

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-CON-2021/01943

In the matter between:

LEXCONSULT (PTY) LTD

PLAINTIFF

and

NORED ELECTRICITY (PTY) LTD

DEFENDANT

Neutral citation: *Lexconsult (Pty) Ltd v Nored Electricity (Pty) Ltd* (HC-MD-CIV-ACT-CON-2021/01943) [2023] NAHCMD 225 (27 April 2023)

Coram: RAKOW J

Heard: 18 – 22 July 2022; 25 – 29 July 2022; 03 August 2022; 28 November 2022

Delivered: 27 April 2023

Flynote: Contract law – Damages claim resulting from a breach of contract – Agreement was renewed – Not the intention of the defendant to sign the contract with the automatic renewal clause and only for 24 months – Intention was to enter into a Service Level Agreement at the end of the implementation period – Plaintiff's claims are dismissed.

Summary: The plaintiff issued a summons on 16 November 2018 against the defendant. In summary, the first claim is based on a contractual claim for damages resulting from a breach of contract, wherein the plaintiff alleges that the agreement was renewed as per clause 2 of the agreement on account of the defendant's failure to notify it on or before 21 August 2016 of its intention to renew or not to renew – as a result, the plaintiff contends that the agreement renewed automatically for two years ending 21 November 2018. The plaintiff concedes that the second claim was not successfully proven as it 'is not sustainable, not supported by contract', thus, it abandoned the second claim. Therefore, this court will deal with the evidence of the first claim only. Similarly, the defendant withdrew claim two of its amended counter-claim with a tender of costs in respect thereof, thus evidence in rebuttal of this abandoned claim will equally not be considered.

Held that: it is important for the court to first determine whether the document is in truth a written recordable of the intention of the parties. The courts, therefore, allowed evidence regarding the negotiations and/or all agreements preceding or accompanying the document, as long as it is directed at establishing the true status of the document. In the current matter, the plaintiff disputed the wording of clause 2 of the contract in that it is their case that a sentence was added regarding an automatic renewal clause, to the wording of this section, and the effective term of the contract was changed from 36 months to 24 months. For these reasons, the counter-claim for rectification of the contract should also be considered.

In summary, the first claim is based on a contractual claim for damages resulting from a breach of contract, wherein the plaintiff alleged that the agreement was renewed under clause 2 of the agreement on account of the defendant's failure to notify it on or before 21 August 2016 of its intention to renew or not to renew – as a result, the plaintiff contends that the agreement renewed automatically for two years ending 21 November 2018.

Held that: as far as the second claim is concerned, the plaintiff claims that certain services and functions which the plaintiff had to render in terms of the agreement would be deferred until the plaintiff furnished the defendant with a quotation and the defendant agreed to the works and functions reflected on it. The plaintiff was required to provide registration and supply an SMS gateway software and the

subsequent SAP integration and configuration of the gateway software and disaster recovery services. It is clear from the evidence that there were only quotations requested for these services and no instructions given for them to be performed. The quotations were also not from the plaintiff but from a different entity, which according to Mr Mushonga has nothing to do with the plaintiff but is a separate entity in the same group of companies.

Held that: the court finds that the witness Mr Mushonga made a poor impression on the court in that he contradicted himself and had a very one-sided recollection of the happenings related to the contract. He did not give direct answers and his general demeanour did not impress the court to find him a credible witness. The second witness called by the plaintiff, Mr Nghiwilep was vague and clearly did not remember a lot about the meeting of 21 November 2014. His evidence regarding the happenings at the said meeting also leaves a lot of unanswered questions. On the other hand, Ms Antindi made a good impression on the court. She answered questions directly and had a very good recollection of the meeting on 21 November 2014.

Held further that: it was indeed not the intention of the defendant to sign the contract with the automatic renewal clause and only for 24 months, but that they intended to enter into a Service Level Agreement at the end of the implementation period which would have covered the services rendered by the plaintiff after implementation and not to have the contract automatically extended.

Plaintiff's claims are dismissed.

ORDER

1. The counterclaim of the defendant for rectification succeeds.
 2. The claims for the plaintiff are both dismissed with costs, costs to include one instructed and one instructing counsel.
 3. The matter is removed from the roll and regarded as finalized.
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JUDGMENT

RAKOW J:

Introduction:

[1] The plaintiff is Lexconsult (Pty) Ltd, a duly incorporated company in Namibia. The defendant is Nored Electricity (Pty) Ltd, a duly incorporated company in Namibia.

[2] During these proceedings, the plaintiff was represented by Mr Murorua of Murorua Kurtz Kasper Inc and the defendant by Adv Bassingweight, instructed by Angulaco Incorporated.

Background

[3] The plaintiff issued a summons on 16 November 2018 against the defendant and claimed the following relief:

'AD CLAIM 1

- a. An order against the Defendant for the specific performance of the remaining period of the ERP Services Agreement;
- b. Alternatively, cancellation and damages in the amount of N\$ 2 201 098.74 (Two million two hundred and one thousand ninety-eight dollars and seventy-four cents);
- c. Interest a *temporae morae* on the aforesaid amount;
- d. Cost of suit; and
- e. Further and or alternative relief

AD CLAIM 2

- a. Alternatively, cancellation and damages in the amount of N\$3 328 408.
- b. Interest a *temporae morae* on the aforesaid amount;
- c. Cost of suit; and
- d. Further and or alternative relief'

[4] These claims were based on an agreement entered into between the parties on 21 November 2014, for the supply, installation, and commissioning of an Enterprise Resource Planning System (ERP System).

[5] The plaintiff concedes that the second claim was not successfully proven as it 'is not sustainable, not supported by contract', thus, it abandoned the second claim. Therefore, this court will deal with the evidence of the first claim only. Similarly, the defendant withdrew its claim two of its amended counter-claim with a tender of costs in respect thereof thus, evidence in rebuttal of this abandoned claim will equally not be considered.

[6] In summary, the first claim is based on a contractual claim for damages resulting from a breach of contract, wherein the plaintiff alleges that the agreement was renewed under clause 2 of the agreement on account of the defendant's failure to notify it on or before 21 August 2016 of its intention to renew or not to renew – as a result, the plaintiff contends that the agreement renewed automatically for two years ending 21 November 2018.

[7] Clause 2 of the agreement states:

'2. Subject to the termination provision of this Agreement, this Agreement shall remain in force for 24 (twenty-four) months from the date of signature and thereafter may be renewed for a period to be determined by NORED. NORED should notify the contractor of its intention to renew or not to renew the contract 3 months before the expiry date, in the absence of such notification the agreements will auto-renew at the same rate.'

[8] However, clause 2 of the agreement is subject to clause 5 of the agreement, which reads as follows:

' Charges

5.1 In consideration of the supply of the Deliverables and the performance of the Services as per the terms of this Agreement, NORED shall pay the Charges specified in Schedule 2.

5.2 Payment shall be made in accordance with the provisions of Schedule 2.

5.3 The Changes exclude value-added tax (VAT)

5.4 Any request for payment in terms of this Agreement shall be approved by NORED, after complying with all the necessary procurement procedures in terms of the laws of Namibia, prior to invoicing.

In the event that a change is proposed or made to the Software or the System or to the Services, LexConsult shall charge an amount to be agreed between NORED and LexConsult at LexConsult' prevailing rates as agreed with NORED.'

