"SPECIAL INTEREST"

CASE NO.: I 1286/2005

SUMMARY

NAMIBIA WATER CORPORATION LIMITED **versus** AUSSENKEHR FARMS (PTY) LTD

DAMASEB, JP

09/01/2009

CONTRACT:

Parties had entered into written agreement containing a non-variation clause:

Defendant alleging that plaintiff vicariously guilty of breach of contract as a result of which defendant says it terminated contract. Court not finding such breach and that the defendant, even if there was such breach was required to communicate termination of contract which it failed to do. To be of any legal effect, termination of contract must be communicated to the guilty party: *Tsabalala v Minister of Health* 1987 (1) SA 513 at 520I

Defendant alleging that the plaintiff's conduct amounting to repudiation of contract entitling it to cancel contract. Court finding no such conduct on plaintiff's part. In any event defendant failing to prove that it, acting on such repudiation, exercised its election to cancel contract.
Defendant relying on alleged oral agreement preceding written instrument. Defendant bearing *onus* to prove such oral agreement but failing to do so. Such claim difficult to prove and must be proved by facts ''in the clearest and most satisfactory manner''.

CASE NO.: I 1286/05

IN THE HIGH COURT OF NAMIBIA

In the matter between:

NAMIBIA WATER CORPORATION LIMITED **PLAINTIFF**

and

AUSSENKEHR FARMS (PTY) LTD **DEFENDANT**

CORAM: **DAMASEB, JP**

Heard on: 29 August 2006

Delivered on: 09 January 2009

JUDGMENT

[1] **DAMASEB, JP:** The plaintiff in this matter is Namibia's national water utility, created by Act of Parliament[1] and registered as a public company under the Companies Act[2]. In terms of s5 of Act 12 of 1997 its objects

"shall be to carry out efficiently, and in the interests of the Republic of Namibia"–

(a) the primary business of bulk water supply to customers, in sufficient quantities, of a quality suitable for the customers' purposes and by cost-effective, environmentally sound and suitable means, and

(b) the secondary business of rendering water-related services, supplying facilities and granting rights to customers upon their request."

[2] The defendant, Aussenkehr Farms (Pty) LTD, is a private company involved in grape production along the Orange River. In 2001, the defendant decided to embark upon a 2000 hectare irrigation scheme for the planting of vineyards for export purposes. The defendant is the owner of the land on which the vineyards were to be planted. To irrigate the vineyards it required 32.2 million cubic meters of water from the Orange River. The government of the day supported the initiative at the highest level; as did the plaintiff in whom the government of Namibia is the sole shareholder. On 15 March 2001, the Ministry of Agriculture, Water and Rural Development (''the Ministry'') hosted a "Stakeholders' Conference'' in collaboration with the grape growers to discuss the economic development potential along the Orange River, including the development of

[1] Act 12 of 1997
[2] 61 of 1973

the 2000 ha irrigation scheme at Aussenkehr farm. The objective of the Conference was stated as follows:

> '' to inform the general public on the development potential of the area;
> to give people in commerce an opportunity to state their interest in future developments; to address general developments of the area including settlement at Aussenkehr; to improve co-ordination amongst grape growers; and,
> to enhance collaboration amongst all stakeholders."

A minute of the conference deliberations attributes the following to Mr. Helge Habenicht, the then chief executive officer of the plaintiff:

> "The CEO, Mr H Habenicht, stated that the corporation does not operate along profit motives, but renders services at a cost. Namwater is involved in developing, managing as well as expanding and financing of water infrastructure. He indicated that <u>if invited, Namwater would be willing to provide, manage, as well as finance and maintain the supply of reasonable quality water to Aussenkehr</u> on condition that the contracting partner was a legal entity." (My underlining)

[3] On 27 September 2007, the plaintiff , represented by its former chief executive officer, Helge Habenicht, and the defendant, represented by its managing director, Dusan Vasiljevic, entered into a written agreement in terms whereof the plaintiff was to render 'services' to the defendant as a precursor to the establishment of the 2000 ha irrigation scheme at Aussenkehr Farm. The written agreement contains the following salient clauses:

> "1.1 This document contains the complete agreement between the parties for the Service. Any variation of this Agreement shall be of no force or effect until reduced to writing and signed by the parties.
>
> …
>
> 1.3 The parties record that the obtaining of tenders for and the detailed design and construction of the bulk water supply scheme, as well as the supply of water in bulk, will be governed by a separate agreement as contemplated in clause 5.
>
> 4.1 Subject to clause 4.2, the Company [Aussenkehr Farms (Pty) Ltd] shall reimburse NamWater the actual internal and external costs incurred by NamWater and posted on NamWater's project accounting system for and in connection with the provision of the

Service , provided that the Company shall only be liable for a maximum amount of N$300 000… exclusive of VAT.

4.2 Unless the parties shall have entered into the agreement contemplated in clause 5 within 3…months from the last day of the Project Period, the Company shall be liable to pay to NamWater the costs referred to in clause 4.1. In the event that the agreement contemplated in clause 5 is entered into within the said period of 3…months, the costs referred to in clause 4.1 charged to the Company for the provision of the Service shall be incorporated and paid in accordance with the provisions of that agreement.

4.3 The costs referred to in clause 4.1 shall be presented in a tax invoice with a detailed cost breakdown attached thereto, which shall be payable by the Company within 30…days of such invoice having been delivered to the company. Without prejudice to any other rights NamWater may have against the Company in the event of the Company defaulting on its obligation to pay in accordance with this clause 4, NamWater shall be entitled to claim interest on any overdue amount calculated at the prime rate of interest charged on commercial overdrafts by NamWater's bankers to their best commercial customers from time to time.

…

5. In the event of the Company requiring NamWater to proceed with the obtaining of tenders, detailed design and construction of the bulk water supply scheme, the company and Namwater will enter into a separate agreement for the obtaining of tenders, detailed design and construction of the bulk water supply scheme, as well as for the supply of water in bulk, in respect of the 2000 hectare irrigation project.

6. The deliverables in terms of the Service are a planning and preliminary design report by NamWater of the complete bulk water supply scheme and a set of tender documents for the detailed design and construction of the bulk water supply scheme, **to be supplied to the Company within the Project Period.** The planning and preliminary design report to be compiled by NamWater of the complete bulk water supply scheme, shall include a detailed cost estimate pertaining to the complete bulk water supply scheme, which estimate shall be as close as possible to the actual costs to be incurred in respect of the design, construction and subsequent operation of the bulk water supply scheme.'' (My underlining for emphasis)

The agreement defines "the service" as:

> "The planning, the preliminary design and the compilation of tender documentation for the provision and construction of a bulk water supply scheme capable of supplying 12500 cubic meters per hour of water for irrigation purposes to a 2000 hectare irrigation project at farm Aussenkehr, No 147, situated in the district of Karasburg, Namibia.''

[4] The plaintiff's case is that the agreement contemplated in clause 5 was never entered into as a result of which the terms of clauses 4.1 and 4.2 kicked in. The defendant denies that the invoice was ever delivered. It also denies liability to pay the amount claimed on several grounds. The salient ones being: the intentional and deliberate refusal by the

plaintiff to enter into the agreement contemplated in clause 5; plaintiff's refusal to supply bulk water while in a position to do so and instead informing the defendant that the latter had to apply for a water abstraction permit; and the existence of an additional oral agreement which defeats the plaintiff's claim. The defendant seeks rectification in order to give effect to the alleged oral agreement that preceded the written agreement in the following terms:

> "Plaintiff would render its services, described as "the service" in the written agreement, to Defendant, with the intention to do as set out below.
>
> Subsequent to the satisfactory rendering of such service, Defendant would conclude an agreement with Plaintiff, the specific terms of which were to be that:
>
> a) Plaintiff would supply bulk water to Defendant, the principal member of the syndicate of grape cultivating entities, without Defendant having to apply to the relevant Ministry for a water permit for such water;
> b) The above water was to be sufficient to irrigate 2000 hectares of vineyards;
> c) The costs of Plaintiff in rendering "the service" as envisaged in the written agreement would be incorporated in the costs per cubic meter of water supplied by Plaintiff to Defendant in its capacity as principal member of the syndicate as aforesaid.
>
> Defendant avers that the parties, through a *bona fide* error and/or oversight, failed to record their mutual and/or common intention as set out above, in the written agreement.
>
> Defendant accordingly avers that the written agreement stands to be rectified by the insertion of the above terms as an integral part of such written agreement."

[5] The defendant had originally filed a counterclaim against the plaintiff which has since been abandoned and concedes that the plaintiff is entitled to the wasted costs occasioned by the abandonment of the counterclaim.

The plaintiff's claim

[6] The plaintiff claims N$300 000 plus VAT of N$45,000 together with interest at the rate of 11.5% as from 21 May 2002 to 30 July 2003 and 16.75% from 1 August 2003 to

date of judgment. It claims that on 26 September 2003 the defendant was indebted to it in the amount of N$422,272.68 which amount despite being due, the defendant refuses to pay.

The plaintiff's evidence

[7] The first witness for the plaintiff was Mr. Schrueder Aldridge who, at the time the written agreement was concluded, was in the employ of the plaintiff in the capacity of ''Manager: Capital Development.'' Before he became a NamWater employee, Aldridge had been employed by the Ministry and had been involved in the bulk water sector for close to twenty years. Aldridge testified that he was 'intimately involved with the compilation' of the document that ultimately became the written agreement on which the plaintiff's case is based. As interlocutor between NamWater and its lawyers, and with lawyers Diekman & Associates acting for the defendant, he acted in that capacity "until both parties were satisfied with the content of the agreement and then…obtained a signed agreement from the representatives of Aussenkehr Farms and submitted it to the chief executive officer of Namwater for signature.''

