

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2017/04092

In the matter between:

FRANKLY ENTERPRISES CC

PLAINTIFF

and

FRANKLIN OHIOZEBAU

DEFENDANT

Neutral citation: *Frankly Enterprises CC v Ohiozebau* (HC-MD-CIV-ACT-CON-2017/04092) [2023] NAHCMD 368 (30 June 2023)

Coram: UEITELE J

Heard: 5 – 9 and 15 December 2022 and 24 March 2023

Delivered: 30 June 2023

Flynote: Action – Civil Procedure – He who alleges bears the burden to, on a balance of probabilities, prove his or her allegations in order to succeed in his or her claim.

Action – Irreconcilable versions – Where the evidence of the parties' presented to the court is mutually destructive, the court must decide as to which version to believe on

probabilities – Approach that a court must adopt to determine which version is more probable, is to start from the undisputed facts which both sides accept, and add to them such other facts as may seem very likely to be true.

Action – Law of contract – Repudiation of a contract – Occurs where one party to a contract, without lawful grounds, indicates to the other party, whether by words or conduct, a deliberate and unequivocal intention to no longer be bound by the contract – If other party accepts repudiation, contract comes to an end upon the communication of the acceptance of the repudiation to the party who has repudiated – Only then a claim for damages arise.

Action – Law of contract – Breach of contract – Award of damages – The sufferer should be placed in the position he would have occupied had the contract been properly performed.

Summary: During the year 2015, Mr Franklin Ohiozebau was the owner of a vacant piece of land. His plan was to construct a 12 bedroom house on that piece of land and to convert the house into a guesthouse. Mr Ohiozebau engaged the services of an architect to draw the building plans for the house. The architect who drafted the building plans introduced Mr Ohiozebau to a close corporation which was in the construction business namely, Frankly Enterprises CC.

During August 2015, a certain Ms Chaardi Klein, the managing member of Frankly Enterprises CC and Mr Ohiozebau, agreed to commission Frankly Enterprises CC to construct the 12 bedroom house. The parties agreed that the construction will be in accordance with the building plans approved by the City of Windhoek. Frankly Enterprises CC provided Mr Ohiozebau with a quotation of N\$3 173 300,02 for the construction of the house, which quotation Mr Ohiozebau accepted. The construction was envisaged to last seven months.

Mr Ohiozebau then approached a commercial bank and applied for a loan to finance the construction cost. Mr Ohiozebau requested Ms Klein to increase the quote with an additional amount of N\$570 000, which quotation amounted to N\$3 743 300,02 in total.

His intention was to use the amount of N\$570 000 to furnish the guesthouse after the completion of the construction or to cover any unexpected expenses not foreseen at the beginning of the construction project. After Ms Klein provided him with a revised quotation in the amount of N\$3 743 300,02, Mr Ohiozebau submitted that quotation in support of his application for a loan to the bank. The bank approved a loan facility in the amount of N\$3 658 300,03.

Frankly Enterprises CC took occupation of the building site during September 2015 and commenced with the construction work. The construction went on well but there appears to have been alterations and additional work and the construction was not completed in the envisaged seven months. During December 2016, a dispute arose between Mr Ohiozebau and Ms Klein. Ms Klein, contending that Frankly Enterprises CC performed additional work, demanded additional payment. Mr Ohiozebau, on the other hand, maintained that Franklyn Enterprises CC was paid for all the work that it had performed.

After the builder's vacation that occurs over every December period, Frankly Enterprises CC, maintaining that it has not been paid for the additional work that it had performed, refused to return to site. As a result of Frankly Enterprises CC's refusal to return to the site and complete the construction, Mr Ohiozebau, during February 2017, engaged other contractors and finalized the construction of the house. When, by September 2017, Frankly Enterprises CC had not yet been paid for the amount it claimed was due to it, on 26 October 2017, it instituted this action against Mr Ohiozebau and claimed payment in the amount of N\$529 646 from him.

Mr Ohiozebau defended the action instituted against him. The essence of his defence is that he denies that he owes Frankly Enterprises CC any amount and alleges that Frankly Enterprises CC abandoned the construction site without having completed the building works in terms of the oral agreement. He further alleges that Frankly Enterprises CC delivered portions of the building with defects, which defects he had to repair at a cost of N\$880 593,38. Mr Ohiozebau, in addition to defending Frankly

Enterprises CC's claim, also instituted a counterclaim claiming an amount of N\$880 593,38 from Frankly Enterprises CC.

Held that, as regards the plaintiff's claim, the plaintiff is entitled to judgment in the sum of N\$52 742,52.

Held that, as regards the defendant's counterclaim, the plaintiff must pay the defendant the amount of N\$158 054,38.

Held further that the amount of N\$52 742,52 is set-off against the damages of N\$210 796,90 proved by the defendant. What is due to the defendant is therefore N\$158 054,38.

ORDER

1. The plaintiff must pay the defendant the amount of N\$158 054,38 plus interest on the amount of N\$158 054,38 at the rate of 20 percent per annum, reckoned from date of judgement to date of payment, both days included.
2. The defendant must pay 50 percent of the plaintiff's costs of suit in respect of the claim in convention, such costs to include the costs of one instructing and one instructed counsel.
3. The plaintiff must, in respect of the counterclaim, pay the defendant's costs of suit, including the costs of one instructing and one instructed counsel.
4. The matter is regarded as finalised and is removed from the roll.

JUDGMENT

UEITELE J:

Introduction

[1] During the year 2015, Mr Franklin Ohiozebau was the owner of a vacant piece of land namely, Erf 912, Academia, Windhoek. His plan was to construct a 12 bedroom house on that piece of land and to convert the house into a guesthouse. Mr Ohiozebau engaged the services of an architect to draw the building plans for the house for him. The architect who drafted the building plans for Mr Ohiozebau introduced Mr Ohiozebau to a close corporation which was in the construction business namely, Frankly Enterprises CC.

[2] Sometime during August 2015, and after some discussions and negotiations between the managing member of Frankly Enterprises CC, a certain Ms Chaardi Klein (Ms Klein), and Mr Ohiozebau, the latter agreed to commission Frankly Enterprises CC to construct the house for him. The parties agreed that the construction will be in accordance with the building plans approved by the City of Windhoek. Frankly Enterprises CC provided Mr Ohiozebau with a quotation of N\$3 173 300,02 for the construction of the house, which quotation Mr Ohiozebau accepted. The construction was envisaged to last seven months.

[3] Mr Ohiozebau did not have the cash to construct the house. He, as a result, approached a commercial bank and applied for a loan to finance the construction cost. Mr Ohiozebau requested Ms Klein to increase the quote with an additional amount of N\$570 000, which quotation amounted to N\$3 743 300,02 in total. His intention was to use the amount of N\$570 000 to furnish the guesthouse after the completion of the construction or to cover any unexpected expenses not foreseen at the beginning of the construction project. After Ms Klein provided him with a revised quotation reflecting the construction costs as N\$3 743 300,02, Mr Ohiozebau submitted that quotation in support of his application for a loan to the bank. The bank approved a loan facility in the amount of N\$3 658 300,03.

[4] Frankly Enterprises CC took occupation of the building site during September 2015, and commenced with the construction work. The construction went on well but there appears to have been alterations and additional work and the construction was not completed during the envisaged seven months. During December 2016, (that is,

approximately 15 months after the construction project started) a dispute arose between Mr Ohiozebau and Ms Klein. Ms Klein, contending that Frankly Enterprises CC performed additional work, demanded additional payment. Mr Ohiozebau on the other hand maintained that Franklyn Enterprises CC was paid for all the work that they had performed.

[5] After the builders' vacation that occurs over every December period, Frankly Enterprises CC, maintaining that it has not been paid for the additional work that it had performed, refused to return to site. As a result of Frankly Enterprises CC's refusal to return to the site and complete the construction, Mr Ohiozebau, during February 2017, engaged other contractors and finalized the construction of the house. When, by September 2017, Frankly Enterprises CC had not yet been paid for the amount it claimed was due to it, on 26 October 2017, instituted this action against Mr Ohiozebau and claimed payment in the amount of N\$529 646 from him.

[6] Mr Ohiozebau defended the action instituted against him. The essence of his defence is that he denies that he owes Frankly Enterprises CC any amount and alleges that Frankly Enterprises CC abandoned the construction site without having completed the building works in terms of the oral agreement. He further alleges that Frankly Enterprises CC delivered portions of the building with defects, which defects he had to repair at a cost of N\$880 593,38. Mr Ohiozebau, in addition to defending Frankly Enterprises CC's claim, also instituted a counterclaim claiming an amount of N\$880 593,38 from Frankly Enterprises CC.

[7] I will, in this judgment, for convenience sake refer to Frankly Enterprises CC as the plaintiff and to Mr Ohiozebau as the defendant.

