CASE NO. SA 28/2001

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

GOVERNMENT OF THE REPUBLIC OF NAMIBIA **APPELLANT**

And

MARRAH TJIKASA WAMUWI, EXECUTOR IN THE ESTATE OF THE DECEASED JOMO AIBU WAMUWI SUBSTITUTED FOR THE DECEASED **RESPONDENT**

CORAM: Strydom, C.J., O'LINN, A.J.A. *et* Chomba, A.J.A.

Heard on: 14/10/2002

Delivered on: 21/05/2003

APPEAL JUDGMENT

O'LINN, A.J.A.: SECTION A: INTRODUCTION

This is an appeal by the Government of the Republic of Namibia against a judgment by Hannah J in the High Court of Namibia wherein the plaintiff, one Wamuwi, claimed from the Government of Namibia, the payment of damages in the amount of N$2 687 867 allegedly for breach of contract.

Mr Frank, S.C., appeared before us for the appellant, the Government of Namibia and Mr Heathcote for the respondent, Mr Wamuwi.

At the outset of the hearing, this Court was informed that Mr Wamuwi, the respondent in the appeal, had died and that his wife, Marrah Tjikasa Wamuwi, who is the duly appointed executor of the estate, wishes to be substituted in her representative capacity for the late Wamuwi as the respondent in the appeal. There was no objection to this substitution and consequently the said executor was substituted on the appeal record as the respondent in this appeal.

The appellant was the defendant in the court *a quo* and the respondent was the plaintiff. As there were also several other applications *in limine* before this Court, I deem it more convenient hereinafter to continue to refer to the parties as in the court *a quo* when referring to the proceedings in the court a quo, but to refer to the parties as appellant and respondent, when referring to the parties in the appeal proceedings.

SECTION B: THE POINTS *IN LIMINE*

1. The application on behalf of respondent to strike the appeal from the record because appellant/defendant did not file the record of appeal timeously.

The respondent relies on Rule 5 (6)(b) of the Supreme Court Rules for submitting that the appeal is deemed to have been withdrawn. The said rule reads as follows:

> "If an appellant has failed to lodge the record within the period prescribed and has not within that period applied to the respondent or his or her attorney for consent to an extension thereof, and given notice to the Registrar that he or she has so applied, he or she shall be deemed to have withdrawn the appeal."

The relevant facts are:

(i) It is common cause that the appellant was in default in filing the Court record. The record was due to be filed in terms of the Supreme Court Rules on or before 15th March 2002. It was only filed on the 26th June 2002, more than three months late.

(ii) However, the appellant did apply to the attorney of respondent before the due date on 15th March 2002 for an extension of the period and respondent consented that the record be filed on or before 22 March 2002. The appellant's legal representative, the Government-Attorney, gave notice on 22 February 2002 that consent had been obtained in terms of Rule 5 (6)(b) and specified that the extension granted is until 22 March 2002.

(iii) Nevertheless, as indicated supra, the record was only filed on the 26th June 2002, more than three (3) months later than the extension date.

(iv) In respondents heads of argument filed on 30th September 2002, respondent took the point as an *in limine* point that the appeal must be deemed to have lapsed in terms of the said Rule 5 (6)(b) and pointed out that no explanation has been forthcoming from the appellant or its legal representatives.

Only thereafter, on 9th October, five (5) days before the hearing of the appeal, the Government-Attorney, filed an application for condonation of the Appellant's failure to file the record timeously. This application in addition asked for:

> "2. Condoning Appellants filing of an incomplete record;
>
> 3. Permitting the Appellant to remove the complete p. 132 in Vol. 1 of 9 of the record and to substitute therewith pages marked 132 (a), 132 (b) and to insert the missing pages 113 and 137 in Vol. 4 of 9 of the record."

There was no objection to paragraphs 2 and 3 of the relief claimed, the problem was with paragraph 1 of the relief applied for.

In view of the fact that the appellant in the first instance did apply to respondent for an extension and was granted such extension, Rule 5 (6)(b) had been complied with in regard to the initial delay.

In Mr Goba's affidavit in support of the application for condonation, he alleged:

> "8. Thereafter, I routinely chased up Global Click by telephone and personal visitations to finalise the record until sometime during the middle of March when they informed me that the record would not be completed by 22nd March 2002.
>
> 9. I once again wrote to Messrs Shikongo appraising them of the position and seeking a further extension of the time period. I sent the letter by fax and mail. However, I did not receive any reply thereto up to the time the record was provided and filed with the Court. I attach hereto a copy of the relevant letter and fax confirmation as Annexure RHG 3 (i) and (ii). The letter in question was copied to the Registrar of this Honourable Court.
>
> 10. Although I did not receive a written reply to the said letter Ms Pearson Le Roux did contact me once telephonically while the late Respondent was in her office enquiring about the status of the record. When I informed her that it was still incomplete she requested me to maintain pressure on Global Click to complete the compilation of the record to which I agreed.

11. I am aware that she also independently pursued the matter with Global Click.

12. I furthermore recall an occasion when I ran into her outside the High Court building and when we again discussed the dilatory conduct of Global Click in compiling the record.

13. The record finally became available during June 2002 and after checking through all the copies and volumes with the assistance of law students attached to the Office of the Government-Attorney for errors, inaccuracies, missing pages etc the record was filed on 26 June 2002.

14. The Respondent's legal practitioners were at all times aware that the delay in filing the record was due solely to the failure by Global Click to complete the preparation of the record on time. More specifically they did not at any stage refuse to grant an extension after the 22nd March 2002.

15. I wish to state further that even when the record became available it contained errors some of which were picked up during the checking process carried out in the Appellant's legal practitioners offices and corrected. In the rush to ensure that no further delay was occasioned in respect of the filing of the record other errors were not picked up in some of the copies such as the copies submitted to Appellant's

> counsel. Counsel detected errors and missing pages which he drew to my attention. Consequently, I visited the Supreme Court and caused certain volumes to be retrieved for my personal inspection. Some of the errors noted in Counsel's copies were not apparent in the copies filed with the Court while those that were observed are the subject of the application for condonation filed herein."

