CASE NO.: I 2803/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

DAMARALAND BUILDERS CC **PLAINTIFF**

and

UGAB TERRACE LODGE CC **DEFENDANT**

CORAM: **MULLER J**

Heard on: 29 June 2010 – 2 July 2010
31 January 2011 – 8 February 2011

Delivered on: 27 May 2011

JUDGMENT

MULLER J

[1] This case concerns the building of a lodge for the defendant, called the Ugab Terrace Lodge, by the plaintiff on the farm Landeck. The defendant apparently provides accommodation facilities for visitors in three different types of facilities, namely a lodge (which is a subject-matter of this case), a luxury tented camp and a camping site. It is understood that the lodge was build on a hill and building material for it had to be conveyed up that hill. The defendant promotes the accommodation facilities of Ugab

Terrace Lodge on its website and photos, apparently obtained from that website, were handed in during the trial. From these photos it appears that the lodge consists of several rooms in beautiful surroundings, including a main building and bungalows, with a magnificent view from the hill top over the surrounding area.

[2] The plaintiff is represented in this case by its member, Mr Bonifatius Kruger, who is a builder of occupation (“the builder”). The defendant is represented by Mr Leon Wiese, who apparently works in Windhoek and the owner of the farm Landeck on which the Ugab Terrace Lodge is situated. He will be referred to hereinafter as “the owner”. It is understood that he defendant also has another farm in the south of Namibia.

[3] To understand the background of the relationship between Mr Kruger and Mr Wiese and the building operation conducted by Mr Kruger for Mr Wiese, one must be aware of the fact, which is common cause, that another builder commenced with building operation, but for one or other reason did not complete it. Mr Kruger was there after contacted by Mr Wiese and the contractual relationship, which will be dealt with hereinafter, ensued. The construction period in which the plaintiff was involved commenced approximately 20 November 2006. It is in dispute whether the works were completed on 12 March 2007, or whether it lasted until after the plaintiff left the premises of the defendant on 14 April 2007.

[4] The trial in this matter lasted for a week, whereafter it had to be postponed and was set down for another two weeks. The trial was preceded by several applications. It

is not relevant to refer to these applications, save to mention that although the trial was set down on several previous occasions, it did not proceed until it eventually commenced on 29 June 2010. During the trial both parities handed in bundles of documents, as well as several other documents, including heaps of invoices. A major part of the trial consisted of evidence and cross-examination on those invoices. Many invoices were also handed in as exhibits. The disputes arising from the invoices between the parties can be derived from the contractual relationship between them, with which I shall deal hereinafter.

[5] Before reference is made to the pleadings in this matter, it is necessary to briefly deal with the circumstances under which the contractual relationship between the parties commenced, which eventually culminated in a written contract. As mentioned before, another builder initially started with the building operation and he was succeeded by the plaintiff as building contractor. It seems to be common cause that Mr Wiese showed Mr Kruger what had to be done and requested a quotation preceding the building construction of the lodge. Thereupon Mr Kruger provided a quotation to Mr Wiese, which was handed in as exhibit “A”. The contract price according to that quotation was N$1 319 000.00. The plaintiff alleged that amount had apparently been amended to include further work orally agreed upon which increased the price to N$1 456 956.00. A written document to that effect was handed in as Exhibit “B”. That alleged oral amendment is disputed by the defendant. Mr Wiese also denied that he has even seen exhibit “B” before preparing for the trial. A written contract, without reference to any prices, but which apparently incorporated the quotation (exhibit “A”) was entered into

between the parties and signed by them on 3 November 2006. That contract was handed in by the plaintiff as exhibit “D” without any objection, but the plaintiff alleged it also incorporated Exhibit “B”. Furthermore the defendant alleges that during the construction period the original agreement between the parties, namely that the plaintiff is not only obliged to do the construction work, but would also provide material for the works, had been amended orally. This agreement is in dispute and will later herein be dealt with. It is further common cause that the plaintiff did not complete the building operation within the time provided for in the contract. For this delay the defendant instituted a counterclaim. The plaintiff did concede that it was behind time with the completion of the building operation, but alleged that the delay was caused by additional work which he had to do on the instruction of the defendant. This reason was disputed by the defendant.

[6] The pleadings consisted of the particulars of claim of the plaintiff, a request for further particulars by the defendant and the answer thereto, as well as the defendant’s plea and counterclaim, to which the plaintiff pleaded. The relevant parts of the pleadings will be referred to and are quoted hereinafter.

“PARTICULARS OF CLAIM

*3. On or about 3 November 2006 and in Grootfontein, the parties entered into a written agreement. The plaintiff was represented by Mr. Bonifatius Kruger and the defendant by Mr. Leon Wiese. A copy of the contract is attached hereto, marked “**DB1**”.*

4. The terms of the contract that are material to this action are:

4.1 Plaintiff agreed and undertook to complete the construction at Ugab Terrace Lodge situated at Farm Landeck No. 700 in the district of Outjo;

*4.2 The agreed contract price is the amount of N$1 456 956.00 as per the quotation by the plaintiff, a copy of which is annexed hereto marked "**DB2**", which the defendant accepted;*

4.3 It was an implied term of the contract that the quotation be and is incorporated as part of the contract;

5. Plaintiff, in fulfilment of its part of the contract, completed the construction at Ugab Terrace Lodge. The defendant made part payment an amount of N$726 000.00 leaving a balance of N$730 956.00, that is due and owing.

6. Demand notwithstanding, the defendant, refused and/or neglected to pay the amount of N$730 956.00.

7. In the premises the plaintiff is entitled to payment of N$730 956.00."

A request for further particulars was made:

*"1. **AD PARAGRAPH 4 THEREOF***

1.1 When did the plaintiff have to come commence with the construction and/or building works at Ugab Terrace Lodge?

1.2 When did plaintiff commence with the building works as contemplated in paragraph 1 above?

1.3 When did plaintiff receive a deposit, if any?

1.4 When was the quotation accepted by defendant?

1.5 When did plaintiff finalize the building and construction work?

2. ***AD PARAGRAPH 5 THEREOF***

Exactly how is the amount of N$730 956.00 made up, calculated and arrived."

