REPORTABLE

CASE NO.: SA 51/2011

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

UGAB TERRACE LODGE CC

(Now known as Ugab Terrace Lodge (Pty) Ltd) **Appellant**

And

DAMARALAND BUILDERS CC **Respondent**

Neutral Citation: *Ugab Terrace Lodge CC v Damaraland Builders CC (SA 51-2011) [2014] NASC (25 July 2014)*

Coram: CHOMBA AJA, MTAMBANENGWE AJA and O'REGAN AJA

Heard: **6 November 2013**

Delivered: **25 July 2014**

APPEAL JUDGMENT

CHOMBA AJA (MTAMBANENGWE AJA and O'REGAN AJA concurring):

[1] In the court *a quo* the present respondent was the plaintiff and the appellant was the defendant. Therefore for the sake of convenience only, I shall in this

judgment refer to them as defendant and plaintiff respectively. Secondly, I deem it necessary to start this judgment by considering the application for condonation as submitted by the defendant.

Application for condonation

[2] The defendant applied to this Court that its failure to timeously comply with some rules of court be condoned. There were three aspects to that application, *viz*:

(a) late filing of the appeal record;

(b) delayed filing of the security bond for the costs of the respondent; and

(c) improper compilation of the record of appeal, which exacerbated the said late filing of record.

[3] Rules of court are matters of the moment for the purpose of ensuring that justice is properly administered. A corollary to this is that a gross injustice can sometimes be occasioned owing to failure to apply, or improperly apply procedural rules. This said, let me now briefly outline this Court's rules of procedure with regard to processing of appeals from the High Court to this Court, in as far as such rules apply to this case.

[4] A party who is aggrieved by the decision of the High Court, has a right of appeal and has resolved to appeal that decision to this Court, is required to observe the following rules of the Supreme Court. Rule 5(5)*(b)* requires that four copies of the record of appeal shall, subject to any special directions issued by the Chief Justice, be lodged with the Registrar of this Court within three months after the date of delivery of the impugned judgment. Rule 8 requires the intending appellant, within the same period of three months after delivery of the judgment, to furnish the registrar with a bond for the security of costs for the intended respondent to the appeal. Finally, so far as this case is concerned, the potential appellant is required to ensure that the record of the proceedings in the court appealed from are properly compiled in conformity with sub-rules (9) to (14) of rule 5.

[5] In its *cause célèbre,* namely *Channel Life Namibia (Pty) Ltd v Otto* 2008 (2) NR 432 (SC)*,* this Court held that if the foregoing procedures (particularly those relating to the lodging of the record of appeal and furnishing of security for costs), are not timeously complied with by the intending appellant, the appeal shall be deemed to have been withdrawn and will, pursuant to rule 5(6)*(b)*, lapse. After such lapse, the only way to resuscitate the appeal is by the intending appellant successfully applying to the Court for condonation and reinstatement in terms of rule 18. The application must be supported by affidavit. In the event that an attempt is made, before the application for condonation and reinstatement is granted, to include the intended appeal on the appeal roll, such appeal, it was held, will be struck off the roll for invalidity. (See also *Ondjava Construction CC v HAW*

Retailers t/a Ark Trading 2010 (1) NR 286 (SC)*; Namib Plains Farming v Valencia Uranium* 2011 (2) NR 469 (SC) para 24*; Arangies t/a Auto Tech v Quick Build* (SA 25/2010) [2013] NASC 4 delivered on 18 June 2013 and *Shilongo v Council of the Evangelical Lutheran Church of Namibia* (SA87/2011) [2013] NASC 13 delivered on 16 October 2013.)

[6] It is apposite to mention that after the intending appellant has applied for condonation and reinstatement, if the proposed respondent is minded to oppose it; he/she in turn is required to file a notice to oppose, backed by an answering affidavit.

[7] It was for the reason of avoiding the consequences mentioned in *Channel Life Namibia (Pty) Ltd, supra*, that the defendant applied for condonation and reinstatement. The application, which was submitted on its behalf by counsel, was supported by affidavit. On behalf of the plaintiff a notice to oppose the application was filed, but its counsel, Mr Denk, failed to support that notice with an answering affidavit. There were two reasons advanced for that failure. The first reason was that the plaintiff did not give its counsel the necessary instructions to do so. Counsel's second reason for the failure was disclosed when, at one point, as this Court was insisting on getting a plausible explanation, my brother, Mtambanengwe AJA, and Mr Denk, had the following dialogue:

> '**Mtambanengwe**: Is this not a simple application of the rule silence means consent.

Denk: There was a notice to oppose, My Lord. So if (intervention)

Mtambanengwe: I mean if you do not file an answering affidavit is this not a simple application of the rule, silence means consent?

Denk: I would submit My Lord that silence in this instance does mean consent, if one has regard to what was stated under oath by Mister (intervention)

Mtambanengwe: What is your explanation for not filing an answering affidavit?

Denk: Mr Kruger did not have the means My Lord.'

[8] After that exchange, we saw no justification for allowing Mr Denk to continue addressing us on the condonation issue. This was because it was not enough to merely give a notice to oppose; the reasons for the opposition must be stated in an answering affidavit. The natural result of the failure by the plaintiff to appropriately verify its intent to oppose the defendant's application was that the application was unopposed.