The pleadings in respect of claim in convention

[8] As I have indicated above, on 26 October 2017, the plaintiff caused summons to be issued out of this court against the defendant. In its particulars of claim, the plaintiff (in summary) makes the following allegations:

a) During August 2015, the plaintiff, represented by Ms Klein, and the defendant, acting in person, concluded an oral agreement in terms of which the plaintiff would supply building materials and complete certain building and construction works at the defendant's property namely, Erf 912 Academia, Windhoek as per the specifications set out in the approved municipal building plans.

b) It was a material, express, alternatively implied, further alternatively tacit, term of the oral agreement that the plaintiff would prepare a provisional estimated quotation and an addendum to the provisional estimated quotation and that the defendant would be responsible to obtain financing from a registered financial institution for purposes of the building works, and will also be responsible for obtaining building plans for the building works from a registered architect and have the building plans approved by the Windhoek Municipality.

c) During the construction phase, the plaintiff would generally inform the defendant upon the final determination of the cost of an item provided for in the initial cost estimate or addendum before incurring the cost. The defendant would then either verbally or by email, confirm the incurring of the cost or, on several occasions, provide alternative instructions to the plaintiff to obtain quotations for items of a higher quality finish than those that are provided for in the initial cost estimate or addendum, relating to *inter alia* the tiles, balustrades, and/or light fixtures. The plaintiff would then inform the defendant of the additional cost and the defendant would either verbally or by email confirm the incurring of the cost. Upon submission of an invoice by the plaintiff from time to time, the defendant would instruct the registered financial institution to make payment to the plaintiff.

d) During February 2016, the plaintiff informed the defendant that the estimated cost of the roof was based on the fact that the Inverted Box Rib roof sheeting ('IBR') would be used for the roof, as per the approved building plans. The plaintiff further informed the defendant that the three-dimensional image of the completed house provided by the architect to the defendant showed a red roof made of Harvey tiles.

These Harvey tiles would require the structure of the house and roof to be changed by the plaintiff in order to accommodate the extra weight. The plaintiff would further have to remove certain parts of the walls, electrical wiring and plumbing, and thereafter re-install or re-build such removed building works in order to accommodate the Harvey Tiles.

e) The plaintiff, at the same time, which is during February 2016, informed the defendant that the alterations to construct a Harvey tiled roof instead of IBR covered roof would entail extra cost and provided the defendant with a verbal estimation of the extra cost. The defendant confirmed the quotation verbally and by email and instructed the plaintiff to go ahead with the construction of a Harvey tiled roof and related activities.

f) The defendant directly engaged someone to install the air conditioning units at the premise, as same was not included in the plaintiff's quotation. During August 2016, a dispute arose between the defendant and the contractor he engaged to install such air-conditioning. Due to this ongoing dispute, certain portions of the building works, some of which had already been completed previously, had to be taken out or to be redone in order to install the air-conditioning. The building works that had to be redone related *inter alia* to the tiling of certain rooms and bathrooms, closing up and plastering parts of walls.

g) The plaintiff completed the requested building and construction work and submitted invoices of the completed building works to the defendant. The defendant, however, despite various undertakings to make payment, failed to submit any further invoices to the registered financial institution and refused or failed to make payment to the plaintiff.

h) The defendant breached the agreement in that he has failed or refused to effect payment to the plaintiff upon invoicing for the building works completed by the plaintiff. The amount due, owing and payable to the plaintiff as at 1 July 2017 amounts to N\$529 646.

[9] On 20 April 2018, the defendant pleaded to the plaintiffs' particulars of claim and simultaneously with the plea, filed a counterclaim. In his plea, the defendant admitted that he and the plaintiff entered into an oral agreement in terms of which the plaintiff had to construct a 12 bedroom house for him at Erf 912, Academia, Windhoek.

[10] The defendant, however, denied that the plaintiff prepared a provisional estimated quotation and that it was a term of the oral agreement that he must obtain building plans for the building works from an architect. In amplification of his denial, the defendant pleaded that he accepted the quote as final quotation and not provisional estimates. He furthermore pleaded that during October 2015, the defendant's bank – Bank Windhoek, registered a mortgage bond over Erf 912, Academia, Windhoek in favour of giving plaintiff access to the funds through progress payments on submission of invoices.

[11] The defendant pleaded that the bank would, upon satisfactory inspection of the standard of the work completed by the plaintiff, make payments for the completed building works directly to the plaintiff. The defendant further avers that the building plans were complete, and that it was the approved building plans on which a quote for building works was provided by the plaintiff.

[12] The defendant furthermore denied that the plaintiff informed him of the alleged final determination of the cost of an item and further that the defendant confirmed incurring the cost. In amplification of its denial, the defendant pleaded that he only required information when the plaintiff would incur costs for an item different from that which is contained in the quotation. The defendant furthermore pleaded that the plaintiff did not attend to light fixtures and that the tiles were only approved in respect of the colour.

[13] As regards the replacement of the IBR roof with a Harvey tiled roof, the defendant admitted that the plaintiff informed him that the construction of a Harvey tiled roof will result in additional costs and that the plaintiff informed and provided him with a

verbal estimation of the additional costs. He, however, denied that the plaintiff informed him that the construction of a Harvey tiled roof would require a roof structure to accommodate the weight of the tiles. The defendant further denies that the plaintiff had to remove certain parts of the walls, electrical wiring, and plumbing. The defendant further pleaded that it was the sole negligence of the plaintiff to place Harvey tiles on top of trusses made for IBR sheet without changing the structure of the walls.

[14] As regards the plaintiff's allegations that the defendant directly engaged another contractor to install air conditioners, the defendant denied that he directly engaged another contractor to install the air conditioners. In amplification of his denial, the defendant pleaded that the contractor for the installation of the air conditioners was engaged upon advice and recommendation of the plaintiff. The defendant further admits that a dispute arose with the contractor for the installation of the air conditioner, but contends that the dispute arose as a result of the defective roof installed by the plaintiff.

[15] The defendant further denies that the portions of the building works already constructed were taken out or had to be redone in order to install the roof unit. In amplification of his denial, the defendant pleaded that the roof was removed because of the plaintiff's defective installation. The defendant furthermore claimed that the removal of the defective roof further damaged the air conditioners pipes. The defendant further claimed that the air condition installation was completed to the knowledge of the plaintiff.

[16] The defendant proceeded and pleaded that the plaintiff was required to complete the installation of tiles, electrical works, and stainless steel balustrades and obtain a certificate of completion of new building from the Windhoek Municipality, but failed to perform all these obligations. The defendant denies that he had reciprocal obligations towards the plaintiff. He pleaded that he incurred an amount in excess of N\$880 593,38 to complete the building works and rectify defective works rendered by the plaintiff. He, accordingly, denied that the plaintiff is entitled to any payment in terms of the agreement because the plaintiff had no invoices that were due and payable.

[17] The defendant further pleaded that the plaintiff abandoned the construction site without having completed the building works in terms of the oral agreement. In particular, the electrical, plumbing, tiling, painting of the building, installation of aluminum doors, geysers, cupboards, and interlocks works were not attended to. He, furthermore, contended that some showers were not connected to the main sewer system and the bathrooms were not tiled. In the alternative, the defendant pleaded that he complied with the payment terms of the oral agreement, in that the bank made payments to the plaintiff in the amount of N\$3 596 738,86 in respect of work performed. The defendant thus denied that he was indebted to the plaintiff in the amount of N\$529 646, or any amount for that matter.

[18] The defendant's counterclaim is based on the plaintiff's alleged breach of the oral agreement. The defendant pleaded that he performed in terms of the agreement, in that he caused a bond to be registered in favour of Bank Windhoek to access an amount of N\$3 658 300 and made payments totaling that amount to the plaintiff. The plaintiff, however, breached the oral agreement in that it abandoned the construction site without having completed the building works in terms of the agreement. As a result of plaintiff's breach of the oral agreement, the defendant suffered damages in the amount of N\$880 593,38, being the cost he incurred to complete the building and rectify the defects on the building.

The issues to be resolved

[19] After the parties exchanged pleadings and in preparation for trial, the parties attended a pre-trial conference hearing after which the court made a pre-trial order. In the pre-trial order the parties, amongst other issues, agreed with respect to the factual issues that the court has to resolve, the questions of law that the court has to determine and also the factual issues that are not in dispute between them.

[20] From the pleadings and the pre-trial order, I have formed the view that the essence of the dispute between the plaintiff and the defendant is, whether the plaintiff, in addition to what it and the defendant agreed upon to constitute the building work, in

fact performed other or additional work and has not been paid for the additional work that it alleges it has performed. The second issue which the court is called upon to resolve is, whether the plaintiff abandoned the building works and rendered defective or incomplete building work or both defective and incomplete building work, to the defendant.

Discussion

[21] In this matter, the plaintiff claims that it has performed work additional to what it had agreed with the defendant, and that it has not been paid for the additional work that it performed. The defendant on the other hand contends that he has paid the plaintiff for all the work that it had performed.

