

NOT REPORTABLE

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case No. I 2009/2003

In the matter between:

**TOPSEC PHYSICAL SECURITY (PTY) LTD**

**PLAINTIFF**

and

**KELLER AND NEUHAUS N.O.**

**DEFENDANT**



Case No. I 2010/2003

In the matter between:

**UNIVERSAL DISTRIBUTORS OF NEVADA**

**SOUTH AFRICA (PTY) LTD**

**PLAINTIFF**

and

**KELLER AND NEUHAUS N.O.**

**DEFENDANT**

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Case No. I 2008/2003

In the matter between:

**UNIVERSAL DISTRIBUTORS OF NEVADA**

**SOUTH AFRICA (PTY) LTD**

**PLAINTIFF**

and

**KELLER AND NEUHAUS N.O.**

**DEFENDANT**

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Case No. I 2011/2003

In the matter between:

**TECHNOLOGY & PROCUREMENT HOLDINGS (PTY) LTD**

**PLAINTIFF**

and

**KELLER AND NEUHAUS N.O.**

**DEFENDANT**

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**Neutral citation:** *Topsec Physical Security (Pty) Ltd; Universal Distributors of Nevada South Africa (Pty) Ltd; Universal Distributors of Nevada South Africa (Pty) Ltd; Technology and Procurement Holdings (Pty) Ltd v Keller and Neuhaus N.O.* (I 2009-2003, I 2010-2003, I 2008-2003, I 2011/2003) [2012] NAHCMD 110 (18 December 2012)

**Coram:** VAN NIEKERK, J

**Heard:** 28 February 2011; 1 – 4 March 2011; 20 April 2011

**Delivered:** 18 December 2012

**Flynote:** Contract – Rectification – Essential allegations and principles set out

**Summary:** The four cases were heard together on agreed limited issues. Originally the defendant in each case was cited as Jairus Shikale trading as Punyu Group Incorporated. After Mr Shikale's death, the executors Keller and Neuhaus were substituted in their official capacity. The plaintiff in the first case ('Topsec') and the plaintiff in the second case ('Universal') each claimed rectification of a written lease agreement allegedly entered into with the defendant. The rectification related to the description of the lessee. Topsec claimed for a substitution of the words 'the Punyu Group Inc. (Registration No. ) herein represented by MR JAIRUS SHIKALE (the duly authorised representative of the lessee) in his/her capacity as : EXECUTIVE CHAIRMAN' by the words 'Jairus Shikale trading as Punyu Group. Universal claimed for substitution of the words 'The Punyu Group, a company duly incorporated in terms of the Laws of the Republic of Namibia/South Africa' by the words 'Jairus Shikale trading as Punyu Group.

The parties were *ad idem* that a mistake occurred in the description of the lessee in the written lease agreements. However, defendant disputed the plaintiff's entitlement to rectification as they were not *ad idem* as to the actual common intention of the parties. The defendant's case was that the common intention was that Punyu Wholesalers (Pty) Ltd was the lessee.

The plaintiff in the third case ('Universal') and the plaintiff in the fourth case ('Techpro') prayed for a declaration that certain oral agreements were in fact concluded with Jairus Shikale. The defendant claims that the oral agreements were in fact concluded with Punyu Wholesalers (Pty) Ltd.

The plaintiffs led evidence that they throughout intended to contract with Mr Shikale in his personal capacity, whether he traded as Punyu Group or Punyu

Casino. The Court rejected this evidence, finding that the evidence shows that the plaintiffs intended to conclude the written lease agreements with the Punyu Group, mistakenly thinking that it was a corporate entity. The probabilities are that the mistake made by the plaintiffs is not material in the sense that they would still have contracted with the Punyu Group even if they knew that it was not a corporate body. The evidence indicates that they were intent on embarking on the casino project provided that there was a valid casino licence in place. This was also the position of the defendant. The probabilities are overwhelming that Mr Shikale, knowing that the Punyu Group is not a corporate body, intended to contract as its owner.

As far as the oral agreements are concerned, it is clear in the context of all the evidence that the Punyu Group had to bear all the expenses of the fitting out and related expenses in respect of the casino. As there is no company by that name, the agreements must on the available evidence have been concluded with the Punyu Group as an unincorporated business. The problems in these matters arose because the plaintiffs did not make sure with what entity they were contracting and because the party with whom they contracted did not enlighten them. As the Punyu Group is not a corporate entity the Court found that the reference to "Punyu Group" or "The Punyu Group" or "Punyu Group Inc" can only be, "in truth" (as the defendants stated in the pleas on the limited issues) a reference to Jairus Shikale trading as the Punyu Group. Similarly, any reference to Punyu Casino, it not being a corporate body, can only be a reference to Jairus Shikale trading as Punyu Casino.

Rectification of the written contracts was granted as prayed for. The declarators in relation to the oral agreements were granted in amended form.

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## ORDER

Case No. I 2009/2003

There shall be an order for the plaintiff in the following terms:

1. An order rectifying the written agreement (annexure “TPS1”) by the deletion on page 1 of the words “the Punyu Group Inc. (Registration No. ) herein represented by MR JAIRUS SHIKALE (the duly authorised representative of the lessee) in his/her capacity as : EXECUTIVE CHAIRMAN” and the substitution thereof by the words “Jairus Shikale trading as Punyu Group”.
2. Costs of suit, such costs to include the costs of one instructing counsel and one instructed counsel.

Case No. 2010/2003

There shall be an order for the plaintiff in the following terms:

1. An order rectifying the written agreement, annexure “A” by the deletion on page 1 of the words “The Punyu group, a company duly incorporated in terms of the Laws of the Republic of Namibia/South Africa” and the substitution thereof by the words “Jairus Shikale trading as Punyu Group”.
2. Costs of suit, such costs to include the costs of one instructing counsel and one instructed counsel.

Case No. 2008/2003

There shall be an order for the plaintiff in the following terms:

1. An order declaring that the contract referred to in paragraph 3 of the particulars of claim on the limited issues has been concluded, and has been so concluded with the late Jairus Shikale trading as the Punyu Group or Punyu Casino.
2. Costs of suit, such costs to include the costs of one instructing counsel and one instructed counsel.

Case No. 2011/2003

There shall be an order for the plaintiff in the following terms:

3. An order declaring that the contract referred to in paragraph 3 of the particulars of claim on the limited issues has been concluded, and has been so concluded with the late Jairus Shikale, trading as the Punyu Group or Punyu Casino.
4. Costs of suit, such costs to include the costs of one instructing counsel and one instructed counsel.

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## JUDGMENT

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VAN NIEKERK, J:

### Introduction

[1] The above-mentioned four matters were heard together. They all concern certain business dealings related to the establishment of a casino, called Punyu Casino, in the town of Ondangwa. The plaintiffs each instituted action during 2003. The parties engaged in various interlocutory skirmishes since then. After certain amendments had been affected, the defendant in each of these actions was cited as 'Jairus Shikale trading as Punyu Group Incorporated'. After Mr Shikale passed away in 2009, he was substituted by the executors of his estate, Keller and Neuhaus. The four matters were enrolled on the fixed roll during the period 28 February 2011 to 4 March 2011. The parties agreed to a separation of issues, which was granted by the Court in terms of rule 33(4) on the basis of Bundle "X", a separate bundle in which a particulars of claim and a plea in each of the four matters set out the limited issues. After the conclusion of the trial on the limited issues, counsel prepared heads of argument to support their

submissions. These have been very helpful in preparing this judgment, for which the Court expresses its gratitude.

A summary of the original claims in the four matters

(i) Case No. I 2009/2003

[2] The plaintiff (“Topsec”) sues the defendant based on a written agreement dated on or about 11 March 2002 for the lease of security surveillance equipment. Topsec *inter alia* claimed rectification of the written agreement; payment of arrear rentals in the amount of N\$369 890.69 plus 15% VAT and interest thereon; the rentals for the balance of the rental period in the amount of N\$ 1,405,584.20; delivery of the equipment, alternatively payment of N\$ 1,405,584.20, plus interest thereon, being the market value of the equipment; and costs.

(ii) Case No. I 2010/2003

[3] This action is based on a written lease agreement dated on or about 6 March 2002 for 82 slot machines and video machines. The plaintiff (“Universal”) *inter alia* claimed rectification of the written agreement; arrear rental of N\$1,591.128.00 plus 15% VAT thereon as at 25 June 2003; fair and reasonable rental for what would have been the balance period of the contract as from 26 June 2003 at N\$5,166.00 per day to date of delivery, plus interest thereon; delivery of the machines, alternatively payment of N\$3,981,500.00, plus interest; and costs.

(iii) Case No. I 2008/2003

[4] In this case the plaintiff (“Universal”) claims payment of N\$594,154.57 in respect of disbursements made or liabilities incurred by Universal on behalf of the defendant and for services rendered and goods sold and delivered by Universal to the defendant in terms of oral agreements concluded between the parties during the period April 2002 – September 2002, plus costs of suit.

(iv) Case No. I 2011/2003

[5] This claim is for payment of N\$246,780.20, being for disbursements made on behalf of the defendant and for services rendered and for goods sold and delivered by the plaintiff (“Techpro”) to the defendant in terms of oral agreements concluded in the period March 2002 – September 2002, plus interest on this amount; and costs of suit.

The disputes on the pleadings on the limited issues

(i) Case No. I 2009/2003 and Case No. I 2010/2003 – the written agreements

[6] Topsec and Universal each claim that it concluded the written lease agreement with Mr Jairus Shikale in his personal capacity.

[7] Topsec claims that its written lease agreement incorrectly describes the lessee as:

‘the Punyu Group Inc. (Registration No. ) herein represented by MR JAIRUS SHIKALE (the duly authorised representative of the Lessee) in his/her capacity as: EXECUTIVE CHAIRMAN’.

[8] Universal claims that its written lease agreement incorrectly describes the lessee as:

‘the Punyu Group, a company duly incorporated in terms of the laws of the Republic of Namibia/South Africa, represented by Jairus Shikale in his capacity as the owner, duly authorised.’



[9] Both plaintiffs claim that its written lease agreement is to be rectified by deleting the description of the lessee as set out above and substituting it with the following:

‘ ”Jairus Shikale trading as Punyu Group”, alternatively “Jairus Shikale trading as Punyu Group Incorporated”, alternatively “Jairus Shikale trading as Punyu Casino” ’.

[10] The defendant in each of these two matters admits that the written lease agreements incorrectly describe the lessee. It denies the plaintiffs’ pleaded versions. In order to understand the defendant’s plea on the limited issues, it is necessary to have regard to its amended pleas to each of the plaintiffs’ amended particulars of claim. In paragraph 4.1 – 4.4 of the amended plea the defendant pleads as follows (the insertions between square brackets and the omissions are mine):

‘4.1 During the course of 2001 and 2002, Mr Ndangi Shipanga, representing Punyu .... [Wholesalers] (Pty) Ltd, commenced negotiations with Messrs Johan Stoop and Gideon Stone (hereinafter respectively “*Stoop*” and “*Stone*”), aimed at establishing a joint venture between Punyu [Wholesalers (Pty) Ltd] and Universal Projects (Pty) Limited (hereinafter *Universal Projects*”), the latter who at the time was represented by Stoop and Stone. The late Mr Jairus Shikale was from time to time present at such negotiations.

