REPUBLIC OF NAMIBIA **NOT REPORTABLE**

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

Case no: I 3798/2007

In the matter between:

MOBILE TELECOMMUNICATIONS LTD **PLAINTIFF**

And

A-BAU (PTY) LTD **DEFENDANT**

Neutral citation: *MTC Telecommunications Ltd v A-BAU Ltd* (I 3798/2007) [2015] NAHCMD 29(20 February 2015)

Coram: DAMASEB, JP

Heard: **4-8 October 2010; 11 October 2010; 16 May 2011- 03 June 2011 and 09 -10 August 2011.**

Delivered: **20 February 2015**

Flynotes: Law of contract – Obligation to perform duty with the required skill and workmanship – Defendant performing substandard work – Breach of contract - Plaintiff

employed a third party to do remedial work - Plaintiff entitled to set off against counterclaim and damages suffered being the difference between the claim and counterclaim.

ORDER

The plaintiff is granted judgment in the amount of:

(a) N$ 1, 811,972.10, being the difference between:
N$ 2,699,572.10: The amount claimed in the summons; and
N$ 887,600.00: The amount due to the defendant

(b) Mora interest on the liquidated amount of N$ 1,811,972.10 per annum from date of service of summons to date of payment;

(c) Costs of suit on party and party scale;

(d) Costs of plaintiff's opposition to the defendant's failed attempt to amend pleadings and to add a new cause of action;

(e) Mr Long, Mr Van den Ende and Mr Aggenbach are declared necessary witnesses as contemplated in old rule 70(3).

JUDGMENT

Damaseb JP:

Introduction

[1] The parties in this case are two companies incorporated and registered under Namibian company law. The plaintiff, a private limited company, provides cellular phone services nationwide. The defendant, also a private limited company, is in the business of tower construction. The defendant being a body corporate under the common law, it

is to be represented by an admitted legal practitioner. Mr Armin Wormsbacher (Wormsbacher), who is the sole director of the defendant, is its alter ego. Wormsbacher made it clear at the commencement of proceedings that the defendant does not have the necessary financial resources to appoint a legal practitioner to represent it in the proceedings. In fact, the defendant was previously represented by a firm of legal practitioners who had since withdrawn as the defendant could not afford their services. Ms Vivier for the plaintiff placed on record that given the defendant's precarious financial position, the plaintiff has no hope of ever recovering any damages if it were awarded by this court. A case was therefore made at that on the ratio established in *Nationwide Detective and Professional Practitioners CC v Standard Bank of Namibia Ltd*[1], Mr Wormsbacher, quo director of the defendant, could act on behalf of the defendant in these proceedings.

[2] The parties entered into a partly oral, partly written agreement in terms of which the defendant agreed to carry out civil works, to design and supply masts and to erect towers at 11 radio-based stations[2] in the North-West (Kunene) area of the Namibia, for the plaintiff. The agreement came about as a result of a tender awarded by the plaintiff to the defendant on 02 May 2006 for the erection of ten towers at ten different sites and for the performance of additional works at an 11th site, being Werda. The tender document which constitutes the written part of the agreement contains the technical specifications for the civil works, supply of mast and building of roads in respect of all sites. On 21 April 2006, the defendant accepted the terms of agreement recited in the amended particulars of claim as follows:

> '4.1 That Works would be completed within a period of 12 weeks calculated from the date of the official hand over of a site by the plaintiff to the defendant.
>
> 4.2 A penalty of N$ 2 500 would be charged per site per day exceeding the completion date.

[1] 2008 (1) NR 290.
[2] The eleven sites were: Killarney, Kranspoort, Spienkop, The Glen, Arbeitsgenot, Terracebay, Palmwag, Grootberg, Tsinsabis, Werda and Langeberg.

5. It was an express, alternatively an implied, alternatively a tacit term of the agreement that the defendant would execute the Works with skills and diligence in the proper workmanship and further that he would use suitable material in doing the works.

6. In consideration for the works to be done by the defendant, the plaintiff agreed to pay the defendant a sum of N$ 6 748 459.00 payable as follows:

6.1 30% as deposit payable on signature or acceptance of the contract subject, to the defendant furnishing to the plaintiff a bank guarantee equal to 30% of the contract price.

6.2 50% on completion of civil works and erection of the masts.

6.3 20% on completion and acceptance of the cite by the plaintiff.'

[3] The standard and specifications which the defendant had to comply with in the execution of the tender appear as an index to the tender document and provides specifics in regard to civil works, mast supply and road build for 11 radio stations. The details of the standards relate to the masts, RF Installation, civil and concrete works, earthing and lighting protection, security fencing, electrical fence and electrical installations.

[4] It is the specifications referred to in paragraph 4 that the plaintiff alleges were not complied with in the execution of the defendant's obligations and for which it claims damages.

The pleadings

[5] The plaintiff instituted action against the defendant for breach of contract basing its claim, firstly, on the defendant's obligation to execute the works with skill, diligence and proper workmanship and secondly that the defendant would use suitable materials in doing the works. Thirdly, the particulars of claim allege that the defendant, in breach of the contract, used a design which contained a design error/ mistake; and fourthly that the defendant failed to do certain work and to supply the requisite materials. In the latter respect it is the plaintiff's case that the defendant failed at Palmwag, Tsinsabis, Kranspoort, Lyte, Spioenkop, Arbeidsvreugde, Terrace Bay, The Glen, Killarney and Grootberg to supply and install the following items:

a) Safety cages;

b) Anti-tampering devices for the stay assemblies;

c) Anti-climbing devices;

d) The chains on the stay assemblies; and

e) Footing for the ladders.

[6] The plaintiff's claim was later amended to include the subcontracting by the defendant of unsuitable subcontractors and, at all events, without the plaintiff's approval as required by clause 5 of the agreement.[3] In the amended particulars, the plaintiff alleges that despite being afforded the opportunity to remedy the defective works, defendant failed to rectify the works to an acceptable standard prevailing in the industry or to use suitable materials. According to the plaintiff, in an attempt to remedy the defective works by the defendant, it employed the services of a third party, a group of consulting engineers, Messrs Van den Ede and Associates, to rectify, alternatively to do the works afresh. The plaintiff alleges that the design errors attributable to defendant's work were responsible for the high costs of rectifying the towers in order to make them safe and fit for purpose.

[7] It is common ground between the parties that the duration for the completion of the works was 15 weeks from the date of the official hand over of a site by the plaintiff to the defendant at a price of N$ 7 490 374.35; to be paid in instalments of 30% deposit on signature or acceptance of the contract, subject to the defendant furnishing the plaintiff with a bank guarantee equal to 30% of the contract price; 50 % on completion of civil works and erection of the masts and 20% on completion and acceptance of the site by the plaintiff. It is further common cause that the plaintiff could charge a penalty of N$ 2 600 per site for every day of a delay beyond the completion date.

