



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CIV-ACT-CON-2017/00954

In the matter between:

KAUNAPUA NDILULA N.O.	FIRST	PLAINTIFF
DEREK WRIGHT N.O.	SECOND	PLAINTIFF
REAGON RUPERT GRAIG N.O.	THIRD	PLAINTIFF
EVANGELINA NANGULA HAMUNYELA N.O.	FOURTH	PLAINTIFF
STUART HILTON MOIR N.O.	FIFTH	PLAINTIFF
JACOBUS DE LE RAY DU TOIT N.O.	SIXTH	PLAINTIFF
EFAISHE NDAMONONGHENDA NGHIIDIPAA N.O.	SEVENTH	PLAINTIFF
ANDREW CAMPBELL N.O.	EIGHTH	PLAINTIFF
GEORGE FABIANUS MARTIN N.O.	NINETH	PLAINTIFF

and

CAPRIVI BUILDING CONSTRUCTORS CC	FIRST	DEFENDANT
FRANCIS SIKUMBA SIKUMBA	SECOND	DEFENDANT
THE ZAMBEZI REGIONAL COUNCIL	THIRD	DEFENDANT

Neutral citation: *Kaunapaua Ndilula N.O. v Caprivi Building Constructors CC and Others* (HC-MD-CIV-ACT-CON-2017/00954) [2019] NAHCMD 456 (05 November 2019)

Coram: KANGUEEHI AJ

Heard: 8 October 2019

Delivered: 5 November 2019

Flynote: Law of Contract – Tacit agreement – Doctrine of quasi-mutual assent – Principles discussed and Applied – Non-variation clause – Deviation therefrom where reliance thereon would amount to conduct in bad faith or against public policy by the party wishing to rely thereon.

Summary: The plaintiff is a trust which operated as a money lender. The trust lent and advanced a loan facility to the first defendant. This agreement encompassed a non-variation clause. The facility agreement underwent amendments and these amendments were reduced to writing. A further disbursement in the amount of 1,936,439.75 was, however, made which was not reduced to writing. This payment forms the subject matter of these proceedings. The second defendant alleged that this payment was made owing to the negligence and or mistake of the plaintiff and since it was not reduced to writing, the first and second defendants deny liability therefor. This despite the fact that the disbursements were made at their specific instance and request.

Held: The court is satisfied that the evidence shows that there was a valid contract, not only based on the written agreements but also as evinced by the conduct and or external manifestations of the parties.

Held: The facility agreement being amended three times shows clearly in the mind of the parties that the agreement was subject to change, albeit subject to the non-variation clause.

Held: The agreement entered into between the first and second defendant and the third defendant is a completely separate agreement from the one adjudicated on in this matter. In any event, the court already pronounced itself on same in a judgment on absolution from the instance.

Held: It would be against public policy to have a party to a contract that conducted itself as the first and second defendants did to escape liability at the back of a non-variation clause.

Held: In any event, even if the court were to indulge the argument by the second defendant that the money was paid owing to a mistake by the plaintiff, the first defendant would in the circumstances have been unjustly enriched in the amount of N\$ 1,936,439.75¹ since it was relieved of the burden to pay its creditors². This burden was carried by the plaintiff throughout.

ORDER

1. The first and second defendants are jointly and severally liable to the Plaintiffs in the amount of N\$3,885,060.50.
2. The first and second defendants shall pay interest on the said amount at the rate of 2% per month and compounded monthly from 11 October 2016 to the date of final payment.
3. The first and second Defendants shall pay the costs of the Plaintiffs; which costs shall include the costs of one instructing and one instructed counsel.

¹ This amount must be added those other amounts contractually agreed between the parties and as contained in the certificate of indebtedness.

² Christie's Law of Contract in South Africa, 7th Edition, LexisNexis, p 98 to 106
'A party who, owing to an excusable error, made a payment (or delivered a thing) to another in the mistaken belief that the payment or delivery was owing may claim repayment from the recipient to the extent that the latter was enriched at the claimant's expense. The person entitled to bring the action is the one who is in law considered to have made the payment or the transfer...'

4. The matter is finalized and removed from the roll.

JUDGMENT

KANGUEEHI AJ:

Background.

[1] This matter concerns a dispute arising out of a contract in the form of a facility loan agreement³. The parties are the plaintiff (Namibia Procurement Fund Trust) the third defendant (the Zambezi Regional Council)⁴ and the first defendant (a Close Corporation trading as Caprivi Building Contractors). The latter was at all material times represented by the second defendant, a Mr. Francis Sikumba Sikumba. The claim against the second defendant is grounded on a deed of suretyship entered into during March 2014.

