1. **REPORTABLE**

2. CASE NO: SA 10/2013

3. **IN THE SUPREME COURT OF NAMIBIA**

4. In the matter between:

5.

6. **ABIA SHIKALE N.O.** 7. **APPELLANT**

8. and **9.**

10. **UNIVERSAL DISTRIBUTORS OF** **11.**

NEVADA SOUTH AFRICA (PTY) LTD 12. **FIRST RESPONDENT**

13. **TECHNOLOGY AND** **14.**

PROCUREMENT HOLDINGS (PTY) LTD 15. **SECOND RESPONDENT**

16. **TOPSEC PHYSICAL SECURITY (PTY)** 17. **THIRD RESPONDENT**

LTD

18. **19.**

20. **Coram:** MAINGA JA, MTAMBANENGWE AJA and HOFF AJA

21. **Heard:** **16 June 2014, 15 July 2014**

22. **Delivered:** **17 April 2015**

23. _____

24.

25. **APPEAL JUDGMENT**

26. _____

27.

28. MTAMBANENGWE AJA (MAINGA JA and HOFF AJA concurring):

[1] It rarely happens on appeal that the court is confronted with two diametrically opposed conclusions in the same judgment from the court below. This is the dilemma this court is faced with in this case.

[2]

[3] The judgment *a quo* in this case is in respect of four matters heard together, namely case numbers I 2009/2003, I 2010/2003, I 2008/2003 and I 2011/2003. For convenience the parties would be referred to as they were in the court *a quo*, the appellant as defendant and the respondents as plaintiffs.

[4]

[5] The plaintiffs in the first two matters, Universal Distributors of Nevada South Africa (Pty) Ltd (Universal) and Technology and Procurement Holdings (Pty) Ltd (Topsec) each claimed rectification of a written agreement of lease purportedly concluded by them with the defendant. The Universal lease described the lessee as 'The Punyu Group, a company duly incorporated in terms of the laws of the Republic of Namibia/South Africa, represented by Jairus Shikale in his capacity as the owner, duly authorised'. 'The Punyu Group Inc (Registration No.) herein represented by Mr Jairus Shikale (the duly authorised representative of the lessee) in his capacity as Executive Chairman.' The plaintiff in the Universal lease sought to have the description of the lessee rectified to read 'Jairus Shikale Trading as

Punyu Group' and the plaintiff in the Topsec lease sought to have the description of the lessee rectified to read as 'Jairus Shikale Trading as Punyu Group'.

[6] In each of the two cases the claim for rectification was based on the allegation that the wrong description of the lessee came about as a result of a common or mutual mistake by the parties. The pleadings show that both parties are *ad idem* that there was a mistake in the description of the lessees but differ as to who the lessees were originally intended to be. Whereas the plaintiffs pleaded that the lessee in each case was intended to be what they claimed should be substituted, the defendant's case is that the common intention was that Punyu Wholesalers (Pty) Ltd was to be the lessee.

[7] The plaintiffs in the third and fourth cases prayed for a declaration that certain oral agreements were in fact concluded with Mr Jairus Shikale. The claims in the first two cases as well as the third and fourth cases are that the agreements were with Mr Jairus Shikale in his personal capacity. Mr Jairus Shikale who was cited in the summonses issued on 30 September 2003 as defendant, trading as Punyu Group Incorporated (by Universal and by Topsec respectively) died in 2009. After his death he was substituted in all four matters initially by his executors Keller & Neuhaus, and thereafter, as executrix by Abia Shikale, his wife, the appellant.

[8] Before dealing with the merits of the appeal in this matter this court considered an application for condonation filed on 12 February 2013 by the legal practitioner who noted the appeal. The condonation sought was for the late noting of the appeal. The appeal was noted some two days late; the circumstances that led to this delay were fully explained in the founding affidavit sworn to by the said legal

practitioner. It is sufficient to say the court was satisfied that good cause was shown and granted condonation accordingly.

[9] Plaintiffs' counsel summarised each of the four matters as follows:

[10] '3.1 **High Court Case No. I 2009/2003:** Plaintiff (TOPSEC PHYSICAL SECURITY (PTY) LTD, hereinafter referred to as "Topsec") instituted action against defendant, flowing from a written agreement (hereinafter referred to as the "Topsec Lease"), entered into on or about the 11th March 2002 with regard to the lease of **security surveillance equipment.** Plaintiff *inter alia* claimed: rectification of the written agreement; arrear rentals in the amount of N$369 890, 69 plus

15% VAT and interest thereon; rentals for the balance period of the equipment, alternatively payment of N$1 014 304, 28 plus interest therein, being the market value of the equipment and costs, as between attorney and own client.

[11]

[12] 3.2 **High Court Case No. I 2010/2003:** This matter is based on a written agreement for the lease of **82 slots wide upright and video machines** (hereinafter referred to as the "Universal Lease") entered into on or about the 6th March 2002 between UNIVERSAL DISTRIBUTORS OF NEVADA (PTY) LTD (hereinafter referred to as "Universal") and defendant. Plaintiff *inter alia* claimed: rectification of the written agreement; arrear rentals in the amount of N$1 591 128, 00 plus VAT thereon as at 25 June 2003; fair and reasonable rentals for what would have been the balance period under the contract in the amount of N$5 166, 00 per day from 26 June 2003 to date of delivery of the machines plus interest thereon; delivery of the machines, alternatively payment of N$3 981 500, 00 plus interest, and costs.

[13]

[14] 3.3 **High Court Case No. I 2008/2003:** Plaintiff (Universal) claims payment of amount of N$594 154,

57 in respect of **disbursements made or liabilities incurred** by plaintiff on behalf of defendant and for **services rendered and goods sold and delivered** by plaintiff to defendant during the period April 2002 to September 2002, together with interest and costs.

[15]

[16] 3.4 **High Court Case No. I 2011/2003:** Plaintiff claimed payment of an amount of N$246 780, 20 being for **disbursements** made on behalf of defendants, **services rendered and goods sold and delivered** by plaintiff to defendant in terms of oral agreements concluded during the period March 2002 to September 2002, together with interests and costs.'

[17]

[18] The parties agreed on the issues to be decided separately. These issues relate to what was pleaded in plaintiffs' particulars of claim read in conjunction with defendant's plea.