The plaintiff replied to this request as follows:

"1. ***AD PARAGRAPH 1 THEREOF***

1.1 *No fix date for the commencement of the construction and/or building works was agreed upon by the parties but plaintiff had to start with the construction as soon as possible*

1.2 *18 December 2006.*

1.3 *6 November 2006.*

1.4 *During September 2006.*

1.5 *13 April 2007.*

2. ***AD PARAGRAPH 2 THEREOF***

Contract Price	*-N$1 456 956-00*
Payment	*-N$ 726 00-00*
Balance Outstanding	*-N$ 730 956-00"*

The defendant pleaded to paragraphs 3-4 of the plaintiff's particulars of claim as follows:

2.

“Ad paragraph 3 thereof

*Defendant admits that the parties signed annexure “DB1”. However, the plaintiff provided the defendant with an offer in respect of the work to be done, already on 5 September 2006. A copy of that document is annexed hereto marked annexure “**P1**”. In this document the plaintiff offered to complete the work for total amount of N$1, 319,000.00 (including all material which had to be purchased by plaintiff). Defendant accepted the offer. The parties then signed annexure “DB1”. During early December 2006, the parties amended the agreement. It was then agreed between the parties, while the plaintiff was represented by Mr Kruger and the defendant by Mr Wiese, that:*

2.1 the plaintiff would continue to finalize the building works;

2.2 whereas, in accordance with annexure “P1”, the plaintiff had to purchase all material, it was now agreed that the defendant would purchase all further material necessary to complete the building work;

2.3 the price to complete the building work (as from the time plaintiff commenced with the work) would not exceed the amount as originally offered by the plaintiff and accepted by the defendant.

3.

Ad paragraph 4.1 thereof

Subject to what has been pleaded above, the defendant admits the allegations contained therein.

4.

Ad paragraph 4.2 and 4.3 thereof

The defendant denies that the plaintiff ever forwarded, or showed, annexure "DB2" to the defendant. The fist date on which the defendant saw annexure "DB2", was when he consulted his legal practitioners for purposes of drafting the plea. Annexure "DB2" was also not annexed to the plaintiff's particulars of claim (as alleged in paragraph 4.2 of the particulars of claim) when summons was served), but was subsequently forwarded to defendant's legal practitioners by plaintiff's legal practitioners."

The Defendant also filed a counterclaim with its plea. The basis of the counterclaim is a claim based on penalties as provided for in the contract for completion 57 days late. The Defendant claimed N$375 000.00, to wit 57 x N$5 000.00. At the commencement of the trial the parties agreed on an amount for penalties, namely N$2 000.00 per day. The counterclaim was accordingly amended and the total claim was N$114 000.00 based on N$2 000.00 x57.

The Plaintiff pleaded to the Defendant's counterclaim. The relevant paragraphs of the plea to the counterclaim read as follows:

2.

"***AD PARAGRAPH 4 THEREOF***

The contents hereof are admitted and the Plaintiff pleads that the parties entered into a further agreement annexed tot he Plaintiff's particulars of claim, marked annexure "DB2".

3.

AD PARAGRAPH 7 THEREOF

Save to admit that the parties did not agree on a specific amount for penalties per day, the remainder of the allegations contained therein is denied and the Defendant is put to the proof thereof

4.

AD PARAGRAPH 8 THEREOF

4.1 The Plaintiff admits that it was late with the completion of the building works but pleads that the delay in the completion of the building works was entirely caused by the Defendant.

4.2 The Plaintiff further pleads that while plaintiff was busy completing the building works, Plaintiff and Defendant orally agreed that Plaintiff would do work additional to that contracted. The Plaintiff duly performed the aforementioned additional work which also caused a delay in the completion of the building work.

5.

AD PARAGRAPH 9 THEREOF

Each and every allegation contained herein is denied, as if specifically set out and transverse herein, and the Defendant is put to the proof thereof."

Applicable Law

[7] The manner in which the contract between the parties has come into being is unfortunate and the interpretation thereof, in order to determine what the intention of the parties had been, is much more difficult than to interpret a building contract which contains all relevant provisions. Consequently, to analyse the current building contract between the parties, the legal position applicable to building contracts has be considered. There also other legal principles that will be referred to and which may have a bearing on the current matter, where applicable. The legal principles set out hereunder have been considered.

[8] Save for contracts of sale or interest in land, our law generally does not require any particular formalities in respect of contracts. It is important to determine what the intentions of the parties were when they contacted. It is trite that a contract is concluded when one party makes an offer and the other party accepts it. In building contracts, more often than not, architects are employed to act on behalf of the employer and tenders are called for the proposed work. Prospective renderers are usually furnished with documents to enable them to tender, e.g. the plans, proposed conditions of contract, specifications and (sometimes) a bill of quantities is completed. That tender

then becomes a valid contract when the entire offer had been accepted. Building contracts fall under the species of *locatio condictio operis* agreements.

> *"Building contracts are frequently concluded by not calling for tenders, but as a result of direct negotiation in the form of offers and counter-offers between contractors and employers, and only when the parties are finally agreed and a particular offer has been accepted is a contract concluded."*

(*McKenzie - The Law of Building and Engineering Contracts and Arbitration*, sixth edition, p15)

[9] Contracts have to be interpreted as a whole and the general scope and purpose of the contract must be considered. In 1934 Wessels CJ said the following in respect of the interpretation contracts in the case of *Scottish Union & National Insurance Company Ltd v Native Recruiting Cooperation Ltd* 1934 AD 458 at 465:

> *"We must gather the intention of the parties from the language of the contract itself, and if that language is clear, we must give effect to what the parties themselves have said; and we must presume that they knew the meaning of the words they use. It has been repeatedly decided in our Courts that in construing every kind of written contract the Court must give effect to the grammatical and ordinary meaning of the words used therein. In ascertaining this meaning, we must give to the words used by the parties there plain, ordinary and proper meaning, unless it appears clearly from the contract that both parties intended them to bear a different meaning. If, therefore, there is no ambiguity in the words of the contract, there is no room for a more reasonable interpretation than the*

words themselves convey. If, however, the ordinary sense of the words necessarily leads to some absurdity or some repugnance or inconsistency with the rest of the contract, then the Court may modify the words just so much as to avoid that absurdity or inconsistency but no more."