[2] The first defendant was awarded a construction contract or tender by the third defendant. This contract entailed the construction of certain building projects. The second contract at play here and the one which forms the subject matter of the proceedings, is the loan (hereafter referred to as *the agreement*) made to the first defendant by the plaintiff⁵. The purpose was to finance the first defendant's building projects, granted to it by the third defendant. The dispute herein lies where an 'overpayment' of N\$ 1, 987, 703, 86 was made to or on behalf of the first defendant. The defendants deny liability for the said amount. In its defense, first defendant pleaded *inter alia* that it was agreed that the Fund was to manage the loan facility. I hasten to add that this proposition was vehemently denied by the plaintiff's witnesses. In fact, the first witness for the plaintiff, Ms. Ndilula, was unequivocal in submitting that the fund did/ does not manage the loan facilities of its clients.

³ It is common cause that this agreement was amended by various addendums. The contents of same are also not in dispute.

⁴ Its link is only in terms of the tender agreement that it concluded with the first defendant.

⁵ A copy of same is annexed to the Plaintiffs' particulars of claim as annexure A1.

[3] The second defendant filed, on behalf of the first defendant, a counter claim against the third defendant. This counterclaim was dismissed on 23 August 2019 after the third defendant successfully applied for absolution from the instance at the closure of the case for the first and second defendants. The main reason therefor was that the first and second defendants failed to establish that they completed all the building works in terms of the tender awarded by the third defendant and thus failed to show that the third defendant held back funds as alleged in the counter-claim. In addition, the second defendant failed to prove that the third defendant bound itself and was liable towards the facility loan agreement entered into by the plaintiff and first and second defendant.

The Evidence

[4] In order to prove their cases, the plaintiff called a total of 4 witnesses and the first and second defendants called one witness. This court needs not repeat the evidence verbatim and it is clear from the facts of this matter, the pre-trial order and counter claim filed by the second defendant against the third defendant that the quantum of the amounts claimed by the first defendant is not disputed. The dispute herein lies on who carries the responsibility to pay the amounts claimed by plaintiff.

[5] The evidence by the plaintiff, testified to by its executive trustee, Ms. Kaunapaua Ndilula was that, the Namibia Procurement Fund Trust, (hereafter referred to as the Trust) during March 2014 at or near Windhoek, duly represented by herself and the first defendant, duly represented by the second defendant, concluded a written facility agreement. The gist thereof was to fund a building project that the first defendant had to execute in terms of a tender received from the third defendant.

[6] The plaintiff did not ask this court for any prayer against the third defendant. The dispute before the court concerning the main claim involves the loan agreement between the plaintiff and the first defendant and the deed of suretiship concluded by the second defendant.

[7] The role of the third defendant was only to make payments on behalf of the first defendant, when all documentation regarding progress payments and inspections were in place. According to the second defendant, all payments in line with each and all progress payment submitted to the third defendant was fully paid and submitted. The evidence, nonetheless, revealed that this averment was false.

[8] The defendants counter claim against the third defendant. From the reading of the counter claim, there is no dispute concerning the amounts claimed by the plaintiff. The second defendant alleged that, the outstanding amount of N\$ 1, 987, 703, 86 was due and payable by the third defendant. This aspect was fully canvassed in the ruling on absolution from the instance.

[9] The second defendant, agreed that the plaintiff paid in terms of the facility agreement, a total amount of N\$ 8,153,164.51 to or on behalf of the first defendant⁶. All the proofs and invoices are contained in files Volume "C" page 745 up to Volume "D" page 1436. The amount paid by the third defendant to the plaintiff in respect of the loan agreement was N\$ 6,165, 460.66. This leaves the outstanding amount of N\$ 1, 987, 703,86. The argument of the first and second defendants was that the building that was constructed is the property of the third defendant and the excess amount of N\$ 1, 987, 703, 86 benefitted the third defendant, who was not entitled thereto and was therefore enriched⁷. I pause to add that that would have been the case if the first and second defendants had completed the building and all the completion certificates were on hand. That was not the case.

[10] It was common cause between the parties that the agreement underwent three changes and those variations were reduced to writing. The evidence led by the plaintiff was to the effect that there were, however, further variations which were not reduced to writing. These further variations involved payments by the Trust to or for the benefit of the first defendant.