[9] The defendant pleads that the written agreement signed by the parties does not correctly record the agreement between the parties and that the parties agreed that the agreement would be for 36 months and not 24 months subject to renewal for a period to be determined by the defendant. The defendant further indicated that the parties did not agree to the wording in clause 2 of the agreement although the plaintiff's case is that the wording was agreed upon between the parties. The **defendant** is, therefore, claiming rectification. Initially, they also claimed damages but withdrew the claim during the trial, tendering wasted costs.

Evidence for the plaintiff

Mr Wonder Mushonga

[10] Mr Mushonga testified that he is currently the Managing Director of the plaintiff since 2009. He explained that the plaintiff was awarded a tender by the defendant for the supply, implementation, testing, and commissioning of an enterprise's resource planning system for an initial period of two years, from 21 November 2014 to 21 November 2016. A copy of the agreement entered into between the parties on 21 November 2014 was presented.

[11] He explained that the plaintiff drafted the agreement and provided a draft to the defendant's company secretary, Ms Etegameno Indongo-Entindi, who according to him is a lawyer by profession, to review the draft agreement on behalf of the defendant. He scheduled a meeting with her to go through the draft agreement and to make amendments collectively. The meeting was scheduled for 21 November 2014 and was attended by the following:

- a) Mr Gottlieb Amanyanga, (the defendant's CEO)
- b) Mr Christoph Aimwata (the defendant's Senior Manager of Finance)
- c) Ms Etegameno Indongo Entindi (the defendant's company secretary and legal advisor)
- d) Mr Victorius Vatuva (the defendant's internal auditor)
- e) Mr Daniel David Nghiwilepo, (plaintiff's chairman)
- f) Mr Shelton Mavesere (plaintiff's head of ICT)

g) Ms Stella Murabe (plaintiff's head of HR and Corporate Services).

[12] Ms Ntindi brought a copy of the agreement on a memory stick and they collectively discussed the agreement while it was projected onto the wall of the boardroom. Ms Ntindi took charge of implementing the agreed changes to the draft agreement and it was printed directly from the projected screen. The plaintiff and the defendant's representatives carefully perused the agreement and signed it and both parties took an identical copy for their records.

[13] Following the signing of the agreement, the project commenced with the project preparation and scope validation, which is the process where the information is verified in the tender terms of reference versus what is actually on the ground and it was signed off by the representative of each division. He further testified that in terms of section 6.2.6 of the vendor instructions, the plaintiff was required to provide system maintenance for two years after the delivery of the license, which was delivered on 17 December 2014. Furthermore, that the ERP system implantation was completed and project phases were signed off during the year 2015 except for the additional work out of scope.

[14] He further testified that a lot of changes were discovered on the blueprint where there was a lot of deviation, but the changes were approved which caused most of the delays.

[15] He further explained that the relationship between them and the IT manager of the defendant had broken down, which was reported to the Project Manager, Mr Hamatwa. The latter and the IT manager met with Mr Mushonga and Mr Aimwata and stated that he has the mandate to ensure the contract runs until November 2018. The witness further states that he asked about their payment for the 2017/2018 financial year, and Mr Aimwata indicated that payment will be due on 21 November 2016. They however, did not receive any payment but received a letter of termination dated 22 November 2016 on 23 November 2016 with the reason cited as the contract has expired, while the plaintiff was under the impression that the contract had been renewed already because they were halfway through the second phase of the contract.

[16] He explained that the agreement between the defendant and the plaintiff came to an end on 21 November 2016 as its first initial two-year period had lapsed but due

to the auto-renewal provision in the agreement, the plaintiff submitted an invoice for the renewal period which was from November 2016 to November 2017. He explained that they initially issued invoices for two years in advance as per the contract, but the defendant indicated that they have a budget issue and that they should invoice one year at a time.

[17] He testified that the defendant did pay for the 2014/2015 year, the 2015/2016 year, and the 2016/2017 year but refused to pay for the final year of 2017/2018 and this is the subject matter of the dispute. Furthermore, he testified that the defendant requested the plaintiff to put payments for the renewal period on hold until some additional part of the scope work requested by the defendant was completed, only then would the defendant would pay the 2016/2017 annual maintenance and support invoices, which the plaintiff agreed to and only issued invoices in June 2017 after all the additions requested by the defendant were completed. The invoice was marked maintenance and support 2016/2017 and had a due date of 01 November 2016. The defendant paid the latter invoice on 01 July 2017. He further explains that the second year of the contract was supposed to end in 2018. Furthermore, a meeting was called on 27 October 2017, which was chaired by the defendant's finance chief Mr Aimwata and he informed the plaintiff delegation that he was given the mandate by the defendants' CEO to ensure that the current contract is extended until 21 November 2018 as stated earlier. He referred to the minutes of the meeting which was held. Furthermore that all the additional work be completed during the one-year extension, which included the SMS gateway and the disaster recovery implementation. In the meeting, the payment of the 2017/2018 invoice was discussed and Mr Aimwata stated that the payment is only due on 21 November 2018 and will be processed as such.

[18] It further follows that the 2017/2018 payment was never made, but instead, the plaintiff received a termination letter dated 22 November 2017. He testified that the letter states as follows:¹

'The letter stated that the initial agreement ended on the 22nd of November 2016 and that clause 2 made provision for the defendant to determine the extension period, hence they were backdating the notice and determining retrospectively that the extension period was only for 12 months. The defendant further in their letter instructed that the plaintiff had thirty

¹ Page 27 line 23 of the transcription.

days to hand over the project and vacate the premises before the 23rd of December and offered to pay the plaintiff an equivalent of thirty days' notice.'

[19] In shock, the plaintiff replied to the letter stating that the defendant cannot backdate a notice period, the agreement is halfway through the second-year renewal period and it only makes business sense to let it lapse than to terminate it prematurely and requested that the parties work together and complete what was already initiated since the budget for the disaster recovery and SMS gateway were provisioned for the 2017/2018 financial year. The plaintiff continued with its duties until it received an eviction order from the defendant's legal practitioners. It was at this point that the plaintiff sought legal advice since it opined that the defendant is acting in breach of the agreement thus, the plaintiff initiated legal action against the defendant.

[20] Mr Mushonga further confirmed that it complied with the agreement fully, in that all deliverables were met and signed off as per the discovered documents and that any outstanding work is either additional functionalities requested by the defendant or the work which the defendant failed to provide the required resources the plaintiff to carry out.

[21] The witness disputed that the contract was to run 36 months as the defendant pleads as this was not stated in any contract between the parties. He supported his contention that the initial agreement auto-renewed because the defendant made payment in the year 2016/2017 according to the agreement. He further explains that the license was issued to the defendant which they paid for in December 2016 when the initial agreement came to an end then it was auto-renewed for a further two-year term. He further explains that it would not have made sense for him not to accept the contract for 36 months, if the defendant's contention is correct because the longer he keeps a client, the better it is for his business.

