REPUBLIC OF NAMIBIA

CASE NO. I 3118/2006

IN THE HIGH COURT OF NAMIBIA

In the matter between:

HEIDRUN DIEKMANN INTERIOR LIFESTYLES CC **PLAINTIFF**

and

L & B COMMERCIAL SERVICES (PTY) LTD **DEFENDANT**

CORAM: DAMASEB, JP

Heard: 07–09/07/2009; 20-22/09/2010

Delivered: 18 June 2012

JUDGMENT

DAMASEB, JP: [1] The plaintiff's claim, as amended, is set out as follows:

> "4. At or about end of November 2005 and at Windhoek, a written, alternatively partly written and partly oral agreement was concluded between the plaintiff and the defendant, the latter was duly represented by Heidrun Diekmann or D & F Design CC. The written part of the agreement is made up by four annexures "A", "B", "C" and "D"…
> 5.1 Defendant accepted liability to plaintiff for plaintiff's interior design fees in the amount of N$ 143 500 plus VAT (thus totalling $ 165 025) which was included in the detailed quote of a close corporation D& F Designs CC as

> per annexure "A" and whereof the total of such quote was included in the plaintiff's quote as per annexure "B" and referred to on page 3 thereof.
> 5.2 The aforesaid sum of $ 165 025 would become due and payable upon completion by plaintiff of its obligations concerning the rendering of the interior design services."

[2] The alternative claim, in the event that the main claim fails, is set out as follows:

> "At or about the end of November 2005 and at Windhoek, a written alternatively a partly written and partly oral agreement was concluded between a Namibian close corporation "D & F Designs CC (duly represented by one D Lindemeier) and defendant (being duly represented by Mike Böttger). The written alternatively written part of the said aforesaid agreement is made up of annexures "A" and D, alternatively "A", B and "D" hereto."

[3] The express, alternatively implied, in the further alternative tacit terMrs of the agreement are then said to be amongst others that:

> "Defendant undertook to pay an amount of N$143,500.00 to the plaintiff in respect of interior design fees'' upon completion of such services which it is alleged she did. It is alleged that the intention of the parties was that D & F Designs concluded the agreement for interior design on behalf of the plaintiff which was accepted by the latter thus binding defendant. It is alleged further that by word or by conduct the plaintiff notified the defendant that the benefit of N$143,500.00 was accepted by the plaintiff as a result of which an agreement came into existence. VAT is then also claimed, making up the total claim of N$165,025.00."

[4] The basis on which the plaintiff seeks damages against the defendant is clearly summed up by Mr. Bourbon in his heads of Arguments that I find it helpful to quote verbatim:

> "what is now alleged is one of three things. Firstly, it seeMrs to be alleged that by accepting the quotation from D & F Designs CC for the supply of furniture the defendant company also accepted liability for the interior design fee as being payable to the plaintiff, even though in the letter of 28 November 2005 it is said to be payable to Mrs. Diekmann personally. Secondly, it is alleged that by accepting the quotation of 29 November 2005 issued in the name of Heidrun Diekmann Lifestyle the liability to pay the interior design fee to the plaintiff was accepted because the quotation incorporated into it the furniture detailed in the quotation of D & F Designs CC and thereby accepting the quotation there was an acceptance of the liability to pay the interior design fee. Thirdly, as an alternative claim, it is alleged that the contract between D & F Designs CC and the defendant company was a contract in part(restricted to the interior design fee specifically stated to be for Mrs. Diekmann) for the benefit of a third party, namely the plaintiff, which benefit the plaintiff has accepted."

[5] The defendant's case is two-pronged: First, it denies that it contracted with the plaintiff to provide its interior design services. Secondly, it denies that the plaintiff in fact provided it with any interior design services. The plaintiff bears the onus on both scores. It must on a balance of probabilities prove that there was a meeting of the minds for the provision of interior design services; and it must still on balance of probabilities prove that it actually rendered interior design services. It does not follow that if the contract is proved, performance follows or should be assumed. If the plaintiff, to the required standard of proof, fails to prove the rendering interior design services to the defendant, the latter is entitled to absolution.

[6] It is common cause that Heidrun Diekmann Lifestyles CC did not exist at the time of the alleged contract. That mush is clear from paragraph 8 of the amended particulars of claim and the further particulars provided by the plaintiff.

[7] In its amended further particulars the defendant had pleaded that in “accepting the quotation (which is not addressed to it) for the supply of office furniture dated 29 November 2005, the Defendant concluded a contract for the purpose in the sum of N$680 835-46 plus VAT with Heidrun Diekmann Lifestyles CC, which the defendant believed to be a corporate entity.”

[8] That led to the plaintiff in replication pleading estoppel against the defendant to the effect that the defendant is by its alleged actions (by words or by conduct) estopped from denying liability for the interior design fees of the plaintiff. That because, in the relevant correspondence, an interior design fee due to Heidrun Diekmann Lifestyles CC is mentioned and was allegedly accepted by the defendant in a letter dated 30 November 2005 under the signature of Mr Böttger, a director of the defendant; and it is suggested in the evidence also based on

what is allegedly the acceptance of the interior design service performed by the plaintiff's Mrs Heidrun Diekmann.

[9] The defendant is the business arm of an incorporated company carrying on the practice of legal practitioner as LorentzAngula Inc. Previously they practiced under the name and style of Lorentz & Bone. It is not disputed that in 2004 the directors of LA Inc. took a decision to relocate from the offices at Frans Indongo Building in the City Centre and to become anchor tenants in a modern office building, through the defendant – their commercial arm. It is also not in dispute that the move to the new, as – yet – to be built office, was of some urgency.

[10] The defendant contracted an architect, Leon Barnard Architects, to plan and design the building. They then appointed D & F Designs to furnish the new office building. The plaintiff somehow became aware of the architect's involvement with the project and wished to take advantage of the business opportunities arising from the new office building. There is a dispute about the exact role and capacity in which she did so, but it is common cause that the plaintiff accompanied the architect to a meeting with some directors of the defendant where the project was

discussed. That meeting took place in September 2005 and was attended by the architect's Mr Leon Barnard, Mrs Diekmann and the defendant's directors Messrs Hinrichsen and Böttger.

