REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: I 44/2013

In the matter between:

VERITAS KAPITAL (PTY) LTD **PLAINTIFF**

and

O'BRIAN BARRY DAVIDS **1ST DEFENDANT**
PAMELA DAVIDS **2ND DEFENDANT**

CASE NO. I 709/2013

In the matter between:

FUTENI COLLECTIONS (PTY) LTD **PLAINTIFF**

and

OB DAVIDS PROPERTIES CLOSE CORPORATION **1ST TO 32ND DEFENDANT**
AND 31 OTHERS

Neutral citation: *Veritas Kapital (Pty) Ltd v Davids* (I 44/2013) and *Futeni Collections (Pty) Ltd v OB Davids Properties Close Corporation* (I 709/2013) [2021] NAHCMD 587 (14 December 2021)

Coram: PARKER AJ
Heard: **15, 16, 17, 18, 19 & 24 November and 1 December 2021**
Delivered: **14 December 2021**

Flynote: Contract – Proof of – Onus of proof on party relying on existence of contract – Court finding that conduct of parties manifested in the joint status reports filed with the court by parties' legal representatives constitutes agreement as to balance on the capital amounts which was in dispute.

Held, there are two fundamental grounds upon which a person proves the existence of a contract, namely 'consensus' and 'reasonable reliance'.

Held, further, the parties' joint status reports filed by the parties' legal representatives with the court constitute a compromise and has the effect of *res judicata*.

Held, further, legal practitioner and client relationship similar to that of principal and agent and authority to represent litigant implies authority to settle matters but legal practitioners should act bona fide and in client's interest.

Summary: Contract – Plaintiffs and defendants entering into credit agreements – Dispute arose at one point as to the balance on the capital amounts owed to plaintiffs by defendants – Parties subjected dispute to court-connected mediation and private mediation – Mediation failed to resolve issue of balance on capital amounts – Dispute to be resolved by court concerned settlement as to the balance on the capital amounts, interest and legal costs – Plaintiffs alleging balance on capital amounts were settled – Defendants denying any such settlement – Burden of court to determine existence of settlement agreement, legal costs and interest – On the evidence court finding there existed settlement agreement as to balance on the

capital amounts on the grounds of reasonable reliance – Court granting judgment in favour of plaintiffs in the amounts calculated by plaintiff.

ORDER

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1. Judgment for plaintiffs against the defendants in the amounts of N$1 984 344.07 and N$1 210 115.92, one paying the other to be absolved.

2. The defendants shall pay plaintiffs, one paying the other to be absolved, interest on the amounts mentioned in para 1 of this order at the prime rate applicable from time in accordance with the credit agreements between the parties, and as already calculated by the plaintiffs; except that the interest payable shall be capped in terms of the *in duplum* rule.

3. Defendants shall pay one paying the other to be absolved, plaintiffs' costs of the matters on the scale as between attorney and own client; and such costs include costs of one instructing counsel and one instructed counsel in respect of:

   (a) proceedings in the matters up to 20 September 2019; and

   (b) the instant proceedings wherein the court is to determine whether the parties had concluded a settlement agreement as to the balance on the capital amounts.

4. The matters are finalized and removed from the roll.

JUDGMENT

PARKER AJ:

[1] There are two matters under two separate case numbers, namely, case no. I 44/2013 and case no. I 709/2013. The first important remark to make is that there is no good reason – none at all – to have consolidated these two matters. The consolidation is to nobody's convenience. The parties in case no. I 44/2013 are not the same, as a matter of law, as the parties in case no. I 709/2013. The facts in issue in one matter are not the same as the facts in issue in the other matter. Be that as it may, the trial proceeded on the basis that the two disparate matters have been consolidated; and so, I shall henceforth use the singular or plural of the noun 'matter' or 'case', as the context allows.

[2] As an aside, I shall say this. Summons were issued in the two cases in 2013. If the matters were children, they will be in Grade 3 in the primary school. The delay in putting these two matters to bed offends the overriding objectives set out in rule 1(3) of the rules of court.

