REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-DEL 2018/03632

In the matter between:

CAPX FINANCE (PTY) LTD **PLAINTIFF**

And

ONAMAGONGWA TRADING ENTERPRISES CC **DEFENDANT**

Neutral citation: *CAPX Finance v Onamagongwa Trading Enterprises CC* (HC-MD-CIV-ACT-DEL 2018/03632) [2021] NAHCMD 458 (4 October 2021)

Coram: TOMMASI J
Heard: **12 – 17 May 2021**
Oral Submissions: **17 May 2021**
Delivered: **4 October 2021**

Flynote: Evidence - contract – defendant denies signature or knowledge thereof - proof of existence thereof – onus on plaintiff to prove the authenticity of the signature – plaintiff failed to prove on a balance of probability that the defendant signed the undertaking.

Estoppel – the onus on the person who avers estoppel to prove same – relies solely on telephone conversation to establish a representation that defendant sole member signed the undertaking – defendant did not represent that the amount claimed was due and payable – this a crucial representation not confirmed or admitted to.

Summary: The plaintiff avers that the defendant's sole member signed an irrevocable payment undertaking. Defendant avers that he did not sign the undertaking and that his signature was forged. The plaintiff pleaded estoppel in its replication.

Held that the plaintiff had the onus to prove the authenticity of the signature and have failed to discharge the onus.

Held further that a representor may be held accountable when he has created an impression in another's mind, even though he may not have intended to do so and even though the impression is in fact wrong (See NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others 2002 (1) SA 396 (SCA)). Although the defendant agreed that he signed an undertaking for "some invoices" he did not confirm the amount of those invoices and cannot be held accountable for the impression in the plaintiff's mind that he acceded to having signed the undertaking for the amount claimed.

ORDER

---

1. Prayer 1 and 3 of the plaintiff's application dated 19 April 2021 is granted.

2. The plaintiff is ordered to pay the defendant's cost occasioned by the application which costs are limited in terms of Rule 32 (4);

3. The plaintiff's claim is dismissed with costs.

JUDGMENT

TOMMASI J:

[1] The plaintiff's claim against the defendant is for payment in the sum of N$876 300 due in terms of an irrevocable payment undertaking signed by the defendant on or about 8 November 2016. The Defendant's case is that the agreement is the product of fraud which was perpetrated by the representative of Ratu Trading CC, a subcontractor of the defendant and that the agreement also amount to an invalid cession.

[2] The plaintiff herein entered into an invoice discounting agreement with Ratu on 8 November 2016. In terms of this agreement Ratu Trading CC ceded and transferred all its right, title and interest in the invoices (payable by the defendant to Ratu) to plaintiff who purchased all the right, title and interest in the said invoices. The defendant according to the plaintiff, signed an irrevocable payment undertaking on the same date to pay the invoices totalling N$876 330 which allegedly was due to Ratu, to the plaintiff by 24 January 2017. On 9 November 2016 the Anthea Walker on behalf the plaintiff made a telephone call to Martin (Martyn) Ipinge, the sole member of defendant. This telephonic conversation was recorded. The plaintiff avers that the defendant failed to make payment on 24 January 2017 as agreed, despite demand.

[3] The defendant raises a special plea to the effect the defendant's claim is based on a forged document i.e. the written irrevocable payment undertaking. Defendant claims it is a document drafted by the plaintiff which is false, unlawful, prejudicial and made with the intention to defraud the defendant. Defendant further pleaded that it is a document which does not comply with the requirements of a valid cession. The Defendant denies that it agreed to the payment undertaking or that he is under any legal obligation to make any payment to the plaintiff.

[4] The plaintiff initially did not file a replication. On 29 April, roughly 2 weeks before the trial the plaintiff filed a notice in terms of rule Rule 32 (4) on an urgent basis requesting directions from the court in terms of Rule 32(4). The court scheduled a status hearing on the same day for 5 May 2021. The Plaintiff filed a Notice of Motion applying to for an order to *inter alia* accept the replication and amend the pre-trial order dated 11 September 2019 to include the issues raised in the replication.

[5] The main thrust of the application is that the replication sought is akin to an amendment, and that the factual issues necessary to sustain plaintiff's reliance on estoppel are already contained in the particulars of claim. The reason advanced for bringing this application on the eve of the trial is that the previous counsel briefed to attend to trial became unavailable on short notice. Mr Jacobs, the current counsel for the plaintiff was instructed on 22 April 2021. He on 25 April 2021 perused the papers and obtained instructions to pursue this application on 26 April 2021. The applicant indicated that the defendant would not be prejudiced as it has the opportunity to meet plaintiff's case, including estoppel now raised on the facts which were always before court.