[19]

[20] <u>The contentions of the parties in detail case by case</u>

[21] In case I 2009/2003 plaintiff contends that the Topsec lease was concluded between the lessor and Mr Jairus Shikale in his

personal capacity and that due to a common error and in the *bona fide* but mistaken belief that the document recorded the true agreement between the parties, the lease incorrectly describes the lessee as already described in para [3] above. It further contends that the written lease should be rectified to accord with the common intention of the parties also as already described in para [4] above. A similar contention is advanced in respect of case I 2010/2003, the Universal lease, claiming rectification to accord with the common intention of the parties and, again, as already described in para [3] above.

[22]

[23] In the two matters defendant pleaded that save for admitting that the written agreements incorrectly describe the lessee, defendant denies plaintiffs' pleaded versions and pleads that plaintiffs' witnesses, Mr Stoop and Mr Stone, had insisted that the lessees be described as already stated notwithstanding that both had specifically been informed that Punyu Wholesalers (Pty) Ltd (Punyu) had the rights to the premises from which the joint venture was to be conducted. It further contends that Punyu was to be the party contracting with Universal Project and Topsec.

[24] In case I 2008/2003 the plaintiff contends that the oral agreements were concluded between Universal and Mr Shikale (represented by Messrs Ashok Lyer, Ndangi Shipanga or Paul Liebenberg). In terms of these oral agreements Mr Shikale would have remunerated plaintiff for disbursements or liabilities on behalf of defendant and/or rendered services and for goods sold and delivered to defendant. Mr Shikale would have remunerated plaintiff upon the rendering of an invoice, alternatively before the end of the month within which a transaction was dated (as per Annexure “A” to the particulars of claim) further alternatively within a reasonable period of time after the date of the transaction.

[25] In case I 2011/2003 plaintiff avers that the oral agreements were concluded between plaintiff and Mr Shikale (represented

personally or by Mr Liebenberg) during the period April 2002 to September 2002. In terms of these agreements Mr Shikale would have remunerated plaintiff for services rendered and goods sold and delivered to defendant. Remuneration would have occurred 14 days from plaintiff's invoice, alternatively within a reasonable period of time. The defence in cases 2009/2003 and 2010/2003 was the same or similar to the defence stated in para [10] above.

Background to all the agreements

[26] Some background to the matters is to be gathered from the evidence of one Mr Daniel Petrus Goosen and a management agreement made at the same time as the lease agreements. According to Mr Goosen, the whole matters had to do with the business of opening a casino in Namibia of which he was informed by a Mr Stone who worked for Universal Distributors of Nevada South Africa (Pty) Ltd. Towards November 2001 he and Mr Stone travelled to Ondangwa where they were met by Mr Shikale who introduced himself as the owner of the proposed casino. During discussions with Mr Shikale, Mr Shikale handed to him his business card which bore the words 'Punyu Group' and referred to Mr Shikale as executive chairman. The reverse side of the card was headed with the words

'Subsidiary Companies' and referred to a host of names all associated with the word Punyu.

[27]

[28] The preamble to the management agreement which was concluded between Universal Distributors and defendant reads as follows:

[29]

> **'MANAGEMENT AGREEMENT**
>
> THIS AGREEMENT MADE AND ENTERED INTO BY AND BETWEEN THE PUNYU GROUP OF Ondangwa, Namibia (hereinafter called the Company) and UNIVERSAL PROJECTS (PTY) LTD of Johannesburg, South Africa (hereinafter called the Management).
>
> **WITNESSETH (*sic*) AS FOLLOWS:**

WHEREAS the company is the owner of the immovable property described in the permission to occupy dated 9 August 1999.

AND WHEREAS the company operates a hotel on the property under the name and style of Punyu International Hotel;

AND WHEREAS the company has applied to the Casino Board of Namibia for the issue to it of a Casino Licence and the Casino Board of Namibia granted the same in respect of premises.

AND WHEREAS the company requires an operator to manage the casino and recognises that the Management of the casino will require special expertise.

AND WHEREAS the company wishes to delegate the Management to Universal Project (Pty) Ltd to manage the Casino subject to the terms and conditions set out herein.

NOW THIS INDENTURE WITNESSETH (*sic*) AND HEREBY AGREED AS FOLLOWS: . . .'

[30] The interpretation and definition section of the agreement contains *inter alia*, the following:

[31]

[32] ‘1.2.1. “affiliate” means in relation to anybody corporate any other body corporate which is subsidiary of the first body or a holding company of the first body or a subsidiary of such holding company (the expressions “subsidiary” and “holding company” having the meanings respectively ascribed to them in the Companies Act;)

[33]

[34] . . .

[35]

[36] 1.2.4. “Company” means the Punyu Group.’

[37]

[38] It is significant that the whole document talks of the company and no one else, and that it is signed by Mr J Shikale ‘for and on behalf of the Punyu Group being authorised thereto’. Clause 1.2.1 above leaves no doubt that the drafter had in mind a corporate body as the contracting party on the side of the defence and not Mr Shikale in his personal capacity. The agreement, in respect of which rectification is claimed, it should be noted, seems to confirm the defence averment that Stoop and Stone had specifically been informed that Punyu had the rights to the premises from which the joint venture was to be conducted and, more significantly, Mr Shipanga’s evidence that all the entities listed on Mr Shikale’s business card resorted under Punyu

Wholesalers (Pty) Ltd. That the entity, was the only registered company in existence at the time of entering into the various agreements, is not disputed by the plaintiffs and the mention of 'subsidiary' and 'holding company' in clause 1.2.1 of the definition section of the agreement and Mr Shikale's business card seems to me to fortify the inference that the corporate entity that plaintiffs thought they were contracting with is none other than Punyu Wholesalers (Pty) Ltd. Had the plaintiffs sought to rectify the management agreement, no doubt revealing questions could have had to be answered by the plaintiffs in particular by Mr Krüger who also drafted the management agreement on the instructions of Mr Stone.

[39]

[40] For completeness sake I should now mention the other provisions of the management agreement. Clause 2.2 reads:

[41]

> [42] 'It is agreed that the management shall manage the casino for and on behalf of the company.'