[3] In support of their case, plaintiffs called two witnesses: Mr Linde, a legal practitioner, who at the relevant time represented plaintiffs and Mr Fourie, a registered chartered accountant, who at the relevant time was in charge of the financial affairs of plaintiffs. Defendants called these witnesses: Mr OB Davids, first defendant in each matter, Ms P Davids, second defendant in case no. I 44/2013 and thirty-second defendant in case no. I 709/2013, Ms R Neline Jansen, Branch Manager of first defendant in case no. I 709/2013, and Mr F Kisting, a chartered accountant.

[4] Plaintiffs have been represented at all relevant times by Mr Linde. At the relevant time, Mr Mueller represented all defendants except Ms Davids (second/thirty-second defendant), who was represented by Ms Petherbridge. But as from 2017, Ms Petherbridge represented all the defendants.

[5] In the instant proceeding, Ms Van der Westhuizen represents the plaintiffs as an instructed counsel; and Ms Petherbridge represents all defendants. The determination of the matter in this proceeding turns on deciding this limited question: Have the parties settled the matters as regards the capital amounts? That is the *factum probans*. (PJ Schwikkard et al *Principles of Evidence* (1997) at 15) Plaintiffs

say the matters have been settled in that regard. Defendants contend contrariwise. Thus, the plaintiffs allege that the parties have reached an agreement that settled the matters with regard to the balance on capital amounts; and so, what remains to be determined are (a) interest and (b) legal costs.

[6] In that regard, plaintiffs bear the burden of proving what they allege. (*Pillay v Krishna* 1946 AD 946) Accordingly, I proceed to consider what probative material plaintiffs have placed before the court to prove the fact in issue (the *factum probans*) in order to succeed.

[7] In considering plaintiffs' allegation, we must perforce go to the legal basics of a valid contract. In that regard, I cannot do any better than to rehearse what I said about the subject in the recent case of *Geomar Consult CC v China Harbour Engineering co Ltd Namibia* NAHCMD 455 (5 October 2021):

> '[4] First and foremost, in our law there are two fundamental grounds upon which a person **X** can prove the existence of a contract, namely, 'consensus' and 'reasonable reliance'. As to the first ground, **X** must establish that there has been an actual meeting of minds of the parties, that is, **X** and **Y** were *ad idem* (ie consensus *ad idem*). If that was established, the validity of the contract is put to bed, not to be awoken. If, however, there was not an actual meeting of minds, that is, **X** and **Y** were never *ad idem*, the question to answer is whether **X** or **Y** by their words or conduct led the other party into the reasonable belief that consensus was reached; that is 'reasonable reliance' (Dale Hutchison (Ed) *et* Chris-James Pretorius (Ed) *The Law of Contract in South Africa* 2nd ed (2012) at 19-20).'

[8] Furthermore, in *Standard Bank Namibia Limited v Alex Mabuku Kamwi* NAHCMD 63 (7 March 2013) para 11, I said the following about a rudimentary principle of our law:

> '[20] It is a general principle of our law that a person who signs a contractual document thereby signifies his assent to the contents of the document and if the contents subsequently turn out not to be to his or her liking, as is in the present case, he or she has no one to blame but himself. (R H Christie, *The*

Law of Contract in South Africa, 5th ed (006): pp 174 – 175) This is the *caveat subscriptor* rule which Ms Williams reminded the court about. And the true basis of the principle is the doctrine of quasi mutual assent; the question is simply whether the other party (in this case the plaintiff) is reasonably entitled to assume that the signatory (in this case the defendant), by signing the document, was signifying his intention to be bound by it (see Christie, *The Law of Contract in South Africa*, ibid., p. 175). The only qualification to the rule is where the signatory had been misled whether as to the nature of the document or as to its contents. (Christie *The Law of Contract in South Africa*, ibid., p 179)'

