



CASE NO.: I 3078/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

BUHRMANN & PARTNERS CONSULTING

ENGINEERS

PLAINTIFF

and

GUNTHER GARBADE

DEFENDANT

CORAM: NDAUENDAPO, J

Heard on: 02 August 2010

Delivered on: 21 May 2012

JUDGMENT:

NDAUENDAPO, J: [1] The Plaintiff, Buhrmann & Partners Consulting Engineers, a firm of Consulting Engineers instituted an action against the Defendant, Gunther Garbade (a farmer and Property Developer).

In the summons the Plaintiff claims:

- '1. Payment of the amount of N\$1 287 530.73 being the amount due and payable by the Defendant to the Plaintiff in respect of professional consulting services rendered by the Plaintiff to the defendant from March 2005 until December 2006 at the Defendant's special instance and request, which amount, despite due demand, the Defendant refuses and/or neglects and or fails to pay:
2. Interest on the aforesaid amount at the rate of 20% per *annum a tempore morae*, until date of final payment.
3. Cost of suit,
4. Further and/or alternative relief"

The defendant filed a notice of intention to defend. The Plaintiff then filed a declaration. For the purpose of this judgment, I will not repeat all the allegations in the declaration except paragraph 3 which states as follows:

3. "On or about the period March 2005 to December 2006 at Windhoek, the Defendant acting in person entered into various oral agreements to engage the services of the Plaintiff represented by Siegfried Teetz and/or P Roland and/or R. Trossbach -to act as engineers and to provide professional consulting services to Defendant in the Am Weinberg Development situated on Erf 1944, Klein Windhoek, Windhoek".

The Defendant raised a special plea to the effect that:

“Defendant pleads that the action should not have been instituted against him, as he at all relevant times acted for and on behalf of Jary Enterprises 136 CC, a close corporation duly registered as such in the Republic of Namibia which should be the correct Defendant,”

I must also mention that Defendant pleaded on the merits, but for the purpose of this judgment I will not deal with that.

The Plaintiff filed a replication to the Defendant’s special plea as follows:

“AD DEFENDANT’S SPECIAL PLEA.

2. In the alternative, and in the event of it being found that Defendant acted for and on behalf of Jary Enterprises One Hundred and Thirty Six CC, Plaintiff replies that Defendant is estopped from denying that he is the correct party to be cited in these proceedings by virtue of the following:

2.1 On numerous occasions prior to and after entering into the various oral agreements to engage the services of the Plaintiff as referred to in paragraph 3 (three) of the Plaintiff’s declaration the Defendant by words and or conduct intentionally, alternatively negligently, further alternatively innocently represented to Plaintiff that he was the contracting party with the Plaintiff;

2.2 The Defendant's words and/or conduct referred to above inter alia consisted of the following:

2.2.1 The Defendant never indicating (sic) that he was acting on behalf of Jary Enterprises One Hundred and Thirty Six cc;

2.2.2 The various correspondence between the parties and particularly the appointment of the Plaintiff as the professional engineers for the project;

2.2.3 The identification of the Defendant as the client in the statement of account sent by the Plaintiff to the Defendant;

2.2.4 The Defendant generally conducted himself as if he was the contracting party in respect of the project.

2.3 Acting on the belief of the correctness of the aforesaid representations, Plaintiff was induced, to its detriment, to enter into the agreements aforesaid with the Defendant, ostensibly as the contracting party to such agreements'.