[43]

[44] Clause 3.4 reads:

[45]

> [46] 'The management shall with the approval of the Company prior to the opening date exercise the following powers on behalf of the Company.
> [47]
> [48] 3.5.1 the acquisition of consumable stores for the casino from stores designated by the Company.'
> [49]

[50] Mr Liebenberg, the manager, was appointed by Universal. His evidence about Mr Shikale amounts to no more than a presumption that Mr Shikale was the connecting party, a presumption based merely on the fact that Mr Shikale approved or took the decisions on everything. But that Mr Shikale would do so is quite consistent with his position as executive chairman of the Punyu Group. Mr Liebenberg was also unable to produce or refer to any invoices directed to Mr Shikale personally. In fact the court *a quo* acknowledged this fact at para 130 of its judgment (which I shall quote in full hereunder) that Mr

Shikale's conduct as described by Mr Liebenberg was consistent with his position as such.

[51]

[52] The judge *a quo* herself quoted the various provisions of the management agreement and in para 130 of her judgment said:

> 'The following clauses are relevant *in casu . . .*
>
> 3.1 From the date hereof until the opening date the Company shall at its sole cost . . . construct, fit out, furnish and decorate the casino as and for a licensed casino to internationally recognised standards.
>
> 3.2 The Company shall at its sole cost provide all of the equipment for the casino (and such other equipment as the Management reasonable *(sic)* considers necessary or desirable for the operation of the Casino *(sic)* and all of the gaming equipment and security equipment (and such other equipment as the Management reasonable *(sic)* considers necessary or desirable for the operation of the casino).
>
> . . .

5.2 The Management shall have the power to enter into contracts in the ordinary course of business on behalf of the Company in relation to the casino and shall have power to do all acts and things in the ordinary course of business which it may consider necessary for the purposes of the casino.

. . .

6.1 During the continuance of this agreement the company shall:-

6.1.6 procure that all necessary service *(sic)* (including but not limited to gas, electricity, heating, lighting, water supplies and waste services) are supplied for the purposes of the casino and further procure that all necessary repairs or replacements in connection with such services are properly carried out.'

She further observed in paras 132 and 133 thereof that the agreement was signed by Mr Shikale 'for and on behalf of the Punyu Group being duly authorised thereto', and that Mr Liebenberg was the casino manager appointed in terms of this agreement and as such he was

authorised to enter into agreements on behalf of the company as defined.

[53] In para 134 the learned judge *a quo* went on to say:

[54]

> [55] '[134] Mr Shipanga testified with specific reference to the first, second fourth and fifth paragraph of the preamble that the words "the Company" are references to Punyu Wholesalers (Pty) Ltd, in spite of the fact that the word "Company" is defined in the definition clause as "The Punyu Group". He gave no specific motivation for this, but I think it would be fair to say, given his other evidence about Punyu Wholesalers (Pty) Ltd being the so called umbrella company, that he probably based this interpretation on the same point of view. Mr Shipanga was interpreting the agreement rather than giving evidence about the intention of the parties when they concluded the agreement, presumably because there is no claim for rectification in respect of this agreement. This is obviously because the plaintiffs are not basing any of their claims directly on the management agreement. However, had they done so, I think it is common cause, viewed in the context of all the other evidence, that the management agreement would have been the subject of a claim for rectification. Having said this, I must say that Mr Shipanga's evidence on the interpretation of the word left me with a rather strong impression whenever he came across the word "the Company"

> he automatically concluded that it must be a reference to Punyu Wholesalers (Pty) Ltd only for the reason that the latter happens to be a company (and, it seems, the only company in the Punyu Group). However, he appeared to state that the reference to "the Company" in the third paragraph is really a reference to Mr Shikale as the casino licence holder. Curiously, in this paragraph the word 'him' is used in reference to the Company'. (My underlining.)
> [56]

[57] [20] In this regard one must also refer to the evidence in chief of Mr Stoop. First of all Mr Stoop said in answer to a specific question – whether he dealt with Mr Shikale directly: 'Myself I did not deal with him directly'.

[58]

[59] This means that the absence of any confirming evidence by Mr Stone from whom he got reports about the negotiations for the agreements and all his evidence about Mr Shikale being the lessee etc. was and remained hearsay as the court *a quo* somewhat obliquely observed.

[60]

[61] Secondly Mr Stoop was taken through the defendant's allegation that he and Mr Stone were informed that Punyu Wholesalers

(Pty) Ltd had the rights to the premises where the joint venture (the casino) was to be conducted. His answer initially was: 'I have not been informed, and I am not aware of that'.

[62]

[63] When the question was repeated as fully alleged in the plea his answer was merely: 'Not to my recollection'.

[64]

[65] He confirmed, however, that a letter dated end February 2007 was under the letterhead Punyu Wholesalers with the email address *Punyuwholesale@ash.namib.com*. He also said the letter had Punyu Wholesalers 'at the top, at above the elephant'. In cross-examination Mr Stoop said he did not know of any document addressed to Mr Shikale personally and repeated that he did 'not have a recollection of insisting for us to have the Punyu Group'. The answer that he did not know of any document addressed to Mr Shikale personally was after he, in chief, had been taken through a great number of documents including invoices sent in connection with the lease agreement of machines and items to be used in the casino business.

[66]

The two diametrically opposed conclusions in the judgment *a quo*

[21] As Mr Korf for the plaintiffs correctly observed, in para 12.12 of his written submissions, the crux of the two matters relating to

rectification is whether the written lease agreements were concluded with and by Mr Shikale personally or in his personal capacity or were conducted with Punyu Wholesalers (Pty) Ltd.

[22] The court *a quo* came to the conclusion that the plaintiffs, who alleged the former of the two claims, did not prove that allegation. The court made that finding after thorough analysis of the evidence of the plaintiffs, including that of Mr Herman Krüger who drafted the Universal lease and the management agreement; the court rightly said of his evidence:

> '[80] In my view, no reasonable person who looked merely at the business card of Mr Shikale could have concluded that Mr Shikale was acting in a personal capacity.
>
> [81] With due respect to Mr Krüger, I regret to say that his evidence in regard to this aspect is inconsistent and confusing. It leaves me with the overall impression that his explanations after the fact are just not convincing'.