[22] He explains that as a result of the defendant's breach, the plaintiff suffered damages in the sum of N\$2 201 98,74 (2 million two hundred and one thousand ninety-eight dollars and seventy-four cents) being the economic value of the wrongful termination of the contract. This figure comes from the invoice submitted in 2017 for the 2017/2018 financial year. He testified to the latter invoice and stated "that it is referring to the maintenance and support services for 2017/2018. It was a commitment already made by the defendant of which when the contract auto

renewed as a consultant we also had to secure the resources for that period so we put people on those two-year contracts for two years. So when it is terminated like it was, we cannot just terminate the contract, these people will take us to labour.”

[23] Mr Mushonga further explains clause 15 of the agreement, in that the defendant may at any time by notice in writing terminate the agreement if the plaintiff is in default of any obligation under the agreement. Provided that plaintiff failed to remedy the default within 30 days or any other period agreed upon between the parties. However, the plaintiff has not received any such notice.

[24] During cross-examination counsel for the defendant alluded to email correspondence, wherein Mr Mushonga attached the agreement in question for the defendant’s consideration. Counsel highlighted the fact that the term which is in dispute read as follows within this email correspondence:²

‘Lex Consult shall provide Nored with onsite support, unlimited telephone and email technical and operational support systems, and support services as provided for the schedule below for a term of thirty-six months beginning after the project go live.’

[25] Mr Mushonga was adamant that this was only a draft agreement which the defendant did not agree to. He amplified his answer that, he would have preferred the agreement to extend to thirty-six months, but unfortunately, their client, who is the defendant in this matter, did not agree to it.

[26] Furthermore, cross-examination was focused on the intention of the parties to the agreement. Counsel for the defense referred to various email correspondence between the parties which were handed in as exhibits.

[27] The essence of the defense counsel’s cross-examination was that the agreement which the plaintiff relies on, does not reflect the true intention of the parties. Furthermore, the automatic renewal clause as relied on, is vague, thus, they pray for rectification of this clause.

[28] When it was put to Mr Mushango, that through the email correspondence, the intention which he expressed to the defendant was that both the implementation agreement as well as the support agreement to be signed at the meeting, and further that the amount provided for under schedule 9, under annual maintenance, is for the

² Page 245, line 3 of the transcription.

annual licensing, he denied this. He explained that it cannot be signed before it was implanted. He explained the SLA for support service level has nothing to do with the implantation, it is only meant to supersede if one schedule is finished.

Daniel David Mgiwilepo

[29] Mr Daniel David Nghiwilepo was the second witness called by the plaintiff. He is the Chairperson of the board of the plaintiff and he testified that he represented the plaintiff at the occasion of the signing of the agreement on 21 November 2014 for an enterprise planning system **VRP**. The initial agreement was for two years from 21 November 2014 to 21 November 2016. He referred to clause 2 of the agreement which provided for the fact that the agreement is renewable for a period to be determined by the defendant and if the defendant failed to notify the plaintiff by 21 August 2016 of its intention to renew or not to renew then the agreement would automatically renew for 2 years.

[30] The notice to renew or not should have been delivered three months before the end of the initial contract and it was not, therefore the contract was automatically renewed for another 2 years. He referred to the situation with regards to the agreement to defer work and out-of-scope works during the project implementation which works were deferred due to budgeting constraints according to him and the cost of which is as pleaded in the particulars of the claim. The plaintiff also loaned its software and hardware to the defendant because they at that stage had not acquired the said hardware and software that was needed to run the system. He testified that the plaintiff suffered losses of contractual income due to the wrongful termination of the agreement by the defendant.

[31] He explained that on the date that the agreement was finally negotiated, the agreement was beamed by way of an overhead projector on a screen by the defendant's official who was in charge of the drafting of the agreement and that the parties discussed each clause of the agreement and changes made throughout the discussions. Then the agreement was printed and Ms Antindi and the internal auditor, Mr Vatuva checked it. He further testified that to his recollection clause 2

formed part of the agreement. He furthermore testified that it was a very lengthy meeting. He arrived at 8 a.m. and it ended in the afternoon.

[32] During cross-examination, Mr Nghiwilepo was referred to his evidence regarding the claim for the SMS gateway and disaster recovery and he was asked on what basis the plaintiff is entitled to the payment and he responded that it was based on the meeting which he attended where Mr Katire and Mr Aimwata were at their offices and Mr Katire assured them that they will continue with the work on the disaster recovery and SMS gateway. He was not sure of the date. Upon being asked whether this work was not part of the scope of the implementation agreement, he agreed that it indeed was. He could also not say whether this work was costed as part of the initial agreement.

[33] Mr Nghiwilepo was asked about the claim of damages but was unable to do so except to say that it translates into the loss the company experienced when the contract was terminated. He elected further not to answer questions relating to what specific services the company was to render for the N\$2 200 000 damages it claims. He was further confronted regarding the duration of the "contract signing meeting" as the defense witnesses would say that they had to fly in that morning from Ondangwa and had to attend a meeting at KPMG before they proceeded to the meeting with the plaintiff's representatives and the meeting could therefore, not have started at 8h00. He then indicated that it was long ago, he could not clearly remember. He could also not remember what was discussed during the day-long meeting.

Defendant's case

Ms Etegameno Nyanyukweni Indongo Antindi

[34] Ms Antindi is employed with the defendant as the executive manager: of legal services and compliance since June 2017. Before that, she was the company secretary and legal advisor. She also acted as chief executive officer of the defendant during May 2015 and December 2015. In 2014, NORED advertised a public tender through a request for proposals for a new enterprise resource planning system – ERP system. The blueprint set out the purpose of the new system as well

as the specifications and functionality required for the ERP system. The plaintiff emerged as the successful bidder.

[35] The witness testified that the plaintiff was informed of the award in a letter dated 30 October 2014 for an amount of N\$14 899,411 excluding VAT. She furthermore testified that the amount awarded is the exact amount as per the plaintiff's financial proposal, a breakdown of which is annexure A to the amended plea. On 16 November 2014 she received a draft agreement from the plaintiff. She testified that this was the only draft the defendant received of the implementation agreement. Ms Antindi testified that this agreement was the agreement that was discussed in the plaintiff's boardroom on 21 November 2014 where the parties made minor changes to the agreement before it was printed and signed. She testified that there were no discussions on changes to clause 2. The changes which were effected were effected by the secretary of the plaintiff who was also responsible to print out the agreement for the signature of the parties. She testified that Mr Mushonga also went out of the boardroom when the secretary went out to collect the printed document. She explained that there were maybe two times that the document was printed because there were not a lot of changes and the parties did not read the document again after it was printed and before it was signed. There were no significant changes except maybe to remove the references to TTCS as a contracting party.

[36] She furthermore testified that TTCS had to be removed from the agreement because the tender was submitted by the plaintiff without TTCS being part of the agreement and the defendant only wanted to contract with the plaintiff because they must be accountable for the whole implementation as a tenderer. The plaintiff is not a value-added reseller of SAP and could not sell the SAP license to them. She indicated that they received a separate agreement from Mr Mushonga, an end-user license agreement, which was signed separately with TTCS. She stated that they did not discuss any changes to clause 2 of the agreement when they met with the plaintiff and as far as the defendant is concerned the agreement was for 3 years and therefore, they acted as per that understanding. This is also clear from the fact that

the charges set out in schedule 9 of the agreement did not change from what was proposed in the financial response or the draft agreement

[37] Ms Antindi continued to testify that although the tender submitted by the plaintiff was not initialed, it formed part of the agreement by virtue of schedule 14. She pointed out that clause 1.5 of the agreement clearly states that the blueprint and the tender proposal submitted by the plaintiff form part of the agreement. She indicated that that clause was inserted at the meeting on 21 November 2014. She furthermore testified that on 20 November 2015, Mr Mushonga emailed them a draft support agreement which the plaintiff wanted the defendant to sign together with the implementation agreement. She referred to exhibit S.

