

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2018/05112

In the matter between:

RMH LOGISTICS CC

PLAINTIFF

and

TRANSNAMIB HOLDINGS LIMITED

DEFENDANT

Neutral citation: *RMH Logistics CC v TransNamib Holdings Limited* (HC-MD-CIV-ACT-CON-2018/05112) [2023] NAHCMD 600 (29 September 2023)

Coram: TOMMASI J

Heard: 4, 5, 6, 7, 8 and 15 August 2022; 14, 26 July 2023 and 28 August 2023

Delivered: 29 September 2023

Flynote: Action – Damages claim arising from wrongful termination of contract - Lack of authority - The defendant raised the point that the employee of defendant who

entered the contract with the erstwhile company HRD, had no authority to enter such contract as he was only limited to enter into contracts not exceeding N\$250 000. The court of the view that the employee had actual alternatively ostensible authority to enter into the contract. The plaintiff failed to prove the quantum for damages. Plaintiff's claim dismissed.

Summary: In this matter, the plaintiff instituted an action against the defendant claiming damages arising from the wrongful termination of a contract in the sum of N\$30 000 000. The plaintiff elected to accept the repudiation and terminated the agreement by the issuance of summons. The plaintiff claims that such repudiation caused damages in the form of monetary value of the defendant's counter performance being the replacement value in money of the wrongfully terminated agreement. The defendant defended the action and denies that the employee of the defendant had authority to act on behalf of the defendant and to enter into the alleged agreement. The defendant denies that the cession agreement created any legal obligations on the defendant. Further, the defendant received a directive from the Ministry of Environment and Tourism to cease with the continuation of the project, the defendant informed the plaintiff and terminated the agreement. The defendant pleads that the plaintiff was paid an amount of N\$11 700 00 for the work done and services rendered which is a fair and reasonable amount and the plaintiff is not entitled to any further payment.

Held that, there was actual authority by both the acting CEO at the time the appointment was done and the Board when the Project Scope was submitted.

Held that, the general rule relating to authority, in context of the law of agency, is that, where one party to a contract purports to act in a representative capacity, but in fact has no authority to do so, the person whom he or she purports to represent is obviously not bound by the contract simply because the unauthorized party claimed to be authorized. That person (the principal) will however be bound by the contract if his or her conduct justified the other party's belief that authority existed.

Held that, In the event this court is wrong that there was actual authority it is this courts view that the plaintiff ought to succeed in terms the principles of estoppel and ostensible authority.

Held that, the Act and the Articles of Association of the defendant makes it lawful for the powers of the Chief Executive Officer to delegate any powers vested in or delegated to him or her to any employee or holder of the post in the Defendant. The acting manager of finance signed the first trilateral agreement providing security to SME bank for payments which would accrue to the plaintiff before the out-and-out cession was concluded and the second one thereafter. The plaintiff was registered as a vendor by the defendant to facilitate payment. There is evidence of discussions and correspondence between the plaintiff and employees in the health and safety department of the defendant. The Board of Directors were informed as early as 2 September 2016 that work was in progress and that funds were allocated. The lack of authority was not raised at this meeting or the subsequent board meetings where the Board in fact approved payment of more than N\$10 million for this project.

Held that, the defendant is bound by the agreement on the basis of the doctrine of estoppel and that Mr Ihuhua had the ostensible authority to conclude the agreement.

Held that, the reason advanced by the defendant for terminating the agreement is without merit. The oil spill for as long as it is not contained must be addressed and it was merely a question of compliance with the Environmental Management Act, before work could continue.

Held that, the court is not satisfied that the plaintiff proved the quantum for damages as there was a lack of evidence to enable this court to determine what would be an award of damages which flows from the breach of the contract.

Held that, the plaintiff partially succeeded in proving its claim, however, failed to make out a case on quantum. The court therefore dismisses the plaintiff's claim with no order as to cost.

ORDER

1. The plaintiff's claim is dismissed
 2. No order is made as to costs.
 3. The matter is finalised and removed from the roll.
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JUDGMENT

TOMMASI J:

Introduction

[1] The plaintiff herein instituted an action against the defendant claiming damages arising from the wrongful termination of a contract in the sum of N\$30 000 000. The plaintiff elected to accept the repudiation and terminated the agreement by the issuance of summons. The plaintiff claims that such repudiation caused damages in the form of monetary value of the defendant's counter performance being the replacement value in money of the wrongfully terminated agreement.

[2] The defendant applied for absolution of the instance and the court declined to grant absolution and undertook to incorporate the reasons at the end of the trial. The reasons are apparent from the conclusions reached herein.

[3] The plaintiff is RMH Logistics CC and the defendant is TransNamib Holdings Limited, a State-owned Enterprise incorporated in terms of the National Transport Services Holding Company Act, 28 of 1998.

Plaintiff's Particulars of Claim

[4] The plaintiff relies on an agreement dated 18 December 2015 in terms whereof HRD Trading Enterprises CC (HRD) represented by Mr Henrik Dawids entered into an agreement with the defendant who was duly represented by Mr Ihuhua in his capacity as Executive: Strategic and Stakeholder Acting. The plaintiff concluded an out-and-out session with HRD on 20 August 2016 and therefore stepped into the shoes of HRD.

[5] The plaintiff attached the agreement, which is in the form of a letter signed by Mr Ihuhua, Executive: Strategic and Stakeholding Acting, addressed to HRD. Mr Ihuhua officially appointed HRD to do contaminated soil remediation and rehabilitation at the defendant's locomotive diesel depot in Walvis Bay. The plaintiff further provided the defendant with a work plan detailing the scope as well as the cost implications of the work, as was requested in the appointment letter.

[6] The plaintiff claims further that Mr Ihuhua, at the time when the main agreement was entered into, and to the best of plaintiff's knowledge and belief, was employed by the defendant and acted within the course and scope of his employment alternatively within the ambit of the risk created by such employment in the furtherance of the defendant's business.

[7] The plaintiff pleaded that it was registered as a vendor of the defendant and it commenced its operations on or about 4 January 2016 until date of termination. The plaintiff also pleaded that as a result of the poor payment schedule of the defendant, the plaintiff procured a credit facility from SME Bank on the strength of the work plan as submitted to the defendant. The plaintiff entered into two trilateral cession agreements with SME bank and the Defendant.

[8] The plaintiff avers that the relevant express, alternatively tacit, alternatively implied terms of the main agreement include the following:

- (a) Plaintiff would complete the work within two years from date of commencement of the project;
- (b) Plaintiff would have architectural and engineering plans drawn and would secure all relevant approvals from the various relevant authorities;
- (c) Plaintiff would submit monthly progress reports to the defendant
- (d) Defendant would conduct site visits to assess the work done by plaintiff; and
- (e) Plaintiff would submit monthly invoices for the work done after the site visits and inspection.

[9] The plaintiff pleaded that it duly complied with and was continuing to comply with all its reciprocal obligations under the main agreement. The defendant however on 6 September 2017 wrongfully terminated the agreement which the plaintiff submits constitutes a repudiation of the contract.

[10] The plaintiff claims damages in the sum of N\$30 million for damages flowing from the breach of contract which is damages in the form of monetary value of the defendant's counter performance being the replacement value in money of the wrongfully terminated agreement. The plaintiff pleads that the amount of N\$30 million represents the economic value of the wrongfully terminated agreement.

Defendant's Plea

[11] The defendant denies that Mr Ihuhua duly represented the defendant in purporting to appoint plaintiff and or concluding the purported agreement. The defendant further disputes that Mr Ihuhua acted in the capacity as Executive: Strategic and Stakeholder of the defendant in concluding this agreement. The defendant pleads that, even if it is found that he acted in this capacity, he had no authority to bind the defendant and or to enter into the alleged contract. The defendant pleaded that Mr

Ihuhua did not have the requisite power and authority to enter into the alleged agreement. In addition hereto, the defendant pleaded that the plaintiff itself was not in law authorized to enter into the alleged agreement as the plaintiff should have known that Mr Ihuhua did not have the mandate and the requisite authority and power to enter into the alleged agreement on behalf of the plaintiff.

