REPORTABLE

CASE NO: SA 37/2012

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

HEIDRUN DIEKMANN INTERIOR LIFESTYLES CC **Appellant**

and

L&B COMMERCIAL SERVICES (PTY) LTD **Respondent**

Coram: SHIVUTE CJ, MARITZ JA and MTAMBANENGWE AJA

Heard: **26 March 2014**

Delivered: **3 November 2014**

APPEAL JUDGMENT

MTAMBANENGWE AJA (SHIVUTE CJ and MARITZ JA concurring):

[1] The court *a quo* (the High Court) dismissed with costs the main and alternative claims by appellant in this matter. The appellant, Heidrun Diekmann Interior Design Lifestyle CC, appeals to this court against the whole judgment and order of the court *a quo*.

[2] The appellant (the 'plaintiff' below) is a close corporation whose sole member is Ms Heidrun Diekmann. The appellant's main claim, as amended, was set out as follows:

> '4. At or about the end of November 2005 and at Windhoek, a written, alternatively partly written and party oral agreement was concluded between first, alternatively second plaintiff and the defendant. . . . , the latter was duly represented by Heidrun Diekmann or D & F Designs CC. The written part of the agreement is made up of annexures 'A', 'B', 'C' and 'D'.
>
> 5.1 Defendant accepted liability to plaintiff for plaintiff's interior design fee in the amount of N$145 500 plus VAT (thus totalling N$165 025) which was included in the detailed quote of a close corporation D & F Designs CC as per annexure 'A' and whereof the total of such quote was included in the plaintiff's quote as per annexure 'B' and referred to on page 3 thereof.
>
> 5.2 The aforesaid sum of N$165 025 would become due and payable upon the completion by the plaintiff of its obligations concerning the rendering of the interior design services.'

[3] The alternative claim, in the event that the main claim failed, was set out as follows:

> 'At or about the end of November 2005 and at Windhoek, a written alternatively a partly written and partly oral agreement was concluded between a Namibian close corporation "D & F Designs CC" (duly represented by one D Lindemeier) and defendant (being duly represented by Mike Böttger). The written, alternatively written part of the aforesaid agreement is made up of annexures "A" and "D" alternatively "A", "B" and "D" hereto.'

[4] The express, alternatively implied, in the further alternative tacit, terms of the agreement are said to be, amongst others, that:

> 'Defendant undertook to pay an amount of N$143 500 to the plaintiff in respect of interior design fees upon completion of such services which it is alleged she did. It is alleged that the intention of the parties was that D & F Designs concluded the agreement for the interior design on behalf of the plaintiff, which was accepted by the latter thus binding defendant. It is alleged further that by word or by conduct the plaintiff notified the defendant that the benefit of N$143 500 was accepted by the plaintiff as a result of which an agreement came into existence. VAT is also claimed, making up the total claim of N$165 025.'

[5] The partners in Lorentz & Bone (later the directors of LorentzAngula Inc.) first became involved with Ms Heidrun Diekmann in August 2005, when Mr Leo Barnard, an architect who was working on the new offices of Lorentz & Bone at Ausspannplatz, asked if she was interested in making proposals to them (Lorentz & Bone) 'to do the interior of their new offices.' Subsequently in September 2005 she attended a meeting at the offices of Lorentz & Bone, where Mr Barnard introduced her as an interior designer who worked for herself.

[6] The gist of Ms Diekmann's evidence-in-chief was that after she made various suggestions to the partners of Lorentz & Bone the question arose as to 'whether they were interested in appointing her as an interior designer or not'. She did not say whether the question was answered or not, but immediately went on to say that the name of her business at that stage was Elephant Empire Trading CC. For the past 15 years she had 'been doing interior designing under that name . . ., she was the sole member of that close corporation'. Ms Diekmann described a

range of activities she undertook including visiting the old offices of Lorentz & Bone and discussing with each partner their requirements. She also described other work she had done, including a visit to Italy to see and discuss the project with a furniture manufacturing company there, a visit to South Africa to see the offices of a legal firm whose outlay one of the partners of Lorentz & Bone had expressed interest in, and obtaining a quotation from a firm called Home Economix. These activities took place before she was able to draft a quotation to supply furniture to Lorentz & Bone. That quotation, *inter alia,* forms the basis of the claim that is the subject matter of this appeal: a claim for an interior design fee.