Aldridge testified that Habenicht is no longer in the plaintiff's employ - and it is common cause that his separation with NamWater was not on amicable terms. According to Aldridge on or about 24 August 2001, and before the conclusion of the written agreement, the plaintiff in writing applied to the Ministry for a water abstraction permit from the Orange River for the purpose of supplying water in bulk to a proposed irrigation project. It is common cause that the proposed irrigation project is the subject matter of the written agreement.

[8] It is necessary to set out in full the content of Habenicht's letter of 24 August 2001:

"The Permanent Secretary
Department of Water Affairs
Ministry of Agriculture, Water and Rural Development

APPLICATION FOR A PERMIT; ABSTRACTION OF WATER FROM THE ORANGE RIVER FOR IRRIGATION PURPOSES AT AUSSENKEHR

Dear Sir

On 15 and 16 March 2001 the Ministry of Agriculture, Water and Rural Development in collaboration with the Aussenkehr grape growers hosted the Aussenkehr Stakeholders Conference. At this occasion the attendees were informed that a private sector joint venture intended to establish an additional irrigation project of 2000 ha of vineyards. An official of the Department of Water Affairs then stated that the Government encourages the private sector to extend irrigated agriculture along the Orange River, since the water demand so generated will strengthen the hand of the Government when it comes to negotiating future water allocations from the Orange River.

Namwater has now been requested by Mr. Dusan Vasiljevic, on behalf of the Aussenkehr Group of Companies, to submit proposals and quotations for the bulk supply of water to the so-called 2000 Hectare Irrigation Project at Aussenkehr. The prospective client indicated that the intention was to develop the project in 20% increments over a period of five years. The associated water requirement will similarly increase from 10 million five years. The associated water requirement will similarly increase from 10 million m^/annum in the first year to 50 million m/annum upon full development of the project. Water is required as from July 2002. It is currently estimated that the establishment cost of the bulk water scheme may be in the order of N$ 65 million, while development of the irrigation project itself may cost N$ 600 million.

The proposed irrigation project will totally depend on water from the Orange River, and thus on the award of a water abstraction permit. We, therefore, hereby apply for a water abstraction permit from the Orange River for the purpose of supplying water in bulk to the proposed project. Information supporting this application is appended to this letter as Annexure 1.

Pending an agreement with the client, we intend to shortly embark upon the execution of a planning and preliminary design study, and the compilation of tender documents for a possible turnkey implementation of the project. Our proposals and quotation's to the client for the establishment of infrastructure and the subsequent water supply will be based on the results of this work.

In view of the magnitude of the proposed investment it will be imprudent to start with the actual establishment of the water supply project or the irrigation project before having obtained the required water abstraction permit. Since the project is o1 extreme urgency, the client may be willing to invest funds in the planning and preliminary design of the water scheme on the strength of a letter of intent issued by the Department of Water Affairs to NamWater. Such a letter could e.g. indicate that the Department Intends to grant a permit, subject to certain stipulated requirements.

You are thus respectfully requested to consider this application for a water abstraction permit. Should the consideration be favourable, please inform us accordingly by means of a letter of intent, and supply us with your requirements to allow the actual award of the permit to take place. Similarly, if you resolve not to award a permit, please inform us in order that we can advise our client of the situation.

Yours faithfully

Helge Habenicht
CHIEF EXECUTIVE OFFICER

Cc Mr. Dusan Vasiljevic, Aussenkehr Farms (Pty) Ltd
Mr. Henner Diekman, Diekman Associates: Attorneys/Conveyancers
Ms Brigitte Weichert, HSBC Securities (Namibia) (Pty) Ltd"

(My underlining)

[9] Aldridge explained that the reason the plaintiff had applied for a water abstraction permit was "on the presumption … it may come about that Namwater may be requested by Aussenkehr Farms to construct infrastructure on the Orange River and abstract water. In terms of the Act [Water Act, 54 of 1956] there must be a permit to do that and therefore we applied for the permit." The underlined sentence in Habenicht's letter above demonstrates that he knew (as did Vasiljevic because the letter was copied to him) that the Ministry retained the prerogative to grant or not to grant the permit sought.

[10] Aldridge testified that after the written agreement was signed, the plaintiff performed in terms thereof by rendering the service as defined in the agreement. In this respect Aldridge testified:

> "My Lord the nature of the service… to be rendered was to carry out the planning and the preliminary design and the compilation of tender documentation for the provision of certain infrastructure that had a certain capacity. In Namwater at the time we did not have sufficient internal manpower resources to do the actual technical work associated with the planning, the preliminary design and the compilation of the tender documents. What we did was we … advertised a tender for the services of consulting engineers to do this work according to our specification and under our control and in terms of the tender process we appointed a consulting group to execute the technical work [under] our control and supervision .''

According to Aldridge, after having invited tenders the plaintiff on 16 October 2001 hired a joint venture partnership *Aussenkehr Bulk Water Consultants* c/o Windhoek Consulting Engineers, to perform the "Planning, preliminary Design and Tender Document preparation for the Bulk Water Supply Scheme for the 2000 ha irrigation Project at Aussenkehr" . The consultants undertook, as part of their tender document on the strength of which they were contracted, as follows:

> "A firm statement from the Department of Water Affairs relating to the issuing of an abstraction permit will be obtained. The plaintiff appointed the consultants 'on fixed cost basis to an amount of N$881 084 including 15% VAT."

Aldridge testified that by letter dated 23rd October 2001, the defendant was informed about the appointment of the consultants, and was requested to provide assistance to the consultants. By reference to a facsimile transmission dated 23rd November 2001, Aldridge testified that the plaintiff was informed by the Ministry of the latter's policy regarding abstraction of water from the Orange River in the light of the plaintiff's application for a water abstraction permit dated 24 August 2001. A duly signed copy of the policy document was then received by Namwater on 22 January 2002.

[11] From the Ministry's policy document, Aldridge read out the following relevant paragraphs as part of his evidence:

> "5. The abstraction permits are issued to irrigable land which must belong to the applicant. The applicant must furnish proof that he is the owner of the land where he wants to use the water and whenever he sells the land, the water allocation remains with the land and not the seller. The permit must be transferred in the name of any new owner of the land under irrigation with the permitted water.
>
> 6. The applicant must submit a feasibility study to convince the Ministry about the technical, socio-economic and environmental viability of the proposed irrigation project.

This information will enable the Ministry to determine if the proposed project warrants the requested water allocation and will be in the best interest of the country. The program for the increase in water abstraction over time as the irrigation land is developed and the scheduling of the annual water demand must also be provided.

7. The proponent of the project must also submit the environmental assessment according to the Namibian Environmental Assessment Policy that was approved by the Cabinet. The main purpose here is to monitor and prevent the possibility of polluting the internationally shared Orange River from irrigation water return flows into the river.

…

11. The request from Namwater to obtain a permit for the abstraction of water to supply his client with water must therefore be declined. The owner of the land must make the application for a permit to abstract the water according to the requirements of the Ministry. The applicant can then solicit the services of a company like Namwater to abstract and supply the water.

…

25.6 The owner of the land must provide acceptable proof that he has access to the capital funds and other resources to enable him to start immediately with the irrigation development when a permit is issued.

25.7 According to the policy of the Ministry, an irrigation allocation is limited to an application of only 16 000m³/ha/a and therefore not more than 32Mm³ can be made available to irrigate 2 000 ha. However, a maximum allocation of only 10Mm³ can be made to the Aussenkehr Group of Companies and Namwater must inform his client that not more than 10Mm³ is at present available for allocation.

25.8 If the proposed allocation of 10Mm³/a is made to the Aussenkehr Group of Companies, it should be kept in mind that the Ministry will then only be able to entertain further water abstraction applications up to 4Mm³/a, unless more water is negotiated with South Africa or until such time as a regulating dam is operational on the lower Orange River." (My underlining for emphasis)

[12] Aldridge testified that the Ministry refused NamWater's application for a water abstraction permit on behalf of the defendant because NamWater was not the owner of the land in respect of which the permit was sought. He added that the preconditions set out in the policy document were those of the Ministry and not of NamWater.

[13] In Aldridge's narrative, the next critical development was a meeting that took place on 21 January 2002 between NamWater and the consultants. Habenicht and Aldridge

attended the meeting. At this meeting, apart from the need identified to determine who bore the responsibility for obtaining the abstraction permit for the 2000 ha project, it was resolved (at Habenicht's prompting) that NamWater require from the defendant acceptable financial guarantees from an AAA rated bank before continuing with the project. Aldridge conceded that he did not know what was meant by an AAA-rated bank. In an attempt to explain the 'guarantees' that Namwater required, Aldridge testified that *"*the concept that has always been adopted by Namwater is that NamWater should not enter into risky business ventures, and therefore adequate guarantees would in all cases or instances be required."