[3] Which states as follows: '5. The tenderer shall be required to notify MTC in writing of all subcontractors to be awarded under or in connection with the tenderer's performance under this tender, provided that the tenderer shall not engage any subcontractor without the prior written approval having been obtained from MTC. The appointment of any subcontractor by the tenderer shall not be construed as relieving the tenderer from any obligation under this tender. MTC shall not unreasonably withhold any such approval'.

[8] The defendant requested further particulars to the plaintiff's claim as regards the allegations that the defendant *'failed to do the work with the necessary skill and diligence; failed to do the works with proper workmanship and used materials which were not suitable for the works'*. The plaintiff provided those further particulars setting out the manner in which the defendant was perceived not to have complied with the standard technical specifications in respect of each site. According to the plaintiff's observations and investigations of the sites, common to all sites, there was a deviation in alignment and prescribed levels resulting in defective structures and or stay attachments, an incorrect or wrong identification and use of unsuitable materials; poor and unsupervised installation of materials; manufacturing or erection errors.

[9] The plaintiff alleges that it had complied with all its obligations in terms of the agreement, including providing personnel and the necessary basic equipment and infrastructure; giving clear specification of the works to be done; compensating the defendant for any extra costs arising from any variation or additional works; ensuring that electricity was available on each site; obtaining approval by the respective landowners; accepting the sites on completion, and making the necessary payments to the defendant. The further particulars additionally state that the sites were officially handed over to the defendant during the period of 29 May 2006 and 20 August 2006 and before the agreed commencement dates of the construction works.

[10] During the consummation of the agreement and its implementation and in the dealings between the parties, the plaintiff was principally represented by Mr Ludwig Tjitandi (Tjitandi) and or Mr Hans Schmidt-Dumont (Dumont) while the defendant was represented by Wormsbacher or Mr Pascheka, a representative of Anthony & Pascheka Bulldozing.

Plaintiff's case

[11] The plaintiff alleges that the defects identified by the plaintiff during the implementation of the agreement, were made known to the defendant's representative, Wormsbacher, on 6 October 2006 in respect of the eight sites and that the defendant was given the opportunity to rectify the defects. That resulted in the construction at Grootberg being suspended, pending the rectification of the allegedly defective works.

Annexure 'E' to plaintiff's particulars sets out the defects which the plaintiff alleges required rectification by the defendant for the works to conform to the tender's technical specifications as agreed to by the defendant. The plaintiff maintains that despite the opportunity given to rectify, defendant failed, alternatively, did not rectify the defects to an acceptable standard prevailing in the erection of telecommunications infrastructure and that on or about 29 March 2007, the plaintiff repudiated and or cancelled the agreement with the defendant, appointed a third independent party to rectify the works and thereupon demanded payment for the damages incurred in rectifying the defective work.

[12] The plaintiff maintains it had made it clear to the defendant that it would no longer allow the defendant access to the sites as a third party had been contracted to remedy the defective works. The plaintiff's case is that it was compelled by the defendant's breach of contract to appoint engineers to do the non-mast related work on the sites and to complete feeder rigging work on site Langebaan (which later changed to Leyte), alternatively to remedy the defective work done by the defendant. The plaintiff claims that it incurred remedial costs in the amount of N$ 2 699, 572.10 (including VAT). The damages claimed are alleged to relate to the works and material supplied by the third party. The plaintiff also claims interest at the rate of 20% a *tempore morae* as well as cost of suit.

The defence

[13] The defendant alleges that the plaintiff was required to facilitate defendant's timely access to all sites; to ensure availability of basic amenities such as electricity on site; to compensate the defendant for any further expenses not initially included in the tender specification; to pay a reasonable and fair remuneration for expenses arising from variations; to timeously accept and takeover completed sites; to obtain the co-operation of affected land owners and, upon accepting the sites, to remunerate the defendant for the work done.

[14] Save for admitting the existence of an agreement and its obligations as regards the performance of the works, the defendant denies that it breached the agreement by failing to do the works with the necessary skill and diligence or in a proper and

workmanlike manner; or that it used unsuitable materials for the works; or that it employed a design with a design error/mistake.

[15] The defendant's pleaded case is that the sites were all finally signed off and accepted by the plaintiff, signifying plaintiff's acceptance of the defendant's performance; that its engineer certified that the towers were constructed according to the requisite engineering design and that the subsequent use of the sites by the plaintiff signifies an acceptance of the work done by the defendant.

[16] The defendant denies ever being afforded the opportunity to rectify the alleged defective work and claims that the plaintiff unreasonably denied it access to the sites to verify and disprove the findings of the independent contractors employed by the plaintiff. The defendant's case is that the alleged defects reflected in annexure E to plaintiff's further particulars were rectified by it and duly confirmed as such by an engineer and that such rectification had been acknowledged by the plaintiff.

[17] In reconvention, the defendant disputes that the plaintiff complied with all its obligations in terms of the agreement and alleges that the plaintiff breached the agreement in the following respects:

a) Failing to timeously hand over the sites to the defendant in accordance with the time planning sheet;
b) Varying the works and changing specifications of masts resulting in additional expenditure;
c) Refusing the defendant access to Grootberg site, such refusal amounting to a repudiation of the agreement. The defendant concedes that to date no work was done at that site but blames the plaintiff for that;
d) Plaintiff making changes to access roads and delaying the supply of container cubicles and electricity necessary for the performance of the works;
e) Belatedly concluding agreements with the land owners – agreements necessary to enable the defendant to perform its obligations under the contract; and
f) Failing to provide personnel at Grootberg site on time for inspection.

[18] In replication, the plaintiff denies that it unconditionally accepted the sites and maintains that the engineer's certificates were only accepted in so far as the certificates confirmed that the masts were erected according to the mast design, which was later rejected because the design contained a design error/mistake. The plaintiff, although admitting that Grootberg site was handed over only on 24 August 2006 and that plaintiff only allowed access to the site in 6 October 2006, alleges that the stay in completion of site Grootberg was to allow completion of the works at other sites. The plaintiff maintains that it was in consequence thereof agreed between the parties that Grootberg site be completed by 1 February 2007. That notwithstanding, the works at Grootberg remained incomplete. The plaintiff admits that some containers were delivered late but that, in any event, the container slabs were not completed for the containers to be installed.

Defendant's counterclaim and plea thereto

[19] Defendant's counterclaim, which is opposed by the plaintiff, is premised on the allegation that the defendant complied with its obligations and that it was the plaintiff instead who breached the agreement by unlawfully frustrating the defendant's full and complete performance of its obligations in the manner detailed in its defence to the plaintiff's claim.