The court then repeated that exchange between defendant's counsel and Mr Krüger as providing further insight into the nature of his testimony. The court quoted the exchange which in my view justifies the comment made earlier in para 79 of the judgment. There the court had described the answer given by Mr Krüger to a question as regards Mr Shikale's alleged personal liability as a "rather startling answer", an observation with which I fully agree.

[23] The court very compressively stated its findings in para 139 of its judgment:

> '[139] I have already pointed out certain unsatisfactory aspects in the evidence on behalf of the plaintiffs. They attempted to show that because they dealt with Mr Shikale in person and because he had to approve and authorize quotations, transactions, etc., he must have contracted with them in a personal capacity. I accept that he was personally involved to the extent that they have indicated, but this alone does not necessarily mean that he acted in a personal capacity or as a sole proprietor. Such conduct on his part is just as compatible with him being a company manager with a hands-on approach. I am also not impressed by the evidence that the plaintiffs intended to contract specifically with him personally because he was the licence holder. I agree with Mr

> Barnard that if they indeed had this intention from the compliance point of view because it was as important to them as they attempted to make out, they would at least have made some attempt to have a more proximate correlation between the licence holder and the lessee in each of the agreements than was the case. In respect of Universal my conclusion on this aspect is fortified by the fact that still as late as April 2003 its lawyers addressed correspondence to the defendant in which it was stated that the lease agreement and the management agreement were concluded with Punyu Group Incorporated. To my mind the evidence by Messrs Goosen, Stoop and Krüger does not on a balance of probabilities show that they had the sole and specific intention to contract with Mr Shikale in his personal capacity. As Mr Barnard submitted, Messrs Goosen, Stoop and Krüger tailored their evidence, "hindsight being a wonderful thing''.'

[24] The Topsec lease was drafted by a Mr Caffrey, their managing director, on information given by Mr Goosen. Mr Goosen signed that agreement on behalf of Topsec without any query as to the description of the lessee; he signed it as representative of the lessor just as Mr Shikale signed it as representative of the lessee. The court *a quo* stated at para 140 of the judgment on this aspect of the case:

> ‘To my mind a conspectus of the evidence clearly shows that they in fact intended to contract with the Punyu Group, mistakenly thinking that it was a corporate body’.

[25] I have carefully reviewed the evidence as analysed by both the court *a quo* and Mr Barnard for the defendant and I fully endorse their conclusions on this aspect. I have also reviewed the evidence as analysed by Mr Korf and found that his analysis does not adversely alter the overall assessment of the evidence of the plaintiffs’ witnesses on the crucial question.

[26] It is therefore not necessary for me to repeat the evidence of the witnesses called on behalf of the plaintiffs on the limited issues before the court below. Suffice it to say the following in that regard:

1. Mr Krüger was the lawyer instructed by Mr Stone to draft the Universal lease agreement. Mr Stone signed the agreement (as drafted with the alleged mistake). Mr Krüger admitted in his evidence in chief that he made the mistake as to the description of the lessee;

2. Mr Goosen of Topsec gave the information to his managing director, Mr Caffrey, to draft the Topsec lease agreement; Mr Goosen signed that agreement without any query as to the description of the lessee; he signed the agreement as representative of the lessor Topsec just as Mr Shikale signed as representative of the lessee;

3. In para 139 of its judgment the court below found, (to repeat):

> ‘To my mind the evidence by Messrs Goosen, Stoop and Krüger does not on a balance of probabilities show that they had the sole and specific intention to contract with Mr Shikale in his personal capacity. As Mr Bernard submitted, Messrs Goosen, Stoop and Krüger tailored the evidence, hindsight being a wonderful thing’.

4. Each of these witnesses had had sight of Mr Shikale’s business card that indicated that a number of companies listed on it were subsidiary companies and that Mr Shikale was the executive chairman of the Punyu Group;

5. Thus the court *a quo* in para 139 of its judgment significantly concluded as it did and as quoted above.

[27] The court *a quo* referred to the principles applicable to rectification; so did counsel on both sides, including the principle requiring what a litigant seeking a rectification of a written document must allege and prove as set out in *Denker v Cosak and Others* 2006 (1) NR 370 at 374E and as approved by this court in *Namibia Broadcasting Corporation v Kruger and Others* 2009 (1) NR 196 (SC) at 224 F, namely:

> ‘(a) an agreement between the parties which had been reduced to writing;
>
> (b) that the written document does not reflect the common intention of the parties correctly. In *Benjamin v Gurewitz* 1973 (1) SA 418 (A) at 425H Van Blerk JA

says that in reforming an agreement all the Court does is to allow to be put in writing what both parties upon proper proof intended to be put in writing and erroneously thought they had (cf *Meyer v Merchants' Trust Ltd* 1942 AD 244 at 253);

(c) an intention by both parties to reduce the agreement to writing;

(d) that there was a mistake in the drafting of the document. See *Von H Ziegler and Another v Superior Furniture Manufacturers (Pty) Ltd* 1962 (3) SA 399 (T) at 411F-H. Rectification and unilateral mistake are mutually exclusive concepts. See *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A);

(e) the actual wording of the agreement as rectified. See *Levin v Zoutendijk* 1979 (3) SA 1145 (W) at 1147H-1148A.'

See also Amler's *Precedents of Pleading*, 6 ed. at 298-299.

[28] A number of these principles are emphasised in the following cases –

1) In *Benjamin v Gurewitz, supra*, where Van Blerk JA had this to say at 425H-426A:

> 'It remains to consider whether on proof of the common intention of the parties and of an error deliberately caused by one of the parties, the respondent would be entitled to claim a rectification of the contract. As De Villiers JA says in *Weinerlein v Goch Buidings Ltd*, *supra*, in reforming an agreement, all the Court does is to allow to be put in writing what both parties upon proper proof intended to put in writing and erroneously thought they had. This *dictum* postulates, as the same learned Judge says at p 288, the existence of an earlier agreement, an agreement in most cases antecedently arrived at by the parties; and the disparity between the preceding agreement and the subsequent written agreement will generally be the result of a *bona fide* mutual mistake made merely by accident. The mistake may, however, also be caused intentionally by one of the parties by *dolus* of one of the parties.' (*Weinerlein's* case at p 291.)