[7] At the time when Ms Diekmann decided to sue the defendant, L&B Commercial Services (Pty) Ltd, for the interior design fee, she did so in the name - and on behalf – of the appellant. At some stage during the pleadings, she applied to be and was joined in her personal capacity as the second plaintiff. The main and the alternative claims dismissed by the court *a quo* were both in the name of the appellant. At the time judgment was delivered, the court had already granted absolution from the instance in respect of the claim by Ms Diekmann as second plaintiff. She did not appeal against the absolution judgment. The appellant thus remained the only claimant for the said interior design fee. It is also the only appellant in these proceedings.

[8] The appellant's claim against the respondent is in contract, more in particular on a term providing for the payment of N$143 500 as an 'interior design fee for Ms H Diekmann.'

[9] The appellant claimed that a written agreement, alternatively a partly written and partly oral agreement, was concluded between it and the defendant. It pleaded that it was duly represented by Heidrun Diekmann or by D & F Designs CC ('D&F') when the agreement was concluded, and that the written part of the agreement consisted of annexures 'A' to 'D' to its particulars of claim. I pause here to note that the appellant seemingly abandoned the allegation that the agreement was partly oral and partly in writing during argument; its counsel could not refer to any oral term of the agreement. In my view, this court should determine the appeal on the premise that all the terms of the agreement that are material to the determination of the issues before us are captured in the written instruments attached to the pleadings.

[10] That being the case, it may be useful to refer to the contents of the annexures on which the appellant relied:

1. Annexure 'A' is a quotation by D&F to Lorentz & Bone dated 28 November 2005 for the supply and installation of office furniture. It was signed on behalf of D&F by one Mr D Lindemeier.

   The quotation, in essence, contains four items: the quoted price of the furniture (N$1 435 000); an 'interior design fee' (N$143 500) for Mrs H Diekmann, which, it is common cause, is equivalent to 10% of the quoted price for the furniture; 15% Value Added Tax (N$236 775); and the total of the quotation (N$1 815 275). The furniture in respect of which quotes were made is shown on the supplied site layout and

depicted in brochures. The quoted price for the furniture included the items listed on a detailed invoice as well as transport, import duties and installation costs, and was based on the exchange rate current at the time of the quotation.

2. Annexure ‘B’ is a quotation from Heidrun Diekmann Lifestyles addressed to Lorentz & Bone dated 29 November 2005. According to its heading, it was for ‘furniture and fittings’. It is common cause that the itemised list included not only furniture and fittings, but also cutlery, crockery and an assortment of office accessories, such as stationery. Immediately below the itemised list appears the following – which, given its importance to the discussion that follows, I shall quote in full:

Total amount (Heidrun Diekmann Lifestyles CC, including VAT)	680 835,46
15% VAT	102 125,32

Furniture as per detailed Quote D & F Designs including VAT	1 815 275,00
15% VAT	230 775,00

Total furniture and fittings	2 496 110,46
Total VAT included in the amount	338 900,32

Heidrun Diekmann Lifestyles CC-

Note: No provision made for blinds/window treatments.

Transport included.

Terms and conditions:

Terms: 50% with order, 50% on completion.

This quotation is valid for 30 days.

D & F Designs - Terms and conditions to be set out.

We trust the above meets with your approval and look forward to hearing from you.

Yours faithfully
Heidrun Diekmann

3. Annexure ‘C’ is a letter from L&B Commercial Services (Pty) Ltd addressed to ‘Heidrun Diekmann Lifestyles’ (marked for the attention of ‘Heidrun’) dated 30 November 2005 in which it confirmed acceptance of the latter’s quotation ‘for office furniture dated the 29th of November 2005’. It further recorded that the fitting and installation of the furniture must be completed prior to 1 March 2006.