[20] The defendant's counterclaim was initially three-fold: Firstly, in respect of variations as agreed to between the parties, for the additional amount for variations to the specifications in the amount of N$ 889 409.77. Secondly, the defendant claims for alleged expenses incurred for the use of a helicopter at Grootberg site, in the amount of N$ 157 508.56; and thirdly for the damages allegedly suffered as a result of the delays caused by the plaintiff in the completion of the works amounting to N$ 1 135 809.00. It is common cause that the third claim has been withdrawn and that the plaintiff had since paid a total amount of N$ 7 513 180.23 to the defendant for work done under the contract.

[21] Save to admit the variations, plaintiff denies that it unlawfully frustrated the defendant's full and complete performance of its obligations and avers that the defendant is not entitled to the remaining balance because it did not comply with its

obligations in terms of the agreement in that the Grootberg site remains incomplete as the road works for that site were never completed. As regards the second claim, the plaintiff pleads that the amount for the additional work under claim one in respect of site Grootberg includes the costs for the helicopter (since settled as will soon become apparent) and that no further amount may be claimed in this respect.

Issues that call for decision

[22] The defendant has now abandoned its major claim against the plaintiff the merits of which I do not need to deal with in this judgment although it is necessary to refer to it for completeness, and particularly because the plaintiff seeks costs of suit in so far as it was, according to the plaintiff, unreasonably persisted with until a late stage into the litigation. That claim is an amount of N$ 1,135 809.00, which the defendant conceded during the course of the trial he instituted 'in retaliation' and on the now-mistaken assumption that the plaintiff's claim against the defendant in part consisted in exacting penalties for the perceived delay on the defendant's part in completing the works. It is now common cause that the plaintiff, although in terms of the agreement entitled to impose penalties on the defendant in the event of delay, had waived whatever penalties it could have imposed. I will say more about this claim when I come to consider the issue of costs.

[23] Although the plaintiff (defendant in reconvention) concedes that an amount of N$ 887 600 is due and payable to the defendant (plaintiff in reconvention), it maintains that in view of the damages it suffered in engaging a third party to correct the defendant's incompetent and or defective work, it is entitled to a set-off [4] against the payments still due and owing to the defendant.

[24] The first issue to be considered, therefore, is whether the plaintiff has made out the case that the defendant breached the agreement as alleged and whether it acted reasonably in engaging a third party to rectify the defects in the work performed by the defendant and whether it proved the damages in so doing. If they did, the defendant's

[4] Set-off (*compensation)* in our law is equivalent to payment. It operates *ipso facto* as a discharge. Where there are two debts in existence between which there is mutuality, so that the one can be compensated against the other, then by operation of law the one debt extinguishes the other *pro tanto*.

entitlement to payment of the balance of the contract prize, being less than what the plaintiff claims it incurred, is obliterated and the plaintiff entitled to payment of the difference by the defendant.

[25] It is now common cause that from the amount of N$ 889 409.77 due and payable to the defendant is to be deducted the amount of N$ 87,621.65 already paid to the defendant and not credited to the plaintiff in the computation of the claimed amount: The amount due and payable by the plaintiff to the defendant is therefore N$ 801, 788.12. It is the latter amount which either the defendant is entitled to if its counterclaim succeeds or against which set-off operates if the plaintiff prevails.

[26] The second claim which the defendant makes against the plaintiff is an amount of N$ 157 508.56 incurred by the defendant for hiring a helicopter for inspections at the Grootberg site. The plaintiff does not deny that the defendant incurred this expense but claims that it is included under the amount which it admits being lawfully indebted to the defendant and is thus not over and above the defendant's only remaining claim. The defendant's claim arising from the helicopter costs associated with Grootberg is now moot because the plaintiff settled that claim although not admitting any liability. Nothing more needs therefore to be said about that claim and Wormsbacher's evidence and submissions on that issue are irrelevant for present purposes.

[27] Another issue that needs resolving is the special costs order the plaintiff seeks against Wormsbacher personally for pursuing an amendment late in the proceedings aimed at introducing an entirely new cause of action seeking damages in the order of N$ 7 000 000 for alleged loss of income on the defendant's part. I refused the application to amend for the obvious reason that it was not something that was not apparent to the defendant when the counterclaim was filed and that, allowing it, would have compromised the trial as the plaintiff was caught completely by surprise and would have justifiably asked for a postponement in order to meet it.

The evidence

[28] The plaintiff called the following witnesses: Mr Ludwig Tjitandi (Tjitandi) who was employed by the plaintiff and worked as a Radio Network Project supervisor for the

plaintiff. He was responsible for the implementation of the tender awarded to the defendant. Mr Hans Schmidt-Dumont (Schmidt-Dumont), who was also employed by the plaintiff as Project Coordinator and whose involvement in the project was to check for technical soundness and compliance to form of the towers. These were the only employees of the plaintiff that testified. The plaintiff further led the evidence of experts who did the remedial work for the plaintiff. Mr Bernard Jacobs Long (Long) was the engineer who was brought in by the subcontractor AGA Technical Services CC from South Africa to try and salvage the situation and who conducted physical inspections and recommended the appropriate measures to be taken.

[29] The plaintiff further called a cost expert, Mr Andries Aggenbach (Aggenbach) who is a duly qualified electrician and a retired member of AGA and who was approached by the plaintiff to prepare a quotation for the repairs and remedial work to be done on the towers installed by the defendant. The plaintiff also led the evidence of Mr Marinus Van den Ede who is the consulting engineer for Web Industries and who, on the instructions of the plaintiff, inspected the towers erected by the defendant.

[30] The plaintiff also called witnesses from other service providers who were involved in the implementation of the tender, such as Mr. Damashke (Damashke) who was an employee of Wildmoor Riggers and who was responsible for the installation of the feeding cables; Mr Abie Louw van der Merwe (Van der Merwe) who was the principal member of Professional Communication System and who was responsible for the rigging and RF installation; Mr Francisco Fortuin (Fortuin) who worked for Telecom as Manager: Network Operations and who was instructed by the plaintiff to install the microwave links on the towers.

[31] The defendant on the other hand led the evidence of Mr Wormsbacher who was the person responsible for the tender implementation with Tjitandi. The expert that testified on behalf of the defendant was Mr Adriaan Naude (Naude) who was the designer responsible for designing the towers on behalf of the defendant. Mr Peter Foster (Foster) who was employed by the defendant as Project Coordinator in respect of the tender of MTC was also called as a witness; as were Mr Antoni Jenes Nel (Nel) with Mr Wilbart Amayulu (Amayulu) who were contracted by the defendant to touch up

the paint works on the towers and Mr Jochen Claud (Claud) who was employed by the plaintiff as its Chief Technical officer and was in charge of the tower projects until 2007 when he resigned from the plaintiff.

[32] It now becomes necessary to briefly summarise the evidence led on behalf of the parties to see if it sustains the plaintiff's claim or supports the defendant's defences and counterclaim.