4.2 At the time of such negotiations Stoop and Stone, apart from representing Universal Projects, also represented the following entities:

4.2.1 Technology and Procurement Holdings (Pty) Ltd (hereinafter ..... [“*Techpro*”]);

4.2.2 Universal Distributors of Nevada SA (Pty) Ltd (..... [hereinafter “*Universal*”]);

4.2.3 Topsec Physical Security (Pty) Ltd (hereinafter “*Topsec*”).

- 4.3 The business of the joint venture contemplated by subparagraph 4.1 above, was to be a casino, to be conducted from the premises of Punyu [Wholesalers (Pty) Ltd] at Ondangwa, Namibia.
- 4.4 The negotiations between the parties were based on the general point of departure that Punyu [Wholesalers (Pty) Ltd] was to provide the premises for the business and that Universal Projects would conduct the management of the business.'

[11] On the limited issues the defendant pleads as follows (the insertions in square brackets and the omissions are mine):

- '2. Upon the insistence of Stoop and Stone and parties representing them, and their principals, the party contracting with Universal Projects was described as "*The Punyu Group*", notwithstanding the fact that:
- 2.1 Universal Projects, and Stoop and Stone, had specifically been informed that Punyu Wholesalers (Pty) Ltd ..... had the rights to the premises from which the joint venture was to be conducted.
- 2.2 Punyu [Wholesalers (Pty) Ltd] was intended by defendant and the parties representing Punyu [Wholesalers (Pty) Ltd] to be the party contracting with Universal Projects.
3. The written lease agreement ..... was, in truth, concluded with Punyu [Wholesalers (Pty) Ltd].'

[12] The defendant in each case denies on the limited issues that the incorrect description of the lessee relied on by the plaintiffs was occasioned by a common error of the parties and that the parties signed the agreements in the *bona fide* but mistaken belief that it recorded the true agreement between them. It also denies that the plaintiffs are entitled to rectification of the agreements.

(i) Case No. I 2008/2003 and Case No. I 2011/2003 - the oral agreements

[13] In these matters on the limited issues Universal and Techpro each allege that oral agreements were concluded between each of them as the plaintiff and (in Case No. I 2008/2003) Mr Shikale, represented by Messrs Ashok Iyer, Ndangi

Shipanga or Paul Liebenberg, and (in Case No. I 2011/2003), Mr Shikale personally, alternatively represented by Mr Liebenberg, during the period April 2002 – September 2002. In terms of these oral agreements Mr Shikale would have remunerated them for disbursements or liabilities incurred on behalf of the defendant and/or for services rendered or goods sold and delivered to the defendant.

[14] In respect of Case No. I 2008/2003, Mr Shikale should have remunerated Universal upon rendering of an invoice, alternatively, before the end of the month in which a transaction was dated, further alternatively, before the end of the month in which a transaction was dated, further alternatively, within a reasonable period of time after the date of transaction.

[15] In regard to Case No. I 2011/2003, the remuneration should have occurred 14 days from the date of Techpro's invoice, alternatively, within a reasonable period of time.

[16] Universal and Techpro each claim for an order declaring that the oral agreement/s has/have been concluded and has/have been concluded with the late Mr Shikale.

[17] The defendant denies the plaintiffs' pleaded versions and pleads the same defence as set out in paragraphs 2, 2.1 and 2.2 of the quotation contained in paragraph [11] *supra* with respect to Case No. I 2009/2003 and Case No. I 2010/2003. It further pleads in paragraphs 3 and 4 (the insertions in square brackets and the omissions are mine):

- '3. Defendant accordingly avers that the oral agreement ..... was, in truth, concluded with Punyu [Wholesalers (Pty) Ltd], alternatively Universal Projects acting on behalf of Punyu [Wholesalers (Pty) Ltd] in terms of the management agreement.
4. Defendant accordingly denies that it is liable for any of the obligations arising from the written lease agreement referred to in paragraph 3 of plaintiff's particulars of claim.'

[The reference to 'the written lease agreement' is clearly an error as the agreements referred to by the plaintiff are oral agreements for remuneration for disbursements or liabilities incurred on behalf of the defendant and/or for services rendered or goods sold and delivered to the defendant. Unfortunately this error was not noticed by any of the parties or by the Court during the proceedings].

### Some common cause facts

[18] It is common cause that –

- (i) The written agreements of lease did not correctly reflect the identity of the lessee.
- (ii) There is no entity registered as “Punyu Group”, “Punyu Group Inc” or any derivative thereof in Namibia or South Africa. I pause to note here that counsel for the defendants made a concession in this regard only to the extent that the defendant does not know whether there is any such legal entity. However, there is no evidence before me that there is such an entity.
- (iii) There was at all relevant times a company registered in Namibia in 1997 by the name of “Punyu Wholesalers (Pty) Ltd)” of which Mr Shikale was the sole shareholder.
- (iv) In spite of the wording of the plea on limited issues, which suggests that the lessor was Universal Projects, defendant’s counsel admitted during the trial that (in respect of Case No. I 2009/2003) the lessor was Topsec.
- (v) In spite of the wording of the plea on limited issues, which suggests that the lessor was Universal Projects, defendant’s counsel admitted

during the trial that (in respect of Case No. I 2010/2003) the lessor was Universal.

- (vi) A casino licence dated 18 April 2000 was made out to Jairus Shikale to conduct a casino under the name of Punyu International Hotel upon the premises of the accommodation establishment known as Punyu International Hotel at Oniihandi (See Consolidated Trial Bundle "A", p1).

Summary of evidence presented on behalf of plaintiffs

(i) Daniël Petrus Goosen

[19] Mr Goosen testified with regard to the written lease agreement between Topsec and the defendant (Case No. I 2009/2003) and the oral agreement between Techpro and the defendant (Case No. I 2011/2003).

[20] He was employed by Topsec from 1996 to the end of 2003. At all relevant times he was the sales and project manager. He negotiated and concluded agreements on behalf of Topsec, a company which rented out surveillance systems. He was also the director of Techpro, a company which sold surveillance systems. He negotiated and concluded contracts on behalf of Techpro.

[21] He had known Mr Gideon Stone of Universal for a long time. (Mr Stone was not called as a witness). Whenever Universal became involved in the setting up of a new casino, Mr Stone used to invite Mr Goosen to become involved on behalf of Topsec.

[22] Toward the end of 2001, Mr Goosen had been informed by Mr Stone about a business opportunity involving the opening of a casino in Namibia. Towards November 2001 he and Mr Stone travelled to Ondangwa where they met Mr Shikale, who conveyed that he was going to open a casino and that he was the owner of the proposed casino. The purpose of Mr Goosen's visit was to conduct a survey for the installation of a surveillance system at the proposed casino.

During the drive from the airport Mr Shikale pointed out several businesses in Ondangwa, stating that he was the owner of those businesses.

[23] Mr Shikale took him and Mr Stone to the premises of the proposed casino, which were brand new and not yet completed. Mr Goosen went ahead to do the required survey. Although there may have been other people around, Mr Goosen recalls that he spoke only to Mr Shikale and that no-one else participated in the discussions he had with the latter at the site. At the time Mr Goosen represented Topsec. He assumed that Mr Stone represented Universal.

[24] Mr Goosen and Mr Shikale exchanged business cards. The latter's business card plays an important role in this case and was placed before the Court (Consolidated Trial Bundle "C", p67). I therefore give a detailed description of it. On the front side the words 'PUNYU GROUP' are prominently displayed in the centre top of the card. Beneath this there appears the name of 'Jairus Shikale' and below that the words 'Executive Chairman'. In the centre at the foot of the card there is a postal address in Ondangwa, two landline telephone numbers, a fax number and a cell phone number. On the reverse side of the card there is a heading in the centre top part of the card which reads 'SUBSIDIARY COMPANIES'. Below this in two columns are listed the following names: '•Punyu House Rental, •Punyu Wholesale, •Punyu Hotel, •Punyu Crusher, •Punyu Northern Market, •Punyu Market, •Punyu Toyota, •Punyu Take Aways, •Punyu Servise (sic) Stations, •punyu norden wholesale, •Punyu Motors, •Punyu Car Hire, •Punyu L Kasch store, •Punyu Beruna, •Punyu Garage, •Punyu Hardware, •Punyu Tourist Camp, •Punyu Model, •Punyu lantern restaurant, •punyu nomsoub supermarket'.

[25] Mr Goosen did not ask Mr Shikale whether he held a licence for the casino, but enquired about this from Mr Stone and also about whether Mr Shikale had been 'scrutinized', from which I understand him to refer to some or other background check. On the basis of information from Mr Stone he was satisfied that Mr Shikale held a casino licence. Although it was important for him to know this, as Topsec was licensed with the (South African) National Gambling Board

and could (in terms of South African legislation) only install surveillance equipment in licensed casinos, the issue did not bother him that much, because he knew that Universal, also being a licensed distributor of casino equipment, would definitely make sure that the casino was licensed.

[26] Pursuant to the meeting at Ondangwa, Mr Goosen prepared a written proposal bearing the description 'PUNYU GROUP' on behalf of Techpro for the supply (i.e. sale), installation and commissioning of a casino surveillance system (Consolidated Trial Bundle "A", p65A-E). He gave the proposal to Mr Stone, who was travelling to Ondangwa for a meeting with Mr Shikale, to hand to the latter. Mr Goosen used the name 'PUNYU GROUP' on the proposal because the business card stated that name. He testified that he intended with this name to refer to Mr Shikale.

[27] The proposal and others were conveyed to Mr Shikale under cover of a letter dated 18 December 2001 written by Mr Stone on behalf of Techpro and Universal. The letter was addressed to 'Mr Jairus Shikale, Punyu Group' (Consolidated Trial Bundle "A", p61).

[28] Mr Shikale did not accept the proposal, as he no longer wanted to buy the surveillance equipment, but rather to lease it. As a result Mr Michael Caffrey, the Managing Director of Topsec, prepared a rental agreement (Consolidated Trial Bundle "C", p9-21). Mr Goosen handed Mr Shikale's business card to Mr Caffrey and informed him, '[T]his is the person who wants an agreement'.

[29] The rental agreement indicates that the lessee is 'PUNYU GROUP INC (Registration No.           )' and that the lessee is represented by 'MR JAIRUS SHIKALE (the duly authorised representative of the Lessee) in his/her capacity as: EXECUTIVE CHAIRMAN'. The name of the building where the equipment is to be installed is given as 'PUNYU CASINO.'

[30] Mr Goosen testified that the agreement was signed at the Windhoek County Club. However, the particular document before the Court indicates that it was signed on 4<sup>th</sup> March 2002 at Ondangwa by Mr Shikale, 'for and on behalf of THE

LESSEE' and by Mr Goosen at Sandton on 11 March 2002 'for and on behalf of THE LESSOR'. Mr Goosen testified that he flew to Windhoek with Messrs Stone and Kruger. They met Mr Shikale in a boardroom and Mr Goosen presented the lease agreement to Mr Shikale and his lawyer, Mr Thambapilai. They worked through the contract, Mr Shikale was satisfied and he signed it there and then. There were no objections from either of them in relation to the description of the lessee.

