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REPORTABLE

CASE NO: SA 25/2012

IN THE SUPREME COURT OF NAMIBIA

In the matter between

BUHRMANN & PARTNERS CONSULTING ENGINEERS	**Appellant**
and	
GüNTHER WILFRIED GARBADE	**Respondent**

CORAM:	SHIVUTE CJ, DAMASEB AJA and HOFF AJA
Heard:	**19 March 2014**
Delivered:	**27 October 2015**

APPEAL JUDGMENT

SHIVUTE CJ (DAMASEB AJA and HOFF AJA concurring):

Introduction

[1] Buhrmann & Partners (Buhrmann), a partnership of consulting engineers, instituted action against Mr Garbade for the payment of the sum of N$1 287 530,73, interest and costs. Buhrmann's case was that during the period March

2005 to December 2006 it had entered into various oral agreements with Mr Garbade in terms of which Buhrmann was engaged by Mr Garbade to act as engineers and to provide professional consulting services to him in the development known as 'Am Weinberg' (also referred to as the 'Am Weinberg Project') situated on [Erf 1……] in Klein Windhoek. Buhrmann pleaded that it had performed all the services required of it in terms of the agreements, thus entitling it to payment of its fees and charges in the sum already mentioned.

[2] Mr Garbade filed a special plea of misjoinder, contending that the action should not be instituted against him, as he had at all relevant times acted for and on behalf of a close corporation known as Jary Enterprises One Hundred and Thirty Six CC (Jary Enterprises), which would have been the correct defendant. Buhrmann replicated to Mr Garbade's special plea, raising the defence of estoppel. On application by Mr Garbade, the High Court ruled that the special plea should be determined first prior to entertaining the merits of the claim. In the hearing that ensued, Mr Garbade testified and called the Am Weinberg Project co-ordinator, Mr Holger Oberprieler, to testify on his behalf. Mr Siegfried Tietz and Mr Pedro Roland, both engineers and partners in Buhrmann, testified on its behalf. The High Court upheld the special plea and ordered Buhrmann to pay Mr Garbade's costs. Buhrmann now appeals against the whole of the judgment and orders handed down by that court.

[3] The appeal raises only one substantive issue. It is whether Mr Garbade contracted in his own name or on behalf of Jary Enterprises. In short, did Mr Garbade contract in a personal or representative capacity?

[4] The answer to this question is important to the parties, but more so to Buhrmann because it has instituted proceedings for breach of contract against Mr Garbade personally. As noted above, Mr Garbade's defence is that Buhrmann is party to a contract with Jary Enterprises and he cannot therefore be sued under that contract. In short, Mr Garbade alleges that Burhman sued the wrong party.

The procedural 'dilemma'

[5] There is a further issue of procedure that should be dealt with at the outset. The court *a quo* rightly ordered that the proceedings be stayed pending the determination of the preliminary issue of whether Mr Garbade was indeed contracting in a personal capacity before the merits of the contractual claim could be heard. This court has heard substantial arguments in which there has been reference to extensive evidence led in the hearing of the special plea. The concern is that should this court give full reasons for its judgment and in it express views on the evidence and the appeal is upheld and the matter proceeds to trial on the merits, there is a risk that the court would in its judgment make findings that would be binding on the court *a quo*. Such findings may also impact on the final determination of the matter on appeal should the matter go that far.

[6] The court invited argument on the point, which was characterised as a 'dilemma' by a member of the court. At the core of the issue is the opposition between the two following principles. First, it is given that litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing.[1] Although not

[1] *Strategic Liquor Services v Mvumbi NO & others* 2010 (2) SA 92 (CC) para 15.

explicitly spelled out in Art 12 of the Namibian Constitution, it seems to me that the duty on a court to provide reasons after a hearing is usually part and parcel of a party's right to a fair hearing.

[7] Second, and against the first principle, is the concern that this court should not pre-judge the merits of the dispute between the parties. These are properly to be considered and decided by the court *a quo* in the event that the appeal is upheld and the matter referred back to that court for the continuation of the trial. On the other hand, the reasons for this court's judgment will necessarily entail certain findings of fact that could be relevant to the substance of the dispute.

[8] Counsel are unanimous in their submissions that by furnishing reasons for its judgment this court does not necessarily have to pre-judge the merits of the case. I agree. In particular, it is important to bear in mind that it is open to us to determine the appeal on narrow grounds, leaving the court *a quo* free to distinguish its findings which will have had the benefit of full evidence being led on all issues at the trial. In any case, the reasoning of this court draws predominantly on the record of the appeal, and avoids as far as is possible value judgments on the weight to be attached to different pieces of evidence that the parties may tender before the court *a quo* should the appeal be upheld and the matter sent back to that court. In light of this consideration, it is clear that the dilemma posed is more perceived than real. As such, we ought to render a reasoned judgment.