[38] She testified that the purpose of the support agreement was for the plaintiff to provide support to the defendant immediately after the system had been implemented and commissioned as per clause 2.1.1 of the draft support agreement. She explained that the support agreement was discussed at the meeting on 21 November 2014 and the defendant indicated that a decision to enter into the support agreement would only be taken after the system had been implemented and therefore the agreement was not signed. She confirmed this regarding the tender instructions dealing with the portion where the service level agreement is discussed. She explained that she understood that the system would be implemented first and then after go-live, annual support would kick in.

[39] When asked if she understands the difference between technical support and Annual Software Maintenance, she explained that she does not quite understand it but she understands it from the documents that were part of the tender proposals. She referred to the instructions to the tenderers in which it was stated that under item H the tenders must provide costing for Annual Software Maintenance being for 2 years. Under item I they were supposed to provide costing for post-implementation support. Her understanding was that this part would deal with the support provided after the go-live system and the Annual Software Maintenance would refer to the licencing.

[40] Ms Antindi testified that at this point the full contract amount was paid but that she was then thereafter informed that the system is not working as it should. She confirmed that the other payments were made before these payments as provided for in schedule 9. She said that she was informed by users, mainly in the finance department that the system was not fully functional and that there was email correspondence between Mr Aimwata and Mr Mushonga about recurring workflow issues. She referred us to emails exchanged in December 2015. The email was written by Mr Mushonga to Mr Aimwata in which he apologised for recurring issues with the workflow which has affected the billing module.

[41] There is also another email before the one that Mr Mushonga sent to Mr Aimwata, addressed to Mr Mushonga from Ms Nazheem Ebrahim in which she indicated that the workflow issues had been escalated to SAP via OSS and that they were busy with the manual workaround. Ms Antindi testified that after Mr Katire took over it was discovered that there were significant configuration problems. Initially, it was decided to continue working with the plaintiff to allow them to fix the problems but some of the issues were not resolved. Eventually, a decision was taken to not renew the agreement after its expiry.

[42] The defendant informed the plaintiff of the expiry of the agreement but the plaintiff then came back and said that the agreement had expired. She then subsequently realised that the clause must have been added shortly before the defendants decided to sign it on 21 November 2014. Ms Antindi continued and testified that she was prompted to go through the draft agreement that had been sent to her in 2014 and realised that it did not have an auto-renew clause. She confirmed with Mr Vatuva whether he also recalls it in the same way and he indicated that the draft agreement did not have an auto-renew clause. She testified that she discovered that the final agreement read differently from the draft agreement only in December 2017. It is also then only that she discovered that the contract period was reduced to 24 months and that it made provision for automatic renewal in the event that the defendant does not notify the plaintiff of its intention not to renew three months before the expiry date.

[43] On the advice of the defendant's legal representatives, the defendant determined the renewal period to be 2 November 2016 to November 2017, and a letter to this effect was sent to the plaintiff on 22 November 2017. Ms Antindi testified about the context in which the letter of 22 November 2017 was written. She further testified that it would have not made sense for the defendant to agree to a clause providing for automatic renewal at the same rate because the implementation was intended to be finalized in the first year of the contract and thereafter there would only be a need for post-go-live maintenance and support while the staff of the defendant became acquainted with the system. The defendant would decide after the 2 years whether any further support was needed depending on how well the staff coped. She testified this is also the reason why the defendant did not want to sign the support agreement presented on 20 November 2014.

[44] Ms Antindi furthermore testified that annexure 2 to the particulars of claim which is a quotation for SMS gateway was never accepted and therefore defendant did not assume any obligations in respect thereof. She also testified that the quotation for disaster recovery was also not accepted. She explained why in the original plea there was reliance on a breach as a basis for termination. She confirmed that the agreement was not terminated on account of a breach although they are of the view that the agreement was breached. It is only when they consulted with their legal counsel that the pleadings were amended and they were advised that they could claim rectification of the contract.

[45] As to the meeting of 21 November 2014, Ms Antindi testified that it was scheduled for 11h00 because they also had another meeting scheduled in the morning with KPMG at 09h00 and they only flew in from Ondangwa on that day. She testified that the meeting was not very long and that it did not go beyond lunchtime. She also denied that there was any back and forth between them and the plaintiff regarding the agreement. She denied that they went through the agreement clause by clause. She testified that she recalls that the agreement was beamed on a screen and the defendant pointed out the pages where they wanted changes to be made. The changes were made by a secretary who was sitting in the boardroom and the document was then printed and she would go out to collect it and Mr Mushonga also went out a couple of times. The agreement was brought back into the boardroom and

the parties started signing without going through the agreement again. They just confirmed that the changes were effected and thereafter, the agreement was signed.

[46] She denied that Mr Mushonga told them that they would have to enter into another agreement separately with TTCS which would make provision for annual licencing fees. She testified that under the tender documents, it was indicated that there would be no additional charges accepted, other than those indicated in the tender. She referred the court to exhibit C paragraph 3.1 with the heading Tender Price where it says that "The tender price inclusive of all taxes and charges, which must be indicated, must be included in the tender submission. The defendant indicated that it will not pay any additional charges that had not been specified in the documents submitted by the tenderers".

[47] Under cross-examination, it was put to Ms Antindi that she brought a memory stick to the meeting from which she beamed the contract onto an overhead projector. She denied this and said she never brought a memory stick because the plaintiff already had their contract and therefore, there was no need to bring a memory stick. She also denied that she had the laptop or that she was given a laptop. She also testified that although she was the only one that was a lawyer in the meeting, she was not in the meeting as a lawyer to give advice or anything, as the purpose of the meeting was to come and sign the agreement. She persisted in her evidence that although the agreement indicates 24 months, the defendant was always of the understanding that the agreement was for 36 months and that they signed the agreement thinking that they are signing an agreement with a clause that provided for 36 months. It was put to her that a contract of 36 months would be more financially beneficial to the plaintiff. She, however, said that she does not agree with the statement because the amounts provided for in Schedule 9 did not change from the draft agreement to the agreement that was finally signed.

[48] Ms Antindi was asked about her statement in paragraph 22 of her witness statement to the effect that they accepted the opinion of the plaintiff regarding the project being ready to go live. It was put to her that it is not true because the plaintiff does not act as a legal advisor or advisor to the defendant. She responded and said

that they accepted the advice of the plaintiff that the system is ready to go live because they were appointed for that very purpose. She furthermore said that they were appointed because the defendant believed that they had the necessary expertise to carry out and deliver the implementation project.

[49] Mr Murorua then referred Ms Antindi to an invoice from Lex Technologies. At this stage, the court realised that the invoice is from Lex Technologies as opposed to an invoice from the plaintiff. He was asked whether she understood what the payment was for in respect of the invoice. She responded and said that it was the third payment in respect of the Annual Software Maintenance. Mr Murorua then put it to her that she said that despite the invoice indicating that it is for maintenance and support. She responded and said yes it does indicate maintenance and support but attached to the invoice is a copy of schedule 9 and the amounts there correspond with the amount for annual maintenance which in the financial proposal from the plaintiff, the costing sheet and instruction to bidders indicate that the amount is for Annual Software Maintenance.