[31] When Mr Goosen was asked by counsel for the plaintiffs, 'Now, sir, if you look at the description of the lessee in this contract, why would you say, you are not a legal expert, but why would you say is this wrong?' he responded somewhat vaguely, 'It should have read Mr Shikale because that is the person I am dealing with and maybe not Punyu Group whatever.' (Transcribed record, p38)

[32] Mr Goosen firmly denied any suggestion that the entity with which Topsec concluded the rental agreement was in fact Punyu Wholesalers (Pty) Ltd, stating that he did not enter into a lease agreement 'with any other than Mr Shikale.' With respect to Punyu Wholesalers (Pty) Ltd he stated that he had no dealings with them and that he does not even know they existed.

[33] Mr Goosen further testified that, when he conducted the initial survey at the casino premises during November 2001, he noticed that there were problems with the electrical reticulation of the premises, which meant that there was not an adequate supply for the surveillance equipment. He pointed this out to Mr Shikale, who stated that he would have somebody look at the problem. He did not hear from Mr Shikale again until after April 2002, when Mr Shikale called him to discuss whether Techpro could send an expert to the casino to do a proper survey on the electricity problem. At some stage Mr Goosen also discussed the problem with the manager of the casino, Mr Paul Liebenberg. The latter took up the issue with Mr Shikale and later informed Mr Goosen that 'they' were unable to rectify the problem and requested that Techpro send an expert to do the survey. A quotation for this service was prepared and sent to Mr Liebenberg, who indicated that he would have to discuss it with Mr Shikale. He later indicated that



the quotation had been approved. The expert was sent to perform the task. He reported back to Mr Goosen and indicated what would be needed to rectify the problem. Another quotation was prepared and sent to Mr Liebenberg, who later conveyed that Mr Shikale had accepted the quotation. Techpro provided certain equipment in terms of the quotation and sent the expert to complete the work.

[34] Techpro further provided certain other equipment to open the casino. These were playing cards, training cards, seal bags, seals and security related equipment. Invoices were drawn for these items (Consolidated Trial Bundle "C", p61-63). Techpro also prepared invoices in connection with the electrical survey (Consolidated Trial Bundle "C", p64) and the supply of electrical equipment (Consolidated Trial Bundle, p65).

[35] All these invoices were made out to "Punyu Casino". Mr Goosen explained that from about the time that the casino was to open, it became known as such and was referred to by that name. The invoices were therefore also made out in that name. He testified that he made enquiries about the payment of these invoices on a few occasions with Mr Liebenberg, who indicated that he had passed all the invoices to Mr Shikale and that he was at one stage referred to 'the financial guy' (who, it is common cause, was Mr Ashok Iyer). Promises to pay were made and at no stage was liability for the invoices denied.

[36] Mr Goosen clearly stated in evidence that he never dealt with Punyu Wholesalers (Pty) Ltd in regard to the supply of all these goods and services, but only with Punyu Casino and Mr Shikale. He also indicated that Techpro would only have dealt with Mr Shikale because he was the holder of the casino licence. He further testified that he had never met Mr Ndangi Shipanga and that he never had any dealings with him, although he had heard his name mentioned.

[37] Under cross-examination Mr Goosen indicated that he is not experienced in drawing up legal agreements and that his expertise rather lies in negotiating a sale and then doing the project management of the installation. He testified that all his correspondence was addressed to either Mr Shikale personally or to Punyu Casino or to Mr Liebenberg as the general manager of the casino.

Challenged by counsel for the defendant to indicate any correspondence addressed to Mr Shikale personally, (the challenge was later repeated in the context that there was no such correspondence until the issue of summons in this matter) he mentioned quotations. However, these quotations did not form part of the Consolidated Trial Bundle. The only quotation that was produced was the one by Techpro for the supply of the surveillance equipment and that was made out in the name of "Punyu Group".

[38] Mr Goosen's evidence that the agreement was signed in Windhoek was put in issue. The agreement itself states that it was signed by the lessee on 4 March 2002 at Ondangwa and by the lessor at Sandton on 11 March 2002. It was put to Mr Goosen that Mr Shipanga would also give evidence to this effect. However, Mr Goosen remained resolute that the agreement was signed in Windhoek.

[39] He testified that it was his firm impression that it was Mr Shikale personally who concluded the written lease agreement with Topsec. When asked why the agreement then does not refer to Mr Shikale personally, his explanation is that the name on the business card was used as the name of the lessee. He was at a loss to explain why Mr Caffrey included the abbreviation "INC", meaning "incorporated", after the name. He did not inform Mr Caffrey of anything that could have led to this, except giving him the business card. Although he saw the abbreviation on the agreement when he went through it, he did not realise the significance of this inclusion, he did not know then what "INC" or "incorporated" meant and he did not know what it meant at the time that he testified.

[40] When he was confronted with the legalities of Mr Shikale's signature on the lease agreement as a representative, compared to Mr Goosen's signature as a representative of Topsec, he testified that these are legal aspects that he did not know of, but what he could say was that Mr Shikale was the person that he dealt with and that Mr Shikale indicated that he was the owner of the casino.

[41] Mr Goosen made it clear during cross-examination that after the appointment of Mr Liebenberg as the general manager of the casino, he dealt with him on the understanding that he represented Mr Shikale, the owner of the casino. The

services rendered and items supplied by Techpro for the casino were all approved, according to his understanding, by Mr Shikale. He denied any knowledge of a management agreement or that Mr Liebenberg was in fact employed by Universal.

[42] It was put to Mr Goosen that when he received the business card he could not possibly have thought that he was dealing with Mr Shikale in his personal capacity. This may very well be so and would tend to reflect upon the credibility of Mr Goosen, but it does not, to my mind, assist the defendant in its defence, which was never actually put to Mr Goosen. Mr Goosen's response was merely that he dealt with Mr Shikale personally and spoke to him personally and, by implication, that was the person with whom his employer contracted. The end result of his evidence on this point is that, in his view, Mr Shikale must be personally liable for two reasons, namely (i) because he spoke to Mr Shikale personally and dealt with him personally; and (ii) because Mr Shikale told him that he is the owner of the casino.

[43] It was put to him that the words 'Jairus Shikale EXECUTIVE CHAIRMAN' on the business card is a far cry from 'Jairus Shikale trading as Punyu Group', to which he responded that he did not know.

[44] When asked about the meaning of the expression 'a subsidiary', he responded that it is another business of a group or business. He agreed that it could possibly be a company whose shares are held by another company or a holding company. When asked whether the use of the expression 'SUBSIDIARY COMPANIES' on the reverse side of the card did not alert him to the fact that there could have been a company structure, he replied that it did not and 'even if it did I do not think that it could have bothered me that much.' This answer is surprising if one bears in mind that Mr Goosen was so adamant that he thought all along that he was dealing with Mr Shikale personally. It is also surprising for another reason. Topsec was mentioned in the lease agreement as being a 100% subsidiary of Servest (Pty) Ltd with Registration No. 1995/001580/07. Mr Goosen was well aware of this and knew that Servest was the holding company.

Bearing in mind that he had this knowledge, it is probable that he would have been alerted to the fact that Punyu Group may have been a holding company because of the fact that there was a reference to subsidiary companies on the business card.

[45] I wish to make it clear that this discussion of the evidence and the findings thereon are not aimed at showing that Mr Goosen was in fact dealing with a corporate entity, but to show that his evidence on the point that he only intended to contract with Mr Shikale in his personal capacity, lacks credibility. It seems to me just from a reading of the agreement that Mr Caffrey was under the impression that the Punyu Group was a corporate entity. On the facts before me the probabilities are that he gained that impression from Mr Shikale's business card, which, objectively speaking, does convey that impression by the use of the words 'Executive Chairman' and 'SUBSIDIARY COMPANIES'.

(ii) Johan Stoop

[46] Mr Stoop testified that he was the financial manager of Universal since April 1999 to June 2003 when he was promoted to general manager, a position which he occupied until 2009. The business of Universal was to sell, rent or lease electronic gambling machines to the casino industry. During 2002 the general manager of Universal was Mr Gideon Stone, who also had authority to negotiate and conclude agreements on behalf of Universal.

[47] Mr Stoop regularly attended Universal's management meetings where he first heard about Mr Shikale in 2001 when Universal dealt with him via the Windhoek Country Club. At a later stage Universal began to deal with him directly. On 19 March 2001 Mr Shikale had made a deposit into Universal's bank account of N\$190 260.00 for the sale to him of second hand slot machines. However, for certain reasons the deal did not go through and in November 2001 Universal refunded the money by paying it into Mr Shikale's bank account.

[48] At the time Universal was in possession of a copy of a document issued by the Secretary of the Namibian Casino Board granting authority in terms of section 38 of the Casinos and Gambling Houses Act, 1994 (Act 32 of 1994), to Windhoek Country Club and Hotel (Pty) Ltd to share in the profits of the casino conducted under the name of Jairus Shikale in the accommodation establishment known as Punyu International Hotel situated at Ondangwa (Consolidated Trial Bundle "A", p16). This authority was valid for the period 1 November 2000 to 31 October 2002. For purposes of the transaction regarding the second hand slot machines, Universal made enquiries about the validity of the underlying casino licence. It is common cause that Mr Shikale was the holder of that casino licence as set out in paragraph [18](vi) *supra*.

[49] Mr Stoop explained that it was typical for Universal to make sure that a valid licence was in place as this was required for them to do business with anyone in the casino industry. As financial manager and being part of the management team it was his responsibility to make sure that the deals Universal concluded were valid deals with valid licence holders as part of Universal's compliance plan.

[50] Some time after the money was refunded to Mr Shikale, Mr Stoop became aware from discussions at the management meetings that there were negotiations between Universal and Mr Shikale regarding the opening of a casino in Ondangwa. As the financial manager he had an interest and duty to be informed about this development as any major business dealings would affect the financial side of Universal's business, as well as its sales forecasts and the ordering of machines, all of which required him to report thereon to Universal's principals. The reports about the negotiations were made by Mr Stone. Based on these reports, his understanding was that Universal was dealing with Mr Shikale and that he would be the party with whom they would conclude any agreement. This information was in line with Universal's investigation regarding the licence holder.

[51] On 18 December 2001 Universal, represented by Mr Stone, made a written proposal for the sale of certain slot machines to 'Mr Shikale, Punyu Group,

Ondangwa'. (Consolidated Trial Bundle "A", p62-65). The proposed sale did not materialize, but a lease agreement was drawn up instead. In regard to this Mr Stoop made certain calculations which he provided to Mr Stone.

[52] The lease agreement (Consolidated Trail Bundle "C", p1-8) was to be sent to Mr Shikale for signature. The agreement was signed by Mr Stone on behalf of Universal. Mr Stoop and one Ms Jooste of Universal signed as witnesses. According to the document this occurred on 6 March 2002 at Sandton. The lease agreement describes the lessee as –

'THE PUNYU GROUP a company duly incorporated in terms of the laws of the Republic of Namibia/South Africa, represented herein by Jairus Shikale in his capacity as The Owner, duly authorised (Hereinafter referred to as "the Company").'

