive and contradictory. He scrupulously avoided accepting that it was established or operational. He was reluctant to concede anything to the contrary even when contemporaneous reports by the defendant indicated to the contrary until he was eventually constrained to concede that it was established 'in the paper work.'

[111] Turning to the meeting of 17 January 2007, he accepted that the minutes of the meeting were correct after some equivocation. He said he signed the minutes because he trusted the DCA, Mr Mujetenga. He confirmed that the defendant would receive a 10% increase in fees for the years 2005, 2006 and 2007. As to the invoice which was provided after the meeting claiming these fees, he could not say how N$1 388 million had been arrived at even though he had prepared the invoice together with Mr Kamau and a clerk. He said questions should rather be directed to Mr Kamau as to that and other invoices and claims. He did however state that an invoice for approximately N$2, 1 million was first presented to Mr Mujetenga. After discussion with the latter, it was withdrawn and a subsequent invoice for N$1, 388 million was accepted by Mr Mujetenga. He accepted that the invoice was to be pursuant to the 17 January meeting.

[112] Capt Eggersweiler confirmed that the issue of an extension to the 2004 agreement had not been agreed upon at the 17 January meeting and had been postponed. He said that the 2004 agreement would run out and that was why

the defendant sought an extension. He said that the amending agreement was prepared by Mr Kamau. He accepted that it had never been forwarded to the Attorney-General's office and that he was aware of the requirements for that office to first approve agreements beforehand but said that this was not a 'big agreement'. Despite what was stated in his evidence-in-chief, he also agreed that the 5 year extension had not been discussed with Mr Amunyela but said that Mr Amunyela had been 'in charge for the P.S.' (referring to the Permanent Secretary) but later said that he was only 'in charge of the meeting.' He later did not dispute that the Permanent Secretary was not aware of the extension and confirmed it had not been discussed with the Permanent Secretary, but said it had been given to the DCA and that this was an 'internal problem for the Ministry.'

[113] In the course of his cross-examination, he acknowledged that the defendant had received sums of money from two participating States, Nigeria and Libya in the sums of US$80 000 and US$40 000 respectively. He acknowledged that these sums were not deposited in an escrow account and had been deposited in the defendant's bank account and utilised by it. When asked about the purpose of these contributions, he said that these states wanted to support the defendant 'to continue to get to the inauguration.' He conceded that the defendant was at the time being paid fees and all expenses covered by the Namibian Government. He could not explain on what legal basis these amounts had been utilised by the defendant.

[114] Capt Eggersweiler conceded that there had been no exchange of letters or notes in respect of the amending agreement. When it was put to him that the formalities for the amending agreement had not been complied with, he said that the Government's internal procedures were none of the defendant's business. He did not dispute that the 2004 agreement had benefited the defendant without much direct benefit to the Government but he said it was contemplated that the expenses paid by the Government would be recovered eventually from authority. He was unable to explain how the defendant could claim for expenses not yet incurred as part of the severance claim.

[115] In answer to questions posed by the court, Capt Eggersweiler again said that there had not been much discussion with Mr Amunyela when the amending agreement was signed and that he had signed immediately. He was unable to explain why a 5 year extension would be agreed upon at the time the authority was being set up. He reiterated that an extension was not agreed upon at the 17 January meeting where it was resolved to postpone discussions on that. In answer to a question as to whether the extension in the amending agreement was pointed out to Mr Amunyela, said 'we do not discuss too much. We were a very short time there, we only read out and then he signed and took the stamp from the secretary. There was no discussion, because everything was discussed before with the Director of Civil Aviation, Mr Mujetenga' (sic).

[116] The defendant's second witness was Mr K. W. Kauaria, the Under Secretary for Transport within the Ministry at the time the agreement was operative. He is currently Under Secretary for Administration within the Ministry. The Director of Civil Aviation at the time reported to him. He said that he considered both the 2004 agreement and the amending agreement to be valid and binding. He said that both were signed by duly authorised officials. He said that payments had been made under the amending agreement without objection from the Ministry. This turned out to be a self serving statement as he had authorised those payments.

[117] Mr Kauaria also testified that the payment of N$1, 388 million to the defendant had been personally signed for by the Permanent Secretary having been approved by the Ministry's authorised official, the (DCA) in January 2007. He said that the sum was agreed upon and paid by the Ministry. Mr Kauaria said that the defendant had, after the inauguration of AFRO-CAA, presented a draft international agreement to the Attorney-General for accreditation for international professionals to be appointed in Namibia. The Government and DCA had not responded to this.

[118] As far as he was concerned, the defendant substantiated its claims to the Ministry. The claim for N$1, 388 million was in respect of two sets of payment for arrears professional fees and also reimbursable expenses. He did not consider

that the defendant owed any refund in respect of that sum. He said that he had never approved double claims. He also said that the forensic audit was only instructed after the severance claims had been received from the defendant. He further viewed the termination as “ill-considered”.

[119] When cross-examination, Mr Kauaria said that he could not recall if he was involved in the process of approval of the N$1, 388 million payout. He was also not aware that approximately N$2, 1 million had first been claimed. In respect of the amending agreement, he said that Mr Amunyela had said that an increase of only 10% had been approved.

[120] As far as he was concerned, the authority was not established in June 2007 because a headquarter building was not available and approval had not been obtained from the Foreign Ministry for international accreditation.

[121]

[122] As to Mr Amunyela’s authority to sign the amending agreement, he said there would need to be reference to a letter from the Permanent Secretary to Mr Amunyela to determine that. Whilst accepting that only a Permanent Secretary could bind a Ministry, he pointed out that a Permanent Secretary could delegate that power and that the Permanent Secretary would not sign all agreements. He conceded that he had not however seen any written authority for Mr Amunyela to sign the amending agreement.

[123] The defendant’s other principal, Mr M. Kamau then gave evidence. He testified that the defendant persuaded the signatory countries to agree to set up the authority/agency in Windhoek in 2007. He said in his evidence in chief that ‘it was agreed with the plaintiff to extend the agreement . . . for a further five years’. But he did not elaborate upon with whom in the Government this was agreed. He presumably referred to the amending agreement. He said to achieve the establishment of the authority was necessary to promote AFRO-CAA with the other 49 African States.

[124] Mr Kamau said that he initiated the 17 January 2007 meeting because there had been no annual increase in the defendant’s professional fees since

the start of the project. He also said that the defendant's subsistence and travelling rates had been at the level of Namibian Government's subsistence and travelling rates (for its officials) and not at the level of international consultants as was provided for in the agreement. He also said that the Permanent Secretary wanted a change to the severance pay out clause and wanted to be briefed on discussions. There was also a need for the proposed escrow account to become operational.

[125]

[126] Mr Kamau said that the defendant wanted the 2004 agreement extended as they (its principals) felt that more time was needed. He accepted that the minutes reflected what was discussed (and decided) at the meeting. He confirmed that the amending of the agreement was postponed pending further discussions.

[127] When asked about the genesis of the amending agreement, Mr Kamau stated that when the inauguration did not occur in March 2007, the defendant stated to press for an extension to the 2004 agreement 'with our point of contact', the DCA. He further said 'we had repeatedly discussed point by point over several weeks. When we finally came to what we considered to be an agreeable amendment, we then made the draft, took it to him.' This was however never put to Mr Mujetenga who had instead said that he had no idea as to what was contained in the draft. He said Mr Mujetenga had said he was not authorised to sign the draft and referred them to Mr Amunyela. He said that he and Capt Eggersweiler then proceeded to Mr Amunyela's office. (This also conflicted with what was put by defendant's counsel to Mr Amunyela that Mr Mujetenga accompanied the defendant's principals to Mr Amunyela's office.) He said that Mr Amunyela went through the agreement and said 'gentlemen, this is what we agreed at the meeting, I have no problem signing.'

[128] Mr Kamau denied that the defendant was overpaid in its N$1,388 million claim which had been paid out to it. He acknowledged that the defendant was told to re-submit the claim after discussions with Mr Mujetenga and that the defendant had "agreed to come down" in respect of its N$2, 1 million claim. Mr Kamau said the full claim of N$2,1 million represented a refund to the defendant

of subsistence and travelling at international consulting rates but that the defendant was prepared "to come down" on its claim to be paid S&T at international rates. But he added:

> 'We agreed, I think we came down almost N$800 000 but then we wanted to know what would be our monthly professional fees, if we could somehow incorporate what we had lost in those three years in a substantial increase in the monthly profession fees. We came to a figure of N$139 145.' (Emphasis supplied).

[129] When it was put to him that Mr Amunyela did not know what he was signing, he said that was "patently incorrect". Mr Kamau denied that there had been any misrepresentation. He said the amending agreement was signed originally three times and that he was present throughout with Mr Eggersweiler. He confirmed that the amending agreement had been drafted by the defendant.

[130] The international agreement (of 28 June 2007) was however drafted by the participating States.

[131] When it was put to him that the 2004 agreement had become terminated upon the inauguration of the authority and that the objective had thus been achieved, he said that he was never informed of this at the time. He also disputed that the authority had been established upon inauguration and said this would only occur once it was fully operational. He said that the defendant was in any event asked to continue after inauguration in terms of the amending agreement. He also said that it had never once been put to the defendant that the 2004 agreement terminated upon the signing of the international agreement in June 2007 until after the plaintiff had instituted its action against the defendant (and only after amending its particulars of claim).

[132] In his evidence in chief, Mr Kamau explained the counterclaim (no. 3) based upon severance, by stating that severance had two components, namely fees and reimbursable expenses.

[133]

[134] In explaining the defendant's first counter-claim, he referred to invoices

reflecting the sums referred to in paragraph 7 of the counter claim. The invoices for the sums of N$480 037, 65 and N$240 569, 82, he said, were in respect of expenses and were submitted after the cancellation and on 15 and 16 July 2008 respectively. The invoice for N$64 161, 29 submitted on 16 July 2008 was in respect of professional fees for July 2008, at an increased rate in excess of N$153 000 because he said the amount of N$139 145 had increased by 10%.

[135] As to the further amount claimed in claim 1 of the counterclaim in the sum of N$226 394, 07, he merely said:

> 'Yes, that I can remember, in all fairness, it is also right, which must be reimbursed to Namibia because from the inauguration date Namibia must be reimbursed for everything that has occurred before and after.'

[136] He was then asked by defendant's counsel if the sum represented 'expenses incurred by the defendant or moneys due to the plaintiff'. He said:

> 'It is the money that is due. We have incurred the expense and they must be refunded that money.'

[137] He reiterated that the defendant had incurred expenses in that amount but stated that the plaintiff should be refunded.

[138] Mr Kamau explained the sums referred to in claim 2 (N$600, N$39, N$4 000 and N$10 000) as follows:

> 'I am reading from your counterclaim. - - - Yes, there were four invoices that were paid to us that were calculated wrong on that invoice itself. In other words, when the invoice says ten thousand (N$10 000-00) it should be saying ten thousand and four hundred (10 400-00). So, we calculated and asked for a refund of that fourteen thousand (N$14 000-00).
>
> You submitted that invoice? - - - Yes, they are all there.
>
> You submitted to the plaintiff? - - - Yes, we submitted and we were paid, but there was a shortfall and we have not accused them of being fraudulent, we just understand it is an error.'

[139] An examination of each of the four invoices reveals that the error was the defendant's by wrongly adding up the constituent amounts in those invoices.

[140]

[141] Mr Kamau said that after the agreement had been terminated, he had had discussions with the Permanent Secretary who had said the agreement was a financial drain upon the Ministry and that the agreement was terminated together with some 10 others in order to save costs.

[142] Mr Kamau said that the defendant's admitted double claims were not fraudulent or dishonest. They were the result of a change of personnel at their travel agent, Trip Travel, and that the payments had been paid to it.

[143] When it was put to him that the amending agreement was void for want of compliance with its own formalities, he disputed that, stating the consultation had occurred at the 17 January 2007 meeting. He said there had also been an exchange of letters, and referred to invoices provided by the defendant in support of that.