[9] Before starting to deal with the merits, I deem it impelling to say a last word on the condonation issue. This is prompted by the comedy of errors which emerged from the affidavit verifying the application as sworn by the defendant's legal counsel. The making of preparations for the appeal began sometime in 2011. Counsel confessed that she was admitted as an attorney only the previous year and that handling this appeal was her first experience since then. She claimed that her superior had given her written advice in which it had been stated that the record of appeal was required to be lodged within three months *from the date of filing the notice of appeal*. In her own words she was *adamant* to ensure that she

handled the preparatory appeal process strictly according to the procedural rules. To the contrary, she boobed by following wrong advice. Much more was expected of her than merely following advice blindly. As a matter of fact a court-bound lawyer is considered to be incompetent if he/she does not know the rules of procedure. Moreover, in law schools for learner legal practitioners they normally place a high premium on learning rules of procedure whether in criminal or civil matters. Furthermore, one expects that in every law firm of court practitioners there will be a library inclusive of rules of procedure. That stresses the pivotal role the rules play in litigation. If, therefore, counsel in this case had cared to peruse those rules - since she was concerned to ensure that she did the right thing - she would have accessed them and then discovered that the three-month period starts to run, not from the date of filing the notice of appeal, but from the date of judgment.

[10] The judgment in this case was delivered on 27 May 2011. Because of the inept manner in which the matter was handled, the appeal records were not finally lodged until 29 August 2012; that was a delay of some twelve (12) months. Further, counsel stated in the verifying affidavit that she expected the firm which compiled the appeal case records to do its work competently. To her chagrin, the records were incompetently compiled. As this court observed in *Channel Life Namibia (Pty) Ltd, supra*, it is the responsibility of counsel to ensure that appeal records are correctly compiled according to the rules. In practice this means that the lawyer seized of the matter ought to supervise record preparation in order to ensure that rules relevant to record preparation are meticulously observed. Therefore counsel’s

excuses for the mistakes she committed were unacceptable. On the obverse side, however, she was most apologetic for the multiple lapses occasioned.

[11] In order to decide whether condonation and reinstatement of the appeal should be granted, the court will now turn to consider the prospects of success upon appeal.

Once that has been done, the court will decide whether the application for condonation and reinstatement should be granted.

The appeal

[12] This appeal was a direct result of the defendant's dissatisfaction with the decision of the court *a quo* which resolved in favour of the plaintiff the dispute which arose from a contract between the parties. In summary the following were the undisputed circumstances in which the contract was concluded. The defendant, Ugab Terrace Lodge CC, represented by a Mr Leon Wiese (Mr Wiese), engaged the plaintiff, Damaraland Builders CC, represented by a Mr Bonifatius Kruger (Mr Kruger), to complete the construction of a lodge which bears the name of the defendant. Both the defendant and plaintiff were at the material time close corporations with Mr Wiese and Mr Kruger as their respective sole members and owners. For this reason in the ensuing paragraphs of this judgment I shall refer to the defendant and Mr Wiese interchangeably, and to the plaintiff and Mr Kruger interchangeably.

[13] It would appear that the construction had been begun by a different contractor, but for reasons which do not concern us in this appeal, that another contractor had abandoned ship, so to speak. Therefore Mr Wiese engaged the plaintiff to complete the construction.

[14] It is common cause between the parties that the contract document upon which this matter was premised and later fought in the court *a quo* was drawn up in a layman's manner by Mr Wiese, a non-lawyer; for this reason it was crudely crafted as will be apparent presently. Bereft of the non-essential aspects thereof, it was couched as follows:

> 'TERMS AND CONDITIONS
> All building and contracting work will be completely finished and done within 56 (fifty-six) calendar days from the date of acceptance of quotation and payment of deposit.
>
> DAMARALAND BUILDERS CC will be liable for the deposit amount received from Leon Wiese until the tender as quoted by THE BUILDING CONTRACTOR is completed.
>
> All moneys received from Mr Wiese for and on behalf of UGAB TERRACE LODGE by Mr BONIFATIUS GRUGER *(sic)* on behalf of DAMARALAND BUILDERS CC must be used solely for the purpose of this project and are not to be used for any outstanding debt of DAMARALAND BUILDERS CC or Mr BONIFATIUS KRUGER (ID 521101050015) in his own personal capacity until such time and date when the project is completed in full.

The building contractor (Mr B. Kruger) must be on the construction site at all times during this period for daily communication. Exceptions shall be made, and needs to be arranged in advance.

All work to be done must be of high standard.

The materials used must be of good quality and must be agreed upon between both parties.

Both parties accept and acknowledge that no building plans exist and that constant communication is necessary to avoid any problems.

The building contractor shall be liable for all transport, building material and labourers needed for the completion of the tender and penalty fees will be applicable if deadlines are not achieved within the mentioned time frame of 56 (fifty six) calendar days.

Both parties involved hereby accept and understand the terms and conditions noted on this agreement.

SIGNED ON THE 03 DAY OF NOVEMBER 2006 AT GROOTFONTEIN.'

