

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION  
HELD AT WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2020/01354

In the matter between:

**KOOLIKE CONSULTANCY CC**

**PLAINTIFF**

and

**BENGUELA CURRENT COMMISSION**

**DEFENDANT**

**Neutral citation:** *Koolike Consultancy CC v Benguela Current Commission* (HC-MD-CIV-ACT-CON-2020/01354) [2023] NAHCMD 182 (11 April 2023)

**Coram:** UEITELE J

**Heard:** 6 – 8 June 2022 and 21 July 2022

**Delivered:** 11 April 2023

**Flynote:** Action – Law of contract – He who relies on a contract must prove its existence and its terms.

Law of contract – Implied or tacit terms – Implied terms are devised and implied by law itself and imported into the contract as supplementary to the express terms which have their origin in the actual intention of the parties – Tacit terms are

inferred as a matter of fact to have been actually, though tacitly, declared or indicated by the parties or parties whose declared will constitutes the contract.

**Summary:** The plaintiff was requested by the defendant to provide the defendant with production of raw visual audio and editing services and provided a quotation to that effect, which quotation was accepted by the defendant. The plaintiff alleges that it was requested to do additional work, which it did. However, the invoice which it submitted remained unpaid. Aggrieved by the non-payment of the invoice for additional work, the plaintiff commenced these proceedings claiming the amount for services which the plaintiff alleges it, over and above what was agreed, rendered to the defendant. The defendant resisted and defended the plaintiff's claim. The essence of its opposition of the plaintiff's claim is its denial of the fact that it requested the plaintiff to render additional services and also its contention that the plaintiff's services were incomplete and of poor quality.

*Held* that, with regards to the incidence of the burden of proof, it is a well-established principle of our law that 'he who alleges must prove'. Firstly, the person who claims something from another has to satisfy the court that he or she is entitled to it. Secondly, where the person against whom the claim is made is not content, but sets up a special defence, then he is regarded *quoad* that defence, as being the claimant: for his defence to be upheld he must satisfy the court that he is entitled to succeed on it.

*Held* that, having regard to the evidence and the documents presented, the court is satisfied that the invoice which remains unpaid, consists of and amounts to services that are additional to that which was contained in the approved quotation. The court accordingly reject the evidence on behalf of the defendant that the plaintiff did not provide additional services. In the court's view, the plaintiff has succeeded in discharging the *onus* resting on it and has satisfied the court that it rendered additional services to the defendant. The defendant must therefore pay to the plaintiff the amount of N\$98 435.

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**ORDER**

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1. The defendant must pay to the plaintiff the amount of N\$98 435 plus interest on the amount of N\$98 435 at the rate of 20% per annum reckoned from 14 April 2023 to the date of final payment.
2. The defendant must pay the plaintiff's disbursements which it incurred in the prosecution of its claim.
3. The matter is regarded as finalised and is removed from the roll

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**JUDGMENT**

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UEITELE J:

Introduction and background facts

[1] The plaintiff is Koolike Consultancy CC, a close corporation incorporated in terms of the laws of this country. The plaintiff is, in this matter, represented by its sole member, Mr Frans Koolike (Mr Koolike). The defendant is the Benguela Current Commission, which is a multi-sectoral intergovernmental organization established by the Republics of Angola, Namibia and South Africa to promote a coordinated approach to long term conservation, protection, rehabilitation, enhancement, and sustainable use of the Benguela Current Large Marine Ecosystem. The organization is, in terms of s 21 of the Companies Act, 2008<sup>1</sup>, an incorporated association not for gain.

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1 The Companies Act, 2008 (Act 28 of 2004).

[2] The background facts that I gathered from the pleadings and the evidence presented in court during the trial of this matter are briefly these. On 11 June 2019, Mr Koolike received a telephone call from a certain Mr Mundjulu Ipeinge (Mr Ipeinge) who was the National Project Coordinator of the defendant. Mr Ipeinge requested the plaintiff to provide the defendant with a quotation for the production of raw visual audio and editing services. Mr Koolike provided Mr Ipeinge with the requested quotation.

[3] Two days later, which is on 13 June 2019, a certain Ms Laimy Brown (Ms Brown), the defendant's Manager of Finance and Administration, telephonically contacted Mr Koolike and informed him that the defendant immediately required the plaintiff's services in Swakopmund. The two, that is Mr Koolike and Ms Brown, then discussed the quotation that Mr Koolike submitted to Mr Ipeinge especially around the days of filming and editing and additional photography services that Ms Brown requested, which was not on the first quotation submitted to Mr Ipeinge.

[4] Mr Koolike resubmitted the quotation, this time, directly to Ms Brown. In the resubmitted quotation Mr Koolike indicated that the plaintiff would provide audio-visual services (raw footage) for three days at a cost of N\$3780 per day or N\$11 340 for the three days, video and photo editing services (this would include voice-over/narration) for two days at a cost of N\$9000 per day or N\$18 000 for the two days and photography services for five days at a cost of N\$3000 per day or N\$15 000 for the three days. The total amount of the quote was thus an amount of N\$44 340.