Evidence led on behalf of the plaintiff

Tjitandi

[33] Tjitandi testified that the defendant did not comply with the tender specifications and drawings in various respects at the eight sites that he attended for inspection during early October 2006. Tjitandi testified that the inspection was necessitated by a report received from Wormsbacher that the sites were 100% complete and that the plaintiff needed to be satisfied before payment could be made.

[34] Tjitandi's site inspection report dated 29 September 2006 records that the towers did not have grout to protect them from water or expansion of the tower which made them susceptible to corrosion; no anti-tempering devices were installed; guy ropes were not symmetrically aligned and towers had bumps resulting in twisting and, therefore, not straight; the members of the towers were not properly fitted as a result of a manufacturing error; no bolts and nuts were fitted to tighten the members; there was no proper cabling system and orientation to the extent that water cable, instead of feeder cables, was used at site Kilani; ladders were not mounted to the tower or were incomplete making it difficult to reach the platform at the top of the tower; bad tower orientation; no nuts at the platform to avoid collapsing; bad earthing techniques which put the sites at risk of being struck by lightning; humps in guy ropes which made the tower pull more to the one side and thus not straight; incomplete RF rigging; platforms (hatch) not opening up to the required angle, being 90°; spaces between different parts of the tower which made them unstable; the slack in the foundation on the guy ropes was left too short on site Kranspoort and thus making it impossible for routine

maintenance; tower leg not in alignment with the members and cross members as well as poor painting work on towers.

[35] According to Tjitandi, the defects referred to in his report were duly communicated to the defendant and to its appointed manufacturer and supplier at a meeting that took place on 9 October 2006. The defendant's engineer and designer, Naude, thereafter visited the sites and made recommendations as regards remedial work to be done on the sites and which, it was promised, was to be completed latest by 17 November 2006. Following the last site acceptance inspection visit by early November 2006 Tjitandi testified that at that point in time, improvements on the sites were visible, except that some ladders were not fixed, bolts and nuts were not all fastened; the bumps were also not removed on the towers and the RF works remained incomplete.

[36] Regardless, the plaintiff accepted the sites on the understanding that the defendant was not going to be penalized for the delay as from the 18 November 2006 for incomplete work and that Transtech, the contractor doing the transmission equipment and putting up dishes on the towers, would incorporate the RF work together with the transmission works to be done on the sites. It is for these reasons that, according to Tjitandi, the plaintiff accepted the sites and, furthermore, because the plaintiff wanted to go live with the towers and that Transtech could only commence work after it was accepted and handed over by the defendant to the plaintiff. The drift of Tjitandi's evidence is that the plaintiff waived the penalties it could extract from the defendant on the understanding that the defendant would have no further claims against it.

[37] According to Tjitandi, it was a condition and requirement from the plaintiff that the sites be certified by the engineer as being in compliance with the tower designs in order for the plaintiff to do the necessary payments. Tjitandi added that after the plaintiff started using the towers, completion certificates were received from Naude certifying compliance with the tender specifications.

[38] With regard to the six remaining sites, Tjitandi indicated the plaintiff's reluctance to accept any site that was not complete on the completion date, being 1 February

2007. In that regard, the defendant confirmed that the masts would be done before that deadline and would comply with the specifications. The sites were visited on 7 February 2006 by Tjitandi accompanied by Wormsbacher. Once again, defects were identified, which included the following: wrong tower installations, wrong antenna installations; use of non-prescribed bolts; earthing and installations not according to specifications; no ladders installed; certain parts missing from the feeder cable for the RF works; feeder connection not complete; towers experiencing power trip due to earth leakage within the site; bolts not fastened; tower lights not working; and energizer terminals not according to specification.

[39] Tjitandi testified that he was, notwithstanding the defects, instructed by his superiors to accept the sites because the plaintiff wanted the project to end and to identify what the plaintiff could accept and what could be fixed by an independent contractor in order to put right defendant's breach. After the inspection of the sites, only certain certificates were accepted by the plaintiff and for all other outstanding defects, the acceptance of the site was conditional on the defendant submitting all documentation and certificates together with the site files. The only remaining site was however Grootberg were no work was done by the defendant.

[40] Tjitandi testified that several opportunities were afforded to the defendant to rectify the defects, and a reduction in penalties was allowed on 24 November 2006 on condition that the sites were completed by the year end. Although in breach thereof, the defendant was further pardoned on 24 January 2007 to complete the works by end January 2007 since final acceptance of the sites was scheduled for the 5-6 and 9-8 February 2007. With the site inspection on 7 February 2007, the defects were discussed with the defendant and a final extension was, at the request of Wormsbacher, granted until 10 February 2007. At that point in time, the towers were not completely done as some feeders were not used and the RF installation was still not done. The plaintiff thereafter indicated its intention to contract another contractor to do remedial work and for the costs to be deducted from the defendant's final payment. Tjitandi testified that the parties agreed that the defendant would then be responsible for the rectification of the mast-related repairs at the sites while the plaintiff would employ an independent

contractor to do all site-related repairs, which included the RF works (non-mast repairs) on sites on A-Bau's account.

[41] According to Tjitandi, by 10 February 2007, the site files were still outstanding and no engineering certificates or payment certificates were submitted by the defendant. It was at this point in time that the defendant invoiced the plaintiff for the work done, including Grootberg where the defendant stated in correspondence of 14 March 2007 that the delay was solely the plaintiff's fault in refusing to pay the helicopter costs; handing over the sites late, for the late delivery of containers; late changes to various sites as well as late supply of electricity to some sites.

[42] Tjitandi did not deal with the evidence as regards the short-comings of the plaintiff; but with regard to the claim, he testified that the plaintiff employed the services of Van den Ede and Associates following a report that the tower at Tsintsabis was about to fall and that urgent remedial work had to be done on the site. Fortuin, who was employed by Telecom Namibia which tendered to provide microwave transmission links to all the 11 towers, testified and confirmed that the tower at Tsintsabis was skew and was leaning over to one side. Long was then brought in from South Africa to do the inspection firstly at Tsintsabis where he discovered that the problem was the foundation on site. That then prompted the plaintiff to request AGA to visit all sites and to quantify the costs for rectifying the sites.

Schimdt-Dumont

[43] Schmidt-Dumont testified that the plaintiff was aware of the fact that the defendant had in its tender documents indicated that its professional team would comprise of NEC Stahl but was not aware that the defendant used Geo-Stott as its manufacturer and supplier for the masts. His evidence is, however, contradicted by that of Claud who testified that the plaintiff knew that the masts were being sourced from Geo-Stott. Schmidt-Dumont testified that the defendant approached him to do an inspection on short notice but refused and requested for progress reports with pictures, which he eventually got from Wormsbacher. Schmidt-Dumont's observations from seeing the photos of the civil works are that the acceptance of the sites with some of the defects overlooked happened without his authority and that had he known of all these

defects, no site would have been accepted by the plaintiff as it compromised the safety of the towers.