[14] In the light of the Ministry's policy position communicated in the 23 November 2001 missive, Habenicht on 30 January 2002 sent a letter to the Permanent Secretary of the Ministry stating, amongst others, the following:

> '' Namwater in August 2001 applied for a water abstraction permit from the Orange River for the purpose of supplying water in bulk to the proposed project. The estimated abstraction volume applied for at that time was 50 million m³ per annum: After having preceded with the planning and preliminary design of the project the required volume has now been refined to 32.2 million m³/annum (16 000m³/hectare/annum.)
>
> Namwater has since been informed of the Ministry's policy and procedures pertaining to the allocation of water for irrigation purposes along the Orange River. The policy amongst other directs that a water abstraction permit for irrigation purposes is allocated to the owner of the land to be irrigated. In the case of the proposed development by the Aussenkehr Group of Companies the implication is thus that a water abstraction permit should not be issued to Namwater.
>
> In all existing cases where Namwater is the bulk supplier of water to a customer, Namwater and not the bulk water customer is required to have a water abstraction permit. This situation pertains to all purposes of bulk water supply, whether it is to a town (Noordoewer from the Orange River), a mine (Scorpion Mine from the Orange River), stock watering (in communal areas) and irrigation (at Hardap, Etunda and Naute).
>
> With regard to the water abstraction policy on the Orange River and our pending application for the above-mentioned permit our main concern is under what authority Namwater will abstract water for the purpose of bulk water supply to the proposed irrigation project at Aussenkehr. In

> addition, we are most eager to establish whether positive consideration could be given to allocating an abstraction permit for (say) 32 million m³/annum.
>
> It is our opinion that a discussion between your Ministry and Namwater will contribute to clarifying various aspects, to expediting the processing of our application, and to resolving uncertainties that we have. We therefore respectfully request a meeting with the Honourable Deputy Minister, the Permanent Secretary, the Deputy Permanent Secretary and Mr Piet Heyns. ''

(My underlining for emphasis)

It is clear from the above that from 23 November 2001 and certainly at the date of his letter above, Habenicht knew the defendant was required to apply for the permit and that not all the water required for the project was being considered by the Ministry. He was also aware by the date of that letter that the consultants appointed by NamWater to do the planning and preliminary design report were busy working and had recommended that 32.2 million cubic meters of water would be required for the project and not the 50 million cubic originally thought.

[15] Aldridge left a clear impression on me that the reason Habenicht's letter was written was to convey to the Ministry that NamWater felt that the Ministry's attitude that the landowner (not Namwater) apply for the abstraction permit was in conflict with practice existing in respect of other water sources across the country and that Namwater wanted the Ministry to reverse its position. Aldridge testified that in February 2002, the consultants produced the 'Planning and Preliminary Report' in terms of the mandate given to them – being the first of two deliverables which Namwater had to produce for the defendant. The second deliverable was the tender documentation for the design and construction of infrastructure which was in like manner received from the consultants. The first deliverable, Aldridge testified, gave design concepts and fairly reliable cost estimates of what the eventual infrastructure may cost, while the second deliverable is a set of tender documents compiled for the purpose of a turnkey project entailing the award

of a contract to an entity that would do the final design and construction of the water supply infrastructure under the control, supervision and specification of Namwater.

[16] A critical finding in the first deliverable is that:

> "The estimated annual water requirement of the proposed 2000 hectare irrigation project is 32.2M m^3. (± 16 000m^3/hectare per annum)".

In Aldridge's own words *"*if this thing went ahead-capacity-wise it would have been the second largest bulk water supply scheme in Namibia.'' The deliverables also detailed the estimated costs of the completed project: over a phased period of 5 years the projected costs was to be N$106 500 000.00. The consultants recommended in the deliverables that Namwater only proceed with the project if the defendant provided acceptable financial guarantees and if the water abstraction permit for the project is issued by the Ministry.

[17] Aldridge testified that after the two deliverables were received, the defendant who had to bear the costs of the infrastructure construction had to decide whether to proceed with the project – and that Namwater was not responsible for the capital amounts required for investment in bulk water supply. By reference to the deliverables, Aldridge testified that the consultants had established from the Ministry that in order for an irrigation permit to be considered favourably, the developer (i.e. the defendant) would have had to:

a) submit a full environmental impact assessment for the entire project;

b) fulfill the requirements of Namibia's Environmental Assessment Policy; and

c) submit a project feasibility study.

[18] Aldridge testified that to his knowledge the 2 deliverables were handed over to the defendant. According to Aldridge, at the request of defendant's Vasiljevic, a meeting was called on 15 May 2002 between the plaintiff and the consultants engaged by the plaintiff; and the Aussenkehr Group. The purpose of the meeting was to report back on progress made to date on the project and to explore the way forward in the implementation of the project. Habenicht, as well as officials of the Ministry, attended the meeting, including Piet Heyns who, it is common cause, authored the 23 November 2001 policy document. The meeting was also attended by a group referred to in the meeting's memorandum as '' Navico investors'' –amongst them Vasiljevic and Gerard de Kok. As Navico financial/legal/ technical advisors attended, amongst others, Charles Church, Chris Muir , Stephan Naude and, of course, attorney Henner Diekman.

[19] It is important to refer to paragraphs 3.4.1, 4 and 5 of the minutes of the meeting of 15 May:

> "3.4 Negotiations with Department of Water Affairs
>
> 3.4.1 Messrs C Muir, G de Kok and S Naudé reported on the meeting held in the morning of 15 May 2002 with the Department of Water Affairs, represented by Mr. Piet Heyns, Director of Resource Management:
>
> 1. An irrigation permit could only be issued to landowners (in this case the five investors as group of investors) but could be managed / controlled by a company such a NAVICO.
>
> 2. An application for the issue of such an irrigation permit must be accompanied by:
> 2.1 a feasibility study

2.2 a business plan
2.3 socio-economic development proposals
2.4 environmental impact study

4. The quantity of 30Mm³/annum of water required for a permit for this project should be available in principle, obviously subject to approval by the authorities and meeting requirements including those listed above."

…

"5.1 **Feasibility & Business Plan**

5.1.1 Mr. G De Kok advised that both a feasibility study and business plan would be prepared within the next 4 weeks, as well as completing other formalities which are required for application for the irrigation permits.

5.2 **Bankability**

5.2.1 Mr. C Church advised that the above studies and plans would be drawn up along international guidelines to make them bankable.

5.2.2 Mr. G De Kok advised that the irrigation permits, if granted, could be considered bankable, in fact financial institutions would probably only consider the project after the issue of permits.

5.3 **Role of Namwater**

5.3.1 Mr. D Vasiljevic questioned the role of Namwater in this project for 2 main reasons:

1.1 it has now been established that Namwater cannot apply for an irrigation permit (only land owners can)
1.2 Namwater at present requires 100% guarantees for the bulk water supply scheme, which is equivalent to providing cash for the cost of the project.

5.3.2 Mr. H Habenicht advised:

2.1 that Namwater is a non-profit organization, hence has no financial reserves and is intended to supply water at cost.
2.2 that Namwater must obtain finance from institutions for projects of this nature, and that would require bankable guarantees.

5.3.5 Mr. H Habenicht replied:

5.1 that if it was requested of Namwater to take a financial risk in connection with bulk water supply to the scheme, this becomes a business risk proposition and a corresponding profit component needs to be considered.

5.2 that such an approach needed consultation with and approval from the ministry (possibly even from cabinet)

5.3 That such an approach probably still required acceptable (but less onerous) sureties from the developers." (My underlining for emphasis)

[20] At the meeting, and rather incongruously (in the light of the policy document which it is common cause he authored), Piet Heyns of the Ministry is quoted as having said that the quantity of 32.2 million cubic meters of water per annum required for the project would be available ''in principle'' but subject to approval by the government and the meeting of the conditions of such a grant – presumably a feasibility study, a business plan and an environmental impact assessment. I find no indication in the meeting's memorandum that Heyns contradicted what was attributed to him by Muir and de Kok.

[21] Aldridge testified that on 5 August 2002, the Ministry formally replied to NamWater's application for a water permit on behalf of the defendant. In that letter the following is stated:

> "3. The owner of the land on which the water will be applied for irrigation purposes must make the application for a permit according to the requirements of this Ministry. It is therefore not possible to grant Namwater with a permit to abstract water from the Orange River for irrigation purposes.
>
> 4. However, the recipient of an allocation of water from the Orange River may of course employ the services of Namwater to supply the water.
>
> 5. In order to advise your client, it is brought to your attention that the allocation of water along the Orange River is limited to 16 000 m^3/ha/a or 32 Mm^3 for 2 000 ha of land under irrigation.
>
> 7. Due to the allocation of water to existing permit holders, the maximum quantity of water left for allocation on the lower Orange River is only 10 Mm^3/a, until such time as an increased quota can be negotiated with South Africa or until a regulating dam has been established on the lower Orange River."
>
> (My underlining)

[22] Aldridge testified that after delivery to the defendant of the deliverables and the meeting of 15 May 2002, the plaintiff never received any instruction from the defendant to proceed with the implementation of the 2000 ha irrigation scheme ; and that by letter dated 20 May 2002 addressed to Vasiljevic, the plaintiff invoiced the defendant in the amount of N$345 000.00 (inclusive of VAT of 15%) for the ‘’production and supply of the planning and preliminary design report, and a set of tender documents for the detailed design and construction of the scheme.” Aldridge stated that the defendant was invoiced since, as per the agreement, a period of three months in which, at the behest of the defendant, the second agreement was to be concluded had lapsed, without such agreement being concluded.

[23] Mr. Barnard for the defendant suggested to Aldridge in cross-examination (who could not gainsay) that at some point prior to the 2000 ha project it became clear to the defendant’s Vasiljevic that NamWater made proposals to the Ministry for Namwater to be allowed to take over the management of the water resources allocated to Namibia from the Orange River; including receiving and considering applications for water extraction permits by persons who wished to be allowed water abstraction rights from the Orange River. It was further suggested, and not denied, that the defendant’s Vasiljevic became aware of this proposal of NamWater and therefore entered into negotiations with NamWater’s Habenicht for the 2000 ha project. In cross-examination of Aldridge Mr Barnard sought to suggest, based on the statement made by Habenicht at the Stakeholders’ conference that Namwater was in the business of financing bulk water supply and would do so if invited by Aussenkehr; and that in fact Habenicht and

Vasiljevic discussed and agreed on Namwater financing the bulk water supply for the 2000 ha irrigation project. Aldridge answered as follows when this was put to him by Mr Barnard:

> "My Lord all I can say is that if Mr Habenicht undertook to finance it, there was never any indication given here of the conditions of financing, so the conditions of rendering the service and the conditions of financing and the conditions under which any service would be rendered was never addressed in this paragraph."