[50] Mr Murorua then put to her that she is being disingenuous in the sense that the proforma did not provide exclusively for maintenance and support. The witness responded that it does if one goes to the instructions to bidders where it says the tenderers must cost for Annual Software Maintenance and the bidders had to indicate to the defendant how much they are going to charge the defendant for Annual Software Maintenance and just below item H was item I in which the bidders have to indicate how much they are going to charge for post-implementation support. Mr Murorua then referred the witness to the agreement that was signed with SAP in September 2018 and put it to her that the agreement was signed because the parties had omitted to sign the agreement initially. She answered that the parties did not omit to sign any agreement. They were only provided with two agreements to sign which they did.

[51] Mr Murorua had asked the witness where she gets her understanding that they must pay the plaintiff and then the plaintiff will pay over to SAP. She was referred to Mr Mushonga's email of 16 November 2015 288 in which he indicated that the plaintiff was going to pay SAP in advance for the whole two years for support

services and that it is part of their agreement with SAP and is a requirement for them to have support guaranteed for the first two years. Ms Antindi was asked in re-examination to place the context of the bullet points underneath schedule 9 in context. Just underneath the heading "Notes" which is then followed by the bullet points and in particular bullet point four which the plaintiff relied on as being the basis for it being entitled to technical support at the costs of N\$1,7 million. She was asked how she understood the bullet points and she testified that those were simply notes that the parties had to take note of. She furthermore confirmed that the only payments they were supposed to make are those identified in schedule 9.

[52] Ms Antindi was then asked to look at the invoices that were given to them on 1 November 2016 and 1 November 2017. She confirmed that both these invoices were from Lex Technologies (Pty) Ltd and that they did not have any agreement with Lex Technologies for maintenance and support. She, however, confirms that the invoice that was given to them on 16 November 2015 was from the plaintiff she also stated that she did not realize that the invoices were coming from a different company at the time.

Mr Mangisto Katire

[53] The witness is the manager at the plaintiff for information, communication, and technology since starting to work for the plaintiff on 1 February 2016. He previously worked at the Ministry of Defence where he was a key member of the SAP implementation team of the ministry. Their SAP implementation focused to integrate the logistics for the military. He had more than 15 years of SAP experience at the time he started working for the plaintiff. Several months after he joined the plaintiff, he was appointed as project manager for the SAP implementation. He testified that by the time he was appointed as Project Manager, he had already observed that SAP was not fully functional although it had gone live on 14 November 2015 and should have been in use for almost eight months.

[54] He testified that although the plaintiff claimed that some services were deferred by agreement between the parties due to budgetary constraints, he did not find any documentation on the project which recorded any agreement to defer any of

the services or modules due to budgetary constraints. He referred to the implementation status report that he had received, which indicated that all the modules were configured tested, and signed off except capital projects, and a Softline VIP interface with SAP which were not signed off. He testified that he found amongst the documentation that he received when he was appointed as Project Manager that the defendant had experienced problems with the system since shortly after go-live and that there were attempts by the plaintiff's team to rectify the problems, but that defendant had already paid in full for the implementation of the project and had also made payments for maintenance in advance.

[55] He decided to work with the plaintiff to complete the implementation of the system and also allow them to fix whatever problems there may be. He also referred the court to the relevant email correspondence and issued logs in support of his evidence. He testified that although there were sign-offs, the acceptance testing was executed by the business users on a quality insurance system while the actual business operations would be run on the production system which are two separate systems, and that doing acceptance testing in this manner does not provide assurance that the system is fully functional. Mr Katire also stated that when he took over management of the project, billing which was very crucial for the defendant was still being run on Evolution. This resulted in invoices being sent out on Evolution while payments were processed on SAP and this resulted in incorrect invoicing and cash collection errors putting the business at risk of losing substantial amounts of money due to incorrect billing records.

[56] He testified that he had a meeting with the plaintiff and that he decided to prioritise two modules in a meeting held on 11 July 2016. They started with the job card issue in July 2016 and it finally went live in February 2017. Despite the defendant having paid fully for the implementation of the system it incurred additional costs to have the issue resolved because five SAP consultants were flown in from Zimbabwe from the plaintiff's partner TTCS and the defendant had to pay for all those costs additionally. When he asked about the SMS integration he was told that the SMS messenger on the existing system could not be integrated with SAP but the plaintiff did not exclude the costs of SMS integration when it issued its invoices being an amount of N\$69 602.

[57] He indicated that he asked the plaintiff to provide a quotation on 19 February 2017 to enable SMS notification. He made this request to consider the defendant's options. A quotation was provided for N\$1 441 870 for the installation of the SMS gateway. The quotation was never accepted and therefore no obligations arose in respect thereof. He also clarified that the quotation that was received was actually from Lex Technologies and not from the plaintiff. On the issue of whether there was, in fact, a RARS messenger on the defendant's systems, Mr Katire testified that when he arrived there, he found an RARS messenger on the system. He testified that the plaintiff told him that it could not be integrated into SAP although they had actually in their tender indicated that this was possible despite having full knowledge of the version which was available to the defendant. They had the option to indicate in their tender that additional work would be done and also the cost for it, but they chose not to do so.

[58] Mr Katire also testified that billing went live in July 2017 after the defendant had to pay an additional amount of N\$500 250 for it to be implemented even though the plaintiff had already been paid fully. The plaintiff insisted on treating it as a change request although it was not because billing was never functional. He pointed out that since go-live, up to June 2017 no invoices generated by the SAP system were sent to customers. As billing was of significant importance to the defendant a decision was taken to pay the additional costs to have billing fixed instead of getting a new consultant. He pointed out that the plaintiff admitted that billing was not properly implemented although they blamed their technical partner, TTCS for this failure. He referred to an email of April 2017 in which Mr Mushonga informed him that the plaintiff had decided to complete the implementation without TTCS because TTCS failed to deliver what they had been contracted to do on the ERP system implementation.

[59] It was put to him that Mr Mushonga had testified that what he was referring to in the April 2017 email was the work that TTCS was supposed to do in respect of a change request in billing. Mr Katire pointed out that from go-live until July 2017 no invoices went out to customers from SAP. The only reason why no invoices could go out was because the system was not working. He continued and said that in

February 2016 the plaintiff started discussions with Mr Hilundwa from the defendant, regarding the implementation of SAP disaster recovery site hardware, software, and configuration. A quotation was provided but the quotation was never accepted.

[60] Concerning annual licencing fees he testified that his understanding was that the annual licencing fees for the period 2014 to 2015 and 2015 to 2016 were paid in full. He referred to an invoice from the plaintiff dated 30 November 2014 for the SAP software and licence fees which amount was paid in full. He indicated that this is the invoice that was required to be paid upon signature. The amount was for the once-off licence fee as well as one year's annual maintenance. He testified that on 29 June 2017, plaintiff issued an invoice for the licencing fees or maintenance and support fees for the years 2016 to 2017 in the amount of N\$2,201,098.74. He testified that the invoice came from Lex Technologies but was supposed to be from the plaintiff because these are payments that are linked to the agreement that was signed with the plaintiff.