4. Annexure ‘D’ is a letter from L&B Commercial Services (Pty) Ltd addressed to ‘D&F’ (marked for the attention of ‘Dirk & Francesca Lindemeier’) dated 30 November 2005 in which it confirmed acceptance of the latter’s quotation ‘for office furniture dated the 28th of November 2005’. In addition, it recorded that the delivery and fitting of the furniture for the second and third floors should be completed by no later than 1 April 2006 and the delivery and fitting of the top floor should be completed by no later than 10 March 2006.

[11] It is the appellant’s case that the annexures, when read cumulatively, evidence a single all-encompassing agreement concluded between itself and the respondent. The respondent took issue with that allegation and pleaded that two

separate and distinct contracts were concluded: one between the defendant and D&F by virtue of its written acceptance on 30 November 2005 (annexure 'D') of the quotation dated 28 November 2005 (annexure 'A') and another between Heidrun Diekmann Lifestyles and the defendant consequent upon the written, but separate, acceptance on the same date of the quotation dated 29 November 2005. I pause here to point out that although the defendant initially pleaded that the quotation dated 29 November 2005 (annexure 'B') was by an entity styling itself as Heidrun Diekmann Lifestyles 'for the supply of office furniture and accessories in the sum of N$680.835.46' to Lorenz and Bone (who was not to the defendant), it later admitted in further particulars dated 12 November 2008, that in 'accepting the quotation (which was not addressed to it) for the supply of office furniture dated 29 November 2005, the defendant concluded a contract … in the sum of N$680 835-46 plus VAT with Heidrun Diekmann Lifestyles CC, which the defendant believed to be corporate entity.'

[12] Having considered the pleadings, I am satisfied that although both quotations were addressed to Lorentz & Bone, it was known that the partnership was about to be dissolved and none of the offerees took issue at any relevant time with the fact that the subsequent acceptance of the quotations by L&B Commercial Services (Pty) Ltd bound the respondent – rather than Lorentz & Bone – as the contracting party. There I also some uncertainty about identity and corporate status of the business or entity on behalf of which Mrs Diekmann submitted the quotation marked 'B'. The quotation refers to 'Heidrun Diekmann Lifestyles' and 'Heidrun Diekmann Lifestyles CC'. It is not disputed that, unbeknown to the respondent, Elephant Empire Trading CC was seeking to register a change of its

name to ‘Heidrun Diekmann Interior Lifestyles CC’ at the time. I shall accept for purposes of this judgment that the uncertainty in the mind of Mrs Diekmann about the name under which she should submit the quotation might have resulted from the exact status of the registration process and which one of the proposed names was or would be approved by the Registrar of Close Corporations.

[13] Having said that, the first, and in my view, fundamental threshold issue to be determined is whether the respondent entered into one comprehensive contract – as the appellant claims – or, as it pleaded, whether two separate and distinct contracts were concluded, i.e. one as between D&F and the respondent and the other as between the entity represented by Mrs Diekmann and the respondent. As I shall presently show, the determination of this threshold issue will, in turn, bear on:

1. the appellant’s reliance upon the doctrine of an undisclosed principal in the law of agency to step up and vindicate its rights under a contract concluded by an agent on its behalf;

2. the extent to which the parol evidence rule finds application in determining the true identities of the parties privy to the contract(s);

3. the need to consider -

    (a) the appellant’s application for rectification to substitute the reference of ‘Heidrun Diekmann Lifestyles CC’ in annexure B for a reference to

‘Elephant Empire Trading CC’ (the previously registered name of the appellant);

(b) the issue of estoppel raised in connection to the respondent’s denial that the contract had been concluded with the appellant; and

(c) the appellant’s alternative claim based on the allegation that the contract between D&F and the respondent incorporated a term for the benefit of a third party (i.e. the appellant) and had been accepted as such.

In what follows, I shall assume in favour of the appellant that it is entitled to the rectification sought and premise the reasoning on that assumption.

[14] It is trite, of course, that the burden to prove the existence of the contract, the parties thereto and the terms of the contract relied on for the relief prayed for is borne squarely by the appellant. This burden must be discharged on a balance of probabilities. It will not serve any useful purpose to cite for purposes of this judgment the many authorities underpinning this evidential approach. It is also trite that the intention of the parties will generally be gathered primarily from the terms of a written contract. I will also not recite the many authorities in support of this approach.