[24] Mr. Barnard also suggested that it was orally agreed that Namwater would supply water to the defendant without the latter applying for a water permit and that the fact that NamWater could no longer supply the water was a breach on NamWater's part. Aldridge said that he knew nothing of such oral agreement and that he was never informed of such an agreement by his superiors. Aldridge was therefore not able to confirm or deny the alleged oral agreement between Habenicht and Vasiljevic relied on by the defendant. Mr. Barnard then put to Aldridge defendant's instructions as follows:

> " Mr. Barnard Now, the Defendant says that the reason why it was agreed as in 4.2(a) [of the plea], because the Defendant says that he was at the end of his tether with the ongoing toing and froing with the Ministry and he saw an opportunity, if Namwater were to be the bulk water supplier that he could eradicate the interaction between the Ministry and the Defendant and for that this agreement contained the term as set out in 4.2(a) [of the plea], do you have any comment thereupon?
>
> Aldridge: My Lord I can make comment but I don't think it will contribute the proceedings."

[25] Mr. Barnard suggested that it made no sense for the defendant to enter into a contract with Namwater without the knowledge that there would be enough water for the 2000 ha project. To which Aldridge replied:

> "…., it is completely and perfectly understandable to me that the Defendant could enter into an agreement with Namwater to do preliminary investigation work for which they would be charged three hundred thousand dollars ($300 000), I said it would be perfectly stupid to invest millions and millions of dollars without knowing whether water was in fact available."
>
> '' Mr. Barnard: So you want to say Mr Aldridge that in fact what the Defendant had in mind is to just brief Namwater to do a preliminary study but it was not the intention that after the preliminary study, Namwater would also do the supply of the water, is that what you say?
>
> Aldridge: My Lord that is precisely what I say."
> Mr. Barnard: Yes. The Defendant had the option whether to employ Namwater in future or not employ Namwater in future for subsequent work. ?
>
> Aldridge: Yes the question was whether this agreement implied that Aussenkehr would continue to use the services of Namwater and my reply was no that was not the understanding, they had the option either to do it or not to do it and the agreement was only to render these services and then a further decision could be made by the Defendant, whether to proceed or not to proceed with using NamWater's services."

(My underlining)

[26] Aldridge testified that he could think of two reasons why defendant chose the plaintiff in the execution of the project: (a) because Namwater is a non-profit making body whose services are relatively cheap, and (b) because Namwater has the necessary expertise and knowledge of the local Namibian conditions. As regards the alleged oral agreement on which the defendant now relies to escape liability, Aldridge remarked that if it was of such importance he could not understand why it was not included in the written agreement. Significantly, Aldridge conceded that the changed reality that the Ministry could only allocate 10 million cubic meters of water for the 2000 ha irrigation project, instead of the 32.2 cubic, had the result of making the envisaged project effectively unsustainable. As he put it:

> '' Mr. Barnard : But clearly Mr. Aldridge if the only water that were to be available for the extraction from the Orange River for the purposes of the scheme were to be a third of the user requirement, the matching infrastructure that had to cope with the user requirements would have been completely different, by logical implication, do you deny that?
>
> Aldridge : My Lord if it was determined, firmly established that the proposed irrigation scheme could only have a certain amount of volume of water per annum, it would serve no purpose to build a scheme that can supply much more than that." (My underlining)

[27] The cross-examination of Aldridge also established the following:

(1) Upon receiving the policy document from the Ministry same was not immediately communicated to Vasiljevic or the defendant.

(2) The defendant was not made aware that the Ministry would allocate only 10 million cubic meters instead of the 32.2 million cubic actually required.

(3) The defendant was not informed that it and not the plaintiff had to apply for the water abstraction permit.

(4) The consultants were not informed about the changed reality created by the Ministry's policy document. There was an opportunity at the meeting of the 21st January 2001 for the consultants to be apprised about all these matters.

It is a meeting which Aldridge described in the following terms under cross-examination:

> "Ok so the purpose of the meeting was to discuss the content of the report to see whether, to allow the Consultants to present the report, to discuss the contents of the report, to identify whether there were matters not addressed that should be addressed, whether there were aspects that were not properly considered etcetera. So the normal practice is, at such a report discussion decisions may be made of further work to be done or changes to be made or aspect to be further investigated and so forth. So this is a meeting that can be regarded as part of the execution of the project."

[28] The minutes of the meeting of the 21 January 2002 record:

"The following critical issues that required discussion were identified:

- with whom does the responsibility lie for obtaining an abstraction permit
- what does Namwater require of the Developer in terms of guarantees before the project will be implemented
- whether the project should be designed to accommodate additional consumers such as the proposed Aussenkehr town, new irrigation developments near the river, etc.
- who should conclude the power supply agreement with NamPower

The following decision was made:

- that Namwater will only require acceptable guarantees from an AAA rated bank before continuing with the project. A proper feasibility of the irrigation project may be a requirement for an abstraction permit or a requirement for the bank to provide the guarantees. Namwater itself will not require such a feasibility study.

The following recommendations were approved at the meeting:

It is recommended that:

4.1 The results of this report be discussed with the Developer.
4.2 Namwater should continue with the implementation of the project if so instructed by the Developer, subject to the following conditions:

4.2.1 that acceptable financial guarantees are provided by the Developer
4.2.2 that a water abstraction permit for irrigation purposes be issued by the MAWRD." (My underlining)

It must be apparent from the underlined part that NamWater did not require a feasibility study.

[29] Aldridge maintained that Namwater never accepted the information contained in the Ministry's letter of 23 November 2001 as the final word on the matter, as Namwater, after receiving the letter, sought audience with the Ministry in order to reverse the positions taken by the Ministry.

Aldridge testified that he was not aware at what stage the defendant had been informed by the plaintiff of the potential hurdles to the project in the light of the Ministry's positions contained in the document of 23

November 2001. He testified:

> My Lord what I can say is that if Namwater, if permission could not be obtained for abstracting water from the river, this scheme could not been established."

[30] The defendant established in cross-examination that at the meeting of 15 May 2002 between, on the one the one hand, the defendant's representatives and, on the other hand, the plaintiff and the consultants it was once again reiterated that 32.2 million cubic meters of water was an essential requirement for the irrigation of the proposed 2000 ha vineyards. It is apparent from a reading of that minute that the defendant was not informed that only 10 million cubic meters of water would be available instead of the 32.2 million cubic actually required.

[31] Aldridge accepted that after Namwater received the letter of 23 November 2001, the consultants were not instructed to stop with their work. This was in response to the suggestion in cross-examination that the plaintiff should have stopped the consultants as their report, when completed, would be useless. Aldridge said the reason the consultants were not stopped was because Namwater was still negotiating with the Ministry to allocate the 32.2 million cubic meters of water required for the project and entertained the hope that the Ministry would comply. That is clear from the following exchange between Mr. Barnard and Aldridge:

> "Mr. Barnard: up until the meeting of the 15th of May there was no indication that the Ministry would relent on its views as set out in the November 2001 fax … Namwater … thought that they could persuade the Ministry but there was no indication that the Ministry would relent. ---

> Aldridge: Ja. I must also say that again that the document of November was not the final document."
>
> " Mr. Barnard : Well they knew … that the report would be useless and they knew that if the Defendant wouldn't want to go on with the useless report it would have to in terms of the written agreement that Namwater was going to look at the Defendant for the payment of the amount that they are looking for now. And they allowed the cost to build up and build up and yet they don't say anything to the consultant despite their pertinent knowledge arising from the facts of the 23rd November 2001. Isn't that a bit unfair Mr Aldridge?
>
> Aldridge: --- If it was so it was unfair. Yes absolutely. --- But we have not established that it was so." (My underlining)

Aldridge did not agree with Mr. Barnard's suggestion that the definition of ''the service'' included the supply by NamWater of bulk water to the defendant.

[32] Aldridge accepted that the defendant had up until 27 May 2002 (if it were to comply with the 3 month period) to ask the plaintiff to proceed with the second phase of the project. Mr. Barnard put to Aldridge that it was impossible for the defendant to have performed all the requirements and preconditions within 12 days; and that the plaintiff's expectation of their performance by the defendant amounted to the plaintiff frustrating the agreement. Mr. Barnard also put to Aldridge that to require of the defendant to put up the equivalent of up to N$67 million on the basis of which a bank could have given acceptable financial guarantees on behalf of the defendant, amounted to a further frustration of the defendant's performance of the contract.

[33] As to whether it was possible for the defendant between the date the report was received and when the second agreement was to have been signed, to move on to the second phase of the project, the following exchange took place between Mr Barnard and Aldridge:

> "Mr. Barnard: Mr Aldridge, if Namwater knows as it did clearly that by imposing these requirements that they are going to impose requirements that simply cannot be met by the Defendant then they deliberately frustrated the continuation of the project.
>
> ALDRIDGE --- That is so My Lord. But I have to repeat that these requirements are not imposed by Namwater but by the Ministry. So it was not Namwater who deliberately imposed these restrictions or whatever, they were not imposed by Namwater and Namwater did not do it deliberately."

(I need to say in passing that in cross-examining Vasiljevic, Mr. Frank suggested that the plaintiff did not accept that the defendant had only 12 days from the 27 of May to proceed to sign the clause 5 agreement.)