Long

[44] Long testified that he visited all ten sites as requested by the plaintiff and was accompanied on those visits by Aggenbach of AGA. After he inspected the sites he prepared a report and amongst others recorded that: the installation standard done by the defendant on all sites was very poor; that the structures were not properly tightened resulting in loose bolts; tower members were not aligned and straightened; Tsintsabis, Kranspoort and Grootberg leaned up to a full mast, twisting out at the top. He concluded that the workmanship was such that in future MTC would be saddled with high maintenance costs since the state that the towers were in posed a risk of failure and loss of system under operational conditions. He thus concluded that the masts set up by the defendant did not comply with what the plaintiff had contracted and that the defendant's work compromised the safety of the towers. The safety of the towers was further put into question when Damascke testified that he suffered a hairy incident at Kranspoort when, while trying to install a feeder cable, he came across a loose ladder that was fastened only with two bolts.

[45] According to Long, the structures were not designed according to accepted standards and were afflicted by design errors which made them not conform to the plaintiff's specifications. He was emphatic that the accepted standards in erecting towers dictate that towers be erected with careful supervision and consideration to avoid any of complications and that any problems should be identified and solved at the factory before anything is manufactured or assembled. This part of the evidence is supported by the report prepared by Van den Ede who was a Principal Design Engineer for Web Industries and who inspected the sites at the request by Aggenbach.

[46] The report by Van den Ede recommended that the structures be dismantled and be re-assembled but that recommendation was not proceeded with because the plaintiff considered that it would take a long time and would not be in plaintiff's commercial interest. Long testified that although he became involved only around May 2007 and

was thus not part of the first phase of Tjitandi's inspections, he would have arrived at the same conclusions as Tjitandi did had he inspected the sites in October 2006.

[47] The outcome of Long's inspections were duly communicated to the defendant's representatives, Naudè and to Geo-Stott who were rather left in a state of embarrassment as they were unable to detect the problem themselves until it was brought to their attention. It became clear from Long's testimony that the defendant's representatives acknowledged the defects and expressed their willingness to rectify the defects found in the towers and even availed the services of Naudè who came up with a rectification design for all towers.

[48] As a result of the joint effort of Long and Naude, a positive jacking system was recommended as a solution to support the structures horizontally and to prevent them from collapsing. This would enable the parties to do the repairs in *situ* instead of dismantling the whole structures. The plaintiff took the view that although the jacking system solution was costly, as opposed to the recommendations by Van den Ede, it was speedier than dismantling all the sites and re-assembling from scratch. This was in respect of both the mast and civil works that had to be repaired.

[49] Following the discussions held on 17th of May 2007, an agreement was reached between Long and Aggenbach for the plaintiff on one hand, and Naudè and Geo-Stott for the defendant, on the other, in following terms:

'To rectify the above mast to a level of client acceptability we believe it is not necessary to break down the erected mast but rather to effect the changes as listed from point 2 above. And I mentioned this earlier. The hill to hill dimension of the mast will be reduced from 1200mm to six, 1160 through the utilisation of spaces at the base of the mast and the rest of the masts conforming to 1167mm hill to hill dimension. The splice plates at the mast at the platforms and guy rope positions will be replaced to reduce the hill, to hill dimension to 1160mm. The four platforms on the mast will be replaced. Trap doors on the crows nest platform to be replaced. The ladders on the mast are to replace. Note that there will be no cage on the ladder. Ladders will be through welded and will have locking devices at the foot of the ladder. Guy ankers will be tested in tension to the vertical plane at random to design test loads using a calibrated test rig and loads as well as anker creep noted at all tested ankers. Should ankers fail this tests they would have to be replaced. Geo Stott and company will manufacture and supply the

replacement parts mentioned above and AGA technologies will install the components. Rectification is to start at on the Tsintsabis mast and Geo Stott will provide technical expertise on site to oversee the rectification with AGA technical personnel.' Geo Stott will assist AGA technical services with rectification of the other masts were required. Detailing the replacement parts will be completed by the 28th of May 2007 manufacture there lay of complete on the 29th of June 2007. Parts will be shipped to AGA technical services yard in Windhoek. Geo Stott technical resource and AGA crew will be ready to start rectification first week in July 2007. Geo Stott will commence detailing and manufacturing these parts as soon as it receives confirmation of AGA technical services.'

[50] Following this agreement, remedial work was carried out by AGA on site and both the masts and civil works rectified to the plaintiff's satisfaction. According to Long, it was he who physically carried out the actual remedial work, together with a group of five professional riggers and one overseer from South Africa, a group of approximately ten people from the National Youth Service, with AGA supplying all the heavy vehicles. Long paid all expenses for transportation of material by AGA, to the tune of N$ 1 500 000. Long testified that these types of tower buildings required specialized skill and continuing supervision and that had the defendant carried out the work, with the necessary skill, all the defects and costs would have been avoided. Although he, generally, acknowledged that the towers were well designed by or on behalf of the defendant, Long opined that the cause of the defect in the towers lay in a design error. He fortified his opinion in that regard by stating that Naude after the fact came up with a workable solution to rectify the defects.

Aggenbach

[51] Aggenbach testified that due to the particular nature of the problems experienced with the erected masts, it became necessary for AGA to subcontract the work to a very experienced expert in the field who was available and prepared to do the necessary work on a very urgent basis. Accordingly, AGA accepted the quotation of Long of SCI Designs who is an acknowledged expert in the field to which AGA Technical Services' costs were to be added for administering the remedial work; for the remedial work itself; for the costing of the repairs; for the preparation of the scrap works and changes thereto; for the supply of materials; for the site establishment of ten sites; for preliminary

work and general work based on the project of ten sites including investigations, insurance and 4X4 transport to the ten towers, five of which were 80 meter structures, one a 54 meter structure and four were 84, 48 meter structures.

[52] Agenbach opined that the amount of N$ 2 337 454.00 was a fair and reasonable amount for the work which was required to be done and materials to be supplied to rectify the defects and to do remedial work on the ten tower masts. He testified that in his opinion only Long had the requisite experience to do the remedial work *in situ*.

Van der Merwe

[53] Van der Merwe testified that he did the rigging and RF installation on four 48 meter free-standing towers and the 54 meters tower at Palmwag on instructions of the plaintiff. According to this witness, more time and additional resourced had to be sourced to rectify the defective work done by the defendant: eg it took him and his team double the time to rig the tower at Terrace Bay for the slotting of the base plates into the same direction and altering the tower members to keep the towers straight. He testified that the defendant's riggers refused to rig the towers at Palmwag due to the poor conditions of the tower foundations and that this much was brought to the attention of Wormsbacher. According to Van der Merwe, the work done by the defendant was so poor that he did not wish to ever be associated with the defendant.