There is need to explain at the outset that the word 'tender' appearing in the foregoing text was used in a non-technical sense as there was no conventional invitation for tenders, nor were there bids received from members of the public to undertake the necessary work. Instead there was a direct nomination of the plaintiff to do the work.

[15] The plaintiff commenced the action by combined summons and the following were the particulars of claim attached to the combined summons filed on 28 September 2007:

'PARTICULARS OF CLAIM

1. The PLAINTIFF is DAMARALAND BUILDERS CC, a close corporation bearing registration number CC/2001/1806, incorporated in terms of Close Corporation Laws of the Republic of Namibia with its registered business address at No. BB1, Josef Hoabeb Street, Khorixas, Republic of Namibia.

2. The DEFENDANT is UGAB TERRACE LODGE CC, a close corporation incorporated in terms of the Close Corporation Laws of the Republic of Namibia with its registered business address at 1st Floor, Corporate House, 17 Lüderitz Street, Windhoek, Republic of Namibia.

3. On or about 3 November 2006 and in Grootfontein, the parties entered into an agreement. The plaintiff was represented by Mr Bonifatius Kruger and the defendant by Mr Leon Wiese. A copy of the contract is attached hereto, marked "DB1".

4. The terms of the contract that are material to this action are:

    4.1 Plaintiff agreed and undertook to complete the construction at Ugab Terrace Lodge situated at Farm Landeck No. 700 in the District of Outjo;

4.2 The agreed contract price is the amount of N$1 456 956,00 as per the quotation by the plaintiff, a copy of which is annexed hereto marked “DB2”, which the defendant accepted;

4.3 It was an implied term of the contract that the quotation be and is incorporated as part of the contract.

5. The plaintiff, in fulfilment of its part of the contract, completed the construction at the Ugab Terrace lodge. The defendant made part payment an amount N$726 000 leaving a balance of N$730 956,00, that is due and owing.

6. Demand notwithstanding, the defendant, refused and/or neglected to pay the amount of N$730 956,00.

7. In the premises the plaintiff is entitled to payment of N$730 956,00.

WHEREFORE PLAINTIFF CLAIMS:

1. Payment of the sum of N$730 956,00.

2. Interest at the rate of 20% per annum from the date of judgment to the date of final payment;

3. Costs of the suit;

4. Further and/or alternative relief.’

[16] The immediate reaction of the defendant was that it requested for further particulars to which an appropriate response was filed by the plaintiff. Thereafter the defendant, on 3 March 2008 filed a plea and counterclaim. The plea was framed in the following terms:

'The defendant pleads as follows to the plaintiff's particulars of claim as amplified by its further particulars:

1.

Ad paragraphs 1 and 2 thereof

The defendant admits the allegations contained therein.

2.

Ad paragraph 3 thereof

Defendant admits that the parties signed annexure "DB1". However, the plaintiff provided the defendant with an offer in respect of the work to be done, already on 5 September 2006. A copy of that document is annexed hereto marked annexure "P1". In this document the plaintiff offered to complete the work for a total amount of N$1 319 000,00 (including all material which had to be purchased by the plaintiff). Defendant accepted the offer. The parties then signed annexure "DB1". During early December 2006, the parties amended the agreement. It was then agreed between the parties, while the plaintiff was represented by Mr Kruger and the defendant by Mr Wiese, that:

2.1 the plaintiff would continue to finalise the building works;

2.2 whereas, in accordance with annexure "P1", the plaintiff had to purchase all the material, it was now agreed that the defendant would purchase all further material necessary to complete the building work;

2.3 the price to complete the building work (as from the time the plaintiff commenced with the work) would not exceed the amount as originally offered by the plaintiff and accepted by the defendant.

3.

Add paragraph 4.1 thereof

Subject to what has been pleaded above, the defendant admits the allegations contained therein.

4.

Add paragraphs 4.2 and 4.3 thereof

The defendant denies that the plaintiff ever forwarded, or showed, annexure "DB2" to the defendant. The first date on which the defendant saw annexure "DB2", was when he consulted his legal practitioners for purposes of drafting the plea. Annexure "DB2" was also not annexed to the plaintiff's particulars of claim (as alleged in paragraph 4.2 of the particulars of claim) when summons was served, but was subsequently forwarded to the defendant's legal practitioners by the plaintiff's legal practitioners.

5.

Ad paragraph 5 thereof

Defendant admits that he paid the amount of N$726 000,00 to the plaintiff, but denies that a balance is outstanding. In fact, the plaintiff finalised the work (albeit out of time [see defendant's counterclaim filed simultaneously herewith]), for much more than the agreed price of N$1 319 000,00.

6.

Ad paragraphs 6 and 7 thereof

Defendant admits demand, but pleads that it is entitled to refuse to make any payment to plaintiff.

WHEREFORE defendant pleads that plaintiff's claim be dismissed with costs.'

[17] It suffices to state that in the counterclaim the defendant alleged that it had been agreed between the parties that the construction would be completed within 56 days and that there would be penalties to be incurred by the plaintiff for late completion. In that vein, the defendant pleaded that although the penalty was not quantified, the usual amount charged in building contracts was N$5000 for each day of delay. According to the defendant there had in this case been a delay of 57 days. Therefore, multiplying that rate by the number of days of delay (N$5000 x

57), the original amount of the counterclaim was N$285 000. Additionally, the defendant claimed interest at the rate of 20% per annum payable from the date of judgment to the date of final payment, and costs of the suit, followed by a prayer for further and/or alternative relief. However, when the hearing started in the court *a quo* the parties compromised and agreed that the penalty charge was to be at the rate of N$2000 per day. Therefore the total counterclaim was amended and accordingly reduced to N$114 000.