[34] The next witness for the plaintiff was Willem Cornelius Venter who, as Aldridge's subordinate, was assigned project manager of the plaintiff to manage the written agreement between the plaintiff and the defendant. He bore knowledge about the agreement between the parties. Venter confirmed that the plaintiff had agreed to engage the consultants at the cost of N$881 084. Venter otherwise corroborated Aldridge on most aspects of his testimony. I will next refer to some new facts that he added to the plaintiff's case. Venter confirmed that on 23 October 2001 he wrote a letter to Vasiljevic in the following terms:

> "The Managing Director
> Aussenkehr Farms (Pty) Ltd
> P O Box 724
> Aussenkehr Farms
>
> 23 October 2001
>
> **AUSSENKEHR 2000 HECTARE IRRIGATION PROJECT: BULK WATER SUPPLY**
>
> Dear Mr Vasiljevic,
>
> Namwater on 16 October appointed the joint venture partnership known as Aussenkehr Bulk Water Consultants to assist us in the provision of the service agreed upon between Namwater and Aussenkehr Farms. The joint venture consists of Windhoek Consulting Engineers, Seelenbinder

Consulting Engineers cc, Manfred Redecker Consulting Engineer cc & Element Consulting Engineers.

Since your water supply needs and requirements form the basis of the service to be rendered by Namwater, staff members of the joint venture will approach representatives of Aussenkehr Farms from time to time to obtain information and to discuss various technical aspects. Your co-operation with and assistance to the joint venture will be appreciated.

The following milestone deliverables have been set for the execution of the programme:

Preliminary results (concepts and costs) – 16 November 2001
Draft planning & preliminary design report – 7 January 2002
Final planning & preliminary design report – 15 February 2002
Turn-key tender documentation – 15 February 2002.

It is essential that we should discuss the preliminary planning results as soon as they are available. Not only would we like to clear the water supply infrastructure concept with you, but we also wish you to indicate whether the proposed irrigation project would be feasible at the projected cost of water supply.

It would thus be appreciated if a meeting could be held in Windhoek during the week of 26 November 2001, on a mutually acceptable date that is still to be arranged. If you have a preferred date during this week, it would be appreciated if you could inform me.

Yours faithfully

W VENTER
Project Manager" (My underlining)

[35] Venter testified that the meeting envisaged in this letter never took place as Vasiljevic was not available. Venter's letter makes clear that the defendant was informed that the consultants were required to comply with certain deadlines and that they would have completed their work by the middle of February 2002. According to Venter, time was of the essence in relation to this project and for that reason the parties through the written agreement agreed on ''milestones'' so that all involved would honor the ''milestones'' and see to it that what was agreed was honored.

[36] Venter confirmed that the plaintiff received the policy document from the Ministry on 23 November 2001 and that the plaintiff wished to discuss it with the Ministry. He testified that the plaintiff regarded the document as a draft only at that stage

but ‘’as a risk to the project’’ which could be managed and that the plaintiff’s Habenicht wrote a letter to the Ministry seeking an opportunity to discuss its contents in so far as it negatively impacted on the 2000 ha project. Venter’s explanation for why the plaintiff was not bothered by the Ministry’s policy document suggesting that only 10 million cubic meters of would be available is best described in his own words as follows.

“Mr. Frank: Sorry, I just want to ask you: you came back, one question, and you said you recall you received a, well what you would receive a document emanating from Mr. Heyns the first on in November. And you’ve indicated that …it was a risk that you’d be able to manage. And if you can jut explain a little bit what do you mean by that?

Venter --- My Lord initially it was indicated to us from the client, since this was such a large project, that the project would be, the development of the vineyards would take place over, I can’ remember, four or five years. So there would be an initial requirement for water for the first phase, for the first year. And at that stage the estimate of the water requirement was fifty million cubic meters. So if Mr. Heinz indicated that ten is available, that is twenty percent of the fifty. So we thought well, as least they can proceed with the first twenty percent of the development. And then next thing that was very important to us is that since so much political involvement was also in this project and there was this investor’s conference that the upstream dams in South Africa had a lot of water available. And if an agreement could be reached with the South African authorities more water could be made available if this was really a gold mine, as was presented to us. So the fact that he had the information of ten was not the indication to us that it was a fatal flaw. There was a possibility of negotiations and further agreements with South Africa that could make the water available if it was a really feasible project.”

[37] Venter testified that the consultant's report upon being received was sent by him personally to the defendant's Vasiljevic on 17 February 2002. A meeting was then held with Vasiljevic on 15 May 2002 to discuss the way forward in the wake of the consultant's report. Venter stated that it was considered by NamWater at that stage that the 32.2 million cubic meters of water required for the project would be available ''in principle''.

[38] Venter testified that on 20 May 2002, the defendant was invoiced for the work done by the consultants and that following the invoicing NamWater did not receive any communication from the defendant disputing liability to pay the amount due. Venter testified that he made a call to the financial manager of defendant who said that there was no provision made in the budget and that the payment had to stand over. Venter explained how the total project costs was arrived at - distinguishing between internal Namwater costs and the external costs of the consultants. The total costs being N$775 109 and the defendant being charged only N$300 000 thereof in terms of the agreement.

[39] In cross-examination, Venter conceded that (1) the Ministry's policy document of 23 November 2001 was never sent to defendant and that (2) he could not recollect if the defendant was ever informed that only 10 million cubic would be available.

[40] Venter, like Aldridge before him, testified that all in NamWater remained confident that the 32.2 million cubic meters of water required for the irrigation scheme would be made available. The fact that this was

repeated in the presence of Piet Heyns at the meeting of 15 May without being contradicted by the latter, suggests to me that this was not an unreasonable attitude.

[41] In cross-examination of Venter Mr. Barnard disputed that the invoice presented complied with the written agreement because there was no tax invoice ‘’with a detailed cost break down attached thereto.’’

[42] At the end of the plaintiff’s case, the defendant’s case commenced with a very substantial and far-reaching amendment of the plea which Mr. Barnard explained was necessitated by a consultation held with Mr Habenicht. Mr. Barnard tendered wasted costs occasioned by the amendment.

The case for the defence

[43] The first witness for the defence was Helge Habenicht who was the chief-executive officer of NamWater until he left its employ in July 2002. He concluded the written agreement with Vasiljevic. As NamWater’s chief-executive officer at the time he had considered that Namwater should be made responsible for the abstraction and management of Namibia’s share of the water from the Orange River. He had formally proposed as much to the Ministry. Habenicht considered that this would help bring the Orange River in line with the rest of the country as far as water abstraction and management was concerned in terms whereof NamWater holds the water abstraction permit for a particular water source and in turn supplies water out of this resource to a

customer: an arrangement referred to in the evidence as the ‘’umbrella permit’’. Under that arrangement, I was told, the end- user does not and would not apply for a water abstraction permit and the Ministry’s officials would not be involved. Habenicht testified that he met Vasiljevic for the first time in 1999. He confirmed that the latter was not satisfied with his dealings with the Ministry and was hoping that Namwater would supply him with water he required for Aussenkehr farm. Habenicht confirmed that the defendant did not have the financial resources to on its own finance any big water development on the farm. He testified that it was NamWater’s mandate to (1) manage water infrastructure and (2) finance the establishment of water infrastructure. He confirmed that he had stated at the Stakeholder’s conference that ‘’if invited’’ NamWater would be wiling to finance and maintain the supply of a reasonable quantity of water to Aussenkehr. He called that a vision of NamWater’s as under the regime extant at the time only the Ministry could grant permits for the abstraction of water from the Orange River.

[44] Habenicht testified that between the Stakeholders conference and the signing of the agreement on 27 September 2001, he had met Vasiljevic once or twice only. He agreed with defendant’s allegation in the plea to the effect that it was agreed between the parties that the plaintiff would supply water to the defendant without defendant having to apply for a water permit to the Ministry and that the cost of the plaintiff’s ‘’service’’ (i.e. the consultants’ report) envisaged in clause 4.1 of the written agreement would be incorporated in a cost per cubic meter of water supplied by plaintiff to defendant after the bulk water supply infrastructure had been built and became operational; and that if the

plaintiff chose not to proceed with the construction of the bulk water supply infrastructure, it would itself bear the costs of the consultant's report and not pass that on to the defendant. As regards NamWater's application to the Ministry for the water abstraction permit in furtherance of the 2000 ha irrigation project, Habenicht stated that at the time Namwater did not have the right to abstract the water which the project required. However, in the light of the Stakeholders conference, and the President's and the Minister's support for the project, he saw the application for the water permit ''more as a formality rather than a cumbersome exercise''.

[45] In cross-examination Habenicht conceded that NamWater would only have been in breach of the written agreement if it did not deliver ''the service''. He accepted that even if NamWater had an umbrella permit for the Orange River, it would not have been sufficient to supply water to Aussenkehr without the requirements of a feasibility study and the environmental impact assessment being met. Habenicht conceded also that he and Vasiljevic appreciated at the time that Namwater could not have assisted Vasiljevic in the way he wanted until the authority to manage and supply water from the Orange River had actually passed on to Namwater. He also accepted, although he thought it unlikely, that his wish for NamWater to be allowed to manage and supply water from the Orange Water might not be granted by the Ministry.

[46] Habenicht testified in cross-examination that if it happened while he was the chief executive officer of NamWater that the Ministry required the defendant to apply for the water permit, he would have unilaterally stopped the study of the consultants. He maintained that

when the consultants' report came to hand he was no longer the chief executive officer of the plaintiff. He persisted in his view that it made business sense to cancel the study being undertaken by the consultants when it became apparent that NamWater could no longer apply for the water permit. He also felt it unfair for the plaintiff to burden the defendant with the costs associated with that study. As he put it "the ethical essence of that agreement is to say I cannot deliver a study for something which doesn't make sense and then ask the client to pay for that." Habenicht said had he been CEO at the time he would have written off the N$300 000.

[47] Habenicht confirmed that while he was still at the helm, NamWater had wanted the defendant to provide guarantees before NamWater could proceed with the building of the bulk water infrastructure. When the consultant's report was delivered, Habenicht testified, he was no longer the CEO as he was suspended in July 2002. This is so palpably false as the report came to hand in mid February 2002.