[11] Four written documents (annexures A-D to the amended particulars of claim) are relied on by the plaintiff to constitute the written part of what is alleged to be a written, alternatively partly written partly oral contract that allegedly constitutes 'acceptance of liability' by the defendant to pay plaintiff's 'interior design services fee'. I will set out briefly the content of each document in so far as it is relevant to the plaintiff's claim. Annexure A is on D & F Designs's letterhead, is dated 28 November 2005, and is addressed to Lorentz & Bone. It is headed "Quotation on supply and installation of office furniture". It states, amongst others, "We hereby have pleasure in quoting you on the supply and installation of the office furniture for your new offices. The furniture quoted is as shown on the supplied site layout and seen in the brochures. The design is based on the drawings supplied by the architect and our various discussions." It then goes on to provide the "price of all furniture" as – 1,435.000" and states an "Interior design fee for Mrs H. Diekmann as – 143.500.00". The letter

is signed by Mr D Lindemeier, one of two members of D & F Designs CC.

[12] Annexure B is a letter on a letterhead of “Heidrun Diekmann Lifestyles”, dated 29 November 2005 and is addressed to Lorentz & Bone. It is signed by Heidrun Diekmann. The subject is stated as “Furniture and fittings new offices”. It proceeds to quote for “furniture and accessories” for various for reception, bar/lounge, seating 3rd floor, terrace 3rd floor, crockery and cutlery for bar, first and second floor furniture items, office accessories for executives and assistants. It proceeds to reflect a “total amount (Heidrun Diekmann Lifestyles CC, at 680,835.46 and including 15 % VAT ‘at – 102.125.32.” It also sets out an item in respect of D & F Designs, including VAT and specifically records in respect of D & F Designs “Furniture as per detailed quote D & F Designs”. At the bottom of the letter, and again in respect of D & F Designs it is stated “D & F Designs- TerMrs and conditions to be set out.”

[13] Annexure C is a letter on the letterhead of L&B Commercial Services (Pty) Ltd, dated 30 November 2005 for the attention of ‘Heidrun’ and is addressed to ‘Heidrun Diekmann Lifestyles’. The subject is stated as “Supply and

installation of office furniture//Auspannplaza". It is signed by Mr Mike Böttger as director and states:

> "We hereby confirm our acceptance of your quotation for office furniture dated 29th of November 2005. We wish to record, as you know, that we will commence practicing at Auspannplaza as from the first of March 2006 and that the fitting and installation of the furniture must therefore be completed prior to that date."

[14] Annexure D is again on the letterhead of L&B Commercial Services (Pty) Ltd and is addressed to D & F Designs CC, is dated 30 November 2005 and the heading is stated to be "Supply and installation of office furniture //Auspannplaza". It records the following:

> "We hereby confirm our acceptance of your quotation for office furniture dated 28th of November 2005. We further record that delivery and fitting of the furniture for the second and third floors will be completed no later than the 1st of April 2006, and that delivery and fitting of the top floor will be completed by no later than the 10th of March 2006. We wish to record, as you know, that we will commence practicing at Auspannplaza as from the first of March 2006 and that the fitting and installation of the furniture must therefore be coordinated with the firm's principals."

[15] The question that arises in this case is whether the defendant with full knowledge of what was being offered, contracted with the plaintiff for her to render interior design services. It is stating the obvious that as pleaded

by the plaintiff, the above documents are the ones from which the Court must come to the following conclusions:

(a) That the present plaintiff was contracted by the defendant to provide interior design services for the amount pleaded in the particulars of claim;

(b) That D & F Designs concluded a contract with the defendant for the benefit of the present plaintiff in respect of interior design services for the amount claimed in the particulars of claim;

(c) That by mistake of the present plaintiff or Mrs Diekmann, the common intention of the parties for the present plaintiff (at the date of contract known as Elephant Empire Trading CC) was not named in Annexure B and therefore that document must be rectified to refer to Elephant Empire CC.

[16] At the very outset I wish in the latter respect to agree with the submission made by Mr Bourbon for the defendant that it is common cause that the claim for rectification is aimed at:

(a) Only annexure B, being Mrs Diekmann's letter written on Heidrun Diekmann Lifestyle's letterhead;[1]

(b) And does not seek rectification of Annexure A[2] , C[3] or D.

Necessary background to claim

[17] It is important to sketch the history of this matter, from the moment the claim was first filed to the present, as that materially impacts the outcome of the case. The claim started life on 13 October 2006 with only the present plaintiff cited as plaintiff against two defendants: the present defendant (L&B Commercial Services (Pty) Ltd) as first defendant and D & F Designs CC as the second defendant. As against the first defendant the claim was on the straightforward basis of the alleged written, alternatively partly written and partly oral agreement exactly in the same terMrs as at present alleged. There was no mention of rectification. The claim against the second defendant was premised on joint and several liability with

[1]This letter makes no reference to an interior design fee.
[2]This letter mentions the interior design fee but attributes it to 'Mrs Diekmann' and it is not sought to be rectified.
[3]In this letter the defendant accepts a quote for furniture only and is addressed to Heidrun Diekmann Lifestyles but it too is not sought to be rectified either as to the inclusion of an interior design fee or the replacement of Heidrun Diekmann Lifestyles with Elephant Empire Trading CC.

the present defendant, the one paying the other to be absolved, and was in the alternative to claim one. It was alleged that D & F Designs had agreed with the plaintiff to include the latter's design fee in its furniture supply and installation quote to the defendant and that following such quote the first defendant would assume liability to the plaintiff for interior design fee whereupon it would become due and payable upon completion of the interior design services. Such interior design services having been included in the D&F Design quote as aforesaid and being accepted by the first defendant and the plaintiff having rendered the interior design service, D&F Design - in breach of its obligations in terMrs of the aforesaid agreement- refuses or fails to pay the aforesaid design fees to plaintiff despite being liable for same and such amount being due, owing and payable to plaintiff."