[5] On the same day, which is on 13 June 2019, shortly after the discussion between Ms Brown and Mr Koolike and after Mr Koolike had provided Ms Brown with the quote, Ms Brown sent Mr Koolike an email in which mail she stated the following:

'Dear Frans, Please find approved quote, we need the service asap in Swakopmund. Please note due to unavailability of our bank signatories in office this week, payment can be made early next week. We apologize for the inconveniences this may have caused you.'

[6] In the approved quotation the defendant stated that 'due to limited time the filming schedule' was to take place as follows: 13 June 2019 at Henties Bay, 14 June

2019 at Swakopmund, and 15 June 2019 at Walvis Bay. On 16 June 2019, the plaintiff had to edit the voice narration and videos, and on 17 June 2019 had to assist with video showcase. The defendant further stated that the expected output were:

(a) A ± 5-6 minutes high resolution video Blue Economy captured from the three towns;

(b) Edited Blue Economy with narration.

***Note: The BCC shall provide the videographer with a narrator.***

[7] After receiving that email from Ms Brown, Mr Koolike on the same day, that is 13 June 2019, travelled to Swakopmund and on the following day started to film the items as indicated in the approved quotation. Mr Koolike, when he was filming the items, was accompanied and guided by Mr Ipeinge to the places and items that he had to film. By 16 June 2019 Mr Koolike had finished the filming of the sites and was busy editing the video.

[8] Whilst Mr Koolike was busy editing the video, Mr Ipeinge requested that they (Ipeinge and Koolike) go to Walvis Bay where the Blue Economy Inter-Ministerial Committee was scheduled to have a meeting. Mr Ipeinge and Koolike, on 16 June 2019, left Swakopmund for Walvis Bay where they joined the Inter-Ministerial Committee meeting on the Blue Economy. At the meeting Mr Koolike was asked to present the video. Mr Koolike informed the committee that the video was not done and that he could only present the work in progress and that is what he did. On 18 June 2019 the defendant paid the plaintiff the invoiced amount of N\$44 340.

[9] Mr Koolike alleges that, while he was in Walvis Bay he was requested to do additional work. Mr Koolike further alleged that he did the additional work as requested by filming and editing an additional day of Commission's meeting on 16 June 2019 at Walvis Bay, filming and editing an additional day of the stakeholders' consultation in Walvis Bay on 17 June 2019, filming and editing an additional day of the validation meeting in Windhoek on 26 June 2019, and adding captions and subtitles to these videos and personally narrating these videos. Mr Koolike alleges that these additional work was done over a period of more than 12 days. He

consequently on behalf of the plaintiff, on 27 June 2019, presented an additional invoice (for additional services) in the amount of N\$129 000 to the defendant. This invoice was revised during July 2019 and September 2019 to N\$155 438.

[10] The invoice which he submitted remained unpaid until around February 2020. Aggrieved by the non-payment of the invoice for additional work, the plaintiff during March 2020 commenced these proceedings claiming the amount of N\$155 438 for services which Mr Koolike alleges he, on behalf of the plaintiff, over and above what was agreed on 13 June 2019, rendered to the defendant.

[11] The defendant resisted and defended the plaintiff's claim. The essence of its opposition of the plaintiff's claim is its denial of the fact that it requested the plaintiff to render additional services and also its contention that the plaintiff's services were incomplete and of poor quality.

#### The issues

[12] After the parties exchanged pleadings, the court on 30 November 2021, called for a pre-trial conference. At the pre-trial conference the issues that the court was required to resolve crystallised into the following questions, which the court included in the pre-trial order as follows:

1.1 Whether subsequent to the payment of the plaintiff's initial work as per approved quotation the defendant orally requested the plaintiff to render certain additional services, outside the scope of the original terms of reference.

1.2 Whether the material and express, alternatively tacit or implied terms of the oral agreement were that: The plaintiff would provide these additional services at its hourly rate, and the defendant would pay upon presentation of the former's invoice;

1.2.1 Such additional work would, *inter alia*, include the following: Filming and editing an additional day of conventions on 16 June 2019 at Walvis Bay;

1.2.2 Filming and editing an additional day of the Stakeholder consultation in Walvis Bay on 17 June 2019;

1.2.2.1 Filming and editing an additional day of the Validation meeting in Windhoek on 26 June 2019;

1.2.2.2 Adding captions and subtitles to these videos; and

1.2.2.3 Personally narrating these videos.

1.2.3 Whether the plaintiff complied with the alleged oral part of the agreement, by filming the alleged additional conventions, alleged editing the film work and alleged narrating the video.

1.2.4 Whether the defendant is indebted to the plaintiff in the amount of N\$ 155 438 for the alleged additional work.'

[13] In determining the issues that the court is required to resolve I find it appropriate to briefly touch on the relevant parts of the evidence that was presented at the hearing of this matter.