[6] On 5 May 2021 the plaintiff attended the scheduled hearing but the defendant was absent. The court directed that the Defendant must file opposing papers, if any, by 15:00 before or on 07 May 2021 and the plaintiff to file replying papers, if any, by 10:00, before or on 10 May 2021. The application was set down to be heard on 10 May 2021, the day on which the trial in this matter was to start. The defendant filed a Notice of Intention to oppose indicating that the defendant intended raising issues of law. No opposing affidavit was filed. On 10 May submissions were heard.

[7] Mr Jacobs submitted that the defendant failed to set out the question of law raised and secondly there is no opposing affidavit filed on the merits. Mr Jacobs submitted that the defendant was required to set out the points of law. He submitted that the application for the acceptance of the replication ought to be considered an amendment and that the principles applicable for an amendment be applied. He followed the guidelines set out in *IA Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC [2014] NAHCMD 306 (I 601/2013 and I 4084/2010; 17 October 2014)* which advises that an application for

directions in terms of Rule 32 (4) should be brought before the managing judge and therefore the procedure cannot be regarded as irregular. He argued that the facts necessary has already been pleaded and the only issue joined is whether the facts support a finding of estoppel. He argued that the matter was brought to the attention of the managing Judge as soon as it came to his attention. He prayed that cost be cost in the cause.

[8] Mr Kwala, counsel for the defendant, gave brief heads of argument and dealt with the following issues:

Non-compliance with Rules 23, 47(2), 51(b) - Replication.

He submitted therein that the plaintiff in the case plan dated 5 October 2018 which was made an order of court guided the procedures that were to be followed by the parties. In the case plan Plaintiff had confidently foregone the replication. He further submitted that the Defendant's plea is dated 26 November 2018 and if regard is had to the rules and practice directives, the Plaintiff's replication was due not less than 15 days from date of case plan or the last day allowed for filing a replication or subsequent pleading has lapsed and it has not been filed. He submitted that Plaintiff failed to comply with Rules 23, 47(2) and 51(b).

Amendment of the Pre-Trial

Mr Kwala further argued that the purported amendment of the pre-trial order is not in compliance with Rule 52. He submitted that the rules are clear when it comes to amendments and that the plaintiff has failed to follow the rules by amending a pleading without a notice as contemplated in Rule 52(1).

Change of Counsel

He further argued that Rule 44 as well as section 50 of the Practice Directive is instructive when it comes to the change in counsel (instructing and instructed). According to him this change was supposed to have been made with the approval of this Honourable Court.

Failure to apply for condonation

He referred to Rules 53(1)(c) and 54(1) and argued that the plaintiff failed to seek condonation in its attempts to amend and to replicate thereby entangling itself in the non-compliances with the rules. He referred this court to *Zaire v Van Biljon (HC-MD-CIV-ACT-OTH-2019/00180 [2019] NAHCMB 253 (25 July 2019)* where that court dealt with an application for condonation and the need for legal practitioners to diligently comply with the rules of court.

[9] On 11 May 2021 the court ordered that the application for the acceptance of plaintiff's replication and the proposed amendment of the pre-trial order to stand over for determination together with the merits. What follows is the determination of whether the court should accept the replication filed and vary the pre-trial order.

[10] Rule 66 (1) (c) provides that:

'1. A person opposing the grant of an order sought in an application must:

(c) if he or she intends to raise a question of law only, deliver notice of his or her intention to do so within the time stated in paragraph (b), setting out such question.'

The court must bear in mind that the defendant was given very short notice to file the opposing papers. The defendant filed Heads of Argument stipulating the issues he intended to raise despite the short notice given and this court accepts that the plaintiff was given sufficient notice of the issues the defendant intended to raise. There is however no answering affidavit filed by the defendant and the merits of the application is thus undisputed. This issue of prejudice was not canvassed and neither was this addressed during trial.

[11] Rule 53 (3) provides that where a party fails to deliver a pleading within the time stated in the case plan order or within any extended time allowed by the managing judge, that party is in default of filing such pleading and is by that very fact barred.

[12] On 13 November 2018 the court ordered that;

'The plaintiff must, if so advised, replicate to the defendant's plea and if necessary plead to the defendant's counterclaim by not later than 07 December 2018.' No replication was filed.

