REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: I 1359/2011

In the matter between:

DEWALD CHRISTO LUDEKE **1ST PLAINTIFF**
HESTER SUSANNA LUDEKE **2ND PLAINTIFF**

and

ANDRIES LOUW T/A ANDRIES LOUW DEVELOPERS **DEFENDANT**

Neutral citation: *Ludeke v Andries Louw T/A Andries Louw Developers* (I 1359/2011) [2016] NAHCMD 177 (17 June 2016).

Coram: **UEITELE, J**

Heard: **01, 02, 03, 22 & 23 OCTOBER 2012**

Delivered: **17 JUNE 2016**

Flynote: *Work and labour* - Building contractor - Primary duty of - Cracks in badly excavated foundation - Liability of building contractor - *Onus***.**

Work and labour - Building industry - Standard of skill required by members thereof - Failure to adhere thereto constituting negligence.
Negligence - What constitutes - Failure to adhere to general level of skill and diligence possessed and exercised by members of litigant's profession constituting negligence.

Contract - Implied term - When term has to be implied - Breach of contract - Damages - Plaintiff must allege and prove nature and method of calculation.

Summary: During August 2010 the plaintiffs commissioned the defendant to construct a house for them. The realization of the plaintiffs' dream to own a house was shattered and delayed during December 2010 when the house that they had commissioned for construction displayed some structural defects and had to be demolished.

It is as a result of the shattered and delayed dream and the consequential financial losses which the plaintiffs allege they have suffered that the first plaintiff, Mr. Dewald Christo Ludeke, on 13 May 2011, issued combined summons against the defendant, claiming damages in the amount of N$ 504 812 and interest on that amount at the rate of 20% per annum reckoned from the date of judgment.

The plaintiffs claim is based on contract. The defendant entered notice to defend the plaintiffs claim, he denies liability on the basis that the agreement between him and the plaintiffs contained an implied term that the materials (i.e. the erf) provided by the plaintiffs must be fit for the purposes for which they are intended. Defendant furthermore counterclaimed, claiming damages in the amount of N$ 125 000 (in respect of claim 1) and N$ 25 218, alternatively in the amount of N$ 20 218 (in respect of claim 2).

Held that the parties agreed that the terms set out in the document admitted into evidence as Exhibit B form part of their agreement and one such term was that the defendant would excavate the trenches for the foundation on firm natural ground.

Held further that the defendant undertook and promised the plaintiffs that he would excavate the foundations for the house on firm and natural ground. The court thus

concluded that where there is an express provision dealing with a particular matter there is no room for an implied term dealing with the same matter.

Held furthermore that the defendant has not shown the standard of workmanship to the general level of skill and diligence possessed and exercised at the same time by the members of the branch of the profession to which (he) belongs. That the failure of the defendant to show that level of workmanship constitutes negligence.

Held furthermore that the plaintiffs' loss was one flowing naturally and generally from the defendant's breach of contract and one which the law should presume to have been contemplated by the parties as a probable result of the breach.

Held furthermore that the defendant's counterclaim against the plaintiff cannot succeed and the plaintiff is entitled to recover the damages that he has suffered.

ORDER

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1 The court grants judgment in favour of the plaintiff and the defendant must pay to the plaintiff the sum of N$ 484 623 -60 plus interest at the rate of 20% per annum reckoned from the date of this judgment to the date of payment;

2. The defendant's counterclaim is dismissed.

3 The defendant must pay the plaintiffs costs.

JUDGMENT

UEITELE J:

Introduction

[1] On 01, 02, 03, 22 and 23 October 2012 (that is, three years and nine months ago) I heard the evidence in the dispute between Mr. and Ms. Ludeke on the one side and Mr. Louw on other side. At the conclusion of hearing the evidence on 23 October 2012 I promised to deliver judgment not later than six months (that is around March 2013) from that date. I have unfortunately failed to keep to my promise and commitment. I must confess that whatever excuse I have for the failure to keep to the promise I made to the parties, it is unfair and unreasonable to parties who approached court to wait for more than three years for the pronouncement by the court on their dispute. I therefore unreservedly and sincerely apologize to Mr. and Ms. Ludeke on the one side and Mr. Louw on the other side for the delay in delivering this judgment.

[2] In this matter Mr Dewald Christo Ludeke is married to Hester Susanna Ludeke. They had dreams of constructing and owning a house of their own. During August 2010 they commissioned Mr. Andries Louw who trades as Andries Louw Developers to construct a house for them. The realization of the Mr. and Ms. Ludeke's' dream to own a house was, however, shattered and delayed during December 2010 when the house that they had commissioned for construction displayed some structural defects and had to be demolished.

[3] It is as a result of the shattered and delayed dream and the consequential financial losses which Mr. and Ms. Ludeke allege they have suffered that Mr. Dewald Christo Ludeke, on 13 May 2011, issued combined summons against Mr. Andries Louw who trades as Andries Louw Developers claiming damages in the amount N$ 504 812 and interest on that amount at the rate of 20% per annum reckoned from the date of judgement. Mr. and Ms. Ludeke's (I will, in this judgment, refer to them as the plaintiffs except where the context requires me to refer to each one separately as first or second plaintiff) action is based on contract. Mr. Andries Louw (I will, in this judgment, refer to him as the defendant) denies liability and counterclaimed, claiming damages in the amount of N$ 125 000 (in respect of claim 1) and N$ 25 218, alternatively in the amount of N$20 218 (in respect of claim 2).

<u>Background</u>

[4] The essential facts are these (These facts are what I have discerned from the pleadings and the undisputed evidence): During August 2010 and at Windhoek the first plaintiff and the defendant entered into a written agreement (there is a dispute between the parties as to what the constituted the written agreement) in terms of which the defendant agreed to build a house for the plaintiffs at Erf 193, Demonte Street, Auasblick, Windhoek (I will, in this judgment, refer to this property as the Erf 193) for a quoted amount of N$ 625 000. On 20 August 2010 the defendant took possession of the site but only started with the construction work during September 2010. The defendant completed building the structure during the first week of December 2010. On 02 December 2010 the plaintiffs authorized their financier, being Nedbank Namibia, to pay to the defendant an amount of N$ 437 500 (representing 70% of the value of the work completed) of the amount quoted. During the second half of December 2010 the Bank's official noticed large cracks in the walls of the house and alerted both the first plaintiff and the defendant of the cracks.