[12] The defendant admits that Mr Ihuhua was employed by the defendant but dispute the remainder of the allegations. The defendant specifically denies that Mr Ihuhua acted within the course and scope of his employment or within the ambit of risk created by his employment or that he acted in furtherance of the defendant's business when he purported to conclude the agreement on 18 December 2015.

[13] The defendant pleaded that section 5(1)(c) of the National Transport Services Holding Company Act 28 of 1998 (the Act) provides that the defendant may in writing delegate any of its powers to any person if it considers it necessary for the efficient performance of its functions. The defendant pleaded that the Memorandum of Association and the Articles of Association of the defendant are public documents.

[14] The defendant further pleaded that during 2006 the Board of Directors (the Board) of the defendant resolved to delegate some of its powers to the management of the defendant. The defendant avers that, in terms of the said delegation of powers, Mr Ihuhua was only authorized to enter into contracts and/or expenditure not exceeding N\$250 000; and to the extent that he was acting in any of the positions within the management of the defendant, which is disputed and denied, he could only enter into a contract of expenditure of not more than N\$5 000 000. The defendant pleaded that only the defendant's Board of Directors could approve and/or conclude an agreement in the amount alleged by the plaintiff exceeding N\$ 5 000 000.

[15] It is further the defendant's case that the delegation of powers of the Board of the defendant is contained in a purchasing policy of 23 October 2009 which is effective from 23 October 2009. In terms hereof it specifically states that where the expenditure of a

project has a value of N\$5 000 000 or higher, it requires the approval of the defendant's Board and that such contracts shall be signed by the Chairperson of the Board or the Chief Executive Officer with authorization from the Board.

[16] The defendant pleads that in light of the fact that the agreement seemingly had an annual value of not less than N\$5 000 000, Mr Ihuhua could not reasonably or lawfully have determined that the agreement had an annual value of less than N\$250 000, which is the amount he could have determined in the alleged capacity.

[17] The defendant pleaded that plaintiff's particulars of claim relating to the authority of Mr Ihuhua was, to the knowledge of the plaintiff and Mr Ihuhua: false and misleading, did not correctly reflect the terms or comply with section 5(1)(c) of the Act and/or the terms of the delegation, and was inserted to create a false impression that Mr Ihuhua was properly authorized to conclude the alleged agreement.

[18] The defendant's plea is that *ex facie* the "main agreement" and the "work plan" attached to the plaintiff's particulars of claim the amount of the contract was N\$20 million and this amount was not authorized and/or approved by the defendant's Board of Directors. Accordingly the plaintiff pleads that no valid and legally enforceable agreement was concluded and or could have been concluded between the parties.

[19] The defendant further pleaded that in terms of the Purchasing policy a formal tender must be issued by the Tender Committee in accordance with the procedures laid down by the Tender Committee in cases where any commitment is made on behalf of the defendant for the purchasing of products and services exceeding N\$350 000. The defendant maintained that the agreement read with the work plan was contrary to the determinations and express Tender Procedures of the defendant's Board and Mr Ihuhua had no authority to circumvent the defendant's requirement. The defendant pleaded that these procedures were known or ought to have been known by Mr Hendrik Dawids who represented the plaintiff in the conclusion of the alleged agreement.

[20] The defendant places the contents of the cession agreements in dispute and denies that the agreement(s) created any legal obligations on the defendant. The defendant further pleaded that insofar as the plaintiff places reliance on the agreement(s) to create support or to bolster the plaintiff's cause of action, it is denied and the defendant put to the plaintiff to the proof thereof. The defendant admits that the plaintiff was registered as a vendor but denies that the plaintiff rendered services in terms of the agreement concluded until the date of termination. The defendant denied that the plaintiff commenced its operations on or about 4 January 2016.

[21] The defendant further denied the terms of the agreement as set out by the plaintiff but without admitting the validity of the agreement, pleaded that the plaintiff failed to complete the works within the stipulated time and was in any event *in mora* of its required performance at the time when the agreement was terminated in September 2017.

[22] The defendant pleaded that it was contemplated that the plaintiff would execute his obligations in compliance with the Environmental Management Act, Act 7 of 2007. The defendant, due to no fault of the defendant, received a directive from the Ministry of Environment and Tourism to cease with the continuation of the project. The defendant, in compliance therewith informed the plaintiff of the stoppage of further work and terminated the agreement. Performance therefore became impossible and the defendant in the premises was and still is excused from any obligations arising from the said agreement.

[23] The defendant pleaded in the alternative that the defendant paid the plaintiff the amount of N\$11 700 000 and this amount is a fair and reasonable value for the works that the plaintiff executed under the agreement and the plaintiff is not entitled to further payment by the defendant.

Reply by Plaintiff

[24] The plaintiff in reply pleaded that the plaintiff by cession with the defendant's assent replaced HRD as a cessionary and the defendant assumed obligation towards the plaintiff and have in fact tacitly and impliedly confirmed that fact by: Registering the plaintiff as a vendor, accepting the work plan of the plaintiff, accepting plaintiff's performance of the obligations; remitting payment to plaintiff for services rendered in terms of the initial agreement in the amount of N\$11 700 00; and concluding further trilateral cession agreements between the plaintiff, the defendant and SME bank in which the plaintiff's entitlement to payment from the defendant in terms of the initial agreement was provided as security for the loan advanced to the plaintiff.

[25] The plaintiff raised the issue of estoppel in reply and pleaded that defendant is precluded and estopped from denying the authority of Mr Ihuhua. The plaintiff contend that Mr Ihuhua acted with the clear knowledge and authority of the defendant and was at all times ostensibly and in fact, acting in the interest and in the cause of his employment with the defendant. The plaintiff further avers that the plaintiff would not have known that Mr Struggle Ihuhua did not have a mandate requisite authority.

[26] The plaintiff replicates that, to the best of plaintiff's knowledge and belief Mr Ihuha was in the employ of the defendant as Executive: Strategic and Stakeholder and acted within the course and scope of his employment alternatively within the ambit of the risk created by such employment in the furtherance of the defendant's business. The plaintiff avers that it conducted business with the defendant through the agency of Mr Ihuhua and the defendant at no time informed plaintiff that Mr Ihuhua was not the defendant's authorized representative. The plaintiff submitted that employees with whom the defendant exchanged several correspondences pertaining to performance of the obligations in terms of the main agreement continuously confirmed the authority of Mr Ihuhua to conclude binding agreements and the validity of the main agreement. The plaintiff contends that it, acting on the belief of the correctness of the representation, was induced, to its own detriment, to enter into the out-and-out cession agreement in respect of the main agreement.

[27] The plaintiff further replicates that section 5(1)(c) of the Act has nothing to do with the internal delegation of power and authority by the defendant to its employees but has something to do with the delegation of power and duties in respect of the statutory mandate of the defendant. The plaintiff replicates that even if it were to be found that the agreements and annexures referred to were unlawful for one or other reasons, the defendant has no right to raise such a defense against the plaintiff as a cessionary attritionary, that the defendant, as a public entity, has no right to collaterally challenge the agreement, and that the agreement and all legal deeds entered into by the defendant's employees are valid and produce legal consequences.

[28] The plaintiff denies that the amount of N\$11 700 000 is a fair and reasonable value of the work done and it in any event does not cover the damages suffered by the plaintiff.

The evidence

Background

[29] During or about October 2015 the defendant's Health, Safety and Security department became concerned about the spillage of oil at the defendant's Walvis Bay Locomotive Depot. This defendant was given a fine for surface diesel spillage by Namport and they were concerned that it was only a question of time before this issue was brought under the attention of the Ministry of Environment and Tourism.