<u>Evidence led on behalf of the defendant</u>

Wormsbacher

[54] Wormsbacher testified that the plaintiff misrepresented the tender specifications with the aim of placing the defendant in jeopardy in not completing its obligations in terms of the agreement. Wormsbacher's evidence turns on several points: that the plaintiff frustrated the completion process resulting in unnecessary costs for the defendant since additional materials and services had to be acquired at a late stage; that all the delays on the part of the plaintiff was done with the aim of favoring the

independent contractors, AGA; that the reports of AGA and Long were contradictory of each other as regards the defendant's compliance with the specifications on several sites eg that photographic evidence presented to court was taken before the rectification and in collusion with Tjitandi in order to make the defendant look bad; that the defendant was not given a chance to check on the validity of the reported defects; nor was it allowed to send its own experts to observe and assist in the rectification work - pointing to the possibility of fabricated evidence.

[55] The basic thrust of Wormsbacher's evidence was that he did not trust the evidence produced concerning the status of the sites and that there was a strong possibility of photos being manipulated to distort the nature and quality of the defendant's work, buttressed by the refusal to allow defendant to visit the sites and to verify the allegations of defective work.

[56] Wormsbacher in so many words, and contrary to the denials in defendant's plea, admitted during his cross-examination of plaintiff's witnesses and his own evidence, that the plaintiff's assertion that the masts built by the defendant's appointed riggers were defective but deprecated the plaintiff's refusal to allow the defendant's experts access to investigate and verify the truth of the allegations. He implied that such refusal by the plaintiff absolved the defendant from any liability and that, in any event, the plaintiff remained liable to compensate it under the contract for the work it did. He disputed that the masts were not installed according to specification and stated that certain aspects such as rigging had no specifications from the plaintiff which could be complied with. According to Wormsbacher, the mast designs were discussed by Mr Roux of NEC Stahl with the plaintiff and that no objections were raised to such designs and that, in any event, the responsibility for the design of masts rested solely with the supplier and that any design error should not be attributed to the defendant.

[57] Wormsbacher also laid great store by the fact that the work performed by the defendant was duly certified by its consulting engineer Naude (who was it's agent) and that the plaintiff, before full completion, occupied the sites and put them to use.

[58] Nel also testified on behalf of the defendant. He had been contracted by the defendant until he left employment in February 2007. Nel worked with Amayulu who did the paint work on the sites and weeded the area around the towers. His evidence merely confirms that there were sites that were not done by the time he left the defendant's employ and that some sites, although he could not specify, had missing ladders. He however testified that he knew nothing about glued bolts. This much was corroborated by Amayulu except that the latter's evidence proved that the sites had ladders that they used to climb up in order to fix the bolts or that alternatively, all ladders were fixed by the time they visited all sites in February 2007.

Foster

[59] Foster testified that some sites were indeed handed over by the plaintiff later than scheduled and that, in some cases, containers were delivered late. He added that in some cases variations to the approved project were made by the plaintiff, resulting in more costs for the defendant. These changes accordingly affected the timeline and work schedule of the defendant significantly, thus making it very difficult for the defendant to finish all the works on time. According to Foster, the constant changes from the plaintiff's side made it pointless for progress reports to be submitted timeously, and, although the defendant raised this with the plaintiff, the situation did not change despite various agreements to reduce the variations.

[60] Foster further testified that the delay in design changes, supply of materials and handing over of sites frustrated the completion of the project and that the refusal to pay the helicopter fees following the plaintiff's own decision to make site Grootberg a helicopter site was unreasonable. According to Foster, all these delays led to Van der Merwe refusing to do the rigging work on the sites because it clashed with his schedule for other work and further frustrated Mr Pashacker, the owner of the bulldozer used for the road building, because he incurred greater expense by leaving his bulldozer off-work for days.

[61] Foster, an engineer by profession, acknowledged that Naude signed off the sites and had issued the defendant with the requisite compliance certificates by 22 February 2007 which were then given to the plaintiff.

Naude

[62] Naude was the designer responsible for designing the towers on behalf of the defendant. He confirmed in his testimony that it was he who certified the towers as fit and serviceable. In amplification of his certification, Naude testified that he was responsible for the design of the towers. After the allegations of defective structures came to the surface, he conceded that the towers were not erected according to his design and that the mistakes that crept in during their construction ought to have been detected by the manufacturer and the erector. He sought, in his evidence, to disassociate himself from the defects found in the towers.

[63] Naude conceded Long's diagnosis of the problem associated with the defendant's work on the towers in that the structures were not erected according to the design required by the tender specification: For example, it became apparent to him that there was an uneven tread of ladders; that the bolts were tongued; the turn buckles were not supposed to be welded but were; the platforms were manufactured too big and heel to heel distances were out of dimension. Naude also admitted that the towers, based on Long's and Van den Ede's reports, presented a safety risk as they were not erected according to specification. He, however, pointed out that his job was not to do an X-ray inspection and that the responsibility rested on the erector to ensure that the specifications were complied with. Naude also maintained that most of the towers and masts were erected within accepted deviations although not 100% as per the specifications, alternatively that he was advised by Wormsbacher that the structures were 100% complete and that he was justified, on that basis, to issue the compliance certificates.

[64] Naude testified that he, Geo-Stott and the defendant were at all times willing and able to cooperate with the plaintiff to correct the defects identified in October 2006 by Tjitandi. He conceded the correctness of the plaintiff's stance that the work performed by the defendant under the contract was not of an acceptable quality and that the plaintiff had the right to insist on the correction of the defects.

[65] The plaintiff's case, for which it bore the onus and which the defendant had to rebut upon being established prima facie, is that:

(a) the defendant rendered sub-standard work in executing its contractual obligations under the tender;

(b) It necessitated the plaintiff engaging a third party to rectify defendant's substandard work to conform to the specifications of the tender;

(c) The third party in fact did so and was compensated by the plaintiff for work done;

(d) The expense incurred by the plaintiff in engaging the third party was reasonable;

(e) The payment made to the third party was more than the amount still due and payable to the defendant under the tender;

(f) The plaintiff as a result suffered damages and was entitled to set off the payments made to the third party against what it still owed the defendant

(g) Even after set off it was entitled to recover from the defendant the difference in value between what it paid to the third party and what was due to the defendant.