### The evidence

#### *For the plaintiff*

[14] Mr Frans Koolike, the sole member of the plaintiff, was the only witness called by the plaintiff. Mr Koolike, amongst other testimony, testified on how they reached the agreement with the defendant, which evidence I, in summary, captured in the introductory part of this judgment and will thus not repeat it here. Save to repeat that Mr Koolike also testified that after the two days of filming and recording, he asked Mr Ipeinge as to who would do the voice narration. Mr Ipeinge replied that he would provide the text of the narration and the recorded voice narration. Mr Koolike then requested Mr Ipeinge to send him (Mr Koolike), the voice audio and the text of the narration for the latter to commence with the editing.

[15] Mr Koolike continued and testified that he received the voice audio and a brief text in respect of the films that he shot on the early morning of Sunday 16 June 2019. Upon receipt of the voice audio and text, he commenced with the editing of the video. While he was busy editing the videos of the films that he shot and the voice audio that he received, he was approached by Mr Ipeinge who informed him that they were needed in Walvis Bay where the Blue Economy Inter-Ministerial Committee (the committee) had a meeting.

[16] He continued and testified that they left Swakopmund for Walvis Bay on the same day that is, 16 June 2019. He continued and testified that they joined the committee's meeting where he was asked to present the video. He testified that he informed the committee that the video was not finalised, but he nonetheless proceeded to show the work in progress. Mr Koolike continued and testified that after he presented the video he realised that the committee members held differing views about the video. He testified that the Chairperson of the Inter-Ministerial Committee, a certain Ms Anna Erastus, was not happy with the voice narration and the content of the images of the video.

[17] Mr Koolike further testified that when he realised Ms Erastus's dissatisfaction with the video that he showed, he engaged Ms Erastus. After a back and forth discussion, Ms Erastus undertook to, as per the approved quotation, provide the text that will convey the message as regards the issues that the video displayed and also a person by the name of Frances Sheehama who would do the voice narration. He further proceeded and testified that whilst he was at the committee's meeting, which meeting was held in preparation for the stakeholders' conference the following day, 17 June 2019, which conference was working to develop the 'Namibian Blue Economy Policy/White Paper', he was asked to record the proceedings of the committee's meeting of 16 June 2019 at the Hilton in Walvis Bay, the proceedings of stakeholders conference held at the Municipality Hall of Walvis Bay on 17 June 2019, and the validation meeting held at the Kovambo Nujoma Hall, Khomas Regional Council's Office in Windhoek on 26 June 2019. When in cross-examination he was asked who instructed him to do the filming or recording, he answered that it was Mr Ipeinge.

[18] Mr Koolike further testified that he submitted three recorded and edited videos of the three events that he recorded or filmed. As a result of this, he communicated to the Chairperson of the committee that the additional filming and recording amounts to changes which would affect the invoiced amount. He testified that Ms Erastus' response was that he (Mr Koolike) must take up the issue of additional costs with the secretariat. Mr Koolike testified that he raised the question of additional costs with Ms Brown.



[19] I return to the evidence of Mr Koolike with respect to the 'working video' which he presented to the Inter-Ministerial Committee on 16 June 2019 and again to the validation workshop on 26 June 2019. I indicated earlier that Mr Koolike testified that after Ms Erastus conveyed her dissatisfaction with the text and voice narration of Mr Ipeinge she promised to provide a script of what needed to be narrated and provided a narrator in the person of Ms Sheehama.

[20] Mr Koolike testified that Ms Erastus was sent to him for him to record her, but the script that was provided was incomplete. He testified that because of the absence of a written script as to what must be narrated, this made the task of providing a voice narration difficult if not impossible. He proceeded and testified that he and a certain Dr Mbidi, Ms Sheehama and other officials from the Ministry of Fisheries and Marine Resources developed a script, which Ms Sheehama used to provide a voice narration and which he recorded, provided captions and subtitles to the images in the video. The video which he developed after Ms Sheehama narrated was the video that he presented to the validation workshop on 26 June 2019 at the Kovambo Hall in Windhoek.

[21] Mr Koolike testified that after the presentation of the video to the validation workshop on 26 June 2019, the response that he received from the workshop was that the workshop was satisfied with the content of the video. He continued and testified that despite the fact that the validation workshop conveyed its satisfaction, Ms Erastus was still not satisfied with the video and instructed Mr Koolike to download some images and voice narrations from the internet and to include those images in the video. Mr Koolike testified that for reasons of fear that he may be infringing copy rights, he refused Ms Erastus' instructions. He testified that he conveyed his reasons for the refusal to Ms Erastus.

[22] Mr Koolike testified that after the validation workshop held in Windhoek on 26 June 2019, he submitted three footages of all the events that he filmed and recorded to Mr Ipeinge. He further testified that he also submitted an invoice to Mr Ipeinge which invoice included his charge for what he considered as additional work namely; the developing of a script, the recording of the video narrator, the development of captions and subtitles and the editing work. It is that invoice that the defendant refused to pay.

*On behalf of the defendant*

[23] The defendant called three persons to testify on its behalf, namely Mr Ipeinge, Ms Erastus and Ms Brown. Mr Ipeinge was the first to testify on behalf of the defendant. He corroborated the evidence of Mr Koolike as regards the engagements of the plaintiff. He also testified that Mr Koolike did, as agreed in the terms of reference, shoot films for the three as per the filming schedule.