[18] Both defendants entered appearance to defend and the plaintiff applied for summary judgment which was successfully resisted. D & F Designs CC's Lindemeier deposed to the affidavit in opposition and stated that the inclusion of plaintiff's design fee in the quote to L&B Commercial purposes was only for 'presentation purposes' and denied that it had ever entered into an agreement with the

plaintiff to assume liability towards the plaintiff for the payment of its alleged interior design fees. Lindemeier stated that L&B Commercial Services and the plaintiff had entered into a separate contract in respect of the latter's interior design fee and that it had nothing to do with that contractual relationship.

[19] Mr Hosea Angula, a director of L&B Commercial Services, in the opposing affidavit stated that Mrs Diekmann conducted business with L&B Commercial Services in different names, firms and entities including Elephant Empire CC, Heidrun Diekmann Lifestyles, Heidrun Diekmann Lifestyles CC, Heidrun Diekmann, and Heidrun Diekmann Interior Lifestyles CC. He made clear that they never approached Mrs Diekmann or the plaintiff or solicited their services as interior designers. He maintained that they had not given any instruction or professional mandate to Mrs Diekmann or the plaintiff for the rendering of interior design fees. They had only dealt with Mrs Diekmann in so far as she sold furniture and was to receive commission for doing so. She invoiced L&B Commercial Services for furniture thus sold under Elephant Empire Trading CC. Mr Angula explained that the quotes in which the interior design fee was mentioned were accepted by L&B

Commercial Services “without much time having been spent on analysing the detail of” the quotes.

[20] Both defendants proceeded to plead after the summary judgment was successfully resisted. On 26 November 2007, the plaintiff’s particulars of claim were amended. Mrs Heidrun Diekmann was added as second plaintiff in her personal capacity and a claim included in her personal name in the alternative to the claim of Heidrun Diekmann Interior Lifestyles CC. A claim for rectification was then included in respect of Elephant Empire CC.

[21] In its plea to the amended particulars of claim which included a prayer for rectification, the Defendant pleaded, amongst others, that “any error in the document of 29 November 2005...was a unilateral error on the part of either the plaintiff’s or a third party, which does not in law afford a basis for the claim of rectification.” It also denied that any interior design fee was rendered or that it had contracted with the plaintiff for the provision of such service.

[22] On 29 October Mrs Heidrun Diekmann brought an application to be joined in her personal capacity as second

plaintiff. On the same date the claim against D & F Designs CC was withdrawn and wasted costs tendered.

The evidence considered

The plaintiff

[23] The only witness for the plaintiff was Mrs Heidrun Diekmann. Ms. Diekmann, as the first plaintiff, is the sole member of Heidrun Diekmann Interior Lifestyle CC. She testified that at the request of Mr. Barnard of Leon Barnard Architects, she attended a meeting with some of the directors of the defendant in September 2005 to discuss the possibility of her rendering interior design services to the defendant. At the meeting she presented her ideas as regards the type of tiles, material carpets, office furniture and their fabrics, chairs as well as paint samples to be used, to the defendant’s directors present. She had brought along samples to this first meeting for presentation. Mrs Diekmann testified that she got the impression from the directors present that the presentation went well and she thereafter referred to Mr. Böttger as the person responsible for the project and with whom all necessary arrangements should be made.

[24] Mrs Diekmann testified that she thereafter set up a series of meetings with Mr. Böttger, Mr. Hinrichsen, Mr, Bosseau, Ms. Coleman, Mr. Angula, and Mr. Ruppel with the aim to get any information about the premises and what the directors of the law practice wished to have on the premises. According to her, following those meetings, she made all manner of arrangements with suppliers to meet the directors' expectations, including studying the architect's drawings, handed in as exhibits E1-E9; principally to advise how to integrate the furniture (old with the new). The catalogue of D & F Designs CC was used to select the various furniture that were, in her opinion, suitable for the practice and a proposal was made to the defendant.

[25] Mrs Diekmann testified that she attended a subsequent meeting called by the architects, where Messrs Ruppel, Böttger, Wohlers, and Potgieter were present as directors of the defendant or of the law practice. The point of the meeting was, she testified, for the presentation of the proposal she prepared. At the end she suggested to the directors the purchase of furniture from Della Rovere, an Italian Furniture Manufacturer represented in Windhoek by D & F Designs. This, she said, was accepted by the directors. As a result, Mrs Diekmann testified, she undertook a trip to

Italy in October to discuss the proposal with the manufacturer. She said that she informed Mr. Ruppel that this trip will be an expensive one for the defendant and that Mr. Ruppel agreed to the trip.

[26] According to Mrs Diekmann another meeting was scheduled by Mr. Ruppel to enquire from Mrs Diekmann as regards the costs that would be involved. Various quotations from different manufactures were submitted and it transpired that this would cost the defendant an estimated N$1.5 million, depending on which quotation was chosen. Mr. Ruppel was however not happy with the amount and suggested that Mrs Diekmann gets an alternative option from Mobilia, Cape Town. Another trip was then made to Cape Town at the end of October whereafter two alternative quotes where obtained totalling N$ 2 372 084-00 and N$ 2 547 482-00. She testified that both quotes included a design fee calculated as a percentage of the lower amount of the two quotes. These quotes where allegedly presented at another meeting on 26 November 2005, where only Messrs Ruppel, Wohlers and Böttger were present representing the defendant. No reason was given under cross examination as to why the design fee was not included in her own quotation.

[27] Mrs Diekmann testified that Mr. Ruppel orally accepted the quote on behalf of L & B Commercial services, totalling N$ 2 496 110-00. This confirmation was then reduced to writing the next day by Mr. Böttger by letter dated 29 November 2005. Mrs Diekmann however testified that the name of the present plaintiff was at that time not yet approved by the Registrar of Companies and that the correct name to trade under would have been Elephant Empire Trading CC. She added that the incorrect reference to the CC was never communicated by her to the defendant, nor questioned by the directors of the defendant as it was regarded to be less important considering the fact that Ms. Diekmann was the sole partner of the close corporation.