[9] Besides, any joint status report filed of record with the court by the parties' counsel is an agreement between the parties; and it constitutes a compromise (*transactio*), and the compromise is embodied in such joint status report. (*Farmer v Kriessbach* [2013] NAHCMD 128; referred to in *Markus v Telecom Namibia Ltd* 2014 (3) NR 658 (HC)) and whether extra-judicial or embodied in an order of court, a compromise has the effect of *res judicata* (*Metals Australia Ltd and another v Amakutuwa and Others* 2011 (1) NR 262 (SC) at 268 G-H) It will not conduce to due administration of justice to overlook the compromise and allow the parties ex post facto to sidestep the legal effect of a compromise as the defendants would like to do in these proceedings.

[10] Keeping the foregoing principles and approaches in my mental spectacle, I now proceed to consider the probative material which plaintiffs have placed before the court in order to decide whether plaintiffs should succeed. In that regard, it must be stressed to breaking point that the three legal practitioners whose evidence would greatly assist the court are Mr Linde for plaintiffs and Ms Petherbridge and Mr Muller (who is alive and available) for defendants. Only Mr Linde gave evidence and had his evidence tested by cross-examination.

[11] It follows, as a matter of law, that I am bound to accept as true Mr Linde's testimony on material aspects regarding meetings he had with defendants' legal practitioners and what transpired at such meetings and the resultant joint status reports, unless I find such testimony to be insufficient, unsatisfactory and unsafe to

accept, as the testimony stood unchallenged at the close of plaintiffs' case; and *a fortiori* the court, being a trier of fact, cannot be urged to disbelieve Mr Linde. (*Browne v Dunn* (1984) 6 R. 67 (HL); referred to in *S v HN* 2010 (2) NR 429 (HC))

[12] On the totality of the evidence, I make the following factual findings; and they are set out chronologically to establish that one earlier relevant matter existing at a point in time led inevitably to a subsequent relevant matter; and from that subsequent relevant matter to yet an ensuing relevant matter; in that fashion.

[13] In June 2015 the parties referred the matters to mediation for a resolution of their dispute. And we are getting to 2022 and the dispute remains unresolved in its entirety.

[14] The parties were in five mediation sessions in the period July 2015 – June 2017; two court-connected and three private. All mediations were by Mr Louis du Pisani, a legal practitioner of long standing. The mediator's last report states that the parties agreed to the exchange of financial documents between the auditors of the parties for the auditors to see whether they could agree on the calculations. In their last two mediation proceedings, the parties agreed that the capital outstanding in terms of the financial records of the plaintiff was correct. The upshot was that with the dispute over the capital amounts out of the way because the parties have agreed balance on the capital amounts, what remained to resolve was the dispute regarding interest and legal costs ('the agreement').

[15] Defendants persisted in their contention that no such agreement about the capital amounts was reached. Indeed, in his evidence, Mr Kisting declared with great verve and alacrity that that could not be correct, because he would never have agreed to such agreement. All well and good. Mr Kisting is not a party to the proceedings; and so, Kisting's position is palpably irrelevant in this proceeding: It has no probative value. Indeed, Kisting conceded that if first defendant, who employed him, and plaintiffs decided to agree the balance on the capital amounts, first defendant would not ask for Kisting's permission to do so. Be that as it may, first defendant and second/thirty-second defendant testified that there was no such agreement because there was not an actual meeting of minds: The parties were

never *ad idem* as respects the agreement on the capital amounts and that only the dispute on interest and legal costs remained unresolved.