[48] Habenicht conceded that the Ministry refused to give NamWater the permit and the quantity of water asked for. Although he confirmed that he had made an oral agreement substantially in the form alleged by the defendant's plea and the evidence of Vasiljevic, he did not corroborate Vasiljevic's assertion that it was agreed that the plaintiff would supply water to the defendant without having to apply for a water permit. When asked in re-examination why the alleged oral agreement was not recorded in writing, Habenicht said:

> " Mr. Barnard: Mr. Habenicht arising from the questions from my Learned Friend, just before the conclusion of his cross-examination, will you just look at the document, which is the amended plea with the date 6th August at the top of the, you've already indicated when I asked you this morning and when dealt with paragraphs 2.3 of this document and when I dealt with paragraphs 4 of the document, you've indicated that, that was also agreed between you and Mr. Vasiljevic, can you tell the Court why you are satisfied not to record this agreement to writing?
>
> Habenicht: --- Because it was NamWater's obligation to deliver, it had been agreed upon, Namwater was acting along the lines we had agreed upon and therefore I didn't see any necessity even though Advocate Frank would have liked it, but I didn't see any necessity to actually reduce it to writing because I knew what I was talking about and I knew what we have agreed upon and Namwater was acting alike." (My underlining)

[49] The next witness on behalf of the defence was Dusan Vasiljevic who is the managing director of Aussenkehr Farms (Pty) Ltd. Vasiljevic testified that since acquiring the farm Aussenkehr in 1989, his experience with the Water Affairs officials of the Ministry led him to the belief that compared to South African farmers along the Orange River, Namibian farmers received less favourable treatment when it came to the allocation of water resources. He specifically detailed occasions when he felt Ministry officials treated the defendant unfairly in relation to the renewal of its water abstraction permits. According to Vasiljevic, when the idea of the 2000 ha irrigation project was conceived, he was concerned that they would face difficulties with the Water Affairs authorities in view of past experience. He said that the estimated costs for the development of the vineyards on the 2000 ha land was N$600, 000 000.00 with several investors taking part in the project. His explanation was that Aussenkehr Farm would be only one of several investors who would individually acquire land from the defendant and carry out their own operations in grape production on the Orange River.

[50] Vasiljevic said he was aware of a proposal made by NamWater to the Ministry in terms whereof Namwater would be allowed to manage and supply water from the Orange

River to potential end- users. This he saw as the answer to his problems with the Ministry. He concluded that NamWater's involvement would make it unnecessary for him to deal with the Ministry officials. Although Vasiljevic conceded, in chief, that he did not know if Habenicht was aware at the time of Aussenkehr's financial position, it was his evidence that the defendant saw it as NamWater's responsibility to develop the infrastructure for the abstraction of water from the Orange River and to supply it to the 2000 ha irrigation project. This, he said, was consistent with the statement by Habenicht at the Stakeholders conference and to which I have already made reference.

[51] Following the Stakeholders' conference, and emboldened by Habenicht's statement that NamWater would ''if invited'' provide and manage bulk water to potential end-users, Vasiljevic testified that he wrote a letter to NamWater to set the process in motion. The letter was in the following terms:

"To: CEO
NAMWATER
Windhoek

Att.: Mr. L Niipare

From: Mr. Dusan Vasiljevic
Aussenkehr Farms (Pty) Ltd

May 15, 2001

Re: Irrigation Project

We refer to the recent launching of the 2000 Hectare Irrigation Project by the Honourable Minister Helmut Angula and the subsequent site visit of NAMWATER delegates, led by Mr. Niipare.

Aussenkehr Farms (Pty) Ltd and their associate partner companies request you to prepare suggestions and quotations to supply the bulk water for the Project.

> For details of technical requirements, please liaise with the Chief Engineer of BICON Namibia.
>
> Yours respectfully,
>
> D Vasiljevic
> Managing Director"

[52] Vasiljevic testified that it was envisaged between the parties that if Aussenkehr was prepared and willing to conclude the agreement contemplated in clause 5 but NamWater could not perform, Aussenkehr could not be held liable for the cost of ''the service.'' Why the part of the oral agreement which is sought to be incorporated by way of rectification was not reduced to writing, he explained as follows:

> "Well this was a you know this, because the agreement was made with Mr. Habenicht, he, we both wanting something, we were desperate to get the water, the growers and he want it to get the water from Namwater, so it was, this is what we agreed and it's logical.
>
> My Lord without these points there will be no reason, no reason to do business with Namwater, we have a very capable irrigation engineers, we are the leaders in the, we actually pioneers of the grape grower industry in Namibia, we really don't need any other engineers to help us in our further extension unless we could get the water, unless somebody could build infrastructure for us and the one in the 4 point you know, that unless they can then finance this infrastructure the way it suits us, otherwise My Lord there was no need for us to even talked to Namwater." (My underlining)

[53] Vasiljevic testified that no one from Namwater had informed him of the Ministry's stance that the 32.2 million cubic meters of water required for the project would not be available. He stated that had he been informed that enough water for the project was not available, he would have stopped the project. Vasiljevic testified that he only became aware of the existence of the Ministry's policy document as part of the discovered documents for the purpose of this trial.

[54] Vasiljevic maintained that he had always understood that two options were being considered by the plaintiff and the defendant for financing the water supply infrastructure on the Orange River to make possible the 2000 ha irrigation project. The first option was that NamWater would fund the project and recover the investment cost by means of scheduled payments by the bulk water end-users; alternatively, the end-user would provide the finance for the establishment of the bulk water scheme upfront. For the defendant, Vasiljevic testified, the latter was never an option and that the defendant had, with Habenicht's knowledge, made an election in favour of the first option. Vasiljevic testified that NamWater had reneged on this by, amongst others, requiring the defendant to provide acceptable financial guarantees for the establishment by Namwater of the bulk water supply scheme - a proposition which Vasiljevic saw as being tantamount to requiring the defendant to have the money upfront to support the infrastructure development.

[55] Vasiljevic testified that no- one from NamWater informed him - as soon as the information became available - that the Ministry required the defendant as the owner of the land to apply for a water permit. He said that was only finally made clear to him on 15 May 2002. He also stated that the fact that NamWater would require acceptable guarantees from an AAA rated bank before continuing with the project, and the other requirements such as a feasibility study and an environmental impact assessment only became known to him through the consultant's report released in February 2002 and discussed with him on 15 May 2002. Vasiljevic considered the further requirements relating to a feasibility study and an environmental impact assessment as insurmountable

hurdles. He considered the requirements very vague and made the point that no one took the trouble to explain to him what they entailed. He surmised that it would have taken between six months to one year to comply with the requirements. This when the defendant had only up to 27 May 2002 to enter into the second agreement with Namwater in terms of the written agreement. On cross-examination Vasiljevic accepted that the requirements for the land owner to apply for the permit and for it to submit a feasibility study and environmental impact assessment were those of the Ministry.

[56] Vasiljevic's contention was that when it became apparent to him at the meeting of 15 May 2002 that the landowner would have to apply for the water permit, he considered the project dead. Yet, one De Kok, a partner and fellow representative of Navico , who also attended the meeting, stated at the meeting that both the business plan and the feasibility study would be prepared within 4 weeks, as well as completing other formalities required for application for the irrigation permit. G de Kok and C Muir even went as far as to '' provide an overview of the envisaged time table'' of activities to be undertaken – beginning in June 2002. Muir even suggested that the contract for the construction of the bulk water supply infrastructure start no later than October 2002. All these, clearly, do not support Vasiljevic's assertion that he, and presumably the other investors, considered the project dead. In fact, no contrary views were expressed at the meeting by Vasiljevic. There is no record in the minute of the 15 May 2002 meeting that Vasiljevic stated in terms that the defendant would not proceed with the project in view of the changed reality. It also became clear during cross-examination that after the meeting of 15 May 2002 there is no written record of the defendant informing the

plaintiff that it was no longer interested, nor is there any written evidence, the invoice having been sent, that the defendant at any stage disputed liability to pay the invoice.

THE DEFENCES CONSIDERED

[57] The defendant relies on several defences to escape liability. It has relied a great deal on the notion, in different contexts, that there was ‘’frustration’’ in the continuation of the 2000 ha irrigation scheme which defendant and others wanted to pursue: either because of the conduct of the plaintiff and its consultants, or that of the Ministry.

consultants' failure to perform the service fully

[58] In the first place it contends (vide paragraphs 8-15.2 of the defendant's main heads of argument) that the consultants rendered an incomplete service in that they failed in their duty to do a feasibility study and an environmental impact assessment and recommended to the plaintiff, who acted thereon, that the defendant be required to perform those functions. Vasiljevic testified that the consultants' failure to comply with the terms of reference under which they were appointed was vicariously attributable to the plaintiff. Mr. Barnard submitted that the plaintiff failed to prove that the plaintiff's consultants complied with their obligation as aforesaid. He submitted that since the plaintiff vicariously failed to perform this essential obligation resting on it, it is not entitled to enforce against the defendant the obligation to pay for the work performed by the consultants. The plaintiff's vicarious breach, it is said, was material and effectively made it impossible for the defendant, in the short time it had available, to conclude the

further agreement contemplated in clause 5, thus making it impossible for the defendant to implement the 2000 ha irrigation project.

[59] This defence can be very briefly disposed of. Paragraph 7(c) of the plea is devoted to the issue of the *feasibility study* and the *environmental impact assessment* of the project. As I read that part of the plea, the complaint is that the conditions relating thereto were not the defendant's obligation and that, in any event, they were so vague as to make it impossible for the defendant to understand what was required and that compliance therewith would delay the project to such extent as to terminate the agreement between the parties. As I understand it, the plaintiff's response to this argument is that the requirement for the feasibility study and the environmental impact assessment was one imposed by the Ministry and not by the plaintiff.