[18] The plaintiff did not deny that there had been a delay in performing its side of the contract. That notwithstanding, the plaintiff denied having incurred penalties as per the contract because, according to its plea to the counterclaim, the delay was entirely caused by the defendant in that while he was busy completing the contracted building works, the defendant instructed him to perform additional works.

The Issues

[19] The bones of contention that have to be considered in an assessment of prospects of success are basically the following:

(a) Whether or not the original contract price of N$1 319 000 was increased by mutual consent to N$1 456 956,00;

(b) Whether or not while the plaintiff was busy trying to complete the agreed contract works the defendant instructed him to perform additional works;

(c) Whether or not the plaintiff performed its side of the contract by completing the construction of the lodge;

(d) Whether or not the obligation to purchase all building materials, which was originally agreed to rest wholly on the plaintiff, was later contractually shifted to the defendant, while maintaining the original contract price of N$1 319 000,00;

(e) Assuming that the defendant did instruct the plaintiff to perform additional works, whether or not the performance of that works was the sole cause of the delay to complete the construction; and

(f) The quantum of the award, if any, to which the plaintiff was entitled.

The foregoing were more or less the same issues upon which the judge in the lower court adjudicated, and resolved in the plaintiff's favour.

[20] In this case the plaintiff's only witness was Mr Kruger, just as the sole witness for the defendant was Mr Wiese. The first and second issues emanated from Mr Kruger's evidence to the effect that after he had submitted his first quotation to the defendant in respect of the list of works agreed upon between him and Mr Wiese, the latter instructed the former to do additional works. Because of that, Mr Kruger testified, he faxed a substituted quotation to replace the earlier one

and that Mr Wiese acknowledged receipt of the said fax. It is for that reason that I feel that the first two issues should be considered together. Needless to record that the defendant's stance on both issues was to the contrary.

[21] In my view, the logical approach to resolve these juxtaposed issues is to start by examining the reason that is said to have necessitated the change of the original contract price to the level shown in first issue. So, was there in fact an instruction for additional works to be done? According to Mr Kruger, one of the additional works he performed at the behest of Mr Wiese was the building of a walk-way from the kitchen area to the swimming pool. However, in his submission before us Mr Heathcote discredited Mr Kruger's evidence on this point. In his view the evidence of Mr Wiese, which, as expected, was to the contrary, was to be preferred. The version of the latter witness was that the walk-way was included under the item 'landscaping' in the original agreed quotation. Therefore, according to him, the walk-way was not an additional job.

[22] It is an established principle of evidence that if a party is testifying to a matter of fact on which his opponent has a different version, the opponent has a duty, when that party is under cross-examination, put to him such different version so that that party has a chance to concede or disagree. In other words, there is a duty to cross-examine a witness on any aspects on which there is a dispute. The rationale of the principle is that if it is intended to argue that the evidence of the witness on that aspect should be rejected, he should be cross-examined so as to afford him an opportunity of answering to points supposedly unfavourable to him.

(See *R v M* 1946 AD 1023*; President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC)*; S v Boesak* 2001 (1) SACR 1 (CC)*;* see also *S v Katamba* 2000 (1) SACR 162 (NmS) and P J Schwikkard and S E Van der Merwe *Principles of Evidence* 2 ed (2002) para 18 6 4.)

[23] In the current case, when Mr Kruger was under cross-examination, his version that the walk-way was done as additional work was never challenged by it being put to him that the walk-way had been included under landscaping in the original quotation, or better still, it should have been put to him that when it is his turn to testify Mr Wiese would assert that the walk-way had been agreed to be part of landscaping. Instead, the claim that the walk-way was included in the original quotation under landscaping was made for the first time by Mr Wiese when he was giving his evidence-in-chief.

[24] After making his submission urging the dismissal of Mr Kruger's evidence that the walk-way was an additional job, Mr Heathcote was reminded of the duty to cross-examine on the point, which duty was not discharged in the court below. He conceded and did not persist any further in his submission. For that reason, Mr Heathcote's submission on this point stands to be, and is hereby, rejected.

[25] The record of proceedings in the court below shows that when Mr Kruger was giving his testimony, and particularly under cross-examination, he stood his ground regarding what further work he was instructed to perform outside the works

originally quoted. To this end, he succeeded in showing that the following jobs were done, *viz* constructing a roof at the entrance of the lapa; adding headrests to beds in all the ten bungalows; lowering to the standard level basins in bathrooms which had been set too high by the previous contractor; modification of three sets of stairs from being made of wooden to being made of cement; rebuilding of a septic tank near the swimming pool; installing a stove and steam extractor in the kitchen; making wider-than-normal-size doors and installing them in all the bungalows. Mr Kruger also testified that originally Mr Wiese had wanted to install ready-made droppers in the lodge. These were to be purchased, but later he opted for wooden ones which had to be cut from wood on the farm and suitably shaped. The witness asserted that that change-over caused the longest delay in the construction process. Finally, there were ten donkeys which were convincingly shown to have been erected as additional works in the ten bungalows. These donkeys replaced ten geysers which had been quoted for originally. The only issue that arose concerning the donkeys was as to the number of days it took to erect them as compared to the period it would have taken to erect geysers. However, that issue of the time taken does not need to be delved into presently because it falls to be considered under the counterclaim.