[2] At the commencement of the hearing Mr Mouton, acting on behalf of the defendant, urged the Court to adjudicate on the special plea without going in the merits of the case. He submitted that if the Defendant was to be successful with the special plea then the

merits will not arise and that will dispose of the matter. Mr Corbett, acting on behalf of the Plaintiff, submitted that the Court must hear the whole matter (i.e special and the merits) in one go. He submitted that the issues relating to the special plea are intertwined with the merits of the case. I agreed with the submissions by Mr Mouton and ruled that the special plea must first be adjudicated upon for the simple reason that if the special plea is upheld, it will not be necessary for the Court to hear all witnesses (including expert witnesses) some who are from South Africa and who have been lined up to give evidence and a lot of time and money (I suppose) would have been saved. On the other hand, if the special is dismissed those witnesses must unfortunately come and testify. I do not agree with Mr Corbett that the issues are so intertwined that the special plea cannot be decided on its own without referring to the merits. The way I see it, is that the special plea has nothing to do with the merits. It merely has to do with whether the defendant was the correct party to be sued or not.

THE DEFENDANT'S CASE

[3] **Mr Garbade** testified that during 2003 his wife and her sister who inherited Erf. 1944 from their parents transferred the Erf into Jary Enterprises One Hundred and Thirty Six Close Corporation. Erf 1944 is a huge Erf measuring 17250m² and situated in Klein Windhoek. The old house on the Erf was converted into a restaurant. Mr

Roland, an engineer and a partner in the plaintiff, helped them with the conversion. That was done in 2003 and completed in 2004. The conversion of the house into a restaurant was part of the bigger project known as Am Weinberg Estate. In the sale's brochure *the project is described as "the Am Weinberg Estate is a unique combination of Health and Beauty service, residential entertainment facilities as well as a limited amount of shop space which will mutually benefit and complement other activities on the Estate, the construction is estimated to be completed in the second half of 2007."* Mr Garbade further testified that he orally appointed the plaintiff as consulting civil and structural engineers to the project. In a letter dated 11 June 2003 (exhibit A) from the Plaintiff signed (by Roland) the verbal appointment is confirmed. The letter is addressed to "the manager Am Weinberg wellness centre" and it states:

'Dear Sir

We would herewith like to confirm your verbal appointment as Consulting Civil and Structural Engineers for the Am Weinberg project. As was agreed work done to date will be invoiced only once the projects gets the "green light " i.e. Final detail planning is started with. We trust you agree with the above. (My underling)

Yours Faithfully

Signed Roland"

Mr Garbade testified that a deferred payment to work already done by the plaintiff was because Jary Enterprises One Hundred Thirty Six cc had no funds available at the time and would only pay once the project is on the way.

[4] Mr Garbade testified that he engaged the services of Bob Mould Architects for the project as the principal architect of the project and to that effect an agreement (Exhibit 'B') between Jary Enterprises One Hundred Thirty Six and Bob Mould Architects was entered into.

He also testified about a draft unsigned contract between Jary Enterprises One Hundred Thirty Six cc and the plaintiff (Exhibit 'C') which was drafted by the late Arnold van Zyl which reflected that Mr Garbade was not the contracting party but Jary Enterprises One Hundred Thirty Six and that payment was deferred to a later stage when funds were to become available or the project being financed. He testified that exhibit "C" was given to Mr Teetz for signature but that such draft agreement was never signed by the plaintiff.

[5] Mr Garbade also testified that it was agreed with all the professionals that because Jary Enterprises One Hundred Thirty Six cc had no funds available that payment for work done or to be done would be paid at a later stage when the bigger project will be financed and that 'we get finance for the project'.

[6] He further testified that the agreements with the professionals including the plaintiff was at all times with Jary Enterprises One Hundred Thirty close corporation. He was not acting in his personal capacity and he was at all times acting on behalf of the Jary Enterprises One Hundred Thirty Six cc. He also testified that, although the invoice for fees from the plaintiff, exhibit 'D' was addressed to him in his name, he did not find that strange as he was the manager of the project. The bigger project did not materialize as they did not secure funding for the project.

Mr Garbade also testified about two letters from Stubenranch dated 2 July 2004 and one from the plaintiff, Buhrmann & Partners, dated 22 November 2005 addressed to TransNamib which clearly show that Jary Enterprises One Hundred thirty Six cc was the client of the Plaintiff and was the contracting party. I will return to those letters when analysing the evidence of Mr Teetz.