[30] The department was aware of the surface diesel spillage but also suspected underground spillage of diesel from the two tankers at the depot. The extent of the underground contamination of soil and water was not known but they suspected that it could be substantial. The losses suffered from the diesel spillage was substantial. The spillage posed a fire hazard, the fumes posed a health risk and there was a great possibility that the subterranean contamination of soil and water endangered the marine life and was seeping into the underground water. The defendant knew that the Ministry

of Environment and Tourism could shut down the depot and that this would be disastrous for the operations of the defendant who was already suffering financially.

[31] At that time the defendant employed the services of HRD to clean up a site at Dune 7 situated at the outskirts of Walvis Bay where a locomotive carrying diesel and other toxic chemical overturned. On 14 October 2015 Mr JJ Mbandi, the defendant's manager of Health, Safety and Security made a submission ostensibly to the Executive Properties, Mr Ihuhua to consider and approve the appointment of HRD to clean up the oil pollution at Walvis Bay, Locomotive Depot. He stressed the urgency of the situation and recorded that another company was reluctant to assist due to defendant's failure to settle outstanding payment for services delivered.

[32] It was recommended by this department that HRD be appointed to clean the polluted areas at the Locomotive Depot at Walvis Bay in light of the fact that HRD was already a service provider, another service provider was reluctant to provide a quotation and the fact that the spillage had reached catastrophic proportions which had to be address urgently. It was further proposed that HRD submit a quotation to the defendant as soon as possible for consideration.

[33] This submission was supported by Mr Ihuhua in his capacity as Executive: Properties and it was approved on 18 November 2015 by the Acting Chief Executive Officer Mr Hippy Tjivikua with the following handwritten note:

'This matter is very urgent! If Walvis Bay diesel depot is closed down by the Ministry of Environment and Tourism, we face a serious catastrophe! Everything in the company will come to a standstill!! Jakes can confirm that the other suppliers are refusing to engage TransNamib due to our financial position. In that case, please ensure that Procurement policies are adhered to and if need be to this justification is fair'.

[34] The above events formed the background to the appointment of HRD on 18 December 2015.

Plaintiff's Evidence

[35] The plaintiff called Mr Rodney Hanganda, the sole member of the plaintiff and Mr Ihuhua to testify in support of their case.

[36] Mr Hanganda testified as follows: During November 2016 the defendant sought and obtained a quotation and a report from HRD. It was on the strength of this report that the Mr Tjombe of the Health and safety department became aware that the underground diesel spillage has reached a depth of between twenty to thirty meters caused by the defendant's diesel fuel pump and locomotive service line in Walvis Bay. The said quotation and report of HRD however was not produced. On 18 December 2015, Mr Ihuhua in his capacity as Executive: Strategic and Stakeholder of the defendant and Mr Dawids of HRD concluded an agreement for HRD to do contaminated soil remediation of the Walvis Bay Locomotive Diesel Depot.

[37] On 30 August 2016, the plaintiff entered into an out-and-out cession agreement with Mr Dawids of HRD in terms whereof HRD unconditionally ceded its interest in the ongoing project for the rehabilitative works at the defendant's locomotive depot (diesel spill site) to the plaintiff. The work commenced but no date was provided. He confirmed the terms of the agreement as per the particulars of claim.

[38] The relationship started out well, given the timeous completion of works, submission of invoices, progress reports, project plans by the plaintiff. In this regard he referred to project plans for the months of October, November and December 2016, March and April 2017. Monthly invoices were handed into evidence which spanned over the period August 2016 to September 2017. This is evidenced from an e-mail the plaintiff received from Mr Tjombe on 1 March 2017 where he states that he observed that there is good progress and requesting the plaintiff to provide new drawings in order

to submit to the engineering department. He also included further correspondence which were indicative of the fact that there was no dissatisfaction or disapproval of the plaintiff's rehabilitative works. He also referred to a further report by Mr Tjombe dated 19 January 2019 in which Mr Tjombe relied on the plaintiff's project plan for rehabilitative works at the site and wherein Mr Tjombe once again indicates plaintiff's compliance with the agreement. Both the report and the project plan were produced.

[39] The plaintiff was placed in a precarious financial position which prompted the plaintiff to enter in a further cession agreement with the defendant and SME bank. The plaintiff produced the two separate cession agreements concluded with SME bank and the defendant.

[40] On 15 August 2017 the plaintiff issued defendant with a letter in which the claims due to the plaintiff were illustrated. Despite the submission of numerous invoices and the said letter no payment was forthcoming and this prompted the exchange of various correspondence between the plaintiff's legal practitioners and the defendant.

[41] On 19 June 2017 the defendant addressed a letter to plaintiff directing plaintiff to halt the operations and that no further payments would be made owing to a lack of compliance with the Environmental Management Act, 7 of 2007. Compliance with this Act was however never an express, tacit or implied term of the agreement between the plaintiff and the defendant.

[42] During cross examination it was pointed out that the agreement which the plaintiff relies on does not contain the terms and conditions set out in the particulars of claim. His response was that the terms were given to them by Mr Dawid Tjombe who determined inter alia that the work should be completed in two years. The sporadic nature of the progress reports and the absence of architectural and engineering plans were also highlighted. Mr Hanganda insisted that the engineering plans were submitted to the Engineering Department. When confronted with the absence of an environmental

plan Mr Hanganda testified that it was not his duty to submit any document to the Ministry of Environment. He provides the documents to the defendant and the defendant is responsible for those documents to be handed over to the Ministry of Environment. It was pointed out that this contradicts his particulars of claim which provides that the plaintiff was to secure all relevant approvals from the various relevant authorities. He testified that the approvals related to municipal approval of building construction. It was required that the plaintiff submit the drawings to the municipality and they would then approve it. He insisted that obtaining a clearance certificate from the Ministry of Environment was not the plaintiff's responsibility.

[43] The plaintiff confirmed that no work was done before they came onto the site and that the plaintiff was the first on the site. He confirmed that all the outstanding invoices were paid during 2019 but it was not only for this project but also other projects.

[44] When confronted with Mr Ihuhua's lack of authority he confirmed what was in the articles of association but testified that he has no knowledge of the defendant's internal policies and procedures.

[45] When confronted with the payment of an invoice made during August 2016 when he had just taken over from HRD. He explained that HRD used the equipment of the plaintiff and HRD submitted an invoice in order to the defendant in order to pay the plaintiff. TransNamib however refused to pay the invoice as HRD had already ceded the rights and obligations in the contract to the plaintiff. The plaintiff was the only one who could validly claim at the time so it claimed payment which it was entitled to in respect of equipment rented to HRD. According to Mr Hanganda there was already work done on the road transport site and the dispute does not concern this site but the locomotive depot. According to his testimony his equipment was being used at the road transport site for a month prior to the session by HRD and when the agreement was ceded it was his responsibility to charge for his machinery on 31 August 2016.

[46] In re-examination Mr Hanganda testified that the work was not done when the contract was terminated. Phase two, three and four remained. He maintained that he would have been able to finish the work during the remaining period and earned in excess of N\$23 000 000.

[47] Mr Ihuhua's version may be summarized as follows: He was employed by the defendant from October 2012 until October 2017. He was however suspended on 30 May 2017 for reasons irrelevant to this matter. He was employed as General Manager for Properties. He however acted in the position as General Manager or Executive: Strategic and Stakeholder Management when the manager in that position took up the position of acting CEO. He confirms that he is the signatory to the principal agreement relied on by the plaintiff. He recalled that at the time he was working closely with Mr Tjombe, the health and safety officer who reported to him. He confirmed the background as sketched above and the fact that a report and quotation was sought from the plaintiff and that plaintiff provided such a quotation and report which formed the basis of the assessment report of Mr Tjombe dated 16 November 2015. No evidence was led as to what amount was quoted by HRD and neither was this document adduced into evidence.