[26] I am, therefore, satisfied that Mr Kruger did perform the specified additional jobs which had not been included in the original quotation. Consequentially, the submissions on behalf of the defendant on this issue are rejected.

[27] Coming to the second issue, the plaintiff expressly stated in the particulars of claim that the enhanced contract price was communicated to the defendant per the new quotation which was admitted in the trial proceedings and was marked exhibit 'DB2'. In para 4 of the defendant's plea, Mr Wiese denied that he received that exhibit, but he asserted that he saw it in the possession of his counsel, Mr Heathcote, when he went to see him 'for purposes of drafting the plea', to use Mr Wiese's own words. Since he saw the exhibit at the very time when the defendant's plea was to be drafted, that was a very opportune time when he should have given his counsel instructions to expressly deny the substance of it. He did not. Instead he appears to have instructed counsel to deny only the fact of receiving it direct from Mr Kruger. I come to this conclusion for the reason that there was no denial included in the plea. This was very surprising for a party who was supposedly strongly denying that the contract price was ever increased from the original N$1 319 000,00.

[28] According to the rules of procedure on pleadings, every allegation of fact in the combined summons or declaration which is not stated in the plea to be denied or to be admitted, shall be deemed to be admitted. Taking this rule into consideration and linking it with the defendant's plea in para 4, where he stated that '(I)n fact the plaintiff finalised the work . . . *for much more than the agreed price of N$1 319 000*, I find it very difficult to accept that Mr Wiese did not know of the higher contract price prior to the drafting of the defendant's plea. It is therefore logical to conclude, and I so conclude, that by his failure to plead thereon, he implicitly admitted the plaintiff's allegation of the manner in which the new price

was brought to the defendant's attention. This is especially so because it was admitted that exhibit 'DB2' was received by the defendant's counsel at a time when arrangements were being made to draft the plea.

[29] Consequently, taking into account the defendant's failure to challenge Mr Kruger's evidence regarding the walk-way, having regard also to the steadfast manner in which Mr Kruger assertively testified about all the works he claimed to have done in addition to what was originally agreed, and finally taking into account the tacit admission of the price as contained in exhibit 'DB2', I am of the firm view and hold that the learned judge in the court below cannot be faulted for having found in the plaintiff's favour on both the first and second issues. This again means that I must, and do hereby dismiss the submissions on the defendant's behalf.

[30] I now turn to the third issue, namely whether or not the plaintiff performed its side of the contract by completing the construction of the lodge. It is trite civil litigation law that parties must be made aware of the case they will be required to answer to when they go for trial. This is necessary so that no party is ambushed by being presented with issues of which he or she was not notified beforehand. It is for that reason that pleadings are exchanged well in advance of the hearing of an action. Consequently, the plaintiff must articulate his or her contentions in the particulars of claim, and the defendant in his or her plea. The pleadings may sometimes be amended and, depending on the stage at which the proceedings have reached, such amendment may be done with or without the leave of the court. It follows that when the hearing commences, each party will be required to

testify in proof of his or her case strictly in accordance with the facts in issue or facts relevant to facts in issue as articulated in the pleadings.

[31] Ordinarily at the hearing any evidence extraneous to the issues as contained in the pleadings is inadmissible and should not be received by the trial court. In this regard, although I must defer to the *dictum* of De Villiers JA, who stated in *Shill v Milner* 1937 AD 101 that within the strictures of the pleadings *'. . . the court has wide discretion. For pleadings are made for the Court, not the Court for pleadings',* I would clarify that dictum by stating the following. If after the commencement of the trial evidence falling outside the ambit of the pleadings is sought to be introduced by a party on the ground that such evidence is critical to its case, it is imperative that that party must apply to the court for leave to amend the pleadings in order to bring it within the scope of the pleadings. In other words, at that stage it is not within the province of the court to unilaterally use its discretion and admit such evidence. I think that lack of discretion in such situation was implicit in the learned judge's dictum, hence his reference to the strictures of pleadings.

[32] It is also trite that at pleading stage an issue may be formally admitted. When it is so admitted the need to prove it is obviated. (*Sher and Others NNO v Administrator, Transvaal* 1990 (4) SA 545 (A) 554-5; *Principles of Evidence, (supra)* para 26 2, p 439.)

[33] Having regard to what is stated in the preceding paragraphs, it is quite clear to me that no issue was raised as to whether or not the plaintiff completed the

construction of the lodge. In so stating, I am fortified by the pleadings. In para 5 of its particulars of claim, the plaintiff alleged that '. . . in fulfilment of its part of the contract, (it) completed the construction at the Ugab Terrace Lodge'. Responding to that allegation, the defendant stated the following as part of para 5 of its plea: '. . . In fact the plaintiff *finalised* the work (albeit out of time [see defendant's counterclaim filed simultaneously herewith]), *for much more than the agreed price of N$1 319 000.'* (My emphasis.) There was thus a clear admission by the defendant that the plaintiff satisfied its side of the contractual obligation. The record shows that at no time was an amendment requested at the trial to negative the admission earlier pleaded, nor to deny the allegation of the plaintiff.