OBERPRIELER

[7] He testified that he was involved in the Am Weinberg project as the coordinator to develop the business plan from 2003 until early 2007. He testified that he received exhibit "C" draft unsigned agreement from the late Arnold Van Zyl together with more or less similar agreement so contracted between Jary Enterprise One Hundred thirty Six cc and Seelenbinder Consulting Engineers. Exhibit "C"

was taken to Mr Teetz by Mr Garbade. He testified that he never received exhibit 'C' back from the plaintiff.

He testified that the idea was that all professionals would enter into agreements with Jary Enterprises One Hundred Thirty Six cc so that they knew where they stood because they would be paid at a later stage once the project kicked off or at the end of the project either in cash or in kind (acquire units that would be constructed as part of the project as in lieu of payment for their fees).

On 26 and 27 July 2006 he sent e-mail correspondence to Teetz. The e-mail of 26 July 2006 states: "I still need to know from you what your fees are please and also that we can finalise the contract".

The one of 26 July 2006 was read because he was on tracking device.

The e-mail dated 27 June 2006 from Oberprieler to Teetz states: "I have not heard anything from you yet concerning the contract from Koep & Co again. Were you able to obtain the contract yet?" He testified that in these e-mails he requested to receive the signed agreement between Jary Enterprises One Hundred Thirty Six cc and the plaintiff He testified that exhibit "C" was never signed nor returned to them. That was the case for the defendant.

CASE FOR PLAINTIFF

Siegfried Teetz

[9] Teetz testified that he is a partner in the plaintiff and a qualified engineer. He testified that he was approached by the architect Jaco Wasserfal to be involved in the bigger project but he was also involved in the earlier stage of the conversion of the house into the restaurant. He testified that from the start he was put under the impression that Mr Garbade was the contracting party and not Jary Enterprises One Hundred Thirty Six cc. He never bothered to enquire from Mr Garbade whether he was acting personally or on behalf of a Close Corporation. He testified **‘that we do draft a lot of agreements and it is really important for us to get the right employer in specified (sic) in the contract. We do contracts on a daily basis so that is why it is important for us to get the terms right and that Mr Garbade was our client.’** He testified that the client was Mr Garbade and not Jary Enterprises One Hundred Thirty Six cc. Mr Teetz further testified that the word ‘the manager’ in exhibits ‘A’ referred to

Mr Garbade representing AM Weinberg Wellness Center and not in his personal capacity. He also testified that there were various site meetings attended by him and Mr Garbade and he never told him that he was acting on behalf of a Close Corporation. He testified that: ‘we never dealt with somebody else, Mr Mouton. We always dealt with Mr Garbade. There was never somebody else. Also at the time of

Wasserfall was still in, in his capacity as architect number One, if I many call it like this, there was never Jary Enterprises or a cc whatever, never'.

He further testified that, regard to the magnitude of the project, in the region of N\$ 50 million, he did not bother to ascertain whether Mr Garbade had personally such funds available or not. He testified that all correspondence and payment certificates were made out to Mr Garbade. He also testified that in March 2007 there was a meeting between the partners of the plaintiff and Mr Garbade because of the outstanding account and they wanted to know how he (Garbade) intended to pay the outstanding account of their fees. He requested more time to make the funds available. He did not claim that the account was wrongly addressed to him nor did he dispute the claim amount of N\$1 287 530.73 for professionals services rented by the plaintiff. Mr Garbade undertook to pay the outstanding fees in installment of N\$20 000.00, but that offer was rejected.

He further testified that he was not aware of any documentation before the commencement of these proceedings which showed that Jary Enterprises One Hundred and Thirty Six cc was the contracting party.

[10] Mr Teetz also testified that during November 2006 the defendant asked him whether he would consider taking up members' interests in the close corporation that owned the property. He informed him

that he would discussed that with his partners. He discussed it and the offer was turned down.

During cross examination, Mr Mouton, asked him to show any documentation where Mr Garbade expressly said to him that Mr Garbade is involved in this project in his personal capacity? He replied that there was none.