[28] Mrs Diekmann testified that there is no doubt that an agreement had been concluded for the payment of the design fee. According to her, a quotation, inclusive of the interior design fee, was orally accepted by Mr. Ruppel and in writing confirmed by Mr. Böttger, as director of the defendant. She further testified that had it been communicated to her that her quote was not accepted, she would not have continued with the work that she started with. She accepted that had the client not accepted the fee

there would be no agreement. No such indication was given to her by the directors of the defendant until 23 June 2006. As a result she kept attending site meetings and continued with her obligations until 20th February 2006 when all items ordered had arrived. However, the furniture from Italy only arrived over the Easter weekend of 2006. She testified that her obligation was to supply and install office furniture and that she had performed her duties as from the presentation, visit to the factories, submitting the quotation and thereafter sourcing the furniture from third parties.

[29] It is common cause that the furniture and all other accessories were sourced from third parties and subsequently delivered with a retail mark up.

[30] According to Mrs Diekmann the interior design service which she rendered on behalf of the plaintiff consisted of planning and general finishes; the type of furniture to put in to fit the space, the type of pictures and all other accessories that fit the concept. She said there was no indication from the defendants that they were unhappy or dissatisfied with her services. Having performed her end of the bargain, she invoiced the defendant for interior design

services amounting to N$ 143 500-00 in the name of Heidrun Diekmann Interior Lifestyle CC but the defendant refused to pay. She maintained that this was not justified because at one stage Mr. Böttger mentioned to her that her design fee is payable and that it was Mr. Ruppel who had a problem about not wanting to pay the fee and that she should rather speak to him.

[31] Mrs Diekmann testified that any impression that she worked under Barnard Architects was baseless since she is a separate entity who works hand in hand with Architects and was not remunerated for her services by Barnard Architects. She denied that Mr. Ruppel never agreed to the interior design fee or that she exaggerated that she was responsible for the design of the office layout.

[32] It was conceded by Mrs Diekmann that the design fee in the quote of D & F Designs was inserted by Mr Lindemeier of D & F Designs at her request. When she made this request she did not inform Mr Lindemeier that she was acting on behalf of a close corporation Elephant Empire Trading CC in which she was the sole member. This despite the fact that, according to her, she always intended to contract in the name of the CC with the defendant for interior design

services. She also stated that Mr Lindemeier of D & F Designs CC was not aware of the existence of Elephant Empire Trading CC.

The defendant's evidence

[33] The defendant called several witnesses, including Mr Ruppel, a director of the law practice LorentzAngula Inc, and Mr Böttger both director of the defendant and the law practice LorentzAngula Inc. Both these witnesses denied the existence of a contract with the plaintiff for interior design services; or that they admitted that any fee for interior design was due and payable; or that such service was ever rendered.

[34] Mr Böttger testified that a decision was taken by the Lorentz & Bone law practice to build new offices for law the practice which was to become LorentzAngula Inc. He testified that several meetings were held with Leon Barnard Architects to discuss the requirements for the new building. According Mr. Böttger, Ms. Diekmann showed up at one of the initial meetings and he formed the impression that she formed part of the team that was appointed by the developer. At that stage, he testified, the actual layout of the offices had already been decided and the design of the office already entrusted to Kobus van Wyngaarden. He

testified that although many such meetings occurred at which Mrs Diekmann was present, no contract for interior design services was concluded with her for the plaintiff; and that the only contract concluded with Mrs Diekmann was for the supply of office furniture.

[35] Mr. Böttger conceded that Mrs Diekmann was sent to various places, including beyond the shores, to investigate ideas for furniture. The furniture was then ordered and two quotations, including that of D & F Designs, were presented for payment. According to Mr Böttger, a further meeting took place on the 28 November 2005, where Mr. Böttger, Mr. Ruppel, Mr. Lindermeier and Mrs Diekmann were present to discuss payment procedures for the work done by the Mrs Diekmann and D & F Designs. In reference to annexure A to the particulars of claim Mr. Böttger testified that the defendant has never accepted liability for the interior design fee attributed therein to Mrs Heidrun Diekmann. He said he only accepted liability in respect of furniture and not more. Mr Böttger testified that the design for the office was done and completed by Barnard Architect.

[36] Mr Böttger accepted under cross examination that a design fee was included in the total amount of the quotation

by D & F Designs which he replied to in his letter being annexure D to the amended particulars of claim. The questioning was as follows:

> "now you agree with me that looking at the quotes as a whole and the total set up therein, that includes the interior design fee for Ms. Diekmann in the amount of N$ 143 500,00----yes, I agree that the totals would include that. And that is the total you accepted? ------ yes"[4]

[37] Mr. Böttger submitted that it was an oversight from his part not to carefully study the quote at the time and denied liability since no interior design was done by the plaintiff. He further testified in relation to the plaintiff that he accepted the quote under the letterhead of Heidrun Diekmann Lifestyles (annexure B to the amended particulars of claim) in respect of the supply and installation of office furniture and other accessories. Mr. Böttger insisted however that the documents do not establish any basis for plaintiff to claim any design fees. Furthermore, Mr. Böttger stated that if there was a design fee payable to the Ms. Diekmann, this would have been contained in her own separate quotation and not that of the

[4]As I will show, Mr Böttger was quite generous in his concession that he had accepted the 'total amount' represented in the annexure A to the particulars of claim. The acceptance relates to 'supply and installation of furniture' without any reference to an amount being accepted.

D & F Designs. Mr. Böttger also added that Ms. Diekmann persuaded the defendant to furnish all three floors as per her presentation. To Mr. Totemeyer's suggestion that a design does not need to be a physical drawing prepared but that it can be conceptual, Mr Böttger stated that such an idea never crossed his mind since all design issues were entrusted to the architects.

[38] Mr. Böttger testified that it was during the period the quotes were accepted and the installation of the furniture that the parties were involved in various discussions over the design fee claimed by Mrs Diekmann. He stated that a short discussion took place between himself and the Mrs Diekmann which was rather emotional and highly confrontational over the alleged design fee but denied ever having told her that a design fee was payable.

[39] Mr Hartmutt Ruppel testified that he made contact with the developers who referred him to Leon Barnard Architects to attend to the layout of the building. He further testified that Mrs Diekmann was not involved at this stage and that when she got involved, the layout was actually already taken care of. The only remaining issue that needed

an agent was for the furnishing of furniture, computers and servers.