[22] It is now well established in our law that he who alleges bears the burden to, on a balance of probabilities, prove his or her allegations in order to succeed in his or her claim. In discussing the burden of proof and evidential burden Damaseb JP said:¹

[44] It is trite that he who alleges must prove. A duty rests on a litigant to adduce evidence that is sufficient to persuade a court, at the end of the trial, that his or her claim or defence, as the case may be should succeed. A three-legged approach was stated in *Pillay v Krishna* 1946 AD 946 at 951-2 as follows: The first rule is that the party who claims something from another in a court of law has the duty to satisfy the court that it is entitled to the relief sought. Secondly, where the party against whom the claim is made sets up a special defence, it is regarded in respect of that defence as being the claimant: for the special defence to be upheld the defendant must satisfy the court that it is entitled to succeed on it. As the learned authors Zeffert *et al South African law of Evidence* (2ed) at 57 argue, the first two rules have been read to mean that the plaintiff must first prove his or her claim unless it be admitted and then the defendant his plea since he is the plaintiff as far as that goes. The third rule is that he who asserts proves and not he who denies: a mere denial of facts which is absolute does not place the burden of proof on he who denies but rather on the one who alleges. As was observed by Davis AJA, each party may bear a burden of proof on several and distinct issues save that the burden on proving the claim supersedes the burden of proving the defence.

¹ *Dannecker v Leopard Tours Car & Camping Hire CC* (I 2909/2006) [2016] NAHCMD 381 (5 December 2016) at para 44-45.

[45] In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548A-C, Corbett JA discusses the distinction between the burden of proof and the evidential burden as follows:

“As was pointed out by DAVIS, A.J.A., in *Pillay v Krishna and Another*, 1946 AD 946 at pp. 952 - 3, the word *onus* has often been used to denote, *inter alia*, two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a *prima facie* case made by his opponent. Only the first of these concepts represents *onus* in its true and original sense. In *Brand v Minister of Justice and Another*, 1959 (4) SA 712 (AD) at p. 715, OGILVIE THOMPSON, J.A., called it “the overall onus”. In this sense the *onus* can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal (“weerleggingslas”). This may shift or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other. (See also *Tregea and Another v Godart and Another*, 1939 AD 16 at p. 28; *Marine and Trade Insurance Co. Ltd. v Van C der Schyff*, 1972 (1) SA 26 (AD) at pp. 37 - 9.)’

[23] It thus follows that for the plaintiff to succeed in its claim, it is required to adduce evidence, which proves on a balance of probabilities, the terms of the oral agreement between the parties; that the defendant breached such agreement; that resultantly, the defendant is indebted to the plaintiff in the amount claimed.

[24] In the present matter, the parties’ versions are irreconcilable. The process whereby courts resolve two irreconcilable versions is now well established and I will not restate all the principles here, save to state that:

a) where the evidence of the parties’ presented to the court is mutually destructive, the court must decide as to which version to believe on probabilities;² and

² *Stellenbosch Farmers’ Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at 14H – 15E, *National Employers’ General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at H 440E– G: Approved and followed in *Life Office of Namibia Ltd (Namlife) v Amakali and Another* 2014 (4) NR 1119 (LC) *Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR at 556; *Otto v Ekonolux* (I 3094/2012) [2013] NAHCMD 165 (14 June 2013).

b) the approach that a court must adopt to determine which version is more probable, is to start from the undisputed facts which both sides accept, and add to them such other facts as may seem very likely to be true, as for example, those recorded in contemporary documents or spoken to by independent witnesses.³ Mtambanengwe AJA eloquently stated it as follows:

'This...is how I go about the business of finding facts. I start from the undisputed facts which both sides accept. I add to them such other facts as seem very likely to be true, as for example, those recorded in contemporary documents or spoken to by independent witnesses like the policeman giving evidence in a running down case about the marks on the road. I judge a witness to be unreliable, if his evidence is, in any serious respect, inconsistent with those undisputed or indisputable facts, or of course if he contradicts himself on important points. I rely as little as possible on such deceptive matters as his demeanour. When I have done my best to separate the truth from the false by these more or less objective tests I say which story seems to me the more probable, the plaintiff's or the defendant's.'⁴

[25] The facts which are not in dispute in this matter are that the plaintiff provided a quotation and an addendum to the quotation for the construction of the house to the defendant, and the defendant accepted that quotation and its addendum. The plaintiff submitted a total of 11 invoices to the defendant's bank and the bank made payments in respect of each invoice submitted. I will, in the determination of the issues that I am called upon to resolve, turn to these documents to see whether the plaintiff's claim to do additional unpaid work or the defendant's contention that he has paid the plaintiff for the additional work is established.

[26] The plaintiff annexed a document marked as 'Annexure C' to its particulars of claim, which document was admitted into evidence as Exhibit B as the document reflecting the additional work it performed. The additional work relate to, digging a deeper foundation, constructing a thicker slab, constructing a Harvey tiled roof, initial labour on Harvey Tile, stainless steel balustrades, electricity extras, plumbing extra, construction and costs due to roof extra. I will now deal with each item.

³ *Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone* Case No SA 13/2008 (unreported) para 24.

⁴ *Ibid.*

Deeper Foundation

[27] Ms Klein, who testified on behalf of the plaintiff, testified that when the construction commenced and upon requesting an inspection from Windhoek Municipality ('the municipality') for the foundation, the plaintiff was informed by the municipality that, as a condition of obtaining municipal approval, specific soil tests needed to be performed by a qualified professional in respect of erven situated in Academia Extension 1 (the area within which the defendant's property is situated) and that based on the soil test results, a specific soilcrete for the foundation had to be designed. She proceeded that as a result of the municipality's requirement, an expert was called upon and the necessary tests were conducted. The expert informed Ms Klein that the foundations must be about 1.5 meters and that 900mm of the foundations needed to be filled up with soilcrete.

[28] This resulted in the municipality having required that the foundation needed to be much deeper than what was specified on the initial building plans. She further testified that the municipality dictated that the foundation must be a minimum of 1.5 meters as per the soil expert's specifications, and that backfilling had to be done. Ms Klein further testified that she explained and discussed the municipal requirements with the defendant and also informed the defendant what the estimated additional building costs would be. Ms Klein proceeded and testified that the defendant agreed to the additional building costs for the foundation that now needed to be much deeper than the initial building plans.

[29] In its quotation dated 3 March 2015, which it submitted to the defendant, the plaintiff quoted the first stage of the building works to include site establishment, site clearance, setting out excavation, compaction foundations and foundation reinforcing walls. The cost of all these work was estimated to constitute 13 percent of the total construction cost in the amount of N\$412 529. In the revised quote, the amount increased from N\$412 529 to N\$486 629.

[30] On 3 November 2015, the plaintiff submitted its first invoice for work it performed under stage 1 to the bank (Exhibit E1). In that invoice, the plaintiff sought payment for the following services it said it had performed: 'site establishment (N\$20 000), site clearance (N\$7500), excavation of the foundation and boundary wall – Excavation 1.3m deep (N\$35 000), backfilling of foundation – 550mm soilcrete (N\$45 500), treatment of the foundation with poison (N\$3000), casting of 300mm thick 25mPA (N\$98 700), relevant laboratory test (N\$3950), building out foundation – built out 450 mm under ground level and 1.5m at highest point above ground level by flat at back of erf (N\$75 700) (this was requested by Municipality, preparing for damp coarse inspection (N\$4200), actual building proceeds (N\$75 160), filling of areas – to surface bed level – filling 350 cubes (N\$45 630), compaction of surface bed areas (N\$16 750), and stock on site (N\$30 463).' The plaintiff's total invoice was thus N\$461 533.

[31] The bank's officials went out, inspected and evaluated the work done by the plaintiff against the payment claimed. The bank's official found that the work completed amounted to 12 percent of the total construction work and the officials thus recommended that the plaintiff be paid an amount of N\$376 533. On 5 November 2015, the bank paid the plaintiff the amount of N\$376 533 and the defendant paid the plaintiff the amount of N\$85 000. The total amount paid to the plaintiff in respect of its first invoice thus totaled the amount of N\$461 533.

[32] Having regard to the quotations of 3 March 2015 and 9 July 2015, the invoice of 3 November 2015, the building plans approved by the municipality, the payment voucher to the plaintiff and the evidence of both Ms Klein and the defendant, I have no doubt in my mind that the plaintiff indeed performed additional work to increase the depth of the foundation (in the approved building plans the depth of the foundation was set at 'not less than 300mm' but what the plaintiff said it excavated is 1.3m to 1.5m depth). I equally have no doubt in my mind that based on the plaintiff's invoice of 3 November 2015, that the plaintiff's claim included the additional work and that it was paid for the additional work that it rendered. My view is based on the fact that the invoice submitted by the plaintiff is for the depth of 1.3m to 1.5m demanded by the

municipality as opposed to the depth of 300mm set out in the building plan. I, therefore, find that the plaintiff's claim for payment in respect of a deeper foundation must fail and does fail.