[13] Rule 47 (2) provides that no replication or subsequent pleading which would be a mere joinder of issue or bare denial of allegations in the previous pleading is necessary, and in that event, an issue is considered as joined and pleadings are considered as closed in terms of rule 51(b). As it turned out counsel for the plaintiff discovered that it was necessary to have filed a replication but did not. Under these circumstances the plaintiff failed to file the replication within the time frame provided for by this court and is by that very fact barred. Rule 55 (1) provides that the court or the managing judge may, on application on notice to every party and on good cause shown, make an order extending or shortening a time prescribed by these rules or by an order of court for doing an act or taking a step in connection with proceedings of any nature whatsoever, on such terms as the court or managing judge considers suitable or appropriate.

[14] The Joint Pre-Trial report was adopted and made an order of court. The request of the plaintiff amounts to a request to vary the court order which the court may do in terms of Rule 26 (10) on good cause shown.

[15] For purposes of this matter I shall consider the application filed by the plaintiff an application envisaged by Rule 55 and will be guided by the provisions of Rule 56 to determine whether good cause has been shown to allow the late filing of the replication and for the variation of the pre-trial order. This court further acted in terms of rule 32 (4) and gave directions for this application to be heard.

[16] The explanation offered for failure to file the replication boils down to the fact that it was an oversight which was only discovered when a second counsel was instructed. This is not a withdrawal of a legal practitioner in terms of Rule 44 but merely a change in the instructed counsel. The facts were already known to the plaintiff from the outset of this matter. The last minute changes to pleadings before trial can be considered prejudicial *per se*. It is to the credit of the applicant that it did not amount to a re-opening of pleadings and that it also did not necessitate a postponement of the matter. The facts upon which the plaintiff relies in raising estoppel indeed has been incorporated in the particulars of claim and the defendant had the opportunity to plead thereto. This omission furthermore cannot be visited upon the plaintiff as this is clearly an oversight by the first instructed counsel and or the instructing legal practitioner. I am of the considered view that the court must accept the replication and vary the pre-trial order to incorporate the issue of estoppel raised in the replication. The plaintiff however would not be able to escape the cost order which should follow for the wasted costs incurred by the defendant in resisting the application. The cost should however be limited in terms of the provisions of Rule 32 (11).

[17] The replication joins issue with the allegations in the defendant's plea and furthermore raises estoppel as a defense in the event the court finds that the undertaking was not signed by a duly authorized representative of the plaintiff. The plaintiff alleged that the defendant had negligently represented on 8 November 2016 that the defendant's sole member, Mr Iipinge, sent an email attaching the undertaking from his personal e-mail, alternatively allowing his e-mail to be used. Mr Iipinge also confirmed telephonically that he signed the agreement on 9 November 2016. The plaintiff under these circumstances accepted the representation and signed the agreement and acted to its prejudice by making payment to Ratu Trading CC. The plaintiff avers that the defendant is estopped from denying that he signed the undertaking. The proposed amendment to the pre-trial includes the above issue of estoppel raised in the replication.

[18] In terms of the pre-trial order the court is called upon to determine whether:

(a) The defendant signed the written payment undertaking;

(b) Inge Zamwaani forged the signature of Mr Iipinge;

(c) Ratu Trading CC issued Job Cards for payment of N$448 500 during October 2016 and N$427 800 during November 2016.

(d) Ratu Trading CC ceded its rights, if any, to Plaintiff.

[19] The plaintiff at the outset alerted the court that it was unable to locate one of the witnesses which it intended to call by subpoena namely Inge Zamuaani despite best efforts to trace her. Inge Zamuaani is reflected on the undertaking as the person who, on behalf of Ratu Trading CC irrevocably and unconditionally instructs the defendant to pay plaintiff the invoice amounts and who warrants that she is duly authorised thereto by Ratu Trading CC. Her absence, although through no fault of either party, is regrettable.

[20] Anthea Walker, a director of plaintiff testified that the plaintiff was approached by Ratu Trading CC, represented by one Inge Zamwaani, during November 2016 for invoice discounting service. The invoices offered for discounting was due for payment by the defendant on 24 January 2017. They drafted the irrevocable payment undertaking (referred to as "the undertaking") and forwarded the e-mail to the defendant's business e-mail. She obtained the e-mail address by doing a google search of the business independently to avoid the risk of fraud. This e-mail enclosing the undertaking and other documents was however not produced. The first e-mail handed into evidence is in fact an e-mail from Martyn Ipinge to Ms Walker dated 8 November 2016 at 12H38 using the e-mail address onamagongwatrading@gmail.com. It simply reads 'Attachment are (sic) attached below for Ratu Trading invoices.' It was not disputed that this was in fact an e-mail which attached the signed undertaking and a signed Invoice discounting agreement. Both these documents were handed into evidence. The undertaking appears to have been signed on behalf (pp) of a person who warrants that he/she is duly authorised by the defendant. Next to this signature is the name Martyn clearly visible. The Invoice discounting agreement was also signed on behalf (pp) of the defendant and the name Martyn Ipinge clearly written. The latter document was erroneously signed as it was in fact Ratu Trading CC who was supposed to have signed it.