[16] The time has come to turn to the basics about a valid contract discussed in para 7 above. I find that the evidence is not sufficient and satisfactory to establish that the parties were *ad idem* as to the agreement; and so, it is unsafe to accept it. But there is an overwhelming and uncontradicted evidence in favour of the plaintiffs for them to be thankful of the reasonable reliance principle in proving the existence of the agreement. (See para 7 above.) Ms Van der Westhuizen referred to the principle as conduct; that is, the conduct of the parties. The 'reasonable reliance' or conduct of the parties manifests itself clearly and sharply in the series of joint status reports that the parties filed with the court. Two such joint status reports are outstanding in their sheer probative value; and so, I shall refer to them particularly. I set out the relevant parts of the 10 May 2017 status report:

> '3. The Plaintiff has <u>furnished its calculations of its accounting department</u> to the auditor of the Defendants for their consideration and input without reply. This seems to be due to the fact that the Defendants' auditor alleges not to have received the information. Same has been furnished to the First to Thirty-First Defendants' legal practitioner recently for further dissemination to the auditor.
>
> 4. Ms Petherbridge represents Ms. Davids in as far the further conduct of this action is concerned. Thirty second defendant agrees that the only issue outstanding is the calculation of the interest on the capital amount. A stated case in respect of this issue is proposed by thirty second defendant.
>
> 5. Therefore the parties have not yet reached a consensus as to how to proceed due to the outstanding reconciliation currently awaited from the Defendants' auditor.'
> [Underlining in original document]

[17] The 10 May 2017 status report is signed by Mr Linde and Ms Petherbridge for second/thirty-second defendant. That is followed by the status report (dated 14 June 2017) and it is signed by all the parties' legal representatives, namely, Mr Linde, Mr Mueller and Ms Petherbridge. The agreement in the joint status report constitute a compromise; 'and whether extra-judicial or embodied in a court order of court, it has

the effect of *res judicata*.' (See para 9 above.) The signing signifies the parties' compromise. (See para 8 above.) And to crown it all and in response to first defendant and second/thirty-second defendant, I should say, the compromise binds, them. On such compromise, Lord Denning MR in *H Clark (Doncaster) Ltd v Wilkinson* [1965) All ER 934 (Court of Appeal) at 936 F-G, stated the law thus:

'We are referred to cases where a compromise or settlement has been made by counsel acting within his ostensible authority. That of course is binding, as in the case of *Strauss v Francis*.... and they rest on the simple principle that a principal is bound by a contract made by his agent within his ostensible authority.'

[18] And on the relationship of legal representatives and those they represent, the Supreme Court in *Worku v Equity Aviation* 2010 (2) NR 621 said:

'[27] The lawyer and client relationship is no more than that of principal and agent. As such, it is trite that when an agent acts within his apparent or ostensible authority, the principal is bound thereby even if he or she has given private or secret instructions to the agent limiting the authority. It is equally trite that the authority of the agent is generally construed in such a way as to include not only the powers expressly conferred upon him or her, but also such powers as are necessarily incidental or ancillary to the performance of his mandate. In order to escape liability it would be necessary for the principal to give notice to those who are likely to interact with the agent, *qua* agent, of the limitations imposed by him or her upon the agent's apparent authority.'

[19] Some two years later after the 14 June 2017 joint status report, Mr Linde wrote a letter to Mr Mueller and Ms Petherbridge, wherein Mr Linde stated in material part:

'1. Given that the capital amounts outstanding are not at issue and the only issue to be determined by an arbitrator is that of which principle should apply to interest calculations i.e the *in duplum* rule or interest calculated on a *morae* basis, our client will agree that *in duplum* rule apply in the calculation of interest in this matter in order to bring finality to the dispute in this respect.

2. Should you agree, the only other issue that is outstanding is the legal costs of our client. Client seeks costs as claimed for in the action.

3. A formal settlement agreement be drafted to record the specific terms of the settlement which can be negotiated as per practice.

Should the parties agree on point number 1 and not point number 2, we propose that the legal costs is set down for argument.

You are invited to make your further proposals in this regard, alternatively to indicate your position on respect of this offer.

Our client will provide us with the final figures shortly.'

[20] The following invitation and entreaty by Mr Linde in that letter is telling in the extreme:

'You are invited to make your further proposals in this regard, alternatively your position in respect of this offer.'