He was also asked to explain why the Plaintiff addressed many letters to Mr. and Mrs Garbade? 'On many occasions Mrs Garbade was also present, but she never, she never got into the, if you can call it again negotiations she was present'. He replied.

ROLAND

[11] He is a partner in the plaintiff and a professional engineer. He knew the defendant for over 30 years. He testified that he was approached by the defendant initially to assist with the conversion of the old house into a restaurant. He later worked on the bigger project which was to build a Wellness Centre, small hotel, coffee shop and houses.

He testified that it was not of any concern to him who owned the property. Because in many of the projects that they do the developer is not the owner of the land.

He testified that it was not his concern who will pay his fees and in this case Mr Garbade was the one to pay his fees. He was asked to explain why he addressed. Exhibit 'A' to "the manager" 'can you

explain why it was addressed to the manager?.....I would not know at this stage really why the manager. I cannot remember. Who did you understand to be the manager? Mr Garbade,' the Court then asked him: 'Sorry, what is your explanation? Can you just repeat that again? Exactly why I called the manager, I am not sure, but it was always Mr Garbade in my eyes. But what was your understanding of the word, the manager? The one that manages, the one that instructs, I would say'.

[12 He testified that Jary Enterprises One Hundred Thirty Six cc was not the contracting party. He was asked about Exhibit "G6" which was a letter written by himself to Mr and Mrs Garbade dated 12 November 2003. Why did you refer to Mr and Mrs Garbade in that letter? Maybe I discussed the content with both of them together, but I am not sure'. He also testified about a meeting between the partners and Mr Garbade about the outstanding account and at that meeting Mr Garbade asked for more time to pay the account. He did not dispute the account. He offered to pay N\$20 000.00 per month, but that offer was rejected.

That was the case for the plaintiff

ANALYSIS OF THE EVIDENCE

[13] On 2 July 2004 Mr Andries Cloete, on the letterhead of Stubenrauch Planning Consultants cc Town and Regional Planners, addressed a letter to TransNamib which clearly showed that Jary Enterprise One Hundred and Thirty Six cc was the client and the contracting party. I quote the letter verbatim (exhibit) "K"?

2 July 2004

W/02142

The General Manager

TransNamib Holdings

Private Bag 13204

WINDHOEK

Att. Mr. B Black

A) LEASE OF A PORTION OF PORTION 4 OF KLEIN WINDHOEK TOWN AND TOWN LANDS NO. 70.

B) RELAXATION OF SOUTHERN BUILDING LINE-ERF 1944, KLEIN WINDHOEK.

1. INTRODUCTION

On behalf of Jary Enterprises One Hundred and Thirty Six cc., the owner of Erf 1944, Klein Windhoek, we herewith apply for the lease of a portion of Portion 4 of the Klein Windhoek Town and Townlands No. 70.

Erf 1944, Klein Windhoek is situated between Jan Jonker Road and the railway reserve. The City of Windhoek granted permission for the development of the following on Erf 1944:

- *Dwelling units and dwelling houses with a maximum floor area of 5200m².*
- *Restaurant & shops with a maximum floor area of 500m²*
- *A hotel with a maximum floor area of 2700m²*
- *A health-resort & wellness centre with a maximum floor area of 1800m²*

2. THE EXISTING SITUATION

The Southern boundary of Erf 1944 borders with the reserve of the Windhoek-Gobabis railway line. Within this area, the railway line is in a cutting, approximately 3 metres below the natural ground level.

It will be noted from the attached plan that we are also in the process of subdividing Erf 1944 into Portion A and Remainder. Until the registration of the body-corporate for Portion A/1944, the ownership of both portions will remain the same.

3. **THE PROPOSED LEASE AREA AND TERMS**

Attached please find a diagram of the proposed lease area, measuring 4.556m².