(See also *Oerlikon SA (Pty) Ltd v Johannesburg City Council* 1970 (3) SA 579 (A); *South African Warehousing Services (Pty) Ltd and Others v South British Insurance Co Ltd* 1971(3) SA 10 (A) at 19; *Van Rensburg en Andere v Taute en Andere* 1975 (1) SA 279 (A) at 302 -3; *Glyphise v Tuckers Land Holdings Ltd* 1978 (1) SA 530 (A); *Grinaker Construction (TVL) (Pty) Ltd v Transvaal Provincial Administration* 1982 (1) SA 78 (A); and *Pritchard Properties (Pty) Ltd v Koulis* 1986 (2) SA 1(A).

[10] Our courts have also in the past established some rules that may assist in construing what the intention of the contracting parties were if some inconsistency or ambiguity exists in a contract. These are listed in the work of *MacKenzie*, *supra*, at p20-22 and it is appropriate to briefly refer to certain important principles in that list:

a) *A construction which leads to an absurdity will be avoided;*

b) *A court will prefer a construction which upholds a contract or a clause in a contract to one which will make it void or ineffectual and will prefer a construction that presumes that the parties intended a lawful contract rather than an unlawful contract;*

c) *A court will tend to adopt an equitable interpretation rather than an inequitable one;*

d) *Where both parties have understood an ambiguous clause in a particular way the court will give it that meaning;*

e) *Where a contract consists partly of printed and partly of written words and there is conflict, the court will give greater weight to the written words;*

f) *In cases of ambiguity, courts sometimes apply the quod minimum rule and the contra proferentem rule... according to the contra proferentem rule words of doubtful meaning in a contract are constructed against the party who formulated or framed the terms;*

g) *Where general words immediately follow a number of particular words which are descriptions of species of a single genus, the general words prima facie are limited in meaning to other species of the same genus..... This rule is generally known as the ejusdem generis rule;*

h) *In the construction of a contract document the recitals are subordinate to the operative part, and consequently, where the operative part is clear, it is treated as expressing the intention of the parties, and it prevails over any suggestion of a contrary intention afforded by the recitals. Where the operative part is ambiguous assistance may however be derived from the recitals or preamble or other non-operative parts of the agreement;*

i) *When construing an agreement comprising more than one document, one must consider all the terms used by the parties in all the documents to determine the meaning thereof;*

j) *When a third person questions the meaning of a contract, regard can be had to the parties' conduct in executing their obligations; and*

k) *The court will interpret exemption of liability clauses narrowly and will take into account the context of the wording.*

[11] A further aspect that needs consideration in respect of the interpretation of the contracts is the *parol evidence* rule.

> *"The rule is that when a contract has once be reduced to writing, no evidence may be given of its terms except the document itself, nor may the contents of such document be contradicted, altered, added to or varied by oral evidence."*

(*Lowrey v Steedman* 1914 AD 532 at 543.)

The parole evidence rule is of particular importance in respect of building contracts where it has been preceded by negotiations before the contract was reduced to writing. No oral or written evidence is admissible in respect of the negotiations prior to or contemporaneous with a reduction of the contract to writing in order to show what the intention of the parties were. (*McKenzie*, *supra*, at p23);

Rand Rietfontein Estate Ltd v Cohn 1937 AD 317; *Caxton Printing Works (Pty) Ltd v Transvaal Advertising Contractors Ltd* 1937 TPD 288);

There are some exceptions to the *parol evidence* rule, namely whether or not there was a contract, supplementary and subsequent oral contracts, and to explain the terms used in the contract.

(Mckenzie, supra, 23-24)

In respect of the exceptions only the second one mentioned above may be have application to this case. As an exception to the parole evidence rule a party is entitled to

show by evidence that apart from the written contract there have been an independent oral contract. It is permissible to provide evidence of the subsequent oral agreement which alters the terms of the written contract. This issue will be discussed later herein. (*Goss v Nugent* (1833) 2 *LJKB* 127; *African Films Trust v Popper* 1915 TPD 201; *Cohen v Surkhey, Ltd* 1931 TPD 340; and *Aird v Hockly's Estate* 1937 *EDL* 34.)

[12] The effect of extras and variations to a contract depends on the interpretation of the particular contract. The issue of delay caused by the execution of extras and variation orders by the employer in respect of the agreed time of completion has been interpreted by our court in the past. It has been held that the stipulated time of completion in the majority of cases cease to apply. In *Kelly v Hingle's Trustees and Union Government* 1928 TPD 272 at 284 the court set out certain rules governing the application of penalty clauses in building contracts:

> *"(1.) that where a building owner by his own act prevents performance he is not, apart from special stipulation, entitled to take advantage of his own wrong;*
>
> *(2.) that where the terms of the contract are ambiguous, and one construction would lead to an unreasonable result the Court will be unwilling to adopt that construction:....;*
>
> *(3.) that an unreasonable a burden is cast upon the contractor where the work to be done in a limited time subject to a penalty clause may be increased at the will of the building owner; and*

(4.) that where the terms of the contract are such as in effect to make the building owner judge in his own cause on questions of delay, such provisions are to receive a restrictive interpretation."

(See also *McKenzie, supra*, p161)

Extras have also been considered in previous court cases, namely extra work not expressly or impliedly included in the contract. (*Dalinga Beleggings (Pty) Ltd v Antina* (Pty) Ltd 1979 (2) SA 56 (A) at 66F.) The courts have in the past distinguished between extra and additional work: the former is work that fairly and ordinarily fell in the contemplation of the parties at the time when they entered into the contract, while additional work is work which they did not actual contemplate, but which naturally follows from the work contracted for and ordered to be done. (*Hansen and Schradr v Deare Three* EDC 36 at 43.) This is opposed to work where there is a bill of quantities.

[13] An employer is usually liable to pay for extra work if such work forms part of the contact In certain circumstances a claim for extra work is based on the doctrine of enrichment, but generally a claim of such a nature will be based on contract. The contractor then has to prove that a contract had been concluded, either expressly or impliedly, in terms of which the employer agreed to pay for such additional work. (*De Water v Muller* 1912 TPD 821 at 823; *Gorfinkel v Muller* 1931 CPD.251). It is not enough that the employer had knowledge of this extra work, he must have consented thereto.