[53] The lessor is described as –

'UNIVERSAL DISTRIBUTORS OF NEVADA SOUTH AFRICA (PROPRIETARY) LIMITED a company duly incorporated in terms of the laws of the Republic of South Africa, represented herein by Gideon Frederick Stone in his capacity as General Manager, duly authorised (Hereinafter referred to as "the Supplier").'

[54] The lease agreement provides for someone to sign on behalf of the parties respectively as 'For: The Punyu Group, duly authorised.' and as 'For: Universal Distributors of Nevada South Africa (Pty) Ltd, duly authorised.'

[55] Regarding the agreement the following exchanges took place between plaintiffs' counsel and Mr Stoop:

'Now on your understanding of events who would have been the lessee of this equipment? --- Mr Jairus Shikale.

And if anything to the contrary appears from this document, how would you respond thereto? --- It is impossible it is in my opinion it reads Mr Jairus Shikale.

Yes, and would anything to the contrary be right or wrong? --- It would be wrong.'

[56] Mr Stoop's opinion that the document 'reads Mr Jairus Shikale' runs counter to Universal's case that the lease agreement contains a mistake, but read with the following question and answer, he appears to be stating that the lessee should have been Mr Shikale.

[57] Mr Stoop stated that he had heard of the existence of Punyu Wholesalers (Pty) Ltd for the first time only about two weeks before he testified and that it had never been suggested that Punyu Wholesalers (Pty) Ltd would be the lessee. Even if it had at some stage been proposed that Punyu Wholesalers (Pty) Ltd become the lessee, Universal would not have been allowed to deal with this company as it was not a licensed entity in terms of the relevant casino legislation.

[58] After the lease agreement was concluded Universal's focus was on sourcing equipment for the casino which had to be opened as soon as possible based on Mr Shikale's request. Mr van der Merwe of Universal was employed to put the project together and to do the procurement of equipment and to assist with the installation for the casino to open. Mr Stoop as financial manager became aware of problems in this regard, because suppliers of the equipment needed were not paid or were paid late by the defendant. He described what typically happened in such cases. Mr van der Merwe would approach him for help, whereupon he would contact Mr Ashok Iyer as representative of Mr Shikale to obtain approvals for payment from Mr Shikale. Mr Iyer would revert to state that they would be paying or when they would be paying, or, in urgent cases, with a request that Universal makes payment on their behalf. Sometimes when he did not get hold of Mr Iyer, he would contact Mr Shipanga to convey the message, but it was always Mr Iyer who would revert on behalf of Mr Shikale.

[59] With reference to Universal's consolidated statement (Consolidated Trail Bundle "C", p66) he identified the specific transactions which were concluded in terms of the above-mentioned typical procedure. He also identified the transactions in which Universal incurred liabilities for supplies to 'Punyu Casino'.

[60] This consolidated statement was sent to Mr Shikale on a monthly basis. Mr Iyer and Mr Shikale responded by giving undertakings that they would pay Universal. Payment was discussed with either Mr Shikale or Mr Iyer on various occasions. Mr Stone and Mr Stone scheduled various meetings at Ondangwa with Mr Shikale and Mr Iyer to discuss the expenses and payment. At one such meeting Mr Shikale was not present, but was represented by Messrs Shipanga, Iyer and Thambapilai, who stated that they would advise when payment would be made. It was never denied that payment would be made. A further meeting was scheduled to meet Mr Shikale regarding payment. This was the sole purpose of the meeting, but when Mr Stoop arrived at Ondangwa, he was informed that Mr Shikale was not available.

[61] Mr Stoop testified about two occasions on which payment was made for the expenses incurred. On 8 August 2002 an amount of N\$98,000.00 was paid by Ondangwa Prestige Casino (a close corporation of which Mrs Shikale was the sole member) and on the same date an amount of N\$20,500.00 was made by Punyu Wholesale. Mr Stoop was not concerned about the source of the payment, as he was all too happy that payment had been made.

[62] Mr Stoop denied the allegations made in the defendant's plea in paragraph 2 in Case No. I 2010/2003 namely that he had been specifically informed that Punyu Wholesalers (Pty) Ltd had the rights to the premises from which the casino was to be conducted. Regarding the allegations in paragraph 2.1 that he, notwithstanding that he had so been informed, insisted that the lessee must be described as "The Punyu Group", he stated that he had no such recollection. With respect to the allegations in paragraph 2.2, namely that the defendant and the parties representing Punyu Wholesalers (Pty)Ltd intended Punyu to be the lessee in the written lease agreement, Mr Stoop responded that he was not aware of that. According to him the lessee was supposed to be Mr Shikale.

[63] During cross-examination Mr Stoop stated that he was not involved in the negotiations to conclude any agreements. The lease agreement was drawn up



by Universal's lawyer, Mr Herman Krüger. Mr Stoop did not give him instructions regarding the agreement, but these should have been given by Mr Stone.

[64] Mr Stoop was referred to several invoices by Universal addressed to "PUNYU CASINO CC" (Consolidated Trial Bundle "B", p634, 635, 636, 645, 648, 651 and 652. After this exercise, it was put to Mr Stoop that there is no invoice in the bundle which is addressed to Mr Shikale personally. Mr Stoop was invited to state whether he knew of any document or invoice of this nature, to which he responded that he did not.

(iii) Herman Krüger

[65] Mr Krüger is a legal consultant to the gambling industry since 1997. From his employment prior to that he has gained considerable experience in drafting legislation regarding gambling in South Africa and was involved in setting up the first Gambling Board in South Africa. Universal has been a client since 1997.

[66] During about 2002 Universal approached him to draft a standard lease agreement for gambling equipment and a standard casino management agreement. His instructions regarding the lessee were that it was the Punyu Group, with the owner, Mr Shikale. Given the fact that both parties to the agreement are *ad idem* that the description of the lessee is wrong, Mr Krüger commented in the witness box, 'Well, hindsight (*sic*) it is a wonderful thing'. He proceeded to explain that South African gambling legislation prohibits, *inter alia*, the supply (which includes the maintenance) of any gambling equipment to a natural person or corporate body that is not licensed under that legislation. In terms of the legislation every licensee must have a comprehensive compliance plan approved by the particular gambling board to ensure compliance with the legislation. With this in mind it was his responsibility, when Universal did business with another party in the gambling industry, to ensure that the business met the requirements of the compliance plan. One of these requirements would be to ensure that the party is licensed.

[67] Mr Krüger checked on the valid holder of the casino licence in this case and received confirmation that it was Mr Shikale. In regard to this he stated:

‘So ....., we are Universal, my client should deal with Mr Shikale. So in hind sight (*sic*), when I look back, it should have stated that the contracting party should have been Mr Shikale in his personal capacity and trading as the Punyu Group. That is how I would rectify it if I can. Obviously it is after the fact.’

[68] He further explained that he did not view the Punyu Group as a registered entity and he was also not instructed at the time that the Punyu Group was a company incorporated under the laws of Namibia or South Africa. His explanation for the presence of words indicating this in the contract is that it was a standard agreement on which he worked from a template and that he neglected to remove the words as an oversight. He made sure that Mr Shikale was mentioned as “the owner”, because he knew that Mr Shikale held the licence and that was important from a compliance point of view.

[69] The draft contract was sent to Mr Shikale and his lawyers and he discussed it telephonically with the lawyers regarding some proposals for minor changes. He said they had ample opportunity to look at it and so had his client.

[70] Early in 2002 he flew to Windhoek with Mr Stone to attend a signing ceremony at the Windhoek Country Club. His recollection is that Mr Goosen also accompanied them. He met Mr Shikale and his lawyer, Mr Thambapilai there. Mr Shikale handed him his business card. (This business card is the same as the one that was given to Mr Goosen). Nothing on the business card made him uncomfortable about the manner in which he had drafted the contract. He sat down with Mr Thambapilai and they went through the agreements in detail. Mr Thambilai was very satisfied with the agreement, except that he proposed the inclusion of an arbitration clause in the management agreement. They agreed to add this later and not to delay the signing of the agreement. There was no objection to the description of the lessee in the lease agreement. After their discussion Mr Thambapilai discussed the agreements with Mr Shikale, who also

read it. (I pause to note here that, although Mr Krüger at times mentioned 'the agreement' in the singular, I think it must be taken that he meant to refer to the lease agreement and the management agreement). He was not privy to their discussions, but there were no objections to the agreements. The agreements were then signed by Mr Shikale and Mr Stone, for Universal. Mr Goosen (for Topsec) also signed an agreement. There were several people at the signing ceremony, including a deputy minister, presumably to represent the Namibian Government. The meeting occurred in a very friendly atmosphere.

[71] Mr Krüger further explained that he thought that the Punyu Group was a group of companies of which the owner was Mr Shikale and that Mr Shikale traded as the Punyu Group. However, he never verified whether any of the entities mentioned were indeed registered companies.

[72] On 7 March 2002 Mr Thambapilai faxed a letter dated 5 March 2002 to Mr Krüger in which he addressed the issue of the arbitration clause in the management agreement with Universal Projects (Consolidated Trial Bundle "A", p171-172). He suggested that it be incorporated into the already signed agreement by way of an addendum to the agreement. He enclosed the addendum for approval and signature. The addendum makes provision to be signed 'for and on behalf of THE PUNYU GROUP duly authorised thereto' (Consolidated Trial Bundle "A", p182). Although Mr Krüger did not know who the author was of the addendum, the probabilities are that it was Mr Thambapilai.

[73] On 10 September 2002 Mr Iyer sent a letter to Mr Krüger on the letterhead of "THE PUNYU GROUP" in which certain matters relating to a 'dissension of views' between Punyu Group and Universal regarding the casino are addressed (Consolidated Trial Bundle "B", p629). In the letter Mr Iyer inter alia states:

'Mr Jairus Shikale happens to be the owner of the casino and was acting well within his stipulated rights to, in trying to find out the state of affairs of the casino.'

[74] When asked whether the reference to Mr Shikale being the owner of the casino corresponds in any manner to his understanding of what the position was

prior to the conclusion of the agreement(s), he answered that it corresponded completely as Mr Shikale was the owner of the casino licence granted by the Gambling Board of Namibia.

[75] Mr Krüger testified that several discussions and meetings took place between him on behalf of Universal and lawyers representing Mr Shikale regarding the issue of payment to Universal and about casino staff. It was difficult to reach agreement because Mr Shikale kept changing lawyers. In fact, during the period of his involvement he worked with four different legal practitioners representing Mr Shikale. At one such meeting at the end of November 2002 a newly appointed lawyer, Mr Mostert, represented Mr Shikale, The next morning Mr Shikale himself attended a further meeting during which Mr Stoop gave all documentary proof regarding outstanding payments to be made to Universal. During this meeting Mr Shikale again confirmed commitment to the casino project and promised payment.