[15] There are, in my view, a number of *indiciae* that militate against the appellant's claim that only one comprehensive contract had been concluded if regard is had to annexures 'A' to 'D':

1. The quotation by D&F (Annexure 'A') was addressed to Lorenz & Bone; it was expressly stated to be for the supply and installation of the office furniture to their 'new offices'; the hope was expressed that it would meet their favourable approval and their response was invited. On the face thereof, this was not a quotation submitted, as one often finds by a subcontractor and addressed to a main contractor, for the latter's acceptance or rejection and possible inclusion in the main contractor's quotation to a client for the delivery of goods and/or services.

2. The quotation by D&F (Annexure 'A') was for the supply and installation of office furniture other than those pieces itemised in the separate and differently dated quotation of the appellant.

3. The terms and conditions subject to which the quotation of D&F was submitted differed in significant respects from that of the appellant's quotation: the pricing of the former included transport and was qualified by the exchange rate that applied at the time, whereas the pricing of the latter did not include transport, was not conditional on exchange rate fluctuations and stipulated that 50% of the quoted price had to be paid on order.

4. The respondent confirmed acceptance of the two quotations in two separate letters. One was addressed to D&F and the other to the appellant, marking them for the attention of Dirk and Francesca Lindemeier and that of Heidrun Diekmann respectively.

5. The conditions subject to which the respondent confirmed acceptance to the two entities differed significantly: the furniture to be supplied by the appellant had to be fitted and installed prior to 1 March 2006, whereas the acceptance of the quotation by D&F was subject to the conditions that the delivery of the furniture for the top floor had to be completed by no later than 10 March 2006, and delivery of the furniture for the second and third floors had to be completed by no later than 1 April 2006.

[16] In arriving at this conclusion, I appreciate that some significance must be given to the reference in the quotation of the appellant to that of D&F, and the inclusion of the quoted amount in the latter's quotation as well as the 'grand total' appearing at the foot of annexure 'B'. Can it be said that this total was included with the intention that that quotation should be subsumed by the quotation of the appellant and that, in effect, only one quote was submitted for approval? Or was it simply included to provide Lorentz & Bone with a bottom line figure for the total costs of the contemplated furnishing project if both quotes are taken into account? In my view, there are a number of considerations that, on the probabilities, favour the latter interpretation:

1. It is apparent from the two letters of acceptance, each addressed to a different entity and containing different conditions of acceptance, that the respondent intended to conclude two separate contracts. Had the respondent understood that the quotation of D&F was incorporated, and in that sense, subsumed by the quotation of the appellant, it would have sufficed to accept only the latter.

2. The subsequent conduct of the contracting parties also suggests that all of them understood at the time that two substantive agreements, each with its own rights and obligations, had come into existence and would govern the legal relationship between the parties privy to those agreements on different terms and conditions. So, for example, payment by the respondent was made directly to the party that supplied the furniture or rendered the contracted service. A further clear example is to be found in a letter dated 18 April 2006 by LorentzAngula Inc. (presumably acting on behalf of the respondent) addressed to the Managing Director of D&F, Mr Lindemeier, in which it recorded a number of complaints about shortcomings in relation to the furniture supplied and installed. The letter proposes that D&F should only be paid ‘for what has been delivered and installed in accordance with your quote’. It is clear from the letter that the respondent was holding D&F accountable (not the appellant) in terms of the agreement and that it was proposing a compromise in relation to the payments to be made under the contract to D&F (again, not to the appellant). Had there been only one contract, as the appellant claimed, i.e., one resulting from the acceptance of its

quotation, there would have been no *vinculum iuris* between the respondent and D&F which could be renegotiated directly with the latter and on account of which it could be held contractually liable. Were the appellant correct on this point, the only parties privy to the contract would be the appellant and respondent.