Plaintiff has discharged the onus

[66] After all the evidence was led it became common cause that:

a) None of the towers were rigged with the necessary skill and diligence;
b) The works were not performed in a proper and workman fashion;
c) The towers contained errors (Plate to an oversized platform);
d) There were a number of manufacturing errors in respect of the towers and the ladders;
e) The defendant’s poor work or non-performance, as the case may be, was caused by its riggers (steel workers) and supplier (Geo-Stott);
f) Geo-Stott erroneously calculated the design of Naude; and
g) The plaintiff in fact paid the amount it now claims being N$ 2 699 572. 10 to third parties to complete and or to rectify the poor work done by the defendant.

[67] The defendant has, in so many words, admitted the following allegations of the plaintiff:

(a) that it appointed a subcontractor in the person of Clary Christopher without the plaintiff's approval;
(b) that Geo- Stott had no previous experience in the kind of work which was the subject of the works covered by the tender;
(c) that the design produced by Naude 'was flawed and corrections had to be made'[5];
(d) that a meeting took place between the defendant's Wormsbacher and the plaintiff's representatives on 6 October 2006 and at which meeting the plaintiff conveyed to the defendant that the works did not comply with the tender specifications; and that the defendant accepted as much and proceeded to start work on the sites in order to attempt to rectify the shoddy work.
(e) that there was a delay in the completion of the works and handing over of the sites by the defendant and that, in consequence, the plaintiff became contractually entitled to impose the penalties provided for in the contract but waived the same.
(f) that the work delivered by the defendant was in some respects unsafe: e.g. no anti-tampering devices; problem with cages, platform etc.
(g) incomplete work at Grootberg and the fact that site files and maintenance reports were never submitted by the defendant.

[68] In terms of the tender, the defendant, not its agents, was responsible for the design, supply and erection of the towers. It is not only plaintiff's case, but it is common cause, that it was a term of the contract that the defendant would use NEC Stahl towers designed by Zeelenbinder which plaintiff was familiar with and approved. The defendants, however, used towers designed by a first time designer (Naude) and supplied by Geo-Stott. The evidence establishes on balance of probabilities that

[5] Defendant's submissions, para 3.5.1.

Naude's compliance certificates were not issued after he had diligently applied his mind to the matter based on his own first-hand observation of the work done by the defendant on the sites. Naude conceded that he issued the compliance certificates concerning the towers, in some cases while work on them was not completed at the time of his inspection, and that he acted on the basis of 'trust' that the outstanding work had in the meantime been done. For example, he conceded on oath that had he known about the cut bolts and the over slotting of steel at Grootberg, he would not have issued the relevant certificates. Naude had also stated under oath that the towers erected by the defendant did not in material respects conform to the contractually prescribed standards but he nevertheless, while aware of that fact, issued compliance certificates.

[69] Tjitandi was able to systematically and clearly explain the various provisions of the agreement and the obligations they imposed on the defendant and the extent to which the defendant's execution of the tender came short. For example, that the defendant was required to make sure that all guy ropes were galvanized (galvanizing certificate is to be issued); anti- temper devices shall be provided at ground level on all guy ropes termination points in order to protect the mast against vandalism[6] while the inspection revealed that towers did not have grout to protect them from water or expansion of the tower which then makes it susceptible to corrosion, no anti-tempering devises; guy ropes not symmetrically aligned and had bumps resulting in towers twisting and therefore not straight. Tjitandi's evidence on the defective nature of the defendant's work is materially corroborated by Long, Van den Ende and Aggenbach, including the defendant's witnesses as previously mentioned.

[70] The defendant's reply is twofold: first, that it remedied the defects brought to its attention by the plaintiff and, secondly, that upon it taking the remedial steps in regard to the defects shown on annexure 'E' to the plaintiff's further particulars, the plaintiff accepted the sites as exemplified by the engineer's certificates and put them to use. The plaintiff maintains, and correctly so, that it was not under any duty to allow the

[6] Para 4.9 of the Standard Technical specifications for guyed lattice masts.

defendant the opportunity to rectify the proven defects, but that, in any event, it allowed it to do so and that the defendant failed to complete rectification of the defects.

[71] I am satisfied that the plaintiff has discharged the evidential burden that it had notified the defendant after the sites handover that it was dissatisfied with the work done on the sites by the defendant. The defendant's response was not to dispute the allegations of shoddy work but to proceed to perform what it considered as remedial work to meet the plaintiff's complaints. Two issues arise in that context: the first is that the defendant in so doing by conduct accepted the legitimacy of the plaintiff's dissatisfaction with the quality and standard of the work done on the respective sites. The second issue is, accepting that the defendant's initial works were in breach of its contractual commitments, whether the remedial work performed on the sites by the defendant was satisfactory or accepted by the plaintiff and thus acknowledging, in so doing, that the defendant had fully complied with its obligations under the agreement and thus became entitled to payment of any outstanding balances. The evidence in the latter respect is to be considered against the parties' suggested premises.

[72] The plaintiff maintains that accepting the sites, as it did, was not an unequivocal endorsement of the work done by the defendant, whereas the defendant suggests the contrary. The question is: what is the plaintiff's explanation for accepting the sites handover when it did. According to Tjitandi and as regards the phase 'A', the plaintiff accepted the sites on the understanding that the defendant was not going to be penalized for the delay as from the 18 November 2006 for incomplete work and that Transtech, the contractor doing the transmission equipment and putting up dishes on the towers, would incorporate the RF work together with the transmission works to be done on the sites. It is for these reasons that the plaintiff accepted the sites. Furthermore, the plaintiff wanted to activate the towers and Transtech could only commence work after it was accepted and handed over by the contractor to the plaintiff. As regards phase 'B', the plaintiff accepted the sites only to the extent that it complied with the specifications in that only certain certificates were accepted by the plaintiff and for all other outstanding defects, the acceptance of the site was subject to the submission by the defendant of all documentation and certificates with the site files,

which were not. The only remaining site was however Grootberg were no work was done by the defendant.

[73] Once I accept as reasonable, as I do, and as making business sense Tjitandi's explanation for accepting the handover of the sites, the central pillar of the defendant's defense evaporates.

[74] I have come to the conclusion that the defendant's non-compliance with important standard specifications for the construction of the towers resulted in works which the plaintiff reasonably concluded did not meet the standard accepted in the industry as contemplated in the tender accepted by the defendant. It has been established by the plaintiff on a preponderance of probabilities that the work performed by AGA materially and substantially improved the works delivered by the defendant and that it was for that reason reasonable for it to have engaged the services of Van den Ede and to pay for its services. The plaintiff's waiver of penalties which, on the facts before me, seemed justified strengthens the probabilities (in its favour) that the hiring of a third party was a reasonable business decision to restore the towers to a state which rendered them both fit for its purpose and safe.

[75] The evidence establishes on balance of probabilities that the work performed by the defendant was below the standard acceptable in the industry and did not comply with the specifications of the tender. That indeed it was so is not only common cause after all evidence was led but was conceded both in court and in the actions of the defendant. The defendant purported to put right the defects brought to its attention by the plaintiff's representatives. Various consultants of the defendant engaged in remedial actions following the plaintiff's complaints, although in material respects their efforts were not sufficient and, in any event, did not detract from the plaintiff incurring expenses in engaging a third party to rectify the admitted defects resulting from the defendant's work.