We would like to report that during a site inspection on 2 July 2004 it was found that the building contractor responsible for building works on the site has already erecting a fence along the proposed boundary of the lease area. We were informed that the fence was erected on the proposed lease area. We were informed that the fence was erected on the proposed lease boundary due to the following:

Due to the building activities, the area had to be fenced off. As the civil engineering division from TransNamib informed the development team that no technical problems are foreseen regarding the proposed lease.

As the terrain is more level at the proposed lease boundary and much easier for the erection of a fence.

It is not that the proposed lease was taken for granted. The erection of the fence was rather a matter of fencing the area off as quickly as possible on the most suitable terrain.

The proposed lease area is to be used for gardening purpose. No buildings are to be erected in the area.

Jary Enterprise One Hundred and Thirty Six cc would like to lease the proposed portion of Portion 4 of the Klein Windhoek Town and Townlands **No. 70 for a period of 9 years and 11 months, renewable.**

4. **RELAXATION OF BUILDING LINE**

Due to the topography the owners of Erf 1944 would like to construct the residential units as close as possible to the Southern boundary of Erf 1944. We herewith request your permission for the relaxation of the existing building line to construct residential unites on the southern boundary of Erf 1944, Klein Windhoek.

We trust that you will support the application and remain.

Yours faithfully

Signed

Andries Cloete.'

A copy of that letter was faxed to Mr Teetz by Stubenrauch Planning Consultant and based on that Mr Teetz, on the letterhead of the plaintiff (Buhmann & Partners Consulting Engineers), addressed a letter to TransNamib Holdings Limited. (Exhibit "L") The letter states:

TransNamib Holdings Limited

22 November 2005

By hand

WINDHOEK

Att: Mr D. du Plessis

Dear Sir,

AM WEINBERG-PERMISSION FOR CONSTRUCTION ON
SOUTHERN ERF BOUNDARY-ERF 1944 KLEIN WINDHOEK.

Our telcon of 22 November 2005 refers.

We herewith submit a copy of all documentation for your valued perusal and comments, which were issued already to Mr. J Engelbrecht of TransNamib during October 2005.

Attached hereto please find a colored architectural layout indicating the proposed development of the Erf 1944 Klein Windhoek, as well as our AO contour survey showing Erf boundaries, the existing railway line including sections of possible future extension to the railway line all as requested by Mr Engebrecht.

Background:

The proposed development is situated in 13 Jan Jonker Road Windhoek. Luxurious residential units, a restaurant, shops and offices as well as a wellness center are to be constructed on the site during 2006/2007. The residential units are designed along the Southern boundary of the Erf adjacent to the TransNamib railway reserve of the Windhoek-Gobabis railway line (see attached drawings).

***In 2004 our client had applied** to TransNamib to lease a portion of the adjacent land **for a period of +-9 years renewable to** be used for additional gardening purposes on which no structure would be built (see copy of application attached). (My underlining's)*

The residential units were designed in such a way that the outside living area behind each unit would benefit from the additional land to be leased from TransNamib.

The application to have small portions of the present embankment excavated for the above -mentioned use was presented on a drawing to Mr. Engelbrecht during October 2005.

Two weeks ago Mr Engelbrecht informed us telephonically that the property department of TransNamib has turned down our applications for the additional embankment excavation.

He furthermore informed us that no permission would be granted by TransNamib to erect any building on the Erf boundary, affecting houses, F5 F7 & F10.

As we have to date not received any final decision in writing from TransNamib we would therefore like to enquire whether the decision given to us by Mr Engelbrecht would be reconsidered.

Awaiting your reply in this matter we remain.