[11] The evidence showed that the capital amount due as a result of the overpayment was in the of N\$ 1, 987, 703, 86. This amount, together with further

⁶ This is not in dispute. In fact, this is admitted in the first and 2nd defendants' Plea filed on 19 January 2018.

⁷ Para 11 of the counter claim.

interest, the further finance margin, tracing costs and the fee for the performance guarantee amount to N\$ 3,885,060.50⁸.

[12] It is these variations which form the subject matter of the dispute before the court. The second defendant's defence, as he puts it, is that he studied journalism and not finance. Any overpayment made (referring to the N\$ 3,885,060.50) was not his responsibility as it was a mistake made by the trust to have paid this amount to or on behalf of the first defendant. He argued in the alternative that it was the responsibility of the third defendant to pay this outstanding amount. This point can be disposed off quickly by the fact that the plaintiff did not go out on a frolic of its own to solicit and pay these expenses. These expenses were given by the first and second defendants⁹. Plaintiff then obliged as per the agreement and paid them¹⁰.

[13] The agreement *in casu* underwent three changes which were reduced to writing. The plaintiff, however, alleges that there were further variations which were not reduced to writing. These variations occurred, upon the request of the first defendant for additional funds. The variations were recorded in writing and took place during June 2014 at Katima Mulilo¹¹. A further variation occurred during November 2014¹². The third variation reduced to writing took place March 2015 and at Windhoek¹³.

[14] In March 2015 and at Windhoek, the second defendant bound himself in writing as surety and co-principal debtor jointly and severally with the first defendant for the due and punctual performance on demand of all obligations of the first defendant owing to the Trust, under and in terms of the facility agreement as amended.¹⁴

⁸ Exhibit "H".

⁹ The first and 2nd defendants admit this much in the plea and counterclaim.

¹⁰ The evidence documents various requests for disbursements and applications for advances; all signed for by the 2nd defendant on behalf of first defendant. These are then followed by various electronic fund transfers to the suppliers and/ or to the first defendant.

¹¹ A copy whereof is annexed to the plaintiffs' particulars of claim as annexure A2. The terms and content of the first amendment agreement are not in dispute.

¹² A copy whereof is annexed to the plaintiff's particulars of claim as annexure A3. The terms and content of the second amendment agreement are not in dispute

¹³ A copy whereof is annexed to the plaintiffs' particulars of claim as annexure A4. The terms and content of the third amendment agreement are not in dispute

¹⁴ A copy of the written surety agreement executed by the 2nd defendant is annexed to the Plaintiff's particulars of claim as annexure A5.

[15] During the period of March 2015 to August 2015 the second defendant, for and on behalf of the first defendant, provided the Trust, pro-forma invoices and quotations for suppliers of building materials and requisition applications for expenses in respect of the project in terms of the amended facility agreement. The Trust, in terms of the amended facility agreement paid a total amount of N\$ 8,153,164.51 to and on behalf of the first defendant. Copies of all the relevant document in regard to the payments made by the Trust were received as exhibits.

[16] The third defendant, in turn, paid plaintiff the amount of N\$ 6,165,460.66 by or on behalf of the first defendant, leaving the balance of N\$ 1, 987, 703, 86. This capital amount, together with further interest, the further finance margin, tracing costs and the fee for the performance guarantee, as agreed, translate to the total sum of N\$ 3,885,060.50, due, owing and payable.

[17] The defence by the first and second defendants are, not only that it was the mistake of the Trust to have paid out such extra amounts. The agreement itself, the argument goes, embodies a non-variation clause which required that all variation must be in writing. If a variation is not in writing and yet the plaintiff performed, then the plaintiff only has itself to blame, goes the argument.

ISSUES

[18] The legal issues for decision are the following:

1. Was there a binding agreement and who the parties are thereto? The duty to perform will ultimately lie with the parties.
 2. In the alternative, did the parties conduct themselves in a manner giving rise to a binding contract or a variation thereof?
 3. Did the plaintiff perform as per the agreement such that it is entitled to counter-performance by the first and second defendants?
 4. Does a non-variation clause apply strictly so as to deprive a party who has performed of counter-performance by the other party?
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The Law

[19] Christie's *The law of contract in South Africa* (6th ed) at p. 464 opines that:

'When a non-variation clause appears in a contract it creates a situation in which the same argument of freedom of contract or *pacta sunt servanda* can lead to two opposite conclusions. It can be argued that the original contract must be respected and a subsequent agreement that is not in writing must be ignored. Or it can be argued that the subsequent agreement, made *animo contrahendi*, must be respected and the non-variation clause ignored. After some controversy the Appellate Division chose the former of these two irreconcilable views in *SA Sentrale Ko-op Graanmpy Bpk v Shifren* 1964 4 SA 760 (A), and *Shifren* was confirmed after full argument in *Brisley v Drotsky* 2002 4 SA 1 (SCA). Any attempt to agree informally on a topic covered by a non-variation clause (including cancellation, and an extension of time for payment, if covered by such a clause) or to vary informally a contract containing a non-variation clause must therefore fail.'¹⁵

[20] This test is, however, subject to exceptions. Principles such as public policy, fraud come into play and the circumstances surrounding whether conduct is indeed a variation or not.

[21] *In the Brisley v Drotsky*,¹⁶ *supra*

'The jurisprudence of this Court has already established that, in addition to the fraud exception, there may be circumstances in which an agreement, unobjectionable in itself, will not be enforced because the object it seeks to achieve is contrary to public policy.'

[22] In the matter of *Kovacs Investments (Pty) Ltd v Marais*^{17 18}, at paragraph 17, the court stated the following is said –

¹⁵ (The *Shifren* matter was followed in *Namibia Beverages v Amupolo* 1999 NR 303 (HC) at 305E-F and *Brisley v Drotsky* was applied in *Mushimba v Autogas Namibia (Pty) Ltd* 2008 (1) NR 253 (HC) at 260G-H).

¹⁶ *Brisley v Drotsky* 2002 4 SA 1 (SCA) (at p34G):

¹⁷ See also [*Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA) para [22].]

¹⁸ *Kovacs Investments (Pty) Ltd v Marais* (323/2008) [2009] ZASCA 84 (20 August 2009.)

'A question that could be asked, legitimately so, I think, is whether a deviation from the performance of an obligation as required by a written agreement does not amount to a variation of the contract. In *Neethling v Klopper*¹⁹ Steyn CJ reasoned that:

"clauses (in written agreements) relating to the manner and time within which payment of the purchase price is to be made, generally fall under the category of material (wesenslike) provisions. As such, they cannot be varied or amended by oral (or tacit) agreement. But that does not mean, said the learned Chief Justice, that on a restrictive interpretation of the provision (that requires an agreement of sale of land to be in writing) no variation or amendment by consensus or oral agreement of the provisions of such clauses may be permissible. "'

[23] In *Rani Traders cc & 5 others v Woerman Brock & Co (Pty) Ltd*²⁰ at para 19, the court stated that:

'As far as the reliance on the non-variation clause is concerned, it is apparent that it does not in all cases prevent conclusions of further agreements.'

[24] Further in *Gray v Waterfront Auctioneers (Pty) Ltd and Another*²¹ the court stated the following:

'Even if the non-variation clause had been relevant because the parties' conduct amounted to a variation of the lease, the applicant may well have been precluded from praying it in aid because, as it is put by Christie in *The Law of Contract in South Africa* seconded at 535, a party whose conduct is "fraudulent, or unconscionable, or a manifestation of bad faith" (referring to *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1962 (3) SA 565 (C) at 571F, per Rosenow J) 'will not be permitted to rely on a non-variation clause' (referring to *Leyland (SA) (Pty) Ltd v Rex Evans Motors (Pty) Ltd* 1980 (4) SA 271 (W) at 272H-273A).'

¹⁹ *Neethling v Klopper en Andere* 1967 (4) SA 459 (A)

²⁰ *Rani Traders cc & 5 others v Woerman Brock & Co (Pty) Ltd* (I 3889/2014) [2016] NAHCMD 223 (27 July 2016) at para 19

²¹ *Gray v Waterfront Auctioneers (Pty) Ltd and Another* 1996 (2) SA 662 (WLD) at 668H-J

[25] The most common and most helpful technique, for ascertaining whether there was an agreement, true or based on quasi mutual assent, is to look for an offer and acceptance²².

[26] In the matter of *Wasmuth v Jacobs*²³ Levy, J said:

‘It is fundamental to the nature of any offer that it should be certain and definite in its terms. It must be firm, that is, made with the intention that when it is accepted it will bind the offeror.’