[5] The first plaintiff asked the defendant what he was going to do about the cracks. The defendant's response to the cracks was to submit a claim to his insurer. The insurer appointed an engineer to investigate the cause of the cracks. The investigations revealed that the house which was built on Erf 193 was constructed on an old landfill site containing building rubble, which led to settlement of the foundation that resulted in structural cracks. The first plaintiff on his part also commissioned a soil engineer to conduct a full geotechnical investigation. The soil engineer also concluded that the house was constructed on a landfill site containing building rubble.

[6] To remedy the cracks the engineers recommended two possible solutions, the first being to construct supporting columns from an incompressible underground layer (this process is known as underpinning) and the second option was to completely demolish the house and rebuild it from the beginning. After the engineers' reports and recommendations were made known to the first plaintiff and the defendant the defendant opted not to proceed with the contract. The first plaintiff thereafter called for quotations for the demolition of the house and the rebuilding of the house. In pursuance of that calling for quotations the plaintiffs appointed another contractor, known as M

Richter Renovations, who demolished the structure constructed by the defendant and built another structure.

[7] The plaintiffs allege that the defendant was negligent when he constructed the house on an old landfill and that as a consequence of the defendant's negligence they suffered damages. The defendant on the other hand denies having acted negligently and alleges that the first plaintiff was negligent by not disclosing to him that the building site (that is, Erf 193) was an old landfill site. It is these competing claims that I am called upon to resolve. I will start by briefly setting out the allegations made by each of the protagonist in their pleadings, and will thereafter briefly set out the evidence led at the trial. After I have briefly restated the evidence I will proceed to discuss the issue that I am called upon to resolve.

<u>The pleadings</u>

[8] As I have indicated above, on 11 May 2011, the first plaintiff issued summons against the defendant. In their particulars of claim, the plaintiffs claim that on 31 August 2010 they entered into a written agreement (which the plaintiff attached to his particulars of claim as Annexure *"DLC 1"***,** this document was admitted into evidence as exhibit B and will from here on refer to it as exhibit 'B') with the defendant. In terms of the written agreement the defendant would built a house for the plaintiffs at Erf 193. The plaintiffs amongst other things furthermore alleges that:

(a) It was an express term of the agreement between the parties that all trenches for foundations would be excavated on firm natural ground;

(b) It was an implied term of the agreement between the parties that the defendant would perform its duties in a professional and workmanlike manner;

(c) The defendant failed to perform his duties in a professional and workmanlike manner in that he was negligent in not excavating the foundations of the house to firm natural ground as agreed between the parties;

(d) As a result of the negligence of the defendant, the plaintiff had to; demolish the house built by the defendant; excavate the foundations to the rock layer and construct a raft foundation over the footprint of the house; and built the house all over again;

(e) The contractor, whom the plaintiffs appointed after the defendant decided not to proceed with the contract, M. Richter Renovations provided the plaintiffs with a quotation as follows:

(i) Demolishing the existing dwelling- N$ 45 600-00

(ii) Excavation of the foundations and Constructing a raft foundation N$ 318 400-00

(iii) Erection of a new dwelling- N$ 550 000-00

Total Costs: N$ 914 000-00

(f) As a result of the negligence of the defendant the plaintiffs suffered damages in the amount of N$ 504 812-00 as set out in annexure "*DCL4"*[1] to his particulars of claim.

[9] On 04 August 2011 the defendant pleaded to the plaintiffs' particulars of claim and simultaneous with the plea filed a counterclaim. In his plea the defendant admitted that he and the plaintiffs entered into a written agreement in terms of which he had to build a house for the plaintiffs on Erf 193, for a quoted amount of N$ 625 000. He also

1 In annexure *"DCL4"* the plaintiff described his losses as follows:

Supplier	**Description**	**Amount**
Andries Louw	Builder 70% paid out	N$ 437 500
Kudu Electrical	Electrician Paid out/work already done	N$ 17 391
Martin Richter	Demolition of the existing house	N$ 45 600
Shick Renovation	Removal of the Garage door	N$ 250
Shick Renovation	Install garage door	N$ 1 000
City of Windhoek	Water connection-Included in contract of builder expense	N$ 3 071
	Total	**N$ 504 812**

admitted that during December 2010 he was paid 70% of the contract price being the amount of N$ 437 500 in respect of the structure that he had built. He furthermore admitted that the engineers found that the house was constructed on an old landfill and that the plaintiffs had to completely demolish the house and rebuild it.

[10] The defendant, however, pleaded that the written agreement which he entered into with the plaintiffs comprised and consisted of two parts, namely the quotation which was attached to the plea and marked as annexure *"A";* and the City of Windhoek approved building plan as supplied by the plaintiffs to defendant, which was attached to the plea and marked as annexure *"B"* (in accordance with which the defendant had to build the house). The defendant further pleaded that it was an express, alternatively an implied, in the further alternative a tacit term of the agreement between the parties, *inter alia*, that the defendant would build the aforesaid house according to the building specifications contained in the building plans supplied by plaintiffs to defendant, and more specifically according to the building specifications in respect of the depth of the trenches for and strength of the foundations.

[11] In his plea the defendant denied that he and the plaintiff entered into a written agreement on 31 August 2010, and pleaded that the document attached as Annexure *"DLC 1"* to the plaintiff's particulars of claim (exhibit "B'), was an undertaking which he and the plaintiff gave to Nedbank Namibia Limited for the latter to finance the construction of the house. He further denied that he and the plaintiff agreed that he would excavate the foundations of the house to firm natural ground and pleads that the only agreement between the parties was that agreement (the quotation and the building plans) entered into on 18 August 2010.

[12] As regards the plaintiffs allegations that the defendant failed to perform his duties in a professional and workmanlike manner and that he was negligent in not excavating the foundation of the house to firm natural ground as agreed between the parties. The defendant denied that he was negligent in not excavating the foundations of the house to firm natural ground and pleaded that he excavated the foundations exactly to the depth specified in accordance with the building specifications as per the City of Windhoek's approved building plans, as supplied by plaintiff to defendant.

[13] The defendant pleaded in the alternative that in the event of it being held that he was negligent then in such event he pleaded that he was absolved by the plaintiffs' negligence in that:

'(a) Plaintiff, by supplying the building plans for the house to be built at Erf 193, (No. 39) Demonte Street, Auasblick, Windhoek, represented to defendant that the aforesaid Erf, and more specifically the condition of soil and/or ground thereof was suitable for the construction of the house as per the building specifications contained in the building plans, so provided.