[34] The ordinary meaning of the words quoted above from the fifth para of the defendant's plea, as I understand them, is that the plaintiff not only discharged its obligation to perform, but additionally the value of the work it accomplished exceeded the original contract price. It is granted that that statement was qualified by referring to the counterclaim, an issue which I shall deal with hereinafter because it is not directly connected to the issue presently under discussion. Therefore, applying the rule of procedure regarding formal admissions, the result is that the plaintiff was under no onus to prove performance or completion of the construction.

[35] Moreover, in addition to the lucid plea as stated above, there was also evidence adduced at the trial which consolidated the plaintiff's contention that it performed the works contracted to it. In this regard, I refer to the undisputed

documentary evidence which was adduced during the hearing, namely the completion certificate. When translated from the Afrikaans language in which it was originally written, the certificate was rendered as follows:

> 'Damaraland Builders B. Kruger contracted by Ugab Terrace Lodge having received punch list completed after two days.
>
> Present at inspection:
>
> L. Wiese
> G. Otto
> K.H. Oosthuizen
> B. Kruger (Building contractor)
>
> Completion of work according to quotation on 12 March 2007. Further work was the make of doors that was not completed by sub-contractor Gawie.
>
> Signed
> Gudrun Otto.'

Ms Gudrun Otto who authenticated that certificate by signing it was one of the two persons Mr Wiese had appointed as his representatives at the construction site. Additionally, it is to be noted that the certificate shows that Mr Wiese himself was present at the time of inspection of the completed works.

[36] Notwithstanding all the foregoing, the defendant's witness purported to allege *during* the hearing in the court *a quo* that the plaintiff did not fully perform its obligation to complete the construction of the lodge. As if that was not otiose

enough, in his submission before this Court, Mr Heathcote sought to perpetuate that allegation. It is my view that in the court *a quo* the attempt by the defendant's witness to gainsay what had been admitted in the defendant's pleading should never have been allowed. For the same reason, it was equally improper for the learned counsel to make such a submission in this Court.

[37] In his zeal to flog a dead horse, namely the allegation that the plaintiff had failed to perform his side of the contract, Mr Heathcote brought in the question of the original contract having been amended in mid-December 2006. His argument was that by that amendment, the obligation to purchase all building materials was contractually shifted from the plaintiff to the defendant. To that end counsel made reference to several invoices which evidenced purchases of such materials in the period after that December. In the result, counsel submitted that at the close of the plaintiff's case there had been failure by the plaintiff to set up a *prima facie* case through Mr Kruger's failure to show that he had purchased all building materials up until the contract period. Therefore, according to Mr Heathcote, the court *a quo* ought to have returned a verdict of absolution from the instance.

[38] With due respect to counsel, in making such submission he must have been oblivious of the clear admissions as set out in the preceding paragraphs. Having been formally admitted, the question of performance of the plaintiff's side of the bargain had ceased to be an issue. In my view, even if there was any credit to his argument in that regard, the best the defendant ought to have done would have been to claim a set-off from the contract price. However, as I shall show in due

course hereinafter, the argument of a December 2006 amendment was never established. For now it suffices to state that the learned trial judge cannot be faulted for not having returned a verdict of absolution from the instance. That notwithstanding, *ex abundanti cautela* the judge discussed *in extenso* the issue of performance on the plaintiff's part and still came to the conclusion that the plaintiff had performed. Since the question of performance was a non-issue, I find it otiose to discuss it any further. My last word on this is to express regret that what should have been treated as a non-issue was, unfortunately, later given the garb of an issue both in the lower court and in this Court, resulting in so much time having been expended in discussing it. In the final result, I equally dismiss Mr Heathcote's argument on this point.

[39] Whether the original contract was amended in December 2006 is the next issue to which I now turn. At the pain of repetition, it is necessary to highlight that it was Mr Heathcote's contention that in that December the original contractual obligation borne by the plaintiff to purchase all building materials required for the completion of constructing the lodge was agreed to be taken over, and was in fact taken over, by the defendant. In the face of Mr Heathcote's argument on this issue, this Court put it to him that that contention raised the question of confession and avoidance, and that, therefore, the burden of proving the avoidance, which in fact boiled down to asserting that a new contract was agreed upon to supplant the original one, lay on the defendant. Counsel was consequently expected to indicate from the proceedings in the court below evidence which would amount to a discharge of that burden. He failed to do so. He failed because despite that he

pointed to some exhibited invoices supporting purchases of some building materials by Mr Wiese, there was also other evidence which showed that some of those materials were not meant for the lodge but were for luxury tents which did not form part of the contract. Moreover this Court even drew counsel's attention to evidence showing that during the period when it was claimed that the defendant had taken over totally the obligation to purchase building materials, there were also a number of exhibited invoices showing purchases made by the plaintiff. The learned counsel having failed to establish his submission of confession and avoidance, his submission on the point must equally fail, and I so hold.