[60] The defence that the consultants, and the plaintiff vicariously, failed in their duty to do a feasibility study and an environmental impact assessment simply was not pleaded; and consequently, the plaintiff was not required to meet it. That defence therefore does not avail the defendant. In any event, at the meeting of 15 May 2002, the following is attributed to C Muir who attended as an advisor of Navico:

> ''3.5 **Technical Status Quo of Project**
>
> 3.5.1 Mr C Muir gave a brief overview of the project stating that a planning and preliminary design report as well as a turnkey tender document for the bulk water supply to the project had been completed by the Aussenkehr Bulk Water Consultants on behalf of NamWater, but that this constituted only one component of the proposed irrigation project.

> 3.5.2 Current discussions with the developers indicate the desirability to extend the bulk water supply to have five terminal points instead of one as planned at present in order to develop "vertically" instead of "horizontally''
>
> 3.6 **Environmental Aspects**
>
> 3.6.1 Mr C Muir reported that an environmental impact study did form part of the documentation for the bulk water supply Infrastructure , but advised that an EIA [Environmental impact assessment] would have to be undertaken for the proposed extensions to the bulk supply infrastructure (5 take-off-points instead of one) and other components of the project.'' (My underlining)

[61] The above underlined passages demonstrate that the defendant and the other developers had studied the consultants' report and found therein an environmental impact assessment report but wished to make modifications in the way the final plan for the infrastructure would look to meet their needs. They also wished to do further work in the form of an environmental impact assessment- the very thing Vasiljevic says represented an obstacle to the project.

imposition of conditions frustrating performance by defendant

[62] That leaves for consideration the issue whether the plaintiff imposed on the defendant conditions for a feasibility study and an environmental impact assessment which it could not meet and in that way frustrated performance. Aldridge and Venter testified that those conditions were imposed by the Ministry in the 23 November 2001 policy document. Habenicht confirmed as much. Needless to say, Act 12 of 1997 in any case requires the plaintiff to provide water by *environmentally sound and suitable means*. At the meeting of 15 May 2002 these conditions were the subject of discussion with

Habenicht and Vasiljevic also present. One De Kok who attended the meeting as part of Vasiljevic's delegation - in relation to the requirement for a feasibility study and the environmental impact assessment - said those could be done within 4 weeks. Vasiljevic did not contradict him when one would have expected him to do so in the light of the stance he now takes. Not only that- he did not state there and then that those requirements spelled the end of the agreement and the project as he now does. Termination of a contract must be communicated to the other side to have any effect in law: *Tsabalala v Minister of Health* 1987(1) SA 513 at 520 I. That defence, therefore, does not avail the defendant.

consultants' report useless for defendants' purposes

[63] The next defence relied on by the defendant is that the report of the consultants was rendered ''useless'' for the defendant's purpose by the policy document of the Ministry, first made known to the plaintiff on 23 November 2001 that only 10 million cubic meters of water would be available for the 2000 ha irrigation project. I find that the plaintiff was not able to disprove the defendant's version that it had never been made aware at any stage of this decision of the Ministry. A related aspect of the defence under this heading relates to the failure to communicate the fact that the defendant had to apply for the water permit. The defence case, which was never rebutted by the plaintiff, is that it had never wanted to apply for the permit itself because of past unpleasant experience with the Ministry. The fact that the plaintiff in fact applied for the permit and sought to persuade the Ministry to reverse its decision when the latter insisted upon the defendant as landowner applying, buttresses the defendant. The defendant maintains that because it

was no longer possible for NamWater to be granted the permit, the whole basis for the agreement fell away and the plaintiff at the stage where that became known should have informed the defendant immediately and ought to have halted the work of the consultants.

[64] The defendant established that prior to approaching the plaintiff in 2001 with regard to the water requirements for the 2000 ha irrigation project, it had had dealings with the Ministry about which it felt aggrieved. The plaintiff could really not gainsay this allegation.

[65] In my view, the defendant's assertion that it wished to obtain water from NamWater and not the Ministry, is irrelevant. The fact that that is what it wanted cannot make the plaintiff guilty of a breach when the requirement that the landowner should apply was one which emanated from the Ministry. As at 15 May 2002, the defendant knew it had to apply for the water abstraction permit. By then the two deliverables had been finalized by the consultants and delivered to the defendant.

[66] There is no doubt that both Vasiljevic and Habenicht knew NamWater did not have the right to abstract water and place it at the disposal of the defendant without government approval. Because the 2000 ha irrigation project had the support of the government both expected that NamWater would be given the right to extract water and place it at the disposal of the defendant. However, as Mr. Frank submitted, they both must have foreseen the risk in the water permit not being granted. That such a risk must

have been foreseen is amply demonstrated by the last sentence in Habenicht's letter dated 24 August 2001 *supra* (copied to Vasiljevic*)* in which he stated:

> '' Similarly, if you resolve not to award a permit, please inform us in order that we can advise our client of the situation''.

The assertion that Habenicht guaranteed 32.2 million cubic meters of water for the 2000 ha irrigation scheme is therefore both improbable and implausible. In the first place, Habenicht stated in terms that he made no such guarantee and at all events Habenicht could not have agreed to grant rights which NamWater did not have.

[67] The obvious failure of the plaintiff to communicate with the defendant until 15 May 2002 about who was to apply for a water permit and that the Ministry intended to make available an insufficient quantity of water for the irrigation scheme - raises the question whether the plaintiff should not be non-suited. Should the plaintiff have stopped the work of the consultants when those facts were known? The duty to have informed the defendant could only arise if I should find that the defendant would have been at liberty at that stage to call off the performance of the service. It should be borne in mind that as at 23 November 2001, the consultants had already been appointed and had commenced with their work. They therefore had vested rights and could not simply be wished away. Venter's letter of 23 October 2001 confirms his oral evidence at the trial that time was of the essence in the performance of the obligations under the written agreement. In that letter Vasiljevic was informed that as early as 16 November 2001, the consultants were expected to produce results under their mandate. The plaintiff would have been obliged to compensate the consultants for the performance of their mandate. In my view, therefore, nothing turns on the failure of the plaintiff to have informed the defendant at

the time that the policy document became known. Good business practice would dictate that they should have, but I find no legal consequence in the omission. In any event, as at 15 May 2002, the defendant was aware of the requirement that it had to apply for the water permit. No indication was given at that meeting or thereafter that it no longer felt bound to the performance of the service under the written agreement. Since it knew at that stage already that the consultants had completed their work one would have expected them, in view of the posture they now take, to have told the plaintiff in unequivocal terms that the project had to come to an end.

[68] Habenicht's evidence was that had the Ministry's policy position that the defendant, instead of NamWater, should apply for the water permit been known to him while he was the head of NamWater, he would have stopped the work of the consultants immediately. The fact of the matter is that he was still at the helm of NamWater when the initial policy position was received on 23 November 2001. He was aware of it because by letter dated 30 January 2002 he wished to meet with the Ministry to have it reversed. Nothing has been pointed to me in the evidence that Habenicht took any steps to stop the work of the consultants or even as much as warn the defendant of the potential adverse impact of the Ministry's policy position on the 2000 ha project. It is common cause that the consultants' report was received in February 2002 and delivered to the defendant in the same month. Prior to that, i.e. on 21 January 2002, Habenicht chaired an internal NamWater meeting with the consultants where, in the course of the discussion on the draft report, the issue was not even raised. On the contrary, Habenicht set about having agreed by the corporation requirements that the defendant should be called upon to meet.

He then was present at the meeting of 15 May 2002 with the defendant present - well after the report of the consultants had been received against the backdrop of the policy position of the Ministry - but never took the trouble of informing the defendant that he would not hold them liable for the costs which up to then had been incurred in respect of the consultants. For these reasons, I do not find Habenicht a credible witness. The defence under this heading also fails.

considerably less water available than actual requirement

[69] The alleged breach by the plaintiff here arises from the policy document of the Ministry to plaintiff whose content was finally confirmed on 5 August 2002 but never communicated to the defendant. As at 23 November 2001- it stands to reason- the plaintiff had reason to believe that the amount of water required for the project might not be available. I am satisfied that because of what transpired at the meeting of 15 May 2002 in Heyns' presence, it was reasonable for the NamWater officials to entertain the hope, as they did, that in spite of the Ministry's 23 November 2001 policy document , the requisite quantity of water would be available for the project. It was well after the defendant had been invoiced for the consultants' report – in fact on 5 August 2002- that the Ministry finally stated that only 10 million cubic meters of water would be made available. The defendant fails to distinguish between, on the one hand, the agreement between the parties and the obligations flowing therefrom and, on the other hand, the requirements imposed by the Ministry who at the end of the day had to grant the water

abstraction permit ; requirements which without doubt adversely impacted on the written agreement. The plaintiff cannot be in breach because of the latter.

oral agreement concluded before written agreement and to be incorporated through rectification

[70] The next defence is based on an alleged oral agreement concluded between Habenicht and Vasiljevic before the written instrument between the parties was signed. The alleged oral agreement is to the effect that if plaintiff for ‘’whatever reason’’ could not, after the service was rendered, enter into a further agreement with the defendant to supply 32.2 million cubic meters of water for the 2000 ha project without defendant having to apply to the Ministry for a water permit, the cost of the service would be borne by the plaintiff and would not be passed on to the defendant. It is pleaded that the terms of the alleged oral agreement are not precluded from incorporation in the written agreement by the non-variation clause because (i) it is to be strictly interpreted so as not to exclude an ‘’addition’’ , and (ii) the ‘’unconscionable conduct’’ and ‘’ bad faith’’ of the plaintiff precludes it from relying on the non-variation clause.