[40] Mr. Ruppel could not remember the number of meetings that took place where Mrs Diekmann was also present but testified that he met her at the practice's offices and that no discussion of interior design fees ever took place. He testified that her quotation for the supply of furniture was accepted and met in full. Mr. Ruppel testified that when he met Mrs Diekmann at the meeting with the Barnard Architects he was under the impression that she formed part of the Architects' team. The impression was based on the fact Mrs Diekmann promoted certain furniture to the representatives of the defendant and in fact succeeded in selling a huge quantity of furniture to the defendant. He insisted there was no agreement to engage the plaintiff to render interior design services. Mr. Ruppel accepted that a design fee for Mrs Diekmann was contained in the quotation of D & F Designs who, according to Mr. Lindermeier, were instructed by Mrs Diekmann to include it in the quotation. Following the dissatisfaction of the furniture from Italy being contrary to what the firm ordered, Mr. Ruppel insisted on the quotes and thereafter discovered this design fee. Upon enquiries to D & F Designs, a subsequent invoice was submitted without

this fee and that no payment was outstanding for a design fee.

[41] Under cross-examination Mr. Ruppel disagreed with the idea of conceptual design and testified that no design service was rendered by Mrs Diekmann and that she merely promoted and sold furniture that were designed to fit the offices, i.e. to fit in an environment that was already created. To the question of why the components of the quotes where not examined, Mr. Ruppel testified that the furniture were needed on an urgent basis and the details of the quotes were not looked at carefully. He denied any agreement to hire Mrs Diekmann as a designer for the offices and as such no basis existed for an interior design fee.

[42] Also called to the stand was Mr Johannes Willemse, a partner in a furniture dealership known as Office-Economic. He testified that Mrs Diekmann approached him in relation to the supply of office furniture around October 2005. It is common cause that Mrs Diekmann approached Mr. Willemse for the second time in the company of a Ms. Tanya Jobber, whereafter a quotation for certain furniture was requested by her. In asking for a quote Mrs Diekmann requested to not disclose therein the client discount as that would be her

commission on the work done. Mr. Willemse refused to do so as he considered an improper business practice. Under cross-examination he stated that the main reason why he refused the request was because it was unethical to conceal a trade discount from a client. As it happens, Office-Economix never got the business to supply furniture to the defendant.

[43] Mr. Dirk Lindermeier is one of two members of D & F Designs CC and was contracted by the defendant to supply and install furniture. He confirmed that a quotation was submitted on 28 November 2005 (annexure A to the amended particulars of claim) which included a design fee for Mrs Diekmann but that it was on the direction of Mrs Diekmann, at a rate of 10% of the value of the furniture. Mr. Lindermeier testified that the inclusion of the design fee in the quotation was for presentation purposes only. He stated further that at some stage Mr. Ruppel denied liability for the design fee and asked it to be removed from the invoice of D & F Designs CC.

[44] The last witness for the defendant was Mr Sparange Staby. Mr Staby was the architect working for Leon Barnard Architects and was responsible for the layout of the defendant’s office building. He testified that he prepared

the drawings showing the layout of the offices and the filing cabinet system. He testified that an interior designer must be formally appointed and given a mandate to carry out certain duties and responsibilities. He testified under cross-examination that, in his opinion as an architect, a furniture layout is initiated by first preparing a concept which then later evolves into a final product and that a ‘design’ is trying to get everything together on which you then base the technical documentation. He further testified that the role of an interior designer is not necessarily procurement but cohesive interior design to create a certain ambiance. The role of a designer should also include styling in terMrs of materials or furniture. On the plans that were prepared by Mrs Diekmann, Mr. Staby commented that it makes it difficult to identify the author of the plans because there are no title blocks that bear the name of the author, as a qualified architect would include on every plan with three dimensional drawings.

[45] The critical allegation by Mrs Diekmann that she had specifically pointed out to Mr Ruppel a design fee upon presentation of the quote was strenuously denied by Mr Ruppel. Mr Lindemeier also denied ever being informed by

Mrs Diekmann that Mr Ruppel had agreed to a 10% fee for Mrs Diekmann's interior design fee.

The more natural or plausible inferences to be drawn from proved facts

[46] The classical test when it comes to proof in a civil case was stated in *Govan v Skidmore*[5] as follows:

> "Now it is trite law that, in general, in finding facts and making inferences in a civil case, the Court may go upon a mere preponderance of probability, even although its so doing does not exclude every reasonable doubt."

[47] The principle was further elaborated in *Ocean Accident and Guarantee Corporation Ltd v Koch*[6] when Holmes JA put it thus:

> "…in finding facts or making inferences in a civil case, it seeMrs to me that one may, as Wigmore conveys in his work on Evidence,3rd ed.,para.32, by balancing probabilities select a conclusion which seeMrs to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one. I need hardly hard that "plausible" is not here used in its bad sense of 'specious', but in the connotation which is conveyed by words such as acceptable, credible, suitable. The Skidmore approach is now universally accepted in South

[5] 1952(1) SA 732 at 734.
[6]1963 (4)AD at 159.

> Africa[7] and it has been cited with approval by the Supreme Court in *M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz Megabuild v Kurtz* 2008 (2) NR 775 (SC) 790, para. 30."

[48] The approach to be followed by the Court where the version of the plaintiff and that of the defendant is mutually destructive has been stated as follows by O'Linn J: (at 155C)[8]:

> "But it is clear that when the probabilities are equal, or where there are no probabilities favouring the one version rather than the other, the Court must at least be satisfied on adequate and sufficient grounds that the version given by or on behalf of the plaintiff is true, before judgment can properly be granted in plaintiff's favour."

[49] Hannah J added (at 161C):

> "Where the probabilities in a case are evenly balanced the plaintiff can only succeed if the court is satisfied that his version is true and that the defendant's version is false."