[21] A second e-mail on 8 November at 15H20 sent by Ms Walker to Martyn Ipinge thanked him for signing the undertaking and attaching a letter from Ratu Trading confirming that all payments must be made to plaintiff. This e-mail was sent to the same address as the one attaching the signed agreement i.e. onamagongwatrading@gmail.com. She also requested Mr Ipinge to confirm that he changed the banking details on the system. It is common cause that no such confirmation was ever sent.

[22] On 9 November 2016 she called the business number of the defendant and asked to speak to Martyn Iipinge. She was given his cellular number. The following is the entire transcript of the conversation:

'Martyn	Hello
Anthea:	Good day is this Martyn?
Martyn	Ja
Anthea	Hello Martyn, my name is Anthea and I am phoning from CapX Finance
Martin	CapX
Anthea	Yes. We are doing the invoice discounting for Inge for Ratu Trading.
Martyn:	Oh yes
'Anthea	Yes, so you have signed the undertaking that confirms those invoices and that confirms that they going (sic) to get paid on the 24th of January. Is that correct?
Martyn:	Yes, Yes
Anthea:	Alright. I also need to confirm with you that you understand that the payment needs to be made directly to CapX and not to Ratu Trading?
Martyn:	Oh, you mean whenever we are going to put the payment should not go directly to her should go to you?
Anthea:	It must come to us, you can't pay it to Ratu Trading it must be paid to CapX Finance.
Martyn:	No, I don't have you bank details.
Anthea:	Ok, I have sent you. Our banking details is (sic) on that document that you have signed. I've also yesterday afternoon sent you a letter that is signed by Inge from Ratu Trading that also confirms that payment must be made to us and it confirms our banking details again.
Martyn:	Oh, ja

Anthea:	Ok, so I can
Martyn:	Thank you but I did not have email I am actually working outside.
Anthea:	Ok
Martyn:	(indiscernible)… early to the site and late…
Anthea:	Ok I understand that but I mean the banking details are there you only need to make payment in January.
Martyn:	Yes Yes
Anthea:	So you'll get the email when you connect to the internet again.
Martyn:	yes, I can access it maybe this afternoon.
Anthea:	Ok, this afternoon. I have also sent you an email if you can reply to that e-mail and just confirm yes you have received it and you understand.
Martyn:	Ok
Anthea	If you confirm this afternoon I will appreciated that.
Martyn:	yes.
Anthea	Ok great, thank you so much Martyn
Martyn	Good Ma'am
Anthea	Ok keep well, bye'

[23] It was pointed out to Ms Walker by Mr Kwala, counsel for the defendant, that there was no discussion on the amount. She testified that she felt confident that he had signed the undertaking and that he knew what she was talking about. It is also common cause that he never confirmed having received the e-mail she referred to in the discussion.

[24] On 23 January 2017 she received an e-mail from Martyn from the same e-mail address acknowledging being aware that the due date was the next day but requesting a 10 day grace period in order to make the full payment. She granted the grace period but no payment was forthcoming. She contacted Martyn numerous times thereafter but received no response. She sent a letter of demand on 28 February 2017 per e-mail and per facsimile. On 1 March she received a telephone call from Martyn indicating that the only amount that is due to Ratu Trading CC is N$136 000. He confirmed that he spoke previously but he denied that he confirmed with her afterwards. She met him in person on 2 August 2017 and he informed her that he does not remember the conversation of 9 November 2016 very well and he denied having signed the undertaking.

[25] She explained that Plaintiff is primarily in the business of Invoice Discounting and that it does thorough investigation of the invoices which they intend to purchase and also relies on the information provided by its clients such as the defendant.