[48] He recalled that at the time, the severity of the contamination could not easily be ascertained. He considered the loss of diesel and the ongoing pollution to the environment. It was resolved to address the concern as recommended by Mr Tjombe as a matter of urgency and this led to the conclusion of the contract between him in his capacity of Executive for Strategic and Stakeholder of the defendant and HRD represented by Mr Hendrik Dawids. He maintained that the contract was not concluded in the absence of board approval. He attached a presentation/report to the Board of Directors of the Defendant titled 'Oil Spill Disaster at Walvis Bay Diesel Depot'. The said report was presented at a Board Meeting of 17 November 2016 and this led to a resolution of the Board of Directors on 6 April 2017 to approve the amount of N\$5 500 000 to keep the rehabilitation activities going. He was also aware of the cession agreement entered into between HRD and the plaintiff. *Ex facie* the document it

however appears that the resolution was taken on 8 December 2016 as it bears the resolution number BR03/081216.

[49] Mr Ihuhua was extensively cross-examined on his authority to have entered into an agreement with HRD which resulted in a claim of N\$30 000 000. Mr Ihuhua admitted that he did not have the authority to bind the defendant for the contractual amount claimed by the plaintiff i.e the sum of N\$60 000 000. He admitted that neither he nor the CEO could have committed the defendant to an obligation in excess of N\$5 000 000 and that only the Board of Directors could approve a contract in excess of N\$5 000 000. Mr Ihuhua confirmed that paragraph 2.4 of the Purchasing Policy of 23 October 2009 provides that the CEO may commit the defendant to obligations below N\$5 000 000 and that, in his capacity, his limit was N\$250 000. He also agreed that the provisions of paragraph 2.4 applies despite any deviation as provided for in paragraph 2.8 and that a formal tender was required if the amount exceeded N\$350 000. Much was made of the tender document and the provisions for informal tenders.

[50] Mr Ihuhua persisted with his version that there was compliance in that the matter was urgent and there was no other supplier willing to perform the work. Furthermore, the CEO approved that HRD be appointed. He confirmed that the oil spillage was not a new issue and that it was known for some time. He admitted that the requirement of the approval and supervision of MET on the work done was an important consideration. He was adamant that the appointment of HRD was not for the amount of N\$60 000 000 and that this was merely a quotation or estimate for the period of 24 months. He testified that he initially appointed HRD to do the work but when they started to work, no one knew the severity of the problem. They discovered that the tanks were spilling half of its contents worth approximately N\$ 5 million. As the plaintiff was digging deeper there was actually a dam of fuel. They recognized that it went beyond their powers and they informed the board. He however denied that he appointed HRD to do work worth N\$30 000 000 or N\$60 000 000 but testified that he approved for emergency work to be done with the approval of the CEO. He further admitted that he appointed HRD at a time

when the work had not been quantified. He testified that the Board was made aware of the estimated costs of N\$60 000 000.

[51] During re-examination, on a question as to whether he was aware of any decision by the board to reject that amount, he responded as follows:

‘No. In fact they went further to approve part payments or to say that is, that is why you will see there is N\$5 million that was approved as part of that ... whilst the company was looking for funding.’

[52] Mr Ihuhua was unsure as to the exact date that he was appointed to act in the position of Executive: Strategic and Stakeholder and indicated that it has been seven years since he has been in the employ of the defendant and that he would require the record in possession of the defendant to refresh his memory. He also insisted that a report was handed to them together with the quotation by HRD before it was appointed on 18 December 2015.

[53] During cross-examination he admitted that the work plan was submitted almost ten months after the plaintiff purportedly started working. In response to questions regarding the requirement to have an environmental clearance certificate he responded that from what he knows is that the scope must first be assessed to ascertain the damage and thereafter a plan is drawn up. He testified that the environmental commissioner was kept informed throughout the process.

Defendant's evidence

[54] The defendant called Mr Johny Smith who was the Chief Executive Officer of the defendant since 1 February 2018, to testify. What follows is a summary of his testimony. He testified that he was not employed by the defendant during the period when the dispute between the parties arose but brought the information before court from the records of the defendant which were in his possession.

[55] It is his view that Mr Ihuhua purported to act in his capacity as Executive: Strategic and Stakeholder and he seemingly notified HRD that it had been appointed to do contaminated soil remediation and rehabilitation at Locomotive Diesel Depot, Walvis Bay. He held the view that the contract did not specify the terms of the alleged contract. The letter also did not specify who authorized and or approved the alleged contract relied upon by the plaintiff. It further did not set out whether HRD would be remunerated and if so the amount of such remuneration.

[56] He holds the view that Mr Ihuhua, in his capacity as claimed, did not have the power and/or the authority to conclude the contract on behalf of the defendant. This statement is based on the defendant's policies and operational documents which flow directly from the public registration documents of the defendant. In his view the value of the contract was beyond the threshold of any member of the executive or the executive management, not even the CEO. Mr Ihuhua's ceiling was N\$150 000 in terms of the defendant's policies and levels of delegation of authority. He thereafter refers to the defendant's Purchasing Policy of 23 October 2009 which provides in paragraph 2.4 that where an expenditure of a project or purchase has a value of N\$5 000 000 or higher, it requires the approval of the defendant's Board of Directors and that all other contracts not falling within the minimum threshold of paragraph 1.1 (most likely refer to paragraph 5.1) have to be put out to public tender.

[57] Mr Smith considered the records of the Board at the relevant time including the minutes and resolutions. He found no resolution authorizing Mr Ihuhua or the defendant or anyone else to conclude the contract relied on by the plaintiff. Mr Ihuhua was not delegated and or authorized by the defendant to enter into this contract on its behalf. He held the view that Mr Ihuhua knew that he had no power to conclude the contract relied upon by the plaintiff and his position is that Mr Ihuhua gave a false impression that he was authorized and/or empowered to conclude the alleged contract. He further did not come across a decision of the executive management authorizing Mr Ihuhua to conclude the agreement and even if they did it would be problematic given that

management did not have the power to do so, having regard to the levels of value of the alleged contract.

[58] Mr Smith referred to a briefing to the defendant's Board informing them of the oil spillage and ongoing remedial/rehabilitative works at Walvis Bay dated 7 November 2016. He pointed out that the Board at its meeting of 2 September 2016 resolved that defendant's executive management must table a report at the subsequent meeting. The board resolved that the condition of the defendant's fueling depot at Walvis Bay and other towns be declared disaster areas but no approval was given by the Board for the conclusion of the contract relied on by the plaintiff.

[59] Mr Smith further refers to a decision paper dated 1 December 2016 and a meeting of the Board on 17 November 2016 wherein the board requested the management to make recommendations on how to address the environmental disaster due to oil spillage at the concerned areas. A copy of the decision paper and the resolution were attached.

[60] Mr Smith testified that the articles of association of the defendant are public documents and the plaintiff should have been aware of the contents thereof. He pointed out to the court that the services rendered by the plaintiff do not constitute emergency services and were not declared as such under the tender procedures of the defendant. He also points out that even if it was classified as emergency services, which it was not, the agreement itself still had to be approved by the board of directors given the amount and the values relied upon by the plaintiff.

[61] The witness also referred this court to the defendant's tender procedures and in particular that it requires that a formal contract be drawn up and that it should not be ceded without the prior written approval of the defendant. It furthermore provides that all contracts exceeding N\$5 000 000 shall be signed by the Chairperson of the Board of Directors or the CEO with the authorization from the Board. He also maintains that Mr Dawids could not have been under the reasonable and genuine belief that any company

officer of the level of Mr Ihuhua had the authority to circumvent the defendant's tender procedures to the value of the agreement relied upon by the plaintiff.