In support of the allegations in paragraph 9, a copy of a letter to respondent's attorneys dated 25th March and a fax confirmation of receipt thereof was attached. The said letter reads as follows:

> "We refer to our letter of the 15th *ultimo* and your reply dated 21st February 2002. We regret to advise that as of 22 March 2002 the transcript of the record was not yet completed.
>
> As this is a circumstance beyond our control we respectfully seek your further indulgence.
>
> R H Goba,
>
> For Government Attorney!"

Ms Tanja Pearson, on behalf of respondent's attorneys, deposed to an opposing affidavit but did not reply at all to paragraphs 8, 9 and 10 of Goba's affidavit.

It follows then that the allegations in the said paragraphs 8, 9, 10 must be deemed to be admitted, including the crucial fact that appellant did ask

respondent's legal representative for a further indulgence and explained that Global Click was unable to have the record ready by the 22nd March.

The allegation in paragraph 5.4 of plaintiff's heads of argument on appeal is therefore partly incorrect insofar as it was argued:

> "Subsequent to that date (i.e. 22 March 2002), no further document has been filed, and the plaintiff did not grant any further extension. Nevertheless, the record was only filed on the 26th June 2002 (Annexure 2 hereto). The delay as from the end of March is unexplained."

Although the respondent did not expressly grant a further extension, such extension was sought in writing and to that request, no written or oral express refusal was communicated to appellant's legal representative. This may have been regarded as tacit consent. It is, however correct to say that Mr Goba failed to give notice to the Registrar in terms of Rule 5 (6)(b). Furthermore, Mr Goba did explain the need for a further extension, although Ms Pearson on behalf of plaintiff in her affidavit filed in opposition on 30th September 2002, claims that appellant's legal representatives were in wilful default and denies that Global Click was responsible for the delays. In support of Ms Pearson's stand the affidavit of Mr Böck of Global Click was annexed, together with documentation indicating when instructions were received and when Global Click had completed the record.

Mr Goba, in a further affidavit in reply, contests the latter allegations by Ms Pearson and Böck and repeats his denial of any fault on his part, particularly, wilful default.

It is not possible to decide the correctness of these allegations and counter allegations on affidavit and it is indeed not necessary. It appears to me that appellant's legal representatives did not comply fully with the rules of Court in regard to the record. However, there is no room for the strict application of the deeming clause in Rule 5 (6)(b). It must have been quite clear to all interested parties that the appellant at no stage abandoned its appeal and had no intention to do so.

Even on the assumption that appellant was remiss in not fully complying with the rules of Court, this Court should give due weight to the question of whether or not there are reasonable prospects of success on appeal.

I believe there are such reasonable prospects, as is apparent from the discussion of the merits hereinafter dealt with and the conclusion reached. It follows that the appellant must be granted condonation for the late filing of the record.

2. The question whether or not the decision of the court *a quo* was a judgment or/order which was appealable without leave.

This point was only raised in the appellant's heads of argument and not raised by or on behalf of plaintiff/respondent. The reason for Mr. Frank raising and arguing this point was that the court *a quo* had decided only the issue of liability and not the quantum of damages, as agreed upon by the parties in accordance with Rule 33(4) of the Rules of the High Court.

The appellant noted the appeal subsequent to the decision on liability and without waiting for the quantum of damages to be decided before noting an appeal. No leave to appeal was requested.

The question consequently arose whether or not the decision of the Court on liability was a judgment or order with final and definitive effect, entitling the appellant to appeal as of right and without the need to apply for leave to appeal as would be required when the decision of the Court is a so-called "simple" interlocutory order.

This issue has been raised and decided on in recent decisions of this Court.[1]

There are also several relatively recent decisions of the Supreme Court of Appeal in South Africa and its predecessor indicating a less rigid approach than in the past.[2]

I am satisfied that in a case like the present, the decision of the Court on the issue of liability and the costs in regard thereto is a "judgment or order" with final and definitive effect in regard to an important part of the relief claimed and as such the appellant has a right of appeal in accordance with Section 18 of the High Court Act of Namibia, Act No. 16 of 1990 as amended.

3. Appellant's application on appeal for amendments to its plea.

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[1] *Vaatz & Another v Klotz & Another*, NmS, 11/10/2002, not reported.
Aussenkehr Farms (Pty) Ltd & Another v Minister of Mines and Another, NmS, not reported
[2] *SA Eagle Versekeringsmaatskappy Bpk v Harford* 1992 (2) SA 786 (A) at 786 (A) *Coroluskraal Farms (Edms) v Eerste Nasionale Bank* 1994 (3) SA 407 (A) at 410 D-J at 416 A-D.
Guardian National Ins Co Ltd v Seorle NO, 1999 (3) SA 295 SCA at 300 F-303 B.

The application for amendment is as follows:

(i) By the insertion of a new subparagraph 3.1 to the main paragraph 3 thereof to read as follows:

> "insofar as it may be found that defendant did enter into an agreement as alleged, defendant avers that the agreement was subject to the condition that funding would be provided by UNICEF to defendant to execute the agreement which condition failed."

(ii) By the insertion of a new subparagraph 3.2 to the main paragraph thereof to read as follows:

> "Insofar as it may be found that plaintiff did in fact enter into an agreement as alleged then defendant avers that such an agreement was invalid in that the tender process provided for in the Tender Board of Namibia Act, Act No. 16 of 1996 was not complied with."

It seems to me that if the appeal must succeed on the pleadings as it stands, it would not be necessary to decide the application for amendment. I find it therefore convenient and appropriate to first consider whether or not the appeal should succeed on the merits on the basis of the pleadings at the time of judgment in the Court *a quo*.