[27] In the matter of *Namibia Broadcasting Corporation v Kruger and others*²⁴, where Chomba, AJA in paragraph 36 referred to the matter of *JRM Furniture Holdings v Cowlin*²⁵. Where Nestadt J stated:

‘... acceptance must be absolute, unconditional and identical with the offer. Failing this, there is no consensus and therefore no contract. (*Wessels Law of Contract in South Africa* seconded vole I para 165 et seq.) *Wille Principles of South African Law* 7th ed at 310 states the principle thus:

“The person to whom the offer is made can only convert it into a contract by accepting, as they stand, the terms offered; he cannot vary them by omitting or altering any of the terms or by adding proposals of his own. It follows that if the acceptance is not unconditional but is coupled with some variation or modification of the terms offered no contract is constituted...” ’

[28] *Plum v Mazista Ltd*²⁶ Wessels, JA held that:

‘...court may hold that a tacit contract has been established where, by a process of inference, it concludes that the *most plausible probable conclusion* from all the relevant

²² *Henred Fruehauf Trailers (Pty) Ltd v Enkali* (HC-MD-CIV-ACT-CON-2016/03741) [2019] NAHCMD 392 (30 September 2019) and Christie R H: *The Law of Contract in South Africa*: 5th Edition LexisNexis Butterworths p 28.

²³ *Wasmuth v Jacobs* 1987 (3) SA 629 (SWA) at 633.

²⁴ *Namibia Broadcasting Corporation v Kruger and others* 2009 (1) Nr 196 (SC) at pg. 35 and 36.

²⁵ *JRM Furniture Holdings v Cowlin* 1983 (4) SA 541 (W) at 544.

²⁶ *Plum v Mazista Ltd* 1981 (3) SA 152 (A) at 163 – 4.

proved facts and circumstances is that a contract (being offer, acceptance and consensus) came into existence²⁷.’

[29] From the authorities it is well accepted that offer and acceptance form the cornerstone of a binding contract. However, there are principles which will similarly assist a court in establishing whether there exists a tacit contract between the parties. Christie²⁸ proposes the following test:

‘In order to establish a tacit contract, it is necessary to prove, by a preponderance of probabilities, conduct and circumstances which are so unequivocal that the parties must have been satisfied that they were in agreement.’

[30] A court is therefore entitled to look at the external manifestations of the defendant when it comes to contract between the parties, be it written or oral.

[31] The author R H Christie²⁹ states the following:

‘In the result it is correct to say that in order to decide whether a contract exists one looks first for the true agreement of two or more parties, *and because such agreement can only be revealed by external manifestation one must of necessity be generally objective.* This generally objective approach is now known as the doctrine of quasi-mutual assent.’ (Emphasis added).

[32] Professor Christie goes further and states³⁰:

‘This doctrine embodied in *Smith v Hughes* (1871) LR 60 page 597 607 and *Pieters & Co v Salomon* 1911 AD 121 137 has been explained at pages 10-12 above where the comment was made that without it our law would be in a sorry state. The reason for this was well expressed by Davis, J in *Irvin & Johnson (SA) Ltd v Kaplan* 1940 CPD 647 651. After quoting from *Smith v Hughes* and *SAR & H v National Bank of SA Ltd* he said: ‘If this were not so, it is difficult to see how commerce could proceed at all. All kinds of mental reservations, of careless unilateral mistakes, of unexpressed conditions and the like, would

²⁷ Also see; *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd* 1984 (3) SA 155 (A); *Joel Melamed and Hurwitz v Vornier Investments (Pty) Ltd* 1984 (3) SA 155 (A); *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* 1983 (1) SA 978 (A) at 981A D).

²⁸ Christie R H: *The Law of Contract in South Africa*: 5th Edition LexisNexis Butterworths. Footnote 4 at 85.

²⁹ *Law of Contract in South Africa* 5th Edition page 24.

³⁰ Christie R H: *The Law of Contract in South Africa*: 5th Edition LexisNexis Butterworths at 24.

become relevant and no party to any contract would be safe, the door would be opened wide to uncertainty and even to fraud. Because of its reliance in resolving disputes, Christie stresses that the importance of the doctrine is such that no dispute on the existence of the agreement can properly be resolved without calling in aid.'

Law to Facts

[33] Each of the plaintiff's witnesses were *ad idem* that there was no dispute regarding the terms and addendums of the facility agreement. The evidence by the witnesses for both parties was that the capital amounts were not fixed, and this is evinced by the three addendums annexed to the original agreement. In fact, the evidence of all witnesses, including the defendant, was that this facility was treated³¹ as a revolving credit facility.