The slab thickness

[33] Ms Klein also testified that, at the stage of reaching the first – floor level – the plaintiff received the building plans for the slab from the structural engineer. According to the plan drawn by the structural engineer, the slab thickness differed from the plans drawn by the architect (a certain Ms Nepela). She continued and testified that she advised the defendant that the construction must not deviate from what has been specified by the structural engineer and that the construction must continue in accordance with the structural engineer's plan. She further testified that she informed the defendant that the construction of a thicker slab would result in further additional costs. It was Ms Klein's testimony that the defendant accepted her advice and that there would be an additional cost implication. He nonetheless instructed her to proceed, which she did.

[34] The plaintiff called an expert witness, a certain Mr Ewald Steenkamp, a qualified quantity surveyor who confirmed in his construction cost report that the slab thickness increased from 170mm to 280mm plus rebar. The defendant's expert, Mr Joseph Ndiliman Sosinyi, a qualified engineer, in his expert report reported that he had visually inspected the property and confirm that the slab thickness was between 240 – 285mm while the architects drawing indicates a slab thickness of 170mm. I am thus satisfied that the plaintiff performed additional work as a result of the increase in the thickness of the slab.

[35] The question that needs to be answered, however, is whether or not the plaintiff was paid for the additional work. On 2 December 2015, the plaintiff submitted its second invoice to the bank (Exhibit E2). In that invoice, it sought payment for the following services: 'Building up of walls till slab level (N\$136 275), supplying and

Installation of electrical conduit in ground floor (N\$15 000), supplying and Installation of plumbing pipes in ground floor (N\$16 800), installation of sheeting on floors (N\$7500), installation of steel mesh in floors (N\$14 000), casting of ready mix for floors (N\$74 375), supply of material and installation of formwork for slab (N\$150 000), supply and bend and fixing of steel on the slab – 12 500kg of steel (N\$143 660), supply and installation of electric conduit on slab (N\$22 000), supply and installation of plumbing pipe on slab (N\$18 000), construction of 74 percent of boundary wall (N\$125 725), and filling of outside areas –Filling 480 cubs (N\$62 500).’ The plaintiff’s total invoice was thus N\$785 835.

[36] In this matter, the plaintiff did not specify, both in Exhibit B and in Ms Klein’s oral testimony, what portion of her claim of N\$529 646 constitutes her claim for the increased slab thickness. Mr Montzinger, who appeared for the plaintiff, urged me to award the plaintiff the amount of N\$87 956,08 for additional work in respect of the increase in the slab thickness. He argued that both expert witnesses for the plaintiff and the defendant in their joint report agreed that reasonable costs must be allocated for the increase in the slab thickness. Mr Steenkamp, on behalf of the plaintiff, calculated that a reasonable amount would be N\$87 956,08. This amount is the total of N\$28 425,94 to cast a slab of 225mm compared to 170mm (i.e. 55mm extra thickness) and the amount of N\$59 530,14 for the extra cost for rebar on the project.

[37] I indicated earlier that the defendant’s defence is that the plaintiff was paid by the bank for the additional work. Mr Montzinger argued that the proposition that the plaintiff was paid by the bank must fail because there is simply no evidence to suggest that the terms of the agreement was such that payment from the bank constitute full and final payment of all claims that the plaintiff may have against the defendant. Furthermore, there is no agreement that the total amount paid by the bank would constitute the full and final payment for all the work (including variations) to the plaintiff.

[38] Mr Montzinger’s argument is unattractive, and it is so for the following reasons. First, the question is not whether it was a term of the agreement that payment from the bank constitute full and final payment of all claims by the plaintiff. The question, in my

view is, did the plaintiff perform additional work and did it get paid for the additional work it performed? Secondly, the onus is on the plaintiff to prove that it and the defendant agreed to cast or construct a slab at a specified thickness and costs, but that due to the increase in the thickness of the slab, the costs proportionately increased.

[39] The plaintiff bears the onus to, in monetary terms, prove the proportionate increase. The plaintiff has not done that. From the invoice (Exhibit E2) it is evident that the costs claimed by the plaintiff in its invoice of 2 December 2015 (Exhibit E2), for the work performed by the plaintiff, that are associated with or related to the slab, are for a slab of 225mm thickness as compared to a slab of 170mm. I, therefore, find that the plaintiff has failed to discharge the onus resting on it to prove that it has not been paid for the additional work relating to the increase in the thickness of the slab.

Reconstruction of the Roof (Harvey tiles, initial labour on Harvey tile)

[40] Ms Klein further testified that on the day that the roof sheeting arrived, the defendant was on site and was unhappy when he saw that the roof will consist of IBR roof sheeting. She proceeded and testified that he provided her with a three-dimensional drawing which showed a roof constructed with Harvey tiles. Ms Klein continued and testified that she explained to the defendant that the approved building plans provided for IBR roof sheeting and that the trusses had already been made, constructed, and erected for IBR roof sheeting and not for Harvey tiles.

[41] Ms Klein continued and testified that despite her explanation, the defendant insisted that he preferred the Harvey tiles for the roof. She testified that she explained to him that departing from the IBR roof sheeting and changing to the Harvey tiles would result in major additional costs; that she explained to him that the already constructed and erected trusses had to be removed, more wood would need to be ordered and purchased, the trusses would need to be reconstructed and erected at a higher height, the walls would need to be build higher, the IBR roof sheeting would need to be returned, Harvey tiles would need to be ordered and purchased and the Harvey tiles would have to be installed onto the new roof structure.

[42] Ms Klein further testified that in response to her advice, the defendant indicated that he wanted to save costs and instructed her to rather install the Harvey tiles on the existing trusses that were constructed for the IBR roof sheets. She continued and testified that she advised the defendant against this course of action and pointed out the risks in doing so, but the defendant insisted that she must follow his instructions. Ms Klein testified that she proceeded to construct the Harvey tiles on the trusses that were manufactured for the IBR sheeting.

[43] The defendant, on the other hand, testified that Ms Klein assured him that the Harvey tiles will fit on the building structure and on the trusses manufactured for IBR sheets. The defendant further testified that Ms Klein simply informed him that the use of Harvey tiles will increase the cost of the house. The defendant denies that he was informed of the need to change the wall and roof structure to accommodate the weight of the Harvey tiles, and similarly denies that he was alerted to the fact that walls, electrical wiring, and plumbing will have to be removed and re-installed because of the structural changes to the walls.

[44] Despite the contradictions between the testimony given on behalf of the plaintiff and the defendant, it cannot be disputed that the plaintiff had to reconstruct the roof from making provision for a roof with IBR roof sheeting to a Harvey tiled roof. It can furthermore not be disputed that the building plans provided for an IBR roof sheeting while the complete building has a Harvey tile roof. Ms Klein testified that she indicated to the defendant that the estimated cost for the change of the roof from IBR covering to Harvey tiles would be approximately N\$240 000.

[45] On 27 January 2016, the plaintiff submitted an invoice, tax invoice 3 (Exhibit E3) to the bank. In that invoice, the plaintiff, amongst other claims, claimed an amount of N\$125 000 for supplying and installation of trusses (100 percent material on site, 50 percent trusses completed and 29 percent trusses erected). On 23 February 2016, the plaintiff further submitted another invoice, tax invoice 4 (Exhibit E4) to the bank and in that invoice the plaintiff, amongst other claims, claimed an amount of N\$60 000 for the

erection of roof sheeting. From the evidence before me, it is clear that these invoices (Exhibits E3 and E4) were rendered after the defendant had instructed the plaintiff to change the roof structure from IBR to Harvey tiles. I am, therefore, of the view that of the N\$125 000 claimed in Exhibit E3, 89 percent of that amount (that is, the amount of N\$111 250) is in respect of the construction of the roof and only 11 percent (that is, the amount of N\$13 750) is for the material.

[46] The plaintiff equally did not specify, both in Exhibit B and in Ms Klein's oral testimony, what portion of her claim of N\$529 646 constitutes her claim for the construction of the Harvey tile roof. However, both parties' expert witnesses, Mr Steenkamp and Mr Coelho, agree that extra work was done. In their joint report, the experts have quantified the costs relating to the construction of roof covering the change from IBR roof sheeting to Harvey tiles to be N\$308 132,54 (Mr Steenkamp) and N\$279 852,50 (Mr Coelho) respectively. The average between the amounts determined by Mr Steenkamp and Mr Coelho is N\$293 992,52, which I find to be the amount attributable to the costs of the construction of Harvey tile roof.

[47] It is not in dispute that the defendant has paid to the plaintiff an amount of N\$70 000 towards the change of roof. I have furthermore found that the plaintiff claimed and was paid the amount of N\$111 250 (Exhibit 3) and the amount of N\$60 000 (Exhibit E4) in respect of the construction of the roof. I, therefore, find that the plaintiff was paid an amount of N\$241 250 in respect of the construction of the Harvey tile roof. The plaintiff would therefore be entitled to payment in the amount of N\$52 742,52.