[76] During cross-examination counsel for the defendant confronted Mr Krüger (as he did with Mr Goosen) with the fact that the lease agreement states that it was signed in Ondangwa on 4 March 2002 by the lessee and on 6 March 2002 in Sandton by Universal. Mr Krüger re-iterated that the agreement was in fact signed in Windhoek during the signing ceremony, but that witnesses did not sign then. The original was taken to Ondangwa. On the invitation of counsel he speculated that the witnesses signed there and that the date and place were inserted then and that the original was then sent to Universal in Sandton where the witnesses signed and the date and place were inserted. I pause here to state that in spite of defendant's witness, Mr Shipanga's, evidence to the contrary, Mr Krüger's explanation appears to me to be the most probable explanation. I see no reason not to accept the detailed evidence by both Mr Goosen and Mr Krüger that a signing ceremony and celebration took place in Windhoek, during which all the written agreements were signed. In any event, nothing of substance turns around this issue, except the credibility of the witnesses, as counsel for the defendant made clear.

[77] Mr Krüger was asked when he realized that the description of the lessee in the lease agreement was incorrect. He could not give a precise date, but stated that he eventually realized it when the problems between the parties started. Counsel for the defendant put it to him that he had actually not realized it at all, judging from certain correspondence to which he referred. The one letter was written by Mr Krüger on 6 August 2002 to Mr Thambapilai (Consolidated Trial Bundle "C", p45) in which letter he still refers to the Punyu Group as being the party to what appears to be a reference to the management agreement with Universal Projects. The other is a letter written by Mr Krüger on 29 August 2002 to Mr Mostert (Consolidated Trial Bundle "C", p47) in which letter he continues to refer to the Punyu Group as being the party to the management agreement. In neither of these two letters is there any reference to Mr Shikale personally.

[78] Mr Krüger was also confronted with an undated letter which he wrote on, what seems to be a date shortly after the letter dated 29 August 2002, to "The Managing Director, The Punyu Group", for Mr Shikale's attention (Consolidated Trial Bundle "C", p49). It was put to him that, as he used the words "Managing Director", he could only have had a company in mind. He responded that the letter was a standard letter, that the use of the words "Managing Director" was unfortunate and that he knew at the time that The Punyu Group was not a company.

[79] Mr Krüger was next referred to a letter he wrote on 3 March 2003 to Mr Mostert (Consolidated Trial Bundle "C", p54) on behalf of Universal and Techpro in which the Punyu Group was still considered to be liable in terms of the lease agreements and the management agreement. No reference is made to any liability by Mr Shikale personally. He was asked whether, if by this time he had realized that it is Mr Shikale that is personally liable and not this Group, he would not have sent a letter to say that Mr Shikale is personally liable and that he had realized the mistake. To this he replied that all negotiations with the lawyers always had to be referred to Mr Shikale, that the latter's lawyers also always referred to the Punyu Group as the party involved and that it was never denied that Mr Shikale was the owner. He regarded Mr Shikale as being in charge.

When it was suggested to Mr Krüger that in his mind Mr Shikale was in charge as a managing director, thereby conveying that in his mind there was an absence of any indication that Mr Shikale was personally liable, Mr Krüger gave the following rather startling answer:

'All what I want to say is, I know the circumstances, because as I said, when I met Mr Shikale he gave me his business card, the Punyu Group Executive Chairman and with all the companies on the back, so I knew exactly what the set up was.'

[80] In my view no reasonable person who looked merely at the business card could have concluded that Mr Shikale was acting in a personal capacity.

[81] With due respect to Mr Krüger, I regret to say that his evidence in regard to this aspect is inconsistent and confused. It leaves me with the overall impression that his explanations after the fact are just not convincing. The following further exchanges between counsel for the defendant and the witness give further insight into the nature of his testimony:

'MR BARNARD: Let us deal with that. .... In your testimony in chief you said Punyu is a group of companies, yes, you said yes, you saw that. And your testimony was to the effect that when you received the card and you saw the business card you were not concerned with the description in the agreement. Is that correct? --- Yes.

Because you thought it was accurate? --- No, not accurate, I said I would rather redraft that, in the sense that Mr Shikale trade as (intervention)

Mr Krüger now you are not speaking the truth. Please forgive me to say that. --- I am (intervention)

Just a second. You at a very late stage you said yourself, testified that you realised the problem of the description is that not correct? --- That is true.

So at a later stage, you realised the description ... [is] the problem, correct? --- It is not a problem (intervention)

Yes or no. --- It is not a problem for me.

Or let me put it this way. At a very late stage you realised that it should have been Mr Shikale trading as the Punyu Group and not the company? --- Not the company.

At a late stage? --- I do not know when but later on.

Yes. And most definitely it did not occur to you at the time of the signing of the agreement because it is at very early? [was at a very early stage]? --- No it did not.

Then you cannot testify what you just testified? That at that stage, when you received the business card and you compared it to the description on the agreement, the issue of Mr Shikale being personally liable was not in your head at all? --- You must remember, when I got the business card it was the first time I have met Mr Shikale at the signing of the agreement.

You are not answering my question? --- What is the question?

At the time when you received the business card, the liability of Mr Shikale personally was not in your mind, you have not thought about it, you have not realized that yet? --- No, I knew he was the chairman of the whole company, because his card says that. ([my underlining])

[82] As far as I can make out, Mr Krüger must be taken to have stated that he knew, not that he thought, that Mr Shikale was representing a company. A comparison of this evidence with his evidence-in-chief, namely that he thought that the Punyu Group was a group of companies of which the owner was Mr Shikale and that Mr Shikale traded as the Punyu Group, further illustrates the confusion.

[83] I take note of the fact that Mr Krüger was intent upon mentioning that Mr Shikale was the 'owner'. He never explained what he meant by this. Did he have in mind a sole member and director, in case of a company, or a sole proprietor, in case of a firm or unincorporated business? This question cannot be answered on the basis of his evidence.

(iv) Pieter van der Merwe

[84] Mr van der Merwe testified in regard to Case No. I 2008/2003. Towards the beginning of 2002 he was appointed by Universal to deal with the procurement of equipment for the casino at Ondangwa. He was given a list of requirements to set up the casino and then conducted a site visit to establish what equipment was needed. He was met by Mr Iyer and taken to the hotel where the casino was to be erected. He met Mr Shikale and Mr Shipanga, but he always dealt only with Mr Iyer.

[85] After he established the needs he began with the procurement process. Typically this involved him obtaining quotations which he forwarded to Mr Iyer for approval by Mr Shikale. If approval was given and payment made, he would procure the items quoted for. He gave a specific example of chairs which were needed for the casino. A quotation was obtained and sent to Mr Iyer for approval by his boss, Mr Shikale. The supplier would not have delivered without payment first. Payment was to be made directly (by the Punyu Group) to the supplier and delivery took place. The same process was followed with respect to certain casino tables. He referred to an example of a covering letter by him for invoices and quotations forwarded to 'PUNYU GROUP' for the attention of Mr Iyer (Consolidated Trial Bundle "B", p338).

[86] Problems occurred when the Punyu Group did not pay the suppliers. In fact payment was very slow, if at all. There was considerable pressure to finalise the procurement because the casino had to open. When payment was not forthcoming, Mr van der Merwe would involve Mr Stoop. After a while he was told that the problems had been resolved and he could go ahead. Mr van der Merwe recorded progress on the procurement in a document which he updated from time to time. The document before the Court contained particulars as at 29 April 2002 (Consolidated Trial Bundle "A", p306-309). The document records in paragraph 6 that certain ' ... Shipping costs would be paid by Punyu before ZATrans would ship.'

[87] On one occasion in response to his continuous phoning and requesting payment of invoices, Mr Iyer went so far as to fax him a copy of a letter dated 13



May 2002 written by Mr Shikale to Standard Bank, Ondangwa, on the letterhead of "THE PUNYU GROUP" and ending with 'For The PUNYU GROUP J Shikale' (Consolidated Trial Bundle "A", p340-341). In this letter Mr Shikale states: 'Please debit our Ohangwena Markets a/c with your bank and effect the following transfers ....', followed by a list of transfers, some of which were payment for items procured by Mr van der Merwe for the casino. Mr Iyer did this to prove to Mr van der Merwe that Punyu Group had in fact instructed its bankers to make payment, albeit from another entity's bank account. However, it transpired that some of the transfers were in fact not made.

[88] On 20 May 2002 Mr van der Merwe addressed a letter on behalf of Universal to 'PUNYU GROUP' for attention of Mr Iyer and requested urgent payment for more invoices (Consolidated Trial Bundle "A", p372).

[89] Approximately one week before the opening of the casino, Mr van der Merwe travelled to Ondangwa with Messrs Stone and Stoop. They had a meeting with Mr Shikale, one 'Reggie', Mr Iyer and possibly Mr Thambapilai. The purpose of the meeting was to solicit payment of outstanding invoices. At the start of the meeting Mr Stone gave Mr Shikale a gift as a way to smooth things over. Whenever Mr Stone asked for payment Mr Shikale would change the subject by complaining about Mr Liebenberg.

[90] Mr van der Merwe testified that throughout his dealings with the casino he has never heard of entity by the name of Punyu Wholesalers (Pty) Ltd. It was never communicated to him that Punyu Wholesalers (Pty) Ltd would have been liable for payment of any invoices he sent on behalf of Universal or arising from quotations he provided.

[91] During cross-examination Mr van der Merwe acknowledged that he did not know who owned what business in relation to the business structure of Mr Shikale and the Punyu Group. His impression was that everything belonged to Mr Shikale. His impression was that Mr Iyer was employed by Mr Shikale as he referred to Mr Shikale for everything.

[92] This witness generally made a good impression on me.

(v) Paul Vorster Liebenberg

[93] He testified in relation to Case No. I 2011/2003. He was employed by Universal as the general manager of the casino before the opening date on 22 August 2002 until he resigned in March 2003. He dealt with Messrs Shikale, Iyer and Shipanga and after the opening he had some dealings with Mrs Shikale. Mr Shipanga was not really involved, in fact he appeared to doze off in meetings.

[94] There were many problems with the electrical reticulation and he obtained a quotation from Mr Goosen at Techpro to send an expert to investigate the problem. Mr Liebenberg took the quotation to Mr Shikale and discussed it with him and Mr Iyer. They accepted the quotation. The invoice by Techpro found at p64 of the Consolidated Trial Bundle "C" and addressed to Punyu Casino refers to this. He took this invoice to Mr Shikale who agreed to pay it.

[95] The expert recommended the installation of a UBS. Again Mr Goosen provided a quotation which was taken to Messrs Shikale and Iyer. Again Mr Liebenberg was told that they would pay and he conveyed this to Mr Goosen. The invoice at p65 of Consolidated Trial Bundle "C" and addressed to Punyu Casino relates to these costs. He took the invoice to Mr Shikale who said they would pay it.

[96] The same procedure was followed with regard to the supply of casino related equipment as reflected in the invoices at p61, 62 and 63 of Consolidated Trial Bundle "C".

[97] Mr Shikale took all the decisions regarding the casino. He, for instance, refused to sign for a fax, photocopier and shredder. Mr Shikale also transferred an amount of N\$200 000 from the casino bank account to his personal account.