[26] Martyn Ipinge testified on behalf of the defendant. His testimony is that during October 2016, he concluded a contract with Inge Kunoee Zaamuani representing Ratu Trading CC to lease earth moving equipment namely one JCB and two Cat Rollers Compactors. After 2 months they returned some of the equipment as they had no further use for them. They used the equipment for a period of approximately 3 months and paid an invoice of N$56 000 which was outstanding. Their dealings ended there. He was telephonically contacted between January 2017 and February 2017 by a representative of plaintiff. He was asked if he subcontracted to Ratu and he confirmed. He was advised that he should pay directly to plaintiff any outstanding invoice that Ratu had with the defendant. He then acknowledged that an amount of N$56 000 was still outstanding and due to Ratu. Later in 2017 he was phoned by Mr Maritz from Weder, Kauta & Hoveka who alerted him to a payment of N$876 300 that was paid to Inge Zamuani by plaintiff. To his knowledge he never received that amount nor entered into a contract with the plaintiff. He saw the undertaking for the first time when the summons was served on him. He noted that the document was signed purportedly by him which was signed pp. He denied signing the document and avers that it amounts to a forgery. He suspects that Inge Zaamuani committed the forgery. He indicated that she may have colluded with one of his clerks. He denies that the invoices which are indicated on the undertaking belong to his company. The only other invoice due and payable to Ratu Trading was for N$130 000 which was paid over a period of 2 months.

[27] He testified that his system generates job cards which are sent to Ratu who in turn furnish his office with its invoice. He denies that his e-mail address is onamagongwatrading@gmail.com. He denies that the signature appearing on the undertaking is his and he was unable to identify the signature. He testified that the letter dated 23 January 2021 purporting to be sent by him was not signed by him. He testified

that Inge and one of his employees Anton Karanja compiled the said letter and he had no knowledge thereof.

[28] The plaintiff's case is that the defendant signed the undertaking and bears the onus of proof on a balance of probability.[1] No evidence was adduced that the signature was that of Martin Ipinge or someone he authorised. The court was encouraged to infer from the fact that it was sent from his e-mail address and the fact that he admitted on 9 November 2016 that he signed the disputed document. Martin Ipinge, the sole member of the defendant, disputes having signed the document and that it was his signature on the document or that the document was sent from his e-mail. The e-mail address which appears on the disputed invoices is ote@iway.na. There is no indication that the plaintiff forwarded the agreement to the defendant to the disputed e-mail but only that she received an e-mail enclosing the agreement from this e-mail address. The only other communication from Martyn Ipinge was the email dated 23 January 2017 requesting an extension. This e-mail enclosed an unsigned letter purporting to be have been written by Martyn Ipinge with a letterhead bearing the e-mail address ote@iway.na.

[29] The defendant's testimony regarding the e-mails between Anton and Inge amounts to inadmissible hearsay evidence. These e-mails were not handed into evidence since the authors thereof did not testify. This evidence has no probative value. What is however clear from the letter attached to the email to the plaintiff dated 23 January 2016 is the absence of Martyn's signature thereon. This lends credibility to his testimony that he was not the author thereof. The official letterhead of the defendant contains a different e-mail address and no other proof was adduced that Martyn sent or received any other mail from onamagongwatrading@gmail.com. I find the version of the defendant that it was not his e-mail address, to be plausible.

[30] The telephonic discussion of 9 November 2016 is an important piece of evidence. This conversation was not disputed and the court must accept that it is an accurate reflection of what transpired. The question is whether this is an admission that the

[1] See *Lansdown, NO v Wajar* 1973 (4) SA 329 (T) at p330

defendant entered into the disputed agreement. The plaintiff was correctly challenged that Martyn Ipinge did not admit to the amount of the invoices. The defendant appears to have agreed that he signed an undertaking which confirm “those invoices”. This does not clearly indicate which invoices are referred to and the amount which is due and payable. The date on which he signed the undertaking was also not mentioned. The conversation, in light of these omissions, cannot be proof that the defendant had signed the specific undertaking particularly in view of the failure by the plaintiff to prove that it was indeed Martyn Ipinge who signed the undertaking or for that matter by any person who was authorised to sign on behalf of the defendant. It becomes unnecessary for me to determine whether there was a valid cession.

[31] There is no evidence adduced that Inge Zamwaani forged the signature of Mr Iipinge as the said witness disappeared and could not be traced. There is also no evidence adduced that she issued Job Cards for payment of N$448 500 during October 2016 and N$427 800 during November 2016. It was not disputed that Ratu Trading CC ceded its rights to Plaintiff but it was disputed that Ratu was entitled to the payment as per the invoices attached to the payment undertaking.