Electricity Extras

[48] Ms Klein testified that throughout the construction process, the defendant would frequently instruct her or various of the plaintiff's employees and labourers to commence with additional building works, i.e. building works that have not been provided for in the quotation or on the building plan or both in the quotation and on the building plan. One such additional building work was a request for additional electrical installation work in the kitchen. She testified that the defendant wanted a plug on the kitchen floor in the middle of the kitchen. It was her testimony that by that

time the kitchen floor had already been completed and tiled. The tiling had to be lifted and the floor opened to install the plug.

[49] Ms Klein testified that this plug was not on the initial building plans and did not form part of the plaintiff's quotation. The defendant accepted the additional building costs and requested that the plug be installed. Ms Klein continued and testified that due to the additional downlights, plugs in the bathrooms, and the air conditioning units, it was necessary to purchase and install a second DB (Distribution Board) board. She proceeded and testified that problems were, however, encountered with the installation of the second DB board. The wall in which it had to be installed was a single brick wall. The wall collapsed at certain points when attempts were made to open it. The wall had to be rebuild and re-plastered.

[50] The defendant, on the other hand, testified that as regards the bulkheads and downlights he, on a day-to-day basis, attended at the property during the period that Ms Klein was in South Africa. He testified that he found the workers idle. A labourer and carpenter then suggested to design and build bulkheads for the ceilings in the foyer and living area, being in the main atrium, and he accepted the suggestion. He continued and testified that the labourer and the carpenter informed him of what materials were needed and he proceeded to purchase the required materials. They (that is, the labourer and the carpenter) finished work on the bulkheads without electrical connections.

[51] The defendant testified that the electrical connections were finalised by an electrician, a certain Petrus Ntsinina of Talako Electrical CC, whom he contracted to finish the work after the plaintiff had vacated the site. He testified that he paid the electrician directly for the labour to do electrical connections. The defendant proceeded and testified that for the boundary wall lights, this was a cost already part of the quotation provided by the plaintiff. He testified that he, however, bought the light fittings and paid for the electrician's labour to install the lights.

[52] As regards the shaver plugs, he testified that he purchased these plugs and those plugs were installed by the electrician (Mr Petrus Ntsinina), who the defendant brought on site after the plaintiff left the site. He further testified that he paid for the labour of that electrician. The defendant further denied that the ceilings were to be reopened. In support of his allegations, the defendant submitted invoices which were admitted into evidence as Exhibits O1 to O30 depicting the electrical materials (which included the costs of a DB board) and payment for labour rendered in respect of electrical works. The majority, if not all the invoices were, however, made out in favour of an entity known as Royal Taste Africa Hotel & Restaurants. The defendant testified that he trades as Royal Taste Africa Hotel & Restaurants.

[53] Mr Montzinger submitted that it was common cause that the plaintiff performed extra electrical work. I do not agree that it was common cause that the additional electrical work was performed by the plaintiff. From what I briefly recounted in the preceding paras, it is clear that the versions of Ms Klein and the defendant regarding the additional electrical work are mutually destructive. The probabilities, however, do not favour Ms Klein's version any more than they favour the defendant's version. I, therefore, find that the plaintiff has failed to prove that it performed additional electrical work and the claim for additional electrical work thus fails.

Additional Plumbing Work

[54] As regards the additional plumbing work, Ms Klein testified that further along in the construction process, yet another additional building instruction was required. She testified that the defendant instructed her to change the flow of the water outside the property as his neighbour had asked him to do so. She proceeded that at the stage the defendant made his request for the alteration of the water flow, the outside interlocks had already been laid, and the water flow was as per the approved building plans. To change the direction of the water flow, as per defendant's instructions, the interlocks had to be taken out and lifted, the natural ground levels had to be adjusted, and the ground had to be re-prepared and filled. This was an extremely labour-intensive additional building work, testified Ms Klein.

[55] The defendant, however, denied that the version testified by Ms Klein was correct. He testified that even before the plaintiff started to lay the interlocks, he noticed that the gradient was sloping towards the neighbour's property, which he thought was incorrect. He testified that he therefore instructed the plaintiff's workers to slope the gradient of the interlocks towards the open field. However, after the plaintiff's workers had finished laying the interlocks and by that time the plaintiff had abandoned the construction site, he noticed during the raining season that the interlock's slope was towards the garage where no outlets for storm water were installed by the boundary wall, causing water to pool by the garage. He testified that he needed the slopping of the interlocks to be fixed, so he got workers and paid labourers to relay the interlocks.

[56] Mr Montzinger submitted that it was common cause that the plaintiff performed additional plumbing work. I do not agree that it was common cause that the plaintiff performed additional plumbing work. From what I briefly recounted in the preceding paras, it is clear that the versions of Ms Klein and the defendant regarding the additional plumbing work are mutually destructive. The probabilities, however, do not favour Ms Klein's version any more than they favour the defendant's version. I, therefore, find that the plaintiff has failed to prove that it performed additional plumbing work and the claim for additional plumbing work thus fails.

[57] From what I have stated above, it is clear that although the plaintiff proved that it performed additional work as a result of digging a deeper foundation and increasing the thickness of the slab, it has failed to prove that it was not paid for the additional work it performed as a result of the deeper foundation and the increase of the slab thickness. In cross-examination, Ms Klein was asked whether the plaintiff's invoices that she submitted to the bank included amounts for additional work and she confirmed that the invoices included amounts for additional work.

[58] As regards the performance of additional work in respect of electrical works and plumbing work, the plaintiff failed to place sufficient evidence before court to demonstrate that it performed additional electrical and plumbing works. With respect to

the reconstruction of the roof, I have found that the plaintiff has performed additional work, but was partly paid for the additional work and is only entitled to N\$52 742,52. It follows that the plaintiff is entitled to judgment in the sum of N\$52 742,52.

The defendant's counterclaim

The counterclaim and the plea to the counterclaim

[59] The defendant, in his counterclaim, alleges that he performed in terms of the agreement, in that he caused a mortgage bond in the amount of N\$3 658 300 to be registered in favour of Bank Windhoek in order for him to access that amount and pay the plaintiff for the work it performed.

[60]The defendant furthermore alleges that the plaintiff breached the oral agreement in that it:

- a) abandoned the construction site without having completed the building works in terms of the agreement. In particular, the plaintiff failed to install electrical works, plumbing, tiling, painting of the building, installation of aluminum doors, geysers, cupboards and interlocks; and
- b) delivered portions of the building works with defects, in particular, some showers were not connected to the sewage, and the bathrooms were not tiled.

[61] The defendant furthermore alleges that as a result of the plaintiff's breach of the oral agreement, he suffered damages in the amount of N\$880 593,38 being the cost he incurred to complete the building construction and rectify the defects on the building.

[62] The plaintiff denies that it breached the oral agreement. It pleaded that due to an ongoing dispute between the defendant and the artisan, whom the defendant had engaged to install the air-conditioning units, the plaintiff was prevented from finalising the building works. The plaintiff further pleaded that, additionally, the defendant failed or

refused to make payments to it, alternatively failed to instruct the bank to make such payments. It further pleaded that it complied with its obligations in terms of the agreement which it was capable of performing and provided the building works for the defendant as per the defendant's instructions and specifications in so far as it was possible and relevant.

[63] The plaintiff further denies that it abandoned the construction site without having completed the building works in terms of the agreement. It pleaded that it completed the building works, and did so with the necessary diligence, care and skill required. To the extent that some of the building works were not completed, the plaintiff pleads that:

a) The parties did not agree on an exact time for completion of the works. Accordingly, the plaintiff was entitled to complete the building works within a reasonable time. The defendant never notified the plaintiff of a reasonable time by when the works had to be completed, neither did the defendant demand of the plaintiff to complete the building works.

b) The defendant prevented the plaintiff from completing any outstanding building work. The defendant did so by instructing the plaintiff to cease any outstanding building works, at the time, until he had returned from France. The defendant visited France *inter alia* in an attempt to secure additional funding to pay the plaintiff the outstanding moneys in respect of the building works already completed and also for the building work still to be completed. On the defendant's return to Namibia, he deliberately ignored all the plaintiff's attempts at contacting him. Upon visiting the building project, the plaintiff discovered that the defendant had contracted a new building contractor who was executing building works at the property on the instruction of the defendant.

[64] The plaintiff furthermore pleaded that payment was a precondition for the continuation and completion of building works. The defendant, however, failed to pay the plaintiff for building works already completed. The plaintiff furthermore pleaded that the defendant's conduct (of preventing the plaintiff to complete the work and failure to pay for the completed work) constituted conduct that objectively exhibited a deliberate

and unequivocal intention to no longer be bound by the agreement between the parties. The plaintiff elected to accept defendant's repudiation and terminated the agreement between the parties. This election was conveyed by the plaintiff's conduct by claiming payment of the outstanding amount for building work done until instructed by the defendant to cease construction.

The issue for determination in respect of the counterclaim

[65] The issue that I am required to determine is whether the plaintiff breached the oral agreement by rendering incomplete and defective work.