[98] Punyu Wholesalers (Pty) Ltd was a company about 3km away from the casino. Mr Shikale's office was there. The company sold food, blankets, buckets,

etc and had no involvement with the casino, which was referred to as “Punyu Casino”. In Mr Liebenberg’s view the casino was owned by Mr Shikale.

[99] Under cross-examination Mr Liebenberg testified that he had no firsthand knowledge of the business structure of Mr Shikale and the Punyu Group, but in his view Mr Shikale was the owner of the casino because he made all the decisions.

[100] This witness made a good impression on me.

#### Summary of testimony by defendant’s witness

##### Ndangi Shipanga

[101] Mr Shipanga first met Mr Shikale in the 1970s. They were friends and brothers-in-law, Mr Shikale having been married to Mr Shipanga’s sister until his death. Mr Shipanga was appointed in 1990 as the general manager of Mr Shikale’s businesses, which were several retail shops.

[102] When Mr Shikale passed away in 1996 there were no businesses in his personal name. The implication of this statement would appear to be that at some stage at least some businesses were in Mr Shikale’s name. Mr Shipanga did not give any details of the stage from when and in respect of which businesses Mr Shikale was no longer the proprietor.

[103] Mr Shipanga testified that he started discussions with Mr Stone regarding the casino project in 2001. The discussions included the lease of machines and surveillance equipment, as well as the management agreement. The Topsec lease agreement, the Universal lease agreement and the management agreement were signed by Mr Shikale at Ondangwa on 4 March 2002, at which occasion Mr Shipanga appended his signature as witness and also filled in the date and place. Mr Iyer also signed as witness on the same occasion. The agreements were still to be signed by the other parties. (I pause here to note that I have already stated that I find the version plaintiffs’ witnesses that the agreements were signed in Windhoek more probable).

[104] Mr Shipanga testified that he read the agreements before he signed them. He 'felt then they were concluded with a company.' He did not advise Mr Shikale of anything in regard thereto because 'I thought he was acting or representing the company.' He did not give a satisfactory explanation why he did not advise Mr Shikale against the reference to the Punyu Group in the light of the fact that the Punyu Group was not a company.

[105] This witness gave evidence about the structure and ownership of Mr Shikale's businesses. This evidence was contradictory, often unclear and did not always make sense. I must say, with respect to him, that the impression I have is that he did not fully understand the difference between a natural person and a corporate body, specifically a company or a close corporation, or the nature of an unincorporated business conducted by a sole proprietor. For instance, at one stage he stated that there is no difference in his mind between 'Jairus Shikale trading as Punyu Group or Punyu Wholesalers [(Pty) Ltd] trading as Punyu Group'. When asked to describe the difference between a natural person and a company his response was, 'A person is a person and a company is a company', which is hardly illuminating. Curiously, he repeatedly stated that no mistake was made in the description of the lessee in the Topsec and Universal lease agreements as "The Punyu Group", although this was already admitted by the defendant in the pleas on the limited issues. At a certain stage of the cross-examination he appeared to concede that Mr Shikale was conducting the casino business, although he seemed to retract this later. He also stated at a certain stage that, when Mr Shikale applied for the casino licence he intended to have the casino under his own name as a licence holder, i.e. Jairus Shikale, trading as Punyu International Hotel. At other times he was reluctant to concede that Mr Shikale acted in a personal capacity when conducting his businesses, stating that he never acted for his own benefit, but rather for the benefit of the business or the company. From this evidence I gained the impression that he was under the impression that if he concedes that Mr Shikale acted personally trading as the business, it would necessarily mean that Mr Shikale acted only for his own benefit and not for the benefit of the business, which does not necessarily follow.

[106] In 1997 Mr Shikale caused a company, Punyu Wholesalers (Pty) Ltd, to be registered. Mr Shikale was the sole shareholder and director. According to Mr Shipanga, the purpose of this company was to have all Mr Shikale's businesses operate 'within a company.' All Mr Shikale's businesses were 'registered' under this company, it being like an 'umbrella' company. These businesses were those listed as 'SUBSIDIARY COMPANIES' on the reverse side of Mr Shikale's business card. Mr Shipanga did not state whether any of the businesses other than Punyu Wholesalers (Pty) Ltd were corporate bodies or not. There is no such evidence, with the exception of Punyu Wholesale, if that name is to be taken to be a reference to Punyu Wholesalers (Pty) Ltd. According to him, Mr Shikale did not continue doing business in his own name. The name "PUNYU GROUP" was mainly used to refer to all the businesses 'operating within' Punyu Wholesalers (Pty) Ltd. I pause to note here that there is no evidence to show that Punyu Wholesalers (Pty) Ltd ever traded as any of these businesses.

[107] According to Mr Shipanga the management of Punyu Group consisted of Mr Shikale, Mr Shipanga and Mr Iyer, the accountant. Mr Shipanga's duties were the day to day administration of the business and to conclude business deals. Mr Shikale was also involved when it came to negotiations on new business ideas and the conclusion of agreements, including the signing of agreements. I pause here to mention that there is a dispute on the facts whether Mr Shipanga was involved in the negotiations regarding the lease agreements and the initial stages of the casino project. On his evidence he created the impression that he was the one that was actually doing the negotiations. Messrs Goosen, Stoop and Mr Krüger do not place him in such prominent a position. I am inclined to accept their evidence on the issue. Besides, the casino project was a new business involving major expenses. I do not think it at all probable that Mr Shikale, being the 'owner', as Mr Shipanga repeatedly referred to him, would have left the negotiations in someone else's hands.

[108] The business "Punyu Hotel" had another name as well, namely Punyu International Hotel. It operated from premises that are owned by Punyu Wholesalers (Pty) Ltd. According to him, the latter is the owner because the

premises were constructed with its funds. I pause to note that this conclusion, just as it stands, is untenable in law, as Mr *Korf* pointed out. Mr Shipanga was referred to a document (Consolidated Trial Bundle “C”, p59) which is a permission granted on 9 August 2009 by the Ministry of Lands, Resettlement and Rehabilitation to Punyu International Hotel to occupy an unsurveyed business site situated at Oniihandi for the purpose of a restaurant, bar and casino. This corresponds with the description on the casino licence. There is no mention of Punyu Wholesalers on this document. Yet Mr Shipanga testified that the property referred to is in fact Punyu Wholesalers (Pty) Ltd. Under cross-examination he was constrained to concede, in effect, that it cannot be read into the document that Punyu Wholesalers (Pty) Ltd holds the rights to the premises. Clearly the document does not support the defendant’s contention as set out in its pleas on the limited issues that Punyu Wholesalers (Pty) Ltd held the rights to the premises. It also does not support the Mr Shipanga’s contention that the casino fell under Punyu Wholesalers (Pty) Ltd.

[109] According to Mr Shipanga the casino business was started in 2002 after Mr Shikale acquired a casino licence. The reason why the licence is in his name is because the first application, made in the name of Punyu International Hotel had been rejected, the reason being, as he was advised, that such applications cannot be made in the name of a business, only in the name of an individual, i.e. a natural person.

[110] Mr Shipanga explained under cross-examination that he completed both application forms. The 1994 prescribed application form was shown to him. This form, which in terms of section 17 of the Act, is the form which an applicant for a casino licence under section 16 must complete, makes clear provision for an application by a natural person, a company, a close corporation, a partnership or any other association of persons. Mr Shipanga could not remember the forms he completed and whether they were exactly the same as the prescribed form shown to him. The probabilities are that he completed the prescribed form. He must therefore have seen that it makes provision for a company, as these provisions are prominent in the form.

[111] In my view the probabilities are that he did not intend to make application in the name of a company when he first completed the form giving “Punyu International Hotel” as the name of the applicant. There was clearly no intention to apply in the name of Punyu Wholesalers (Pty) Ltd, which is the only company in the Punyu Group of which there is any evidence before the Court that it actually existed at all relevant times. As section 13(1) of the Act provides that a casino licence shall not be granted to any person other than a person who conducts an accommodation establishment, I can only deduct that Punyu Wholesalers (Pty) Ltd did not conduct the accommodation establishment known as the Punyu International Hotel, otherwise the company would have applied for the licence. Punyu International Hotel itself was clearly not a company, otherwise it would have applied for the licence under its own name with reference to its corporate identity, (eg “(Pty) Ltd”). Mr Shipanga testified that he was advised by the consultant who handled the application that the application should be in the name of a natural person. In view of the provisions of the Act, this would make sense, because Punyu International Hotel was not a corporate body. This would explain why Mr Shikale, being the owner of the Hotel, applied as the person conducting the accommodation establishment as required by section 13(1) of the Act and why the licence was granted stating this.

[112] This brings me to Mr Shipanga’s description of Punyu Wholesalers (Pty) Ltd as being the company “under” which all the other businesses were “registered.” Although these other businesses were described as being “SUBSIDIARY COMPANIES”, the impression one has from the business card is that they are subsidiary companies of an entity called PUNYU GROUP and not of Punyu Wholesalers (Pty) Ltd. As I stated before, there is no evidence that any of them were in fact companies, except the entity listed as “Punyu Wholesale”. The name is not quite the same as “Punyu Wholesalers”, but it is unlikely that there would be two companies with almost identical names. The probabilities are, then, that Punyu Wholesalers (Pty) Ltd or (“Punyu Wholesale”) is listed as a subsidiary company in the Punyu Group. This does not fit in with the description Mr

Shipanga gave of Punyu Wholesalers (Pty) Ltd actually being the 'umbrella' company.

[113] Apart from Mr Shipanga's unsatisfactory evidence about the businesses being "registered under" the so-called umbrella company, there is no evidence that Punyu Wholesalers (Pty) Ltd ever traded as any of the listed businesses. Instead Mr Shipanga's evidence is replete with references to Mr Shikale being the owner of the businesses, the owner of the casino, the owner of the Hotel, the owner of Punyu Group, etc. He even stated at one stage during cross-examination that the reason why the Universal lease agreement states that Mr Shikale acts in the capacity as owner of Punyu Group was because Mr Shikale was the owner of Punyu Group. I have considered whether all these references should not merely be attributed to a layman's understanding of the relationship between a company and its sole member, but I do not think this explanation would fit into all the surrounding facts.

[114] If these businesses were not corporate bodies, Mr Shikale as the owner and *alter ego* was in truth trading as those businesses. In this case there is clear evidence that the casino was not a corporate body at the time the agreements in all the cases were concluded. The preponderance of probabilities indicates that the Punyu International Hotel was not a corporate body either. I reject any suggestion that Punyu Wholesalers (Pty) Ltd was the party who was in truth the lessee under any of the two lease agreements or that the oral agreements *in casu* were in truth concluded with Punyu Wholesalers (Pty) Ltd.

[115] The defendant's pleas on the limited issues set out very specific allegations that Messrs Stone and Stoop and parties representing them and their principals, insisted that the party contracting with the lessors and the suppliers of the goods and services be described as "The Punyu Group", notwithstanding the fact that Messrs Stoop and Stone had specifically been informed that Punyu Wholesalers (Pty) Ltd had the right to the premises from which the joint venture was to be conducted. None of these allegations were ever put to any of plaintiffs'



witnesses. Even Mr Shipanga for the defendant did not testify in support of these allegations, except when some questions around this were posed to him in cross-examination.