[14] *Wessels - Law of Contract in South Africa,* second edition, vol. 1, paragraph 1612 adopted the definition given by *Halsbury's - Laws of England,* and stated in respect of payment in respect of work that had not been fully completed:

> *"A contract is said to be entire when the complete fulfilment of the promise by either party is a condition precedent to the right to call for fulfilment of any part of the promise by the other."*
>
> *In general building contracts are entire contracts and in the absence of an agreement to the contrary a contractor is not entitled to payment until he has completed the work."*

(*McKenzie*, *supra*, at p201: *Hauman v Nortje* 1914 AD 293 at 302, 306: *BK Tooling (Edms) Bpk v Scope Precision Engineering* (Edms) Bpk 1979 (1) SA 391 (A); *Dalinga Belleggings (Pty) Ltd v Antina (Pty) Ltd*, *supra*,.) In the case of *Human v Nortje*, *supra*, Lord De Villiers CJ described this principle as follows:

> *"... the general principle applicable to all bilateral contracts undoubtedly is that the one party cannot, in the absence of any special agreement, call upon another party to perform his contract without himself having performed or being ready to perform his part of the contract."*

[15] A contractor may, however, in certain circumstances claim a reduced contract price even though he has not completed the contract. (*BK Tooling* case, *supra*) This principle has often been referred to as "*quantum meruit*". However, in the *BK Tooling* case it was suggested that it will be more appropriate to describe such a claim as a claim for a reduced contract price and to avoid the term "*quantum meruit*" as well as the

language of liability for unjust enrichment. It is suggested that this description would avoid confusion and the findings in the *BK Tooling* case should be followed in preference to cases like *Hamman v Nortje, supra.* Consequently, a reduced contract price may in certain circumstances be claimed, even though the contractor has not completed the contract.

[16] The *onus* is on the contractor to prove a claim for a reduced contract price. McKenzie, in reliance on the *BK Tooling* case suggests that in order to succeed, the contractor has to prove:

> *"(i) that the employer is utilising the incomplete performance;*
>
> *(ii) that circumstances exist making it equitable for the court to exercise its discretion in his favour;*
>
> *(iii) what the reduced price should be, i.e. what it will cost to bring his performance in order so that it can be determined by how much the contract price should be reduced."*

(*McKenzie, supra*, at p204.)

In the *BK Tooling* case it has been held that it would be more likely that courts would exercise their discretion in favour of the contractor in future, provided the employer have benefited from the work and provided that the claim is assessed in such a manner that the employer will not be worse off than he would have been had the contract been completed. Courts will only adopt this rule in cases of incomplete contracts when there

have been an assessment of the amount which the contractor should receive on the basis of unjust enrichment. (McKenzie, supra, at p206.)

[17] It has further been held in cases like *Lievaart v Strydom* 1938 TPD 586; *Macfarlane v Crooke* 1951 (3) SA 256 (C) at 260; and *Badenhorst v Prinsloo* 1967 (1) SA 212 (O) that although a contractor might have based his claim in his pleadings on contract, he may nevertheless recover payment on the basis of unjust enrichment even though it has not specifically been pleaded.

[18] The leading case in respect of pleadings is *Shill v Milner* 1920 AD 101 where de Villiers JA described the object of pleadings and its relevance with regard to evidence presented at the eventual trial as follows:

> *"The object of pleadings is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the court has wide discretion. For pleadings are made for the court, not the court for pleadings."*

It has often been held that pleadings, and in particular the particulars of claim, should reflect the case a defendant is required to meet. If there are serious discrepancies between the pleadings and the evidence presented, amendments should be sought. In *Middleton v Carr* 1949 (2) SA 374 (A) Schreiner JA described this as follows at p386:

> *"Generally speaking the issues in civil cases should be raised on the pleadings and if an issue arises which does not appear from the pleadings in their original form an appropriate amendment should be sought."*

(*Brenner v Doeseb* 2010 (1) NR 279 (HC) and *Rodgerson v SWE Power and Pumps (Pty) Ltd* 1990 NR 230 (SC) at 234G.)

[19] A *quantum meruit* claim may be awarded even on appeal although not claimed in the pleadings, provided that the facts are before the court. (*Christie - The Law of Contracts*, fifth edition, at p427: *Howarth v Lion Steel Construction Company (Pty) Ltd* 1960 (3) SA 163 (FC) at 166 F-G; *Middleton v Carr, supra*, at 386.)

As mentioned before, the appellate division of the Supreme Court in South Africa in the case of *BK Tooling, supra*, has held that a contractor's claim based on incomplete performance should be regarded as a claim for reduced contract price, not a *quantum meruit* claim. (*Christie, supra*, at 426)

[20] Evidence that is disputed cannot be left unchallenged and failure to cross-examine a witness on points in dispute may entitle the party calling that witness to assume that such evidence is accepted as correct. (*President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA1 (CC) at 37 [61] and [62]); *Namibia Tourism Board v Kauapirura-Angula* 2009 (1) NR 185 (LC) at 194 A-B; *Goagoseb v Arechanab Fishing and Development Co. (Pty) Ltd* NLLP 1998 142 NLC).

[21] It is impermissible hearsay if evidence is tendered with the purpose of proving the truth of a matter without calling the person who made the statement or on whose information the statement is made. (*Gemeenskapsontwikkelingsraad v Williams and Others* (1) 1977 (2) SA 692 (W) at 696H; *Passano v Leissler* 2004 NR 10 (HC) at 17B-C).

Peculiar circumstances of this matter

[22] I have briefly alluded to the circumstances under which the contract between the parties came into existence. It is undisputed that this is a building contract *locatio conduction operis*. Such a building contract is generally not difficult to interpret and the wording and terms thereof are usually not ambiguous. However, it is clear that this is not the usual type of building contract. Mr. Wiese is the drafter of the contract and it was his decision to incorporate Mr. Kruger's quotation therein. The contractual relationship between the parties is peculiar, mainly in the following manner:

- It is not a contract according to the generally prescribed form of a building contract;
- There were no drawings, specifications or a bill of quantities;
- No architect was involved;
- The owner was not fulltime available to inspect the building operations and to give instructions, but had to rely on others in this regard;
- No written variation orders or written instructions were given to the builder;
- Other employees of the owner, namely Ms Otto and Mr Oosthuizen supervised the building operations and apparently gave instructions to the builder;

- No provision was made for interim of final certificates of completion and the manner in which it should be effected;

[23] It is common cause that the plaintiff provided the defendant with a quotation and that a contract was thereafter entered into on 3 November 2006. What is, however, in dispute is the contract price, namely whether it is N$1 319 000.00 (N$1.3 Million) or N$1 456 956.00 (N$1.4 Million). A further dispute in respect of the contract is the defendant's version that after the deposit of N$3 000.00 was paid and Mr Kruger was unable to provide the materials he quoted, the agreement was in fact changed so that Mr Wiese from that stage on purchased and provided the building material and Mr Kruger was only responsible for the labour. It is common cause that the plaintiff has the *onus* to prove the contract that the parties entered into. However, it is in dispute who bears the *onus* to prove the amendments to the contract. During the course of the proceedings in court and the in written arguments presented, the parties also accused each other of not presenting evidence according to what was pleaded.