The evidence concerning the special plea and judgment of the High Court

[9] As noted above, Buhrmann is a firm of engineers who were instructed to provide professional consulting services in respect of a building project called the Am Weinberg Development in Klein Windhoek. This project was to be situated on [Erf 1……], a plot of land inherited by Mr Garbade's wife and her sisters in 1988 and registered in the name of Jary Enterprises in 2003. The services included the reconstruction of the original property into a new restaurant, and the performance of associated geotechnical investigations and compilation of pre-tender cost estimates. These agreements took the form of oral contracts made during the period March 2005 to December 2006.

[10] The consideration for these services was agreed to be N$1 287 530,73. Buhrmann claims that this sum is due to them as they have completed their obligations under the agreement. Mr Garbade, so far as is material, argues that the work carried out was negligent and fell short of the contractual standard. In particular, it is alleged that the project was over-excavated, and the foundations were not of a sufficient standard. These allegations were subject of arbitration proceedings. He further alleges that he cannot be sued under the agreements as he is not party to them. Rather, he claims, it is Jary Enterprises, a close corporation whose sole member is Mr Garbade's wife which is the party. As previously noted, this is the only issue on appeal.

[11] Buhrmann makes two arguments. The principal one is that, in any case, the reasonable construction of the documents and agreements associated with the development indicate that Mr Garbade was contracting in a personal capacity. Second, they submit in the alternative that Mr Garbade is estopped from resiling

from his alleged representations that Buhrmann was contracting with him personally. The alternative argument will be dealt with only if this court finds that the special plea ought not to have been dismissed on the basis of the principal argument.

[12] The court *a quo* found that Mr Garbade was contracting in a representative capacity for Jary Enterprises. The judgment rests on three main pillars. First, the court below considered a first letter that was sent to TransNamib – implicated in the development because [Erf 1…...] has a southern boundary adjoining to the Windhoek-Gobabis railway line – that identified the developer as Jary Enterprises and not Mr Garbade. A partner of Buhrmann, Mr Tietz, then also sent a second letter to TransNamib that referred to the above correspondence. Significantly in the opinion of the court below, Mr Tietz stated in that letter that 'our client had applied to TransNamib'. Given that the first letter in question identified Jary Enterprises as the developer, and the second letter from Mr Tietz refers to the developer in the first letter as 'our client' the court found that Mr Garbade was contracting in a representative capacity.

[13] Further, the court relied on a confirmation of an initial verbal agreement in 2003 that was addressed to 'The Manager' of the Am Weinberg Project which was sent by Mr Roland, another partner in Buhrmann. The court *a quo* reasoned that reference to 'The Manager' in the letter by Mr Roland demonstrates Buhrmann's understanding that Mr Garbade was not the owner of the project, and was thus not acting in personal capacity.

[14] Finally, the court below explained away Mr Tietz's testimony that 'We always dealt with Mr Garbade. There was never somebody else' by stating that a natural person must always act on behalf of a close corporation. Mr Garbade, therefore, was this person and that is why Buhrmann dealt exclusively with him. That Mr Tietz only dealt with Mr Garbade, so the court *a quo* reasoned, was therefore not evidence that he was contracting in a personal capacity.

[15] The estoppel defence also failed on the basis that the court found that since the very inception of the contractual relationship, as demonstrated in the confirmation of the oral agreement in 2003, Buhrmann knew that Mr Garbade was working in representative capacity. It therefore did not behove the latter to explain this – there were no erroneous representations to correct.

[16] It is my considered opinion that the court *a quo* erred in holding that Mr Garbade acted in representative capacity. What follows are the reasons for this conclusion.

[17] It is important to remember that the court here has to determine a factual issue, and, to that extent, must make a value judgment about the identities of the parties to a commercial relationship. It is important, therefore, to construe the evidence as a whole in light of the purpose of that relationship to ascertain whether Mr Garbade contracted in personal or representative capacity. With respect to the learned judge below, he lost sight of this broad approach when he based his conclusions on the individual word 'manager' in the context of a string of contracts and forensic analysis of voluminous non-contractual correspondence.

This can be seen upon further examination of the three bases for the court *a quo*'s findings.

[18] First, the TransNamib correspondence does not show that Buhrmann was contracting with Jary Enterprises. It is to be noted that the second letter in question was written nearly a year and a half after the first letter, and in any event, the substance of the letter was only to chase up TransNamib's reconsideration of the application to relax the building line. Moreover, it would make sense for the application to be initially sent from Jary Enterprises. They, as the court *a quo* notes, were the owners of the Erf in question. It would be difficult to conclude from this alone that Mr Garbade was contracting in a representative capacity.

[19] Second, turning to the letter from a partner of Buhrmann to the 'Manager' of the Am Weinberg Wellness Centre, the court below extracted a dictionary meaning of 'manager', and found that this meant that Buhrmann would have understood themselves to be contracting with the manager of Jary Enterprises. This cannot be accepted as correct. Reference to 'the manager' simply means that Buhrmann would have understood to have been contracting with the manager of Am Weinberg Wellness Centre. It should be noted that back in 2003 this was a separate and smaller prior project, undertaken under the hand of a different architect.