[24] He continued and testified that on 24 June 2021 Mr Koolike presented the plaintiff's work (video filming) to the committee. He testified that he was present at his presentation on that day. Ms Erastus was unhappy with the work Mr Koolike presented and immediately after the presentation and in the presence of the committee, verbally informed him as such. Ms Erastus there and then instructed him to redo the work and thereafter do another presentation to the committee.

[25] Mr Ipeinge furthermore testified that on 27 June 2019, Mr Koolike again presented the plaintiff's work (video filming) to the committee and the committee was again not satisfied, and the committee, thereafter, requested the Namibia Broadcasting Corporation ('NBC') to complete the video. He testified that the Namibia Broadcasting Corporation completed the work to the satisfaction of the committee.

[26] Mr Ipeinge continued and testified that on 27 June 2019, Mr Koolike submitted an invoice for the amount of N\$129 000 to the defendant. He testified that as procedure he forwarded the invoice to the Finance Manager (Ms Brown). He continued and testified that on 4 July 2019 Mr Koolike, on behalf of the plaintiff, submitted another invoice in the amount of N\$159 995 to the defendant.

[27] Mr Ipeinge testified that the alleged additional work which is included in the invoices of 27 June 2019 and 4 July 2019 does not, in terms of the terms of reference agreed to by the parties on 13 June 2019, amount to additional work attracting additional payment. He testified that Mr Koolike had to redo the same work he already quoted for because the committee was unhappy with his work. He

contended that the fact that Mr Koolike had spent more hours to redo the work does not amount to additional work.

[28] The second witness to testify on behalf of the defendant was Ms Brown. She also confirmed how the plaintiff was engaged by the defendant. She testified that on 19 June 2019, she paid the plaintiff's quotation in the amount of N\$44 340. She continued and testified that, on 10 July 2019, she received an email from the plaintiff, and attached to the email was an invoice from the plaintiff, in the amount of N\$159 995. She testified that the invoice reflected that it was in respect of video editing, voice-over narration recording, and captions or subtitled, Inter-Ministerial Committee on 16 June 2019, recording stakeholder consultations in Walvis Bay on 17 June 2019, and recording the validation meeting in Windhoek on 26 June 2019. She further testified that she neither requested nor expected an invoice from Mr Koolike.

[29] Ms Brown further testified that, the next day she responded to Mr Koolike's email, and informed him that she would liaise with the committee to establish the nature of the invoice. She continued and testified that on 10 July 2019, she engaged Ms Erastus regarding the invoice she received from the plaintiff. Ms Erastus then informed her not to make payments as the description of the services on the invoice do not amount to any additional work at all, and the initial payment made to the plaintiff on 19 June 2019 was the only payment the plaintiff was entitled to. Ms Brown further testified that she thereafter informed the plaintiff that it had already been paid for the services rendered as per the quotations submitted to her and approved by her.

[30] The third witness to testify on behalf of the defendant was Ms Erastus. She testified that on 24 June 2021, Mr Koolike presented the video that the plaintiff had developed to the defendant. She testified that the work presented by the plaintiff was not what was expected by the committee, the quality of the video visuals was disappointing. She further testified that she and the other committee members had a meeting where the other committee members expressed their dissatisfaction with the work of the plaintiff. She testified that she and a certain Vivian Kinyaga, the project manager for the Benguela Current Large Marine Ecosystem, after the meeting with the committee, again spoke to Mr Koolike and requested him to improve the quality of the video.

[31] Ms Erastus testified that on 27 June 2021, Mr Koolike again presented the video to the committee and other stakeholders. They remained unsatisfied with the work of Mr Koolie and informed him of their dissatisfaction. She continued and testified that the committee, in the wake of the dissatisfaction with Mr Koolike's work, requested the NBC to perform the work as contained in the terms of reference agreed to between the plaintiff and the defendant.

[32] Ms Erastus continued and testified that on 11 July 2019, Ms Brown informed her that the plaintiff submitted an invoice in the amount of N\$159 995 to the defendant. She continued and testified she neither requested nor expected another invoice from the plaintiff. She then, on the same day, consulted with the other members of the committee as regards the invoice. She continued to testify that after the meeting with other committee members, she informed Ms Brown of the outcome of the meeting, namely that the committee decided that Ms Brown must not make payment to the plaintiff as the description of the services on the invoice does not amount to any additional work at all, and the initial payment that was made to the plaintiff on 19 June 2019 was the only payment the plaintiff was entitled to for the services it rendered.

[33] Ms Erastus continued and testified that on 2 September 2019, Mr Koolike addressed a letter to her, in which letter he demanded payment of the invoices which he submitted on behalf of the plaintiff to the defendant. As a result of the letter she invited Mr Koolike to a meeting with the committee on 9 September 2019. At this meeting the committee informed him that it would provide him with an official response regarding his demands for payment of the additional invoices. She continued and testified that on 12 September 2019 she, in writing, responded to the plaintiff's demands for payment of additional invoices and disputed his demands and indicated that he was already paid for the work in accordance with his quotation provided on 13 June 2019.