[32] What remains to be decided is the issue of estoppel. The plaintiff pleads that defendant is estopped from relying on the fact that the written undertaking was not signed by a duly authorised representative of defendant as the defendant negligently represented to plaintiff that defendant, duly represented, had signed the written undertaking dated 8 November 2016 by virtue of the fact that Mr. Martyn Ipinge, sent an email to which was annexed the written undertaking signed on defendant’s behalf, to plaintiff’s director, Ms. Anthea Walker on about 8 November 2016; alternatively allowed the email aforesaid to be sent to plaintiff’s Ms. Anthea Walker from defendant’s email address; on about 9 November 2016 and by the defendant’s Mr. Martyn Ipinge, telephonically confirming to plaintiff’s, Ms. Anthea Walker, that the written undertaking was signed by him on behalf of defendant.

[33] Mr Jacobs, in his argument relied solely on the telephone conversation which took place on the 9th November 2016 and I, in light of Mr Iipinge's denial that the e-mail belongs to him, shall follow suit.

[34] Mr Jacobs referred this court to *Deputy Sheriff of Swakopmund V Marina Toyota CC and Another 2012 (1) NR 321 (HC*) where Judge Parker AJ succinctly deals with the issue of estoppel. The headnote reads as follow:

'Estoppel is a rule of evidence which precludes X denying the truth of some statement previously made by him or from denying the existence of facts which X has by words or conduct led others to believe in. And before estoppel can lie against a party, it must be proved: (1) that X had previously by words or conduct held out the existence of a certain fact, and (2) that X has led Y (alleging estoppel) to believe in the existence of such fact, and (3) that Y has by reason of such belief acted to Y's prejudice.'

[35] In *Factcrown Ltd v Namibia Broadcasting Corporation 2014 (2) NR 447 (SC)* page 456, paragraph 37 the court cites the following:

'Dealing with ostensible authority and estoppel the following was stated by Schutz JA, in the NBS Bank[2] case supra para 25 at 411G – J:

'… Our law has borrowed an expression, estoppel, to describe a situation where a representor may be held accountable when he has created an impression in another's mind, even though he may not have intended to do so and even though the impression is in fact wrong. Where a principal is held liable because of the ostensible authority of an agent, agency by estoppel is said to arise. But the law stresses that the appearance, the representation, must have been created by the principal himself. The fact that another holds himself out as his agent cannot, of itself, impose liability on him. … And it is not enough that an impression was in fact created as a result of the representation. It is also necessary that the representee should have acted reasonably in forming that impression: Connock's (SA) Motor Co Ltd v Sentraal Westelike Ko-operatiewe Maatskappy Bpk 1964 (2) SA 47 (T) at 50A – D.'[my underlining]

[36] Ms Walker's response to the question whether the amount was mentioned indicated that she was confident that Mr Iipinge knew what she was talking about. It must however

[2] *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others* 2002 (1) SA 396 (SCA)

be pointed out that she was not entirely clear in seeking confirmation from Mr Ipinge. The telephone call was to determine whether Mr Ipinge indeed signed the undertaking. The undertaking involved a certain amount of money and this was a crucial element of the agreement. It is evident from the telephonic discussion that Mr Iipinge was aware of the arrangement by Ms Zamwaani with CapX concerning the invoices which were payable to her. He also confirmed that he understood he had to make payment directly to CapX. It can be said that the defendant held out that he had signed an undertaking of "some invoices" which are due on the 24th of January. This falls short of holding out that he signed an undertaking of invoices in the amount of N$876 300. The existence of this fact was not put to him to confirm and it cannot now be argued that he held out the existence of an undertaking involving invoices in this amount. Whilst Ms Walker had the impression that he knew what she was talking about, it cannot be said that he held out that payment in the sum of N$876 300 was due to Ratu Trading and that he would pay this amount to the plaintiff. The defendant therefore cannot be held accountable for the impression in the plaintiff's mind that he acceded to having signed the undertaking for the amount claimed.

[37] In light of the above this court finds that the plaintiff has failed to prove its claim against the defendant on a balance of probability and it stands to be dismissed with costs. The following order is therefore made:

1. Prayer 1 and 3 of the plaintiff's application dated 19 April 2021 is granted.
2. The plaintiff is ordered to pay the defendant's cost occasioned by the application which costs is limited in terms of Rule 32 (11).
3. The plaintiff's claim is dismissed with costs.

M A TOMMASI

Judge

APPEARANCES

PLAINTIFF:	Adv. Jacobs Instructed by Schickerling Attorneys
DEFENDANT:	Mr. F Kwala of Kwala & Co. Inc.