[40] The fifth issue concerns the penalty clause based on delayed completion of construction of the lodge. It arises from the counterclaim. As it has emerged from the review of the evidence and submissions thereon, the defendant's allegation of delay is beyond dispute; it was conceded by the plaintiff. However, it was contended that the defendant was the architect of the entire delay. The plaintiff attributed the delay to the performance of additional works on the instruction of Mr Wiese. In the preceding paragraphs I have accepted the plaintiff's contention that the additional works were indeed performed on the instructions of the defendant's witness.

[41] Mr Kruger was closely and at length cross-examined on each and every one of the works which have been listed in paras 21 and 23 as additional ones. In each case he was asked how many days it took him to do those jobs and it transpired that the overall period, according to him was far in excess of the 57 days upon

which the counterclaim was based. Whether or not the plaintiff's witness exaggerated the period he took to do the additional work is not the issue. The issue was whether the plaintiff incurred the penalty for the admitted delay.

[42] The issue of penalty clauses in building contracts was considered in *Hansen and Schrader vs Deare* 1883 (3 EDC 36). In that case there were two reasons for the delay in the contractor completing the contracted works within the time specified in the contract, namely the belated arrival of a roof in Port Elizabeth, South Africa, which had been ordered from England, and secondly extensive alterations which had been carried out to the Drill Hall as additional work beyond the work contracted. Under the contract in that case, the completion date was slated to be 6 June 1881, but mainly because of the late arrival of the door, the entire work was only completed by 11 February 1882. A penalty clause had been provided for that for each day of delay the employer would deduct a penalty of £5. The employer, who was the defendant in that case, had duly deducted £500 from the final payment to the contractor by way of penalty. The contractor disputed the deduction of the penalty amount and hence instituted a claim for reimbursement of the same.

[43] In the course of delivering his judgment in the action Barry, JP stated the following, *inter alia:*

> '. . . the principles of law applying to this case are very clear. The case of *Holme vs Guppy* (3, M. & W., 387), is founded on the principles of law common to Roman-

> Dutch, the Civil, and English law. If a man by his own act prevents the performance of what another has stipulated to perform, he cannot take advantage of his own wrong. Another consideration has been imported into this case, based upon a decision, which we have not before us in a full report, in the case of *Westwood vs Secretary of State for India* (Fisher's Dig. 9114). In that case there seems to have been a suggestion thrown out that if by ordering extras, such extras interfered with the completion of the work, it might render void a time penalty. But the grounds of that decision are not before us, and the suggestion there seems at most to have been an *obiter dictum* pronounced by the court. The case of *Jones vs St. John's College* (L.R. 6, QBD, 115), however, does decide this, namely, that if a man binds himself by a distinct contract to do a particular work, and by the same contract contemplates that the architect should have the power to order additions during its progress, and the contract further provides that if the contractor does not fulfill his contract by a certain time he shall be liable to a penalty, the contractor cannot complain if the additions ordered prevent his completing the contract by the time specified; because, says the law, we give you the power to contract, and if you choose to make a foolish contract, whereby you place yourself in a position which will allow a person to take advantage of you, you have only to blame yourself.'

[44] However, another member of the Bench sitting with Barry, JP, namely Buchanan J, boldly in my view, had this to say:

> 'As it was the defendant's own act which prevented the completion of the contract by the time stipulated, he cannot now take advantage of the penalty clause. *I wish distinctly to guard myself from being understood to agree with the proposition that the ordering of extras can in no case affect a time penalty'.* (The italics are mine.)

[45] I have had the chance of reading the *dictum* of Feetham J, in *Kelly and Hingle's Trustees v Union Government* 1928 TPD 272 where he discussed the applicability of penalty clauses in building contracts. He first endorsed the principle

that a party to a building contract cannot benefit from a penalty if he has been the cause of the delay. In doing so he stated:

> 'The principle is laid down in Comyn's *Digest, Condition* L (6) that, where one party to a contract is prevented from performing it by the act of the other, he is not liable in law for the default; and, accordingly, a well-recognised rule has been established in cases of this kind, beginning with *Holme v Guppy,* to the effect that, if the building owner has ordered extra work beyond that specified by the original contract which has necessarily increased the time requisite for finishing the work, he is thereby disentitled to claim the penalties for non-completion provided for by the contract. The reason for that rule is that otherwise a most unreasonable burden would be imposed on the contractor.'

[46] Having stated the foregoing, he then went on to elucidate Barry, JP's reference to foolish contracts. To that end he said:

> 'Contracts were entered into by which the builder agreed to do any work which the building owner or his architect might order. It was urged in such cases, as, for instance, in *Westwood v Secretary of State for India* (11 W.R.736)*,* that the fact that the builder had contracted to do any extra work that might be ordered prevented application of the rule which I have mentioned. But it was held that that was not so. Then there came another case which was said to be an exception from the rule, namely, that which existed in *Jones v St John's College* (L.R. 6 Q.B. 115)*.* There it was alleged on the pleadings that there was an agreement by which the builder agreed that, if any extra work was ordered, then, whatever that work might be, he would undertake nevertheless to complete the works within the time originally specified by the contract; and it was thereupon held that, if the builder was foolish enough to make such an agreement, he was bound by it and must take the consequences. The whole question here is whether on the construction of this contract, by which undoubtedly the builder has undertaken to perform any extra work that may be ordered, he has agreed to take upon himself the burden which

> the builder had taken upon himself in *Jones v St John's College*; in which case, however foolish and unreasonable such agreement may be, he must stand by it.'