[34] Ms Erastus continued and testified that on 16 September 2019, Mr Koolike responded to her letter, in which letter he indicated his amenability to be paid half of the invoice amount, and then provided another invoice amounting to N\$99 887.50. She testified that she did not respond to Mr Koolike's letter of 16 September 2019

because, according to her, her response of 12 September 2019 was sufficient and in accordance with the decision taken by the committee on 9 September 2019.

[35] Ms Erastus furthermore testified that the 'additional work' quoted for on the invoices does not amount to additional work. She stated that the plaintiff had to redo the same work he already quoted for because the committee was unhappy with the work that was produced. The fact that the plaintiff spent more hours to redo the work does not amount to additional work. She further testified that the alleged additional work falls outside the scope of the terms of reference was agreed upon on 13 June 2019. She concluded and stated that if at all any additional work was performed by the plaintiff outside the scope of the terms of reference agreed upon on 13 June 2019, then the necessary approval should have been granted for such work by the committee or by the defendant. To her knowledge, no approval was granted to the plaintiff to perform additional work outside the scope of the terms of reference agreed upon on 13 June 2019, as such, the plaintiff was not entitled to the amount of N\$155 438, claimed for the alleged additional work.

### Discussion

[36] In this matter, the evidence demonstrates that the versions of the protagonists are mutually destructive. The approach that must then be adopted to establish which version to accept is set out in *National Employers' General Insurance Co Ltd v Jagers*<sup>2</sup> as follows:

'(The plaintiff) can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff

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2 *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440E – G. Also see *Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR 555 (HC) at 556-8.

can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

[37] In *Motor Vehicle Accidents Fund v Lukatezi Kulubone*<sup>3</sup> Mtambanengwe, JA outlined the approach he adopts in determining which of two conflicting versions to believe as the approach advocated by Mr. Justice MacKenna<sup>4</sup> when he said:

'I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help. This is how I go about the business of finding facts. I start from the undisputed facts which both sides accept. I add to them such other facts as seem very likely to be true, as for example, those recorded in contemporary documents or spoken to by independent witnesses like the policeman giving evidence in a running down case about the marks on the road. I judge a witness to be unreliable, if his evidence is, in any serious respect, inconsistent with those undisputed or indisputable facts, or of course if he contradicts himself on important points. I rely as little as possible on such deceptive matters as his demeanour. When I have done my best to separate the truth from the false by these more or less objective tests I say which story seems to me the more probable, the plaintiff's or the defendant's.' (my emphasis)

[38] With the above introductory remarks I now proceed to consider the questions that I am required to consider.

*Did the defendant request the plaintiff to render certain additional services outside the scope of the original terms of reference?*

[39] I start off by considering the issue of evidentiary burden and ancillary matters. The incidence of the *onus* tells us who must satisfy the court. With regards to the

3 *Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone* Case No SA 13/2008 (unreported) at 40 para 51.

4 Mtambanengwe JA says at para 51 in a paper read at the University College, Dublin on 21 February 1973 and printed in the Irish Jurist Vol IX new series P.1, which was concurred in its entirety by Lord Devlin at 63 in his Book titled 'The Judge' 1979.

incidence of the burden of proof, the following can be said. It is a well-established principle of our law that '*he who alleges must prove*'. This approach was stated in *Pillay v Krishna*<sup>5</sup>. The first rule is that the person who claims something from another has to satisfy the court that he or she is entitled to it. Secondly, where the person against whom the claim is made is not content, but sets up a special defence, then he is regarded *quoad* that defence, as being the claimant: for his defence to be upheld he must satisfy the court that he is entitled to succeed on it.<sup>6</sup>

[40] The first two rules have been read to mean that the plaintiff must first prove his declaration, unless it is admitted, and then the defendant his plea, since he is the plaintiff as far as that goes. The third rule is that he who asserts, proves, and not he who denies. Therefore, a mere denial of facts which is absolute does not place the burden of proof on he who denies but rather on the one who alleges. Davis AJA further pointed out that each party may bear a burden of proof on several and distinct issues, save that the burden on proving the claim supersedes the burden of proving the defence.<sup>7</sup>

[41] It is another well-established principle of our law that the incidence of the burden of proof is a matter of substantive law. In this instance, the principle applies that he who relies on a contract must prove its existence and its terms.<sup>8</sup> It is for the above reasons that the plaintiff bears the *onus* to convince this court on a balance of probabilities that the plaintiff and the defendant concluded an agreement for the plaintiff to render services additional to those that were contained in the approved quotation of 13 June 2019.

[42] In this matter there is no dispute that the plaintiff and the defendant concluded an agreement in terms of which the plaintiff agreed to render certain services to the defendant. The services that the plaintiff had to render to the defendant were: to film certain objects at three different towns on three different days namely, at Henties Bay on 13 June 2019, at Swakopmund on 14 June 2019, and at Walvis Bay on 15 June 2019. Once the plaintiff had filmed or recorded the objects, it had to produce a

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5 *Pillay v Krishna* 1946 AD 946 at 951 -2.