2) *Netherlands Bank of South Africa v Stern N.O. and Another* 1955 (1) SA 667 (W) where Williamson J said at 672 C-F:

> 'But the party so seeking to rely upon a right to claim a rectification must establish the facts justifying a rectification "in the clearest and most satisfactory manner" . . . . The decision in the case of *Meyer v Merchant's Trust Ltd,* 1942 AD 244, made it clear that, in order to obtain rectification, it was not necessary to show that an antecedent agreement between the parties had by mistake not been embodied in the writing of the document sought to be rectified; it is sufficient if it is proved that the parties did have a common intention in some respect which they intended to express in the written contract but which through a mistake they failed to express'.

3) *Levin v Zoutendijk, supra*, where Coetzee J pointed out at p 1147H:

> 'The purpose of an action for rectification is to reform a written document in a *specific* fashion and a wholesome practice has developed over the years to draft the actual wording of the term omitted and to pray that that be inserted at a suitable place in the writing . . . . It is essential for any party to a written contract to know what the other party contends regarding the actual wording of the contract. Important rights and obligations may arise or be affected by the form of a written contract'.

The last sentence in this quotation is quite apposite as regards the situation that obtained in the present case. At p 1148A the Learned Judge also stated:

> 'The very cause of action for rectification postulates that the parties' agreement or common intention was clear and unmistakable on those aspects in respect whereof the writing is to be reformed. Cf *Anglo-African Shipping Co (Rhod) (Pty) Ltd v Buddeley and Another* 1977 (3) SA 236(R) at 241'.

4) *Von Ziegler and Another v Superior Furniture Manufacturers (Pty) Ltd* 1962 (3) SA 399 where Trollip J said at 409H:

> '. . . in practice our Courts rigorously insist upon the party who relies on rectification, pleading all the essentials thereof and proving them on a substantial balance of probabilities (see, for example *Lax v Hotz,* 1913 CPD 261 at p 266; *Venter v Liebenberg,* 1954 (3) SA 333 (T) at p 337; *Senekal v Home Sites (Pty) Ltd,* 1947 (4) SA 726 (W) at p 730; *Bardopoulos & Macrides v Multiadous*, 1947 (4) SA 860 (W) at pp 863-864; *Netherlands Bank of South Africa v Stern*, N.O., 1955 (1) SA 667 (W) at p 672B-F).'

5) *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (AD) where Corbett JA pointed out at 548A-C that the word *onus* has been used to denote two distinct concepts:

> ‘(i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim or defence, as the case may be; and

> (ii) the duty cast upon a litigant to adduce evidence in order to combat a *prima facie* case made by his opponent. Only the first of these concepts represents *onus* in its true and original sense. In *Brand v Minister of Justice and Another,* 1959 (4) SA 712 (AD) at p 715, Ogilvie Thompson, JA, called it “the overall *onus*”. In this sense the *onus* can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal (“weerleggingslas”). This may shift

> or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other. (See also *Tregea and Another v Godart and Another*, 1939 AD 16 at p 28; *Marine and Trade Insurance Co Ltd v Van der Schyff*, 1972 (1) SA 26 (AD) pp 37-39)'.

[29] I pause here briefly to point out that I refer to cases mentioned in para [28] (5), *supra*, in answer to an apparent suggestion made by Mr Korf for the plaintiffs in paras 12.6 to 12.8 of his heads of argument, where he talks of a *prima facie* case which, if made out by plaintiffs, would call for rebuttal by the defendant. An examination of the judgment *a quo* shows that any suggestion that in this case plaintiffs made out such a *prima facie* case as to the identity of the parties in the two lease agreements (as was apparently made in para 11.1 of Mr Korf's heads of argument *a quo*) is untenable. This is so although the court *a quo* dealt with this issue in paras 131 to 137 of its judgment and appeared to agree with Mr Korf's submission as against Mr Barnard's submission to the contrary; as I have already pointed out in

para 23, *supra*, the court went on to categorically reject plaintiffs' evidence in para 139 of the judgment *a quo.*

[30] The findings in para 139 of the judgment *a quo* show that, at best, plaintiffs proved a unilateral mistake which defeats the whole exercise of trying to obtain rectification, as rectification and unilateral mistakes are mutually exclusive concepts. See *Denker v Cosak,* at 374H. Although in his written heads of argument in this court Mr Korf appears to repeat the suggestion that plaintiffs made a *prima facie* case, and in that respect relies on *South Cape Corporation v Engineering Management Services, supra*, he however appears to have studiously avoided any criticism of the court *a quo*'s findings or to claim anywhere in his submissions that the court *a quo* misdirected itself in making those crucial findings. It seems to me that his reliance in *South Cape Corporation v Engineering Management Services* was misplaced because of the following:

(i) In recognizing that the parties' respective versions on essential and peripheral matters are diametrically opposed, Mr Korf referred to what was stated in *Stellenbosch Farmers' Winery Group v Martell et Cie SA and Others*, 2003 (1) SA 11 (SCA) at 14I-15D, namely:

> 'The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarized as follows. To come to a conclusion on the disputed issues a court must make findings on **(a)** the **credibility** of the various factual witnesses; **(b)** their **reliability;** and **(c)** the **probabilities. As to (a),** the court's finding on the credibility of a particular witness will depend on its **impression about the veracity** of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' **candour and demeanour** in the witness-box, (ii) his **bias,** latent and blatant, (iii) internal **contradictions** in his evidence, (iv) **external contradictions** with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the **probability or improbability of particular aspects** of his version, (vi) the **calibre and cogency** of his

> performance compared to that of other witnesses testifying about same incident or events. **As to (b),** a witness' reliability will depend, apart from the factors mentioned under (a)**(ii), (iv)** and **(v)** above, on (i) the opportunities he had **to experience or observe** the event in question and (ii) the **quality, integrity and independence** of his recall thereof. **As to (c)**, this necessitates an analysis and evaluation of the **probability or improbability** of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it'.

This was done by the court *a quo* before it made the findings in para [139] of the judgment *a quo*.