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[7] Jordaan v Bloemfontein Transitional Local Authority and Another 2004 (3) SA 371 (SCA) ([2004] 1 All SA 496) at 379I - J; Hulse-Reutter v Gödde 2001 (4) SA 1336 (SCA) ([2002] 2 All SA 211) at 1344D - E; Minister of Safety and Security v Jordaan t/a André Jordaan Transport 2000 (4) SA 21 (SCA) at 26G; Cooper and Another E NNO v Merchant Trade Finance Ltd 2000 (3) SA 1009 (SCA) at 1028C - D.

[8] *Ostriches Namibia (Pty) Ltd v African Black Ostriches (Pty) Ltd* 1996 NR 139.

[50] In my view, the proved, admitted or common cause facts tend to show that Mrs Diekmann intended to obtain a design service fee from the defendant in her personal capacity. It could not have been in the name of Heidrun Diekmann Lifestyles Close Corporation because a CC by that name did not exist. It is improbable given that she traded under that corporation for 15 years in interior design, that she would by mistake have omitted to name Elephant Empire Trading CC. Mrs Diekmann could however not properly pursue the claim for such services in her personal capacity because she was not registered for VAT in that capacity. In fact that was the basis on which I granted absolution against her in her personal capacity at the end of her case as she was forced to concede that she never intended to contact in her personal capacity. The only basis on which the claim can conceivably succeed is if it is found that Elephant Empire Trading CC ought to be the proper plaintiff. That she never intended to trade in respect of the interior design fee in the name of Elephant Empire Trading CC is equally obvious because it is so improbable given that she had at the same time been selling wares to the defendant in that name that she would not have properly identified that corporation as the beneficiary of the interior design fee. I am satisfied that the attempt to seek rectification to Annexure B to

include Elephant Empire Trading CC to take the place of the present plaintiff is an afterthought to rationalise the predicament Mrs Diekmann finds herself in. An important factor in that regard is that she does not state in unambiguous terms as to when she became aware of the mistake; and her not having sought the rectification when the summons was first issued is telling and adds credence to the probabilities that it is an afterthought. Equally significant is the fact that she never mentioned to Mr Lindemeier of D & F Designs CC Elephant Empire Trading CC as the corporation she intended to use to contract for interior design fee with the defendant. Therefore, the reliance on a mistake that justifies rectification is contrived and the claim stands to be dismissed on that basis alone. Even if I am wrong in that regard, there was no common mistake between the parties that would justify rectification.

[51] It is stated in the amended particulars of claim, and it is common cause that at the time the alleged contract came into existence, a close corporation by the name of Heidrun Diekmann Lifestyles CC did not exist. Rectification can only succeed if it is shown, and the plaintiff bears the *onus*, that there was a common mistake between the parties. I agree with Mr Bourbon for the defendant that it is

contradictory to on the one hand suggest that Mrs Diekmann made a mistake in referring to Heidrun Diekmann Lifestyles CC when she should have referred to Elephant Empire CC, and in the same breath to suggest that when she represented Heidrun Diekmann Lifestyles CC as a contacting party, she was actually doing so on behalf of an undisclosed principal “Elephant Empire Trading CC”.

[52] I cannot agree with the contention made by Mr. Totemeyer for the plaintiff that, as he put it “strictly speaking, rectification” of the document which the plaintiff relies on as allegedly constituting the written part of the agreement “is not necessary, since the undisputed evidence shows that this is one and the same entity”. Rectification is central to this case. Whether it is consensus of the parties on which the alleged contract rests; whether it is on the undisclosed principal that liability is to be found; or whether it is on estoppel that the acceptance of liability rests, the simple truth in this case is that a corporate entity called Heidrun Diekmann Lifestyles CC did not exist in November 2005. For the claim to succeed, I must find that Elephant Empire Trading CC is the corporate entity that the parties by common intention wanted to render the

interior design service, but because of a mistake common to both did not properly reflect. That is only possible if there is rectification to restore what is alleged to be the true position.

[53] To start with, as correctly pointed out by Mr Bourbon for the defendant, the reliance on an undisclosed principal does not avail the plaintiff because it has not been pleaded. Secondly, the pleadings themselves make clear that Heidrun Diekmann Lifestyles CC did not exist at the time of the alleged contract. It cannot be the one and the same thing as Elephant Empire Trading CC. No amount of evidence can change that legal reality. Rectification can only succeed if the plaintiff shows that the reference to Heidrun Diekmann Lifestyles CC was a mistake common to the parties. The mistake (if it can be called that) is that of Mrs Diekmann in naming an entity that did not exist in the eyes of the law instead of the one that did.

[54] I agree with Gibson J when she approved the observations in *Lawsa*, Vol. 5 at 59, para 129 in *T Shefler t/a Night Watch Services v Institute for Management*

Leadership Training[9] to the effect that common mistake exists where both parties to a contract make the same mistake and that in such situation each party knows the intention of the other and accepts it and each is mistaken about the same underlying fact relating to the contract. Although contrary to Mrs Diekmann's evidence which suggests it was a common mistake, Mr Totemeyer argues (as indeed the pleadings state) that the mistake in this case was caused by the one party only but argues that the requirements for rectification are met in any event. I cannot agree. I agree with the view expressed in *Denker v Cosack and others*[10] that rectification and unilateral mistake are mutually exclusive concepts.[11]

[55] It is trite that one of the requirements to be met for rectification to be granted is (and again the plaintiff bears the onus) that there was a mistake in drafting the document.[12] When the letters were drafted on 25 November 2005 and 29 November 2005 suggesting the involvement of Mrs Diekmann, and the reply was done on 30 November 2005, the defendant did not know that Heidrun Diekmann Lifestyles CC

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[9]1997 NR 50 (HC) at 52C-D.
[10]2006 (1) NR 370 (HC) at 374E-I.
[11]Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis 1992 (3) SA 234 (A).
[12]Denker v Cosack and others supra at 374E-I.

did not exist and that it ought to have been Elephant Empire Trading CC, which has since become the present plaintiff. It is conceded by the plaintiff in its pleadings that Heidrun Diekmann Lifestyles CC was non- existent when the alleged written part of the contract was concluded.[13] The insertion thereof is attributed to a mistake by either the present plaintiff or Mrs Diekmann.

