REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3221/2010

In the matter between:

JEANDRE DEVELOPMENT CC **PLAINTIFF**

and

WESSEL H MOOLMAN **FIRST DEFENDANT**

MARINDA S MOOLMAN **SECOND DEFENDANT**

Neutral citation: *Jeandre Development CC v Moolman* (I 3221/2010) [2013] NAHCMD 172 (20 June 2013)

Coram: PARKER AJ

Heard: **21 – 24 May 2012; 19 – 22 November 2012; 13 – 15 February 2013; 20 March 2013; 17 May 2013**

Delivered: **20 June 2013**

Flynote: Contract – Building contract – Court rejecting defendant's contention that agreement between the plaintiff and defendants was reduced in writing in the form of a Quotation – Court rather accepted plaintiff's contention that the agreement between the parties to construct a house was an oral agreement – Court finding that plaintiff has proved the terms of the oral agreement whereby the defendants agreed to construct their house themselves and the plaintiff agreed to assist them by giving them technical assistance when solicited and to place its accounts with his suppliers at the disposal of defendants who will pay for such account as asserted by the plaintiff – The court accepted evidence of the terms of the oral agreement – Court further accepted plaintiff's evidence that N$228 703,61 is due, owing and payable by

the defendants to the plaintiff in terms of the parties' oral agreement – Consequently, court gave judgment for the plaintiff in that amount.

Summary: Contract – Building contract – Court rejecting defendants' contention that a Quotation issued by the plaintiff at the defendants' special request constituted a written contract – Court rejected as unproven defendants' plea that the agreement between them and the plaintiff respecting the building of their house is a written contract (in the form of a Quotation) conclusive as to the terms of the transaction and be regarded as the exclusive memorial of the transaction respecting the building of the house – A concomitant factual finding *a priori* is that the parties concluded an oral agreement.

Flynote: Evidence – Burden of proof – Court determining which party bears the onus of proving certain assertions made in the proceeding.

Summary: Evidence – Burden of proof – Court held that burden lies on the party that asserts but if a party sets up a special defence, the onus of proving that defence is on that party who raises it – In the present case the defendants are not content with denying the existence of an oral agreement as asserted by the plaintiff and they have set up a special defence of the existence of a Quotation which they say is conclusive as to the terms of the transaction respecting the building of the house – Court found that the defendants failed to discharge the burden cast on the defendants – Consequently, court rejected their plea that the Quotation constitutes a written contract respecting the building of their house.

ORDER

(a) Judgment is for the plaintiff in the main claim.

(b) The defendants must pay the plaintiff N$228 703,61, plus interest thereon at the rate of 20% per annum from 1 February 2009 to date of full and final payment, jointly and severally, the one paying the other to be absolved.

(c) The defendants must pay plaintiff's costs of suit on a scale as between party and party, jointly and severally, the one paying the other to be absolved, including costs of one instructing counsel and one instructed counsel.

JUDGMENT

PARKER AJ:

[1] The plaintiff, Jeandre Development CC (a close corporation), institutes action against the first defendant and the second defendant (who are married in community of property) for the payment of N$228 703,61, plus interest at the rate of 20% per annum from 1 February 2009 to date of full and final payment and costs of suit; jointly and severally, the one paying, the other to be absolved. In the particulars of claim the plaintiff indicates that the action is based on a main claim or alternative claims, being first alternative claim, second alternative claim and third alternative claim. The main claim, according to the plaintiff, is based on an oral agreement concluded on or about 2 May 2007 between the plaintiff (represented by John-André Fourie) and the defendants (acting personally) respecting the construction by the defendants of a residential dwelling at Erf 731, Avenue 1 East, Mariental (hereinafter referred to as 'the house'). Mr Fourie is the sole member of the plaintiff. In this judgment 'plaintiff' and 'Fourie' are used interchangeably as the context allows.