[24] During the evidence of the builder, Mr Kruger, and the owner, Mr Wiese, several invoices were discussed, put to them and evidence were given in respect of those invoices. I shall later herein, where necessary, deal with issues pertaining to those invoices. However, it is also evident that the invoices dealt with during the trial were mainly used in order to prove or verify the conflicting versions of the parties in respect of various issues relied upon by them. It is therefore necessary to identify the main issues

which are in dispute against what the pleaded versions were, as well as the where the onus rested in respect of these issues.

The building contract

[25] It is necessary to quote the building contract in full and to make certain observations regarding it.

> ***"CONTRACT OF COMPLETION OF UGAB TERRACE LODGE CC***
>
> *Between*
>
> *Ugab Terrace Lodge CC*
> *P.O. Box 58*
> *Outjo*
>
> *Represented by: Leon Wiese (ID 7401300000035)*
>
> *And the building contractor*
>
> *Damaraland Builders CC*
> *P.O. box 129*
> *Khorixas*
> *Registration Number: CC/2001/1806*
>
> *Presented by: Mr Bonifatius Kruger (ID 521101050015)*
>
> ***TERMS AND CONDITIONS:***
>
> 1. *All building and contracting work will be completely finished and done within 56 (fifty six) calender days from date of acceptance of quotation and payment of deposit.*
> 2. *Damaraland Builders CC will be liable for the deposit amount received from Leon Wiese until the tender as quoted by the building contractor is completed.*

3. *All monies received from Mr. Wiese for and on behalf of Ugab Terrace Lodge by Mr Bonifatius Kruger on behalf of Damaraland Builders CC must be used solely for the purpose of this project and are not to be used for any outstanding debt of Damaraland Builders CC or Mr. Bonifatius Kruger (ID 521101050015) in his own personal capacity until such time and date when the project is completed in full.*
4. *The building contractor (Mr. B. Kruger) must be on the construction site at all times during this period for daily communication. Exceptions shall be made, and needs to be arranged in advance.*
5. *All work to be done must be of high standard.*
6. *The material used must be of good quality and must be agreed upon between both parties.*
7. *Both parties accept and acknowledge that no building plans exist and that constant communication is necessary to avoid any problems.*
8. *The building contractor shall be liable for all transport, building material and labourers needed for the completion of the tender and penalty fees will be applicable if deadlines are not achieved within the mentioned time frame of 56 (fifty six) calendar days.*
9. *Both parties involved hereby accept and understand the terms and conditions noted on this agreement.*

SIGNED ON THE 3 DAY OF NOVEMBER 2006 AT GROOTFONTEIN

(signature)	*(signature)*
.....	*.....*
MR. LEON WIESE	*MR. BONIFATIUS KRUGER*
(signature)	*(signature)*
WITNESSES 1).....	*1).....*
	(signature)
2).....	*2).....*

<u>Attached documents</u>:

A) *Copy of identification document of Mr. Bonnie Kruger.*

B) *Copy of Damaraland Building Contractor CC vat. registration document.*

C) *Copy of Damaraland Building Contractors CC founding statement".*

[26 As mentioned, this contract followed a quotation by the plaintiff which was accepted by the defendant. Although not anomalous, the contract itself is certainly not a model of good draftmanship. However, the parties did not dispute the terms thereof at all and both relied on this contract in their pleadings and evidence. Thus they cannot complain about their contract and have to live with the consequences thereof, less of all the defendant whose Mr Wiese was the drafter thereof. The following observations can inter alia been made from the contract:

1. From the wording of the contract it appears that it was an intention of the parties that the plaintiff would complete the works.

2. The parties foresaw that the contract would the take 56 days to complete, which would commence from the date of the acceptance of the quotation and the payment of the deposit by the defendant.
3. The requirement that building material should be provided by the plaintiff appears from paragraphs 5 and 7 of the contract, namely that the material should be of a good standard and that the builder should provide the material, transport thereof, as well as the labourers to do the work.
4. Because there were no building plans, the parties foresaw that there would be continuous communication between them. No mention is made for any representation of anyone else on behalf of Mr. Wiese, if and when he is not available.
5. Payment of penalties was foreseen in the event of the construction not being completed within 56 days, although no amount in respect of penalties was mentioned in the contract.

Common cause issues

[27] It is common cause between the parties that a contract based on a quotation provided by the plaintiff to the defendant and accepted by the defendant was signed. Similarly is it common cause that despite payment of the deposit of N$300 000.00 by the defendant to the plaintiff on 6 November 2006, further progress payments were made by the defendant to the plaintiff in the total amount of N$726 000.00. It is further common cause that while Mr Wiese of the defendant worked in Windhoek, Ms Gudrun

Otto and Mr Oosthuizen was on site and from time to time gave certain instructions to Mr Kruger.

The first issue in dispute – the contract price

[28] The fact that a written quotation was provided on 5 September 2006 by the plaintiff to the defendant is not in dispute and also that the amount of that quotation was N$1 319 000.00 (N$1.3 Million). What is in dispute, is that although Mr Wiese of the defendant accepted and signed that quotation, he denied that he required certain changes, whereupon the plaintiff's Mr Kruger faxed a new quotation in the amount of N$1 456 956.00 (N$1.4 Million) to him, which he accepted. That document (Exhibit "B") was not signed as the original quotation (Exhibit "A") was. The changes that Mr Wiese apparently required and which was quoted as contained in Exhibit "B" pertained to the following, namely the addition of twelve donkeys (water heating devices), the replacement of ceramic tires on the floors by a yellow oxide surface on the cement, the building of a new sunburn wall, construction of a walking way from the kitchen to the swimming pool and a shade with sitting areas and slasto finishing. According to Mr Kruger he faxed Exhibit "B" to Mr Wiese on 3 November 2006, who responded by faxing the contract to Mr Kruger on the same day to be signed. It is common cause that the contract has been signed on 3 November 2006.