Did the plaintiff breach the agreement?

[66] The defendant testified that by around August/September 2016, the progress on the building was very slow. He continued and testified that during September 2016, the plaintiff managed to get some materials on site and did some work. After it did the work, it requested the bank to evaluate the work that it did for purposes of progress payments. The bank, after evaluating the work performed by the plaintiff, informed the plaintiff that the materials on site are not considered for progress payments. The bank evaluated the work that the plaintiff had performed at 16 percent and on 28 September 2016 paid the plaintiff an amount of N\$33 690.

[67] The defendant proceeded and testified that Ms Klein then called him and complained about the payment she received and requested him to intervene because she no longer had funds left. The defendant proceeded and testified that on 3 October 2016, he addressed a letter to the bank and indicated that he was prepared to assume responsibility and requested the bank to make payment of an additional N\$150 000 to the plaintiff. On 7 October 2016, the bank paid the plaintiff the amount of N\$150 000.

[68] The defendant further testified that after the bank paid the plaintiff the amount of N\$150 000, the plaintiff did some work and, in December 2016, requested another progress payment. On 15 December 2016, the bank paid the plaintiff the amount of N\$200 000. After the plaintiff was paid that amount, it closed for the December holiday. The defendant proceeded and testified that he visited the building site during January 2017. During that visit, he did not find anybody on the building site and no work had been performed since December 2016.

[69] The defendant further testified that after he, on several occasions, unsuccessfully attempted to telephonically contact Ms Klein, he sent her a text message to which she also did not reply. He testified that he also called her staff at her pharmacy and was informed that Ms Klein was still in South Africa. The defendant testified that upon Ms Klein's return from South Africa, she informed him that she did not have the money to continue with the building works because the Government Medical Aid Scheme did not pay her. In February 2017, she again travelled to South Africa. When the defendant enquired from her as to when she will resume the building work, her reply was that she was expecting money for work she had done in South Africa which would enable her to proceed with the defendant's building work.

[70] The defendant continued and testified that during February 2017, he and Ms Klein exchanged emails and by February 2017, Ms Klein's tune had changed and she alleged that the defendant still owed her money from the roof construction and the 'Damara Garden' projects, and that the defendant must first pay her those amounts before she would return to site. The defendant testified that his reply to Ms Klein's demands was to request a meeting where they would reconcile the work done, the payments effected and determine what was still outstanding in terms of work to be done, and what payment had to be made to the plaintiff, if any. The defendant submitted all the email correspondences between him and Ms Klein as evidence and these emails were admitted into evidence as Exhibits N1-N13. He testified that it later became apparent that Ms Klein was not prepared to meet him.

[71] He proceeded and testified that when he realised that Ms Klein was not prepared to meet him to finalise the building work and rectify the defects on the house, he contacted a certain Petrus Ntsinina of Talako Electrical CC, the electrical subcontractor on the site to assess the electrical needs of the house and in particular, the quantity and types of lights to be bought. After Mr Ntsinina's assessment, he purchased the required material and Mr Ntsinina's company (Talako Electrical CC) completed the installation of the electrical work. He further testified that he instructed a plumber, a certain Mr Conillius Jere, to complete the outstanding plumbing work as well as to fit the outstanding cornices and skirting. He further testified that he also discovered further defects in respect of the plumbing works done by the plaintiff, namely that some showers were not connected to the sewage and the bathrooms were not tiled.

[72] The defendant furthermore testified that he employed numerous day labourers whom he remunerated in cash and was accompanied by them to various stores to acquire the materials they needed to finalise the project. He testified that he diligently kept invoices of all the material he purchased and the payments that he made in respect of the materials and labour cost. He submitted those invoices into evidence as exhibits. The defendant furthermore tendered photos depicting the showers that were not connected to the sewage and the bathrooms that were not tiled, and the water spots on the ceilings which were an indication of the roof leakages.

[73] The defendant called five witnesses (of whom two were expert witnesses) to testify in support of his counterclaim, namely a certain Mr Mateus Ekandjo (Mr Ekandjo), Mr Wilbard Hainghumbi (Mr Hainghumbi), Mr Hafunda Elias Enkali (Mr Enkali), Mr Joseph Sosinyi (Mr Sosinyi – an expert witness) and Bruno Coelho (Mr Coelho – an expert witness).

[74] Mr Ekandjo testified that around March 2017, the defendant approached him and requested him to finish the construction work on the building at Erf 912 Academia, Windhoek. He testified that he went to the building and finalized the construction work, but during the process detected other defects on the building. He testified that the defects that he detected related to the bathroom showers. He testified that the

bathroom showers were not installed correctly, as the showers were not connected to the sewerage. He testified that he discovered these defects when no water came out of the showers.

[75] Mr Ekandjo further testified that at the time when he discovered the defects, the floors were tiled and the interlocks already laid. He thus had to remove the tiles, interlocks and connect the two showers to the sewerage, and he retiled the floor and replaced the interlocks. Mr Ekandjo further testified that in addition to the defects relating to the bathroom showers, he detected that the air evacuator fan was not piped to the outside and he rectified that defect. He further testified that according to his recollection, the defendant paid him an amount of approximately N\$18 000 for the materials and labour for his work. Mr Ekandjo submitted photos, depicting the tiles and interlocks that he had removed, which were admitted into evidence and marked as Exhibits Y9 and Y10.

[76] Mr Hainghumbi testified that he was, since February 2014, employed by Talako Electrical CC (Talako), which was the electrical sub-contractor for the plaintiff, to do installation of all the electrical work at the defendant's property. He testified that during February 2017, the plaintiff left the construction site. After the plaintiff left the construction site, the defendant called Talako and requested it to help him with a review of what electrical work still needed to be done at the property. Mr Hainghumbi proceeded and testified that he was the head electrician during construction when the plaintiff was still working at Erf 912 and knew the site well. He testified that during the review, he discovered that the conductive pipework and main wiring was done, but there were no final connections or a power meter at the property, and many fittings were also not installed, and materials were also missing.

[77] Mr Hainghumbi continued and testified that after the review was done, the defendant requested Talako to finalise the electrical work which needed to be done as it already had experience on the property. He continued and testified that Talako performed the following work:

- a) installed and connected the electrical wiring to the ceiling lights, interior wall lights, exterior wall and boundary lights as well as the staircase lights which had to be purchased completely new and installed;
- b) fixed all the faulty wiring;
- c) installed the wall plugs and electrical light switches;
- d) connected the kitchen stove;
- e) did the last wiring for the air-conditioner units;
- f) installed a pre-paid electrical meter; and
- g) installed the geysers.

[78] Mr Hainghumbi furthermore testified that in order to finish the work, him and his supervisor went with the defendant to Pupkewitz Megatech, Windhoek Electrical Warehouse and other suppliers to purchase all the materials required for the work to be performed. He proceeded and testified that Talako finished all the electrical work at the property where he worked for a period of about six months from February 2017 to August 2017. He testified that after they finished the work, the defendant paid them in cash. He testified that he was not sure about the exact amount, but it must have been around N\$30 000. The defendant would give him cash and he would then give the cash that he had received from the defendant to his supervisor.

[79] Mr Enkali testified with respect to the paint work that he performed. He testified that the paint work was incomplete, and as a result, he did the skimming and the painting of the outside of the building, the ceilings in the rooms, and the sealing of the spaces in the skirting and vanishings. His labour was N\$12 500. Mr Enkali further testified that during the rainy periods, the roof leaked and he was then asked to do repairs on the roof. He testified that he was paid an amount of N\$19 500 for sealing the roof.

[80] Mr Sosinyi's testimony mainly dealt with the construction and thickness of the slab. He also testified with respect to the roof. He testified that the leakage of the roof is likely to cause lasting damage arising from excessive moisture ingress, damaging the wooden trusses supporting the roof tiles. Mr Coelho testified as a quantity surveyor for the defendant.

[81] In view of the evidence that was presented, I now proceed to consider whether the plaintiff or the defendant breached the agreement. It is settled law that repudiation of a contract occurs where one party to a contract, without lawful grounds, indicates to the other party, whether by words or conduct, a deliberate and unequivocal intention to no longer be bound by the contract.⁵ Then, the innocent party will be entitled to either: (i) reject the repudiation and claim specific performance; or (ii) elect to accept the repudiation, cancel the contract and claim damages. If he or she elects to accept the repudiation, the contract comes to an end upon the communication of the acceptance of the repudiation to the party who has repudiated. Only then does a claim for damages arise.

[82] In *Denmark Productions Ltd v Boscobel Productions Ltd*⁶ it was stated that:

'Where A and B are parties to an executory contract, if A intimates by word or conduct that he no longer intends, or is unable, to perform it, or to perform it in a particular manner, he is, in effect, making an offer to B to treat the contract as dissolved or varied so far as it relates to the future. If B elects to treat the contract as thereby repudiated, he is deemed, according to the language of many decided cases, to 'accept the repudiation' and is thereupon entitled (a) to sue for damages in respect of any earlier breach committed by A and for damages in respect of the repudiation, (b) to refrain from himself performing the contract any further.'