(ii) The court *a quo* arrived at those findings in para 139 by stages as follows:

‘135 In this case the plaintiffs’ burden of providing clear and convincing proof is eased somewhat by the fact that the parties are *ad idem* that there was a mistake in the two lease agreements.

136 Mr Korf in para 11.6 of his heads of argument submitted in respect of the identity of the lessees that, if the plaintiffs place *prima facie* evidence before the Court, which the court can accept while applying its reasonable mind, then the defendant is called upon to explain why it says the lease agreements were concluded with Punyu Wholesalers (Pty) Ltd. If that explanation is not forthcoming, he submitted, the plaintiffs’ version ought to be accepted. I agree with this submission, bearing in mind that I have already rejected any suggestion that Punyu Wholesalers (Pty) Ltd was the party who was in truth the lessee under any of the two lease agreements or that the oral agreements in *casu* were in truth concluded with Punyu Wholesalers (Pty) Ltd.

137 Mr Korf sought to make out an argument that Topsec and Universal made out their cases as pleaded on a balance of probabilities and submitted that the evidence on behalf of the defendant that the agreements were actually concluded with Punyu Wholesalers (Pty) Ltd must be rejected.

138 Mr Barnard submitted that it is not a matter of having to choose between Mr Shikale and Punyu Wholesalers (Pty) Ltd as the lessee. He adopted the approach that these plaintiffs did not prove their cases because they are unable to prove (i) that they had intention to contract with Mr Shikale personally; and (ii) that Mr Shikale intended to bind himself personally'.

[31] Earlier at para 45 the court had observed:

'[45] I wish to make it clear that this discussion of the evidence and the findings thereon are not aimed at showing that Mr Goosen was in fact dealing with a corporate entity, but to show that his evidence on the point that he only intended to contract with Mr Shikale in his personal capacity, lacks credibility. It seems to me just from a reading of the agreement that Mr Caffrey was under the impression that the Punyu Group was a corporate entity. On the facts before me the probabilities are that he gained that impression from Mr Shikale's business card, which, objectively speaking, does

> convey that impression by the use of the words 'Executive Chairman' and "SUBSIDIARY COMPANIES"'. (my underlining for emphasis.)

[32] It will be noted that the learned judge *a quo* in para 136 of her judgment purports to agree with Mr Korf's submission but does not comment on Mr Barnard's submissions as stated by her in para 138 of the same. Were it not for the court's subsequent finding in para 139 of the judgment, which vindicates Mr Barnard's submission, one would have been left wondering what exactly the court meant by its apparent agreement with Mr Korf – did the court agree that a *prima facie* case had been made out by the plaintiffs and that the defendant then had a duty to rebut. Since, however, Mr Korf repeated the submissions in his written submissions before us, I should point out that in the *South Cape Corporation* case, *supra*, at 548 Corbett JA made it clear:

(a) that the true *onus* never shifts and that whether the onus to adduce evidence to rebut shifts depends on the measure of proof furnished by the other party; and

(b) that 'this not being an *onus* proper but merely a burden of adducing evidence to rebut a *prima facie* case, the other party (defendant in this case) would not be obliged to establish a case on a preponderance of probability'. (My emphasis.)

Para 139 of the judgment in the court *a quo* makes it clear that plaintiffs did not make out a *prima facie* case at all.

[33] In para 140 of the judgment *a quo* the court purported to deal with the probabilities in the case; it stated:

‘However, having stated all this, I hasten to observe that all is not lost for the plaintiffs. To my mind a *conspectus* of the evidence clearly shows that they in fact intended to contract with the Punyu Group, mistakenly thinking it was a corporate body. In this, it is reasonable to conclude that Mr Goosen and Mr Krüger gained this impression mostly from Mr Shikale’s business card. In my view it is [more] probable than not that Mr Stone was also given a business card. Apart from this, when the draft agreements were discussed with Mr Shikale and his lawyers prior to the conclusion of the agreements, they did not point out that the description of the lessees were wrong, as any reasonable person would have expected them to do. I also have no hesitation in finding that the probabilities are overwhelming that Mr Shikale, knowing that the Punyu Group is not a corporate body, intended to contract as its owner. In this regard Mr Shikale provides some insight into his thinking in a letter dated 14 October 2002 and addressed to Mr Stone of Universal on the letterhead of “THE PUNYU GROUP” (Consolidated Trial Bundle “B”, p 666-667). The heading reads “RE: Financial Situation – Punyu Casino”. He states *inter alia*:

(I repeat the contents of the letter, underlining certain parts of it in order to show the vein in which it was written as I consider that the court's reasoning, based on it, is fallacious).

> 'As a starting point, I'd like to solemnly reiterate my organisations (*sic*) commitment towards your organisation and Punyu Casino. If you will recollect, we had agreed on making this a highly profitable venture for both organisations. We will stand by our commitment, in that regard. It's true that we disagree on various points, but is our firm belief that these points can be settled through negotiations in a friendly environment. I'm grateful to your organisation for the patience and understanding shown in dealing with difficult situations and sincerely hope that this demeanour will be maintained in our endeavour to make this relationship highly successful for both organizations.
>
> I acknowledge and appreciate your benevolence in understanding our tight cash flow situation and putting forward the necessary funds required for the setting up of the relevant infrastructure for the casino and I assure you that we are fully committed to settling our liability in this regard. . . .'

[34] The court's reasoning follows in paras 141 – 142 of the judgment *a quo*:

> 'The letter is signed by Mr Shikale and bears his stamp to (wit) "J Shikale". This letter clearly conveys that the casino project is a venture in question between the two organisations, namely the Punyu Group and Universal, that it is distinct from Punyu Casino and that the Punyu Group acknowledges liability for providing funds to set up the infrastructure for the casino. Nowhere on the letterhead is there any indication that Mr Shikale is writing on behalf of a corporate entity as is required by law. The body of the letter also does not convey any such meaning. Whilst there is not an explicit reference to the fact that he accepts personal liability, the letter, read in context with all the other facts and circumstances, must be taken to be written by Mr Shikale trading as the Punyu Group.
>
> The probabilities are that the mistake made by the plaintiffs is not material in the sense that they would still have contracted with the Punyu Group even if they knew that it was not a corporate body. The evidence indicates that they were intent on embarking on the casino project provided that there was a valid casino license in place. This was also the position of the defendant. I accept the clear evidence by Mr Shipanga to the effect that Mr Shikale was a law abiding businessman who would not intentionally have embarked on an illegal venture.