6 *Ibid.*

7 *Pillay*, *supra* at 953.

8 *Trethewey and Another v Government of the Republic of Namibia (unreported)* Case No: SA 13/2006 (Delivered on 29 November 2016). Also see Hoffmann & Zeffertt, *The South African Law of Evidence* 4 ed at 509.

five to six minutes long high resolution video on 16 June 2019 and show case the video on 17 June 2019. There is furthermore no dispute between the parties that in order for the plaintiff to produce the high resolution video the defendant had to provide the plaintiff with a script and a narrator relating to the voice content of the video.

[43] Mr Koolike testified and this testimony was not denied by the defendant that Mr Ipeinge represented to him that he (Ipeinge) would provide the script to the plaintiff and also narrate the message that would accompany the video footage). Not only did Mr Ipeinge provide a script but he also read and narrated the script. Based on the script and narration by Mr Ipeinge, the plaintiff produced a five to six minutes video which he presented to the committee.

[44] In addition Mr Koolike also testified that on 16 June 2019 he was asked to film and record the proceedings of the committee at Walvis Bay on 16 June 2019, the stakeholders' consultation meeting on 17 June 2019, and the validation workshop in Windhoek on 26 June 2019. In cross-examination, Mr Koolike clearly testified that the person who requested him to film those proceedings was no other than Mr Ipeinge. The chairperson of the committee was however not happy with the video presented by the plaintiff.

[45] Mr Koolike testified and this was again not disputed that what the chairperson was unhappy with was the voice of the narrator and the content of the narration. As a result of the chairperson's dissatisfaction, the plaintiff was provided with a different narrator and revised written script, which script, with the involvement of a certain Dr Mbidi and other officials of the Ministry of Marine Resources, was rewritten by Mr Koolike. The plaintiff also had to re-record the provided narrator, a certain Ms Sheehama, and had to add captions and subtitles to the video. Mr Koolike testified that these activities amounted to additional work which he performed over a period exceeding 12 days, but he only charged the defendant for 12 days.

[46] The defendant's testimony was to deny that the plaintiff performed additional work. The defendant's main contention was that the plaintiff had to redo the work because its initial work was of poor quality. When Ms Erastus testified, I enquired from her whether the approved quote also contained a requirement that the plaintiff



had to film, record and edit the proceedings of the Inter-Ministerial Committee at Walvis Bay on 16 June 2019, the stakeholders' consultation meeting on 17 June 2019, the validation workshop in Windhoek on 26 June 2019, and to add captions and subtitles to the video. I also asked her whether these activities do not amount to additional work. I furthermore enquired from her whether the defendant provided the plaintiff with a script and narrator as it was obliged to do. Her reply was that the defendant never requested Mr Koolike to film and record the activities I referred to. She stated that she did not and still does not know who instructed Mr Koolike to record those activities. As regards the script and the narrator, she could not provide a clear answer.

[47] In his testimony, Mr Ipeinge simply testified that the work that Mr Koolike claims to be additional work is not additional work. He testified that the alleged additional work was work which Koolike had to redo because his initial work was of poor quality and Ms Erastus was not happy with that work. When, during cross-examination, he was questioned by Mr Koolike as to who instructed Mr Koolike to film, record and edit the activities of 16, 17 and 26 June 2019 and to add captions and subtitles to the video, he had no answer. Mr Ipeinge was furthermore, during cross-examination, asked why he would send a mail confirming that the plaintiff must be paid if the plaintiff's work was of substandard. He had no answer to that question. The email of 4 July 2019 which he sent to Ms Brown and Ms Kinyaga was in the following terms:

'Dear Colleagues

Attached kindly find the note file I prepared for the Video job. I think, let us go ahead and pay Koolike Consultancy. I have all the materials ...'

[48] Mr Koolike further testified that after he presented the video to the validation workshop on 26 June 2019 and not on 24 June 2019 as alleged by Ms Erastus, the workshop clapped for him and indicated their satisfaction with the video. He testified that despite the workshop's indication, Ms Erastus still instructed Mr Koolike to download some features from the internet to include them in the video. Mr Koolike indicated that he, for fear of infringing copy rights, refused those instructions. When, in cross-examination, this version was put to Ms Erastus she admitted it and added that it is when Mr Koolike refused to download material from the internet that she,

without conveying to the plaintiff its work was substandard or that his contract was terminated, instructed the NBC to produce the video that the plaintiff was contracted to produce.

[49] On a question from the court, Ms Erastus also confirmed that it was also only on 12 September 2019 that she, for the first time, communicated to Mr Koolike that the services that he rendered were of poor quality.