3. There is also a further consideration affecting the probabilities for the inclusion of a reference to D&F's quote in that of the appellant. Prior to the submission of annexure 'B', Mrs Diekmann prepared another quote in the name of the appellant dated 28 November 2005 for Lorentz & Bone (Exhibit 'N'). This quotation included most of the items later enumerated in annexure 'B' but made no reference to the quotation of D&F and did not include the sum total of the two quotes. She submitted this quotation to some of the principals of Lorentz & Bone either before or at a meeting held at the offices of the architect on that date. At the meeting, she also submitted the separate quotation of D&F and other options. At the conclusion of the meeting, she was pertinently asked by one of the principals, Mr Ruppel, what the bottom line of the furnishing expenses would be. Taking into consideration the sum of the quotations she preferred, she said that it would be about N$2,5 million and from his response gathered that the amount was acceptable. It was on the basis of the discussions and decisions at that meeting that she amended the quotation of the appellant the next day by adding certain items and it is likely that, given the pertinent interest expressed at the meeting in the 'bottom line', she added to the amended quote the sum of D & F Designs'

quotation to illustrate the correct approximation of the total costs to the client as mentioned by her at the earlier meeting.

[17] For these reasons (and if I were to assume in favour of the appellant that it stepped forward as undisclosed principal, alternatively that annexure ‘B’ is rectified by the substitution of the phrase ‘Heidrun Diekmann Lifestyles CC’ for the phrase ‘Elephant Empire Trading CC’), I am satisfied that two distinct contracts were concluded: one between D&F and the respondent and the other between the appellant and the respondent. Alternatively, and in any event, I am not satisfied that the appellant proved on a balance of probabilities that the accepted quotation of D&F was subsumed in a single contract entered into by and between the appellant and the respondent.

[18] A finding to this effect makes it unnecessary to consider the appellant’s application for rectification. Rectification, as pointed out, is only sought in relation to annexure ‘B’ and is limited to the substitution of the phrase ‘Heidrun Diekmann Lifestyles CC’ wherever it may occur in that annexure for the phrase ‘Elephant Empire Trading CC’. Even if rectification were to be granted, such rectification would only assist in the identification of the parties privy to the second contract, i.e. the one that came into being by virtue of the acceptance of the quotation submitted by or on behalf of the appellant. There is no dispute that all payments due under that contract have been made.

[19] On this premise, I turn to the appellant’s contention that D&F contracted as agent for the appellant (alternatively, on behalf of Mrs Diekmann, who in turn acted

on behalf of an undisclosed principal, i.e. the appellant) for an interior design fee of N$143,500 and the alternative contention that the contract between D&F and the respondent incorporated a *stipulatio alterii* in favour of the appellant for the payment of an interior design fee.

[20] The law distinguishes between those contracts where a person contracts with another as an agent for and on behalf of a principal (whether disclosed or undisclosed) and those where a person concludes a contract as principal with another and that contract includes an offer or benefit open for a third party to accept. The legal consequences of these two types of contract differ significantly, particularly as regards the rights and obligations of the principal in one and those of the third party in the other.

[21] It must immediately be clear from the findings that I have made earlier that D&F submitted the quotation in its own name, and that the acceptance of that quotation by the respondent resulted in the conclusion of a separate contract to which D&F and the respondent were privy. This contract was not concluded by D&F as an agent acting on behalf of the appellant. All the rights and obligations which came into existence upon the conclusion of the contract vested in D&F and the respondent respectively, including the obligation to offer the payment of a design fee of N$143 500 to Mrs H Diekmann. This is typical of what is sometimes described as a ‘complex’ contract for the benefit of a third person (see Kerr, *The Principles of the Law of Contract* (4th Ed at 72 to 73) where, prior to acceptance there is no *vinculum iuris* between the third party and any other contracting party (ibid, 77). If the third party (Mrs Diekmann) accepts the benefit/offer a new contract

would come into existence between that party and the other contracting party (the respondent) without derogating from the remainder of the provisions in the main contract between the original contracting parties (D&F and the respondent).

[22] This construction is not only supported on the face of the documents and the analysis thereof that I have done earlier, but also by the evidence. Her evidence in chief on this aspect could not have been clearer. Mrs Diekmann was asked by her counsel during her evidence in chief: 'For whose benefit was that interior design fee included, in annexure "A"?' Her response was as follows:

> *'For my benefit*. This fee, I had specifically said to Mr Lindemeier, I wanted to be completely clear and transparent to the client. That there is a fee payable and that is it. I stopped there, *it was for my benefit*. So listing that,… *it was for my benefit* and when they accepted the quote, *I accepted that benefit because I delivered the work'*.