> As such it appears to me on the probabilities of the case that there was a meeting of minds on the identity of the parties'.

[35] I point out the selectiveness of the court *a quo*'s points of criticism of the letter in question. More importantly, I point out the reliance on probabilities leading to the non *sequitur* conclusion 'that there was a meeting of minds on the identity of parties'. The learned judge seems to have forgotten her clear findings in para 139 of her judgment and, more importantly, that the onus was on the plaintiffs to allege and prove what the parties agreed, but by mutual mistake failed to record in the written lease agreements and that the plaintiffs failed to prove the facts entitling them to a rectification.

[36] In *Lazarus v Gorfinkel* 1988(4) SA 123 (CPD) the question of the identity of a contracting party was in issue. In the course of considering the evidence Seligson AJ remarked at 135F:

> 'It is true that it was common cause that, as between plaintiff and Kahn, plaintiff was intended to be the creditor. It is also so that normally one would expect an experienced businessman to ascertain the true position concerning the principal indebtedness for which he is standing surety'.

In *casu*, notwithstanding the court's criticism of the late Mr Shikale for the so-called non-disclosure of the identity of the lessees in the lease agreements, the censure equally applied to the plaintiffs, (more so to them) who, in spite of their possession of Mr Shikale's business card with all it indicated *vis-à-vis* the Punyu Group, failed to ascertain the true identity of the lessee for the two lease agreements, and appear to have taken matters for granted; the evidence shows that all of the witnesses for the plaintiffs (Messrs Goosen, Stoop and Krüger) are experienced businessmen whose naivety and remissness in this matter are quite telling and unforgivable.

[37] I do not understand what the learned judge *a quo* meant by saying in para 142 of her judgment.

> ‘The probabilities are that the mistake made by the plaintiffs is not material in the sense that they would still have contracted with Punyu group even if they knew that it was not a corporate body. The evidence indicated that they were intent on embarking on the casino project provided that there was a valid casino license in place. This was also the position of the defendant’.

At best this statement seems to be a mystification of the situation that the evidence had clearly established that plaintiffs had failed to prove their entitlement to a rectification. At worst it seems to me to be mere speculation or an attempt to draw an adverse inference against the defendant. Mr Barnard, correctly, in my view, submitted that Mr Stone who was not called to testify was an essential witness to establish the claims of rectification for all the plaintiffs because he negotiated with Mr Shikale. Mr Goosen relied on the information obtained from him (Mr Stone), he gave instructions to Mr Krüger to draft the Universal lease agreement as well as the management agreement, he signed the Universal lease agreement and he was central to the concluding of the Topsec agreement as well; the plaintiffs offered no explanation why they did not call him to testify. Mr Barnard concluded, and I agree, that in not calling Mr Stone to clear up the uncertainties surrounding the provisions of the agreements the inference to be drawn is that plaintiffs

feared that Mr Stone's evidence would expose facts unfavourable to them.

[38] In the case of *Lazarus v Gorfinkel, supra,* the learned Acting Judge discussed the question of inference to be drawn in such circumstances. He remarked at 134F-135B:

> 'It is well established that in appropriate circumstances an inference can be drawn adverse to a defendant who remains silent. See *Galante v Dickinson* 1950 (2) SA 460 (A*)* at 40D-E. However, the application of this principle is inappropriate where the plaintiff's case is so vague and inadequate with respect to the basic facts that the only findings and inferences which can be made amount to pure speculation. *Van der Schyff's* case *supra* at 49H. The position was succinctly summarised by Miller JA in *Titus v Shield Insurance Co Ltd* 1980 (3) SA 119 (A) at 133F-G as follows:

> "It is clearly not an invariable rule that an adverse inference be drawn; in the final result the decision must depend in large measure upon 'the particular circumstances of the litigation' in which the question arises. And one of the circumstances that must be taken into account and given due weight, is the strength or weakness of the case which faces the party who refrains from calling the witness. It would ordinarily be unsafe to draw an adverse inference against a defendant when the evidence of the plaintiff, at the close of the latter's case, was so vague and ineffectual that the court could, only by a process of speculation or very dubious inferential reasoning, attempt to find the facts".

Furthermore, when proof of the plaintiff's case depends upon reasoning by inference, a salutary safeguard is the rule that an inference can be based only on proved facts and not on assumptions. In this regard, the following observation by Miller J (as he then was) in *S v Naik* 1969 (2) SA 231 (N) at 234C-E received the stamp of approval from our highest court in *A A Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A) at 620E-G:

> "If the court, on the evidence before it, were to come to that conclusion, it would be making an assumption rather

than drawing an inference, for the facts necessary for the drawing of an inference are lacking. As Lord Wright observed in *Caswell v Powell Duffryn Associated Collieries Ltd* [1939] 3 ALL ER 722 at 733:

> 'Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish . . . But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture'".

See also *Macu v Du Toit en 'n Ander* 1983 (4) SA 629 (A) at 650C-F; *Motor Vehicle Assurance Fund v Dubuzane* 1984 (1) SA 700 (A) at 706A-C; *S v Mtsweni* 1985 (1) SA 590 (A) at 593E-G.' (Emphasis mine.)

[39] In the present case the positive proved facts are decidedly such that they leave no room for the court to indulge in the speculation that the plaintiffs would still have contracted with the Punyu Group even if they knew it was not a corporate body; the evidence in this case does not, in my view, support this conclusion. In my view Mr Barnard was quite correct to submit that the court *a quo* was in this regard speculating, and to rely on *Lazarus v Garfinke*.

[40] At this juncture let me revert to Mr Korf's written submissions regarding a *prima facie* case. In para 12.6 of his heads of argument Mr Korf says:

> 'It is expected of the plaintiff to prove its case at least *prima facie*. This means that if plaintiff places sufficient evidence before this Honourable Court on any particular (disputed)

> issue, then defendant will attract the evidential burden (the duty to rebut) or the so called “weerleggingslas”’.