[29] The defendant's version to the above mentioned alterations contained in Exhibit "B" is a total denial. The facsimile (fax) report contained in the plaintiff's bundle of discovered documents in respect of the date when the contract was signed, namely 3

November 2006, supports Mr Kruger's version. That fax report indicates that 8 pages were sent by fax to the work fax number of Mr Wiese, namely 061-250130 at 12h08 on 3 November 2006. The original quotation had already been submitted by the plaintiff on 5 September 2006. Even if that quotation was faxed again it is obviously that more pages were faxed to Mr Wiese by Mr Kruger on 3 November 2006. The contract was thereafter signed and faxed on the same day at 14h49 from Mr Wiese's work number in Windhoek to fax number 067-243719, which apparently belonged to Mr Kruger. Mr Kruger's evidence was that Exhibit "B" was sent together with the other quotations to Mr Wiese, who immediately thereafter sent the contract to him. There is also further supporting evidence based on invoices that Mr Kruger did purchase the required donkeys from OBM Engineering and Agra Co-operative respectively, and installed the donkeys in the 8 bungalows and the main building. The original quotation did not require the purchase and installation of any donkeys. It is also apparent from the evidence that no tiles were in fact installed on the kitchen and bungalows floors, but that, according to what is contained in Exhibit "B", the floor surfaces were constructed with a yellow oxide covering. Photos handed in at the trial depict the construction of gravel walk ways with brick borders from the lapa to the swimming pool. Mr Kruger further testified that he did erect a sunburn wall and the shade areas with seating.

[30] On the evidence presented, I cannot come to any other conclusion than that the contract in fact did include the requirements set out in Exhibit "B", namely the additional quotation and that the contract amount is that which the plaintiff alleged in its particulars

of claim, namely N$1 456 956.00. In this regard I find that the plaintiff has discharged the *onus* to prove what the contract amount was.

The second disputed issue - Was the contract changed during the construction to the effect that the defendant now had to provide the building materials?

[31] According to the defendant the original contract had been amended in December 2006 to the effect that the defendant would further on purchase the building material which the plaintiff would need to complete the work. Significantly, there was apparently no simultaneous agreement to amend the contract price. It is obvious that such an amendment would constitute a fundamental change to the contract and by making such serious allegations the defendant would bear the *onus* to prove it. No specific date for this amendment was supplied by Mr Wiese for this fundamental amendment. However, he testified that it had been done telephonically 30 days after a payment of the envisaged deposit by him, which was made on 6 November 2006. On his own evidence Mr. Wiese thus ties it down to 6 December 2006. According to Mr Wiese's version, all purchases of building materials required as indicated by Mr Kruger would be made from that date on by the owner contrary to the direct provisions of the building contract, Exhibit "D". Allegedly this also included the transport of such material from the supplier to the lodge. Mr Wiese further compiled a spreadsheet in which he indicated all such purchases which were made by him. That spreadsheet was handed in and marked as Exhibit "R". Mr Wiese was thoroughly cross-examined on the invoices regarding the items so purchased according to this alleged amendment of the contract. On the other

had, Mr Kruger categorically denied that the contract had been amended as alleged by Mr Wiese. According to Mr Kruger he did specify certain materials for which quotations had to be obtained. Mr Kruger agreed that certain purchases were made by Mr Wiese for which the supplier first quoted. Mr Denk submitted in argument that Mr Wiese not being a builder himself, would obviously not know which material had to be purchased. By discovering several invoices which was handed up in a bundle and marked Exhibit "N", Mr Wiese purported to prove that the contract had indeed been amended. Although the evidence did indicate that certain materials have been paid for by the defendant and not the plaintiff, I find it difficult to hold that the contract had indeed been amended by the parties as alleged by the Mr Wiese. There are several reasons for these difficulties, which will be discussed more fully hereinafter.

[32] The defendant did plead that the contract had been amended early December 2006 to the effect that the defendant would further on purchase all material necessary to complete the building work. The terms of that alleged oral agreement is contained in paragraph 2 of the plea referred to earlier herein. This was the first time that any allegation to this effect had been made. Not even the request for further particulars did contain any question regarding any possible amendment of the original contract. The plaintiff did not replicate in answer to the defendant allegations in this regard in his plea.

Secondly, the evidence regarding the invoices contained in bundle Exhibit "N" clearly constitutes impermissible hearsay. Mr Wiese worked in Windhoek. He testified that although the purchases had been paid for by him after amendment of the contract, he

did not make such purchases himself. Those purchases were made by either Mr Oosthuizen or Ms Otto, or both. The fuel was also not purchased by him, but information in that regard was conveyed to him. One Simeon, an employee could have given evidence regarding the purchasing of the fuel, but was not called to testify. It is common cause that Mr Oosthuizen and Ms Otto were overseers of the building project and were apparently full time on the premises where the building operation in terms of the contract were done. Neither Mr Oosthuizen, nor Ms Otto was called as witnesses to testify in this court. Similarly, no evidence was provided by any supplier in respect of any purchases made. The spreadsheet, Exhibit “R”, was compiled on the information obtained from either Ms Otto or Mr Oosthuizen, or both, or from ladies involved in the administration, regarding the alleged purchases contained in bundle Exhibit “N”. It is undisputed that Mr. Wiese had no independent knowledge of these purchases, yet he testified in respect of the truth of thereof, while the defendant failed to call any witness who had such knowledge. That is impermissible hearsay.