[61] He testified that maintenance is usually around 20 percent of the licence fee and entitles you to updates and access to the SAP support portal. He also confirmed that it is how he motivated the payment regarding exhibit Q2 in which he indicated that the annual SAP licence was paid for two years and that they have been operating without the SAP licence since November 2016 which is a high risk. Mr Katire furthermore explained that on 9 July 2017, he sent an email to Mr Mushonga to enquire whether or not the defendant is up to date with all its SAP maintenance licencing obligations because this was after they had made a payment in June 2017. He followed up in August 2017 by way of an email on 2 August 2017 and also had a discussion with Mr Mushonga. Mr Mushonga responded on 2 August 2017 saying that he had sent a letter to Mr Aimwata to send to SAP to be moved from TTCS management to SAP management so that the defendant could in the future pay the licence fee directly to SAP and only the system maintenance support services to the defendant thus splitting the payment.

[62] Mr Katire was asked about an email that was sent to Ms Ndakolute and Mr Aimwata and which was copied to him in which it was said that the plaintiff is now

operating as Lex Technologies and therefore all payments must be made to the account of Lex Technologies. Upon a question as to whether he ever had a discussion with Mushonga regarding this email and he said he did not because he was only copied in the email. He also stated that there was never any point where there was a discussion that the plaintiff is out of the picture and that Lex Technologies is now taking over the agreement. He said that there was no such discussion because he would then have insisted on aligning the contractual relationship to that by amending the agreement to have the responsible party changed.

[63] It was put to Mr Katire during cross-examination that the plaintiff presented a case that apart from handholding support, they also had to do technical support which means that they place people at the defendant's offices to provide technical support over a lengthy period and for which they were entitled to charge. When the contract was cancelled this income was lost. Mr Katire responded and clarified that people did not only arrive after go-live. He stated that this means that they arrived for purposes of the Implementation Agreement as there was a requirement to set up a project office and it is normal to have people there during the implementation process. He pointed out that once you go live, a service level agreement is supposed to kick in which the tender documents stipulated. The implementation would then be completed and the Service Level Agreement would then start. As part of this Service Level Agreement, there would be people involved. In this case, however, although go-live happened, implementation was not completed. The project therefore remained in perpetual implementation which should never have been the case.

[64] Mr Murorua during a question to Mr Katire clarified that his client's instructions are that when the agreement went into automatic renewal, bullet point 4 under schedule 9 kicked in and the amount in bullet point 4 would be payable over and above the amounts indicated in schedule 9 because those were the only recurring amounts. He also clarified that the amount of about N\$14 million would have been paid fully before the renewal and would be exceeded during the renewal.

[65] Mr Katire was asked about the agreement signed with SAP in September 2018 and whether the amounts payable to SAP in terms of that agreement are the same as the amounts payable to the plaintiff in terms of technical support. He responded and said that the agreement with SAP was signed in 2018 and the current invoice was for 2021. The invoice from the plaintiff was for 2016 and was in accordance with the agreement concluded at the time. And therefore he said that the two agreements and invoices are not comparable because at the time in 2016 when the plaintiff invoiced the defendant there was no agreement in existence with SAP and there was no amount payable to SAP. The entire relationship was with the plaintiff and their partners. He later explained that the amount was less because there was no longer a middleman.

[66] It was put to Mr Katire that during the blueprint verification, it was established by the plaintiff that the SMS system was not there. Mr Katire responded and said that when he came to the defendant it was sending SMSes from the CRC system which was reflected in the blueprint. The defendant only wanted the SMS sending to be integrated with SAP so that SAP can start sending SMSes the same way that the CRC system is sending the SMSes. He furthermore testified that the plaintiff provided an indication of what they were going to do to do the integration charging an amount of N\$69,000 for it but then they changed their story and said that they can no longer integrate now they need to implement a SMS gateway at an amount of N\$1,4 million.

[67] It was put to Mr Katire that the plaintiff suffered damages because of the wrongful termination with regard to the SMS gateway implementation. Mr Katire responded and said the agreement provided for SMS integration which was supposed to have been done by go-live which happened in November 2015. The fact that the defendant had to go out and tender again to have the SMS integration is an indication that the plaintiff did not do the work although they were paid the N\$69 000 which they had charged.

Mr Christof Aimwata

[68] Mr Aimwata was the last witness called by the defendant. He testified that he is currently the Executive Manager, Strategy for the defendant. During the tender process, he was the senior manager for finance in the employ of the defendant. At

the time that the tender went out, the defendant had no one with experience in SAP systems. He testified as to the role that KPMG was playing. KPMG provided and assisted the defendant with an independent assessment of the process and quality assurance of the project. He confirmed that even though KPMG was there to provide quality assurance, the plaintiff was always accountable for the project, and based on their representations, the defendant expected quality work.

[69] He testified that he was appointed as the project manager on 22 December 2014 and that he testified that he and the steering committee signed off at go-live but the billing function was not functional and was therefore not ready for implementation at go-live. He stated that data migration was not completed. He testified that even though billing was signed off, it was clear that it was not ready to go live and although it was indicated as one of those ready to go live, it was not. He testified that the go-live happened in November 2015 and thereafter plaintiff had to provide maintenance services until the contract expires in November 2017. Whilst this process is ongoing billing could still be implemented and only went live on 30 June 2017. He testified that after go-live and during the handholding phase he started the migration phase from the Evolution system to SAP and in this process, they still found teething issues that would then be attended to with constant configuration and coding changes. He mentioned as an example a payment that had to be made which they could not make. He testified that he stopped being the Project Manager on 21 June 2016 when Mr Katire was appointed and at that stage, the project was incomplete as billing was not working at that stage.

[70] He was confronted with Mr Mushonga's evidence that billing did go live in November 2015 and that the only reason why more work had to be done on the billing was that there was a rule change requested by the defendant. Mr Aimwata testified that there was no change in processes. He made it clear that there were a lot of configurations going on with billing and a lot of resources that were coming but it was not because of a change in any processes. He furthermore testified that he did not have any discussion with Mr Mushonga that the SMS gateway would be a deferred service. He also clarified that all discussions that they had were with the

project steering committee and that the project steering committee is where everything is decided. He would not have had a one-on-one discussion with Mr Mushonga on important things. He furthermore stated that the SMS gateway was not part of the project implementation that he was overseeing.

[71] During cross-examination, Mr Aimwata was asked about the agreement. He testified that he was not involved in the conclusion of the agreement because there was another project manager before him who was involved in those discussions. He furthermore testified that he did not see the termination letter before. It was put to him that the agreement ended in November 2016 and was automatically renewed. He responded that he has no comment on that and with regards to the damages that the plaintiff suffered Mr Aimwata said that he did not deal with contracts. Any payments that he effected were only based on certification that was done by the project sponsor. The internal process requires that payments must be certified. As far as technical support is concerned, Mr Aimwata said that he knows that there were people but he does not know whether there were one or three and that support payment was embedded in the N\$14 million which was already paid fully at go-live. He was taken to the invoice and told that that was for payment of onsite support and he testified that his understanding is that it was for payment of the annual licences for SAP.