[56] There is force in the argument that all the confusion there is in this case about just who contracted with whom is of the making of Mrs Diekmann. It is common cause that all references in the documents she says constitute the written agreement with the defendant for the provision of interior design services, refer to her acting in a personal capacity or non-existent Heidrun Diekmann Lifestyles CC. Her case now is *that* was a mistake: It should actually have been a reference to Elephant Empire Trading CC that had since changed its name to the present plaintiff.

[57] Just to demonstrate the confusion, Mrs Diekmann testified in her evidence in chief that at the first meeting with some directors of the defendant (also partners of Lorentz & Bone) she introduced herself to Mr Claus

[13]Vide para 8 of the amended particulars of claim.

Hinrichsen(a senior partner), and Mr Böttger, as being there on her own behalf. She testified:[14]

> "And I also just want to point out that it was very clear that I was there on my own behalf. That was an entity represented, or that I came in the name of Elephant Empire Trading or in my own name. I, Mr Barnard introduced me as an interior designer who works for herself."

[58] In just this one paragraph of four lines we see the confusion being created by Mrs Diekmann. Was she there in her personal capacity or was she representing a close corporation? She could not have been both. The claim included both until the one in her personal capacity was disallowed at the absolution stage because she testified that she never really intended to contract in her personal name. In considering the alleged mistake made justifying rectification, one cannot disregard Mrs Diekmann's own evidence: In cross-examination she testified that it was not her intention to contract in her own name for the provision of interior design services. She testified[15] that she always intended to contract with the defendant on behalf of a close corporation (Elephant Empire Trading CC). She went on to say it was a 'common error' (i.e. common to both

[14]Vide p.13, line 10 of the record.
[15]Vide p.140 of the record.

her and the defendant) that the latter close corporation was not named as the provider of the interior design services for a fee. She added[16] that she also told Mr Lindemeier that she wanted a fee to be included for interior design on behalf of the close corporation. With all this evidence that that is what she always wanted to do, there is not even as much as one word just why she in all the relevant correspondence refers to herself acting in her personal capacity or used a name of a close corporation (Heidrun Diekmann Lifestyles CC) that did not exist. There is also no explanation just when Mrs Diekmann became aware that she made a mistake.

[59] I come to the conclusion that the plaintiff has failed to discharge the *onus* in establishing that there was a mistake common to the parties that Elephant Empire Trading CC, not Mrs Diekmann personally, was the entity the parties wanted to provide interior design services. The claim must therefore fail.

[60] Even if I am wrong in that and it be found that there was indeed a proper basis laid in fact and law for rectification, I must, as I pointed out already, be

[16]Vide p.158 of the record, line 10.

satisfied that the plaintiff on a preponderance of probabilities established that she had rendered an interior design service to the defendant and that there was in fact consensus between the parties for the rendering of such services in the first place.

[61] Where there are irreconcilable factual disputes and differences between the parties the test I must apply is that set out in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*[17]. The test was applied by Heathcote AJ in *U v Minister of Education, Sports and Culture and Another*[18]. The test is that in resolving factual disputes the court must take the following approach:

1. It must make credibility findings on the respective parties' factual witnesses based on stated criteria;[19]
2. It must determine the reliability of the factual witnesses also based on stated criteria;[20]

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[17] 2003 (1) SA 11 (SCA)

[18] 2006(1) NR 168 at 184A-J and 185A-B.

[19] Being, the court's impression of the veracity of the witness predicated on the witness' candour and demeanour in the witness box; the bias of the witness; internal contradictions in the witness' evidence; contradictions between his evidence with the pleadings and previous inconsistent out-of court statements and conduct; the probability or improbability of particular aspects of his version; how well he fared compared to other witnesses on the same issue.

[20] In addition to the criteria in note 19, the opportunities he had to experience or observe the event in question and the quality, integrity and independence of his recall of the relevant event.

3. It must consider the probabilities involving an analysis and evaluation of the probability or improbability of each side's version on the disputed issues.
4. Where the credibility issues and the probabilities are equipoise, the probabilities prevail.

[62] On the material issues on which the parties' versions are mutually destructive, I must make credibility findings and consider too where the probabilities lie. In order to find for the plaintiff the Court must be satisfied that the defendant's evidence is false and that of the plaintiff true. I am unable to come to such a conclusion in favour of the plaintiff. The defendant's witnesses gave their evidence in a clear and coherent manner and made concessions where the circumstances called for but explained why, in the case of Messrs Ruppel and Böttger, such concessions were not inconsistent with the tenor of the defendant's case that there was no contract for an interior design service and that no such service was delivered. Not only are the probabilities not evenly balanced[21], but the plaintiff has failed to satisfy the Court that the version of the defendant is false.

Probabilities considered

[21]They clearly favour the defendant's version as will be seen below.

[63] The most significant circumstance tending to show that there more than likely was an agreement in the terms alleged by the plaintiff, is Annexure C to the amended particulars of claim. The fact that the plaintiff's Mrs Diekmann paid many visits to the offices of the defendant, a considerable amount of which happened even before the all-important Annexures A-D, and went on visits beyond our shores to investigate furniture solutions is not inconsistent, as I will presently show, with the defendant's version that she did so as a broker for furniture dealers and was paid handsomely for it. The evidence of Willemse shows how she made mark up on furniture sales. That she made retail mark-ups is common cause.

[64] Before I set out the probabilities favouring the defendant's version, I will set out material facts that are either common cause or properly established by evidence. They are the following:

(a) Mrs Diekmann had never discussed the issue of an interior design fee with any of the directors before the all-important Annexures A-D. She in fact took great care to not make it apparent in documents written by her: She never included it in Annexure B. Instead, Mrs Diekmann had coerced Lindemeier to include a design fee

in the quote of D & F Designs CC. In any event, Mr Lindemeier's evidence that it was only for presentation purposes undermines the alternative claim which postulates that his doing so was intended to create legally binding obligations on either D & F Designs CC or the defendant.

(b) Mr. Böttger's evidence that he never applied his mind to the issue of a design fee in view of the urgency of the matter at the time, remains unshaken.