[50] Having regard to the evidence and the documents presented, I have formed the firm view that the filming, recording and editing of the activities of 16, 17 and 26 June 2019, and the adding of captions and subtitles to the video by the plaintiff, amounts to services that are additional to that which was contained in the approved quotation. The reasoning by Ms Erastus and Mr Ipeinge that Koolike had to redo the work because his initial work was of poor quality overlooks the fact that the defendant did not keep to its side of the bargain to provide a clear and defined script and a narrator. As a result of its failure, the work had to be redone and sure this must be at the costs of the defendant. The denial by Ms Erastus that she does not know who instructed Mr Koolike to film, record and edit the activities of 16, 17 and 26 June 2019 is unconvincing because Mr Koolike squarely identified Mr Ipeinge as the person who instructed him, and Mr Ipeinge is the person with whom Mr Koolike was interacting.

[51] I accordingly reject the evidence on behalf of the defendant that the plaintiff did not provide additional services. In my view the plaintiff has succeeded in discharging the *onus* resting on it and has satisfied me that it rendered additional services to the defendant.

[52] In view of my finding that the plaintiff rendered additional services to the defendant, the next question to be answered is, at what rate is the plaintiff to be compensated.

[53] In its particulars of claim the plaintiff pleaded that the agreement to render additional work was concluded orally and that it was an implied or tacit term of the oral agreement that the plaintiff would provide the additional services at its hourly rate, and the defendant would pay upon presentation of the plaintiff's invoice.

[54] I find it appropriate to first consider what is meant by 'implied' or 'tacit' term of a contract. In *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration*<sup>9</sup>, the former Appellate Division of the Supreme Court of South Africa stipulated that a tacit term is:

'... an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances.'

[55] The English Law on which our law on unexpressed terms of a contract is based was articulated as follows by Salmond and Williams<sup>10</sup>:

'... implied terms of a contract, meaning thereby the terms devised and implied by the law itself and imported into the contract as supplementary to the express terms which have their origin in the actual intention of the parties, must be distinguished from those terms inferred as a matter of fact to have been actually, though tacitly, declared or indicated by the party or parties whose declared will constitutes the contract. These latter terms may be described as tacit terms. It is regrettable that the word implied is ambiguous and is frequently applied not only to terms implied in law but also implied in fact, i.e., tacit terms. ... Indeed, a complete contract may be made by such conduct, as when a purchaser takes a newspaper from a bookstall and thereby incurs an obligation to pay for it. In such cases the contractual intention or will is considered to be an actual fact inferable from the conduct of the persons concerned. Such cases, therefore, do not differ in essence from those where the intention or will is expressed in spoken or written words, for speaking and writing are themselves merely particular forms of human conduct. In both kinds of case, the essential thing is that there is considered to be in the minds of the parties an actual intention or will manifested or declared by the parties by their overt acts, whether those acts take the form of written or spoken words, or other conduct. Both tacit and express terms are considered to represent the actual intention of the parties. Implied terms, on the other hand, are introduced by the law in default of the manifestation by the parties of any such actual intention ...'

[56] In *Alfred McAlpine*<sup>11</sup> the court proceeded and stated that the distinction between implied and tacit terms is that an implied term is a term implied by the law,

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9 *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A).

10 Sir John Williams Salmond and James William; *Principles of the Law of Contracts*. London, 1945.

11 Footnote 9.

whilst a tacit term is a term implied by the facts. In *Wilkins NO v Voges*<sup>12</sup> Nienaber JA explained that:

‘[a] tacit term, one so self-evident as to go without saying, can be actual or imputed. It is actual if both parties thought about a matter which is pertinent but did not bother to declare their assent. It is imputed if they would have assented about such a matter if only they had thought about it – which they did not do because they overlooked a present fact or failed to anticipate a future one.’

[57] In *Bezuidenhout v Otto and Others*<sup>13</sup> Wunsh J remarked that:

‘When it comes to supplementing the express terms of an agreement, the Courts have distinguished between a term in a contract implied by law (a ‘residual provision’ according to Kerr), and a tacit term inferred by the Court. What is not always appreciated in some of the books is the difference between the following:

1. A tacit term, which is sometimes called an implied term

In earlier cases also described as an implied term, which a Court will find to exist when:

- (a) it is necessary to import it to give business efficacy to the contract; or
- (b) the parties did not, in fact, apply their minds to it, but if an officious bystander had asked them if it should have been in the contract, they would unhesitatingly have responded in the affirmative...

2. A tacit term proper

That is to say one which the parties actually agreed upon, but did not articulate; a term they did agree to, as distinguished from one they must have agreed to. The enquiry is whether on the basis of the proved facts and circumstances it was probable that a tacit agreement had been reached.’

[58] From the above discussion it appears that there are three classes of unexpressed terms which a court may impute into a contract between parties; namely:

- (a) terms that the parties probably had in mind but did not trouble to express (Wunsh J refers to these terms as consensual tacit terms based on fact – what the

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12 *Wilkins NO v Voges* 1994 (3) SA 130 (A).

13 *Bezuidenhout v Otto and Others* 1996 (3) SA 339 (W) at 343-344.

parties had actually intended with regard to a matter which they had considered, but failed to express);

(b) terms that the parties, whether or not they actually had them in mind, would probably have expressed if the question had been brought to their attention (Wunsh J refers to these terms *as imputed* tacit terms and are based on fiction – what the parties would have agreed to if they had considered the matter at the time when the contract was concluded.; and

(c) terms that, whether or not the parties had them in mind or would have expressed them if they had foreseen the difficulty, are implied by the court because of the courts view of fairness or policy or in consequences of rules of law. (Wunsh J, adopting Professor Kerr's term, refer to this term as a residual provision).