SECTION C: THE APPEAL ON THE MERITS ON THE BASIS OF THE PLEADINGS AT THE TIME OF JUDGMENT IN THE COURT *A QUO*

The particulars of claim read as follows:

"1. The **PLAINTIFF** is **JOMO AIBU WAMUWI**, an adult male person and coordinator of the Maximo-Sauzanda Cultural Group residing at 83 Diaz Street, Windhoek.

2. The **DEFENDANT** is **THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA**, represented herein by the Minister of Health and Social Services and the Minister of Basic Education and Culture, c/o Government Attorneys, Sixth Floor, West Wing, Government Building, Robert Mugabe Avenue, Windhoek.

3. During September and/or October 1998, the Plaintiff, acting in person and the Defendant, then and there represented by A Xoagub entered into an oral agreement alternatively partly written and partly oral agreement, with the following explicit, alternatively implied in the further alternative tacit terms:

   3.1 the Plaintiff had to undertake a country-wide tour to create HIV/AIDS awareness and enable capacity building at workshops and drama performances at 1,400 schools in Namibia;

   3.2 the Plaintiff had to render consultancy services in the form of drafting a HIV/AIDS national policy document, writing syllabi for inclusion in the current school syllabi, designing posters and educational materials on HIV/AIDS;

   3.3 for the services rendered as envisaged in paragraph 3.1 the Plaintiff would be remunerated at the rate of N$2,800.00 per performance per school and for the services rendered as paragraph 3.2 the Plaintiff would be remunerated at a fair and reasonable rate, which payments would be paid by the Defendant to the Plaintiff alternatively, would be paid by UNICEF for and on behalf of the Defendant;

   3.4 the Defendant would co-operate with the Plaintiff in order to comply with his obligations in terms of the agreement, *inter alia*, by informing the schools to facilitate the performances.

4. The Plaintiff complied with all his obligations in terms of the agreement alternatively at all relevant times, tendered to comply with his obligations in terms of the agreement.

5. Since December 1998 the Defendant repudiated the agreement and/or breached the agreement by refusing the Plaintiff the opportunity to continue with his obligations in terms of the agreement.

6. Despite demand by the Plaintiff to the Defendant to rectify the said breach and/or repudiation, the Defendant refused to do so which entitled the Plaintiff to accept the repudiation and/or cancel the agreement which the Plaintiff did alternatively the Plaintiff hereby accepts the repudiation and/or hereby cancels the agreement.

7. As a result of the Defendant's breach of the agreement the Plaintiff suffered damages in the amount of N$2, 687, 867.00.

WHEREFORE Plaintiff claims against the Defendant:

1. Payment in the amount of N$2, 687, 867.00.

2. Interest on the aforesaid amounts at the legal rate from date of judgment to date of payment.

3. Costs of suit.

4. Further and/or alternative relief."

The defendant pleaded as follows:

"1. AD PARAGRAPHS 1 AND 2 THEREOF

The contents hereof are admitted.

2. AD PARAGRAPH 3 THEREOF

2.1 The Defendant admits that in or about July 1998 an agreement was entered into by and between Plaintiff and the Ministry of Health and Social Services, the Ministry of Basic Education and Culture and UNICEF in terms of which Plaintiff would undertake Aids Awareness initiatives at selected schools in Namibia through a cultural group, Maximo-Thousand, from Zambia.

2.2 The project would be facilitated through the National Aids Control Program (NACP) of the Ministry of Health aforesaid.

2.3 Specifically, 31 performances comprising of 15 capacity building workshops and 16 drama performances would be carried out.

2.4 Plaintiff would be paid a fixed rate of $2 800,00 per performance.

2.5 Pursuant to the agreement the United Nations Children's Fund (UNICEF) was approached for funding through the NACP.

2.6 UNICEF agreed to fund the initiative and paid a total of $130 000,00 being the full amount in terms of the agreement through NACP to the Plaintiff.

2.7 Plaintiff partially carried out his obligations in terms of the agreement and was paid in full through the NACP by UNICEF.

2.8 When UNICEF paid out the full amount it was unaware that the Plaintiff had partly carried out his obligations.

2.9 UNICEF later carried out an audit which revealed that the Plaintiff had not fully complied with the agreement and demanded a refund of part of the payments.

3.0 Save as aforesaid Defendant denies each and every allegation herein contained as if specifically traversed.

3. AD PARAGRAPH 4 THEREOF

Defendant repeats paragraph 2.

4. AD PARAGRAPH 5 THEREOF

The Defendant has no knowledge of the allegations, does not admit them and puts the Plaintiff to the proof of all his allegations.

5. AD PARAGRAPH 6 THEREOF

The Defendant repeats paragraph 2 and 4.

6. AD PARAGRAPH 7 THEREOF

In the premises the Defendant denies each and every allegation herein contained as if specifically traversed.

WHEREFORE DEFENDANT PRAYS THAT PLAINTIFF'S ACTION BE DISMISSED WITH COSTS."

At the outset I regard it necessary to point out that the pleading in this action, both the particulars of claim and the plea, are vague and indeed embarrassing and failed to pinpoint the real issues between the parties. To mention only a few features:

The particulars of claim allege:

"During September and/or October 1998, the plaintiff acting in person and the Defendant then and there represented by A Xoagub and/or Kahikuata entered into an oral agreement alternatively partly written and partly oral agreement, with the following explicit alternatively implied in the further alternative tacit terms."

Nowhere was it specified which part was partly oral and which part was in writing and no writing was attached which allegedly constituted part of the contract. This uncertainty was further highlighted by the allegations that the terms of this agreement were either explicit or implied or tacit. Although this type of pleading is permissible the first impression from this is that the plaintiff and his legal representative were uncertain and even confused about what plaintiff's case was.

No further particulars were requested on behalf of defendant in order to narrow down the issue between the parties. Defendant did not expressly deny the "agreement" alleged by plaintiff but instead said that it admitted plaintiff's allegation regarding the conclusion of an "agreement" but then alleged an agreement completely different in regard to the time concluded and the terms of such agreement.