[83] In *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*⁷ the Supreme Court of Appeal stated that the test for repudiation is objective. The test is whether a reasonable

⁵ *Nash v Golden Dumps (Pty) Ltd* [1985] 2 All SA 161 (A); 1985 (3) SA 1 (A) at 22D-F.

⁶ *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 QB 699.

⁷ *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) para 16.

person, in the aggrieved party's position, would conclude that proper performance, in terms of the agreement, will not happen.

[84] The court must thus ask whether the plaintiff or the defendant, by words or conduct and without lawful grounds, indicated its or his unequivocal intention to no longer be bound by the contract and that it or he will not perform their obligations any longer. It does not matter whether that is what the plaintiff or the defendant meant or not; the question is, whether a reasonable person, looking at the plaintiff's or defendant's conduct, would regard these actions as a repudiation. Whether the plaintiff or defendant was under the impression that it or he was allowed to terminate the contract or not is irrelevant. If they did not have a lawful ground for terminating the contract and declaring their intentions to terminate it, it could amount to a repudiation.

[85] In this matter, the plaintiff, in its plea to the defendant's counterclaim, claims that the defendant repudiated the contract, by preventing the plaintiff from completing any outstanding building work. The plaintiff claims that the defendant did so by instructing plaintiff to cease any outstanding building works, at the time, until he had returned from France. The plaintiff, however, did not lead any evidence to back its allegations that the defendant instructed the plaintiff to cease the work.

[86] The evidence of the defendant on the other hand was clear in this regard and was not seriously contradicted by the plaintiff. The email correspondences between the defendant and Ms Klein also speaks volumes. In this matter, the facts which the plaintiff cannot deny are that: the plaintiff, after the December 2016 holiday, did not return to the building site despite being called upon by the defendant to return to the site and complete the construction work. Any reasonable person, looking at the plaintiff's conduct, would regard its actions as an indication that it is its unequivocal intention to no longer be bound by the contract and that it will not perform its obligations any longer. I, thus, have no doubt that the plaintiff repudiated the contract.

[87] Ms Klein, during her testimony, testified that the decision to discontinue the work at the construction site was due to the defendant's failure to pay the outstanding

amount. She further testified that the defendant's payment of the outstanding amount was a precondition to the continuation and completion of the building works. Based on this testimony by Ms Klein, Mr Montzinger argued that the plaintiff can rely on the *exceptio non adimpleti contractus* as its preferred common law remedy because of the defendant's breach of contract. Mr Montzinger further argued that it follows that the plaintiff was, in law, excused from continuing with the building works at the construction site until the defendant tendered performance by payment of the outstanding amount.

[88] This court, on occasion, had to deal with the concept of *exceptio non adimpleti contractus* in *Du Plessis v Ndjavera*.⁸ Maritz J (as he then was) stated that the *exceptio non adimpleti contractus* as a defence in an action for specific performance is inextricably linked to the principle of reciprocity under a bilateral contract. He quoted with approval Jansen JA⁹ statement that:

'...the *exceptio* is a '*meeganger*' ('companion') (literally translated) of the principle of reciprocity. It is only if and when there are reciprocal obligations contemplated in a contract (irrespective of whether they are to be discharged concurrently or consecutively) that the *exceptio* may afford a defence to a claim for specific performance. The position is, in my view, correctly stated in the dictum of Corbett J (as he then was) in *Ese Financial Services (Pty) Ltd v Cramer* 1973 (2) SA 805 (C) at 808H-809D:

"In a bilateral contract certain obligations may be reciprocal in the sense that the performance of the one may be conditional upon the performance, or tender of performance, of the other. This reciprocity may itself be bilateral in the sense that the performance, or tender of performance, of them represent concurrent conditions; that is, each is conditional upon the other. A ready example of this would be delivery of the *res vendita* and payment of the purchase price under a cash sale. (See *Crispette and Candy Co Ltd v Oscar Michaelis NO and Another* 1947 (4) SA 521 (A) at 537.) Alternatively, the reciprocity may be one-sided in that the complete performance of his contractual obligation by one party may be a condition precedent to the performance of his reciprocal obligation by the other party. In other words the obligations, though inter-dependent, fall to be performed consecutively. An example of this would be a *locatio conductio operis* whereunder the *conductor operis* is normally obliged to carry out the

⁸ *Du Plessis v Ndjavera* 2002 NR 40 (HC).

⁹ In *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at 417H.

work which he is engaged to do before the contract money can be claimed. In such a case the obligation to pay the money is conditional on the preperformance of the obligation to carry out the work, but, of course, the converse does not apply (see, eg, *Kamaludin v Gihwala* 1956 (2) SA 323 (C) at 326; ...”

[89] However, where one party to a reciprocal contract repudiates it, the obligation of the opposing party to perform is suspended for as long as the repudiation stands, even where the repudiation has not yet resulted in the cancellation of the contract.¹⁰ In *Moodley and Another v Moodley and Another*¹¹ Nienaber J said:

‘It would be surprising if the law were to be so much out of tune with common sense as to require of the plaintiff as a prerequisite to its cause of action against the first defendant that, notwithstanding its futility, it should perform the exercise.

The purpose of a tender of performance is to enable the other party to take the necessary steps to perform his part of the contract. But, if the latter expressly declares that he is under no circumstances prepared to perform, the whole purpose of a tender falls away. In my view, the first defendant by its continuing repudiation of the contract waived its right to a tender of performance by the plaintiff.’

[90] In the present matter, the defendant, in its counterclaim, is not claiming specific performance from the plaintiff, but is claiming damages resulting from the plaintiff’s repudiation of the agreement and other breaches of contract. It thus follows that the defence *exceptio non adimpleti contractus* is not available to the plaintiff. Secondly, I have found that the plaintiff repudiated the agreement between it and the defendant. It thus follows that plaintiff, by its continuing repudiation of the contract, waived its right to a tender of performance by the defendant. The plaintiff’s reliance on *exceptio* is thus misplaced.

[91] The defendant led evidence demonstrating that when the plaintiff abandoned the construction site, building work was not complete and that there were some defects to

¹⁰ *Moodley v Moodley* 1990 1 SA 427 (D) 431C-I.

¹¹ *Ibid.*

the building. I find it appropriate to briefly digress and restate some legal principles here.

[92] In our law, building contracts fall within the category of letting and hiring of work (*locatio conducti operis*). A contract has been defined by many learned authors¹² and in many cases before our courts¹³ as an agreement between two or more persons by virtue of which certain legal rights and obligations are created. Mackenzie¹⁴ argues that the principle behind the law of contract is so simple that it is taught to all children when they reach the age of understanding that '*you must keep your promise.*'

[93] The legal rights and the legal obligations are, as a general rule, set out in the agreement by the terms upon which the parties to the contract have agreed. It is however acknowledged that certain terms of the contract will necessarily arise from the contractual relationship or are necessary in the business sense to give efficacy to the contract and will thus be implied into the contract. The circumstances in which a term ought to be implied in a contract were discussed in a number of old authorities, one such authority being *Douglas v Baynes*¹⁵ where Lord Atkinson said:

'The principle on which terms are to be implied in a contract is stated by KAY, L.J., in *Hamlyn v Wood*, 1891 (2) Q.B. 488 at p. 494, in the following words: "The Court ought not to imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question that the Court is necessarily driven to the conclusion that it must be implied".'

¹² See for example Van der Merwe, van Huyssteen, Reinecke and Lubbe; *Contract: General Principles* 2 ed, who argue that '*one must then assume that an agreement will be a contract if the parties intend to create an obligation or obligations and if in addition, the agreement complies with all other requirements which the law sets for the creation of obligations by agreement (such as contractual capacity of the parties, possibility of performance, legality of the agreement and prescribed formalities)*'.

¹³ See for example the unreported judgment of *The Council of the Municipality of Swakopmund v Swakopmund Airfield CC* (A 428-2009) [2011] NAHC 71 (15 March 2011) and the authorities there cited.

¹⁴ McKenzie H S: *The Law of Building and Engineering Contracts and Arbitration* 5 ed Juta & Co Ltd at 7.

¹⁵ 1908 A.C. 477 (This was an appeal from the Supreme Court of the then Transvaal to the Privy Council).

[94] And in *Mullin (Pty) Ltd v Benade Ltd*¹⁶ Centlivres CJ said:

'You must only imply a term if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that you can be confident that if at the time the contract was being negotiated someone had said to the parties "what will happen in such a case?" they would have replied "of course, so and so. We did not trouble to say that; it is too clear".'