[62] The witness further pointed out that for the work undertaken by the plaintiff an Environmental Impact Assessment is often required by both the employer (defendant) and the Ministry of Environment and Tourism from the contractor. It would also be required of the plaintiff to execute its obligations in compliance with the Environmental Management Act. Through no fault of the defendant, and after the plaintiff had already commenced with work, the defendant received a directive from the Ministry of Environment and Tourism to cease with the continuation of the project and in compliance therewith the defendant terminated the agreement. A copy of the letter is attached and dated 19 June 2017. Performance therefore became impossible.

[63] Mr Smith referred to a report by AIJ Cost Consultants who assessed the work of the plaintiff. The said report was tabled before the Board on 6 September 2017 together with a submission made by the CEO on the payment of the then outstanding invoices. The report is attached. The Board resolved that the plaintiff be paid in the amount of N\$5 398 876.08, that it be paid immediately and that a letter be written to plaintiff informing him that the remainder of the work will be put out on tender and that the amount as approved at the Board meeting held on 30 August 2017 would constitute the final payment. The amount was to be paid in instalments and it was resolved that no further money will be paid to plaintiff. Based on this resolution the witness offered to pay the plaintiff the amount of \$5 898 897.75 in full and final payment for the work done in five instalments. The plaintiff indicated his acceptance of the proposal by signing the said letter.

[64] Mr Smith indicated that the defendant was aware that the plaintiff had undertaken some work and it was assessed. He is of the view that this amount paid to the plaintiff was adequate for the value of the work which the plaintiff had performed.

[65] During cross-examination the witness was confronted with the fact that the plaintiff was registered as vendor in order to facilitate payment through the internal processes of the defendant, that the amount of approximately N\$11 million dollars was paid to the defendant and that the defendant terminated the agreement instead of self-reviewing its conduct. The witness was confronted with the fact that neither the CEO, Mr Tjivikua nor the members of the board raised the issue of lack of authority although they knew about the fact that the plaintiff was performing work and was being paid. He was asked to indicate where it was stated by the Minister of Environment that the project must be stopped. The witness conceded that the content of the letter does not indicate that the project must be terminated. It was suggested to the witness that the defendant is liable to pay the money which the plaintiff loaned from SME bank as part of the damages suffered.

Documentary evidence

[66] The documentary evidence adduced tells its own story as to what had transpired between the parties. The first document is the document where the Acting CEO approves the recommendation that HRD be appointed to clean up the polluted areas at the Locomotive Depot and that a quotation and a report be obtained from HRD. It is recorded that the matter is urgent and has reached catastrophic proportions and that the other suppliers are refusing to engage the defendant due to the defendant's financial situation. These are the recorded reasons for approving the appointment of HRD.

[67] Mr Tjombe compiled an assessment report on 16 November 2015 together with the report and quotation from HRD in support of the recommendation that letters of appointment should be finalized and issued. This report is followed by the letter of 18 December 2015, the agreement the plaintiff relies on for the relief he is seeking. In this letter the plaintiff is requested to provide the defendant with a work plan.

[68] The plaintiff handed in an e-mail dated 4 April 2016 in support of his averment that Mr Tjombe engaged in regular site visits and reported to the relevant representatives of the defendant on a regular basis. This was an e-mail addressed to Mr Karon. This document reflects that the work has started at 'Road Transport Depot Walvis Bay' and that the contractor was busy with the first phase of the Road Transport Depot. This clearly did not relate to the contract for the contaminated soil remediation and rehabilitation at the Locomotive Depot at Walvis Bay. This e-mail is not evidence that the work had commenced at the Locomotive Depot.

[69] The first trilateral cession agreement was entered into on 29 August 2016, the out-and-out cession agreement was entered into on 30 August 2016 and the first invoice of the plaintiff was submitted on 31 August 2016.

[70] The Trilateral cession agreement specifically refers to a contract for the Diesel Spill at Walvis Bay Diesel Depot and Dune 7. The cession agreement was to provide SME bank with security for the repayment of a loan advanced to the plaintiff. The plaintiff ceded and transferred all progress payments to the bank from payments which would be due to be received by plaintiff in terms of his contract with the defendant. It is not disputed that the defendant's acting finance manager signed the Cession agreement. What is interesting is that the trilateral cession agreement was signed before the out-and-out cession agreement between HRD and the plaintiff. This lends credence to the plaintiff's averment that the defendant assented to cession and was fully aware of the circumstances surrounding the cession agreement.

[71] The plaintiff indicated that the invoice related to services rendered in respect of the Road Transport Depot by HRD. The e-mail dated 4 April 2016 supports his testimony that work and services were rendered by HRD in respect of Road Transport Depot and that the invoice related to this project. It is also clear that no work was performed at the Locomotive Depot before this date i.e 30 August 2016.

[72] On 2 September 2016, i.e three days after the out-and-out session the Board of Directors met and Mr Ihuhua was invited to attend. The board was informed of the spillage from the fuel tankers at Walvis Bay Depot and took note of what they termed 'a serious matter'. Mr Ihuhua was tasked to compile a full report regarding the spillage for Exco and thereafter to provide the board with cost implications and that the matter be treated as a disaster. It is clear that the Board's approval for incurring further expenses was sought.

[73] On 7 November 2016 Mr Ihuhua prepared an information paper to the Board of Directors on findings and progress of the rehabilitation which emanated from the oil spillage at Walvis Bay Locomotive Diesel Depot. This report refers to the request by the Board of Directors on 2 September 2016 for a report on progress of the rehabilitation process. A presentation was prepared. Reference was made to a meeting with the Environmental Commission and a letter which was sent to the Environmental Commissioner. It was recommended that the project schedule and cost implications for Walvis Bay depot be established as soon as possible. This report was signed by both the Acting CEO and Mr Ihuhua.

[74] On 8 November 2016 the plaintiff submitted a revised project plan (meaning a previous plan was submitted) for the rehabilitation works at the locomotive depot with indications of the budget/costing and the respective time frames as requested. In this revised project scope the project is divided in five phases/units which commence in September 2016 and ends in January 2018. The costing for the entire project is given as N\$60 000 000. The notes on costs and time frames are the following:

- '1.The time frame due to planning, plan layout, drawings and design of new modernize sites.
2. Construction may require standard foundation layout, compacting, building with in consideration of wet area and weather.
3. Uncontrolled price changes of materials and equipment
4. Slow payment of TransNamib after invoicing to buy replacement equipment.
5. Servicing defects and break down of machinery and equipment.'

[75] On 17 November 2016, the Board of Directors met and the issue of the oil spillage at Walvis Bay was once again placed on the agenda. Mr Ihuhua and the acting CEO was once again in attendance. At this meeting a detailed report was presented by Mr Dawid Tjombe, Acting Manager of Health and Safety. It was resolved *inter alia* that a full report on work done with cost implications be submitted at the same meeting.

[76] On 1 December 2016 the CEO and Mr Ihuhua once again compiled a submission to provide the Board of Directors with a plan for the remedial/rehabilitative action to address the soil and underground water pollution due to oil spillage at Walvisbay and other depots. What is of importance is the following report:

'Regular health and safety inspections of the company fuel facilities over the years found excessive oil contamination due to oil spillage/leakages. In late 2015 this reached a point where Namport as the landlord issued TransNamib with a fine for soil contamination. TransNamib appointed HRD investments to carry out the rehabilitation works. In line with best practice, HRD investments commissioned an independent environmental auditor, Enviro Solutions to determine the severity of the contamination whose findings was (sic) rather alarming leading the company to declare that particular site a disaster area – See Enviro Solutions report – Annexure A

Due to the magnitude of the work, HRD Investments has subcontracted some of the works to RMH Logistics CC, their same subcontractor which also did the rehabilitation works at Dune 7. Given the severity of the soil and now underground water contamination, management has since reported this disaster to the Environmental Commission.

As requested by the Board at its meeting of 17 November 2016, a **project schedule/plan** and **estimated rehabilitative cost** (N\$60 million) for Walvis Bay depot are attached hereto as Annexure "B". We must note that this plan and costs are indicative as more damages to the environment is discovered as the rehabilitative work progresses. Thus far, the contractor has been paid approximately N\$2 000 000.