[116] During cross-examination Mr Shipanga repeated at one stage that on 4 March 2002 the casino was one of the businesses falling under Punyu Wholesalers (Pty) Ltd, that it was owned by Punyu Wholesalers (Pty) Ltd and that all the rights and obligations vested in the latter. He continued to state that it was still the position (at the time he testified) and that the casino licence was still in the name of the late Mr Shikale, although the casino shut down in 2003.

[117] At some time after the agreements were signed, a close corporation by the name of Ondangwa Prestige Casino CC (hereinafter "OPC") was registered. Its sole member was Mrs Shikale. Mr Shipanga testified that the purpose was that OPC should conduct the business of the newly opened casino. Mr Shipanga agreed under cross-examination that OPC could not have been a party to the two lease agreements because it did not exist at the time they were concluded. However, Mr Shipanga was confronted with three affidavits, which, it is common cause, that he had made at an earlier stage of the litigation on 31 October 2003 when he deposed to affidavits in opposition to applications for summary judgment in Case No. 2008/2003, Case No. 2009/2003 and Case No. 2011/2003. In these affidavits he stated that the owner of the casino is OPC. It is abundantly clear that this version cannot be true in the light of Mr Shipanga's testimony that the owner of the casino was and still is Punyu Wholesalers (Pty) Ltd, and *vice versa*. The discrepancy was not clarified in re-examination. This casts a dark shadow over Mr Shipanga's credibility.

[118] He was further confronted with a confirmatory affidavit deposed to during November 2006 in which he confirms certain instructions given to a legal practitioner for the defendant when he made an affidavit to support an application for leave to amend the defendant's pleas. The gist of the instructions is that OPC was the owner of the casino when the management agreement was concluded, which was at the same time that the two lease agreements were concluded and

that in truth the agreement was entered into with OPC. Mr Shipanga sought to explain these instructions by saying that the intention during March 2002 was to register OPC, but that it was only done later. The fact of the matter is, though, that nothing about this intention was stated anywhere in the agreement. The affidavit also did not explain this, but made bald statements about the role of OPC as if it existed at all relevant times. Interestingly, the amended pleas eventually filed at a very late stage in February 2011 make all the same allegations, except that Punyu Wholesalers (Pty) Ltd is mentioned in the place of OPC. Mr Shipanga provides no explanation for this. I am not impressed at all by Mr Shipanga's evidence in general. It seems to me as if he has no qualms to turn his sails to the wind in an effort to pin liability for the plaintiffs' claims to a corporate entity at all costs.

#### Principles relating to rectification

[119] Since the decision in *Weinerlein v Goch Buildings Ltd* 1925 AD 282 it is trite that an action for rectification may be brought where there has been a mistake in the written document as a result of which the document does not correctly reflect the true intention of the parties to such contract. In *Benjamin v Gurewitz* 1973 (1) SA 418 (A) the court, referring to old authorities quoted by DE VILLIERS, J.A., at p. 289 of the *Weinerlein* case and stated (at p426C-D):

'..... the broad underlying principle of the doctrine of rectification is that in contracts regard must be had to the truth of the matter rather than to what has been written, and the mistake must yield to the truth.'

[120] In *Tesven CC and Another v South African Bank of Athens* 2000 (1) SA 268 (SCA) ([1999] 4 B All SA 396) the court stated in para [16]:

'To allow the words the parties actually used in the documents to override their prior agreement or the common intention that they intended to record is to enforce what was not agreed and so overthrow the basis on which contracts rest in our law: the application of no contractual theory leads to such a result.'

[121] The essential allegations for rectification as a claim were set out in *Denker v Cosack and others* 2006 (1) NR 370 (HC) as follows at (p374E-I) (and approved in *Namibia Broadcasting Corporation v Kruger and others* 2009 (1) NR 196 (SC) at p224F):

'Essential allegations for rectification as a claim

It has been held that the following facts must be alleged and proved:

- (a) an agreement between the parties which had been reduced to writing;
- (b) that the written document does not reflect the common intention of the parties correctly. In *Benjamin v Gurewitz* 1973 (1) SA 418 (A) at 425H Van Blerk JA says that in reforming an agreement all the Court does is to allow to be put in writing what both parties upon proper proof intended to be put in writing and erroneously thought they had (cf *Meyer v Merchants' Trust Ltd* 1942 AD 244 at 253);
- (c) an intention by both parties to reduce the agreement to writing;
- (d) that there was a mistake in the drafting of the document. See *Von Ziegler and Another v Superior Furniture Manufacturers (Pty) Ltd* 1962 (3) SA 399 (T) at 411F-H. Rectification and unilateral mistake are mutually exclusive concepts. See *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A);
- (e) the actual wording of the agreement as rectified. See *Levin v Zoutendijk* 1979 (3) SA 1145 (W) at 1147H-1148A.'

[122] In argument before me Mr *Barnard* for the defendant emphasized what was stated in *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004 (6) SA 29 (SCA) at p39J-39A when the court expressed itself as follows:

'...it is clear that the remedy of rectification is not one which easily lends itself to a fallback position by way of afterthought. It is a settled principle that a party who seeks rectification must show facts entitling him to that relief 'in the clearest and most

satisfactory manner' (per Bristowe J in *Bushby v Guardian Assurance Co* 1915 WLD 65 at 71; see also *Bardopoulos and Macrides v Miltiadous* 1947 (4) SA 860 (W) at 863 and *Levin v Zoutendijk* 1979 (3) SA 1145 (W) at 1147H - 1148A).'

[123] In approaching the matter I bear in mind that –

'Proof of an antecedent agreement may be the best proof of the common intention which the parties intended to express in their written contract, and in many cases would be the only proof available, but there is no reason in principle why that common intention should not be proved in some other manner, provided such proof is clear and convincing.' (*Meyer v Merchants' Trust Ltd* 1942 AD 244 at 253).

[124] In the *Bardopoulos* case the court indicated (at p 863 – 864) that -

'.....where the common intention is to be shown not by any writing but by verbal evidence, the Courts may have great difficulty in determining whether there was a mistake in the written contract. These cases do not, I consider, require more than a balance of probability in favour of the party seeking rectification but indicate that such a claim is in fact difficult to prove.'

[125] Mr Barnard submitted with reference to Christie, *The Law of Contract in South Africa*, (5<sup>th</sup> ed) p 22-24 that in order to decide whether a contract exists one looks for the true agreement of two parties, and because such agreement can only be revealed by external manifestation, one's approach must of necessity be generally objective. This shall be my approach.

#### The management agreement

[126] Although no relief is sought with regard to the management agreement itself, it plays an important part in the cases before me. It forms part of the objective facts on the external manifestation of the common intention of the parties on the other agreements and explains the oral agreements on which the plaintiffs rely *in casu*. I am ultimately of the view that Universal intended throughout to contract with the same party. I shall now deal with it in more detail.

[127] As I have stated, Mr Krüger drew up this agreement on instructions of Universal. It is common cause that the casino was to be managed in terms of the

management agreement by persons who had the necessary expertise and the intention was that Universal would assist in this regard.

[128] The management agreement (Consolidated Trial Bundle “C”, p21 – 41) records that it is entered into between ‘THE PUNYU GROUP ... of Ondangwa, Namibia (hereinafter called the Company)’ and Universal Projects, called ‘the Management.’ It is common cause that the intention was that Universal would see to the incorporation of Universal Projects, but this never occurred. The parties therefore accepted that the agreement was actually with Universal. The agreement records the following in a preamble:

‘WHEREAS the Company is the owner of the immovable property described in the permission to occupy dated 9 August 1999.

AND WHEREAS the company operates a hotel on the property under the name and style of Punyu International Hotel;

AND WHEREAS the company has applied to the Casino Board of Namibia for the issue to him of a Casino License and the Casino Board of Namibia granted the same in respect of premises (*sic*).

AND WHEREAS the Company requires an operator to manage the casino and recognizes that the Management (*sic*) of the casino will require special expertise.

AND WHEREAS the Company wishes to delegate the Management (*sic*) to Universal Projects (Pty) Ltd to manage the Casino subject to the terms and conditions set out herein.’

[129] The word ‘Company’ is defined in the definition clause as ‘The Punyu Group’ and the word ‘casino’ is defined as meaning ‘the licensed casino operation to be carried out on a portion of the Site. The word ‘Site’ is defined as meaning ‘\*\*\*\*, approximately \*\* hectares in extent’. It appears that the intention was to describe the site with more particularity but that this was eventually not done. In clause 2.1 and 2.2 the following is recorded:

- '2.1 The Management has considerable experience of and acknowledged expertise in carrying on and managing casino businesses.
- 2.2 It has been agreed that the Management shall manage the casino for and on behalf of the Company upon the terms and subject to the conditions hereinafter set out.'

[130] The following clauses are relevant *in casu* (the omissions are mine):

- 3.1 From the date hereof until the opening date the Company shall at its sole cost ..... construct, fit out, furnish and decorate the casino as and for a licensed casino to internationally recognized standards.
- 3.2 The Company shall at its sole cost provide all of the equipment for the casino (and such other equipment as the Management reasonable (*sic*) considers necessary or desirable for the operation of the Casino (*sic*) and all of the gaming equipment and security equipment (and such other equipment as the Management reasonable (*sic*) considers necessary or desirable for the operation of the casino).
- 5.2 .....the Management shall have the power to enter into contracts in the ordinary course of business on behalf of the Company in relation to the casino and shall have power to do all acts and things in the ordinary course of business which it may consider necessary for the purposes of the casino .....
- 6.1 During the continuance of this agreement the company shall:-
- 6.1.6 procure that all necessary service (*sic*) (including but not limited to gas, electricity, heating, lighting, water supplies and waste services) are supplied for the purposes of the casino and further procure that all necessary repairs or replacements in connection with such services are properly carried out;'

[131] The *domicilium citandi et executandi* of the Company is given as 'The Punyu Group, P O Box 247 Ondangwa, Namibia'.

[132] The management agreement was signed by Mr Shikale 'for and on behalf of **THE PUNYU GROUP** being duly authorised thereto'.

[133] It is common cause that Mr Liebenberg was the casino manager appointed in terms of this agreement. As such he was in terms of the agreement authorised to enter into agreements on behalf of the Company as defined.

[134] Mr Shipanga testified with specific reference to the first, second fourth and fifth paragraph of the preamble that the words “the Company” are references to Punyu Wholesalers (Pty) Ltd, in spite of the fact that the word “Company” is defined in the definition clause as “The Punyu Group”. He gave no specific motivation for this, but I think it would be fair to say, given his other evidence about Punyu Wholesalers (Pty) Ltd being the so-called umbrella company, that he probably based this interpretation on the same point of view. Mr Shipanga was interpreting the agreement rather than giving evidence about the intention of the parties when they concluded the agreement, presumably because there is no claim for rectification in respect of this agreement. This is obviously because the plaintiffs are not basing any of their claims directly on the management agreement. However, had they done so, I think it is common cause, viewed in the context of all the other evidence, that the management agreement would have been the subject of a claim for rectification. Having said this, I must say that Mr Shipanga’s evidence on the interpretation of the word left me with a rather strong impression whenever he came across the word “the Company” he automatically concluded that it must be a reference to Punyu Wholesalers (Pty) Ltd only for the reason that the latter happens to be a company (and, it seems, the only company in the Punyu Group). However, he appeared to state that the reference to “the Company” in the third paragraph is really a reference to Mr Shikale as the casino licence holder. Curiously, in this paragraph the word ‘him’ is used in reference to the Company.