[144] The defendant had provided an invoice for N$1, 388 million which the Government had acted upon. It was also put to him that Mr Amunyela did not have the authority to sign and amending agreement. He responded by questioning why he had signed it and why invoices pursuant to it had been paid, pointing out that it had been honoured. He pointed out that Mr Kauaria was the main agent in the Ministry who had signed their claims.

[145] When asked about the portion of the severance claim in excess of N$13 million (in respect of disbursements) which had not as yet been incurred, he sought to justify this claim with reference to article 5.3 of the 2004 agreement. He said that severance was for the 'costs to be incurred in seeking new sites and relocating the headquarters'. When asked how expenses to be incurred could be calculated in advance, he said that average disbursements were projected for the duration of the project as extended by the amending agreement.

[146] During cross-examination, he pointed out that he had worked as an aircraft accident investigator for the Ministry from 1998 until 2004. He accepted that he was well acquainted with Government procedures. He also knew the ministry officials well. He said that he presently occupied the position of General Manager at the Namibia Airports Company and also acted as a consultant on aviation matters in his spare time and has done so 'for quite a while.' Although his position is full time, he was permitted to do his own business as long as there was no conflict of interest. He said he was no longer pursuing the defendant and that AFRO-CAA was without a secretariat.

[147]

[148] Although the defendant's agreement with the AFRO-CAA (to fulfil the function as secretariat ended in 2010, the defendant had 'for all practical purposes' ended its activities with the termination (of the 2004 agreement) in July 2008 because there were no funds with the authority (AFRO-CAA). He also did not refer to any costs which the defendant had in fact incurred to 'relocate the headquarters'. He had instead taken up his senior position with the position with the Namibian Airports Company. In answer to a question as to the obligation of member States to fund the authority and that if they did so, it would continue to operate, he replied that he did not know but later acknowledged that it was not running.

[149] Mr Kamau confirmed that the defendant performed the function of secretariat of the AFRO-CAA which he described as its administrative function. He accepted that there was no need for the Namibian Government to fund the AFRO-CAA but that the defendant submitted claims for its fees and expenses. He said that ultimately the Namibian Government would be refunded by the participating states for its outlay.

[150]

[151] Mr Kamau said that he had prepared the 2004 agreement which had been first referred to the Attorney-General before signature. Mr Kamau further accepted in cross-examination that if funds had flowed into the authority, then it would buy property, recruit staff from those funds. He also accepted that the defendant reported to the board of the authority. He further denied that the Government of Namibia was financing the authority but stated it was rather the

defendant which submitted claims to it for its activities. He debated at some length with counsel for the plaintiff as to whether the authority had been established by its inauguration. He spent some time referring to dictionary definitions as to the meaning for the word ‘establish’ and stated, according to him, the meaning which was to be given was that it is not merely the bringing into existence of the authority but also to set it up firmly and permanently. He argued that the Government accepted this meaning by continuing to pay the defendant until termination of the agreement. It was pointed out by the court that the interpretation to be placed upon the agreement was a question of contractual construction and for the court to determine.

[152]

[153] Mr Kamau was cross-examined at some length as to the role which the defendant played after the inauguration of the authority, as the secretariat of that authority. He stated that the defendant is a private company and operated as a secretariat, but also had another role, pointing out that a consultancy frequently entails having two roles and having more than one client. When it was put to him that the 2004 agreement came to an end upon the inauguration of the authority, he repeatedly stated that the Government had not accepted this as its position as it is signed the amending agreement and continued paying the defendant without any verbal or written complaint.

[154]

[155] When pressed on this issue, he stated to counsel representing the plaintiff that the latter did not represent the views of his client in proceeding with that line of cross-examination. When counsel insisted that he was acting upon instructions in his line of questioning, Mr Kamau responded by questioning that and further stating that the defendant was the victim of internal differences amongst ministerial officials. He also said that the reason why the agreement had been terminated was because he had been informed that the Government was losing a lot of money and that Ms Paulo had questioned it. He also said that Mr Mujetenga and Mr Kauaria had said to him that they had been intimidated because they had given the defendant statements and that they were to testify on behalf of the defendant. He then said that it was for that reason that the defendant had served subpoenas upon them. When he was asked why this was not put to those witnesses, he was unable to give a satisfactory explanation.

[156] When it was put to Mr Kamau that the invoice set out in the defendant's counterclaim were expenditures for the authority that fell outside the 2004 agreement and that it was obliged to pay them, he stated that the claims were presented on the defendant's letterhead because they were promotional expenses and that they should be paid.

[157]

[158] As to the meeting on 17 January 2007, he confirmed the 10% increase in fees but stated that it was not the only thing which was discussed at the meeting. He claimed that it was also agreed that the defendant fees would increase to N$139 145. This was in contradiction to his earlier evidence that this only had arisen after the submission of the claim which followed that meeting and when the defendant's claim for N$2, 1 million was rejected. In order to compensate for the compromise (where the defendant had agreed to in accepting N$1, 388 million in respect of arrears in fees), he had said that the defendant had agreed with Mr Mujetenga that the fee for the following financial year would increase by much more than 10% and would be N$139 145. But Mr Kamau was eventually constrained to accept that the minutes of the 17 January meeting reflected what had happened there, even though they were cryptic. He further accepted that the minutes were correct in respect of what was agreed upon.

[159] When cross-examined upon the claim which was then submitted following that meeting, he confirmed that the defendant had provided an invoice in the sum of N$2, 1 million and that there was a further component to that invoice in respect of recoverable expenses. He explained that for three years the defendant had only claimed S&T at the rate accorded to Government officials and that the 2004 agreement stated that they were entitled to the fees at the rate of international consultants when asked what that rate was, he was vague and could not recall the amount. He accepted that it amounted to about €400 per day which was in excess of what was paid to Government officials. He said that it was then pointed out by the DCA that the claim of N$2, 1 million exceeded what was available in the budget which resulted in the defendant cutting down on the claim to N$1, 388 million, representing what was available.

He stated that he did not have the exact calculations and could not explain how the sum had been arrived at.

[160]

[161] In justification of this claim, Mr Kamau stated that it had been agreed that there would be an increase of professional fees and recoverable expenses. When he was confronted with Mr Mujetenga's evidence that the agreement was only to the effect of back dating 10% on professional fees, Mr Kamau disagreed and stated that Mr Mujetenga approved a component of the claim which was in respect of an increase in recoverable expenses. Mr Kamau explained the difference between the calculated increases in fees of the three year period in the sum of N$1, 388 million was to be attributed to recoverable expenses. He also pointed out that there was a claim for interest, as is also reflected upon that invoice. He stated that interest was not paid on the recoverable expenses because he had been told that there was no money for that and that the defendant should compromise.

[162] Mr Kamau was referred to a handwritten note on the last page of the invoice which broke down the sum of N$1, 388 million into three amounts with reference to 2005, 2006 and 2007 which were not further broken down. He stated that this had been done after a letter had been received from the Ministry after termination asking how the sum of N$1, 388 had been made up and that this breakdown have been provided by the defendant in a letter in response. He referred to the letter which the defendant had sent to the Government after the termination of the agreement which had provided those three figures as a breakdown for the sum of N$1, 388 million. The three sums were reflected as follows: N$419 422, 39 for 2005 increased by 10% to N$461 364, 63 for 2006 and this sum increased by a further 10% to N$507 501, 10 for 2007, giving a total of N$1 1388 288, 12. When Mr Kamau was confronted with his earlier answer, confirming that the fee component of the sum had been calculated in the sum of N$647 000 and that the balance was for recoverable expenses, he stated that he could not remember how the amount had been calculated and in particular how the recoverable expenses had been calculated. Mr Kamau reiterated that the minutes of the meeting 17 January 2007 should have reflected that agreement had been reached in a further increment in the

professional fees to the sum of N$139 145.

[163] He also eventually accepted that it had not been agreed in the meeting of 17 January 2007 to amend the agreement to provide for its extension. He also confirmed that the Permanent Secretary had wanted an amendment to the term relating to severance and that the defendant had been opposed to changing that term, no doubt because of it being so favourable to the defendant.

[164]

[165] When it was put to Mr Kamau that Mr Amunyela was not authorised to sign such an agreement, his reply was:

> [166] 'If he did not have the authority, why did he sign it and I do not know that, those are the plaintiff's internal affairs.'

[167]

[168]

[169] It was then put to him that, having worked for the Government, he knew that only the Permanent Secretary or his delegate is authorised to sign agreement on behalf of Government. Mr Kamau responded by saying that the 2004 agreement had been signed by Mr Kauaria, an Under-Secretary and that it had been honoured. When it was put to him that he had been duly authorised to do so, he argued with counsel about this, stating that Mr Kauaria was not Acting Permanent Secretary or Permanent Secretary and if there was a letter of authorisation, he would like to see it. But Mr Kamau later conceded that he was aware that the Permanent Secretary is the accounting officer but added that he was not familiar with anything else which required that, unless he signs a contract, it cannot come into force, especially in this case where it had been honoured for more than a year.

[170]

[171] Mr Kamau was also asked why he went to Mr Amunyela when the 2004 agreement referred to the Permanent Secretary and to the DCA. In answer to that, he stated that he was been directed by Mr Mujetenga to Mr Amunyela. He further stated that when he went to Mr Amunyela, the latter signed it without hesitation. He dismissed Mr Amunyela's explanation that he signed it without reading it and for that reason it should not be honoured. He said if that were permitted then thousands of contract will be 'overthrown'.

[172]

[173] It was put to Mr Kamau by the court that the reference in the minutes of the meeting to the Permanent Secretary wanting to be briefed after the meeting and that he was aware that the Permanent Secretary wanted to amend the severance clause, would indicate that the Permanent Secretary had retained his power to decide whether to agree upon a new regime for in an amendment, thus alerted the defendant to his requirement of being briefed and his wish to have specific changes to the severance clause. He agreed with that fundamental proposition but stated that the onus was on the Ministry to make sure that if they wanted certain clauses in the agreement, they should have attended to that and that it was not for the defendant to look after the Government's interest in that regard. He further stated that the defendant had done nothing unethical or illegal when in proceeding with the amending agreement.

[174] When asked by the court if the five year extension had been specifically pointed out to Mr Amunyela at that time, Mr Kamau initially sought to avoid the question but eventually stated that he could not remember everything that was discussed with Mr Amunyela. When he was asked whether the 2004 agreement was also on the table when Mr Amunyela was asked to sign the amending agreement, he stated that he did not think so.

[175] When Mr Kamau was asked why the defendant did not account to the Government for the money received from the Governments of Libya and Nigeria, he stated that the defendant was not required to account for that because the defendant had obtained that money as 'a company – a (Pty) Ltd'. He was then asked whether the receipt of those sums was not relevant in reclaiming expenses incurred if there had been other governments which had provided payments to the defendant for their expenses. His answer to this was evasive. He first stated that it did not cover expenses but was later vague as to the nature of the payments and when they were received. But he subsequently confirmed that they were in respect of this project. When it was put to him that the defendant should have informed the Government and that the money should have been placed in an escrow account (pursuant to the 2004 agreement), his answer was merely 'there was no escrow account.' When he was asked why the

defendant could not at least inform the Government, he repeated that there was no escrow account and provided no further explanation.

[176]

[177] When Mr Kamau was asked as to why the defendant could not set up its own escrow account in the meantime, he stated that he did not consider the position would have been any different as the account contemplated by the 2004 agreement had to be approved by Treasury so that it would be in any event have been‘outside the contract’. When he was asked by the court why funds could not be placed in some form of trust account because that would appear to be what the agreement contemplated, he accepted that this could be done but then argued ‘but why would we want to put the money in the trust account when we were needing to use the money? That is why we were asking for it.’ He then conceded that the defendant wanted to use the money for itself and that ‘it was never intended for a trust account.’

[178] When cross examined about the defendant’s claim for severance and if he accepted that the AFRO-CAA board would decide to relocate, he eventually answered after being asked the question four times (and only after it was pointed out by the court that he had not answered the question), that the board did not make any decision to relocate the headquarters. When asked about the remuneration clause in the 2004 agreement, he argued that the reference to the remuneration in clause 5.3 meant that it was not limited to fees set out in the agreement and that was the reason why the defendant claimed projected expenses. Mr Kamau further said that the portion of the severance claim in respect of the recoverable expenses had been calculated with reference to the average in the past in order to pursue the project.