[2] In the particulars of claim the plaintiff sets out the 'material express, alternatively implied, in the further alternative tacit terms of the agreement'. The defendants, on the other hand, deny that they owe the plaintiff the amount claimed or any amount. On that score they deny the main claim or the alternative claims. As respects the main claim; the defendants aver that the contract price for the construction of the house is N$484 782,40. The only basis of their averment is a 'Quotation' (dated 2 May 2007), attached to the defendants' plea and marked 'WM1' that is drawn out on the headed-paper of the plaintiff's and signed by Johan-André Fourie. According to the defendants the 'Quotation' constitutes the written agreement entered into between themselves and the plaintiff, and that there is no other contract – written or oral – existing between themselves and the plaintiff respecting the construction of the house. From this contention, the defendants aver that the total

'contract price' in terms of the 'Quotation' is N$500 000,00, but since the piece of land on which the house was to be constructed was theirs N$20 000,00, representing 'Administration Cost' (appearing as the first item on the Quotation), was to be deducted from the total amount of N$500 000,00, leaving what they contend to be the 'contract price' of N$480 000,00.

[3] It is, therefore, the averment of the defendants that the contract respecting the construction of the house was reduced into writing; and the writing is the Quotation. From the defendant's plea I find that the entire defence of the defendants to this action is based on this: the Quotation must be 'regarded as the exclusive memorial of the transaction' (see *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at 47, per Watermeyer JA). Thus, according to the defendants, the Quotation, which is the only contract – a written contract – concluded between themselves and the plaintiff provides that the contract price is N$500 000,00 (minus N$20 000,00, as explained previously); and that is the contract price for the plaintiff building the house; that is, if the plaintiff built the house, I should say.

[4] It seems to me clear that while the plaintiff's main claim is based on an oral contract concluded on 2 May 2007 or thereabouts, the defendant's defence to the main claim is based on a written contract, being – as I have said more than once – the Quotation. The plaintiff asserts that the terms of the transaction respecting the building of the house are based on an oral contract, as I have said more than once, and that the plaintiff has performed its obligation under the oral contract.

[5] It has been said that the burden of proof lies on the party who asserts, but – and this is significant – if a party (as is in the instant proceeding) sets up a special defence, the onus of proving that defence is on the party who raises it. (P J Schwikkard, *et al*, *Principles of Evidence* (1997) pp 400–401, and the cases there cited)

[6] In the instant case, as I have said previously, the defendants are not content with denying the existence of an oral contract concluded between themselves and the plaintiff; they have set up a special defence (which I have discussed previously), namely, that the contract they entered into between themselves and the plaintiff is a written contract (ie the Quotation) and so the Quotation must be regarded as the exclusive memorial of the transaction respecting the building of the house. The

defendants special defence is, therefore, that the Quotation 'is conclusive as to the terms of the transaction'. (See L H Hoffmann and D T Zeffertt, *The South African Law of Evidence* 4 ed (1988) p 291.) That being the case, upon the authorities, the defendants bear the onus of proving their special defence that the Quotation is conclusive as to the terms of the transaction respecting the building of the house.

[7] The first step in the enquiry should, therefore, be a determination as to whether the Quotation can, as a matter of law, pass as an agreement; and I so proceed to determine. The evidence is clear and incontrovertible that the Quotation is dated 2 May 2007; it is written on the headed-paper of the plaintiff's; and it is signed by Johan-André Fourie, the sole member of the plaintiff CC, as aforesaid.

[8] As respects written contracts; once the parties have decided that they will reduce their contract to writing and that they will be bound by their written contract, then the contract comes into existence *when, and only when*, the written document containing it has been signed by both parties. (Italicized for emphasis) But there are certain types of contract, eg promissory notes and mortgage bonds, that are effective and enforceable as written contracts although signed by one party. (Christie, ibid. p 118) In the instant proceeding the Quotation is not a promissory note or a mortgage bond. Furthermore, it has also been said that '[t]he proper analysis of the process of signing a written bipartite contract, as in the instant case, is that the first party to sign makes an offer and the other by signature accepts. (Christie, loc. cit.) In the instant case the signature of Fourie on the Quotation denotes an offer, but the defendants have not, by their signatures, accepted the offer. In short, the defendants did not sign the Quotation.

[9] For the aforegoing reasons, I find that the Quotation is not a written contract. Accordingly, I hold that the defendants have failed to discharge the onus of proving their special defence that the Quotation is a written agreement. Since I have found that the Quotation is not a written agreement, it follows inevitably and irrefragably that the Quotation cannot be 'conclusive as to the terms of the transaction'. (Hoffmann and Zeffert, loc. cit.); neither can the Quotation 'be regarded as the exclusive memorial of the transaction'. (*Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd*, loc. cit.) Accordingly, I reject as unproven the defendants' plea to the effect that the agreement between them and the plaintiff respecting the building of the house is a written contract conclusive as to the terms of the transaction

respecting the building of their house. A concomitant factual finding *a priori* is, therefore, inevitably, that the plaintiff and the defendants concluded an oral agreement with the plaintiff respecting the building of the house as asserted by the plaintiff. Accordingly, I hold that the oral agreement contains the terms of the transaction respecting the building of the house, as asserted by the plaintiff.