In the third instance, it became apparent during the cross-examination of Mr Wiese that a luxury tented camp was erected on the farm simultaneously with the building of the lodge in terms of the contract between the parties. The plaintiff was not involved in the construction of the luxury tented camp, which was erected by Mr Wiese’s own employees. It also became clear that several purchases indicated on the invoices and relied on by Mr Wiese to present purchases made on behalf of the plaintiff, were in fact made for the luxury tented camp. Originally, Mr Wiese testified and conceded that an amount of N$22 640.37 represents purchases that were wrongly indicated in Exhibit “R”

to be for the lodge, were in fact for his own account and that amount should have been deducted. However, during cross-examination Mr Wiese was constrained to admit that there were in fact much more purchases made which were not for the plaintiff's contract rendering the amount N$22 640.37 much higher. An example is that the defendant did not require construction of wooden floors as part of the works to be executed by Mr Kruger in terms of the contract between the parties, but that wooden flooring planks and other fittings listed in Exhibit "N" and depicted on the photos in the photo plan clearly proves that an amount of N$68 337.22 represented such purchases. Mr Wiese's attempt to explain this discrepancy by stating that these wooden planks could have been used to make window frames, is disingenuous. Although Mr Wiese refused to admit several other similar purchases, it is evident that the amount that should be deducted is explicitly much higher that what Mr Wiese was prepared to admit. Mr Wiese also had to concede that several purchases that appear on invoices are in fact for his farming operations.

Finally, if the agreement had been amended as suggested by Mr Wiese, it is very strange that several purchases were in fact made by the plaintiff **after** the 6th December 2006. That is in fact the situation and Mr Denk pointed out in argument that the undisputed evidence of Mr Kruger is that he indeed made purchases from suppliers, e.g. Pupkewitz and Sons, Agra and Otjwarongo Skryn Werkers on several occasions between 14 December 2006 and 24 March 2007 in amount totalling in excess of N$78 000.00. When this was pointed out to Mr Wiese in cross-examination, he could not provide a plausible explanation.

[33] On evidence presented in this court, a finding cannot be made that the defendant has discharged the *onus* to prove that the original contract had been amended as alleged by the defendant. It is clear that the probabilities in this regard are not in favour of the defendant.

The third disputed issues - Penalties

[34] The defendant's counterclaim concerns a claim for penalties as a result of the delay in completing the building operation by the plaintiff. The contract, as referred to earlier, provided for penalties to be paid by the plaintiff if the building works are not completed within 56 days. In its counterclaim the defendant alleged that the plaintiff substantially completed the works 57 days late. The contract did not provide for a specific amount in respect of penalties per day that the works had not been completed. As mentioned before, the court was informed at the commencement of the trial that the parties have agreed to an amount of N$2000 in respect of penalties per day and that the amount in the counterclaim should be amended to that effect with a total claim of N$114 000.00.

The plaintiff pleaded to the defendant's counterclaim. The plaintiff admitted that it was late with the completion of the building works, but specifically pleaded that the delay was entirely caused by the defendant as a result of an oral agreement between the parties that the plaintiff would do additional work. On that basis the plaintiff prays that the counterclaim be dismissed with costs.

[35] According to Mr Wiese the building works commenced on 20 November 2006 and the plaintiff left the site on 14 April 2007. According to Mr Denk that constitutes a period of 165 calendar days while the defendant only claimed for 57 days in its calculations as penalties. According to my calculations the building period according to Mr Wiese's evidence from 20 November 2006 to 14 April 2007 is a period of 145 days, while the completion of the building should have been in 56 days according to the contract. The time that the contract period was exceeded is therefore 87 days, while only 57 days were claimed in respect of penalties. Mr Wiese attempted to explain this discrepancy by stating that it was in fact in favour of the plaintiff that only 57 days were claimed in respect of the penalties because month ends and holidays were not taken into account. Whatever the correct calculation may be, it is evident that a much longer delay occurred than what the defendant claimed. In any event, in the light of my decision the time of delay is irrelevant.

[36] Mr Wiese denied that the plaintiff was required to do **any** extra work, while Mr Kruger gave evidence in respect of several different types of work over and above that which he had to execute during the contract period as a result of oral agreements on site. Ms Schneider submitted that the quotation, which forms part of the contract, was so badly drafted that it is impossible to determine that the work claimed by Mr Kruger to be extra work, was in fact not included in his quotation. In his evidence Mr Wiese also attempted to hide behind the badly drafted quotation in respect of the alleged extra work. It certainly does not suit the defendant to hide behind the obvious badly drafted

quotation, when it (Mr. Wiese) incorporated it in the building contract drafted by himself. On the basis of the *contra proferentem* rule any interpretation of the contract does not avail the drafter thereof. The plaintiff was also criticized for basing its defence to the counterclaim on extra work, while it did not claim for such extra work. This submission, if I understand it correctly, namely because the plaintiff did not claim for extra work, is an indication that no such extra work was done beyond what was required in the contract. I do not agree that the fact that the plaintiff did not claim for extra work, prevents him from using this defence. Ms Schneider also calculated the periods provided by Mr Kruger for each and every item of extra work and submitted that it would have taken him 278 days, approximately 9 months, to have completed the extra work. The explanation offered by Mr. Kruger was that not only one building team was utilized to construct the extra work, but sometimes up to three teams worked thereon and that such a calculation refutes the time that the each item of extra work consumed.

[37] The issue of extra work again highlights the issue of impermissible hearsay evidence on which the defendant relies. As mentioned earlier, Mr Wiese worked in Windhoek and was apparently satisfied that Ms Otto and Mr Oosthuizen could take decisions regarding the construction of the work. They were in fact the only people who could provide evidence in respect of the additional work and whether Mr Kruger was instructed to do additional work beyond what was contained in the contract, or not. They were not called to testify. Mr Kruger, on the other hand gave evidence in respect of several items of extra work which the plaintiff had been ordered to construct and such construction caused the contract period to over run. It is not necessary to repeat the

evidence in this regard, but Mr Kruger testified in detail how much time was consumed by that extra work in respect of each of the several items. Such extra work entailed the following: the construction of the bungalow doors (not only the fitting of the doors as Mr Wiese stated); the construction of walk ways which was time consuming and which had to be constructed because the original walk ways were damaged by rain and water; installing of ceilings in the bungalows by uneven cut branches in the place of tanalith droppers originally quoted for; and the painting of the roof of the main building and of the bungalows. Mr Denk also submitted that Mr Wiese merely made bald allegations in respect of the extra work, but failed to challenge the version of Mr Kruger in cross-examination. Mr Denk submitted that, based on applicable case law, the conduct of the defendant entitled the plaintiff to assume that his version is correct and was accepted by the defendant. Mr Denk did concede that the plaintiff had the *onus* to prove that the delay was caused by the extra work that it was required to do, but he submitted that the plaintiff did discharge that *onus*. I agree with the submissions of Mr Denk. The plaintiff did discharge the *onus* which rested on him and find that the counterclaim by the defendant has not been proved and should be dismissed. In the light thereof the court is not in a position to make a finding according to Mr Wiese's version that no extra work, beyond what was required in the contract, was done.