[179]

[180] When asked by the court whether the claim had been approved by the board of AFRO-CAA, he stated that it had not and that the claim arose because of the contractual arrangements with the Ministry and that the board did not have any contract with the Ministry. When he was asked ‘so this has nothing to do with the board?’, he responded: ‘This is to do with our contract, severance payment.’ He was then asked by the court:

> ‘But surely if you are going to relocate the offices, that must be on the board’s

> authority and with approval?'

His reply to this question was:

> 'We will get that and thank you for that point, we will get that because we have to relocate, there is no headquarters here in Namibia.'

[181] When asked whether the defendant was dormant, he confirmed that it is dormant and that in June 2010, the defendant wrote to the participating states and told them that the defendant would no longer be acting as a secretariat. Mr Kamau was then asked by the court that, if the defendant was no longer secretariat, on what basis the court should make an order that it be paid in excess of N$13 million. His reply was: 'We are still the pty and we are still willing to go ahead and seek this promotion for these people.' When he was then asked in what capacity, his reply was:

> 'As the pty, because the contract said that you terminate, so you lose the capacity with the ministry. You are still an existing company and if you are willing and able, the contract said that you pay the severance and you go and do it and we have told them and in fact they were very happy, they said ok you can do it, but we said we do not know until we get this issue over with.' (sic)

[182] Mr Kamau was then confronted with Mr Eggersweiler's statement that the defendant had accepted the cancellation by the Ministry. He indicated that it was a qualified acceptance.

[183] I turn now to the competing claims of the parties.

The Government's claims

[184] As I have already pointed out, claim 1 has been conceded in a lesser amount. It follows that the plaintiff is entitled to judgment in the sum of N$49 249, 24 in respect of double payments.

[185]

[186] Much evidence and time was devoted to claim 2. The Government's claims 2, 3 and 4 are enrichment actions and specifically the *condictio indebiti* and *condictio sine causa*. Before dealing with the factual bases for these

respective claims, I first refer to the incidence of the onus and the requisites for the *condictio indebiti* and *condictio sine causa*.

[187]

[188] The plaintiff's claim 2 is on the basis of the well established principles of the *condictio indebiti* and it would appear that both claims 3 and 4 are based upon a *condictio sine causa*.

[189] The plaintiff did not seem to base its claims upon a general enrichment action as is foreshadowed in the illuminating judgment of Schutz JA in *McCarthy Retail Ltd v Short Distance Couriers CC.*[2] Although that matter did not establish a general enrichment action, it certainly strongly articulates a basis for the adoption of a general enrichment action as part of the common law. Subsequent judgments of the South African Supreme Court of Appeal have however not as yet embraced such a general enrichment action.[3] The plaintiff's particulars of claim specifically raise the *condictio indebiti* in claim 2 and would appear to raise the *condictio sine causa* in claims 3 and 4. Both counsel argued on the basis of those claims. They did not make submissions on the question as to whether a general enrichment action should be adopted as part of the common law. Whilst I respectfully agree with the sentiments so cogently expressed in the judgment of Schutz JA in *McCarthy Retail Ltd* on that issue, I decline to make any finding in that regard, as the matter was not canvassed in argument and it would also not be necessary upon the facts of this case to venture into that unchartered terrain as the plaintiff's causes of action would appear to fall within ambit of existing enrichment actions.

[190] A *condictio indebti* is open to the party who has made payment to another due to an excusable error and believed that the payment was owing whereas it was not. That party may then reclaim payment to the extent that the

[2] 2001 (3) SA 482 (SCA) at par 8-10.

[3] *Absa Bank Ltd v Leech NO* 2001 (4) SA 132 (SCA); *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 113 (SCA); *Jacquesson v Minister of Finance* 2006 (3) SA 334 (SCA); *Affirmative Portfolios CC v Transnet Ltd t/a Metro Rail* 2009 (1) SA 196 (SCA); *Afrisure CC and Another v Watson NO and Another* 2009 (2) SA 127 (SCA); *Lagator McKennor Inc and Another v Shea and Other* 2010 (1) SA 35 (SCA); *Leeuw v First National Bank Limited* 2010 (3) SA 410 (SCA).

receiver was enriched at the expense of the former party.[4] The *condictio indebiti* may also be open to the party to reclaim performance made in terms of an invalid contract, as would be the *condictio sine causa*. It would seem that the latter action is more frequently be used in those circumstances.[5]

[191] The essential requirements for a *condictio indebiti* are:

a) the defendant must be enriched;
b) the plaintiff must be impoverished;
c) the defendant's enrichment must be at expense of the plaintiff; and
d) the enrichment must be unjustified in the sense of having been made in a reasonable but mistaken belief that a payment was owing – thus been a reasonable error in the circumstances of the case.[6]

[192] The first three elements are also required for a *condictio sine causa* and the fourth is merely that the enrichment is unjustified in the sense of the absence of a valid causa.[7]

[193]

[194] I turn to the facts relevant to claim 2. It was common cause that the defendant had petitioned the Government to review the defendant's remuneration under article 7.1(d) of the 2004 agreement. This had occurred in the latter part of 2006. A meeting was eventually convened for this very purpose by the Permanent Secretary of the Ministry and was held on 17 January 2007. Its purpose was to deliberate on that issue, even though the defendant also wanted to raise the issue of the duration of the agreement and propose its extension. The Permanent Secretary had also indicated that the provisions in the agreement relating to severance payments, which were onerous upon the Government, should also be amended.

[4]See *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202 A. See generally Harms *Amler's Precedents of Pleadings* (7ed) at…..

[5]*Enocon Construction (Pty) Ltd v Palm sixteen (Pty) Ltd* 1972 (4) SA 511 (T).

[6]*Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue supra; See Joubert et al The law of South Africa (2d) vol 9 at par 209*; See also *Visser Unjustified Enrichment* (2008) at 174.

[7]*Harms Amler's Precedents of Pleadings* supra at 103-104 and the authorities collected there.

[195] The Under-Secretary: Administration within the Ministry, Mr Amunyela, was appointed by the Permanent Secretary to chair the meeting. It is also common cause that the defendant proposed an increase of 40% to its fee of N$84 000 per month. The Government representatives at the meeting found this proposal to be unacceptable and proposed a 10% increase for each financial year (which runs from 1 April to 31 March). This was then agreed upon, as is reflected in the minutes and was confirmed by all the witnesses. (The issue of an extension of the agreement was also discussed but could not be agreed upon and was deferred to subsequent deliberations.)

[196] The minutes were then prepared by the then DCA Mr Mujetenga and signed very shortly after the meeting – on the next day by the defendant and by Mr Amunyela on the day after that.

[197] The meeting also resolved that the defendant resubmit its invoice in respect of past financial years and the then current financial year. This was also done almost immediately.

[198] The defendant first submitted an invoice claiming a sum of approximately N$2, 199 million. This fact only emerged in the cross-examination of its first principal who gave evidence, Capt Eggersweiler. It was significantly not contained in the affidavits of the defendant's two principals whose purpose was to contain their evidence-in-chief. It was also not mentioned by Capt Eggersweiler in his evidence-in-chief. Nor was it put by the defendant's counsel to Mr Mujetenga, the DCA at the time who gave evidence for the Government and who had recommended payment of N$1, 388 million. Its significance is not only by virtue of the fact that such an exorbitant claim was made which way exceeded the increase in fees agreed upon, but also because of the evidence of Mr Kamau for the defendant that the rejection of this claim and the apparent compromise which subsequently occurred in accepting the amount of N$1, 388 million formed the basis, according to him, for the steep increment in fees for the following financial year which commenced on 1 April 2007 - instead of being N$111 804 which represented a 10% increase and replaced it with N$139 145 in

the amending agreement.

[199] None of the witnesses testified that an increase in recoverable expenses had been raised or agreed upon or even discussed at the 17 January meeting. The agreement also did not make provisions for that. It made provision for an increase in remuneration, represented by the professional fees payable to the defendant. Yet the defendant made a claim which massively exceeded the entitlement to the increase in professional fees. In doing so, it would seem to me that the approach and conduct which characterised the defendant's dealings and its claims under the contractual regime with the Government were motivated by greed and unprincipled opportunism. It would seem that the relationship the defendant's principals had enjoyed with members of the Ministry's management, no doubt as a consequence of having worked closely with them within the Ministry for some years, resulted in key members of the Ministry dealing with the claims with a far less than critical eye and not with the vigilance expected of senior Government officials with regard to the expenditure of public funds.

[200] What is clear however in the Government's claim 2 is that the payment which the defendants were to receive following the meeting of 17 January 2007 was however in respect of the increased professional fees agreed upon at that meeting. It is also clear that the defendant's claims made pursuant to that meeting were not restricted to the increase in professional fees which amounted N$647 892. The DCA at the time, Mr Mujetenga, rightly rejected the claim of N$2, 199 million which the defendant had opportunistically made. The stated reason for doing so given by Mr Kamau was apparently because it exceeded the amount in the budget of the Ministry set aside to pay for an increase in fees. This is also entirely understandable as it would have represented three times more than the increase which had been agreed upon.

[201] It would appear that the then DCA, Mr Mujetenga being under the impression that the defendant was entitled an increase in recoverable expenses over the period in question, considered that the Government should compromise the defendant's claim to the extent of what was available in the

budget. I can only conclude that this was the reasoning. This was the version of the defendant's Mr Kamau. It had been indirectly stated by him in cross-examination. But this had unfortunately not been put by defendant's counsel to Mr Mujetenga who was less than forthcoming concerning his dealings with the defendant to this court. It would however appear that Mr Mujetenga was under the impression that the defendant was entitled to increased amounts for recoverable expenses on the basis of either a commensurate increase to S&T equivalent to the increase in fees or what was referred to in the 2004 agreement that the S&T rate was as provided for international consultants. When Mr Kamau was asked about those rates, he was vague in the extreme in his response. It was put to him that the rate was in the region of €400 per day but he could not confirm that.

[202] There was furthermore no breakdown provided for the further amounts in excess of the increase in the professional fees which was claimed and paid to the defendant, totalling N$740 396, 12. The only amount specified which did not form part of the increase in professional fees was the claimed payment in the amount of N$64 789 for interest referred to as being calculated at the rate 12% (although it would appear to have only been calculated at the rate of 10%). Mr Mujetenga understood that this amount of interest was payable under the agreement, given the fact that the increase in fees was in respect of fees in which it had been paid in previous financial years. He assumed that this obligation to pay interest had arisen pursuant to article 6.3 of the agreement which provides:

> 'Payments shall be done within 30 days. Rendered invoices not paid within 60 days of the date of receipt may attract interest at the prime rate stipulated by the Standard Bank of Namibia. The payment of such interest shall not become applicable unless and until a period of sixty (60) days, calculated from the date on which the relevant invoice(s) were submitted, has elapsed.'

[203] It was put to Mr Mujetenga and defendant's witnesses that the invoice in respect of increase of fees for previous years was only submitted in January 2007 after the meeting of 17 January 2007. There was no complaint that it had not been paid within 30 days or 60 days after submission of the invoice.

[204] It is clear that there was no obligation on the part of the Government to pay interest under article 6.3 in respect of that claim. Mr Mujetenga had incorrectly understood that it was required under article 6.3 and thus recommended the approval of that portion of the payment on that basis.

[205] The question arises as to whether the payment of the interest as well as the further amount of which together totalled N$740 396, 12 in excess of what was owed in respect of professional fees was as a consequence of an excusable error on the part of the Government.