The arguments

[72] For the plaintiff, it was argued that the *essentialia* for the damages claim for breach of contract has been satisfied on a balance of probabilities by the plaintiff. It was further argued that the evidence provided by the defendant's witnesses derogates from that presented by the plaintiff's witnesses. These conflicting testimonies were largely directed against whether or not the contract contained clause 2 as per the contract or as per the evidence of the defendant, hence the claim for rectification. The court is requested to approach this claim against the backdrop of the defendant's negligence around the signing of the agreement and that after almost three years of implementation, the defendant now wants to rely on the said clause for the cancellation. With the withdrawal of the defendant's counterclaim, the questions pertaining to the incomplete implementation of the ERP system largely

dissipated but the defendant in their evidence admitted completing the acceptance testing and the subsequent sign-off.

[73] The agreement was therefore not terminated for breach of the agreement but for effluxion of time. Another issue that stands to be considered was whether monies payable under the contract were correctly branded as being for maintenance and support or whether they indeed were meant to be payments for SAP license fees. These monies were payable to the plaintiff had the contract not been wrongfully terminated.

[74] It was further argued by the plaintiff that the interpretation of clause 2 of the contract is a matter of law and not fact. The defendant's conflicting testimony of comparison of the agreement with the draft agreement goes against the parol evidence rule which operates to exclude all documents and correspondence other than those constituting the transaction in issue.

[75] For the defendant, it was argued that once the court finds that there must be rectification, the plaintiff's claim will fail on that basis alone. It was submitted that the defendant discharged its onus regarding the rectification especially when regard is given to the evidence of Ms Antindi in this regard. The plaintiff drafted the agreement. Mr Mushonga said as much and it was confirmed by Ms Antindi. He then shared a draft of the agreement with the defendant for it to consider and provide its input. In this draft agreement, clause 2 made provision for a contract of 36 months but more importantly it did not contain the last sentence in clause 2 which appeared in the final agreement that was signed by the parties. Clause 2 simply read as follows in the draft agreement which was shared with Ms Antindi and Mr Vatuva:

'Subject to the termination of the provisions of this Agreement, this Agreement shall remain in force for a period of 36 (thirty-six) months from the date of signature and thereafter may be renewed for a period to be determined by Nored.'

[76] The final agreement signed by the parties did not change this part of clause 2. It is evident from that fact that the parties always intended for Nored to determine the renewal period.

[77] Furthermore, it is clear from the evidence overall that technical services were not provided in the implementation agreement. Firstly, it was always the intention that a separate service level agreement would have to be signed for support services – in this case, support services meaning the technical support services as contemplated in paragraph 4.2.3 of the I T requirements portion of the instructions to bidders – exhibit B. That paragraph provides for the defendant to enter into a post-implementation support agreement with the successful vendor for, amongst others, the provision and installation of all patches and updates, service packs, and upgrades to the ERP system as and when they are made available by the software vendor, provision of consultancy services for the configuration and roll-out of additional functionality and the provision of consultancy services for support services such as help desk support, remote support, onsite support, patch installations, end-user training, and business automation definition. It is clear that although the plaintiff provided the defendant with a service level agreement during November 2014 for purposes of discussion and signing on 21 November 2014 together with the implementation agreement, the support agreement (SLA) was never signed.

[78] It was further argued that the defendant could not just plead one case and on the evidence try to make out another. The defendant approached this matter and defended it on the basis made out in the pleadings. To this date, the plaintiff has not amended its replication despite the evidence from Mr Mushonga that there was a mistake in the replication. In those circumstances, the replication stands and the court must accept that claim 1 was for annual software licencing fees which the plaintiff is not entitled to claim for. In any event, when one has regard to the contract as a whole it is clear that the amount claimed could not be for technical support services. Firstly, as indicated above, any technical support was supposed to be rendered only in terms of a separate service agreement which was never entered into between the parties. Furthermore, in terms of clause 1.5 of the agreement, the plaintiff's tender proposal formed part of the contract documents.

Legal considerations

[79] In order to determine whether or not a breach of this agreement occurred, we need to understand the concept of breach of contract and the requirements which need to be met to establish the breach. Christie³ defines breach of contract as follows:

'The obligations imposed by the terms of a contract are meant to be performed, and if they are not performed at all, or performed late or performed in the wrong manner, the party on whom the duty of performance lay (the debtor) is said to have committed a breach of the contract or, in the first two cases, to be in mora, and, in the last case, to be guilty of positive malperformance.'

[80] In their book, *Law of Damages* the fifth edition, the authors Visser & Potgieter concluded that before a party to a contract may institute a claim for damages for breach of contract the following requirements must be met⁴ :

- 'a) The other party must have committed breach of contract;
- b) The plaintiff must already have suffered actual patrimonial loss in determined or determinable amount as a result of the breach, a causal nexus between the breach of contract and patrimonial loss has to be proven;
- c) The party who commits a breach of contract must be liable in law to compensate such loss. This means that the damage must, in terms of principles regarding remoteness of damage (i.e. limitation of liability), fall within the contemplation of the parties.'

[81] The Supreme Court in *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors*⁵ O'Reagan JA referred to the South African case *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁶ where Wallis JA usefully summarized the approach to interpretation as follows –

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context

³ Christie R H: '*The Law of Contract in South Africa.*' 5th ed, LexisNexis Butterworths at 495.

⁴ Visser & Potgieter. *Law of Damages*. 2nd Edition page 310-311.

⁵ *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors* (SA 9 of 2013) [2015] NASC 10 (30 April 2015).

⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.

Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusiness-like results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words used.'

[82] O' Reagan further said the following regarding the accepted approach for the interpretation of contracts⁷:

'What is clear is that the courts in both the United Kingdom and in South Africa have accepted that the context in which a document is drafted is relevant to its construction in all circumstances, not only when the language of the contract appears ambiguous. That approach is consistent with our common-sense understanding that the meaning of words is, to a significant extent, determined by the context in which they are uttered. In my view, Namibian courts should also approach the question of construction on the basis that context is always relevant, regardless of whether the language is ambiguous or not.'

...

'Again this approach seems to comport with our understanding of the construction of meaning, that context is an important determinant of meaning. It also makes plain that interpretation is 'essentially one unitary exercise in which both text and context, and in the case of the construction of contracts, at least, the knowledge that the contracting parties had at the time the contract was concluded, are relevant to construing the contract. This unitary approach to interpretation should be followed in Namibia. A word of caution should be noted. In accepting that the distinction between 'background circumstances' and 'surrounding circumstances' should be abandoned, courts should remember that the construction of a contract remains, as Harms JA emphasised in the *KPMG*⁸ case, 'a matter of law, and not of fact, and accordingly, interpretation is a matter for the court and not for witnesses.'

⁷ Supra.

⁸ *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) ([2009] 2 All SA 523; [2009] ZASCA 7).

[83] The *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC*⁹ therefore set out the proper approach to the interpretation of documents generally, which was summarized as follows.¹⁰

(a) Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.

(b) Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production.

(c) Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or un-businesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.

(d) The construction of a contract is a matter of law, and not of fact. Its interpretation is therefore a matter for the court and not for witnesses. Interpretation is 'essentially one unitary exercise' in which both text and context are relevant to construing the contract.