Yours faithfully

Signed by S.R.TEETZ "

[14] Mr Teetz testified that he read the faxed letter to him by Stubenrauch Plainning Consultants and based on that letter he addressed the letter to TransNamib on the same date. The evidence by Mr Teetz that he may have overlooked or it was an oversight not to pick up that **Jary Enterprise One Hundred Thirty Six cc** was the client is simply not true. I say so because he earlier (before the letters were produced in Court) testified that, "Mr Corbet, we do draft a lot of agreements and it is really important for us to get the right employer in specified (sic) in the contract. We do contracts on a daily basis. So that is why it is important for us to get the terms right and that Mr Garbade was our client" from his own evidence Mr Teetz must have known that the client was Jary Enterprise One Hundred Thirty Six cc and not Mr Garbade. How Mr Garbade could have entered into a lease agreement with TransNamib, whilst he did not apply to enter into such an agreement and also not the owner of Erf 1944, is beyond me

In the letter to TransNamib Mr Teetz clearly referred to **our client as being Jary Enterprises One Hundred Thirty Six cc**. It is Jary Enterprises One Hundred Thirty Six cc that applied to TransNamib in 2004 to lease the piece of land and not Mr Garbade. In that letter i.e. application to lease it is clearly stated that the **owner of Erf 1944 is Jary Enterprises** and not Mr Garbade. Mr Teetz is being untruthful

when he informed the Court that he never heard about Jary Enterprises One Hundred Thirty Six cc until when the case came to Court. The letter by Stubenrauch also corroborates the evidence of Mr Garbade that all the professionals knew that he was acting on behalf of Jary Enterprises One Hundred Thirty Six cc and that is why in that letter (from Stubenrauch) they stated that they were acting on behalf of Jary Enterprises One Hundred Thirty Six cc and not Mr Garbade. There is also the agreement with the architect Bob Mould - which clearly states that the agreement was with Jary Enterprises One Hundred Thirty Six cc and of course the unsigned agreement exhibit "C" between Jary Enterprises One Hundred Thirty Six cc and the plaintiff which he took to Mr Teetz but never signed.

[16] There is also nothing in his (Mr Garbade) conduct which conveyed to the plaintiff that he acted in his personal capacity. Exhibit "A" was addressed to 'the manager' which confirmed the verbal agreement of appointing the Plaintiff as consulting civil and structural engineers to the Am Weinberg project.

By addressing the letter to 'the manager' it clearly showed that the plaintiff represented by Mr Roland understood that Mr Garbade was the manager of the AM Weinberg wellness Centre and not the owner and or acting in his personal capacity. The concise **Oxford dictionary** (ninth edition) defines the word manager as **a person controlling or administrating a business or part of a business**'.

[17] Mr Teetz also testified that: 'We always dealt with Mr Garbade. There was never somebody else'. A close corporation can never act on its own, a natural person(s) must act on behalf of the close corporation and in this case it was Mr Garbade who was the manager and acting on behalf of the close corporation and that is why they always dealt with him.

Having regard to the evidence adduced and on the balance of probabilities, I am satisfied that Mr. Garbade was acting on behalf of Jary Enterprises One Hundred Thirty Six cc and not in his own personal capacity.

ESTOPPEL AS A DEFENCE:

[18] The Plaintiff relies on the doctrine of estoppel in the event that the special plea is upheld.

[19] Rabie and Sonnekus (The law of Estoppel in South Africa JC Sonnekus and Rabie 2000 P3) define the doctrine of stopped, **as follows "the doctrine as applied in the courts of South Africa may be said to amount to the following, namely; that where a person (the representor) has by his words or conduct made a blameworthy representation to another person (the representee) and the latter believing the representation to be true, acted thereon and would suffer prejudice if the representor were permitted to deny the truth of the representation made by him, the representor may be**

estopped, that is precluded, from denying the truth of his representation if the maintaining of the representation will not be in conflict with public policy.”

[20] **The elements of the doctrine are:**

[20.1] Representation by word or conduct of a certain factual position made by the representor to the representee. **In Eysselinck V Standard Bank Namibia Ltd 2004 NR 246-252D 253C** O’linn JA relied on a quotation from Rabie the law of **Estoppel in South Africa law** and held that: “as will be shown below, in South African law an estoppel can be based on a representation by conduct if the representee can show that he reasonably understood the representation in the sense contended for by him and that the representor should have expected that his conduct could mislead the representee. It is not required that he must show the conduct in issue amounted to a precise and unequivocal representation.”