[47] On the authorities just referred to in the preceding paragraphs, it is quite clear that our case comes within the ambit of the rule established in Comyn's Digest and applied in *Holme v Guppy*, *supra*. That is to say that a builder will not suffer a penalty arising from a delay which has been caused by the employer who has given instructions to perform extra work falling beyond the contractual limits. Our case certainly cannot be said to fall in the contemplation of the builder who made a foolish contract.

[48] In the matter before us, there was no architect involved. Secondly, I cannot discern any foolishness in terms of the manner in which the plaintiff entered into the present contract. On the evidence in the court *a quo* there was no suggestion that the plaintiff had contemplated agreeing, or that he impliedly agreed, at the time of entering into the contract that the defendant would have power to order additions during the progress of the construction, nor that if such power was exercised, the plaintiff undertook all the same to complete the construction within the time stipulated in the contract. Additionally, in our case there were several jobs which the defendant instructed the plaintiff to undertake. Therefore the defendant must be assumed to have known that, because of the additional works he ordered, the period specified for the completion of the contract would be exceeded. It would not be equitable to allow him to have his cake and eat it by benefitting from the penalty clause since he was the cause of the delay. For all the foregoing reasons, I agree

with the learned trial judge in dismissing the counterclaim. The submission on this score on the defendant's behalf is, accordingly, rejected.

[49] Lastly, in assessing the damages to award to the plaintiff it is inevitable that I should consider the submission which Mr Heathcote made in reference to the document marked exhibit 'Q'. It is granted that that document was signed by Mr Kruger and purports to show that the final payment which was due from the defendant to Damaraland Builders CC, as of some unclear date in April 2007 was N$240 000. An attempt was made in counsel's submission to pin the plaintiff down to accepting the said sum in place of the N$730 000 as the outstanding balance in the event that the plaintiff's case was to be upheld.

[50] While I take note of the fact that Mr Kruger's evidence on behalf of the plaintiff was vague as to why he prepared that exhibit, the evidence in support of the plaintiff's case is abundantly clear. First, in the particulars of claim it was clearly stated that the unpaid balance was N$730 956,00. Secondly in the defendant's plea it was also very clear that the only payments the defendant made towards liquidating the contract price amounted to N$726 000. In addition to all the foregoing, the following evidence came from Mr Wiese's own mouth while testifying in chief:

> **'Schneider:** Now it is common cause between the parties that the defendant made certain payments to the plaintiff and it is plaintiff's case that he received payments to the extent of seven hundred and twenty-six thousand Namibian dollars (N$726 000,00). Can you agree or disagree with that?

Wiese: That is correct my Lord.'

Strictly in terms of the English language, that answer sounds vague, but gauging Mr Wiese's comprehension of the English language by what is in the record of proceedings at the trial, I feel sure that he was agreeing, and not disagreeing, with the proposition put to him that the only amount the defendant paid towards the contract price was N$726 000. The rest is arithmetic. In any event, if his case was that there were other payments which he had made, his counsel's question at that stage presented him with an opportunity to make such assertion, but he did not do so.

[51] In the result, I hold that the N$240 000 was not even worth the paper on which it was written; it was a mere figment of Mr Kruger's imagination. It cannot stand in the face of the defendant's own admission of the only amount that he had paid.

[52] The foregoing notwithstanding, I must, and do, take into consideration that the plaintiff, through its counsel, Mr Denk, did intimate to the trial judge that an amount of N$211 311,17 was incurred by the defendant in respect of building materials for which the plaintiff did not want to claim credit. Accordingly, that amount must be set-off from the amount claimed. This leaves a balance of N$519 644,83.

[53] There was in the course of submissions before us some discussion underlying an award based on *quantum meruit* and the principle in *BK Tooling (Edms) BPK v Scope Precision Engineering (Edms) BPK* 1979 (1) SA 391 (A). The principle relating to both *quantum meruit* and the *BK Tooling* case applies where there has been incomplete or imperfect performance of a contract but from which the employer has nonetheless benefitted. Therefore, it is unnecessary to consider the applicability of that principle in the present case because here there was evidence of full performance.

[54] In the light of the foregoing, I conclude that the defendant (appellant) has no prospects of success upon appeal. Accordingly the application for condonation for the late filing of the appeal record and reinstatement of the appeal falls to be dismissed and I so dismiss it. In consequence whereof I make the following orders:

1. The application for condonation and reinstatement of the appeal is refused.

2. The appellant is hereby ordered to pay the costs of the respondent before this Court, which shall include the costs of one instructing and one instructed counsel.

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CHOMBA AJA

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MTAMBANENGWE AJA

_____

O'REGAN AJA

APPEARANCES

APPELLANT:	R Heathcote (with him H Schneider) Instructed by Van der Merwe-Greeff Andima Inc
RESPONDENT:	A H G Denk Instructed by Tjitemisa & Associates