(b) Plaintiff knew that defendant would act on the assumption that the building plans and the building specifications contained therein are factually correct and that the soil and/or ground on which the house was to be build was sufficiently stable and suitable for the construction of the house in accordance with the building plans and specifications. Plaintiff owed a duty of care towards defendant to provide defendant with correct information.

(c) The building plans were material and were supplied by plaintiff with the intention of inducing defendant to quote thereon and subsequently construct the house according to it.

(d) Defendant, relying on the correctness thereof, quoted the amount of N$ 625 000 - 00 for the construction of the said house, which quotation was accepted by plaintiffs.

(e) The representation was false in that the aforesaid Erf was located on an old landfill, which caused the soil and/or ground to be unsuitable for founding and constructing a house as per the building specifications and building plans supplied by plaintiffs to defendant.

(f) Plaintiffs were negligent in making the representation because they did not make proper inquiries as to the quality and nature of the soil and/or ground.'

[14] In the counterclaim the defendant repeated the allegations that he made in his plea particularly the allegations quoted above and made further allegations that in terms of the agreement (as constituted in the quotation and the building plans) he completed the building works. The defendant pleaded that he duly completed the following building works, in terms of annexures *"A"* and *"B"* namely he completed all the wet work for the construction of the entire structure of the house, constructed, painted and sealed the roof, installed the ceilings and cornices, completed all the plumbing work; and constructed the 110m boundary wall.

[15] The defendant further pleaded that on or about the 17th of December 2010 the plaintiffs instructed defendant to cease with the building work, pending the resolution of the structural cracks. He thus asserts that he was accordingly entitled to cancel the agreement between the parties due to the above false representation made by plaintiffs and hereby cancels the agreement. The defendant alleges further that as a consequence of plaintiff's misrepresentation, he has suffered damages in the amount of N$125 000-00, calculated as follows:

(a)	amount payable to defendant in terms of the agreement	N$ 625 000
(b)	minus 70% of agreed contract amount paid to defendant on 02 December 2010	N$ 437 500
(c)	minus 10% of the agreed contract amount, being the reasonable and fair value outstanding building work	N$ 62 500

Total amount of damages by defendant N$ 125 000

[16] In the alternative the defendant pleaded that he has *bona fide* to the best of his knowledge and ability completed the building works according to the building plans and specifications as I have set them out in paragraph 14 above. He proceeded and pleaded that after he had completed the work (as I have set it out above in paragraph

14) the house developed structural cracks as the foundations began to settle due to the house having been built on an old landfill site. He further pleaded that during or about April and May 2011 the plaintiff demolished the house build by defendant, but reused and enjoyed the benefit of the following building materials in the construction of a new house on Erf, 193:

(a) 42 910 x Super Bricks 7mpa;

(b) The sanitary ware and fixtures ;

(c) The IBR roof sheets and trusses; and

(d) The plumbing and drainage material.

[17] The defendant alleges that the value to the plaintiff of the building material mentioned above in paragraph [16] is the sum of N$148 580-46, made up and calculated as follows:

(a)	42910 x Super bricks 7mpa:	N$ 88 407-12
(b)	sanitary ware and fixtures	N$ 7 579-40
(c)	IBR roof sheets and trusses:	N$ 44 122-04
(d)	Plumbing and drainage material	N$ 10 471-90
TOTAL		N$148 580-46

[18] The defendant's second counterclaim is based on additional work which he was allegedly instructed to perform. He claims that during the course of the construction of the house on or about 1 December 2010 and at Windhoek he and the plaintiff entered into a further written agreement, in terms of which he would do the following work additionally to that contracted for in terms of the agreement contained in annexure "A"

and “B”, namely: building a steel reinforced retaining wall at the rear end on the eastern side of Erf 193, according to the engineer’s design and drawings supplied by plaintiff and attached to the counterclaim as annexure “C”. He claims that it was an express term of the agreement that plaintiff would pay the amount of N$25 218-00 to defendant for performing the additional work. Alternatively, it was an implied term of the agreement that defendant would be paid a fair and reasonable remuneration for the additional work and the fair and reasonable remuneration for the said work is N$25 218-00. He claims that he completed the additional work on or about 17 December 2010 and is thus entitled to be paid the amount of N$25 218-00.

[19] On 05 September 2011 the plaintiffs pleaded to the defendant’s counterclaim. The essence of the plaintiffs’ plea to the counterclaim is that he maintained that the agreement between the parties is the agreement concluded on 31 August 2010 and which is attached to his particulars of claim as annexure ‘DCL 1’**.** He pleaded that: the quotation which the defendant attached as annexure ‘A’ to his particulars of claim in the counterclaim was attached as annexure ‘A’ to annexure ‘DCL1’ (exhibit B)**,** the minimum building specifications which the defendant had to comply with were set out in the agreement, annexure ‘DCL 1’ (exhibit B)**.**

[20] The plaintiff furthermore denied that he had made any false representations to the defendant and that the defendant is entitled to cancel the agreement between the parties. He pleaded that the defendant as a builder had to ensure that the construction work was done in a professional and workmanlike manner, which included compliance with clause 8.2 of the agreement between the parties (annexure ‘DCL 1’**)**. He furthermore denied that he instructed the defendant to stop the construction work, he pleaded that the defendant stopped with the construction work on his own accord on 27 January 2011 to await the report of a structural engineer.

The Evidence

The evidence tendered on behalf of the plaintiffs.

[18] The first witness to testify on behalf of the plaintiff was the plaintiff himself who testified in support of his claim and also called two other persons to testify on his behalf. In addition to confirming what is contained in the pleadings the plaintiff testified that, during July 2010, he bought Erf 193 at an auction conducted by the City of Windhoek. After purchasing that erf he approached a certain Corne who drew the house plan for him. The draughtsman provided him with the name of Andries Louw (the defendant). He called the defendant who after the telephone call came to the first plaintiff's office and there they discussed the construction of the house for the plaintiff. He thereafter asked the defendant to prepare a quotation. After the defendant prepared the quotation and submitted the quotation to him he went to his financiers, Nedbank Namibia, to enquire whether the defendant was on the list of building contractors approved by Nedbank to perform building work for that Bank's clients and there he was informed that the defendant was on the list of the approved building contractors.