In regard to this agreement which the defendant "admitted", it was also claimed by defendant that the agreement was carried out by the plaintiff and that defendant was paid a total of N$130 000.00 being the full amount payable in terms of the agreement. The defendant further stated that this payment was made by UNICEF i.e. the United Nations Children Education Fund through the National Aids Programme (NACP) of the Ministry of Health.

Again there was no request for further particulars or an attempt made to clear up the ambiguity on behalf of plaintiff.

At best for the parties, it can be implied that defendant denied the agreement alleged by the plaintiff and pleaded the conclusion of a different agreement and that full payment had been made in terms of that agreement by UNICEF in accordance with its Youth Health Development Programme.

An important feature of the plea was that Defendant alleged that the agreement it "admitted" was between "Plaintiff and the Ministry of Health and Social Services, the Ministry of Basic Education and Culture and UNICEF. UNICEF accordingly was alleged to be one of the parties to the agreement.

Although defendant in paragraph 2.3 of its plea stated that "Save as aforesaid Defendant denies each and every allegation herein contained as if specifically traversed, it did not specifically deny plaintiff's allegation that in entering into the agreement as alleged by plaintiff, defendant was represented by A Xoagub and/or Kahikuata. Although it is a principle of pleading that a denial of authority of an alleged agent "must be specifically and unambiguously pleaded", the party who wishes to rely on agency must in the first place "allege and prove the existence and scope of the authority of the alleged agent."[3]

In this case the plaintiff failed to allege that Xoagub and/or Kahikuata were duly authorised, only that they "represented the defendant." Furthermore, this is another example of the ambiguity in plaintiff's particulars of claim, because the claim is that it is either Xoagub or Kahikuata or both of them who represented the Ministers, who in turn represented the government.

In the light of such ambiguous and defective pleading, it is indeed doubtful whether the defendant could be prevented in the trial from denying the so-called representative's authority to enter into the agreement as alleged by plaintiff and denied by defendant.

It is not necessary to decide this issue finally in this judgment because there can be no doubt that the plaintiff had to prove at the trial the agreement it

[3] Ambler's Precedents of pleadings, 5th ed. by Harms, 25.
Potchefstroomse Stadsraad v Kotze 1960 (3) SA 616 (A)
Scala Café v Rand Advance (Pty) Ltd, 1975 (1) SA 29 (N)
Durbach v Fairway Hotel Ltd 49 (3) SA 1081 (SR)
Tuckers Land & Development Corporation (Pty) Ltd v Perpellief, 1978 (2) SA 11 (T) at 16.

alleged, the parties to that agreement and the obligations undertaken by the respective parties.

Plaintiff could only succeed if he succeeded in proving that:

1. A final agreement was reached amounting to a binding legal contract, giving rise to legal relations.[4]

2. That this contract was between the Government of Namibia, represented by its Ministers, and the plaintiff. Furthermore in this case, that UNICEF was not a party to such contract and that the Government of Namibia was responsible for providing the funds and paying the plaintiff and not UNICEF.

In this regard the plaintiff's allegation in its particulars of claim is once more in the alternative, where it is alleged in paragraph 3.3 that the payments due "would be paid by the Defendant to the Plaintiff, alternatively, would be paid by UNICEF for and on behalf of the Defendant.

It follows that plaintiff could not succeed on the alternative basis, even if proved because it did not allege that UNICEF was a party to the contract and did not join UNICEF in the action, notwithstanding the fact that defendant pleaded that UNICEF was one of contracting parties. Furthermore plaintiff could not succeed if it failed to prove that UNICEF was not a party.

[4] *Government of the Self-governing Territory of Kwazulu v Mahlangu*, 1994 (1) SA 626 (T) at 635.

The learned judge *a quo* in his judgment correctly distinguished between an agreement in July 1998 in terms of which plaintiff performed and for which he was paid and a further alleged agreement in September/October 1998. The learned judge *a quo* correctly states:

> "The defendant denies entering into a further September/October agreement and that is the essential issue in this case. Was there a further agreement."

This is the issue as it crystalized in the pleadings and in the evidence in the course of the trial. It must be noted however that in plaintiff's particulars of claim there is no indication of a July agreement and a further agreement in September/October. Plaintiff only averred one agreement in September/October and this alleged agreement was denied by the defendant. It is this agreement which plaintiff had to prove.

The defendant's case as it developed in the course of the trial was that such an agreement was discussed between Xoagub, Kahikauta and representatives of UNICEF but a final, binding contract was never agreed upon. The Court, however found that the plaintiff succeeded in proving the contract alleged by him; that the agreement was breached or repudiated by defendant as a result of which plaintiff suffered damages.

Central to this judgment were the following findings by the Court.

(a) "There was a concluded agreement between plaintiff and defendant."

(b) "There never was a question of UNICEF being party to the agreement."

Although this Court must give due weight to the credibility findings of the trial Court in regard to witnesses and findings of fact based thereon, this Court may come to a different conclusion if the Court *a quo* misdirected itself.

For the finding that there was a concluded agreement between plaintiff and defendant as alleged by plaintiff, the Court relied heavily on the testimony of Kahikuata, who was a Chief Education Officer in the Ministry of Basic Education and Culture.

According to this evidence, so the Court reasoned, Kahikuata "obtained approval for the project from the Ministry of Health, UNICEF and his own Permanent Secretary. Everything was agreed subject to the Annual Review. The Annual Review was held and the principle was agreed that there should be more workshops and drama. Nothing further stood in the way of the implementation of the project. As Kahikuata said and I accept his testimony, everything was in place and funds were available. Had it not been for UNICEF's unfortunate intervention based on a misapprehension concerning the July project, the main project would have commenced in January 1999."

With all due respect to the learned trial judge, the above findings and reasoning are flawed and constitute misdirections.