[206] The full bench of this court has made it clear in *Seaflower Whitefish Corporation Ltd v Namibian Port Authority*[8] that negligence in relation to a claim base upon a *condictio indebiti* is no bar to repayment under the *condictio indebiti* or *sine causa*. Mr Mujetenga's conduct in not seeking legal advice as to whether or not the Government was obliged to make that payment or in failing to more thoroughly interrogate the contractual basis for those claims would appear to amount to negligence on his part in the sense of failing to meet the degree of care a reasonable government official of that seniority should have exercised in the particular circumstances. But that would not be a bar to an enrichment action based upon *conditio indebiti* or *sine causa*.[9] As the full court made clear, negligence as such would not be a bar to a successful claim, while supine negligence is only a bar if it was so supine that the payer intended it as a gift or was completely indifferent as to whether it was due or not.[10]

[207] The defendant did not plead either of those two propositions in its plea but rather claimed that it was entitled to the payments and that they were not paid in error.

[208]

[209] Capt Eggersweiler who referred to the N$2,1 million claim made by the

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[8] 2000 NR 57 (HC) at 65.

[9] *Cape Town Municipality v Paine* 1923 AD 207 at 217 cited with approval in *Seaflower* atp65 C.

[10] *Seaflower Whitefish Corporation Ltd v Namibian Port Authority* supra at p65 to 66A and the authorities collected there.

defendant was clearly in his evidence uncomfortable with that claim and when asked about, said that questions should rather be posed to Mr Kamau concerning the issue. As I have said, the submission of the N$2, 1 million claim was significantly not put to the plaintiff's witnesses, especially Mr Mujetenga. It would also not appear to have been discovered by the defendant, despite its relevance – not only to claim 2 but also to a version put forward by Mr Kamau as to why such a huge increase in fees was inserted in the amending agreement of N$139 145.

[210] Mr Mujetenga said he considered the claim (of N$1, 388 million within) which was paid on 23 January 2007 – days after the meeting. He was referred to the invoice in respect of the claim. It was stated on the first page:

> 'In terms of Article 6.5 of the agreements (sic) and the meeting hold (sic) on 17 January 2007
>
> | | | |
> |---|---|---|
> | Outstanding amount | | N$1, 323, 499, 12 |
> | Interest 12% 1 year | 10. 080 | |
> | 2 Year | 21. 168 | |
> | 3 year | 33 541 | |
> | ..... | | |
> | Total interest | N$ 64 789 | 64 789 |
> | | | ..... |
> | Total amount | | N$1, 388 288, 12' |

[211]

[212] The second, third and fourth pages set out a break down in terms of article 6.5 of the agreement, the increase in fees, calculated with reference to the initial fee of N$84 000 plus amounts reflecting interest calculated at 12% (which differed from the amounts stated on the first page which would appear to be calculated at the rate of 10% on the sums for each year, despite stating that the rate of 12% was applied). The total amount for increased fees including 12% interest was stated as N$685 389, 60 as the balance outstanding at the end of March 2007 (even though the invoice was dated 18 January 2007). There was no breakdown whatsoever the further amount claimed excluding interest. It is totally unexplained on the invoice.

[213] When asked whether he had received supporting invoices, Mr Mujetenga said that for the total claim, 'there were just the breakdowns' (provided on the invoice in tabulated form which only dealt with the claimed increase in professional fees and interest totalling N$685 389, 60. He did not explain the difference between the calculated increase and the total claim. Surprisingly he was not asked about this by plaintiff's counsel. Also surprisingly, this issue was not canvassed in cross-examination. Mr Mujetenga was however asked to confirm claims submitted long after he had left his position as DCA and which formed part of the defendant's counter-claim. He said he did not dispute them. But they were submitted in July 2008, nearly a year after he had relinquished his position as DCA.

[214] Mr Kamau referred to the difference between what was paid and what emerged as common cause as the fee increase proportion (N$647 892) and the claimed interest (N$64 789), as being payable on the basis of recoverable expenses in the form of S&T allowances which had not been paid at the unspecified rate for international consultants (but instead at rates applicable to Government officials). He was referred to a letter addressed by the defendant to the Ministry on 3 October 2008 which had queried that payment after terminating the agreement. In this letter, the defendant sought to justify the invoice in the following way:

> '(2) As per the Minutes, our proposed back payment invoice was considered too high for funds available (for financial years ending 2005, 2006 and 2007). A compromise was reached where we were to resubmit a lower invoice to 'bridge' the unpaid years. The request to resubmit the invoice is in the Minutes. In return (as reflected in the Amendment) we were to receive N$139 145 monthly payments from 2007.
>
> (3) We agreed to a percentage cut to our first invoice for the 2005 back-payment which was calculated to N$419 422, 39. Per the Minutes this was increased by 10% to N$461 364, 63 for 2006 and another 10% to N$507 501, 10 for 2007. The 'bridging' total for these three figures came to N$1, 388 288, 12 as reflected in our second invoice, which was mutually agreed and paid to us by the Ministry. This second signed

invoice also contains a statement that this was indeed discussed at the 17th January 2007 meeting.

(4) As per the Minutes/Amendment it was agreed that annual increase of fees be 10% from April 01st 2007.'

[215] It would seem that Mr Kamau's approach was that the term 'remuneration' referred to in article 6.5 of the agreement included expenses and that the defendant would be entitled to an increase in expenses as well when a review was undertaken to remuneration as envisaged by article 6.5. This would appear from his letter of 3 October 2008 where it seems that he calculated a back payment for the first increased year (at an increased rate for both fees and expenses presumably, which amount was increased by 10% for the subsequent years). This was also how he justified the severance claim in claim 3 of the counter-claim, stating that severance would include reimbursable expenses.

[216]

[217] The subsequent calculation contained in that letter was inconsistent with his version at the trial where he said that expenses claimed by the defendant could then in January 2007 be increased to the unspecified international rate, having claimed and accepted S&T allowances at a lower rate applicable to Government officials in previous years. This despite the fact that this was not raised at the 17 January meeting.

[218]

[219] On either of these bases, he clearly convinced Mr Mujetenga that not only a 10% increase in fees was payable, but that an increase in expenses was also to be paid pursuant the 17 January meeting. Possibly the way in which he achieved this was by a massively inflated claim of N$2, 1 million which was more than three times the entitlement to an increase in fees and then negotiating its reduction with reference as to what was available in the budget, in accordance with his testimony and his letter. This was however not put by the defendant's counsel to Mr Mujetenga. Nor as was the inflated claim ever put to him. It would seem to me that Mr Kamau was bent on securing the maximum he could extract from the Government and find whatever way for justify it with reference to the 2004 agreement – either asserting that an increase in

remuneration under article 6.5 included an increase on reimbursable expenses already paid or with reference to unspecified international consultant's rates (also not put to Mr Mujetenga).

[220] I found Mr Kamau to be an extremely unsatisfactory witness who was evasive or argumentative when dealing with virtually any question which he perceived to be adverse to the defendant's case. He also contradicted himself in seeking to justify the defendant's claims and actions. This is apparent from his evidence on how the increased fee of N$139 145 was arrived at. He initially said that it had been agreed (with Mr Mujetenga) after the 17 January meeting. This is consistent with what was stated in his letter of 3 October 2008. But later under cross-examination, presumably realising that Mr Mujetenga would not have had the authority to enter into such an agreement and that the amending agreement may not withstand scrutiny, he shifted his version to say it had been agreed at the 17 January meeting, latching onto what Mr Mujetenga had said in that regard when he was present in court.

[221]

[222] Mr Kamau's answers about the receipt of funds for the project from the governments of Libya and Nigeria were most unimpressive and unsatisfactory. As I have said, these payments only emerged in the cross-examination of Capt Eggersweiler. It was clear from his cross-examination that they had not been disclosed to the Government – as was eventually admitted by Mr Kamau. He was visibly uncomfortable in the witness box when this was canvassed. This was understandable, given article 7.1(b) of the agreement which provided:

> 'Funds received for the project from donors as a result of joint efforts by the client and the project promoter will be deposited in an ESCROW account approved by Treasury. Any interest accrued will be paid to Treasury. Sixty percent (60%) of the donated amount shall be payable to the Project Promoter within 30 days or receipt thereof, for the further setting up of Regional Offices. The remaining forty percent (40%) shall be for the use of the client for the full establishment of the Head Quarter, including the purchasing of immovable and other property.'

[223]

[224] Mr Kamau's discomfort on this issue was compounded by Ms Paulo's

evidence, completely unchallenged in cross-examination that she had been told by the defendant's principals that no country other than Namibia had contributed to the purpose of establishing the AFRO-CAA, a grossly misleading statement.

[225]

[226] It was clear that the parties envisaged that the Government was to share the benefit of contributions from donors. The intention was to place such funds in a trust account to be shared in the ratio referred to. Not only did the defendant appropriate the substantial funds received, but it failed to even disclose the receipt of donor money to the Government. There is however no claim for a refund of 40% of those funds. Nor has the Government made a claim that this conduct is in breach of the agreement. I thus do not further address those issues. But what is clear is that this conduct reflects very badly on the defendant and its principals and relevant of their credibility and the credibility of their claims. The question of a breach aside, their conduct was plainly not in good faith and probably in breach of the agreement. Even though the agreement does not refer to the defendant having a duty of good faith to the Government, this would in my view be implied by article 4.3[11] read with article 7.1(b) and in any event underlines contractual relations in our law.[12] As I have said this issue was not pertinently raised in the pleadings but it does adversely reflect upon the defendant's principals in their dealings with the Government and is demonstrative of their unprincipled and opportunistic conduct and reflects adversely upon their credibility and showing that they were prepared to mislead the Government's official who was charged with administering the agreement on behalf of the Government.

[227] As I have already pointed out, the issue of payment of recoverable expenses was not on the agenda of the 17 January meeting. Nor was it raised there. The annual review of remuneration referred to in clause 6.5, expressly referred to in the minutes, is clearly confined to the professional fees set in terms of clause 7.1(a). In contradistinction, the agreement refers in article 8 to travel costs which in terms of article 8.2 would appear to include a subsistence

[11] See *Barkhuizen v Napier* 2007 (5) 323 (CC) at par 80-82.

[12] Article 4.3 obliges the defendant to exercise all reasonable skill, care and diligence in the discharge of its services.

allowance as part of those costs.

[228] An increase of 10% would thus only relate to the professional fees of the defendant and could never been intended to refer to their travel costs. This also emerged as common cause in evidence. This was also the stated basis which the payment of N$1, 388 was recommended and approved – as being determined and paid with reference to article 6.5 (the consequence of reviewing professional fees.)

[229] The 10% increase in fees over the two preceding financial years was thus payable as a consequence of the agreement set out in the minutes of the 17 January meeting. That is what was due to the defendant following the review of fees and not an increase in travel costs or S&T allowance. Nor was interest payable under article 6.3 of the agreement, given the fact that the invoice for those fees was provided in January 2007 and there was no suggestion that it was unpaid more than 60 days. Furthermore, I take into account that the further amount (over and above the increased fees and interest) was not specified in any sense at all in the defendant's invoice. That was also confirmed by Mr Mujetenga. Nor could either of the defendant's principals provide any detail or support for this further amount claimed. I also take into account the fact that Capt Egegrsweiler could not explain how the amount was made up and the failure on the part of Mr Kamau to provide any documentary support or other support for the amount as well his conflicting versions – that contained in his letter of July 2008 and in his evidence. When queried subsequently, a justification is raised which is at variance with the stated calculations contained in the invoice.

[230] I accordingly conclude that the sum of N$740 396, 12 paid to the defendant by the Government was not payable to the defendant which was enriched to that extent whilst the Government was impoverished to that extent. That enrichment was furthermore at the expense of the Government.

[231] The then DCA was brought under the impression by the defendant that such sum was owing to the latter. He was mistaken in recommending that it be

paid, which then occurred.

[232] It is clear from both Mr Mujetenga's evidence as well as that of Ms Paulo, the current DCA, who referred to the fact that Mr Mujetenga's background was in aircraft maintenance, that the Government was not giving the defendant a gift or completely indifferent as to whether it was and thus not so supine as to not meet the requirement of excuseability contemplated by the *condictio indebiti*. The payment was however rather as a consequence of being demanded by the defendant in pressing for a payment following the January 17 meeting and which it contended arose from an interpretation to the agreement and contractual relationship between the parties which was thus not justified or in the circumstances. In reaching this conclusion, I also take into account the relationship of trust between the then DCA, Mr Mujetenga and the defendant's principals – a factor relevant to this enquiry as was found by the full bench in *Seaflower Whitefish*[13] in following *Willis Faber Enthoven*.[14]

[233] I accordingly conclude that the payment thus made on the part of the Government in response to that claim was reasonable and excusable.