[20.2] The onus rests on the plaintiff, who relies on estoppel to plead and prove its essentials

[21] “A representee can only base an estoppel on a representation made by conduct if he can show

- (a) that he reasonably understood the representation in the sense contended for by him and;

(b) that the representor should reasonably have expected that his conduct could mislead the representee (c) the test in both (a) and (b) is objective, the norm in (a) being the understanding of a reasonable man and (b) the expectation of a reasonable man.

See: **PJ Rabie The Law of Estoppel in South Africa P37.**

When a representation is made by silence it is important that the silence should have occurred when there was a duty on the person whom it is sought to estop to speak or act, **Rabie** states that: **“as to when such a duty exists, the law appears to be that the duty arises when the person whom it is sought to estop should reasonably have expected, in the light of the relationship existing between himself and the other party concerned and all the relevant facts of the case, that his failure to speak or act could mislead and cause prejudice to the other party”** see **M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz Megabuilt v kutz 2008 (2) NR 775 sc at 784, PW 15.**

[22] Another requirement is that the party acted on the correctness of the facts as presented and that the party, who acted or failed to act, did so to his detriment.

[23] The evidence adduced was that it was the plaintiff who addressed Mr Garbade as “the manager” of AM Weinberg when confirming the verbal appointment as structural and civil engineers to the project. Mr Teetz in his evidence also testified that Mr Garbade when addressed as ‘the manager’ was acting in a representative capacity.

So, the plaintiff understood from the very beginning that Mr Garbade was acting in a representative capacity. There was no duty on him to rectify that as the plaintiff correctly understood that he was acting in a representative capacity. There was no letter or documentation from Mr Garbade stating that he was acting in his personal capacity.

To the contrary, Mr Teetz in his letter to TransNamib referred to the client as Jary Enterprises One Hundred and Thirty Six cc and not Mr Garbade. The plaintiff addressed letters to Mr and Mrs Garbade because they were acting on behalf of the close corporation.

Mr Corbett submitted that the defendant admitted liability in evidence for the plaintiff’s claim. He referred to the evidence by the plaintiff when he said “there has never been on my intention that or our intention as I later say now that the fees of the account of Buhrmann and Partners would not be paid” He also referred to the evidence by the defendant that he undertook to pay off the full account of the plaintiff in the amount of N\$ 1287,530.73 by way of installments of N\$20 000.00 per month. Nowhere in his evidence did

Mr Garbade say that he is liable to pay the account in his personal capacity, he was always acting in a representative capacity.

Mr Corbett also submitted that numerous letters from the plaintiff were addressed to Mr Garbade where reference was made to him as the client and that in no such instances did Mr Garbade ever write back or even communicate to plaintiff that this was incorrect and that the client should be referred to as Jary Enterprises.

As I pointed out there was no duty on Mr Garbade to correct that because of the very first letter from the plaintiff confirming the appointment of the plaintiff as civil and structural engineers addressed to “the manager” and that showed that the plaintiff knew or understood from the very beginning that Mr Garbade was acting in a representative capacity.

Mr Garbade did not make any representation in writing or by his words or conduct conveying to the plaintiff that he was acting in his personal capacity. In all the circumstances the defence of estoppel cannot succeed.

In the result, I make the following order:

1. the special plea raised by the defendant is upheld.
 2. the defence of estoppel raised by the plaintiff is dismissed.
 3. the plaintiff is ordered to pay the costs of the defendant, such costs to include the costs of one instructing and one instructed counsel.
-

NDAUENDAPO, J

ON BEHALF OF PLAINTIFF:

INSTRUCTED BY:

ADV. CORBETT

LORENTZ ANGULA INC.

ON BEHALF OF THE DEFENDANT:

ADV

MOUTON

INSTRUCTED BY:

KOEP & PARTNERS