It is evident from the judgment itself that the conclusion that "the funds were available" is derived from another part of the evidence of Kahikuata. This appears in an earlier part of the judgment where the Court said:

> "Kahikuata said that the funds were available for the main project and his Ministry agreed to the plaintiff's project proposal. His permanent secretary knew of the agreement. If it had not been for UNICEF letter dated 18th December the circular which he had drafted for the Permanent Secretary's signature would have gone out and the project would have taken place. The only reason it did not was the arrival of this letter. Kahikuata agreed that the defendant was in breach of its agreement with the plaintiff."

For the repeated statements that the funds were available, reliance was placed by the Court on the evidence of Kahikuata but this evidence appears to be based on a misconception of what Kahikuata had said in a minute which he had prepared for the Permanent Secretary's approval and signature dated 21st September 1998.

The Court further held that "the minute pointed out that funds in the region of 2 million were available in the Youth Health and Development Programme."

It was apparently misunderstood or ignored by Kahikuata as well as the Court that the Youth, Health and Development Programme, was a programme of UNICEF, controlled by UNICEF. The funds were those of UNICEF, controlled by UNICEF and not by the Namibian Government or its Ministries. It is apparent from the record and the available letters and documents, that UNICEF would only make available such part of the funds available for its Youth Health and Development Programme if UNICEF had approved of a project. Even then it was clearly the practice and the understanding by all concerned, that UNICEF would monitor the project, including whether or not the projected work had been properly executed and the monies made available properly spent.

There was therefore not one shred of evidence that the programme prepared by plaintiff would be financed by the defendant, i.e. the Namibian Government, from funds made available to its Ministries and/or the National Aids Programme controlled by the Ministry of Health and Social Services and for which programme Mr Abner Xoagub was the Programme Manager.

It was incorrect to suggest and more so to find that the N$4.2 million was available for the Namibian Government to spend at its behest or even worse that of its officials on projects favoured by some of its officials, but not agreed to by UNICEF.

UNICEF's so-called "unfortunate intervention" as found by the Court was rather part of its necessary functions and responsibility to the original donors to approve and monitor projects for which the funds are made available, once the project and the spending thereon was properly authorized by it.

It is clear from Kahikuata's testimony and the Court's own acceptance thereof that quite apart from the approval by UNICEF, Kahikuata had at least to get the approval of the Permanent Secretary of his own Ministry and that of the Ministry of Health and Social Services. The allegation in paragraph 1 of the plaintiff's particulars of claim that the defendant was represented in the action by the Minister of Health and Social Services and the Minister of Basic Education and Culture but that defendant government was represented by a Mr Xoagub and/or Kahikuata when entering into a contract with plaintiff is a complete misnomer from the start, considering that these persons were not even Permanent Secretaries who may represent the Ministers if the Minister's functions are duly delegated to them.

But be that as it may, the fact is that at best for plaintiff, the permanent secretaries were approached for their approval and their approval was the minimum required to bind the Government, particularly when it concerns an activity or programme where millions of rands of taxpayers monies had to be spent in terms of an approved budget.

This is so because it is a notorious fact that taxpayer's monies can only be expended by Government in accordance with an approved budget and the Cabinet and its individual Ministers are responsible for administering and executing the functions of government.[5]

It is also a notorious fact that permanent secretaries of ministries are again responsible for the everyday running of the Ministries administration. Neither Mr Xoagub nor Mr Kahikuata ever testified or even suggested that they fulfilled the functions of the Ministers or of the permanent secretaries of the Ministries or that they were delegated to do so or that the Government had budgeted to spend the monies required for the programme to be executed by plaintiff.

The question which then arises is not whether or not Mr Xoagub and/or Kahikuata approved the project, but whether or not at least the said permanent secretaries approved.

Consequently it is not enough for Mr Kahikuata to say that his permanent secretary "knew of the agreement" and for the Court to rely on such evidence. Mr Xoagub and Mr Kahikuata never contended the contrary.

[5] Article 35 (1), 40 (a), 40 (c), article 41.

The documentary evidence:

In the minute of the 21st September referred to by the Court, Kahikuata asked for the secretary's "involvement and authorization so that we can request our ... partners to release funds for this critical issue to be addressed appropriately." (the emphasis is mine).

It was also in this minute where the allegation of the availability of the N$4.2 million was made.

In a following letter dated 23 September, by Ms Katoma in her capacity as permanent secretary of the Ministry of Basic Education and Culture, wrote to "the Country Representative U.N.D.P, Windhoek, for attention Ms Mary Delaney, wherein the writer after setting out the need for action on an HIV/AIDS programme in schools, concluded:

> "The purpose of writing you this letter is simply requesting you to make available to us as a Ministry of Education and Culture financial resources to move a step forward in our endeavour to implement our desired goal towards integrating HIV/AIDS as part of our school curriculum as incompassed in the Youth Health Development Programme Plan of Action 1997-2001."

To this letter Ms Delaney of UN AIDS (the United Nations Programme on HIV/AIDS) replied in a letter dated 5/10/1998 that "with regard to the proposal for additional support for a school HIV/AIDS campaign (prepared by Mr Jomo Aibu Wamuwi), I have consulted with my colleagues at UNICEF, one of UNAIDS' six co-sponsors. They have updated me fully on the status of the Youth Health

Development Programme (YHDP), to which MBEC (Ministry of Basic Education and Culture) is a key partner. In addition we have held several meetings to discuss the proposal, the YHDP with Wamuwi and Mr J Kahikuata, MBEC's special education officer."

After saying that the UN "welcomes very much your call for expansion and is willing to consider proposals for complementing funding" and dealing with further activities in regard to the Youth Health Development Programme the writer said: "After intensive internal consultation, we feel that before funds allocated to YHDP are diverted to unplanned activities on relatively short notice, we should take advantage of the upcoming YHDP Annual Review to sit together to discuss progress, constraints and options for improving efforts already underway…."