...

It is recommended for the approval of the Board:

1. That N\$10 million be prioritized to complete at least part of the ongoing rehabilitative works at Walvis Bay fuel depots and that way avert total shut-down of that facility by either the Environmental Commissioner and/or Namport '

[77] On 8 December 2016 the Board resolved that N\$5.5 million is approved to keep the rehabilitation activities going as soon as the Government provided funding to TransNamib and that a full audited report should be provided by Enviro Solutions on what has been done to date on the rehabilitation of the Walvis Bay Diesel depot.

[78] At this stage the plaintiff had invoiced the defendant for the months of September 2016 (R938 055), October 2016 (R1 099 515) and November 2016 (R1 131 485) for this project. The total amount expended before it obtained Board Approval and it amounted to N\$ 3 169 055.

[79] On 19 January 2017, Mr Dawid Tjombe compiled a report on the rehabilitative process at Walvisbay. This was addressed to the Chief Executive Officer. He confirms therein that N\$2 000 000 has been paid to the contractor since rehabilitation commenced.

[80] On 28 February 2017, the plaintiff, defendant and SME bank entered into its second trilateral agreement for a further loan in the sum of N\$5 750 000.

[81] On 25 April 2017, the plaintiff was informed by way of letter written by Mr Garoeb of the claims department of the defendant that payment has been placed on hold because 'a decision has been taken by the board to withhold payment which is due and approved because of the outstanding status report from the Environmental Solutions. By this time the plaintiff had filed progress reports for the months October, November and December and had a work plan for March and April 2017.

[82] During May 2017 the plaintiff demanded payment but same was not forthcoming. On 13 June 2017, the defendant received a letter from the Environmental Commissioner. What can be gleaned from this letter is that:

- there was an environmental plan compiled by Enviro Solution a copy whereof was handed to the Commissioner by Mr Tjombe but that same was inadequate. It was also not reviewed and approved by MET.
- That no further work should continue on the second section of the spillage site.
- That the structures of the completed works still pose a risk for future contamination.

[83] On 19 June 2017, a letter was addressed to the plaintiff by the acting CEO then, Mr Ferdinand Ganaseb. The plaintiff was informed that the Minister of Environment and Tourism advised the defendant that no work should continue on the second diesel spillage site for a number of reasons. The plaintiff was instructed to immediately stop all work on the TransNamib's sites as was resolved at special board meeting held on Friday, 16 June 2017. The plaintiff was to note that there was no Environmental Management Plan to guide the activities of the rehabilitation and related process and that the actual work done on the site has not been verified by the TransNamib Engineering team and in light hereof no payments will be made to plaintiff.

[84] During August 2017, the quantity surveyors assessment (AJJ Project Cost Consultants) were availed to the Board. They were appointed on 1 August 2017. This report essentially confirmed that the work done by the plaintiff was satisfactorily completed.

[85] On 6 September 2017, after the board meeting held on 30 August 2017, the board of directors signed a round robin resolution which read as follows:

‘That it be and herewith is approved that:

TransNamib pays RMH logistics the amount of N\$5 398 876.60.

TransNamib will pay the amount, with immediate effect, provided that the following conditions are met:

RMH receives a written communication from TransNamib stating that:

The remainder of the work will be put out on tender in terms of TN procurement policy.

The amounts as determined in the Board Meeting held on 30 August 2017, will constitute a final payment to RMH Logistics to be made in two installments.

No further money will be paid (sic) to RMH Logistics regarding this project. ‘

Discussion

Authority of Mr Ihuhua

[86] The first challenge is whether the plaintiff succeeded to discharge the onus upon it to prove that Mr Ihuhua was duly authorized to conclude the agreement with HRD on behalf of the defendant. It is not in dispute that Mr Ihuhua signed the appointment letter dated 18 December 2015. The question is whether he was duly authorized by the defendant to appoint HRD.

[87] Mr Namandje, counsel for the plaintiff, citing various cases in support hereof, submitted that the defendant is not entitled to raise a collateral challenge based on public law grounds¹; that the defendant in any event admitted to having cancelled the contract, and that Mr Ihuhua had actual authority alternative ostensible authority² to conclude the agreement on behalf of the defendant, and in such case the defendant is estopped from denying authority on the basis of the allegations made by the plaintiff in the replication and the evidence. He further submitted that, in addition hereto, the

¹ *MEC For Health, Eastern Cape, and Another v Kirland Investments (Pty) Ltd T/A Eye and Laser Institute* 2014 (3) SA 219 (SCA) paras 21; 22; 25, 26 & 27; *The Head of Department: Department of Education, Free State Province v Welkom High School & Harmony High School* (766 &767/2011) [2012] ZASCA 150 (28 September 2012) paras 12 – 15.

² *African National Congress v Ezulweni Investments (Pty) Ltd*, Case no A 5035/2021 delivered on 29 June 2022 paras 24, 25, 28, 41 and 42 and *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC).

plaintiff was entitled on the basis of the *Tuquand-rule* to assume that the internal procedures and decision-making arrangements were complied with.³

[88] The defendant bears the burden to prove that the agreement is invalid for want of compliance with a statutory provision or internal policies and procedure. For this reason this issue was not considered at the end of the plaintiff's case but will be considered below. The court proceeded from the premises that the defendant factually and legally admitted the existence of the contract having chosen to cancel same and pleading this in the alternative. The defendant furthermore performed in terms of the agreement by making the payments to the plaintiff.

[89] Mr Phatela, counsel for the defendant, argued that it was critical for the plaintiff to establish whether Mr Ihuhua concluded the agreement and also the exact employment capacity in which he acted. He submitted that the court is called upon to make a determination as to what exactly was the capacity of Mr Ihuhua, Executive: Strategic and Stakeholder entailed. This he submits is a specific allegation by the plaintiff that Mr Ihuhua acted in this capacity and this allegation was disputed by the defendant. He submitted that the court had to be furnished with evidence of what exactly the capacity of the Executive: Strategic and Stakeholder was within the employment of the defendant. He argued that the plaintiff completely failed to discharge that onus and in fact no evidence whatsoever was led in respect of the capacity of Mr Ihuhua's position, the powers of that capacity or position and what the competencies of that position entails. He referred this court to admissions extracted from Mr Ihuhua that he did not have the power to bind TransNamib in the alleged agreement specifically pertaining to the duration as well as the contractual amount.

[90] The second aspect Mr Phatela invited the court to consider was the question of whether, in the conclusion of the alleged agreement, Mr Ihuhua duly represented the defendant. He submitted that the defendant is a juristic entity established by Statute and

³ *Walvis Bay Municipality and Another v Occupiers of the Caravan Sites at Long Beach Caravan Park, Walvis Bay 2007 (2) NR 643 (SC) paras 95 to 101.*

it is thus imperative that in order for Mr Ihuhua to have duly represented the defendant, he had to be authorized to do so.

[91] Mr Phatela argues that the claim of the plaintiff that Mr Ihuhua acted within the scope of his employment with the defendant or within the ambit of risk created by such employment, embodies the mental aspect, i.e reasonable impressions created by Mr Ihuhua on 18 December 2015. He submitted that there was no evidence adduced and that there is a lacuna in the testimony of the alleged course and scope of Mr Ihuhua's employment to such an extent that the plaintiff had failed to discharge the onus it bore at the end of its case.

[92] The evidence adduced by the plaintiff herein is that Mr Ihuhua on 14 October 2015 was approached by the Manager of Health and Safety and Loss Control Department to support a request to the acting CEO to approve the appointment of HRD to clean up the oil pollution at the Locomotive Depot in Walvis Bay. He did so at the time by wearing the hat of Executive: Properties. The evidence further revealed that there was approval by the acting CEO. The acting CEO recorded that the matter was urgent; that everything in the company would come to a standstill if the depot would be shut down by the Ministry of Environment and Tourism; repeated the fact that the other suppliers are refusing to engage the defendant. He further stated "in that case" ie in the case referred to above, that the concerned department must ensure that the defendant's procurement policies are adhered to.