[19] After he was informed that the defendant is on the Bank's list of the approved building contractors, they (i.e. the plaintiffs and the defendant) on 31 August 2010 went to Nedbank for the purposes of signing an agreement. At Nedbank the three of them signed a document which was titled *"Contractor's Minimum Building Specifications and Waiver of Lien.*" This is the document which was attached to the plaintiffs' particulars of claim as *annexure 'DCL 1'* and admitted into evidence as exhibit B was signed by the plaintiffs and the defendant, the quotation which the defendant prepared and submitted to the plaintiff was attached as an annexure to that document. That document amongst other things reads as follows:

'**2 PREAMBLE**

2.1 The contractor[2] has entered into an agreement with the mortgagor[3] in terms of which the contractor has undertaken to construct and complete the works[4] subject to certain conditions.'

2.2 …

8 EXCAVATIONS

8.1 The area of the site to be built upon shall be cleared of all refuse and vegetation. Where trees or tree roots within the building area are removed, the ground shall be consolidated. (A soil engineer's report shall be supplied if requested by the Bank.)

8.2 Trenches for foundations shall be excavated on firm natural ground. The bottom of all trenches shall be levelled and where necessary stepped and rammed.'

[20] The plaintiff further testified that he was excited about the fact that their dream of owning a house was about to be realised so every afternoon he would go to the construction site and take pictures of the progress of the building process, most of the pictures that he took were submitted into evidence as exhibits '*D1* to *D 43*'. During September 2010 he received a telephone from the defendant who informed him that they (that is, the defendant and his contractors) were struggling to find solid ground. The defendant thus requested him to go to the Municipality and enquire whether the erf was situated on a landfill. First plaintiff continue to testify that he went to the Municipality to a person who was known to him and whilst there the defendant again called him and told him that he should not bother as they have found solid ground.

[21] During December 2010 the defendant completed the construction of the structure of the house he authorized the Bank to pay the amount of N$ 437 500 to the defendant. He testified that during the second week of December 2010 he noticed large cracks in the house and as I have indicated above these cracks led to a halt in the

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[2] In the interpretation section of the document contractor is defined as Andries Louw Developers.

[3] In the interpretation section of the document mortgagor is defined as Dewald Christo Ludeke and Hester Susanna Ludeke.

[4] In the interpretation section of the document works is defined as the work as per attached quotation.

building process and the investigations into the cause of the cracks revealed that the house was constructed on an old landfill resulting in the house having to be demolished. The plaintiff further testified that prior to the demolition of the house the following work was not completed; there was no bathrooms in the house, no toilets were connected, the showers were not build, the plumbing of the showers was not finished, the tiling was not laid, the house was not finished with prime paint, the house was not painted at all, the boundary walls was not finished and it was not even painted. The gutters and the sewer were not installed. The installation of the doors, sink units the geyser, the tilling of the floors and the bathrooms and water connections were still incomplete.

[22] He testified that after he took the decision to demolish the structure built by the defendant he called for quotations for the demolition and construction of a new structure. He appointed M Richter Renovations who demolished the structure that was constructed by the defendant. He testified that he paid M Richter Renovations an amount of N$ 45 600 for the demolition of the structure constructed by the defendant. He further testified that when M Richter Renovations rebuilt the house the only material that he reused from the demolished house were the IBR sheets and roof trusses (which the plaintiff concedes were worth N$ 44 122-04) and the sanitary wear and fixtures (which the plaintiff concedes were worth N$7 579-40). The plaintiff furthermore conceded that the defendant was entitled to be compensated for the material used. The plaintiff however denied that he reused the bricks or the plumbing or drainage material.

[23] The second witness to testify on behalf of the plaintiff was a certain Mr. Van der Merwe who testified that he is a retired Structural Engineer now Managing Director of Windhoek Consulting Engineer, that he holds a BSc Engineering Degree in the field of structures, which he obtained at the University of Stellenbosch in 1976 and he has been working as a structural engineer from that point onwards until now. He is registered as a professional engineer with the Engineering Council of Namibia and South Africa.

[24] Mr. Van der Merwe furthermore testified that he was appointed by an insurance company to investigate the failure of a house while it was being constructed. His testimony was that he went to the site and had a look around at the house. He observed that there was substantial settlement (he explained that a settlement means that the

building had sank down vertically into the ground) of the building towards the eastern side and he immediately suspected that there was a problem with the foundations. He instructed the builder on the site to dig a trench all around on the outside but only to the level of the bottom of the existing foundation. He explained that the he did not want the builder to dig deeper than the bottom of the foundation because he wanted to see what was in the ground at the level of the foundation at the time when the builder excavated for the foundation.

[25] He then inspected that excavation and it was very clear to him that the soil that he saw there was not natural ground (what they call *in-citu* ground). Mr. van der Merwe explained that *in-citu* ground is the undisturbed natural soil or rock or gravel. He testified that he immediately saw, in the excavation, pieces of plastic rubber, building rubble mortar and a lot of material that was not part of the natural ground. He recognised that this was fill material that was built on. He then instructed the builder to dig down deeper in that same trench outside the building up to a point where he does not get any fill material anymore. About two and half meters later they were still in fill material and it became clear that the whole site on which the building was constructed towards the east was one huge big rubble dump that was just covered over with sand. The area was full of voids, palm trees, staff that grew over the years and created voids. He testified that it was an absolute disaster, because there was no way that that house was ever going to stand. The witness proceeded to testify that any builder who was in the business of building houses should have reasonable knowledge with regard to the trade of building that is from earth work up to the finishing of the roof. He concluded that what he saw at the site left him with the view that the builder ought to have noticed that the site was filled with material and should have dug deeper until he reached natural ground. He testified that after his observation he compiled his report and recommendations to the insurance company.

[26] The third witness to testify on behalf of the plaintiff was a certain Mr. Martin Richter who trades as M Richter Renovations, the person who demolished the house that was built by the defendant and rebuild it. In his testimony he corroborated the first plaintiff's testimony that he was paid N$ 45 600 for the demolition of the structure that was built by the defendant and that he was paid an amount of N$ 550 000 for the

construction of a new dwelling for the plaintiff. He further testified that most of the bricks and the ceiling used in the demolished structure, were damaged in the demolition process. He furthermore testified that the materials which he re-used in the building were the plumbing material and the two baths, some of the IRB roof sheets and roof trusses. He re-used some super bricks although he could not provide the exact number. He further testified that, although he re-used some of the super bricks he quoted the plaintiffs for all the bricks which was paid by the plaintiffs for all the brick.

The evidence tendered on behalf of the defendant.