[234]

[235] I further conclude that the requisites for the *condictio indebiti* or the *condictio sine causa* have been established in respect of the Government's claim 2 and that it is entitled to repayment in the sum of N$740 396, 12.

Claim 3

[236] I turn to claim 3. At the heart of this claim was the interpretation of the 2004 agreement with regard to its duration. The plaintiff's case is that the 2004 agreement identified the project as the formation and establishment of AFRO-CAA. It is common cause that on 28 June 2007, the AFRO-CAA was established in Windhoek by five founding member states, namely, Namibia, Cameroon, Ethiopia, Libya and Nigeria. It is also common cause that these States signed an international agreement establishing the AFRO-CAA and that

[13]Supra at 64 C-E.

[14]Supra at 224 F-G.

this agreement came into force on the date of signature.

[237]

[238] Upon signature of that agreement on 28 June 2007, AFRO-CAA was thus established as an entity, with Windhoek as its headquarters. In terms of that international agreement, the defendant was assigned the function of administering the secretariat of the AFRO-CAA for a transitional period of one year from the date of signature. Mr Kamau testified that that period was extended by a further year.

[239] Mr Marcus submitted on behalf of the Government that the signing of international agreement on 28 June 2007 resulted in the establishment of the AFRO-CAA and that the object of the 2004 agreement was thereby achieved and that the Government's obligation to make payments pursuant to the 2004 agreement had ceased (and thus become discharged) upon the establishment of AFRO-CAA on 28 June 2007.

[240] Mr Marcus further referred to the promulgation of the international agreement which referred to the establishment of AFRO-CAA by the President of the Republic of Namibia in a Government Gazette of 1 November 2007. He also referred to the fact that AFRO-CAA established a board which held its first meeting on 18 September 2007.

[241] Mr Marcus argued that the 2004 agreement obliged the defendant to perform a particular task and that once this has been performed by establishing AFRO-CAA, the contract terminated being thus discharged by the performance of the defendant of its obligation and extinguishing the reciprocal obligation on the part of the Government to further performance. He submitted that no positive act was then required for the Government to bring an agreement to an end.

[242] In support of these contentions, Mr Marcus also referred to the role played by the defendant following the inauguration of the AFRO-CAA. He pointed out that it undertook the new function of administering the secretariat of AFRO-CAA and reported to its board, as was confirmed by Mr Kamau in his evidence although he was unduly argumentative at times and reluctant to make

even obvious concessions in that context. Mr Marcus also referred to the progress reports which the defendant prepared and issued on AFRO-CAA letterhead after its establishment.

[243] Central to the relief sought by the plaintiff in claim 3 and its alternative (claim 4) as well as the defendant's counterclaims is the question whether the 2004 agreement came to end on 27 June 2007 and the validity or otherwise of the amending agreement of June 2007. These are dealt with in turn.

[244]

[245] **Interpretation of the 2004 agreement**

[246]

[247] The Supreme Court[15] recently adopted the succinct summary of the principles applicable to the interpretation of the contracts as follows:

> 'In the recent case of *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) ([1995] 2 All SA 635), the Appeal Court of South Africa again summarised the rules of construction in the interpretation of documents. At 767E - 768E the following was stated:
>
> > "According to the golden rule of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument. *Principal Immigration Officer v Hawabu and Another* 1936 AD 26 at 31, *Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 465 - 6, *Kalil v Standard Bank of South Africa Ltd* 1967 (4) SA 550 (A) at 556D . . . .
>
> The mode of construction should never be to interpret the particular word or phrase in isolation (*in vacuo*) by itself . . . .
>
> The correct approach to the application of the "golden rule" of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:
>
> (1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract, as stated by Rumpff CJ supra;
>
> (2) to the background circumstances which explain the genesis and

[15] In *Erongo Regional Council v Wlotzkasbaken Home Owners Association* 2009 (1) NR 252 (SC).

purpose of the contract, ie to matters probably present to the minds of the parties when they contracted. *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 454G - H; *Van Rensburg en Andere v Taute en Andere*1975 (1) SA 279 (A) at 305C - E; *Swart's case supra* at 200E - 201A and 202C; *Shoprite Checkers Ltd v Blue Route Property Managers (Pty) Ltd and Others* 1994 (2) SA 172 (C) at 180I - J);

(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions.'[16]

[248] The approach to evidence which seeks to deal with the interpretation of agreements was, with respect, also incisively summarised by *Harms DP in KPMG v Secure Ltd:*[17]

'[38] Much of the evidence dealt with the interpretation of the verification contract. Indeed, each party called an expert on the issue and they testified for about fourteen days on the interpretation of the contract. The factual witnesses, too, spent most of their time dealing with interpretation issues. The parties were able to create a record consisting of 6600 pages of evidence and exhibits. It is difficult to understand why the trial judge permitted the evidence or the cross-examination or overruled the objection to the leading of some of the evidence. Obviously, courts are fully justified in ignoring provisionally objections to evidence if those objections interfere with the flow of the case. It is different if a substantive objection is raised which could affect the scope of the evidence that will follow. In such a case a court should decide the issue and not postpone it. It is accordingly necessary to say something about the role of evidence and, more particularly, expert evidence in matters concerning interpretation.

[39] First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (*Johnson v Leal* 1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly,

[16]Supra at par [31] p261.

[17]2009 (4) 399 (SCA).

interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed) *Phipson on Evidence* (16 ed 2005) para 33-64). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent (*Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corp* [1985] ZASCA 132 (at www.saflii.org.za), 1985 Burrell Patent Cases 126 (A)). Fourth, to the extent that evidence may be admissible to contextualise the document (since 'context is everything') to establish its factual matrix or purpose or for purposes of identification, 'one must use it as conservatively as possible' (*Delmas Milling Co Ltd v du Plessis* 1955 (3) SA 447 (A) at 455B-C).The time has arrived for us to accept that there is no merit in trying to distinguish between 'background circumstances' and 'surrounding circumstances'. The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms 'context' or 'factual matrix' ought to suffice. (See *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) paras 22 and 23 and *Masstores (Pty) Ltd v Murray & Roberts (Pty) Ltd* [2008] ZASCA 94; 2008 (6) SA 654(SCA) para 7.)'[18]

[249] It has also been held that a contract is to be interpreted so as to give it a commercially sensible meaning.[19]

[250]

[251] The 2004 agreement is thus to be examined to determine what the parties intended by having regard to the purpose of the contract.

[252] The objective of the agreement is set out immediately after the preamble. These clauses are interrelated as the objective refers to what is contained in the preamble which is essentially embraced as constituting the objective. These portions of the agreement are as followed:

[253] 'Preamble

Whereas the Government of the Republic of Namibia by Cabinet Decision No: 23rd/28.08.01/007, has resolved as follows:

1) *That the cabinet supports the negotiations for the establishment of the headquarters of the African Civil Aviation Authority in*

[18]Supra at par [38] and [39].

[19]*North East Finance v Standard Bank of South Africa* 2013 (5) 1 (SCA) at par [24], *Ekurhuleni Metropolitan University v Germiston Municipal retirement Fund* 2010 (2) SA 498 (SCA) at par [13].

Namibia and authorizes the Minister of Works, Transport and Communication to sign agreements to this effect in consultation with other Offices/Ministries/Agencies of the Government.

2) *That other Offices/Ministries/Agencies are urged to make the necessary provisions, should Namibia succeed in hosting the headquarters of the above mentioned Authority*.

Objective

The objective of this memorandum of agreement is to secure the professional services of African Civil Aviation Agency (Pty) Ltd which initiated the project with the European Commission and the African Civil Aviation Commission to assist the Ministry of Works, Transport and Communication through the Directorate of Civil Aviation in giving effect to the above mentioned Cabinet Decision.'

[254]

[255] Also of relevance is the definition in article 1 of the project as meaning the 'formation and establishment of the African Civil Aviation Authority.'

[256]

[257] The defendant is thus in terms of the 2004 agreement appointed as the promoter of that project.

[258]

[259] The obligations of the Government as client are listed in article 3. These include a general obligation to assist the defendant as a project promoter in liaising and meeting with relevant organisations including ministries of the Government of Namibia as well as those of international states and other organisations. A further obligation is to give prompt consideration to notices and documents submitted by the project promoter relating to the project.

[260]

[261] The obligations of the project promoter, set out in article 4, include securing agreements ensuring that the headquarters of the AFRO-CAA shall be in Namibia, provided that such efforts and agreements shall not be prejudicial or negate any agreements that the Government of the Republic of Namibia has entered into. A further obligation on the part of the defendant as project promoter was to exercise all reasonable skill, care and diligence in the discharge of the services defined in the agreement. There is also a general obligation to report to

the Government DCA on progress at regular intervals.

[262]

[263] The duration of the agreement is also of importance to the issue raised by the plaintiff. It is set out in clause 5. Clause 5.5 provides:

> [264] 'This agreement shall be valid for the client's financial year 2003/4 to 2008/9 and shall be renewable by a separate exchange of letter for a further 5 years.'

[265]

[266] It was thus contemplated by the parties that the agreement would endure for 5 years and that it could be renewed by a separate exchange of letters meaning that the parties would need agree upon an extension and confirm it in that way. There was thus no right to an extension on the part of the defendant.

[267] Clause 5.3 is also of relevance and provides a right to the Government as client to terminate the agreement on 30 days' notice. In that event, severance expenses as stipulated in article 7.2 would be payable. This term has already been referred to.

[268] It is accordingly clear that the parties contemplated that the defendant would promote the project for a term of 5 years but that this could be renewed and extended if the parties agreed to a further extension. The agreement did not expressly provide that it would come to an end upon establishment of the AFRO-CAA or even upon achieving the stated objective. The agreement instead provided for a term for the performance of the services by the defendant as project promoter. It would come to an end by effluxion of time or by termination by the Government with the consequential obligation to pay severance until the end of its term (at the rate of 50% of the total fee over that period).

[269]

[270] Mr Marcus argued that, as a matter of law, a contract would also end when the obligations are discharged in the sense of the objective set out in the agreement having been achieved.

[271] In accordance with Roman Law, the nature of performance which

discharges an obligation is that which is due under the contract in question.[20] The nature and extent of the required performance is determined by the intention of the parties upon an interpretation and construction of the agreement.[21]

[272] The required performance, considering the objective set out at the outset of the 2004 agreement is 'the establishment of the headquarters of AFRO-CAA in Namibia', as set out in the cabinet decision quoted in the preamble and not merely the establishment (as an entity) of AFRO-CAA, upon which Mr Marcus' approach was premised. The cabinet decision significantly also referred to the obligation of other offices/ministries/agencies to make the necessary provisions should Namibia succeed in hosting the 'headquarters'.

[273] What was intended by the term 'establishment of the headquarters' of AFRO-CAA as the performance required under the agreement is to be interpreted in the accordance with the general principles set out above. The starting point is the ordinary grammatical meaning of the term 'establishment.'

[274] In the New Shorter Oxford Dictionary the relevant meaning of 'establishment' is 'something established, the action of the establishing; 'the fact of being established.'[22]

The verb 'establish' in that authoritative work has a number of meanings.

The first two are as follows:

> '1. Institute or ordain permanently by enactment or agreement; spec. give legal form and recognition to (a Church) as the official church of the country;
>
> 2. Set up on a permanent or secure basis; bringing to being, found, (a government, institution, business, etc).'[23]

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[20]Kerr *The Principles of the Law of Contract* (4d) at 383; See also *Joubert etal The Law of South Africa* (2d) Vol 19 at p155-157; *Van der Merwe, Van Huyssteen, Reinecke and Lubbe Contract-General Principles* (2d) at p482-487.

[21]*Van der Merwe, Van Huyssteen, Reinecke and Lubbe Contract-General Principle* supra at 483-484.