[59] The principles to be applied by a court in determining whether or not a term must be imputed into a contract have been discussed by the courts over the years. In *Union Government (Minister of Railways and Harbours) v Faux Ltd*<sup>14</sup> the court stated that:

'It is needless to say that a Court should be very slow to imply a term in a contract which is not to be found there. The rule to be applied by a Court in determining whether or not a condition should be implied, is well stated by Lord ESHER in the case of *Hamlyn & Co. v Wood & Co.*, (1891) 2 Q.B. at p. 491, as follows: "I have for a long time understood that rule to be that a Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and businesslike manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned.'

[60] In *Seven Eleven Corporation of SA (Pty) Ltd v Cancun Trading No 150 CC*<sup>15</sup> the Supreme Court of Appeal per Lewis JA reasoned that:

'The principle applied over many years is that the term to be incorporated in the contract must be necessary, not merely desirable. The classic tests used to give effect to

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14 *Union Government (Minister of Railways and Harbours) v Faux Ltd.*, 1916 AD 105.

15 *Seven Eleven Corporation of SA (Pty) Ltd v Cancun Trading No 150 CC* 2005 (5) SA 186 (SCA).

this principle do not, however, take into account the actual intentions of the respective parties. They require the court to consider whether the term contended for would give 'business efficacy' to the contract; or to ask what the 'officious bystander' - a person who is not a party to the contract but asked whether the term is necessary - would say. "*We did not trouble to say that; it is too clear,*"... Thus, the tests which have to be satisfied before a tacit term can be imported into a contract are very strict. The reason is that it is not the Court's function to make a contract for the parties. And a Court will only imply a term when it is clear that the parties intended the term to be understood in the contract and that they concluded the contract on that basis.'

[61] The facts of the present matter resembles the example of a newspaper vendor given by Salmond and Williams.<sup>16</sup> I found that the defendant requested the plaintiff to perform additional work and the plaintiff accepted that request by performing the additional work. The defendant thereby incurred an obligation to pay for the work so performed. In a case like the present, the contractual intention or will is considered to be an actual fact inferable from the conduct of Mr Koolike and Mr Ipeinge. I am of the view that the parties actually agreed to the performance of the additional work and their intention or will was manifested or declared by their overt acts. I, therefore, find that the plaintiff has proven the existence of a *consensual tacit term* that it will perform the additional work on the basis of its hourly or daily rate.

[62] The final invoice which the plaintiff submitted to the defendant provided as follows:

NO.	DESCRIPTION	DAYS TWKS/HRS	RATE PER DAY/PER MIN/PER WORDS	AMOUNT
1.	Video editing (blue economy video)	12 days	N\$9000	N\$108 000
2.	Video editing (blue economy video)	4 Days (overtime) work in the night	N\$9000	N\$36 000
3.	Voice-over/narration recording	6:33 audio duration)	N\$3500	N\$21 000

<sup>16</sup> See para 54 of this judgment.

4.	Captions/subtitled	629 Words Video Script	N\$15	N\$9435
5.	Recording Committee meeting in Walvis Bay, on 16 June 2019	1 Day	N\$3780	N\$ 3780
6.	Recording stakeholder consultation in Walvis Bay, on 17 June 2019	1 Day	N\$3780	NS3780
7.	Recording Validation meeting in Windhoek on 26 June 2019	1 Day	N\$3780	N\$3780
8.	Video editing stakeholder consultation	2 Days	N\$7000	N\$7000
9.	Video editing Validation meeting	2 Days	7000	N\$7000
			<b>Total</b>	<b>N\$199 778</b>

[63] The quotation which the plaintiff submitted to the defendant consisted of two days of video editing and voice-over narration. The voice-over narration was not quoted separately. Mr Koolike also testified that he performed the additional work over a period of 12 days, but did not mention anything about four days overtime. I am thus of the view that the charge in respect of the four days overtime (that is the amount of N\$36 000), the cost of voice-over narration (that is the amount of N\$21 000) must be disallowed. So must the amount of N\$44 340 which the plaintiff was paid on 18 June 2019 be deducted. It thus follow that the defendant must pay to the plaintiff the amount of N\$98 435.

[64] The plaintiff was represented by its sole member, who appeared in person, so it is only entitled to its disbursements.

[65] In the result, I make the following order:

1. The defendant must pay to the plaintiff the amount of N\$98 435 plus interest on the amount of N\$98 435 at the rate of 20% per annum reckoned from 14 April 2023 to the date of final payment.
2. The defendant must pay the plaintiff's disbursements which it incurred in the prosecution of its claim.
3. The matter is regarded as finalised and is removed from the roll.

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Ueitele S F I  
Judge



## APPEARANCES

PLAINTIFF:

F Koolike

In person

DEFENDANT:

J Ludwig

Of Office of the Government Attorney

Windhoek