[27] The first witness to testify on behalf of the defendant was the defendant himself who testified that on 17 August 2010 he presented his final draft quotation to the first plaintiff which he accepted and subsequently he and first plaintiff signed on the quotation. The first plaintiff, however, told him that he (first plaintiff) had to furthermore submit the quotation to the Bank (Ned Bank Namibia) for approval. He further testified that towards the end of August 2010 the first plaintiff informed him that the Bank had approved the quotation and that they (i.e. the plaintiffs and him) had to go to the Bank to sign certain documents at the Bank. They went to the Bank and signed the documents and everyone was happy. He said he could not start with the building work because the City of Windhoek had not approved the building plans yet.

[28] The defendant furthermore testified that during September 2010, he, after the City of Windhoek had approved the building plans, commenced with the excavations of the foundations on Erf, 193. The depth of the foundations dug was up to 500 centimeters in accordance with the building plans. On 28 September 2010 he went to the City of Windhoek and applied for inspections for the excavations. Upon inspection by the building inspector Mr. Petrus Hwanda informed him that he was not satisfied with the depth of the foundations on the eastern side of the house, where the garage is situated and he instructed him to dig a little deeper with 100 millimeter to find firm ground. The first plaintiff was not present when the building inspector conducted the first inspection. A day after the inspection he reported to the first plaintiff with respect to the inspection and the instruction which he received from the building inspector. After receiving the report the first plaintiff went to City of Windhoek to establish what the

situation of the ground in Auasblick specifically to his Erf (i.e. Erf 193) was, in particular whether there was any land fill nearby. He testified that the first plaintiff informed him that he (the first plaintiff) was advised that there was no land fill in the area where Erf 193 was situated. He further testified that he also went to the City of Windhoek to verify for himself what the situation was. His testimony was that he received the same information which was given to the first plaintiff namely that the area where Erf 193 is situated there was no land fill or rubble area.

[29] On 29 September 2010 the building inspector returned to the site and conducted a second inspection of the whole foundations and gave the approval to proceed with the casting of the concrete. The defendant furthermore testified that when he dug the foundations there was nothing suspicious and the whole ground was firm natural ground. He furthermore testified that he does not possess any specialized skills or experience or knowledge on soil conditions. He stated that his expertise is building work according to the requirements of the City of Windhoek and the standards of the Banks. He proceeded to testify that after he excavated the foundations and they were approved by the City of Windhoek he proceeded with the casting of the concrete in the foundations. After casting the foundation he proceeded with building the structure until completion. He completed the structure and he put on the roof. He thereafter asked the first plaintiff for the first progress payment.

[30] During December 2010 an evaluator on behalf of Nedbank a certain Mr. Jurie Scholtz came to the site for inspection. On 02 December 2010 he received the first progress payment in the amount of N$ 437 000. He proceeded with the plumbing, underground pipes, ceilings and plastering of the entire building. On 14 December 2010 he asked for second progress payment. Mr. Jurie Scholtz the evaluator again came out and while he was doing his evaluations he discovered the cracks in the main bedroom. As a result the evaluator asked a report from the first plaintiff and him on what should be done to rectify the problem before he can proceed to approve the payment. He proceeded to his insurance company as he had a risk policy and consequently submitted a formal claim. The insurance company appointed an assessor, who in turn appointed an engineer (Mr. van der Merwe) to investigate the cause of the cracks. When the engineer made his findings he (the defendant) opted for a second opinion and

he accordingly agreed with his insurance company to appoint a soil engineer (Mr. Strauss) who would compiled a geotechnical report. Both Messrs. van der Merwe and Strauss found that the house was constructed on a land fill.

[31] The defendant furthermore testified that during November 2010 the first plaintiff and a certain Mr. Berti Calitz, a structural engineer, provided him with a plan for a retaining wall at the eastern rear side of the house. The purpose of the plan was to replace the boundary wall which was supposed to be built by the defendant as per plans which were submitted to him and which were part of parcel of the original quotation. The cost of these additional work amounted to N$ 25 000. He testified that he completed the additional work but was not paid for the additional work.

[32] During cross examination the defendant conceded that he signed exhibit "*B*" and that in terms of that document he was required to dig the foundation's trenches until he found firm natural ground. He however explained that exhibit "B" did not constitute an agreement between him and the plaintiffs but an undertaking given to Nedbank. He furthermore conceded that the first plaintiff did not make any representations to him with respect to the conditions of the soil but maintained that he did not enter into agreement with the plaintiffs that he must first test the soil before he could start building the house.

[33] The second witness to testify on behalf of the defendant was Mr. Petrus Xwanda who testified that he is employed by the City of Windhoek as a building inspector and as the date of trial he was so employed for a period of six years. He testified that his duties at the City of Windhoek entails the inspection at construction sites to ensure that buildings are constructed in accordance with the building plans which are approved by the City of Windhoek. He furthermore testified that as regards Erf 193 he inspected the excavations for the foundations. His findings were that the excavations for the foundations were done as per the building plan except at the back of the house where the excavations were shallower than what was indicated on the building plan. He accordingly instructed the builder to dig deeper so that the foundation could reach the required depth. He returned to inspect the excavation and on his return he found that the foundation was excavated to the depth indicated on the building plan.

[34] The third witness to testify on behalf of the defendant was Mr. Bertie Calitz who testified that he is a qualified civil (structural) engineer, registered with the engineering Council of Namibia. He further testified that he designed the retaining wall on the south eastern side of Erf 193. He furthermore testified that, under normal circumstances one only digs about 600 to 700 millimetres to find natural firm ground and that is the depth for the foundation which he indicated on the plan he drew for the retaining wall on the Erf 193, but as the builder was excavating the foundation for the retaining wall he realised that soil conditions were not normal, because of a lot of rubble that he discovered during the excavations. As a result he requested the builder to dig further down. He testified that he found firm ground at a level of about 1 to 1, 5 meters below ground.

[35] As regards the work done by the defendant in respect of the retaining wall he testified that in his view the defendant had completed approximately 50% of the retaining wall. He further testified that he was again called to the site after the defendant had vacated the construction site. He furthermore testified that the new builder (i.e. M Richter Renovations) had to break down part of the retaining wall constructed by the defendant because some of the reinforcing steel was not fixed properly in accordance with the design he drafted.

[36] The fourth and last witness to testify on behalf of the defendant was a certain Mr Louis Diergardt who testified that he was a bricklayer (he testified that at the time of the trial he had twenty four years' experience as a brick layer) and the person who supervised the excavation of the trenches for the foundation. He testified that they started with the digging of the trenches for the foundations until at the point where they were to cast the concrete into the trenches and from the digging of the trenches to the casting of the concrete he experienced no problems. His testimony was that they excavated the trenches for the foundations at a depth of 60 to 70 centimetres. He testified that as they were excavating the trenches they found natural firm ground and they did not find any rubble in the ground during the process of excavation.