[22](1993) vol1 at p852.

[23]Supra at 852.

[275] Clearly the second meaning is applicable to the use of the term 'establishment' in the agreement, having regard to the context in which the word is used, upon an interpretation of the agreement as a whole, including the its purpose. Importantly the agreement speaks of establishment of the headquarters of AFRO-CAA – and not merely of AFRO-CAA as an entity, as was repeatedly referred to by Mr Marcus in argument and in his questions to the defendant's principals. Plainly, what the parties had in mind was that the headquarters of the authority was to be established in Namibia on a permanent or secure basis.

[276]

[277] As I have pointed out above with reference to the *KPMG* decision, evidence on the interpretation of term is not admissible except to contextualise the agreement in the very confined sense set out. Evidence of a factual nature setting out as to what the headquarters of an international civil aviation authority would require was in my view admissible. Mr Kamau's evidence that the AFRO-CAA, being an international organisation, would need an accreditation as an international organisation for the purposes of its operation and for accreditation for employees was not placed in issue. It was common cause that a draft agreement had been submitted to the office of the Attorney-General for presentation for the Foreign Ministry of Namibia in order to achieve this. The finalisation of that agreement had been delayed by the Government (through either the office of the Attorney-General or its Foreign Ministry). Mr Kamau's evidence that an agreement of this nature was part and parcel of establishment of a headquarters of an international civil aviation authority was not contested. This would in my view seem to be part of the setting up of the headquarters of such an authority on a permanent or secure basis.

[278] Mr Marcus on the other hand contended that the signing of the international agreement established the AFRO-CAA. That contention on its own is correct. The separate legal identity of the organisation was brought into being by the international agreement between the founding states on 27 June 2007. But the objective of the agreement was not merely to set up a legal entity but to do more and to establish its headquarters in Namibia on a permanent or secure

basis. The international agreement was an important step in achieving the establishment of the headquarters in Namibia on a secure basis. But on its own, it did not do so. There was evidence of the board being set up and convening some months later (in September 2007) and the promulgation of the international agreement in the Republic of Namibia in November 2007. These are all necessary components of establishing the headquarters and its international status. I also accept that the international accreditation by the Government of Namibia in respect of the headquarters formed part of its establishment. This is re-inforced by the definition of the project in the agreement as the formation and establishment of the AFRO-CAA, clearly connoting not merely bring into existence the legal entity but something more in the sense of doing so on a permanent or secure basis.

[279] It would follow in my view that the establishment of the headquarters of AFRO-CAA did not merely entail bringing that authority into existence as a legal entity by the signing of the international agreement on 27 June 2007. It entailed more and included further steps required to effectively establish the headquarters in Namibia.

[280] It further follows that the signing of the international agreement on 27 June 2007 did not in my view bring about the discharge of the plaintiff's obligations under the agreement. As a matter of fact, the defendant continued to take steps to establish the headquarters of the authority by approaching the Government to ensure the accreditation of the authority as an international organisation and continued to approach various states with a view to sign them up and for donors to contribute to it.

The amending agreement

[281] The Government contended in its particulars of claim that the amending agreement was void for three separate reasons. In the first instance, the Government contended that the defendant, in the person of Capt Eggersweiler, represented to Mr Amunyela that the memorandum of agreement constituting the amending agreement formed part of the minutes of the meeting of 17

January 2007 and requested his signature to formalise that addendum. Acting on this representation, Mr Amunyela signed the agreement, without reading it and accepting what Capt Eggersweiler informed him as correct and trusting him, given the extensive dealings between Capt Eggersweiler and his co-principal (in the defendant) had with the Ministry over the years. The Government contended that the representation was material and that it was false, with Capt Eggersweiler and the defendant knowing that what was contained in the memorandum of agreement had not been agreed upon at the meeting of 17 January 2007. The Government accordingly contended that the agreement was void as a consequence of the fraudulent misrepresentation.

[282] In the alternative, the plaintiff also pleaded that the formalities for entering into further agreement had not been met as stipulated in the 2004 contract. The Government relied upon the provisions of article 12.1 dealing with amendments to that agreement, requiring consultations followed by an exchange of notes setting out the amendments. Article 5.5 also required that the agreement was renewable by a separate exchange of letters.

[283] In the further alternative it was contended that the amending agreement was unforceable as it did not reflect the agreement reached at the meeting of 17 January 2007. This was related to the question of authority which was also raised. The point was taken that Mr Amunyela did not have the authority to bind the Ministry beyond that which he was expressly given concerning the meeting of 17 January 2007 and that the extension of the agreement and the massive increase in professional fees, not having been agreed upon at that meeting, was thus outside his authority and it was thus void and unforceable for that reason as well.

[284] I have already referred to the evidence concerning the amending agreement. The Government for the most part relied upon the evidence of Mr Amunyela as to what occurred at his office. His evidence was largely unshaken except as to who had attended at his office. He said that it was only Capt Eggersweiler. But the latter and Mr Kamau said that both of them attended at Mr Amunyela’s office. The defendant’s evidence was indirectly supported by Mr

Mujetenga who had stated in evidence that both Capt Eggersweiler and Mr Kamau had attended at his office and that he had then referred them to Mr Amunyela or the Permanent Secretary. He had not accompanied them. But it was put to Mr Amunyela that Mr Mujetenga had attended upon his office with the defendant's two principals. It was in that context that Mr Amunyela denied that version and said it was on Mr Eggersweiler.

[285]

[286] It would thus appear that Mr Amunyela was mistaken as to who attended at his office. It would seem that both Capt Eggersweiler and Mr Kamau attended at his office. It was not disputed by the latter that the agreement had been handed to Mr Amunyela by Capt Eggersweiler. This may have given rise to his mistaken recollection that only Capt Eggersweiler was present. I also take into account that their presence at the office was of a short duration.

[287]

[288] The thrust of Mr Amunyela's evidence was that the agreement was brought in by Capt Eggersweiler who had said that it was an addendum to the minutes of the 17 January meeting and requested Mr Amunyela to sign it on behalf of the Ministry. Although Capt Eggersweiler and Mr Kamau denied that this was stated to Mr Amunyela, they gave no contrary evidence of any discussion at that office except for both stating that Mr Amunyela had said that the memorandum of agreement reflected what had occurred at the meeting. Nothing else was put to Mr Amunyela as to what was discussed. Nor did the defendant's principals state that anything else was specifically discussed.

[289]

[290] Mr Kamau's evidence that their meeting was for at least 30 minutes in Mr Amunyela's office is thus highly unlikely, given the extremely short text of the agreement in question, namely less than a page, as well as Mr Amunyela's statement that he did not read it, given the assurance by Capt Eggersweiler that it reflected what was agreed upon at the meeting. Capt Eggersweiler's account in cross-examination as to the duration of the meeting would rather indicate that it was over quickly and less than 30 minutes. Mr Kamau later conceded under cross-examination that Mr Amunyela signed the agreement immediately which would contradict his earlier evidence of a thorough discussion and of at least 30 minutes in duration.

[291] Capt Eggersweiler stated that the defendant's principals did not point out to Mr Amunyela that the memorandum of agreement sought to extend the 2004 agreement by a further five years. Although Mr Kamau was evasive when he was asked about this by the court, he would not appear to dispute that this was not pointed out to Mr Amunyela. The amending agreement does not state in as many words that the agreement was to be extended by five years but, in a single clause rather refers to four clauses of the 2004 agreement and says that 'it was mutually agreed that the agreement has been reviewed, renewed and revised as set out in those here-said articles'.

[292]

[293] Both Mr Kamau and Capt Eggersweiler acknowledged and confirmed Mr Amunyela's evidence that the latter was not part of the administration of the 2004 agreement and whose only involvement was to chair the 17January 2007 meeting which had been set up primarily to review the defendant's professional fee, even though the issue of an extension was raised but not agreed upon and where it was specifically minuted that the deliberations on that issue were postponed. His evidence that he was thus only authorised to sign an agreement which reflected what had been agreed upon at that meeting was not shaken. This would appear to have been known to the defendant's principals and accepted by them. It is also consistent with the probabilities, given his role and position. Quite apart from this, the defendant's principals were also aware of the internal requirements of the Ministry and Government with regard to first forwarding draft agreements to the office of the Attorney-General before signature. But more importantly both stated that they knew that only the Permanent Secretary as accounting officer of the Ministry or a specifically authorised person delegated by him could enter into agreement on behalf of the Ministry.

[294] It is common cause that the issue of an extension to the agreement had not been agreed upon at the 17 January meeting. All of the witnesses who had attended that meeting confirmed this. Indeed, all of them stated that it was a contentious issue. This was for obvious reasons. The question of the further duration of the agreement was a matter which would need to be deliberated

upon in the light of the consequences of the imminent inauguration and establishment of AFRO-CAA. Furthermore it was common cause that the Permanent Secretary of the Ministry was understandably uncomfortable with the onerous severance provision (to the Government) contained in the 2004 agreement which was on the other hand very generous to the defendant. It was common cause that the Permanent Secretary had wanted this aspect of the agreement to be renegotiated and the clause amended. The duration of the agreement is closely related to the issue of severance and a further extended term would give rise a massive potential liability to the Government for severance in the event of the termination of the agreement.

[295]

[296] The defendant's principals knew all this and would thus have known that Mr Amunyela would not have had the authority to have agreed upon an extension of the agreement. It was thus in my view most significant that they had, on their own version, failed to point out to Mr Amunyela that the amending agreement sought to extend the duration of agreement by a further five years, particularly when this had been an issue upon which the parties could not reach consensus at the 17 January meeting and was also not spelt out specifically in the amending agreement. Even on the defendant's version, if Mr Amunyela were to have stated that the contents of the amending agreement reflected what had been agreed upon at the 17 January 2007 meeting, it was certainly incumbent upon them to point out that this was not the case in respect of two crucial and the most important components of the amending agreement – with reference to the extension and the massive increase to their fee to N$139 145.

[297] As far as the increased fee is concerned, I refer to what I have already stated. It is clear to me that this was not agreed upon at the 17 January meeting. It is not included in the minutes. Had it been agreed upon, I have no doubt that the defendant's principals, having shown the manner in which they sought to extract as much as the they could from the contractual relationship with the Government, would have hastily pointed out this fact when the minutes were drafted and would not have signed the minutes if there was such a glaring and material omission. Furthermore, it was not put to Mr Amunyela that this had been agreed upon at the meeting. I also take into account that the

contemporaneous handwritten notes of Mr Mujetenga which formed the basis for the minutes which he prepared, contained absolutely no reference to this figure. The figure in question also has no relationship to the 10% increase agreed upon. On the contrary it amounted to more than a 30% increase upon what was paid in the preceding financial year ending on 31 March 2007.

[298] I further take into account Mr Kamau's initial evidence that this figure was agreed upon after the defendant's exorbitant claim in respect of increased fees for previous financial years had been rightly rejected and that he had negotiated this vastly increased fee with Mr Mujetenga as a 'compromise' in order to compensate for what Mr Kamau had convinced Mr Mujetenga should have been an increase in respect of both professional fees and expenses.

[299] Even though Mr Amunyela would appear to have been mistaken as to whether Capt Eggersweiler or both of the defendant's principals called upon him for his signature to the amending agreement and that his conduct was clearly unsatisfactory and neglectful by not fully and properly apprising himself personally as to what he was signing and its implications, particularly given this seniority within the Ministry, I did not find him to be an untruthful or unreliable witness in other respects, except for some vagueness in respect of certain answers which may be ascribed to his extremely limited involvement in the project and the passage of time between his signature to that agreement and his evidence in court, namely more than five and half years.

[300] The defendant's principals both struck me as very unsatisfactory witnesses. Capt Eggersweiler who was the more credible of the two, was however evasive in certain of his answers. But Mr Kamau, as I have already indicated, was not only evasive but was not in my view a credible witness and struck me as someone who was prepared to embroider on answers and change his stance in order to suit the circumstances. The defendant's misleading answer given to Ms Paulo on funds received from other states, as I have pointed out, very adversely reflects upon their credibility. Aspects put to plaintiff's witnesses such as Mr Mujetenga accompanying the defendant's principals to Mr Amunyela's office did not accord with their evidence. Nor were important

elements of their evidence put to the plaintiff's witnesses, such as making a claim of N$2, 1 million after the 17 January meeting, how the fee of N$139 145 was arrived at, the receipt of the funds from Nigeria and Libya and the assertion that the amending agreement had been discussed 'point by point' with Mr Mujetenga.