[23] She later, in other parts of her evidence, claimed that it was always her intention to act on behalf of her close corporation whilst, at the same time, seeking to keep the notion that she might have acted in her personal capacity alive. For example, she stated during cross-examination that her intention had always been that the benefits would be for her close corporation 'but if it was not for the close corporation itself, it could only have been either for me on behalf of the close corporation or for myself. That is why I am the second plaintiff'. Her principal assertion that she always intended to act on behalf of the close corporation was intended to support her claim that the all-inclusive contract was one as between the appellant and the respondent. The remainder of her assertion was intended to support the alternative claim instituted in her personal capacity as second plaintiff.

[24] If one were to accept that it was her intention to act on behalf of the close corporation at the time she asked Mr Lindemeier to include the interior design fee in the quotation of D&F, it is common cause that she did not articulate her intention in any way: she did not disclose to him that she was making the request on behalf of the close corporation. It is undisputed that Mr Lindemeier understood her request to be that the design fee should be included for herself. It is on that basis that he formulated the quotation of D&F. Moreover, and more importantly perhaps, is the fact that the respondent accepted the quotation on the basis that the third party for whose benefit the stipulation of a design fee was inserted was Mrs Diekmann, as expressly stated in the written quotation. The obligation that the respondent 'accepted', therefore, was to offer the payment of the stipulated design fee to Mrs Diekmann – not to any other person or entity. More so, because she was the individual whose sense of style and design style accorded with their expectations.

[25]

[26] While I appreciate that during the conclusion of whatever agreement Mrs Diekmann may have had with D&F to include a design fee in its quotation to the respondent, she might have acted on behalf of an undisclosed principal (i.e. the appellant), that fact was not known to Mr Lindemeier when he prepared the quotation. His intention had been to include a term that would oblige the respondent to offer the payment of a design fee to Mrs Diekmann (if it accepted the quotation). That is the obligation in respect of which the respondent

contracted. The offer once made could therefore only be accepted by Mrs Diekmann.

[27] I must interpose here to note that it is not necessary for us to decide whether the offer carried with it corresponding obligations to render design services or not, and whether those design services were in fact rendered. This is so because the High Court granted absolution from the instance as far as the claim of Mrs Diekmann in her personal capacity (as second plaintiff) was concerned and there is no appeal against that order.

[28] In summary, I take the view that:

1. the written acceptance by the respondent (annexure ‘D’) of the quotation addressed by D&F to Lorenz & Bone (annexure ‘A’) constituted a written contract between D&F and the respondent;

2. that contract was a substantive one and did not form part of any other contract concluded with the respondent pursuant to the latter’s written acceptance (annexure ‘C’) of a quotation by the appellant (annexure ‘B’) in which reference was made to the quotation of D&F (annexure ‘A’) or the sum total of the two quotations taken together;

3. that contract created a *vinculum iuris* between D&F and the respondent which, amongst others, included an obligation to offer the payment of a design fee to Mrs Diekmann of N$143 500;

4. it was the common intention of the parties privy to that contract that it would be for the benefit of Mrs Diekmann, not for the appellant or any other person;

5. acceptance of the benefit of that offer (and any obligations attending to it) resulted in the creation of a separate contract between Mrs Diekmann and the respondent and any cause of action based on that contract would vest only in the parties privy thereto;

6. rectification was not sought in respect of either that contract or the contract between D&F and the respondent;

7. neither the doctrine of an undisclosed principal nor the issue of estoppel arise in respect of those contracts; and

8. no cause of action arose for the benefit of the appellant from either that contract or the contract between D&F and the respondent.

Based on my findings, the appeal must fail with costs, such costs to include the costs consequent upon the employment of one instructing and one instructed counsel.

I order accordingly.

_____
MTAMBANENGWE AJA

_____
SHIVUTE CJ

_____
MARITZ JA

APPEARANCES

APPELLANT: R Tötemeyer

Instructed by Theunissen, Louw & Partners

RESPONDENT: A P de Bourbon SC

Instructed by Francois Erasmus & Partners