<u>The issue which I am called upon to decide.</u>

[37] From the pleadings and the evidence led at the trial it is clear that there is consensus between the parties that they had concluded an agreement in terms of which the defendant had to render building services to the plaintiffs. But the decisive issue is:

(a) What were the terms of the agreement? and

(b) Whether the defendant breached his duty to provide skilled professional services to the plaintiff.

Discussion

What were the terms of the agreement between the parties?

[38] Mr. Grobler who appeared for the plaintiff submitted that the plaintiffs, in their particulars of claim, alleged that the defendant offered to build a house for the plaintiffs which offer was accepted by the plaintiffs and as such an agreement was concluded between the plaintiffs and the defendant. He furthermore argued that the plaintiffs led evidence as to how the agreement was concluded and that it was a term of the agreement that the "*Trenches for foundation shall be excavated on firm natural ground, the bottom of all trenches shall be levelled and where necessary stepped and ramped".* He furthermore argued that the defendant failed to excavate the trenches for the foundation on natural firm ground and he was therefore negligent. Mr. Grobler further argued that the defendant's negligence resulted in the house being demolished.

[39] Ms. Visser who appeared for the defendant sought to meet the submission by Mr. Grobler (namely that the document which was admitted into evidence as exhibit *B* was the agreement between the parties) by arguing that the document which was admitted into evidence as exhibit *B* did not constitute an agreement between the plaintiffs and the defendant. She argued that, first, one just has to look at the heading or title of that document. The title of that document which reads as follows, *"Nedbank Namibia Limited: Contractors Minimum Building Specification and Waiver of Lien"*, is indicative of the fact that the document is in favour or for the benefit of Nedbank so her argument went. Secondly, so she further argued, clause 31.2, of that document which

reads that, *"The Bank shall have no liability for rejecting any work or material <u>not conforming to its requirements which are laid down solely for the protection of Bank as mortgagee</u>."* is indicative of the fact the contract is not *per se* a contract between plaintiff and defendant, because the requirements (relating to the work and material) were put in solely for the benefit of the Bank.

[40] Ms. Visser further argued that because the document which was admitted into evidence as exhibit '*B*' was signed by both the plaintiffs and the defendant it is an agreement between the two parties (i.e. the plaintiffs and the defendants) in which they signify their obligations towards Nedbank. She thus submitted that clause 8.2 of exhibit '*B*' which requires the trenches for foundations to be excavated on firm natural ground does not indicate whether it is only the defendant who is bound by it or whether the plaintiff also has an obligation to see to it that the trenches for foundations must be excavated on firm natural ground.

[41] I do not agree with Ms. Visser for the following reasons. Both the plaintiff and the defendant testified that the first plaintiff invited the defendant to submit a quotation for the construction of a house on Erf 193 in accordance with the building plans handed over to the defendant by the plaintiff. After the defendant compiled the quotation he handed it over to the first plaintiff who accepted the quotation but informed the defendant that they still had to go to Nedbank Namibia to sign certain documents at the Bank. At the Bank they signed exhibit '*B'.* The quotation was attached as an annexure to that document. The defendant testified that after signing exhibit '*B'* everybody was happy and the building site was handed over to him, the only reason why he did not commence with the construction work after signing the documents at the Bank was the fact that the building plans were not yet approved by the City of Windhoek. I therefore have no doubt in my mind that the parties regarded exhibit '*B'* as an agreement between them.

[42] Even if I am wrong in my conclusion that exhibit '*B'* constituted part of the agreement between the plaintiffs and the defendant, a reading of exhibit '*B'* makes it clear that the terms of that document (i.e. exhibit '*B'*) apply to the agreement between the plaintiffs and the defendant. I say so for the following reasons. Clause 31.3 of exhibit '*B'* reads as follows:

'The Contractor *agrees and undertakes* to carry out and complete the works in accordance with the aforementioned minimum requirements *which shall form part of the agreement between the Contractor and the Mortgagor* and acknowledge that payment shall be made in accordance with the Bank's requirements applying to building loans from time to time.' [Italicized and underlined for emphasis].

[43] I have above pointed out that in the definition section of exhibit '*B*' the term 'contractor' is defined as Mr. Andries Louw who trades as Andries Louw Developers and the 'mortgagor' is defined as Mr and Ms Ludeke. The term 'works' is defined as the work set out in the quotation (which is the quotation which the defendant submitted to the plaintiff) which was attached to that document. There is in my view no clearer expression by the parties that the terms set out in exhibit '*B*' were binding upon them. The defendant has agreed and undertaken to perform the building work in accordance with the terms set out in exhibit '*B*'. Ms. Visser's submission that the terms of clause 8.2 do not indicate whether it is the defendant alone or both the defendant and the plaintiffs who are obliged to ensure that the trenches for the foundation are excavated on firm natural ground is fallacious and is rejected. In item 16 of the quotation the defendant tendered to excavate the trenches for the foundation of the house, so only he had the duty and obligation to excavate the trenches for the foundation on firm natural ground.

Did the defendant breach his duty to provide skilled professional services to the plaintiff?

[44] Having found that the terms of exhibit '*B*' form part of the terms of the agreement between the plaintiffs and the defendant, I find it appropriate to briefly summarize some of the general legal principles governing agreements in our law. First, there is no special law different from the law relating generally to contracts and the interpretation that applies to building contracts. In our law building contracts fall within the category of letting and hiring of work (*locatio conducti operis*). A contract has been defined by many learned authors[5] and in many cases before our courts[6] as an

[5] See for example Van der Merwe, van Huyssteen, Reinecke; and Lubbe; *Contract: General Principles* 2nd Edition, who argue that "one must then assume that an agreement will be a contract if the parties intend to create an obligation or obligations and if in addition, the agreement complies with all other requirements which the law sets for the creation of obligations by agreement (such as

agreement between two or more persons by virtue of which certain legal rights and obligations are created. Mackenzie[7] argues that the principle behind the law of contract is so simple that it is taught to all children when they reach the age of understanding that '*you must keep your promise*.'

[45] The legal rights and the legal obligations are, as a general rule, set out in the agreement by the terms upon which the parties to the contract have agreed. It is however acknowledged that certain terms of the contract will necessarily arise from the contractual relationship or are necessary in the business sense to give efficacy to the contract and will thus be implied into the contract. The circumstances in which a term ought to be implied in a contract were discussed in a number of old authorities, one such authority being the case of *Douglas v Baynes*[8] where Lord Atkinson said:

> 'The principle on which terms are to be implied in a contract is stated by KAY, L.J., in *Hamlyn v Wood*, 1891 (2) Q.B. 488 at p. 494, in the following words: 'The Court ought not to imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question that the Court is necessarily driven to the conclusion that it must be implied'.'