[301]

[302] The evidence of Mr Mujetenga, who was also rather vague and in my view mistaken in certain respects of his evidence, does not in my view assist the defendant in their version on the amending agreement. The fact that he referred them to Mr Amunyela or the Permanent Secretary would tend rather to support Mr Amunyela's version that it was represented to him that the contents of the agreement constituted an addendum to the minutes. This was because of Mr Mujetenga's evidence – not challenged in cross-examination – was that he did not know what was contained in the agreement and that may have been represented to him as well that it purported to reflect what was agreed upon at the meeting. (This was in indirect conflict with Mr Kamau's who said the amending agreement was the product of extensive and several discussions with Mr Mujetenga.) Why otherwise would Mr Mujetenga have referred them to Mr Amunyela, given the fact that as Under-Secretary for Administration, he would have had no further involvement with the project and the implementation of the agreement, except if the amending agreement reflected what was decided upon at the meeting. Mr Mujetenga conceded that Mr Amunyela would not have the authority to bind the Ministry in the absence of express authority to that effect conferred upon by the Permanent Secretary.

[303]

[304] Taking all of the aforegoing into account, I am satisfied that the plaintiff has established that the defendant misrepresented the nature of the amending agreement to Mr Amunyela as being an addendum to the minutes and that he had been induced by this misrepresentation to sign that agreement on that basis without going through it. It is thus voidable at the instance of the plaintiff by reason of the fraudulent misrepresentation which the plaintiff has established on the part of the defendant.

[305]

[306] But there are further reasons why the agreement was in any event void.

Mr Amunyela on his own evidence did not have authority to sign it. This was essentially not placed in issue by the defendant. Instead the defendant relied upon estoppel and stated that the lack of authority was an internal problem for the Government and of no concern to it. Not only is this misplaced on the facts, given the fact that it is clear to me that they were aware or should have been aware that Mr Amunyela did not have the authority to agree upon issues outside the ambit of what was agreed at the 17 January meeting. But the absence of authority which is prescribed in legislation for the validity of an action on the part Government cannot be remedied by estoppel where there are statutory requirements for the entering into of transactions on behalf of Government.[24] This would also appear to be the position in England.[25] The State Finance Act[26] requires treasury authorisation for expenditure on behalf of the State except where authorisation or approval has been made by the treasury in writing. It was not disputed that by all witnesses that the Permanent Secretary of the Ministry was authorised to enter into certain agreements on behalf of the Ministry and would thus have had the requisite treasury authorisation (and tender exemption). In the absence of that authority from the Permanent Secretary, the entering into an agreement would thus be outside the statutory powers of an official within the Ministry and thus be void and unenforceable for this reason as well.

[307] There is a yet further reason why the amending agreement was void and unenforceable. This was by reason of the failure to comply with the articles 5.5 and 12 of the agreement which specified its own formalities with regard to amendments to it and a renewal under article 5.5. At the very least, the exchange of letters was required. This was no doubt inserted in the agreement to confirm consensus on the issue. These formalities had not been complied with. Nor had they been waived – with the defendant having the onus to plead and establish waiver which it did not do.[27]

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[24]See *Strydom v Die Landbou Bank van S.A* 1972 (1) SA 801 (A) at 815 G-I.

[25]*Minister of Agriculture v Mathew* [1949] 1 all ER 724 at 729, cited in the *Strydom* matter.

[26] Act 31 of 1991.

[27]*Opperman v President of the Professional Hunting Association of Namibia* 2000 NR 238 (SC) at 246; *Mostert v Minister of Justice* 2003 NR 11 (SC) at 20 A-C.

[308] It follows that the amending agreement is void and did not extend the agreement. It further follows that the increase in the fees contained in it in the amount of N$139 145 which the defendant sought to increase even further by 10% in the following financial year namely from 1 April 2008 was also void and unenforceable. Instead, the applicable professional fee from 1 April 2007 was N$111 804, constituting a 10% increase upon the fee in the previous year. There was no further agreement to increase the fee by further a 10% in future financial years. The parties would have needed to agree upon that separately, as is contemplated by the 2004 agreement itself.

[309]

[310] There was thus not an automatic 10% increase from 1 April 2008, as claimed by the defendant. What had occurred was that the fees for the financial years ending 31 March 2006 and 31 March 2007 had been increased by 10% each and that the parties had further agreed that the professional fee for the financial year starting on 1 April 2007 would also be increase by a further 10% to bring it to N$111 804. There was no further increase agreed upon. The fees thus remained at that level.

[311] As far as interest on enrichment claims is concerned, I see no reason why it should only run from date of judgment. If the extent of enrichment is in respect of payments made in error and without justification, I see no reason why interest should not run from the date upon which repayment is demanded. In this case, in the absence of evidence of a demand, it would run from the date of the service of the summons. This would also be in accordance with the judgment of the full bench in *Seaflower Whitefish Corporation*.[28] There may be cases where it should only run from the date of the judgment. But this is not such a case. It is also not necessary for the purpose of this judgment to further consider that question.

[312]

[313] Having made these findings, I now turn to the claims which are affected by them.

[314]

[28] Supra at 69F.

Government's claims 3 and 4

[315] As far as the Government's claim 3 is concerned, its success is dependent upon a finding that the plaintiff's obligation to pay professional fees had come to an end on 28 June 2007 on the grounds that the Government's obligations were discharged by performance. I declined to make a finding to that effect for the reasons I have already indicated. But a portion of that claim relating to the excessive fee in the sum of N$139 145 charged by the defendant is however sound. It is based upon the difference in the fee applicable, namely N$111 804 and that contained in the amending agreement which was claimed and paid in the sum of N$139 145 for the period 1 April 2007 to 28 June 2007. That portion of the claim is in the sum of N$82 023 but actually forms part of claim 4 and thus cannot succeed under claim 3 as it would constitute duplication.

[316]

[317] As far as claim 4 is concerned, I agree that the professional fee payable from April 2007 to 31 March 2008 and thereafter to the date of cancellation was in the amount of N$111 804. Paragraph 35 of the amended particulars of claim is thus incorrect to allege that the fee would have increased by 10% on that amount. The increase would in any event certainly not have been effective from 1 January 2008 but from 1 April 2008, given the end of the financial year in question. The schedule attached to the further particulars to the amended particulars of claim 'APC 3' and handed in as part of Ms Paulo's evidence thus under claims the amount due to the Government. This would mean that claim 4 should have exceeded the amount of N$384 777 claimed by the plaintiff. But the plaintiff did not seek an amendment to this effect. I am accordingly constrained to enter judgment in favour of the plaintiff in the sum of N$384 777 in respect of claim 3 even though the actual enrichment was larger but unclaimed.

[318]

[319] The plaintiff was clearly not liable for the increased fee of N$139 145. A further increase of N$153 059 as claimed and paid to the defendant. These fees were thus not owing to the defendant by virtue of the fact that the amending agreement was void and unenforceable for the reasons I have already given.

[320]

[321] These further payments were made by the Government on the assumption that the amending agreement was valid and enforceable. This was a mistaken assumption on its part. This was a reasonable mistake on the part of Government, given the fact that there was the amending agreement to support such payments which had subsequently turned out to be void and unenforceable. The defendant was enriched by the further sums in excess of N$111 804 paid to it as a professional fee because the further sums were not payable to it. The Government was to that extent impoverished by such further payments in respect of professional fees. I further find that the payments of such further sums to the defendant were unjustified in the circumstances.

[322] I turn to the defendant's counterclaims.

[323]

[324] **Claim 1 of the defendant's counterclaim**

[325] This claim is in the amount of N$1 011 162, 53. The defendant contends that the Government failed make payment in respect of four invoices in the sums of N$480 037, 35; N$240 569, 82; N$226 394, 07; and N$64 161, 29. The defendant further contends that the plaintiff had acknowledged its indebtedness to the defendant in those amounts.

[326]

[327] In the plaintiff's plea to that counterclaim, the plaintiff first denied that the 2004 agreement had come to an end on 28 June 2007 and stated that the Government was no longer liable for the payment of services and expenses as from that date. But the Government further denied in the plea that the defendant incurred the costs referred to in these claims and put the defendant to their proof. It also denied that any acknowledgement of indebtedness was made as it was without the benefit of legal advice and would thus not bind the plaintiff.

[328]

[329] The defendant was thus put to the proof of this claim and its components. The defendant thus had the onus to establish this claim and its component portions.

[330] When Mr Mujetenga gave evidence, it was put to him by the defendant's

counsel that he did not dispute these amounts. He confirmed that. But these claims were however made after the contract was terminated, namely on 15 July and 16 July 2008. This nearly a year after he had occupied the position as DCA. They also arose after his departure, as is reflected upon the invoices. The fact that he did dispute them did not take the defendant's case any further.

[331] In his evidence in chief, Mr Kamau referred to the fact that each of these invoices had been approved with reference to the signature of Mr Kauaria which appears upon each of them. The four invoices were attached to his affidavit which formed his evidence in chief. He confirmed each of them. But in respect of the invoice amount in the sum of N$226 394, Mr Kamau was vague, stating that the Government should be re-embursed for this amount but that it was due to the defendant in respect of expenses. The actual expenses are merely referred to as 'property expenses in accordance with AFRO-CAA agreement'. In turn to this invoice below.

[332]

[333] The invoice in the sum of N$486 287, 74 was, Mr Kamau pointed out, incorrect and should have been only for N$480 037, 35. It was in respect of expenses incurred in May 2008. It included an amount of N$180 101, 64 in respect S&T allowances for two delegates to Tripoli and Nigeria even though the preceding entries stated that one of the delegates had only travelled to Tripoli and not Nigeria.

[334]

[335] The invoice in respect of N$240 569, 82 was for expenses in July 2008, after the agreement had been terminated (on 13 June 2008). It included an S&T claim for two delegates in the sum of N$143 371 and was without any supporting documentation. The claim in the sum of N$64 616, 29 is merely specified as stating 'promotion in regard of the contract' (sic). It is also with reference to July 2008.

[336]

[337] Not one of these invoices is further specified with reference to documentation.

[338]

[339] Mr Kamau stated in evidence however that the sum N$64 161, 29 was

in respect of professional fees for July 2008 and the balance for that month, on the assumption of the fee of N$153 089 (representing a 10% increase in respect of the fee of N$139 145). Mr Kamau stated that the Government was provided with supporting documentation. But this would not be payable if severance is paid to the defendant.

[340] Mr Kamau stated that the signature on the four invoices was that of Mr Kauaria, acknowledging that each of the sums was payable. Included in the first invoice was the sum of N$78 917, 90 in respect of the rental for the offices of the new authority. This is not an expense of the defendant and clearly not envisaged in the 2004 agreement but rather that of an entirely different entity. It was thus plainly not payable by the Government to the defendant. In terms of the 2004 agreement, the Government was liable to pay 'all fees and recoverable expenses as stipulated in Article 7.' Article 7 provides for the payment of the defendant's professional fee and does not include expenses for premises of the new authority (or that of the defendant or any property fees for that matter). Nor does article 8 which provides for the re-imbursement of the defendant's travel costs. Nor is there any other clause in the 2004 agreement which rendered the Government liable for costs of that nature.

[341] The invoice for N$226 394 is strangely dated 27 October 2009 – more than a year after the termination of the agreement. Its heading is 'Invoice MWTC (referring to the Ministry of Works Transport and Communication) September 2009.' The amount is only specified in the following way: 'JHI Property expenses in accordance with AFRO-CAA agreement.' There is no breakdown of the amount. Nor are any documents attached. It is plainly not payable under the 2004 agreement for the reasons I have already given. It is understandable that Mr Kamau said that the Government should be reimbursed for this (by the authority). But no explanation is provided quite how this should be payable by the Government in the first place.