The next letter on behalf of UNICEF was dated 18th December 1998 wherein a Mr Palm on behalf of UNICEF complained that Mr Wamuwi, according to investigations done by them, have not properly executed its contract, (i.e. the first one) and demanded repayment of half of an amount of N$65 000 already paid to him. It is this letter which the Court *a quo* referred to as the "unfortunate intervention."

However it was now clear that UNICEF would no longer consider funding the 2nd Wamuwi programme and the secretaries of the two ministries involved now also put the matter on hold and took no further steps to implement the programme proposed by Mr Wamuwi.

As far as the documentation made available during the trial is concerned, there was no correspondence or other document indicating that UNICEF or UNAIDS or any United Nations entity had agreed to the implementation and funding of the 2nd Wamuwi programme.

From the above documentation it is clear that it is highly unlikely that either the Government through its Ministers or their permanent secretaries could have and would have entered into an agreement of the character alleged by the plaintiff without the consent of any one or more of the mentioned UN agencies.

The Court in its judgment also referred to the circular dated December 8 prepared by Mr Kahikuata for circulation to regional education directors and principals of schools to prepare for implementation of the second Wamuwi programme.

The circular purported to be one by the Permanent Secretary and/or the assistant permanent secretary. The latter however refused to sign the letter. In a subsequent memorandum by the Acting Permanent Secretary to Mr Kahikuata quoted by the Court, the said acting permanent secretary stated:

> "To maintain the Ministry's excellent relation with UNICEF as a major donor, I remain reluctant to sign the circular and commit the Ministry to this programme, if Mr Wamuwi is involved…"
> (My emphasis added.)

Referring to a statement in the aforesaid circular dated the 8th wherein Kahikuata referred to an HIV/AIDS expert (consultant) who allegedly had been

appointed by the Ministry of Health and Social Services, the acting permanent secretary posed the question: "Please clarify who the consultant is."

The Acting Permanent Secretary in this memorandum stated *inter alia* that he was reluctant to commit the Ministry to the programme.

This circular indicated again that Kahikuata accepted that the Permanent Secretary had to agree to and authorize the programme. The query about the identity of the "consultant" again indicates that the Permanent Secretary did not know or at least purported not to know the identity of the consultant and that the Ministry had not committed itself to the programme at anytime.

It was noteworthy that no written letter or document was produced indicating that the Permanent Secretary of the Ministry of Health and Social Services had agreed to the project.

Xoagub, the Programme Manager or Coordinator of the National Aids Programme controlled by the Ministry of Health and Social Services, testified that plaintiff had fulfilled his obligations in terms of July project. As to the second project however he said that there was no agreement with his Ministry. He just gave his blessing to the proposal.

It was clear that Xoagub also accepted that his Ministry had to agree to a contract such as the one alleged and that it did not agree.

According to plaintiff's particulars of claim, Xoagub represented the Minister of Health and Social Services. It is clear that he did not represent the Ministry and did not purport to consent to the agreement as alleged by plaintiff.

Kahikuata may have solicited Xoagub's cooperation and support for the second programme but it does not go further. Xoagub's testimony in regard to the second contract is not only probable but undeniable. The Court did not have any reasonable ground for its finding that Kahikuata also obtained approval for the project from the Ministry of Health. Kahikuata could not in any conceivable manner have legally represented the Ministry of Health and Social Services. He did not testify that he could do so.

If anyone was positioned to obtain the approval of the Ministry of Health, it was Xoagub, not Kahikuata, because Xoagub was at least the programme manager or coordinator of the National Aids Programme which resorted under the Ministry of Health, not the Ministry of Basic Education.

This minute was addressed by Kahikuata to the Permanent Secretary: Ministry of Health and Social Services as pointed out by the Court *a quo*.

It seems that Xoagub was bypassed by Kahikuata in the effort to get the authorization of the Ministry of Health.

The Court correctly comments that in this letter it was envisaged that the implementation of the programme would begin in January, 1999. But the point is that there is no record of a written response by the secretary of the Ministry

of Health to approve and also no clear evidence that the secretary for Health did at any stage approve or purport to approve.

When referring to the "Annual Review" the Court stated *inter alia* that "the principle was agreed that there should be more workshops and drama." (My emphasis added.) But that is a far cry from holding that a final binding contract with legal obligations had been agreed to by relevant and necessary parties. It certainly did not mean that the Government had bound itself to implement the programme and to pay for it.

As I have indicated the Court placed great reliance on the evidence of Kahikuata. On the issue of who were the relevant and necessary parties, Kahikuata's own letters indicate that the contract, if any, was between the aforesaid two Ministries, UNICEF and the plaintiff. It also shows that not only was the Ministry of Health a necessary party, but UNICEF was also a necessary party.

In a letter as late as November 23 by Kahikuata to the said Ministry of Health and Social Services, Kahikuata referred to the Government/UNICEF review meeting which took place on the 29th October 1998 and various resolutions passed there. He then specifically states: "As resolved at the Government/UNICEF annual review meeting, you are required to solicit financial resources from the I.E.C and UNICEF country project funds to enable this programme to be implemented." (My emphasis added.)

I must point out that plaintiff's particulars of claim alleging that the agreement relied on was concluded in September/October 1998 – but here, on November

23, 1998, Kahikuata requested the Permanent Secretary of the Ministry of Health and Social Services, to take initiatives to obtain funding, from I.E.C. and UNICEF. This is significant considering that Kahikuata already stated in a letter to the Permanent Secretary of the Ministry of Health and Social Services dated 21st September 1998 that the money was available and the Court found that it was. Kahikuata in this letter of the 23rd September 1998 to the country representative of U.N.D.P. *inter alia* stated:

> "The Government of Namibia in conjunction with the UNICEF drafted a Youth and Development (HIV/AIDS) programme plan of action in May, 1995... The purpose of writing you this letter is simply requesting you to make available to us as a Ministry of Basic Education and Culture financial resources to move a step forward in our desired goal towards integrating HIV/AIDS as part of our school curriculum as encompassed in the Youth Health and Development Programme Plan of Action 1997-2001."