[10] Having so held, I must now consider the evidence to see what terms of the oral agreement are proved. In this regard the following consideration is significant. The entire defence of the defendants to the main claim is based on their contention that the Quotation is a written agreement and it is conclusive as to the terms of the transaction relating to the building of the house. I have debunked that contention, and I have held that their contention is baseless in law. But that is not the end of the matter. The plaintiff should prove its claim; that is to say, in order to succeed in its main claim the plaintiff should persuade this court of facts by the end of the case of the truth of certain propositions concerning the terms of the oral agreement and connected matters relating to the building of the house. I shall now consider the propositions in the main claim, which is based on the oral agreement.

[11] It emerges from the evidence that the testimonies of the plaintiff's witnesses and the defendants' witnesses on certain material aspects are mutually destructive to each other. In such a case the proper approach is for the court to apply its mind not only to the merits and demerits of the two opposing sets of testimonies but also their probabilities, and it is after so applying its mind that the court would be justified in reaching the conclusion as to which testimony to accept and which to reject. (*Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR 555) That is the manner in which I approach the determination of this case.

[12] I have applied my mind not only to the merits and demerits of the two opposing sets of testimonies and also their probabilities on aspects that are relevant and which have been placed in issue. Having done that I make the following factual findings.

[13] At the special request and insistence of the defendants (particularly the first defendant), Fourie drew up the Quotation for the purpose of enabling the defendants 'to get a loan from the Bank (Bank Windhoek) to use, to get something, a legal document, for them to go to the Bank to facilitate a loan'. The Bank would not give a

loan to the defendants if as owners they were also by themselves going to build their house. It was, in this regard, the expressed aim (expressed by the defendants to Fourie) that the defendants themselves will build the house so as to reduce costs in the building of the house. So enters the plaintiff who agreed to assist the defendants to build the house by themselves. The first major assistance concerns preparing and giving the Quotation to the defendants. Fourie testified: 'They (the defendants) needed that (the Quotation) otherwise they cannot get a loan from the Bank'. I asked Fourie to clarify his testimony that he agreed to assist the defendants (who were going to build the house themselves) knowing that he would not make any profit. I wanted to know why he agreed to assist them, without making any profit. His terse response is this: 'Helping people to construct (houses)'. I shall return to this no-profit-making assistance in due course. It is important to note that the evidence about the defendants' expressed aim forms part of the *res gestae*; and so, it has probative value.

[14] The defendants informed Fourie then that they could maintain a Bank loan of up to N$500 000,00 and that was the amount they would apply for; and they did. Fourie was therefore told to prepare a Quotation which in monetary terms should lie within that limit; and that is what Fourie did. The defendants very well knew, and were aware, that the Bank would not give them a loan if as owners they were also by themselves going to build their house; that is, if they were going to be 'owners-builders'. The Bank knew that the plaintiff is a registered builder: Fourie testified, 'I am a registered builder for all the Banks'. Thus, a Quotation from the plaintiff signifying that the plaintiff was going to build the house facilitated the granting of the loan.

[15] The Quotation and the building plans appearing at pages 66, 67 and 67.1 (of the bundle of documents) were submitted to the Bank by the defendants when the defendants applied for the loan. Thus, when the Bank approved the loan, the Bank was under the justifiable impression that the plaintiff, a registered builder, was going to build the house. Thus, the responsible officials of the Bank swallowed a chicanery crafted by the defendants and played on those Bank officials. Consequent upon this chicanery the Bank issued a 'Letter of Undertaking No. 538/31/2007 for the credit of the plaintiff. The relevant part of the Letter reads:

'**FOR CREDIT: Jeandre Development Account number CHK 1189727001**

Dear Sir

LETTER OF UNDERTAKING NO: 538/31/2007

At the request of Wessel Hendrik Moolman and Mirinda Stella Moolman we, First National Bank of Namibia Ltd, Mariental branch, herein represented by Gerrit Louw and Alida Catharina Engelbrecht in their respective capacities as Manager and Manager's Assistant, advise that we hold at your disposal the sum of N$400 000.00 (Four Hundred Thousand Namibia Dollar).