[20] In any case the letter in question was a brief confirmation of the verbal appointment of Buhrmann as the project's civil and structural engineers. I note that later when submitting the fee estimate they explicitly refer to Mr Garbade in his

personal capacity, and correspondence from the same year and under the same partner’s hand refers explicitly to Mr and Mrs Garbade. That the court below relied on this letter to find that Mr Garbade was contracting in a representative capacity is too strong of an inference to draw.

[21] Finally, rejecting the statement of Mr Tietz to the effect that they only dealt with Mr Garbade on the basis that a close corporation could never act alone underestimates the near total absence of reference to Jary Enterprises in the initial correspondence that gave rise to the contractual relationship. In order to appreciate this, it is necessary to consider the purposes behind Jary Enterprises and its exact role in the financial architecture of the project.

[22] The role of the close corporation was a limited one. As per the Addendum to the Client-Architect Agreement, Mr Garbade and the appointed architect of the subsequent work to the project, Mr Bob Mould, agreed in the interest of providing security for the architect’s fees, *inter alia,* that ‘the CC shall be a property holding CC involved in the construction of buildings . . . . It is especially agreed that the CC will not have in its employ any employees, nor will it incur any extraordinary costs, unless it is agreed between the parties’. Further, it was agreed that the payment of the architect’s fees would include a percentage of the close corporation’s profits and the acquisition of a Unit in the development. Given that it was Jary Enterprises who owned the property in question, it would have only been possible to effect this scheme if Mr Garbade signed the agreement in a representative capacity.

[23] In direct contrast to this, Buhrmann was to be paid a lump sum of N$1 287 530,73. There would be no justification for contracting with the close corporation with the limited purpose as outlined above. On the contrary, Jary Enterprises had no funds with which to pay them. Its only asset consisted of ownership of the Erf. This would have been of not much use to Buhrmann, whose interests lay in payment of the above sum.

[24] Further, turning to Mr Oberprieler's evidence, he confirmed that Jary Enterprises had no bank account, no letterhead and was intended to be kept dormant, without incurring liabilities, so as to facilitate the procurement of a bank loan. Indeed, the attempts to raise funds from financial institutions were all made in Mr Garbade's own name. It is in these circumstances highly doubtful that Jary Enterprises would wish to expose itself to large liabilities in respect of Buhrmann's fees. That Buhrmann would contract for a project in the region of N$50 million with a corporation without any funds is an unbusinesslike interpretation of the contractual relations.

[25] Although this situation is not strictly one where the court is called upon to determine the meaning of a contractual provision, it is important to bear in mind that courts should be slow to reach a conclusion that flouts common business sense. To foist a non-commercial understanding on commercial agreements is more likely to be a misunderstanding of the underlying relationship rather than a realistic interpretation of it. The point was rightly recognised by Levy J in *National Address Buro v South West African Broadcasting Corporation* 1991 NR 35 (HC) at

49G.[2] Similarly, in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18, the Supreme Court of Appeal of South Africa stated that

> 'A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results . . . .'

[26] In addition to these points of principle, this court notes that the overwhelming majority of the documents indicate that Mr Garbade contracted in his personal capacity. Other contracts with different organisations involved in the project such as Bulk Earthworks and KL Construction were concluded in his name. The advertising and promotional material made no mention of Jary Enterprises. Given that these are documents that can give rise to legal liability it is inconceivable that this was due to oversight. Tax invoices were made in his name.

[27] It would be possible to continue enumerating the wide range of documents that are indicia of Mr Garbade contracting in his own name, but it is not necessary to further burden the judgment with factual issues. There are clear reasons of principle and fact militating against a contract between Buhrmann and Jary Enterprises. On the contrary all reasonable indications point to Mr Garbade contracting in person.

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[2]Citing a passage by Lord Wilberforce in *Reardon Smith Line v Hansen-Tangen* [1976] 3 All ER 570 at 574: 'No contracts are made in a vacuum: there is always a setting in which they have to be placed . . . In a commercial contract it is certainly right that the court should honour the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the market in which parties are operating. . . . '

[28] As a final point, it should be observed that the onus lies on the respondent to prove the material facts underlying his special plea.[3] In light of the above findings, it is unrealistic to suggest that he has done so. A combination of factual and principled reasoning militates against the finding of the court *a quo*. It is clear that the evidence it relied on was either taken out of context or gave rise to too strong an inference.

[29] Given that this court finds that Mr Garbade was contracting in a personal capacity, it is not necessary to address the issue of estoppel. The appeal must therefore be upheld.

Order

The following order is accordingly made:

1. The appeal is upheld with costs, such costs to include the costs of one instructing and one instructed counsel.

2. The order of the High Court upholding the special plea is set aside and substituted for the following order:

> 'The special plea is dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.'

[3] *Masuku & another v Mdlalose & others* 1998 (1) SA 1 (SCA) at 11B-C

3. The matter is referred to the court *a quo* for the continuation of the trial.

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SHIVUTE CJ

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DAMASEB AJA

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HOFF AJA

APPEARANCES

APPELLANT:	Mr Corbett
	Instructed by LorentzAngula Inc.
RESPONDENT:	Mr Mouton
	Instructed by Mueller Legal Practitioners