Already in a letter/circular by Kahikuata dated July 21, 1998 addressed to a school principal in regard to the so-called first programme, he stated:

> "The Ministry of Health and Social Services/MBEC/UNICEF – contracted a specialized Community Drama Group from Zambia for the purposes of holding demonstration shows/workshop on HIV/AIDS in Namibia."

In letters to Regional Directors of Education, Kahikuata on July 22 referring to the first programme, stated:

> "These events have been made possible by the sponsor through the NACP (MOHSS) UNICEF and MBEC. (MOHSS is the acronym for the

> Ministry of Health and Social Services; MBEC for the Ministry of Basic Education and Culture. NACP is probably the abbreviation for National Aids Policy Coordinator, i.e. Mr Xoagub)."

In a letter on behalf of the National Aids Control Programme also dated 21 July Mr Xoagub in his capacity as Programme Manager, wrote to the Programme Officer of UNICEF, in which he thanks UNICEF for a fax in which the writer on behalf of UNICEF "outlined detailed requirements that the group should fulfil before they are advanced with the money for the above project." The "above project" as it appears from the letter is the "Project proposal for holding capacity building workshops."

Xoagub mentioned that the NBC will be asked to make a recording of one of the performances and that the NBC, NACP and UNICEF "will have joint copyright to the video."

This letter makes it clear that Xoagub clearly accepted that there were requirements laid down by UNICEF and that it was also necessary to report to UNICEF.

Furthermore, this letter clearly reflects the process of obtaining funds and that UNICEF, not the Namibian Government, will supply the finance; that UNICEF was a full partner and contracting party in the contract with the plaintiff in regard to the first programme.

The letter also shows that the agreed contribution by UNICEF for the said first programme was N$130 000. Another significant fact appearing from this letter is that as far as the National Aids Programme managed by Xoagub on behalf of

the Ministry of Health was concerned, the only agreement at that stage related to a programme where N$130 000 would be paid to the Maximo and Zauzanda Cultural Group. Mr Wamuwi was described as the "Coordinator of the Cultural Group" in Kahikuata's letter also dated 21 July 1998.

It is to be noted that in a later letter by Xoagub to the project officer of UNICEF's Youth Health and Development Programme, Mr Rick Olsen, dated 21.8.1998, Xoagub asked for "reimbursement of the remaining N$65 000 which the Maximo and Zauzanda group are due for payment..."

To return to the letter dated 18.8.1998: In the last paragraph Xoagub points out: "Finally I would like to thank you most sincerely for your cooperation in the ending programme and I would like to request you to expedite the transfer of the remaining N$65 000 to facilitate the payment to the visiting cultural group to enable them depart for their home country in conformity with the thirty (30) days statutory requirements which was allowed for the group to stay and conduct their work in Namibia." (My emphasis added.)

In a further letter dated 21 August by Xoagub to the same project officer of UNICEF, he said: "Please be informed that the group's statutory mandate to stay in Namibia, expires on 22 August. I seek your involvement to expedite the payment to enable the group start their journey to their home country before the expiry of the mandate.." (my emphasis added)

The above quotations clearly indicate that at the time, as far as Xoagub was concerned, there was no arrangement, agreement or contract for the group to

undertake a country-wide campaign for a remuneration of N$2 800 per school for 1400 schools during 1999.

Plaintiff did not produce any letters or other documents showing an agreement between the Ministry of Health and plaintiff wherein plaintiff would perform at 1400 schools at N$2 800 per school during 1999.

However, after the dispute arose Xoagub wrote to the country representative of UNICEF in regard to the demand by UNICEF for the repayment of N$33 600 paid out for performances "by the Maximo-Zauzanda Drama Group under director Mr Jomo Aibu Wamuwi."

In this letter the crucial rôle of UNICEF in the first programme is once again penned. In the letter Xoagub refers e.g. to:

> "The forms of reference drafted by yourselves and provided to guide the group's work set out preconditions for which money payable to the group would be released."

If they set out these preconditions for the first programme for which only N$130 000 would be expended one would expect that for a country wide programme for which over N$4 million would be required, at least similar conditions would apply and documentation would exist to prove such a contract.

In a letter by the plaintiff himself dated 25th May 1999 to the programme manager of NACP, Mr Xoagub, the late Mr Wamuwi referred to the rôle of UNICEF as follows:

> "The terms of reference which UNICEF provided for executing the programme demanded that 31 performances be conducted. Of these 15 were to be capacity building workshops and 16 (sixteen) to be drama performances. My group performed accordingly…"

This once again, was an admission of the central rôle of UNICEF and the fact that the agreement with UNICEF was for 31 performances, not an agreement with defendant, the Namibian Government, for countrywide performances of 1400 schools costing millions payable by the Government as alleged by plaintiff in his particulars of claim.

The confusion about Wamuwi's status

One further puzzling feature of the confusing scenario set out by the plaintiff Wamuwi, is that he described himself as the "Co-ordinator of the Maximo-Zauzanda Cultural Group." He was also described in correspondence as the Director of the group. But in his particulars of claim, his action is not in the name of the Maximo-Zauzanda Cultural Group but in his name, not even as a representative of the group. The money paid over was also for the services of the said Maximo-Zauzanda Cultural group.

The question which then arises is whether the plaintiff in the circumstances was entitled to payment in his personal capacity. But even more important, whether he could sue in his personal capacity as was done, or should he have sued in his representative capacity on behalf of the group?

This issue was not raised by the parties or their counsel and it is not necessary to decide in this appeal. However it is relevant when considering whether plaintiff succeeded in proving an agreement between himself, in his personal capacity, and the defendant, as represented by the Ministers.