This amount will be paid to you at our Mariental branch, free of commission.

SIMULTANEOUS COMPLETION OF THE FOLLOWING TRANSACTIONS:

100% completion of the building on Erf 731 Mariental and upon receipt of the Letter of Satisfaction.

We reserve the right to withdraw from this undertaking should any unforeseen circumstances arise to prevent or unduly delay registration of the above-mentioned matters and whereupon the said sum will no longer be held at your disposal, subject to the condition that we give you written notice, prior to registration, of our intention to withdraw from this undertaking. This letter is neither negotiable nor transferable and must be returned to us upon receipt of our notice of withdrawal or payment of the above sum.

Yours faithfully,'

[16] But between the plaintiff and the defendants it was a term of the oral agreement concluded between them that the plaintiff shall prepare, and give to the defendants, the Quotation for the purpose fully set out previously. The defendants themselves shall build the house; and the plaintiff shall only assist the defendants in their enterprise when such assistance was requested, that is to say, the plaintiff shall not build the house and make profit at the expense of the defendants, as I have found previously. After all, the expressed aim of the defendants is to save costs, as aforesaid.

[17] In sum, in terms of the oral agreement the defendants and not the plaintiff shall build the house. With the greatest deference to Mr Grobler, I find as irrelevant the question asked of Fourie by Mr Grobler whether Fourie knew the defendants are builders or that they have experience in building a house. It follows that evidence by the defendants that they have no experience in building a house is irrelevant and has no probative value. What is relevant and has probative value is that it is a term of the oral agreement – as I have found – that the defendants, and not the plaintiff, shall build the house so as to reduce costs of constructing the building, which has always been the primary aim of the defendants in entering into such oral agreement in the first place and in deceiving the Bank that the plaintiff was going to build the house. The defendants are adults, and the oral agreement they entered into with the plaintiff is valid and enforceable. Fourie bore no legal duty to have sought proof that the defendants have experience in building houses themselves before concluding the agreement with them.

[18] Thus, it was agreed between them that the defendants, and not the plaintiff, will build the house themselves for the sake of – as I have said more than once – to reduce costs of building the house; and further that Fourie shall only assist the defendants. In pursuit of the agreement Fourie assisted the defendants in various respects; chief among them is the following, apart from preparing the Quotation. The plaintiff opened an account for use of the defendants in the plaintiff's books of accounts ('the defendants' account') in which certain transactions respecting the building of the house were recorded. A summary of the transactions appear at page 1 of the bundle of documents. I shall return to the summary in due course. The defendants, accordingly, made use of the various open-accounts of the plaintiff with various suppliers, and those accounts were to be settled by the defendants after the building of the house was completed. Invoices raised in respect of the defendant's account and concerning the building of the house were presented to the plaintiff and were reflected in the defendants' account.

[19] Pursuant to the oral agreement between the plaintiff and the defendants, the defendants themselves went to some suppliers; 'even suppliers in Windhoek, some of them in Swakopmund, to get quotations (for supplies) for certain parts of the building'. Where such suppliers were made use of, the suppliers invoiced the plaintiff. Take, for instance, the evidence of Mr D E Klouse (a plaintiff witness). Klouse ran a private business called Catex Services Mariental and sold solar

equipment, energy-saving equipment and PC's. Klouse was approached by the first defendant for the purchase of low-pressure solar geyser (from Catex Services Mariental). Klouse did not at any stage deal with the plaintiff's Fourie. The geyser was delivered to the house. The agreement between Klouse and the first defendant is that Klouse should only deliver the geyser; and the first defendant shall install it. In any case, Klouse testified he was too old to climb up a structure in order to install the geyser. The invoice for the geyser is made to both the plaintiff and the first defendant. Klouse's explanation, which I accept as reasonable, is that he 'was not sure who would do the payment'. Be that as it may, Klouse received payment from the plaintiff.