[95] In a building contract it is implied, on the part of the contractor (the plaintiff in the present matter), that the contractor will do the work in a good and workmanlike manner and that the materials he supplies will be suitable for the purpose for which they are to be used and of good quality.¹⁷

[96] I now return to this matter and I ask the simple question, did the plaintiff make any promise to the defendant? The plaintiff promised to the defendant that it will, in accordance with the building plans approved by Windhoek Municipality, construct a house for the plaintiff. The answer to that question is therefore in the affirmative. The follow up question is, whether the plaintiff has kept and complied with its promise to the defendant. As I indicated, the evidence that was presented before court is that the defendant would complete the construction of the house. When it left the site in December 2016, it left an incomplete house and left it with some defects. The plaintiff thus broke its promise to the defendant or breached the agreement.

The damages suffered by the defendant

[97] Van der Merwe, van Huyssteen, Reinecke and Lubbe¹⁸ argue that a plaintiff who wishes to claim damages for breach of contract bears the *onus* to prove the following:

- a) breach of contract by the defendant;
- b) damages;

¹⁶ *Mullin (Pty) Ltd v Benade Ltd* 1952 (1) SA 211 (A) at 214.

¹⁷ *Simon v Klerksdorp Welding Works* 1955 TPD 52.

¹⁸ *Contract: General Principles* 2 ed at 386

- c) a factual causal connection between the breach of contract and the damages;
and
- d) that the damage is a natural of the breach of contract or that an agreement was concluded to compensate the damage concerned.

[98] The above requirements have been articulated as follows by Corbett, J.A in *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* as follows:¹⁹

'The fundamental rule in regard to the award of damages for breach of contract is that the sufferer should be placed in the position he would have occupied had the contract been properly performed, so far as this can be done by the payment of money and without undue hardship to the defaulting party²⁰ said that to ensure that undue hardship is not imposed on the defaulting party the sufferer is obliged to take reasonable steps to mitigate his loss or damage and, in addition, the defaulting party's liability is limited in terms of broad principles of causation and remoteness, to (a) those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach, and (b) those damages that, although caused by the breach of contract, are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from its breach.'

[99] I have, in this matter, found that the plaintiff's failure to complete the building as it had promised amounts to breach of contract. It thus follows that the defendant has discharged the *onus* with respect to the first requirement, namely that the plaintiff has breached the agreement.

[100] The damages which the defendant claims in his counterclaim fall under the category known as general or intrinsic damages. I say so for the following reason: the plaintiff did not dispute that the defendant's decision to finalise and complete the construction of the building was reasonable in the circumstances. It thus follows that the

¹⁹ *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A).

²⁰ See *Victoria Falls & Transvaal Power Co. Ltd. v Consolidated Langlaagte Mines Ltd.*, 1915 AD 1 at 22 and also *Novick v Benjamin*, 1972 (2) SA 842 (AD) at 860.

completion of the building and the resultant loss suffered by the plaintiff were in fact directly caused by the plaintiff's failure to complete the building.

[101] The defendant incurred additional costs to complete the building and repair the defects left by the plaintiff and thus sustained these losses as a consequence of the plaintiff not completing the construction. The defendant's loss is thus one that flows naturally and generally from the plaintiff's breach of contract and one which the law must presume to have been contemplated by the parties as a probable result of the breach. It, therefore, falls fairly and squarely within the category of loss for which general damages are awarded. The defendant is thus entitled to the damages he claims and has proved.

[102] As regards the losses which the defendant alleges he suffered, the defendant's evidence was that:

- a) in respect of the electrical works, he bought materials and paid for labour cost in the amount of N\$45 787,83;
- b) in respect of the plumbing work, he bought materials and paid for labour cost in the amount of N\$102 882,45;
- c) in respect of the tiling work, he bought materials and paid for labour cost in the amount of N\$48 831,20;
- d) in respect of the painting work, he bought materials and paid for labour cost in the amount of N\$52 963,28;
- e) in respect of the rails, aluminum doors, geyser, cornices and skirting, he bought materials and paid for labour cost in the amount of N\$174 078,63;
- f) in respect of wooden doors and keys, he bought materials and paid for labour cost in the amount of N\$31 741,50;

- g) in respect of kitchen and cupboards, he bought materials and paid for labour cost in the amount of N\$95 323,73;
- h) in respect of the garage door and gate, he bought materials and paid for labour cost in the amount of N\$52 500;
- i) in respect of the relaying of the interlocks, he bought interlocks and paid for labour cost in the amount of N\$11 150;
- j) in respect of burglar for windows, he bought materials and paid for labour cost in the amount of N\$31 800; and
- k) in respect of the disposal of rubble and cleaning the site, he incurred costs in the amount of N\$20 500.

[103] The amounts that I have set out in the preceding para come to a total amount of N\$667 558,62. I have earlier in this judgment indicated that the majority, if not all receipts in respect of the material which the defendant testified that he bought, were made out to an entity known as Royal Taste of Africa Hotel and Restaurant. The defendant testified that that name is the trading name for the guest house that he was constructing. I, however, agree with Mr Montzinger who argued that the defendant instituted these proceedings in his personal name, and he and Royal Taste of Africa Hotel and Restaurant are two separate legal persons. Since Royal Taste of Africa Hotel and Restaurant is not a party to these proceedings, the defendant cannot claim the expenses paid for by that entity.

[104] In addition to the fact that Royal Taste of Africa Hotel and Restaurant and the defendant are two distinct legal persons, I find that the costs which the defendant expended on the material to complete the building are not losses that he suffered because he retains the building which is an asset to him. It, therefore, follows that the only costs which the defendant is entitled to are the labour costs he expended to rectify the defects in the building and to complete the building.

[105] The labour costs which the defendant incurred are:

- a) in respect of the electrical works, the amount of N\$6375;
- b) in respect of the plumbing work, the amount of N\$18 760;
- c) in respect of the tiling work, in the amount of N\$6600;
- d) in respect of the painting work, the amount of N\$8500;
- e) in respect of the rails, aluminum doors, geyser, cornices and skirting, the amount of N\$4500;
- f) in respect of wooden doors and keys, the amount of N\$6850;
- g) in respect of kitchen and cupboards, the amount of N\$15 000;
- h) in respect of the garage door and gate, the amount of \$8500;
- i) in respect of the relaying of the interlocks the amount of N\$11 150;
- j) in respect of burglar for windows, the amount of N\$10 000;and
- k) in respect of the disposal of rubble and cleaning, the amount of N\$20 500.

Total Amount

N\$ 116 735

[106] In its tax invoice number 7 dated 27 July 2016, the plaintiff charged the defendant an amount N\$57 000 for aluminum folding sliding doors. In its tax invoice number 11 dated 13 December 2016, the plaintiff charged the defendant an amount N\$182 000 for, among other items, bulk heads. In his testimony, the defendant testified that because the plaintiff left the construction site incomplete and unsupervised, certain material were stolen or damaged and as result he bought new aluminum doors from Wispeco, in the amount of N\$21 726,90 and he paid that amount by electronic transfer to Wispeco. He tendered into evidence proof of that payment. In respect of the rails (bulk heads) he paid an amount of N\$72 335 to EJM Investment. I find that the defendant is, in addition to the labour cost, also entitled to recoup the costs of the aluminum doors, in the amount of N\$21 726,90 and the costs of the rails, in the amount of N\$72 335. It follows that the defendant has proven his damages to be in the amount of N\$210 796,90.

[107] It will be remembered that I found that the plaintiff is entitled to judgment in the sum of N\$52 742,52. That amount can be set-off against the damages of N\$210 796,90 proved by the defendant. What is due to the defendant is therefore N\$158 054,38.

[108] For reasons and conclusions I have arrived at in this judgment, I find that the plaintiff must pay the defendant the amount of N\$158 054,38. I further order that the defendant must pay interest on this sum at the rate of 20 percent from date of judgment to date of payment.

Costs

[109] As to costs of suit, the usual rule is that costs follows suit. However, in this matter the plaintiff succeeded only with 50 percent in its claim and the defendant succeeded in his counterclaim to the extent of 50 percent of his claim. I, therefore, order that the defendant pays 50 percent of the costs of the plaintiff in the claim in convention, including the costs of one instructing and one instructed counsel. In respect of the counterclaim, the defendant succeed in its claim and is entitled to its costs and the plaintiff must pay the defendant's costs including the costs of one instructing and one instructed counsel.

Order

[110] I accordingly make the following order:

1. The plaintiff must pay the defendant the amount of N\$158 054,38 plus interest on the amount of N\$158 054,38 at the rate of 20 percent per annum, reckoned from date of judgement to date of payment, both days included.
2. The defendant must pay 50 percent of the plaintiff's costs of suit in respect of the claim in convention, such costs to include the costs of one instructing and one instructed counsel.

3. The plaintiff must, in respect of the counterclaim, pay the defendant's costs of suit, including the costs of one instructing and one instructed counsel.
4. The matter is regarded as finalized and is removed from the roll.

SFI Ueitele
Judge

APPEARANCES

PLAINTIFF: A Montzinger
 Instructed by Louis Karsten Legal Practitioner, Windhoek

DEFENDANT: E Shifotoka
 Instructed by Kloppers Legal Practitioners, Windhoek