And in the case of *Mullin (Pty) Ltd v Benade Ltd*[9] Centlivres CJ said:

> 'You must only imply a term if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that you can be confident that if at the time the contract was being negotiated someone had said to the parties 'what will happen in such a case'? they would have replied 'of course, so and so. We did not trouble to say that; it is too clear'.'

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contractual capacity of the parties, possibility of performance, legality of the agreement and prescribed formalities)*'.*

6 See for example the unreported judgment of *The Council of the Municipality of Swakopmund v Swakopmund Airfield CC* (A 428-2009) [2011] NAHC 71 (15 March 2011) and the authorities there cited.

7 McKenzie H S: *The Law of Building and Engineering Contracts and Arbitration.* 5th Edition Juta & Co Ltd. At p 7.

8 1908 A.C. 477. (This was an appeal from the Supreme Court of the then Transvaal to the Privy Council).

9 1952 (1) SA 211 (A) at 214.

[46] In a building contract it is implied, on the part of the contractor, that the contractor will do the work in a good and workmanlike manner and that the materials he supplies will be suitable for the purpose for which they are to be used and of good quality. In the matter of *Simon v Klerksdorp Welding Works*[10] Murray J said the following:

> 'In a contract for the execution of a contract whereby one party supplies both the material and the labour, both the material supplied and the labour rendered must be such as are reasonably fit for the desired purpose. Where the owner supplies the material selected and desired by him, and orders work to be done thereon, the other party is normally responsible only for seeing that the workmanship is adequate, and is not taken to bear the burden of unsuitability or defective quality of the material selected by the owner of his own accord. In such a case the owner has relied entirely on his own judgement as far as concerns the material to be used. Where, however, before making a decision as to the material to be used, the owner approaches the contractor. <u>In such a case, it appears to me to follow even though the material eventually used is supplied by the owner the contractor is required to give the advice and display the skill and judgement of an expert in the particular matter.</u> If he advises the employment of material of a quality shape or character which he either knew or as an expert should have known was unsuitable for the contemplated purposes he has complied with his duty towards the owner: if the material proves defective or unsuitable for the contemplated purpose the contractor cannot contend that having performed his obligation he is entitled to remuneration for the labour expended upon the same. If in doubt as to the suitability of the material, the use of which is being considered, he must safeguard himself by informing the owner of the risk and making certain that it is with full knowledge of the risk and prepared to accept it that the owner instructs him to proceed.'

[47] It should be noted that where there is an express provision dealing with a particular matter there is no room for an implied term dealing with the same matter.[11] It is equally so that where the contractor expressly undertakes to do work according to

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[10] 1955 TPD 52.

[11] McKenzie H S *supra* at p 19

definite plans and specifications there would seem to be no implied term that the work will be suitable for the purpose for which it is required. In the English case of *Lynch v Thorne* [12] Lord Evershed MR said:

> '…the contract having provided that the house should be built and completed in a particular way by the use of particular materials of particular characteristics the defendant precisely and exactly complied with his obligation. He is clearly found to have shown, through his servants, a high standard of workmanship. Prima facie that finding seems to me …necessarily to exclude the operation of any implied term.'

[48] I now return to this matter and I ask the simple question did the defendant make any promise to the plaintiffs? In my view the answer to that question must be in the affirmative. The second question is what is the promise which the defendant made to the plaintiffs? The answer to that question is again a simple answer namely that the defendant promised to the plaintiffs that he will build a house for the plaintiffs on Erf 193 in accordance with the building plan which was approved by the City of Windhoek with respect to the house to be constructed on Erf 193 and also in accordance the specification contained in exhibit *'B'*. One of the specifications that was contained in exhibit *'B'* was that the trenches for the foundation must be excavated on firm natural ground. I am therefore of the view that that the defendant undertook and promised the plaintiffs that he will excavate the foundations for the house on firm natural ground.

[49] Counsel for the defendant (Ms. Visser) sought to avoid that result or conclusion in one of two ways. First, she submitted that she fully agrees with the legal principle enunciated in the matter of *Colin v De Guisti and Another*[13] where the Court held (the judgment is in the Afrikaans language) that "*n Vakman wat onderneem om iets te vervaardig, waar hy self die materiaal verskaf, onderneem dat hy met vaardigheid en nougesetheid sy taak sal verrig en dat die materiaal wat hy gebruik geskik is vir die doeleindes waarvoor hy dit aanwend…Dit volg dat 'n bouaannemer onderneem dat hy met vaardigheid, nougesetheid en die gebruik van geskikte materiaal die huis of gebou, wat hy bou, sal voltooi*." Loosely translated the passage means:

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12 [1956] 1 ALLER 744

13 1975 (4) SA 223 (NC).

> ‘A Craftsman who undertakes to produce something for which he himself provided the material, undertakes that he will, with the necessary skill and diligence, perform the task and that the material he uses is appropriate for the intended purposes … It follows that a builder undertakes that he will, with the necessary skill, diligence and the use of appropriate materials build the house, which he undertook to build.’,

but denies that the defendant is liable for not excavating the trenches for the foundation on firm natural ground.

[50] The basis on which counsel for the defendant denied that the defendant was obliged to excavate the trenches for the foundation on natural firm ground, is her argument that the material, which gave rise to the problem or which caused the house to crack, was not supplied by the defendant but was supplied by the plaintiff, she argued that the material in this instance is the soil (i.e. the erf on which the house had to be build). She further argued that the defendant had no control over that material, he was given that material and he was told that that was the erf, he was told where the house had to be positioned and how the house had to be build. She argued that the defendant had no choice, there was no way that he could have built on another spot or on another erf, he could not even vary from the exact positions of the plan, the building plan.