[20] Take also, for instance, the evidence of Ms J G van der Merwe, who owns a hardware shop in Mariental called Mariental Building Supplies, which I accept. Whenever the plaintiff was involved in a building project it would open an account with Mariental Building Supplies. Ms van der Merwe recalls earlier projects (eg the Steyn project) which differed in material respects from the building of the house. In those earlier projects she had had direct dealings with the plaintiff in the purchase of supplies from her store. Furthermore, in those earlier projects she had had discussions and negotiations with Fourie about profit margins for materials supplied by her business; and, moreover, where there was to be a profit margin she never dealt directly with persons for whom the plaintiff was building the houses. But that was not the case with the house. The witness testified about, for instance, Plascon paint. She gave the second defendant a brochure from which the second defendant selected the paint and the colour of the paint that should be ordered for the house. The second defendant did not like the basic paints that were already in stock. And the invoice for the order has the second defendant as 'Your Reference' because she is the customer and the paint was specially ordered by the second defendant for the house.

[21] Ms van der Merwe testified further about window frames. She gave the defendants (particularly, the first defendant) options on ordinary window frames and aluminium frames, their sizes and quantity. In this regard she gave them a brochure ('a book') showing different sizes of aluminium window frames for them to choose what pleased their hearts. And as it was with the Plascon paint, with regard to the window frames, too, Ms van der Merwe dealt directly with the defendants. There is the further testimony of Ms van der Merwe about a stove and an oven and an

extractor fan in respect of which, like the Plascon paint and the window frames, she dealt directly with the defendants.

[22] In sum, the defendants made special orders directly with Ms van der Merwe for the Plascon paint, the stove, the oven, the extractor fan and the aluminium window frames. Ms Van der Merwe advised the defendants to collect those items from her store because they were not part of the usual stock in her store: she had ordered them specifically and especially for the defendants and at their special request and insistence. What is crucial and relevant in this proceeding is that the kind of arrangement she struck with the defendants concerning those items was peculiar and specific to the defendants' situation and to the building of the house. That arrangement – in short – was out of character.

[23] Furthermore, upon enquiry, the defendants informed Ms Van Der Merwe that the plaintiff would make payment accordingly. Some of the invoices that were raised for those items, for example, are not signed; and those that are signed are not all signed by either the first defendant or the second defendant. It would seem they were signed by one builder or another, eg Willa (Snyder) or other builders. What she attested to is that she did not expect a customer like Mr and Ms Moolman (the defendants) 'to come and sign for every bag of cement or a little screw or a hammer'. I understand her to say that she considered the defendants as VIPs and so she did not expect them to go to her store for such minor items. She knew that the builders who came into her store to fetch the items to be the defendants' builders and the defendants 'had no problem with it'. She testified further, 'if they (ie the defendants) had any problem they could have come immediately (and) to discuss it with me'.

[24] No evidence was placed before the court to show that the defendants did complain to Ms van der Merwe that they did not receive the bags of cement the invoice for which they did not sign and also that they did not receive the aluminium window frames, the stove and the oven and the extractor fan and the Plascon paint which they had made special orders for. Ms Van der Merwe testified further that the items she supplied for the defendants' account and for which invoices were raised 'went into (the building of) the house'. That being the case, so she testified, the plaintiff is liable to pay for the account. I accept Ms Van der Merwe's evidence.

[25] In addition to the aforegoing evidence which shows that in terms of the oral agreement entered into between the plaintiff and the defendants, it is the defendants and not the plaintiff that shall build the house, there is the evidence of Bindeman and W Snyer. Their evidence undoubtedly converge significantly on this: the defendants visited the construction site 'virtually on a daily basis' between 07h30–09h30 and after 17h00, and on those visits they gave instructions to the builders on certain aspects of the building of the house. Evidence of the defendants to the effect that since the first defendant was at the material time a public servant employed by the Mariental Municipal Council and his daily working hours were 07h30–17h00 he could not have visited the site between roughly 07h30 and 09h00 virtually daily is rejected as palpably false. Not one iota of evidence was placed before the court to show that the first defendant was such a conscientious Namibian public servant who for all the material time that he was so employed at the Mariental Municipal Council clocked in on every working day at 07h30 and did not leave his office until 17h00. Besides, at all such material time the first defendant was employed as an electrician by the Mariental Municipality; it is more probable than not that in virtue of the nature of his work he did not carry out his duties as an electrician exclusively within the walls of his office or within the premises of the Council's office complex. His was office and field work.