At the risk of repeating myself, I point out that Mr Korf in sub-paras 12.7 and 12.8 describes when it is considered a *prima facie* case is made and the consequences thereof but does not go on to specifically allege that in this case a *prima facie* case was made out by the plaintiffs in any of the four matters, nor does he criticize the court’s findings in, *inter alia*, para 139 of the judgment *a quo.*

[41] In *Marine & Trade Insurance Company* case, *supra* Jansen AR at 39C, apparently quotes Wigmore as saying:

> ‘The opponent whose case is a denial of the other party’s affirmation has no burden of persuading the jury. A party may legally sit inactive, and expect the proponent to prove his own case. Therefore, until the burden of producing evidence has shifted, the opponent has no call to bring forward any evidence at all, and may go to the jury trusting solely on the weakness of the first party’s evidence. Hence, though he takes a risk in so

> doing, yet his failure to produce evidence cannot at this stage afford any inference as to his lack of it; otherwise the first party would virtually be evading his legitimate burden. . . .'

[42] From what I have said above about the court *a quo*'s findings as to the weakness of the evidence, nay the failure of the plaintiffs to prove their affirmations on the essential allegations in their pleadings, it will be apparent that defendant was not at all called upon to produce any evidence despite the court *a quo*'s critical comments on, for example, Mr Shipanga's evidence.

[43] Mr Barnard submitted that the only relevant issue before the court *a quo* was the intention of the plaintiffs at the time of contracting. Upon the court *a quo*'s finding that the plaintiff did not have the intention to contract with the late Mr Shikale personally, it was the end of the matter. It follows that the court was wrong or misdirected itself. He submitted further, and I agree, that the mistake by the plaintiffs as to the existence of a body corporate trading as Punyu Group effectively prevented any consensus. The court should have dismissed the claims with costs at that stage.

[44] It is apparent that the court *a quo* faced with the overwhelming evidence militating against the case of the plaintiffs indulged in what Mr Barnard described as circular reasoning. The *New Collins Concise Dictionary* defines circular as circuitous, '3 (of arguments, etc.) assuming as one of the premises the conclusions that is to be proved: the fallacy of begging the question' and begging the question as 'a. to evade the issue b. to assume the thing under examination as proved'. It goes without saying that once the evidence proves or disproves something one does not seek to establish that fact on probabilities as the necessity of resorting to probabilities is to establish the truth when there is no direct evidence to achieve the same result. In any event, it seems to me that what the court *a quo* did in this instance amounted to deciding issues which were not put or fully argued before it. In this regard what the Supreme Court said in *Namibia Plains Farming and Tourism v Valentia Uranium* 2011 (2) NR 469 (SC) at para 39 and 40 applies, namely:

> 'It would be wrong for judicial officers to rely for their decisions on matters not put before them by litigants either in evidence or in oral or written submissions. If a point which a judge considers material to the outcome of the case was not argued before the judge, it is the judge's duty to inform counsel on both sides and to invite them to submit arguments. (*Kauesa v*

> *Minister of Home Affairs and Others* 1995 NR 175 at 182H-183I.)
>
> The above cases amply illustrate that in a civil case a judge cannot go on a frolic of his or her own and decide issues which were not put or fully argued before him or her. The cases also establish that when at some stage of the proceedings, parties are limited to particular issues either by agreement or a ruling of the court, the same principles would generally apply. The cases furthermore demonstrate that relaxation of these principles is normally only possible with the consent or agreement of the parties. (See further the passage quoted from the case of *Rowe v Assistant Magistrate, Pretoria and Another* 1925 TPD 361 and the case of *Simon Alias Kwayipa v Van Den Berg* 1954 (2) at 613H in line 614A-E)'. (Emphasis supplied.)

See also *Ferrari v Ruch* 1994 NR 287 (SC) at 299J-300A.

In any event the stark fact in this case is that the court *a quo* did not decide the matter on probabilities. However, in the end the court concluded:

> '[147] I have considered the fact that my findings about the intention of the plaintiffs are not in strict keeping with what the

> plaintiffs have pleaded about the intention with which they contracted. It encompasses more than what they have pleaded, but includes, in a sense, what they have pleaded. I have considered to hold, as Mr Barnard argued, that the plaintiffs did not prove their cases. However, I do not think that this would lead to a just result on the facts of this case. The defendant cannot claim any prejudice because it had knowledge of the actual situation at the time the contracts were concluded. Furthermore, the rectification that is being claimed is in line with my finding and in line with what the defendant very well knew to have been, "in truth", the actual situation. In my view the finding of the court and the ensuing result will effect justice between the parties'.

[45] The above conclusion has no evidential basis (after the court *a quo* rejected plaintiffs' claims) that they contracted with the late Mr Shikale in his personal capacity. See in this regard paras 79, 80, 81 and 139 of the judgment *a quo.* In addition the conclusion is not based on anything pleaded by the plaintiffs that would justify a departure from the courts findings as reflected in the paragraphs hereat referred. To the extent that it went further than its findings that plaintiffs did not prove their cases and the court *a quo* misdirected itself as Mr Barnard submitted and, in my opinion, the above conclusion compounds that misdirection.

[46] What the learned judge *a quo* appears to attempt to do in the above concluding part of her judgment is to apply equitable considerations as against the clear evidence to the contrary. She seems not to have been aware that this was

impermissible for a court to do. In *Moser v Milton* 1945 AD 517 Trindall JA said at 527-528:

> 'In our system of law, as Kotze JA pointed out in *Weinerlein's* case (at p. 295), equity does not prevail as distinct from and opposed to the law; and equitable considerations do not entitle the Court to enforce a contract which a statutory enactment declares to be of no force or effect, ...'
>
> (See *Wilken v Kohler and Weinerlein v Goch Buildings Ltd* 1925 AD 282 at 295.)

[47] For this reason and my discussion of the evidence as a whole the appeal must be upheld and the following order is made.

1. The appeal is upheld and all the claims by the plaintiffs are dismissed.

2. The plaintiffs are ordered jointly and severally, the one paying the others to be absolved, to pay the defendant's costs of this appeal and costs in the court below, such costs to include the costs of one instructing and two instructed counsel.

MTAMBANENGWE AJA

MAINGA JA

HOFF AJA

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