Other issues

[38] There also remain the issue of the final certificate of completion that was handed in as an exhibit and marked as document 76(a). This document is in Afrikaans, but a sworn translation was handed in as document 76(b), which reads as follows:

> "*Sworn translation*
>
> *Damaraland Builders B. Kruger contracted by Ugab Terrace Lodge having received punch list completed after 2(two) days.*
>
> *Present at the inspection:*
>
> *L. Wiese*
>
> *G. Otto*
>
> *K-H. Oosthuizen*
>
> *B. Kruger (Building contractor)*
>
> *Completion of work according to quotation on 12 March 2007.*
>
> *Further work was the make of doors that was not completed by sub-contractor Gawie."*

[39] From the wording of this document, which had not been denied by Mr Wiese, it appears that it was preceded by a "punch list", which according to Mr Kruger contained what had to be done to complete the work and which was in fact done. According to him all that remained outstanding were certain doors which a certain Mr Gawie had to make. This was not the plaintiff's responsibility. This document facially constitutes a final completion certificate and explicitly states that the work according to the quotation was completed. In his evidence Mr Wiese denied that the work was completed and even

alleged that after Mr Kruger has left the site, there were still outstanding work which was later completed by the defendant. However, on the face of this document and in accordance with the evidence by Mr Kruger, this document constitutes the final completion certificate. Again Mrs Otto and Mr Oosthuizen could provide clarity in this regard, but they were not called to testify. Mr Wiese was present, but save for repeating that the work was incomplete, his evidence cannot refute the undisputed contents of this document. I have no reason not to accept Mr Kruger's evidence in this regard.

[40] Much time was spend on cross-examination in respect of several invoices and the fact that some invoices were not supported by full documentation. In the light of my findings as set out hereinbefore, it is not necessary to deal with all submissions regarding these invoices.

[41] Throughout the trial submissions were made by both counsel to the effect that evidence presented at the trial differ from what are averred in the pleadings. However, save for amending the penalty-amount in the defendant's counterclaim, no other amendment had been sought. The discrepancies between the evidence and the pleadings cut both ways. The pleadings are certainly not a model of proper pleadings. I am satisfied that the cases of both parties were however well enough pleaded to enable them to present evidence and ventilate their respective cases. I am satisfied that the parties were not prejudiced in their preparation prior to the trial. Although no applications were made for amendments to the pleadings, the court was in a position to determine the disputed issues and to make the abovementioned findings.

Quantum Meruit reduction of the contract price

[42] It is evident that a builder is entitled to be paid after he has completed the work in terms of the contract. As mentioned before it is stated in several cases that the entire contract has to be completed before the builder is entitled to payment. The *exceptio non ademplete contractus* is the usual defence by the owner to excuse himself from payment, because the builder has not performed. However, it is also clear from the case law that a building contractor is under certain circumstances entitled to payment of a *quantum meruit*. In the *BK Tooling's* case the court of appeal in South Africa has stipulated that such a claim should be not based on the *quantum meruit* principle, but rather referred to as a reduction of the contract price, depending on the existence of certain circumstances.

[43] In his submissions Mr Denk suggested that an amount of N$211 311.17 should be deducted in respect of costs incurred by the defendant in respect of building material not purchased by the plaintiff according to what Mr Kruger admitted in evidence. It is the submission that the defendant still owes the plaintiff an amount of N$519 644.83 in respect of the performance of its obligations in terms of the contract. To arrive at that amount it is submitted that from the contract amount of N$1 456 956.00., less the payments already made, N$211 311.17 should be deducted. This exercise is clearly based on a reduction of the contract price.

[44] Ms Schneider denies that the plaintiff, or even the court, is entitled to change the plaintiff's claim in respect of specific performance of the contract to a claim for equitable relief based on *quantum meruit*. She submitted that the plaintiff is not entitled to such equitable relief, because it was not pleaded, as well as that the plaintiff is also not entitled to relief on basis of enrichment, also because it was not pleaded. In the alternative, Ms Schneider submitted that in the event if the court does consider granting such equitable relief, it should be based on the requirements set out in the case *BK Tooling, supra*. In that regard she submitted that the *onus* rests on the plaintiff to show that the defendant has taken benefit of the incomplete performance, that circumstances do exist which make it equitable for the court to exercise its discretion in favour of the plaintiff and what the reduction should be. She submitted that this was again neither pleaded, nor proved. From the decisions mentioned earlier, it is evident that a claim based on a *quantum meruit* does not need to be pleaded. On the same basis a claim for reduction of the contract price as equitable relief according to the *BK Tooling* case, similarly does not have to be pleaded. In respect of the requirements in the *BK Tooling* case, on which Ms Schneider relies for her submission that it has not been proved, I do not agree with that submission. It is clear from the evidence presented in this court that the defendant has indeed taken benefit of the alleged incomplete performance and utilises it. There are furthermore circumstances which makes it equitable to reduce the contract price. In respect of what such a reduction of the contract price should be, Mr Denk, on behalf of the plaintiff, submitted that an amount of N$211 311.17 should be deducted from the original contract price. I agree with that submission. In the

circumstances I am entitled to exercise my discretion in favour of the plaintiff in this regard.

Conclusion

[45] In the circumstances and for the reasons set out herein, the plaintiff is entitled to judgment in the amount of N$519 644.83. The plaintiff further claims interest at the rate of 20% per annum on its claim from date of judgment to date of final payment. It is entitled to such interest on the aforesaid amount. In respect of costs, the plaintiff is substantially successful and it is entitled to its costs, which costs includes the costs of one instructing and one instructed counsel.

[46] In the result the following order is made:

1. Payment of the sum of N$519 644.83;
2. Interest at the rate of 20% per annum on the amount of N$519 644.83 from date of judgment to date of payment; and
3. Costs of suit, which costs should include the costs of one instructing and one instructed counsel.

_____

MULLER J

ON BEHALF OF THE PLAINTIFF:	**MR DENK**
Instructed by:	**TJITEMISA & ASSOCIATES**
ON BEHALF OF THE DEFENDANT:	**MS SCHNEIDER**
Instructed by:	**VAN DER MERWE-GREEFF INC.**