[51] Ms. Visser’s argument seem to me to be an attempt to extend the principle of implied terms. I am of the view that, in this matter, the principle of implied terms cannot find application here for the simple reason that in this matter the defendant had undertaken and promised to excavate the trenches of the foundation on natural ground. It is not disputed, in this matter that the trenches for the foundation were not excavated on firm natural ground. The defendant’s argument that he is not a soil specialist will also not assist him because the expert evidence was to the effect that any builder who professed to have the skills of a builder would have notice (because of the condition of the soil, such as the ruble found in the soil)that that ground was not natural ground. I am of the further view that if the defendant could not find firm natural ground it was his duty to inform the plaintiffs accordingly. I therefore cannot find that the defendant precisely and exactly complied with his obligation (i.e. the obligation to excavate the trenches for the foundation on firm natural ground). The defendant has, in my view, not,

either himself or through his servants, shown the standard of workmanship "to the general level of skill and diligence possessed and exercised at the same time by the members of the branch of the profession (the building profession) to which (he) belongs". The failure to show that level of workmanship constitutes negligence.

[52] Second Ms Visser attempted to rely on alleged misrepresentations by the plaintiffs to the defendant. In his evidence the defendant unequivocally testified that the first plaintiff did not make any representations to him as regards the suitability of Erf 193 for the purposes of erecting a house on that erf. Counsel's reliance on misrepresentation therefore fails before it even gets out of the blocks. Sympathising as I do, with the defendant, his counterclaim against the plaintiff cannot, for the reasons that I have outlined above, succeed and the plaintiff is entitled to recover the damages that he has suffered.

<u>The damages suffered by the plaintiff.</u>

[53] Van der Merwe, van Huyssteen, Reinecke; and Lubbe;[14] argue that a plaintiff who wishes to claim damages for breach of contract bears the onus to prove the following:

(a) breach of contract by the defendant;

(b) damages;

(c) a factual causal connection between the breach of contract and the damages;

(d) that the damage is a natural of the breach of contract or that an agreement was concluded to compensate the damage concerned.

[54] The above requirements have been articulated as follows by Corbett, J.A in the matter of *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*[15]:

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[14] *Contract: General Principles* 2nd Edition, at p 386

> 'The fundamental rule in regard to the award of damages for breach of contract is that the sufferer should be placed in the position he would have occupied had the contract been properly performed, so far as this can be done by the payment of money and without undue hardship to the defaulting party[16] said that to ensure that undue hardship is not imposed on the defaulting party the sufferer is obliged to take reasonable steps to mitigate his loss or damage and, in addition, the defaulting party's liability is limited in terms of broad principles of causation and remoteness, to (a) those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach, and (b) those damages that, although caused by the breach of contract, are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from its breach I have in this matter found that the defendant's failure to excavate the trenches for the foundations on firm natural ground amounts to breach of contract. It thus follows that the plaintiff has discharged the *onus* with respect to the first namely that the defendant has breach the contract.'

[55] The learned judge proceeds and state the two limbs enunciated in, (a) and (b), of the above quotation are often labelled "*general*" or "*intrinsic*" damages, while those described in limb (b) are called *"special"* or "*extrinsic*" damages. In my opinion the damages which the plaintiff claims in this matter fall under the category of general or intrinsic damages. I say so for the following reason it was not disputed by the defendant that the first plaintiff's decision to demolish the building constructed by the defendant was reasonable in the circumstances. It thus follows that the demolition of the building and the resultant loss suffered by the plaintiff were in fact directly caused by the failure to excavate the foundation on firm natural ground. The plaintiff sustained this loss as a consequence of the defendant constructing the house on an unstable foundation. In my view, the plaintiffs' loss was one flowing naturally and generally from the defendant's breach of contract and one which the law should presume to have been contemplated by the parties as a probable result of the breach. It, therefore, falls fairly and squarely within the category of loss for which general damages are awarded. The plaintiffs are thus entitled to the damages they have claimed and proven.

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[15] 1977 (3) SA 670 (A).

[16] See *Victoria Falls & Transvaal Power Co. Ltd. v Consolidated Langlaagte Mines Ltd.*, 1915 AD 1 at p. 22; and also *Novick v Benjamin*, 1972 (2) SA 842 (AD) at p. 860.

[56] As regards the losses which the plaintiffs suffered the first plaintiff's evidence was that they paid the defendant an amount of N$ 437 500 for the building which he had constructed and which building had to be totally demolished at a cost of N$ 45 600, they had to remove and reinstall the garage door at a cost of N$ 1 250 (his testimony was that they had to salvage whatever they could salvage from the building before it was demolished, the garage door was one such item which they had to remove before the building was demolished and which had to be reinstalled after the house was rebuild). The first plaintiff furthermore testified that he paid an amount of N$ 17 391 to an electrician called Kudu Electrical for the electrical installations, but due to the fact that the house constructed by the defendant was demolished he had to incur costs for electrical work again. The amount of N$ 17 391 was not included in the amount of N$ 437 500 paid to the defendant. He furthermore testified that he paid the City of Windhoek an amount of N$ 3 071 for water connection. He stated that the costs for the water connection, was actually included in the defendant's quotation but the defendant requested the first plaintiff to pay for the water connection on the understanding that the defendant would refund the first plaintiff for that payment but the defendant never refunded the plaintiffs. The sum total of all these amounts is N$ 504 812.

[57] The first plaintiff furthermore testified that he used sanitary equipment in the house that was rebuild, which equipment was purchased by the defendant and valued at N$ 7 579-40 and he was prepared to deduct that amount from the losses that he suffered. He further testified that he and the defendant entered into an agreement in terms of which the defendant had perform additional work (that is, to construct a retaining wall for plaintiffs at the eastern side of Erf 193). The remuneration for the additional work was agreed to be the amount of N$ 25 218. Mr. Calitz, the structural engineer who was called to testify on behalf of the defendant, testified that by the time that the defendant had vacated the building site and M Richter Renovations took possession of the building site, the defendant had only completed to construct fifty per cent of the retaining wall. The first plaintiff thus conceded that he had not paid the defendant for the construction of the retaining wall and agreed to deduct an amount equivalent to fifty percent (which is equal to N$ 12 609) of the agreed remuneration from his losses. It follows that the total losses which the plaintiffs suffered amount to N$ 484 623-60.

Costs

[58] There is no reason why costs should not follow the result. The defendant must therefore be ordered to pay the costs of the plaintiffs in this court.

Order

[59] I accordingly make the following order:

1 The court grants judgment in favour of the plaintiff and the defendant must pay to the plaintiff the sum of N$ 484 623-60 plus interest at the rate of 20 per cent per annum calculated from the date of this judgment to date of payment.

2 The defendant's counter claim is dismissed.

3 The defendant is ordered to pay the plaintiffs costs of suit.

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Judge

APPEARANCES

PLAINTIFF:	Mr. Z J Grobler Of Grobler & CO
DEFENDANT:	Ms. I Visser Instructed by Nambahu & Uanivi Attorneys