(c) Mrs Diekmann, either personally or through Elephant Empire Trading CC, delivered a considerable amount of furniture to the defendant and was paid for it quite handsomely. Mr Ruppel testified that Mrs Diekmann's shopping list of furniture, for which she was paid, as well as her presentation of the products of Office Economics, Della Rovere and Mobilia made him assume that she was a sales person or a broker for such furniture products. In fact, when Mrs Diekmann procured Mr Lindemeier to include an amount in D & F Designs CC his quote in her favour, she asked that to be expressed as a percentage (10%) of the value of furniture to be supplied.

(d) Mr Sparange Staby who was involved as an architect in the project testified that the work relied on by Mrs Diekmann as 'interior design' do not fit that description and that, in his opinion, an interior designer ought to have been formally appointed to perform such an assignment.

(e) Messrs Ruppel and Böttger's evidence that by the time of Mrs Diekmann's involvement all the design work had been completed, was supported by architect Staby.

[65] Mr De Bourbon for the Defendant has urged me to find that on a proper reading of the proven and objective facts and circumstances in this case, the following probabilities arise in favour of the defendant and that those probabilities undermine the plaintiff's case that there was a consensus on the liability on defendant's part to pay any interior design fee:

i) At the time of the acceptance of the quotes presented to them by D & F Designs CC, the defendant's directors never applied their minds to the issue of a design fee due to Mrs Diekmann or the plaintiff because Mrs Diekmann was seen by the defendant's directors as part of the architect's design team, or was getting paid for her involvement for the supply of furniture as a broker; for which she received a percentage commission for furniture supplied.

ii) Mrs Diekmann did not render any interior design service and that all she did was to advise on the nature of furniture to be purchased, and the colour scheme to go with it.

iii) The services Mrs Diekmann rendered were in the nature of interior décor and the supply and installation of furniture and accessories.

iv) After delivery of the furniture, Mrs Diekmann only provided an after sales service as a broker for furniture and that that does not amount to interior design.

v) If Mrs Diekmann was ever appointed as an interior designer, the compensation she was to receive would have been as a result of a formal appointment and would be commensurate with work actually done and not as a consequence of an acceptance of liability as pleaded.

Court's Findings

[66] I have fully set out the four annexures to the amended particulars of claim (A-D) on which the claim is predicated for the existence of the agreement. It is only a contorted interpretation of those documents that I can come to the conclusion that the defendant 'accepted' liability in respect of the plaintiff's alleged interior design fee. Although it must be said that it would at a very early stage of the process have put the entire matter to rest if Mr Böttger of the defendant had sought clarification about the inclusion of the interior design fee for 'Mrs Diekmann' after he received annexure A, on a plain reading of the annexures I do not find any intention on the part of the defendant, as represented by Mr Böttger, to accept liability for an interior design fee. The most natural inference

discernible to me from the language used in annexure C, read with A and D, is that the defendant was accepting the quotes in respect of the supply and installation of furniture. Nowhere does Mr Böttger mention acceptance of an interior design fee or refer to acceptance of a global sum that includes an interior design service fee. Therefore, plaintiff's claim for the existence of a liability to pay an interior design fee (to whoever) is not supported by the all-important documents on which the claim is based.

[67] In light of the defendant's evidence that all the plaintiff did was interior decor as part of her role as a broker and sales person of furniture, as opposed to interior design that would have attracted a professional fee for design, which in any event had been completed by the architects before her involvement, the plaintiff bore the *onus* to prove what constituted interior design and to adduce evidence establishing on balance of probabilities that it had provided such a service. Without meaning any disrespect, she failed to meet the *onus* in either respect; in particular the documents she crucially relied on in support of her claim that she did interior design were shown in cross–examination not to support such a claim. The fact that it was clearly demonstrated in cross-examination that the

documents Mrs Diekmann relied on in her evidence in chief as her design work pre-dated her involvement; the fact that the design work for the office had been done before her involvement, and that, according to architect Staby, doing such work required a formal appointment (which she did not have), makes the version of the defendant that there was no such contract and that no such services were rendered, more probable than the plaintiff's version that the contrary is the case.

[68] As far as credibility goes, Mrs Diekmann made a poor impression on the Court as a witness. She was evasive on crucial issues and it is no exaggeration that she never really coherently answered any of Mr Bourbon's questions in cross-examination. Mrs Diekmann sought to rationalise facts and events which clearly were inconsistent with her pleadings and her own evidence. I will give a few examples. It is common cause that the addition of Mrs Diekmann as a plaintiff happened much later. The original plaintiff was always the present plaintiff. When she was added as a plaintiff, and just before she begun to give evidence, her pleadings were amended and VAT was claimed in respect of her personal claim. She justified her inclusion as a plaintiff in her evidence in chief. When she came under cross-

examination she, rather reluctantly, conceded that she never intended to contract with the plaintiff in her own name. She did that when she realised the stark reality under cross-examination that she could not have justified a claim for VAT because she was in her personal capacity not registered for VAT. That notwithstanding, she continued to insist that she was properly included as a plaintiff in her personal capacity. She thus properly made a concession only to retract it when she realised the admission put her in a not so positive light.

[69] When Mrs Diekmann testified in chief, she gave the impression that she had borne the expenses for her travel to Italy and that it was on behalf of the defendant and that she could not have done that for nothing. It emerged in cross-examination that the trip was actually paid for by others and that the most important expenses relating thereto were met by others whose furniture she sought to promote. This circumstance strongly corroborates the version that she was more of a broker of furniture who worked for a commission for selling them.

[70] All told, the plaintiff’s evidence on the alleged contract for an interior design fee and that such a service

was actually rendered, does not stand up to scrutiny. The main claim and the alternative claim must therefore fail. I see no reason why costs must not follow the event.

Order:

[71] The plaintiff's main and alternative claims are dismissed with costs; and such costs to include the costs of one instructed counsel.

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DAMASEB, JP

ON BEHALF OF THE PLAINTIFFS: Adv. R Töttemeyer, SC

Instructed By: **S F Kenny Legal Practitioners**

ON BEHALF OF THE DEFENDANT: Adv. De Bourbon, SC

Instructed By: **Francois Erasmus & Partners**