[93] The procurement policies referred to are in essence the purchasing policy approved by the Board on 23 October 2009 and the tender procedures of the defendant.

[94] Paragraph 2.4 of the purchasing policy provides that Board Approval is required in instances where the amount involved is N\$5 million or more and the CEO may approve up to the amount of N\$5 million. Paragraph 2.5.1 of the purchasing policy provides that any commitment made by the defendant for purchasing of products and

services exceeding N\$350 000 requires a formal tender issued by the tender committee and in accordance with procedures laid down by the tender committee. Paragraph 2.8 of the purchasing policy provides as follows:

'2.8 Deviations from procedures laid down under paragraph 2.5 are allowable under the following circumstances (Compliance to delegations as per 2.4 is always a requirement regardless of deviation from procedures). All reasons for deviations shall be documented for audit purposes.

2.8.5 In cases of emergencies and or breakdowns.'

[95] The defendant's protestations that the oil spill was not an emergency is not supported by the handwritten note made by the CEO at the time. He considered that there was a threat to the operations of the defendant which would have had a catastrophic effect. The acting CEO at the time clearly made the call that this was a deviation in terms of 2.8.5 of the purchasing policy and he recorded this in writing. It is common cause that the contract for cleaning up the oil pollution was not put out on tender. I am however satisfied that, *ex facie* the handwritten note of the CEO, the requirements of 2.1 and 2.8.5 were complied with in that, under the circumstances prevailing at the time, the matter was considered as an emergency and the reasons were clearly documented. The only issue which remains is whether the delegations in terms of paragraph 2.4 was adhered to.

[96] The CEO approved the appointment of RHD with the clear instruction that procurement policies must be adhered. This meant that the department could not approve or commit the defendant in the appointment of RHD beyond the amount of N\$5 million.

[97] What is missing is the exemption from tender procedures as provided for in paragraph 13 of the defendant's tender procedures which provides that a request for exemption shall be made in writing to the tender committee accompanied by full details to justify the exemption and supported by suppliers' quotations where applicable. The

tender committee may recommend, for the CEO's approval, purchases without reference to the tender procures in instances where the urgency of the service preclude tendering. In that instance the cause for urgency must be established beyond doubt and placed on record in the application for approval. In exceptional cases, the need for early delivery may justify direct procurement, from qualified supplier of similar equipment. In such a case, to ensure reasonable economy in procurement, it may be necessary to obtain quotations from a limited number of suppliers. There is no evidence that these procedures were followed. The purchasing policy, however, indicates that deviations are allowed and compliance with paragraph 2.4 has been complied with as the approval of the CEO has been obtained.

[98] Mr Ihuha consistently denied that he committed the defendant in the sum of N\$60 million. He testified that the work was not quantified at the time. He confirmed that there was a report and a quotation. It is common cause that the plaintiff was called upon to provide a work plan in order for the defendant to plan logistics for the smooth running of its operations during the rehabilitative work. He testified that he did not act in his personal capacity but in his capacity as employee of the defendant when he concluded the agreement. No evidence was adduced to rebut this statement. The evidence shows that despite the appointment of HRD on 18 December 2015, no work was done until 1 September 2016 and that the first invoice for work done on this project was rendered on 30 September 2016 in the sum of N\$939 055.00.

[99] The Board was informed of the emergency on 2 September 2016. The Board was further advised that the defendant managed to allocate resources to the project. The Board resolved that the Executive Committee presented a full report on the spillage on Friday 9 September 2016. This report appears to have been prepared only on 7 November 2016 for the Board Meeting on 17 November 2016. A presentation was prepared which clearly informed the Board that remedial process have started in Walvis Bay and that the defendant contracted a private contractor. The Board were further apprised of the fact that the process uncovered the true extent of the environmental damage. The plaintiff's project plan and the cost implications were also included in the

presentation and attached thereto. The board was informed that the contractor has been paid approximately N\$2 million, although the total invoices at that point amounted to N\$3 169 055,00 well within the authority levels of the CEO. No questions were raised by the Board in respect of the authority conclude contract. No real resolution was passed at this meeting but at the subsequent meeting of 8 December 2016 where the Board approved the payment of 5.5 million. The invoices from December to 4 July when the contract was terminated amounted to N\$5 010 919,22 (excluding invoices unrelated to this project). This amount was well within the amount authorized by the Board on 8 December 2016.

[100] It is this court's considered view, considering the evidence, that there was actual authority by both the acting CEO at the time the appointment was done and the Board when the project scope was submitted.

[101] In the event this court is wrong that there was actual authority it is this courts view that the plaintiff ought to succeed in terms of the principles of estoppel and ostensible authority. In the matter of *African National Congress v Ezulweni Investments (Pty) Ltd*⁴ the following was stated:

'The general rule relating to authority, in context of the law of agency, is that, where one party to a contract purports to act in a representative capacity, but in fact has no authority to do so, the person whom he or she purports to represent is obviously not bound by the contract simply because the unauthorized party claimed to be authorized. That person (the principal) will however be bound by the contract if his or her conduct justified the other party's belief that authority existed.'

[102] In *River View Estate CC and Others v DTA of Namibia*⁵ the court stated the following:

⁴ *African National Congress v Ezulweni Investments (Pty) Ltd*, Case no A 5035/2021 delivered on 29 June 2022, at para 25.

⁵ *River View Estate CC and Others v DTA of Namibia* 2022 (3) NR 715 (SC) 2022 (3) NR 715 (SC).

[61] If reliance is placed on an ostensible authority, the elements of estoppel must be alleged, including a representation by the alleged principal and the necessary causation.'

[62] A succinct statement of the law on ostensible authority is to be found in a judgment of the UK Supreme Court in *East Asia Company Ltd v PT Satria Tirtatama Enegindo (Bermuda)* where Lord Kitchin put it as follows:

"41. The general principles governing the existence of ostensible authority of an agent of a company are well established. It must be shown that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made by a person or persons who had actual authority to manage the business of the company either generally or in respect of the particular matter to which the contract relates; that the contractor was induced by the representation to enter into the contract; and that under its memorandum or articles of association the company was not deprived of the capacity to enter into a contract of the kind sought to be enforced or to delegate authority to the agent to enter into the contract of that kind.

42. It is also important to have in mind that ostensible authority is a relationship between the principal and the contractor and it is one created by the representation of the principal that the agent has authority on behalf of the principal to enter into a contract of a particular kind. The representation, if acted upon by the contractor by entering into the contract operates as an estoppel which prevents the principal from contending that he is not bound by the contract . . . '

[63] Agency cannot be established from the declarations of the purported agent. It must derive from the actual conduct of the principal.'

[103] The enabling Act and the articles of association of the defendant make it lawful for the CEO to delegate any powers vested in or delegated to him or her to any employee or holder of the post in the defendant. The acting manager of finance signed the trilateral agreement providing security to SME bank for payments which would accrue to the plaintiff before the contract was concluded. The plaintiff was registered as a vendor to facilitate payment. There is evidence of discussions and correspondence between the plaintiff and employees in the health and safety department of the defendant. The Board of Directors were informed as early as 2 September 2016 that work was in progress and that funds were allocated. The lack of authority was not

raised at this meeting or the subsequent board meetings where the Board in fact approved payment of more than N\$10 million for this project.

[104] This court therefor conclude that the defendant is bound by the agreement on the basis of the doctrine of estoppel and that Mr Ihuhua had the ostensible authority to do so.

Was there a contract

[105] Mr Phatela argued that it was not every agreement that should necessarily be elevated to a contract. He submitted that the party who alleges that there was some kind of agreement which could be elevated into a contract, must prove that the agreement was intended to be a contract and must prove that the intention was to give rights to legally enforceable rights and obligations between the parties.