[71] The terms of the alleged oral agreement are fully pleaded in paragraphs 41. 4.2 and 4.3 of the amended plea. The gist of it is that it was orally and expressly agreed that after ‘’the service’’ had been satisfactorily performed, the two parties would enter into an agreement in terms of which the plaintiff would supply 32.2 million cubic meters of water to the defendant and others without the defendant applying for a water permit from

the Ministry for the purpose of realizing the 2000 ha irrigation project; and that the costs related to ‘’the service’’ envisaged in the written agreement concluded on 27 September 2001 would be incorporated in the costs per cubic meter of water supplied by the plaintiff to defendant and others. It is further alleged that the costs of the service would only become enforceable if the failure to conclude the further agreement contemplated in clause 5 of the written agreement was due to a refusal of the defendant to agree to a new agreement while the plaintiff remained ready to supply the requisite quantity of water without the defendant applying to the Ministry therefor and only charging for ‘’the service’’ as part of the costs of cubic meter of water supplied.

[72] It is pleaded that ‘’ the parties, through a *bona fide* error and/or oversight, failed to record their mutual agreement and/ or common intentions …in the written agreement’’. Rectification is then sought. Habenicht and Vasiljevic testified that the parties knew what they signed and did not find it necessary to record the alleged oral agreement in the written instrument because it was so logical or self-evident as not to require inclusion in the written instrument. That evidence does not support the plea that through *bona fide* mistake or error they failed to record their oral agreement in writing. Be that as it may, this case turns not so much on whether the alleged oral agreement meets the criteria entitling the defendant to rectification but on whether the existence of the oral agreement has been proved by the defendant who bears the *onus* on a balance of probabilities. That onus is discharged by facts ‘’in the clearest and most satisfactory manner’’; and it is recognized that such a claim is difficult to prove: *Bardopoulus and Macrides v*

Miltiadous 1947 (4) SA 860 (W) 863-864 - approved in *Soil Fumigation Services v Chemfit Technical Products* 2004 (6) SA 29 at 38J-39A (SCA).

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[73] That the oral agreement relied on is inconsistent with the written instrument is not in doubt. Clause 4.2 thereof makes it clear that the only circumstance in which the defendant would not pay for the service is if the parties entered into the clause 5 agreement within 3 months of the contract period. If that agreement was entered into, the costs of the service was to be ‘’incorporated and paid in accordance with the provisions of’’ the new agreement. To the extent that the plea postulates that the parties orally agreed that there would be other circumstances (as set out in the plea) not recorded in the agreement, the alleged oral agreement is in conflict with the written instrument. Because of the obvious conflict between the written instrument and the alleged oral agreement, one would have expected Habenicht to have informed Aldridge and Venter about it. After all, it was they who in NamWater were responsible for overseeing the implementation of the written agreement. I consider this a circumstance pointing to there never having been any oral agreement in the terms alleged.

[74] In cross-examination Vasiljevic could not satisfactorily explain why what had since become his main defence in this case – being the alleged oral agreement with Habenicht - was not his original defence. He even suggested that the change in his plea came about only when, after the plaintiff’s case, he and his counsel consulted with Habenicht – giving the impression that had it not been for that consultation with Habenicht, he might not have been aware of the belated defence. This undermines Vasiljevic’s claim that the defence he now relies on is founded on the oral agreement that had led him to conclude

the agreement with the plaintiff then represented by Habenicht. The undisputed evidence of Aldridge is that the draft agreement had been presented to Mr. Diekman acting on behalf of the defendant for comment. Aldridge testified that Mr. Diekman returned the draft to him having proposed some changes whereupon it was signed by both parties. The inference is inescapable that Mr. Diekman discussed the draft with the defendant's Vasiljevic before signature. I find it improbable that Mr. Diekman, knowing of the existence of the oral agreement which the defendant now relies upon, would not have insisted upon its inclusion in the final draft that was signed by the parties; or at the very least have placed it on record that there was an oral agreement that had to be read together with the written instrument. I find it even more improbable that Vasiljevic would not have brought the all-important oral agreement to the attention of Mr. Diekman. In my view, this circumstance is another indication that no such oral agreement existed. The *onus* was upon the defendant to prove the oral agreement and I find that it failed to prove its existence on a balance of probabilities. In fact the probabilities point in the opposite direction.

[75] The version of events which, if true, would allow the defendant to escape liability based on the alleged oral agreement is not supported by the objective evidence or in any of the contemporaneous correspondence that passed between the parties. The alleged oral agreement is corroborated only by Habenicht who I found not to be credible in a material respect and who, on his own admission, left the plaintiff's employ under acrimonious circumstances. I am unable to find in the evidence any plausible explanation for why he never shared the gist of the oral agreement with the rest of NamWater.

Plaintiff's requirement of financial guarantees repudiated written agreement

[76] The final defense is that the plaintiff in effect repudiated the written agreement by requiring the defendant to provide acceptable financial guarantees for the construction of the bulk water infrastructure. The defendant says that not only was it the responsibility of the plaintiff to establish the infrastructure, but it knew that the defendant did not have sufficient resources to provide such a guarantee. It is alleged that the defendant's only obligation was to guarantee that there would be end-users for the bulk water to be supplied by the plaintiff. The defendant's case is that the plaintiff's insistence upon the financial guarantees amounted to a repudiation of the written agreement which absolved the defendant from its obligations thereunder

[77] As at 15 May 2002, the defendant's Habenicht knew that the defendant as landowner had to

apply for the irrigation permit and that NamWater required bank guarantees in order to proceed with the construction of the bulk water infrastructure for the 2000 ha irrigation project. Habenicht had made it clear at the meeting of 15 May 2002 that if NamWater were to assume a financial risk in the project, it would become a 'business risk proposition' which would require consideration of a 'corresponding profit component' and that in any event such an exposure of Namwater would require approval of the government. Aldridge and Venter stated that the requirement for guarantees to be provided by an AAA rated bank was agreed at an internal NamWater meeting with the consultants held on 21 January 2002. In the light of Vasiljevic's evidence that the AAA rated bank issue was not of great significance , I will accept *that* requirement was not a matter of great moment, and that what was required was financial guarantees to enable Namwater to proceed with the project; financial guarantees which, in any event, the

defendant considers amounted to requiring the aspirant developers of the vineyards to provide the funds upfront for the construction and establishment of the bulk water irrigation scheme which they saw as the responsibility of the plaintiff.

[78] In the light of Vasiljevic's testimony that the only guarantee that the defendant was required to give was that there would be end-users of the bulk water, I find it curious that since becoming aware of the financial guarantees required, he made no effort to convey his displeasure to NamWater. On the contrary, at the meeting of 15 May 2002, de Kok made clear that the Navico investors would be able to meet all requirements within a matter of 4 weeks. Vasiljevic not only did not contradict him but raised the issue of guarantees as a concern but never stated that it was the end of the project. I am satisfied that the plaintiff's requiring the defendant to provide financial guarantees for the establishment of the bulk water infrastructure did not have the effect of frustrating the defendant's and others' continuation with the 2000 ha irrigation project. I am fortified in this conclusion by the conduct of Vasiljevic. Since receiving the consultants' report in February 2002 he was aware of the requirement for financial guarantees. I have not been pointed to any evidence that the defendant (who throughout remained legally represented) in writing or orally objected to any one in NamWater about this requirement. Similarly, I have not been pointed to any evidence that he informed NamWater officials that he considered the requirement a breach which terminated the contract. As shown by the minute of the meeting of 15 May 2002, knowing of this requirement (having studied the report as shown by Muir's comments) the developers in fact went on to discuss ways to move forward, including identifying further actions to be taken.

[79] Even if I am wrong in that conclusion and that in fact the plaintiff's insistence upon acceptable financial guarantees amounted to repudiation entitling the defendant to terminate, the defendant failed to prove that it exercised its election to terminate. As Nienaber JA said in

Datacolar International (Pty) Ltd v Intamarket (Pty) Ltd 2001(2) SA 284

(at para [28] at 599E-I):

> '' The innocent party to a breach of contract justifying cancellation exercises his right to cancel it (a) by words or conduct manifesting a clear election to do so (b) which is communicated to the guilty party.''

(See also: *Swart v Vosloo* 1965 (1) SA 100 (A) at 105F-H; *Miller and Miller v Dickinson* 1971 (3) SA 581(A) at 587H-588A.)

[80] I find no evidence of the exercise of such an election by the defendant. This defence must therefore also fail.

defective invoice

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[81] The defendant in rearguard action maintains that the invoice does not contain sufficient detail as required by the written agreement. The invoice presented on 20 May 2002 addressed to the defendant identified the activity in respect of which the defendant was being charged and set out the various categories of costs which were related to that activity making plain what NamWater remained responsible for and what was the

responsibility of the defendant. The activities and the associated costs were also set out in some detail in the further particulars which

defendant requested and was supplied. I am satisfied that there is no merit in this defense.

Order

[82] Accordingly, I have come to the conclusion that the defendant's claim to rectification must fail and that the plaintiff, having proved its case on a balance of probabilities, is entitled to judgment:

(i) In the amount of N$ 345, 000.00 plus interest thereon at the prime lending rate of First National Bank of Namibia from time to time, until payment thereof; with

(ii) Costs, occasioned by the employment of one instructing and two instructed counsel; including wasted costs occasioned by the abandonment of the defendant's counterclaim, and the wasted costs flowing from defendant's amendment of its plea at the end of the plaintiff's case

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DAMASEB, J P

ON BEHALF OF THE PLAINTIFF: Mr. Theo Frank, SC

Assisted by: Mr. J Schickerling

INSTRUCTED BY: Lorentz & Angula Inc

ON BEHALF OF THE DEFENDANT: Mr. T A Barnard

INSTRUCTED BY: Diekmann Associates