[342] In his statement made to the defendant prior to the trial and confirmed under oath, Mr Kauaria said that the defendant always submitted properly documented invoices for claims made and that the defendant submitted all

supporting receipts if reimbursement for meetings and trips was required. Mr Kauaria also denied ever approving double claims 'made erroneously by the defendant' and that he had certified the correctness of claims. But these generalised statements were shown to be incorrect upon the very few claims which actually served before court. Double claims were admitted at the commencement of the trial. Furthermore it became common cause that the claim for N$1, 388 million which supposedly included re-imbursable expenses – according to Mr Kauaria's own evidence – was not supported by supporting receipts and the like. Indeed Mr Kauaria was unaware of the preceding claim for N$2, 1 million. Yet he categorically stated that the defendant did not owe any refund to the Government in respect of that payment.

[343]

[344] His evidence showed a bias to the defendant by making statements in support of its case concerning matters on which he did not have personal knowledge and in making sweeping generalised statements which, when examined with reference to the few claims before court, truned out to be wrong and unsupported. Instances of the former included a categoric statement that Mr Amunyela was authorised to sign the amending agreement with reference to a letter from the Permanent Secretary. When pressed on this issue, he was constrained to concede that he had not seen the alleged letter but that he was informed of its contents by Mr Amunyela. Despite Mr Kauaria consulting the defendant's counsel, this was not put to Mr Amunyela. Nor was such a letter sought in discovery or put to any of the Government's witneses.

[345] Mr Kauaria also said that the amending agreement 'was discussed and subsequently entered into by and between the parties on 4 June 2007.' But he was not present when there were discussions. Nor was he present when the agreement was signed.

[346] Mr Kauaria's evidence was self serving, in seeking to justify payments to the defendant, which he had expressly authorised by his signature approving them. This is clear from the penultimate paragraph of his confirmed statement, where he said:

> 'I have as project leader no liability for any claims by either the Ministry or the

> company (referring to the defendant) as I was sidelined by the Ministry when the termination was considered and communicated.'

[347] Mr Kauaria was surprisingly not cross-examined on his approval of the invoices which he had signed off and which formed the subject matter of claim 1 of the counterclaim. These included a claim for office rental (presumably for AFRO-CAA) which is not authorised by the 2004 agreement and the large claims made for July 2008 - after the notice of termination – especially in the context of article 8.6 of the 2004 agreement which provided:

> 'The project promoter shall arrange his activities associated with this agreement to always result in the least cost to the client.'

[348] He was also not cross-examined on the claim for N$226 394 which demonstrably did not fall within the ambit of the agreement. Nor was supporting documentation sought in Mr Kamau's cross-examination especially given the contradictory claim for S&T on the first claim.

[349]

[350] It would follow from aforegoing that the defendant has not discharged the onus of establishing that the invoice of N$226 394 was payable to it as it concerns an item not covered by the 2004 agreement. This despite Mr Kauaria's endorsement of the claim. He was also an unsatisfactory witness who struck me as being bent on justifying his actions in applying so little scrutiny to the defendant's claims and showing an unjustified and questionable bias in favour of the defendant and its principals in his evidence. Ms Paulo's evidence that the claims bypassed her and were processed by a junior clerk and merely signed off by Mr Kauaria who had provided a statement to the defendant (and whose case he supported). This seems to have reflected the reality, given the questionable composition of the few invoices in the project which served before court.

[351] It is also clear that the defendant also did not establish that the sum of N$78 917, 90 was payable to it as it also fell outside the parameters of the Government's obligations in the 2004 agreement. There are other unsatisfactory features in the invoices – the contradictory claim for S&T in the first and the large number of expenses incurred after the notice of termination. These called

for an explanation. But the Government's counsel did not interrogate or further contest the composition of these claims in the cross-examination of Messrs Kamau and Kauaria. It follows from their evidence – not seriously challenged in these respects – that the defendant has established the other components of the claims except for the professional fee portion in the sum of N$64 161, 29 given the incorrect amount upon which it was based and the failure to explain and show that it was payable, given reference to it as the balance of professional fees which would presumably be covered by severance.

[352]

[353] It further follows that the defendant has established claim 1 of the counterclaim in the total amount of N$641 689, 27.

Claim 2 of the counterclaim

[354]

[355] Claim 2 of the counterclaim, is for relatively small claims in the sums of N$10 000, N$600, N$39 and N$4 000. It was contended that they were in respect of invoices incorrectly calculated and that the sums were owing to the defendant. Paragraph 12 of the counterclaim further stated:

> [356] 'The plaintiff has already made payment in respect of the invoices pertaining to the incorrect calculations referred to hereinbefore as a consequence of which the plaintiff is obliged to pay the difference resulting from the incorrect calculations in the sum of N$14 639.'

[357] These allegations were put in issue in the Government's plea.

[358]

[359] Mr Kamau said in his evidence that they represented shortfalls in respect of invoices paid by the Government. Attach to his affidavit were the invoices from it is clear that the defendant had failed to add up the constituent amounts set out in the invoices and had provided incorrect totals. He was not cross-examined on these issues. His evidence must thus stand and the amounts would then be payable. Mr Kauaria was also surprisingly not cross-examined concerning his lack of scrutiny in authorising totals which did not reflect the sum of the constituent amounts on invoices.

[360]

[361] It would follow that the defendant is entitled to judgment in the sum of N$14 369 in respect of claim2.

Claim 3 of the defendant's counterclaim

[362] This large claim is in excess of N$20 million for severance allegedly due in terms of article 5.3 of the 2004 agreement read with article 7.2.

[363] This claim is premised upon the validity of the amending agreement – both in terms of the extension of the 2004 agreement for a further 5 year period and the increased fee of N$139 145 contained in the amending agreement and a further increase of 10% on that from 1 April 2008. As I have found that the amending agreement void and of no force and effect, the portion of the claim dependent upon the amending agreement must thus fail.

[364] The defendant not only claims severance upon its fees (as stipulated in article 7.1(a) as reviewed and adjusted), but also upon re-imbursable travel costs contemplated by article 8. This even though those travel costs had not been incurred. Nor would they have been incurred. There was no intention to do so. But in justification of this massive portion of the claim, Mr Kamau referred to that portion of clause 5.3 which states:

> 'Such severance payment shall be for the costs to be incurred by the project promoter (who shall retain this capacity exclusively) in seeking new sites to relocating the Project headquarters.'

[365] Article 7.2 states that severance (in article 5.3) comprises:

> 'The remuneration paid the terms of the remuneration due during the client's financial year at the time of termination for fifty percent of the remaining period of the contract.' (Emphasis supplied.)

[366] As I have said, the defendant's remuneration payable in terms of the agreement the monthly professional fee provided for in clause 7. This is clear from the use of that term in the agreement itself and by virtue of the ordinary grammatical meaning of that term. Article 7.2 after all forms pat of the

contractual clause dealing with and entitled ‘professional fees.’ It sets the fee in article 7.1(a) and article 7.2 is immediately preceded by art 7.1(d) which provides:

> ‘The terms of remuneration shall be reviewed and where necessary revised annually. . .’

[367] The term ‘remuneration’ used in article 7.2, is thus with reference to the ‘professional fees’ stipulated in that clause. In contradistinction to remuneration, article 8 deals with travel costs to be reimbursed to the defendant. Costs can only be reimbursed if incurred.

[368] The defendant’s claim for severance seeks payment for travel costs, reimbursed in terms of the contract. Article 8.6 states in respect of these costs which are that the defendant ‘shall arrange his activities so as to result in the least cost to the client.’ These travel costs can thus not conceivably form part of a severance claim which is determined with reference to the defendant’s remuneration.

[369] The untenable and unconscionable nature of the defendant’s counterclaim needs only to be examined to be dismissed. But its untenablility is also amply demonstrated by the facts of this case. Mr Kamau, although deliberately vague about the defendant’s activities after the termination of the agreement, did however state that its activities ceased upon termination ‘for all practical purposes’ because of a lack of funds. Sometime afterwards (although the date was not specified), Mr Kamau took on the position of General Manager of the Namibia Airports Company – a full time position, although he supplements his income from that parastatal by also doing private consulting work. He did not specify what travel costs the defendant was thus to be reimbursed for when there was no prospect that any would be incurred, given the cessation of activities on the part of the defendant and his subsequent full time employment supplemented by private consulting which would thus exclude travel for the defendant. But no travel was in any event planned after termination, given the cessation of activities. The defendant’s counterclaim for severance based upon averaged previously re-imbursed travel costs, especially when not intending to

even incur such costs, exemplifies the defendant's and avaricious overreaching approach to the contractual regime with the Government. This despite the terms of article 8.6 quoted above.

[370] It follows that any portion of the severance claim based upon re-imbursable travel costs is to be roundly rejected

[371] In terminating the agreement, Ms Paulo explained the Government rationale in doing so was to cut costs in a project which had resulted in haemorrhaging costs to the Government with little or no benefit. When doing so, Ms Paulo was alive to the prospect that a severance claim could be made and be payable under the agreement. Unlike all her colleagues in the Ministry who gave evidence, Ms Paulo was vigilant about the expenditure of public funds. Unfortunately her colleagues exhibited neglect and a lack of accountability in overseeing the expenditure of public funds in this project.

[372] I understood the evidence that the defendant's fee to the date of termination – 15 July 2008 had been paid at the applicable rate. The rate at which that remuneration should have been charged and paid was, as I have pointed out, N$111 804 per month. (There had been no agreement increase it in the financial year starting 1 April 2008.)

[373]

[374] The defendant would thus be entitled to severance calculated with reference to that fee from 13 July 2008 until the end of the agreement, being 31 March 2009. Severance in the sum of N$479 675, 22 would thus be payable by the Government to the defendant (by dividing the full amount of remuneration payable for that period being 8 months and 17 days at N$111 804 by 50%).

Costs

[375] The plaintiff has been substantially successful with its claims. They were opposed and it should receive its costs. It sought costs on the scale of one instructed and one instructing counsel. Costs on that scale are in my view more than justified in this matter.

[376] Although the defendant had had a measure of success with its claims, it had persisted with an exorbitant claim for severance including a portion exceeding N$13 million for re-imbursable costs which its principals did not even intend incurring which was both unconscionable and untenable. The conduct of the defendant's principals in their dealings with the Government was in my view unprincipled. They abused the misplaced trust in them and the distinct lack of vigilance on the part of key members of management of the Ministry in order to seek and at times extract sums from the Ministry which were not payable. This conduct warrants censure and is, in the exercise of my discretion, sufficiently serious to deprive the defendant of any costs with its measure of success in its claims. But, given the size of the claims made by the defendant, it is also clear to me that it was in any event not substantially successful. The Government was entitled to defend the unconscionable claim for severance and would be entitled to some of its costs in doing so. This would outweigh any costs which the defendant would have received for its measure of success in respect of claims 1 and 2 of the counterclaim which took very little time in the overall context of the trial.

[377]

[378] In the exercise of my discretion, I accordingly make no award of costs in respect of the defendant's counterclaim. As for the plaintiff's costs of succeeding with its claims, and in order to assist the taxing master, it would seem to me that two thirds of the time spent in the trial was necessary for that purpose.

[379] I accordingly make the following order:

a) Judgment in favour of the plaintiff in the sums of N$384 777 and N$740 396, 12;
b) Interest on these sums from the date of service of the summons to the date of payment at the legal rate of 20%;
c) The defendant is to pay the plaintiff's costs in proving these claims. These costs include those consequent upon one instructing and on instructed counsel and amount to two thirds of the time spent in the trial;
d) Judgment in favour of the defendant in the sums of N$641 689,

27; N$14 369 and N$479 675, 22;

e) Interest on these sums at the legal rate of 20% a tempore morae until date of payment;

f) No order as to costs is made in respect of the defendant's counterclaims;

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SMUTS, J

Judge

APPEARANCES

PLAINTIFF:	N. Marcus Instructed by Government Attorney
DEFENDANT:	J. Diedericks Diedericks Incorporated, Windhoek