[26] In addition to the aforegoing, the following crucial pieces of evidence of Fourie stood unchallenged at the close of the plaintiff's case. The plaintiff had 'running accounts' with suppliers, including Mariental Building Supplies and Mariental Hardware. As I have found previously, the defendants had access to those of the plaintiff's suppliers and they ordered materials directly from those suppliers for which invoices were presented to the plaintiff for payment – all in pursuit of the oral agreement between the plaintiff and the defendants. In the construction phase the defendants discussed certain items with Fourie in pursuit of their agreement that he would assist them where his assistance was sought. For instance, the second defendant phoned Fourie for advice, got prices from, and directly made deals, with the plaintiff's suppliers. The invoices that such suppliers raised, accompanied by statements, were rendered to the plaintiff; whereupon the plaintiff 'added up' the invoices' amounts and reflected them on the defendants' account in order to keep track of the expenses involved, and the plaintiff paid the suppliers for the amounts involved. It is important to note that the running account for the defendants' house

was closed on 31 January 2009 when the defendants completed the building of the house.

[27] Furthermore, and significantly, the invoices and the accompanying statements were available at the plaintiff's office for scrutiny by the defendants. And the defendants did, indeed, visit the plaintiff's office quite often for that purpose. It was because the defendants were aware of the progression of the running account – as Fourie testified – that on one occasion the second defendant complained to Fourie that because the plaintiff had been two or three days late in settling an account with Mariental Suppliers interest was charged on the outstanding amount. As Fourie asked rhetorically in his testimony, 'She (the second defendant) had access to the documents (ie the invoices and accompanying statements); because (otherwise) how would she know that there was interest charged that she is not willing to pay?' Fourie continued, '… it is my problem if I paid five, two, one or three days late ….' I understand Fourie to say that if he was the builder of the house, and not the defendants, as the defendants contend, and he ordered materials from one of his suppliers and he was late in paying for the goods and interest was accordingly charged on the outstanding amount, how would that – as a matter of law, common sense and logic – concern the second defendant? That will surely be the plaintiff's concern and problem. The powerful statement of Fourie *a priori* that settles the matter conclusively is this: 'If I build a house the client will never have access to my invoices'.

[28] Standing on their own individually, the aforegoing factual findings may not amount to much. However, taken cumulatively and against the backdrop of the conspectus of evidence that I have accepted, they carry a great deal of weight, and their effect is overwhelming. Accordingly, any lingering doubt as to whether to accept the plaintiff's evidence as true and reject the defendants' evidence as false regarding the type of agreement that was entered into between the plaintiff and the defendants and the terms of the agreement is put to rest. In sum, they lay bare the untenability of the defendants' defence that the Quotation is a written agreement and that the 'contract price' is N$500 000,00, minus N$20 000,00, making N$480 000,00 which, according to the defendants, is what the plaintiff charged them from building the house. The following puts a further nail in the coffin of the untenability of the defendants' defence: If the contract price is N$480 000,00, as the defendants contend so strenuously, why did the defendants pay the plaintiff N$484 782,40, as

the defendants plead in para 5.1 of their plea? It is further proof that there is no written agreement providing for a contract price of N$500 000,00 minus N$20 000,00, or any written agreement for that matter.

[29] For all the aforegoing ratiocination and conclusions of the law and the facts, I hold that in terms of the oral agreement entered into between the plaintiff and the defendants, it was agreed that the defendants shall build the house themselves and the plaintiff shall assist in their enterprise in the manner explained previously. It follows inevitably that it was the defendants – and the defendants alone – who took, and implemented, the decision which in practice altered the original building plans and which resulted in the house which now stands being different from the original concept, in terms of size of the building, fittings and other features, which, as I can gather from the evidence are: a double-sized braai, a double-garage 'is added on the front part' and then 'the bedroom is from the "bottom part" moved upstairs, giving a much larger kitchen, laundry, guest toilet (facility) on the ground floor', 'the width and height of the building is changed significantly' in an enhanced mode. There is significant increase in size brought about by: four bedrooms, with a large master en-suite bedroom, a balcony, as respects the first floor from steel and wood to concrete, carpets and fencing. Not one iota of evidence was placed before the court to show that the materials and other things involved in the construction of the house were not obtained using the defendants' account, and that the additional items cost nothing to the defendants' account. I accept Fourie's evidence that all the costs involved in the building of the house by the defendants using the defendants' account, including any interest chargeable on the account, are a direct cost to the building of the house; and so the defendants are liable. In my opinion the defendants' liability to pay the interest is a tacit term of the oral agreement entered into between the defendants and the plaintiff: the payment of such interest is 'certain (although it was never mentioned between the parties); and it is so self-evident as to go without saying it: it can be imputed. It is inferred from the express terms of the contract and the surrounding circumstances which I have adverted to previously. (See Christie, op. cit. p 187, p 191.)