[106] The difficulty encountered with this arguments is that it was not the defendant's plea that the contract entered into between HRD and the defendant was vague. The difficulty with the plaintiff's case is that the plaintiff relies solely on the written contract which does not expressly state the terms and conditions. What is apparent from the contract is that HRD was appointed to do work, and that a work plan was to be submitted. The work was done and the plaintiff was paid for the invoices he submitted which were processed. This is a clear indication that the parties tacitly agreed that payment would be made subject to the submission of a workplan. The defendant paid the plaintiff the amount due in terms of the invoices rendered for the work done in respect of the work plan and such payments were approved by the Board. All these are indications that the work plan was accepted by the Board of Directors.

The Cession

[107] The defendant's finance manager prior to the cession entered into the trilateral agreement with the plaintiff and SME bank or work which was to be done by HRD (The

contract for remedial and rehabilitative work at Walvis Bay Locomotive Depot). The claims department processed the invoices and payment was made to the plaintiff. Even if there was no express consent to the cession, this court is satisfied that the defendant was aware of the cession and had accepted that the plaintiff stepped into the shoes of HRD.

Cession agreements with SME bank

[108] The trilateral agreements are not agreements in terms whereof the defendant may be held liable for the payment of the loan amount. The loan was granted to the plaintiff and the defendant merely undertook to make payments to the cessionary on behalf of plaintiff if such payments are due to the plaintiff by the creditor.

Compliance with the Agreement

[109] Mr Phatela submitted that the plaintiff pleaded that it was a term of the agreement that: that architectural plans were drawn up to the extent that it secured the approvals from the relevant authorities in respect of the plans; that work should have been completed in two years of the commencement of the project and that it would give monthly reports.

[110] Mr Namandje pointed out that the agreement was not terminated for malperformance and the defendant pleaded impossibility of performance given the directive from the Ministry of Environment and Tourism that no further work should continue on the second section of the spillage cite. The above issues however is briefly dealt with.

Failure to obtain approval for Environmental Management Plan (EMP)

[111] The plaintiff testified that it was not liable for compliance with the requirements of the Environmental Management Act but that this was the responsibility of the defendant. The CEO informed the Board of directors in his submission of 7 November 2016 that:

'Following a meeting with the Environmental Commissioner, a letter outlining the situation was sent to the Environmental Commissioner – Seen Annexure B hereto'.

[112] On 1 December a further submission is made to the Board of Directors by the CEO where the following is stated:

'In line with best practice, HRD Investments commissioned an independent environmental auditor (sic), Enviro Solutions to determine the severity of the contamination whose findings was rather alarming leading to the company to declare that the particular site a disaster area – See Enviro Solutions report – Annexure A

...

Given the severity of the soil and now underground water contamination, management has since reported this disaster to the Environmental Commisisoner.'

[113] The letter from the Environmental Commissioner dated 3 June 2017 states the following:

A quick review of the said TransNamib Rehabilitation Plan (a copy received from Mr Tjombe)...

[114] From the above it is clear that there is room for the court to conclude that it was indeed the responsibility of the defendant to draw up and to seek approval for the Environmental Management Plan as envisioned in the Environmental Management Act.

[115] It is further also clear when the letter of the Commissioner is viewed holistically that the Commissioner did not direct the defendant to terminate the contract of the contractor. It is evident that the Commissioner was not satisfied with the EMP and that the completed works were not up to the required standards but this necessitated compliance and not stopping the rehabilitative and remedial work on the polluted site.

Completion of work within two years and monthly reports

[116] It is common cause that the plaintiff was stopped from performing any further work on 19 June 2017, leaving a period of approximately six months and that by that time the first phase was not yet completed. The plaintiff was adamant that he would have been able to complete all the phases within this period. It is not known how much of the work remained outstanding on the first phase. The last progress report provided to the court was a progress report for the period of December 2016. This court is therefore unable to determine whether or not the plaintiff would have been able to furnish the work it undertook to complete. Work was done and progress reports were submitted. The fact that the work would not be completed within two years cannot be assessed given the fact that the contract was terminated. The defendant, although it pleaded that the plaintiff was in mora, never put it to terms in respect of the period within which it was supposed to have completed the work. This however would play a role when considering the quantum.

[117] This court is satisfied that Mr Ihuhua had ostensible authority and that the defendant is bound on the basis of estoppel. The court is satisfied that the plaintiff had proven, on a balance of probability, that the contract between the plaintiff and the defendant existed and that there has been compliance therewith by the plaintiff. The court is further satisfied that the reason advanced by the defendant for terminating the agreement is without merit. The oil spill for as long as it is not contained must be addressed and it was merely a question of compliance with the Environmental Management Act, before work could continue.

Quantum

[118] The plaintiff's case is that it is entitled to N\$30 million as a result of the breach. This amount is for the monetary value of defendant's counter performance being the

replacement value in money of the wrongfully terminated agreement. It was admitted that N\$11 700 00 was paid and the amount of N\$21 million remains. He submitted that the total amount includes the amount due to SME in terms of the trilateral agreement and the remaining amount as estimated damages suffered by the plaintiff. His submission is that Mr Hanganda testified that this is the projected and estimated loss for the remaining period and same was not challenged during cross-examination.

[119] Mr Phatela argued that the plaintiff bears the onus to prove that the breach caused the loss on a balance of probabilities and that the most difficult question of fact is the assessment of compensation for the breach of contract. The sufferer should be placed in the position he would have occupied had the contract been performed so far as that can be done by the payment of money without hardship to the defaulting party.

[120] Mr Phatela pointed out that the evidence before this court is that the plaintiff is claiming the full contract price of N\$30 million for damages standing or flowing from the alleged breach of contract it being the total contract price had the contract run until the end of the alleged period. He submits that this does not take into consideration the costs which the plaintiff itself would have incurred to discharge the contract such as equipment costs, personnel costs, fuel costs etc. He submitted that the plaintiff in this way is seeking more than what the law of damages for breach of contract is intended to do i.e the plaintiff would not have been in the same position but in a much better position. He strongly submit that the court cannot make a finding on the quantum of the plaintiff's claim.

[121] In *Kalipi Ngelenge t/a Rundu Construction V Anton E Van Schalkwyk T/A Rundu Welding & Construction*⁶ the court held that that when suing for damages for breach of contract, a plaintiff should allege and prove the nature of his damages and how they are calculated. It was erroneous to presume damages just because there was a breach of contract.

⁶ *Kalipi Ngelenge t/a Rundu Construction V Anton E Van Schalkwyk T/A Rundu Welding & Construction* 2010 (2) NR 406 (HC).

[122] It is my considered view that the plaintiff bears the burden of proof and if the plaintiff wanted this court to accept his estimate he ought to have given a realistic estimation taking into consideration the outstanding work, the time left within which to do the work as per the project plan and the projected expenses related to the work still to be done. The court, although aware of this lack of evidence, considered that argument may persuade the court to consider some of the available documentary evidence such as the interest lost as the result of non-payment of the SME loan but none was forthcoming. The amount of N\$30 million was truly pulled from a hat and advanced as a realistic award for the damages suffered. This court is not satisfied that any evidence or argument has been presented to enable this court to determine what would be an award of damages which flows from the breach of the contract.

Costs

[123] The plaintiff herein partially succeeds in proving its claim against the defendant, it however failed to make out a case on quantum. Generally the court would order cost to follow the event but given the facts of this matter this court would make no order as to costs.

[124] In the premises the following order is made:

1. The plaintiff's claim is dismissed.
2. No order as to costs is made.
3. The matter is finalized and removed from the roll.

Tommasi J

APPEARANCES:

PLAINTIFF: S Namandje

Of Sisa Namandje & Co. Inc.
Windhoek

DEFENDANT:

T Phatela
Instructed by Tjitemisa & Associates
Windhoek