Kahikuata's opinion:

The Court mentioned that "Kahikuata agreed that the defendant was in breach of its agreement with the plaintiff." Kahikuata's opinion was clearly inadmissible if he implied that there was an enforceable legal contract between plaintiff and the Government and that such an agreement was breached by the Government. Surely Mr Kahikuata has overreached himself in making such an admission, particularly as there is a clear distinction between mere agreements on the one hand and contracts creating legal relations and legally enforceable obligations on the other. Laymen, such as Kahikuata, will probably not be able to make such a distinction, but the Court should at all times keep such a distinction in mind.[6]

Furthermore, in so far as a tacit contract is concerned, the party pleading such contract must in addition to expressly alleging it, "prove unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was agreement."[7]

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[6] Ambler's Precedents of Pleadings, 5th ed by Harms, 104 *Government of the Self-governing Territory of Kwa-Zulu v Mahlangu*, 1991 (1) SA 626 (T) at 635 *Rose & Frank v F R Crampton & Bros Ltd* (1923) 2 KB 261 CA at 288.

[7] *Standard Bank SA Ltd v Ocean Commodities Inc*. 1983 (1) SA 276 (A) at 292.
Joel Melamed & Hurwitz v Cleveland Estates (Pty) Ltd 1984 (3) SA 155 (A) *Clegg v Groenewald*, 1970 (3) SA 90 (C) Christie: The Law of Contract, 4th ed., 96

In so far as Kahikuata expressed the opinion that there was an agreement between plaintiff and defendant, he clearly overreached himself. And if he intended to say that the "agreement" constituted a contract creating legal relations and legally enforceable obligations, his opinion was inadmissible.

The *viva voce* evidence:

Mr Frank referred to the following parts of the testimony of the plaintiff and witnesses Xoagub and Kahikuata, in addition to the documentary evidence, to demonstrate that no enforceable agreement was entered into in regard to the 2nd project.

> "Evidence of the plaintiff:
>
> 9.1 plaintiff had to wait for approval as funding had to be obtained from UNICEF.
>
> Record: Vol. 4, p 489.
>
> 9.2 When an extended programme was envisaged UNICEF became involved from the beginning.
>
> Record: Vol. 4, p 503, 15-p 504, 15.
>
> 9.3 A project proposal had to be given to the donor UNICEF.
>
> Record: Vol. 4, p 503, 13-15.
>
> 9.4 A Ms Delaney who represented donors was present at the final agreement and the "**project was supposed to be taken back to UNICEF for financing**".
>
> Record: Vol. 4, p 510, p 511 and p 590.
>
> 9.5 The price per school was accepted by Ms Delaney.
>
> Record: Vol. 4, p 524 and 589.

9.6 Plaintiff knew the "**bulk**" of the money came from UNICEF and that he would be paid by UNICEF.

Record: Vol. 4, p 525.

9.7 Plaintiff was informed of the fact that no agreement could be entered into without funding from donor agencies and specifically UNICEF.

Record: Vol. 5, pp 608 – 609 and 610.

9.8 Plaintiff accepts that if UNICEF does not make funding available there will be no agreement.

Record: Vol. 5 p 621.

9.9 UNICEF had to facilitate the finances.

Record: Vol. 5 p 702; Vol. 6 p 769.

Witness Xoagub

9.10 The Ministry of Health and Social Services did not have any of its own funds and assist in obtaining funds.

Record: Vol. 6, p 866.

9.11 The lack of funds was known to plaintiff and hence the involvement of Ms Delaney.

Record: Vol. 6, p 881.

9.12 The funding had to be sorted out prior to the project commencing.

Record: Vol. 7, p 914.

Witness Kahikuata

9.13 The budget is submitted to the UN to acquire funding.

Record: Vol. 7, p 977-978.

9.14 It is only where UNICEF agrees to a project that funds are made available by UNICEF.

Record: Vol. 7, p 979.

9.15 In respect of the initial project of July 1998 plaintiff was informed in so many words that as UNICEF had accepted to fund that project it could go ahead.

Record: Vol. 7, p 993.

9.16 UNICEF can assess requests for funding and can either accept or refuse the funding.

Record: Vol. 8, p 1112, 20 – p 1113, 5.

9.17 If the donor does not release funds it is impossible to carry on with the project.

Record: Vol. 7, p 1116, 1-5.

9.18 Plaintiff knew that the funding for the project had to be from UNICEF.

Record: Vol. 7, p 568, 10-12.

9.19 Should funding not be made available there could be no agreement.

Record: Vol. 7, p 1123, 20 – p 1124, 1.

9.20 It was clear to plaintiff that UNICEF was the provider of funds and that they (UNICEF) would actually pay him.

Record: Vol. 8, p 1105 – p 1106."

The points made by Mr. Frank in regard to the *viva voce* evidence referred to are justified.

Mr Heathcote, on behalf of respondent, attempted to overcome the damning documentary and oral evidence, by relying mainly as the Court *a quo* did, on the *viva voce* evidence of Kahikuata and his assertion that the funds were available.

In my respectful view, the Court *a quo* was not entitled, on the available evidence, to find that an enforceable agreement, as alleged by plaintiff/respondent, had come into being and that it was proved that UNICEF

was not a party to the agreement. The Court *a quo* had misdirected itself in reaching such a conclusion.

In view of this result I deem it unnecessary to decide the application for amendments. However, I should point out that applications for amendments on appeal would not be granted as a matter of course and should not become a substitute and belated remedy for legal practitioners who performed their duties negligently and/or without the necessary diligence and expertise.

In the result I make the following order:

1. The appeal succeeds;

2. The order of the Court *a quo* is set aside;

3. The respondent to pay the costs in the Court *a quo* and on appeal with the exception of the costs caused by the appellant's application for condonation for the late filing of the record, the filing of an incomplete record and the application on appeal for amendments to the pleading.

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O'LINN, A.J.A.

I agree.

_____
STRYDOM, C.J.

I agree.

_____
CHOMBA, A.J.A.

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