[30] For the sake of completeness, I should add that in virtue of the reasoning and conclusions set out previously, it need hardly saying that the plaintiff is, as a matter of law and logic, not responsible for any defects in the building of the house. One cannot be held liable for that which one is not responsible for. If there are any

defects in the building of the house they are the babies of the defendants: the defects must be placed at the door of the defendants because it was the defendants, and not the plaintiff, who built the house – as I have found previously. It follows inevitably that the 'Building Loan Progress Report Cover' which is issued by a P J Scholtz in which Scholtz records that N$44 400,00 'is to be retained until' certain things 'have been rectified and/or completed' has no relevance in the present proceeding. I have no doubt in my mind that the 'Report Cover' was issued because the Bank laboured under the aforementioned chicanery which the defendants put forth for the Bank's consumption to the effect that the defendants are not owners-builders and that the plaintiff, a registered builder, had agreed to build the house. In this regard, I should say that I do not find that the oral agreement between the parties is an illegal contract.

[31] I find that in or about January 2009 the construction of the house was completed and the defendant's account stood at the total of N$713 486,01; and the defendants paid N$484 782,40 of the amount, leaving a balance of N$228 703,61 which is due, owing and payable by the defendants. Thus, the aforegoing reasoning and conclusions impel me to the inevitable conclusion that the plaintiff has proved the main claim, and that the defendants have not established any credible and acceptable facts that beget their defence to the main claim. Accordingly, judgment is for the plaintiff with costs on the main claim. Having determined the action on the main claim, it is otiose to consider any alternative claim.

[32] As respects the issue of costs; it is Mr Van Vuuren's invitation that for the existence of certain pertinent facts this court should grant an adverse costs order against the defendants. In this regard Mr Van Vuuren submitted in this way. The plaintiff had sought summary judgement against the defendants because the plaintiff believed that the defendants have no defence to its action. Knowing that if they did not successfully oppose the summary judgement application, judgement would be granted against them, the defendants filed opposing affidavits opposing summary judgement. As a direct result of the contents of the opposing affidavits so filed, the defendants were granted leave to defend the action. Counsel continued, in the instant proceeding, during cross-examination it was confirmed under oath by both defendants that they had lied as respects material matters in the opposing affidavits filed in answer to summary judgement application. It is Mr Van Vuuren's further

submission that in the circumstances this matter should be referred to the Prosecutor-General for possible perjury charges against the defendants.

[33] I think I should decline the invitation. One of the reasons why the plaintiff has succeeded in its action and the defendants have failed is that this court does not believe the defendants in material aspects of their very weak defence. That should be enough in a civil trial such as the present. In the present proceeding, I do not think the conduct of the defendants – though they may have been ill-advised – has reached the bar set by the high authority of Strydom CJ in *Namibia Grape Growers and Exporters v Ministry of Mines and Energy* 2004 NR 194 (SC) to attract costs on the scale as between attorney and own client. It follows that in my opinion, costs on the scale as between party and party should follow the event. By a parity of reasoning, I should also decline counsel's urging that this court refers a case of possible perjury to the Prosecutor General for her further action. In a trial where a witness is not believed because what he or she states is not credible, it is enough for the court to reject such testimony as false, as I have done in this proceeding.

[35] For all these reasons, I make the following order:

(a) Judgment is for the plaintiff in the main claim.

(b) The defendants must pay the plaintiff N$228 703,61, plus interest thereon at the rate of 20% per annum from 1 February 2009 to date of full and final payment, jointly and severally, the one paying the other to be absolved.

(c) The defendants must pay plaintiff's costs of suit on a scale as between party and party, jointly and severally, the one paying the other to be absolved, including costs of one instructing counsel and one instructed counsel.

C Parker

Acting Judge

APPEARANCES

APPLICANT:	A Van Vuuren Instructed by MB De Klerk & Associates, Windhoek
FIRST AND SECOND DEFENDANTS:	Z J Grobler Of Grobler & Co., Windhoek