[76] The defendant is mistaken in its assumption, persisted with by Wormsbacher, that it bore no responsibility (and presumably no liability) towards the plaintiff for the

standard of work delivered under the tender because either the work was done by a third party or was certified as compliant by a third party. The defendant, not the suppliers, riggers or engineer, was the contracting party answerable in law to the plaintiff and it is against the defendant, and none other, that the plaintiff has recourse in the event that the performance under the contract was not in conformity with the tender specifications.

[77] Even if I were to be satisfied that the plaintiff frustrated the defendant by allowing access to the sites late, or did not make arrangements in time for the availability of electricity, that does not excuse the inferior workmanship of the defendant's riggers.

[78] As for the amount claimed by the plaintiff in respect of (a) the investigation done to establish the nature and extent of the defective work by the defendant and (b) the costs incurred to do the remedial work, the defendant did not offer any rebuttal that the amount claimed was excessive or unreasonable. That the costs were indeed incurred also remains undisputed and was amply established through the evidence of Aggenbach.

[79] The plaintiff is therefore entitled to the relief it seeks.

Costs

[80] The plaintiff has urged me to make special cost orders:

(a) On attorney-and-own-client scale in respect of the defendant's failed attempt to amend pleadings during the course of the proceedings and persisting with an unmeritorious claim long into the proceedings; and

(b) To hold Wormsbacher personally liable for such costs.

[81] Wormsbacher as sole director of the defendant staked his reputation on this project. He naturally was not emotionally detached from the saga that unfolded around the MTC project. He harbored a deep seated sense of grievance against the plaintiff for

what he perceived as its attempt to frustrate the proper implementation of the project. He was very courteous to the court and as a layman did not always appreciate the more finer points of the law and the practices of the court. He, as the evidence demonstrates, was candid about the failure on defendant's part but wrongly assumed that given that it was a relatively small and inexperienced entity it deserved greater sympathy from the plaintiff. I cannot in his actions find any malice as suggested by counsel for the plaintiff and accordingly decline to grant the special costs order asked for by the plaintiff's counsel.

[82] Additionally, I am not inclined to the special costs orders the plaintiff seeks because there are, in my view, certain aspects of this case which, if the defendant was competently represented by a legal practitioner, might have shone a completely different light on this case. I will elaborate. Wormsbacher during cross-examination pertinently put to plaintiff's witnesses, and later when it was the defendant's turn to testify stated, (corroborated by the evidence of Schmidt-Dumont) that the plaintiff's officials were aware that Geo-Scott prepared the design for the towers. The defendant's evidence in that regard is that none of the plaintiff's officials took issue with that fact. I am satisfied that the plaintiff has not in a credible way displaced the evidence of the defendant on that score. There was no requirement that same be in writing. In a similar vein, Wormsbacher challenged the plaintiff's witnesses and stated under oath that Tjitandi knew that Transtech was the RF rigger and yet did not remonstrate about the fact and, for that reason, must be taken to have approved the subcontracting to Transtech. As it happens, the specific terms of the tender on that score were that such approval was not to be unreasonably withheld. The failure on the part of the plaintiff to as much as protest if they were unhappy with the person or entity contracted by the defendant to do the design, leads one to the inference that they approved and that the defendant was not in breach of the contract term in question. That of course still does not absolve the defendant from the rest of the terms as regards compliance with tender specifications.

[83] Another aspect of the case that raises concern is the half-hearted denial on plaintiff's part that it, during the life of the contract, was obstructive in handing over sites to the defendant despite the fact that the defendant had given it a schedule of work

(time planning sheets) and that the plaintiff's conduct resulted in the defendant performing the work out of sequence and that its performance was negatively affected thereby. Foster's evidence on that score remains undisputed.

[84] The evidence of the defendant, which has not been sufficiently met by the plaintiff, is further to the effect that the plaintiff was not forthcoming in timeously informing the defendant when and which sites were available and at times changing sites and locations with resultant negative impact on the work of the defendant. Again, Foster's evidence to that effect remains unchallenged. In similar vein, Wormsbacher put it to Tjitandi on cross examination and testified under oath that the plaintiff delayed delivery of the site containers, electrical installations and withholding orders after issuing verbal orders; and therefore frustrating the work of the defendant. With respect, these allegations of obstruction remain largely unchallenged by credible evidence.

[85] The defendant also testified and in that regard submitted that the plaintiff's assertion that it did not accept the works is not borne out by its conduct: in that, it is said by the defendant, the plaintiff made progress payments after inspection and based on status reports submitted by the defendant in respect of works done. Similarly, as regards defendant's alleged failure to have rectified the defects identified by the plaintiff, the defendant, both in the evidence led and in submissions, retorts that it was expressly denied the opportunity by the plaintiff to send experts to (a) confirm the truth of the defects alleged and (b) to go on site to effect whatever corrections were necessary. The defendant's evidence also shows (and that is not controverted by the plaintiff) that certain corrections had been done by the defendant based on complaints received from the plaintiff and that, as Wormsbacher submitted in argument, 'Annexure E' was rectified by defendant as most issues do not crop up again in handover certificates as discussed with Tjitandi. In similar vein, the defendant challenged Tjitandi in cross-examination and under oath repeated that the defendant's failure to complete Groortberg was as a result of the plaintiff refusing to meet the helicopter costs to enable the defendant access the site and to do the necessary works.

[86] All these considerations militate against the court granting the special costs order the plaintiff seeks.

[87] Plaintiff is, however, entitled to costs of suit and its opposition to the ill-fated attempts to amend pleadings and to add a new cause of action, including its opposition to an otherwise unmeritorious claim persisted with by the defendant long into the proceedings and only abandoned on the eleventh hour.

The Order

[88] The plaintiff is granted judgment in the amount of:

(a) N$ 1, 811,972.10, being the difference between:
N$ 2,699,572.10 : The amount claimed in the summons; and
N$ 887,600.00 : The amount due to the defendant

(b) Mora interest on the liquidated amount of N$ 1,811,972.10 per annum from date of service of summons to date of payment;

(c) Costs of suit on party and party scale;

(d) Costs of plaintiff's opposition to the defendant's failed attempt to amend pleadings and to add a new cause of action;

(e) Mr Long, Mr Van den Ende and Mr Aggenbach are declared necessary witnesses as contemplated in old rule 70(3).

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PT Damaseb

Judge-President

APPEARANCE

Plaintiff	S Vivier, SC
Instructed by	LorentzAngula Inc
Defendant	A Wormsbacher
On behalf of	Defendant