(e) Consideration of the background and context is an important part of interpretation of a contract. Since context is an important determinant of meaning, when constructing a contract, the knowledge that the contracting parties had at the time the contract was concluded is a relevant consideration.

(f) Reliance on the broader context will thus not only be resorted to when the meaning of the words viewed in a narrow manner appears ambiguous. Consideration of the background and context will be an important part of all contractual interpretation.'

⁹ *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC* 2015 (3) NR 733 (SC).

¹⁰ The Supreme Court confirmed this approach in the case of *Egerer and Others NO v Executrust (Pty) Ltd and Others* 2018 (1) NR 230 (SC).

[84] As a general rule forming the backbone to all other rules of interpretation is the Parole Evidence Rule or the Integration Rule. The effect of the rule has been stated to be as follows by Watermeyer JA in *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd*¹¹:

‘Now this court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parole evidence.’

[85] It is also important for the court to first determine whether the document is in truth a written recordable of the intention of the parties. The courts have therefore allowed evidence regarding the negotiations and/or all agreements preceding or accompanying the document as long as it is directed at establishing the true status of the document.¹²

[86] In the current matter, the plaintiff disputed the wording of clause 2 of the contract in that it is their case that a sentence was added regarding an automatic renewal clause, to the wording of this section, and the effective term of the contract was changed from 36 months to 24 months. For these reasons, the counter-claim for rectification of the contract should also be considered.

[87] In doing so, the court must take into account the versions provided by the parties as to what happened during the meeting on 21 November 2014. Both the witnesses for the plaintiff and the defendant testified to this meeting but gave vastly different versions of the happenings.

[88] In this matter, the evidence demonstrates, that the two versions of the protagonists are mutually destructive. The approach is set out in *National Employers' General Insurance Co Ltd v Jagers*¹³ as follows:

¹¹*Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at 47.

¹² The Law of Contract in South Africa supra at 201-202; “as it was put by Ramsbottom J in *Schneider v Raikin* 1955 (1) SA 19 (W) at 21E: ‘The question of the admissibility of the evidence as to the agreement cannot be decided until evidence of the circumstances has been given.’

¹³ *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at H 440E – G: Also

'(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 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.'

[89] In *Burgers Equipment Spares Okahandja CC V Aloisius Nepolo t/a Double Power Technical Services*¹⁴ the court stated that:

'In *Sakushesheka & Another v Minister of Home Affairs*¹⁵, Muller J referred with approval to the case of *Stellenbosch Farmers' Winery Group Ltd & Another v Martell et cie & Others*,¹⁶ where the Supreme Court of Appeal of the Republic of South Africa stated that, where there are two irreconcilable versions in a civil matter, in order to come to a conclusion on the disputed issues, a court must make findings on a) the credibility of various factual witnesses; b) their reliability; and c) the probabilities.'

[90] In *Stellenbosch Farmers' Winery Group Ltd v Martell et cie*¹⁷, the court unpacks these findings and described each as follows:

'To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or

see *Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR at 556.

¹⁴ *Burgers Equipment Spares Okahandja CC V Aloisius Nepolo t/a Double Power Technical Services* [2018] NASC 405 (17 October 2018) at 114.

¹⁵ *Sakushesheka & Another v Minister of Home Affairs* 2009 (2) NR 524 (HC).

¹⁶ *Stellenbosch Farmers' Winery Group Ltd v Martell et cie* 2003 (1) 11 (SCA) at 14I-15D.

¹⁷ *Stellenbosch Farmers' Winery Group Ltd v Martell et cie* 2003 (1) 11 (SCA) at 14I-15D.

with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

[91] In order to succeed with its claim for rectification, the defendant must prove:

- i. That the written agreement does not reflect the common intention of the parties;
- ii. A mistake in the drafting of the agreement;
- iii. The actual wording of the agreement as rectified¹⁸

Discussion

[92] Using these guidelines, if one looks at the terms of the current agreement, one must conclude that the parties intended to include all modalities related to the implementation of the SAP modules in the contract, including the SAP licensing fees and the annual maintenance fee. Upon reading the contract and the instructions to bidders, this becomes clear. The contract further provided for the SMS gateway as part and parcel of the deliverable. It is further the case that in their replication the plaintiff indicates that claim one relates to annual licensing fees whilst the evidence of the first witness indicates that it relates to annual maintenance fees. This indeed was never clarified by the plaintiff. In interpreting the contract however one must conclude that the intention of the contracting parties, together with the bidding instructions and the template provided for the completion of the tender must be interpreted that the contract indeed provided for the payment of SAP licensing fees

¹⁸ Amler's Precedents of Pleadings 3rd Ed at 254.

and annual maintenance fees. This is further supported by the evidence of the plaintiff that they indeed paid these fees on behalf of the defendant.

[93] As far as the second claim is concerned, the plaintiff claims that certain services and functions which the plaintiff had to render in terms of the agreement would be deferred until the plaintiff furnished the defendant with a quotation and the defendant agreed to the works and functions reflected on it. The plaintiff was required to provide registration and supply of an SMS gateway software and the subsequent SAP integration and configuration of the gateway software and disaster recovery services. It is clear from the evidence that there were only quotations requested for these services and no instructions given for them to be performed. The quotations were also not from the plaintiff but from a different entity, which according to Mr Mushonga has nothing to do with the plaintiff but is a separate entity in the same group of companies.

[94] In the current matter, the court finds that the witness Mr Mushonga made a poor impression on the court in that he contradicted himself and had a very one-sided recollection of the happenings related to the contract. He did not give direct answers and his general demeanour did not impress the court to find him a credible witness. The second witness called by the plaintiff, Mr Nghiwilep was vague and clearly did not remember a lot about the meeting of 21 November 2014. His evidence regarding the happenings at the said meeting also leaves a lot of unanswered questions. On the other hand, Ms Antindi made a good impression on the court. She answered questions directly and had a very good recollection of the meeting on 21 November 2014.

[95] When looking at the explanation provided by Ms Antindi for the signing of the contract without noticing the changes to clause 2 of the contract as well as the wording and financial figures used in other parts of the contract, the court must conclude that it was indeed not the intention of the defendant to sign the contract with the automatic renewal clause and only for 24 months but that they intended to enter into a Service Level Agreement at the end of the implementation period which would have covered the services rendered by the plaintiff after implementation and not to

have the contract automatically extended. It is further clear that the wording they understood to be the wording of clause 2 is:

'Subject to the termination provision of this Agreement, this Agreement shall remain in force for a period of 36 (thirty-six) months from the date of signature and thereafter may be renewed for a period to be determined by NORED.'

[96] This was then also the wording that was found in the draft agreement sent to the defendant by Mr Mushonga. The elements for rectifications have therefore all been covered in the case presented by the defendant.

[97] Their claim for rectification must therefore succeed and the claims for the plaintiff were dismissed as a result of this.

[98] The court, therefore, makes the following order:

1. The counterclaim of the defendant for rectification succeeds.
2. The claims for the plaintiff are both dismissed with costs, costs to include one instructed and one instructing counsel.
3. The matter is finalized and removed from the roll.

E RAKOW
Judge

APPEARANCES

PLAINTIFF: L Murorua
Of Murorua Kurtz Kasper Inc, Windhoek.

RESPONDENT: N Bassingweight
Instructed by AngulaCo Incorporated, Windhoek.