[21] The letter is dated 12 August 2012. It was followed by the 25 September 2019 joint status report signed by Linde and Ms Petherbridge. Mr Linde signed also for Mr Mueller. Mr Linde's evidence is that he talked to Mueller and Mueller requested Mr Linde to sign on his behalf. That evidence was not challenged; and I accept it.

[22] Having nothing important to say about the 12 August 2019 letter, and indubitably seeing how weighty and relevant that piece of evidence was, Ms Petherbridge sought to attack the letter on the ground that it was written 'without prejudice.' I demonstrate that Ms Petherbridge's challenge is extremely weak and cannot take the defendants' case any further than where it is: Very weak and untenable.

[23] Ms Petherbridge said that the letter was privileged in favour of the clients; and so, only the clients can waive their right to the privilege. That is a superlatively weak and monumentally untenable argument: The law does not support it, as I

demonstrate. There is no admission made by defendants, requiring protection by the 'without prejudice' tag. What the courts will not generally permit to be disclosed are negotiations. (G D Nokes *An Introduction to Evidence* ibid at 199). The letter in question contains proposals by plaintiff not by the defendants and plaintiffs are the party which has disclosed them; and *a fortiori*, the parties themselves have through their legal representatives disclosed the 12 August 2013 letter to the court in their joint status report of 25 September 2019. Thus, any inference of confidentiality is plainly not sustainable. (See P J Schwikkard *Principles of Evidence* ibid at 123; and the case there cited.)

[24] A reading of the 12 August 2019 letter contextually with the 25 September 2019 joint status report, as the two are complementary to each other, shows clearly that there was an agreement on the ground of reasonable reliance. As Ms Van der Westhuizen submitted, if no agreement had been reached as regarding the balance on the capital amounts, Ms Petherbridge and Mr Mueller would have reacted vigorously to Mr Linde's opening clause in item 1 in the 12 August 2019 letter:

> 'Given that the capital amounts are not in issue and the only issue to be determine by an arbitrator is that of which principle should apply to the interest calculation.…'

[25] Indeed, Mr Linde invited them to react. They did not. But – most significantly– they went ahead and signed the 25 September 2019 joint status report, signifying their acceptance of the proposal in Mr Linde's 12 August 2019 letter; and as officers of the court and the legal representatives of the parties telling the court what the parties agreed, on the authority of *Metals Australia Ltd and Another v Amakutuwa and Others*, the joint status reports are a compromise through and through and has the effect of *res judicata*. The parties are bound upon the authority of *Standard Bank of Namibia Limited v Alex Mabuku Kamwi* and the authority of *Worku v Equity Aviation*. No evidence was led tending to establish that the defendants' legal practitioners did not act bona fide and did not act in the interest of their clients. (*Worku loc cit*)

[26] I accept Ms Van der Westhuizen's submission that if what Mr Linde stated in the 12 August 2019 letter was not correct, they would have reacted vigorously and

immediately. They did not. Common sense (see *S v Jaar* 2004 (8) NCLP 52) and common human experience (see *Bosch v The State* [2001] 1 BLR (Court of Appeal) tell me clearly and unequivocally that if what Mr Linde said – 'Given that the capital amounts….' – was not correct and was far from the truth, the legal representatives would have said so to Mr Linde; and they would not have some five weeks later signed the 25 September 2019 joint status report whose content is based squarely and substantially on the 12 August 2012 letter.

[27] Based on these reasons, I hold that plaintiffs have proved, on the ground of reasonable reliance, that the parties reached a settlement of their dispute to the extent that they agreed that the balance on the capital amounts were settled among the parties; and what still divided them are: (a) interest, and (b) legal costs. And the amounts I find are, as testified to by Mr Linde (and Mr Linde's evidence was not demolished by cogent and satisfactory evidence):

(a) the Futeni account: N$1 210 115.92; and
(b) the Veritas account: N$1 984 344.07.