[34] The court thus deduces, when viewing the facts objectively, that the facility agreement operated as a 'revolving loan' agreement, and as such one, which could be withdrawn, repaid, and redrawn again in any manner and any number of times, until the facility expires.

[35] The court is satisfied that the evidence shows, that there was a valid contract not only based on the written agreements but also as evinced by the conduct and or external manifestations of the parties.

[36] The facility agreement being amended three times shows clearly in the mind of the parties that the agreement was subject to change albeit the presence of the non-variation clause.

[37] If the court were to ignore the conduct of the parties it would create the very situation that the court in *Smith v Hughes* said should be averted. This is where all kinds of mental reservations, careless unilateral mistakes, unexpressed conditions and the like, would become relevant and no party to any contract would be safe. The door would be opened an array of uncertainty.

³¹ Albeit erroneously.

[38] With much respect to the second defendant, his contention that he simply washes his hands when faced with repayment of monies paid to the first defendant for purposes of finalizing a building project simply because it was not reduced to writing and done as a result of a 'mistake' by the plaintiff is against public policy. As a result, it to the court's mind constitutes unconscionable conduct and thus in terms of the matter of *Gray v Waterfront Auctioneers*, constitutes an exception to strictly applying a non-variation clause. That is more so given the fact that the first and second defendants were the protagonists of the disbursement requests and the applications for advances.

[39] The first and second defendants, are the parties that bound themselves to the contract with the plaintiff. The plaintiff performed and repayments to the plaintiff were made by the first and second defendants, through the third defendant, in relation to those completed phases of the work. The first and second defendants failed to finalize the project and therefore could not get further progress payment from the third defendant.

[40] The second defendant further conceded during cross examination that he did not seek all the progress payments which should have been submitted to the third defendant. Evidently, he could not do so because the first defendant did not complete the project. It is in evidence that first and second defendants abandoned the project midway.

[41] I opine that it would be unconscionable, to have a party to a contract who conducted itself as the first and second defendants did, and particularly where the capital amounts were increased on three occasions, to simply refuse to recognize the last increase because same was not reduced to writing. I can safely conclude that strict reliance on the non-variation clause would amount to conduct in bad faith or against public policy.

[42] In any event, even if the court were to indulge the argument by the second defendant that the money was paid as a result of mistake by the plaintiff, the first defendant would in the circumstances still have been enriched in the amount of N\$

1,936,439.75³². This enrichment claim was pleaded in the alternative. One does not need Solomonic wisdom to realize that if the plaintiff had not paid the expenses of and on behalf of the first defendant, the latter would have been burdened with same. In turn, that burden was carried by the plaintiff and the debts of the first defendant to its various suppliers were discharged. This enrichment is in the circumstances unjustified and the plaintiff is indeed impoverished thereby.

[43] The argument advanced by the second defendant that it is the third defendant which was enriched as the building so constructed belongs to the third defendant is with much respect not competent. The facility agreement was entered into between the plaintiff and first defendant only. The first and second defendants benefitted directly therefrom as they would otherwise not have been able to meet their contractual obligations to the third defendant.

[44] In the circumstances the first and second defendants are jointly and severally liable to the plaintiff, the one paying the other to be absolved, in the amounts so claimed, with interest and costs as prayed for.

[45] In consequence whereof, I make the following order:

1. The first and second defendants are jointly and severally liable to the plaintiffs in the amount of N\$3,885,060.50.
2. The first and second defendants shall pay interest on the said amount at the rate of 2% per month and compounded monthly from 11 October 2016 to the date of final payment.
3. The first and second defendants shall pay the costs of the plaintiffs; which costs shall include the costs of one instructing and one instructed counsel.

³²

Christie's Law of Contract in South Africa, 7th Edition, LexisNexis, p 98 to 106
'A party who, owing to an excusable error, made a payment (or delivered a thing) to another in the mistaken belief that the payment or delivery was owing may claim repayment from the recipient to the extent that the latter was enriched at the claimant's expense. The person entitled to bring the action is the one who is in law considered to have made the payment or the transfer...'

4. The matter is finalized and removed from the roll.

K N G Kanguuehi
Acting Judge

APPEARANCES:

PLAINTIFF:

Mr Van Vuuren of
Namlex Chambers
Instructed by Fisher Quarmby & Pfeifer
Windhoek

DEFENDANTS:

In Person.