#### Evaluation and application of the law to the facts

[135] In this case the plaintiffs’ burden of providing clear and convincing proof is eased somewhat by the fact that the parties are *ad idem* that there was a mistake in the two lease agreements.

[136] Mr *Korf* in para. 11.6 of his heads of argument submitted in respect of the identity of the lessees that, if the plaintiffs place *prima facie* evidence before the

Court, which the court can accept while applying its reasonable mind, then the defendant is called upon to explain why it says the lease agreements were concluded with Punyu Wholesalers (Pty) Ltd. If that explanation is not forthcoming, he submitted, the plaintiffs' version ought to be accepted. I agree with this submission, bearing in mind that I have already rejected any suggestion that Punyu Wholesalers (Pty) Ltd was the party who was in truth the lessee under any of the two lease agreements or that the oral agreements *in casu* were in truth concluded with Punyu Wholesalers (Pty) Ltd.

[137] Mr *Korf* sought to make out an argument that Topsec and Universal made out their cases as pleaded on a balance of probabilities and submitted that the evidence on behalf of the defendant that the agreements were actually concluded with Punyu Wholesalers (Pty) Ltd must be rejected.

[138] Mr *Barnard* submitted that it is not a matter of having to choose between Mr Shikale and Punyu Wholesalers (Pty) Ltd as the lessee. He adopted the approach that these plaintiffs did not prove their cases because they are unable to prove (i) that they had intention to contract with Mr Shikale personally; and (ii) that Mr Shikale intended to bind himself personally.

[139] I have already pointed out certain unsatisfactory aspects in the evidence on behalf of the plaintiffs. They attempted to show that because they dealt with Mr Shikale in person and because he had to approve and authorize quotations, transactions, etc, he must have contracted with them in a personal capacity. I accept that he was personally involved to the extent that they have indicated, but this alone does not necessarily mean that he acted in a personal capacity or as a sole proprietor. Such conduct on his part is just as compatible with him being a company manager with a hands-on approach. I am also not impressed by the evidence that the plaintiffs' intended to contract specifically with him personally because he was the licence holder. I agree with Mr Barnard that if they indeed had this intention from a compliance point of view because it was as important to them as they attempted to make out, they would at least have made some attempt to have a more proximate correlation between the licence holder and the lessee in each of the agreements



than was the case. In respect of Universal my conclusion on this aspect is fortified by the fact that still as late as April 2003 its lawyers addressed correspondence to the defendant in which it was stated that the lease agreement and the management agreement were concluded with Punyu Group Incorporated. To my mind the evidence by Messrs Goosen, Stoop and Krüger does not on a balance of probabilities show that they had the sole and specific intention to contract with Mr Shikale in his personal capacity. As Mr Barnard submitted, Messrs Goosen, Stoop and Krüger tailored their evidence, 'hind sight being a wonderful thing.'

[140] However, having stated all this, I hasten to observe that all is not lost for the plaintiffs. To my mind a *conspectus* of the evidence clearly shows that they in fact intended to contract with the Punyu Group, mistakenly thinking that it was a corporate body. In this, it is reasonable to conclude that Mr Goosen and Mr Krüger gained this impression mostly from Mr Shikale's business card. In my view it is probable than not that Mr Stone was also given a business card. Apart from this, when the draft agreements were discussed with Mr Shikale and his lawyers prior to the conclusion of the agreements, they did not point out that the description of the lessees were wrong, as any reasonable person would have expected them to do. I also have no hesitation in finding that the probabilities are overwhelming that Mr Shikale, knowing that the Punyu Group is not a corporate body, intended to contract as its owner. In this regard Mr Shikale provides some insight into his thinking in a letter dated 14 October 2002 and addressed to Mr Stone of Universal on the letter head of 'THE PUNYU GROUP' (Consolidated Trial Bundle "B", p 666-667). The heading reads 'RE: Financial Situation – Punyu Casino'. He states *inter alia*:

'As a starting point, I'd like to solemnly reiterate my organisations (*sic*) commitment towards your organization and Punyu Casino. If you will recollect, we had agreed on making this a highly profitable venture for both organizations. We will stand by our commitment, in that regard. It's true that we disagreed on various points, but it is our firm belief that these points can be settled through negotiations in a friendly environment. I'm grateful to your organization for the patience and understanding shown in dealing with difficult situations and sincerely hope that this demeanour will be maintained in our endeavour to make this relationship highly successful for both organizations.'

I acknowledge and appreciate your benevolence in understanding our tight cash flow situation and putting forward the necessary funds required for the setting up of the relevant infrastructure for the casino and I assure you that we are fully committed to settling our liability in this regard....’

[141] The letter is signed by Mr Shikale and bears his stamp to with ‘J Shikale’. This letter clearly conveys that the casino project is a venture in question is between the two organizations, namely The Punyu Group and Universal, that it is distinct from Punyu Casino and that The Punyu Group acknowledges liability for providing funds to set up the infrastructure for the casino. Nowhere in the letter head is there any indication that Mr Shikale is writing on behalf of a corporate entity as is required by law. The body of the letter also does not convey any such meaning. Whilst there is not an explicit reference to the fact that he accepts personal liability, the letter, read in context with all the other facts and circumstances, must be taken to be written by Mr Shikale trading as The Punyu Group.

[142] The probabilities are that the mistake made by the plaintiffs is not material in the sense that they would still have contracted with the Punyu Group even if they knew that it was not a corporate body. The evidence indicates that they were intent on embarking on the casino project provided that there was a valid casino licence in place. This was also the position of the defendant. I accept the clear evidence by Mr Shipanga to the effect that Mr Shikale was a law abiding businessman who would not intentionally have embarked on an illegal venture. As such it appears to me on the probabilities of the case that there was a meeting of minds on the identity of the parties.

[143] Mr *Barnard* submitted that without the evidence of Mr Stone, there is no evidence about the intention with which Topsec and Universal contracted. He submitted that Mr Stone negotiated on behalf of Topsec. However, I am satisfied on Mr Goosen’s evidence that he was sufficiently involved in the conclusion of the lease agreement to have formed an intention as to the contracting parties. As far as Universal is concerned, it is so that some of Mr Stoop’s evidence is based on hearsay. However, it is clear that the plaintiffs worked together on the casino project and that there was much interaction between them and their representatives. The

probabilities are that it is not a mere coincidence that all the agreements reflect Punyu Group as the other contracting party. In the scheme of things it is more probable than not that Mr Stone, who was intimately involved in the conclusion of the Universal agreements also intended to contract with the Punyu Group, but was mistakenly under the impression that it was incorporated. In my view the case of *Lasarus v Gorfinkel* 1984 (4) SA 123 (CPD) upon which Mr *Barnard* relies is distinguishable on the facts and that it is not necessary in the cases before me to rely on assumptions.

[144] As far as the oral agreements are concerned, it is clear in the context of all the evidence that the Punyu Group had to bear all the expenses of the fitting out and related expenses in respect of the casino. As there is no company by that name, the agreements must on the available evidence have been concluded with the Punyu Group as an unincorporated business. Furthermore, I am satisfied on the evidence of Messrs van der Merwe and Mr Liebenberg that the agreements were concluded.

[145] As I have indicated, the problems in these matters arose because the plaintiffs did not make sure with what entity they were contracting and because the party with whom they contracted did not enlighten them. As the Punyu Group is not a corporate entity it seems to me that the reference to "Punyu Group" or "The Punyu Group" or "Punyu Group Inc" can only be, "in truth" (as the defendants stated in the pleas on the limited issues) a reference to Jairus Shikale trading as the Punyu Group. Similarly, any reference to Punyu Casino, it not being a corporate body, can only be a reference to Jairus Shikale trading as Punyu Casino.

[146] Mr Shikale, his lawyer Mr Thambapilal and even Mr Shipanga, in so far as he may have been involved, could have been under no misapprehension about the fact that the Punyu Group lacked a corporate identity. When they read the contract they must have seen that a mistake occurred, yet they did not alert anyone to that fact. In none of the correspondence was this point ever raised and liability for the debts incurred was never disputed on this basis before summons was issued. In fact, they must have realised that, because Punyu Group was not a corporate body, the only

way the contract could be concluded is if Mr Shikale signed the contract in his personal capacity.

[147] I have considered the fact that my findings about the intention of the plaintiffs are not in strict keeping with what the plaintiffs have pleaded about the intention with which they contracted. It encompasses more than what they have pleaded, but includes, in a sense, what they have pleaded. I have considered to hold, as Mr *Barnard* argued, that the plaintiffs did not prove their cases. However, I do not think that this would lead to a just result on the facts of this case. The defendant cannot claim any prejudice because it had knowledge of the actual situation at the time the contracts were concluded. Furthermore, the rectification that is being claimed is in line with my finding and in line with what the defendant very well knew to have been, "in truth," the actual situation. In my view the finding of the Court and the ensuing result will effect justice between the parties.

[148] As a result the following orders are made:

Case No. I 2009/2003

There shall be an order for the plaintiff in the following terms:

1. An order rectifying the written agreement (annexure "TPS1") by the deletion on page 1 of the words "the Punyu Group Inc. (Registration No. ) herein represented by MR JAIRUS SHIKALE (the duly authorised representative of the lessee) in his/her capacity as : EXECUTIVE CHAIRMAN" and the substitution thereof by the words "Jairus Shikale trading as Punyu Group".
2. Costs of suit, such costs to include the costs of one instructing counsel and one instructed counsel.

Case No. 2010/2003

There shall be an order for the plaintiff in the following terms:

1. An order rectifying the written agreement, annexure "A" by the deletion on page 1 of the words "The Punyu group, a company duly incorporated in terms

of the Laws of the Republic of Namibia/South Africa” and the substitution thereof by the words “Jairus Shikale trading as Punyu Group”.

2. Costs of suit, such costs to include the costs of one instructing counsel and one instructed counsel.

Case No. 2008/2003

There shall be an order for the plaintiff in the following terms:

1. An order declaring that the contract referred to in paragraph 3 of the particulars of claim on the limited issues has been concluded, and has been so concluded with the late Jairus Shikale trading as the Punyu Group or Punyu Casino.
2. Costs of suit, such costs to include the costs of one instructing counsel and one instructed counsel.

Case No. 2011/2003

There shall be an order for the plaintiff in the following terms:

1. An order declaring that the contract referred to in paragraph 3 of the particulars of claim on the limited issues has been concluded, and has been so concluded with the late Jairus Shikale, trading as the Punyu Group or Punyu Casino.
2. Costs of suit, such costs to include the costs of one instructing counsel and one instructed counsel.

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K van Niekerk

Judge

APPEARANCE

For the plaintiffs:

Mr K Korf

Instructed by Koep & Partners

For the defendant:

Mr P Barnard

Instructed by LorentzAngula Inc