[28] Indeed, in his evidence, Kisting testified that he knew the amounts and that is why he was able to assert that the interests were too high; otherwise Kisting's assertion would have been nonsensical. Mathematically, if the capital amounts are unknown quantities, it is not possible to decide that the interests payable were high. He knew from financial documents given by Mr Linde to Mueller. Apparently, Kisting was not happy with them: That is Kisting's funeral, as I have said previously. Kisting is not a party to the matters and cannot be privy to the settlement.

[29] On the evidence and on the application of the principles of law discussed above, I conclude that plaintiffs have discharged the onus cast on them; mentioned in para 6 above. In the result, plaintiffs are entitled to judgement in their favour as respects the balance on the capital amounts.

[30] As to legal costs, I should say that no evidence was placed before the court to persuade the court not to follow the well-established general rule that costs follow the event, unless exceptional circumstances exist for the court to depart from the

general rule, as Ms Van der Westhuizen submitted; and Ms Petherbridge also reminded the court of the general rule. As no exceptional circumstances were proved to exist, the court should apply the general rule. The authorities referred to me by Ms Petherbridge support the general rule.

[31] But that is not the end of the matter. There is the dispute as to what scale the costs should attract. The dispute, in my view, is not intractable. Clause 17.3 of the credit agreements provide:

> 'In the event that the creditor takes legal action to enforce its rights against the debtor in terms of this agreement, it shall be entitled to recover from the debtor its attorney and own client costs thereby incurred.'

[32] I have no good reason, and none was pointed out to the by Ms Petherbridge, not to enforce that which the parties agreed, as Ms Van der Westhuizen submitted. In that regard, I cannot accept Ms Petherbridge's contrary submission. Having considered the relevant papers filed of record and the evidence, I cannot say that the cause of the protracted proceeding can be placed at the door of only one side of the suit.

[33] Furthermore, *Afshani and Another v Vaatz* 2007 (2) NR 381 (SC) and other similarly situated cases, referred to me by Ms Petherbridge, are good law; but they are of no assistance on the consideration of the scale of costs in the instant matter. As I have demonstrated, the scale I have applied was agreed by the parties; and as I have said, I have no good reason not to implement it.

[34] With respect, I fail to see how *Ndilula v Beuthin* NAHCMD 73 (28 March 2018) can assist the court. Ndilula is authority that where plaintiff succeeds in a matter in the High Court in which Magistrates court also has jurisdiction, it will be unjust and inequitable for the court to award plaintiff costs applicable in the High Court.

[35] One last matter: For the purposes of these matters in the instant proceedings, I hold that the common law rule of *in duplum* applies. The rule, being a common law

rule, can only be rendered inapplicable by express provisions of a statute or by agreement between parties to a contract.

[36] In the result, I order as follows:

1. Judgment for plaintiffs against the defendants in the amounts of N$1 984 344.07 and N$1 210 115.92, one paying the other to be absolved.

2. The defendants shall pay plaintiffs, one paying the other to be absolved, interest on the amounts mentioned in para 1 of this order at the prime rate applicable from time in accordance with the credit agreements between the parties, and as already calculated by the plaintiffs; except that the interest payable shall be capped in terms of the *in duplum* rule.

3. Defendants shall pay one paying the other to be absolved, plaintiffs' costs of the matters on the scale as between attorney and own client; and such costs include costs of one instructing counsel and one instructed counsel in respect of:

   (a) Proceedings in the matters up to 20 September 2019; and

   (b) The instant proceedings wherein the court is to determine whether the parties had concluded a settlement agreement as to the balance on the capital amounts.

4. The matters are finalized and removed from the roll.

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C Parker

Acting Judge

APPEARANCES:

PLAINTIFF:	C E Van der Westhuizen Instructed by Theunissen, Louw & Partners, Windhoek
FIRST, SECOND/ THIRTY-SECOND DEFENDANT:	M Petherbridge Of Petherbridge Law Chambers, Windhoek