REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 820/2007

In the matter between:

NEDBANK NAMIBIA LIMITED	**PLAINTIFF**
and	
THE NAMIBIAN TUBERCULOSIS ASSOCIATION	**FIRST DEFENDANT**
LUCKY BRINKMAN	**SECOND DEFENDANT**
RENETTE BALERIE LOUW	**THIRD DEFENDANT**
HEINRICH AMUSHILA	**FOURTH DEFENDANT**

Neutral citation: *Nedbank Namibia Limited v The Namibian Tuberculosis Association* (I 820/2007) [2012] NAHCMD 94 (30 November 2012)

Coram: PARKER AJ

Heard: **5 March 2012 – 16 March 2012; 24 September 2012 – 26 September 2012; 21 November 2012**

Delivered: **30 November 2012**

Flynote: Declaration issued subsequent to issuance of simple Summons – Such Declaration required in terms of the rules of court – Summons capable of interrupting prescription where Declaration merely clarifies and particularizes claim made in the Summons.

Flynote: Delict – Aggrieved party induced to enter into contract on basis of fraudulent misrepresentation – Aggrieved party has a right of action in delict if he or she chooses not claim in contract.

Summary: Prescription – Extinctive prescription – Simple Summons issued for a debt or liquidated demand before prescription has run out – Declaration issued subsequent to issuance of simple Summons – Declaration required by the rules of court – *In casu* Declaration merely particularizing and clarifying grounds upon which action instituted by the Summons is based in the alternative – Declaration not creating new cause of action – Accordingly such Summons (with accompanying Declaration) will interrupt prescription.

Summary: Delict – Fraudulent misrepresentation – Liability for – Liability indicates actual pecuniary loss caused intentionally and wrongfully – To succeed plaintiff should establish that the actual consequence of the wrongful act (the loss) was intended by the defendant – In instant case aggrieved party induced to enter into contract on the ground of fraudulent misrepresentation by fraudulent agents – Aggrieved party's right of action is based on either the contract or delict – Aggrieved party may choose not to claim rescission of the contract but pursue a claim in delict – *In casu* plaintiff's alternative claim is in delict on the basis of fraudulent misrepresentation by fraudulent agents.

ORDER

(a) The special pleas raised by the defendants are dismissed.

(b) Judgment for the plaintiff in the amount of N$156 678,66, plus simple interest on that amount at the rate of 20 per cent per annum calculated from 16 October 2006 until date of full and final payment to the plaintiff by the second defendant and the fourth defendant jointly and severally; the one paying , the other to be absolved.

(c) The second defendant and fourth defendant must pay the plaintiff's costs, jointly and severally; the one paying, the other to be absolved on the scale as between party and party, and the costs include such costs as are occasioned by the employment of one instructing counsel and one instructed counsel.

JUDGMENT

PARKER AJ:

[1] The plaintiff has instituted action against the first defendant, second defendant, third defendant and fourth defendant. The third defendant is not before this court in the instant proceeding. Where the context allows, I shall in this judgment refer to the rest as simply 'defendants'. The plaintiff is represented by Mr Mouton; the second defendant by Mr Kaumbi and the fourth defendant by Mr Kamanja. This matter revolves around international donor funding of health projects in Namibia; particularly a project to reduce the incidence of TB in the country.

[2] The action is against the defendants jointly and severally and to the extent that one of them pays, the others shall be absolved from further payment. In the Summons the plaintiff claims payment of the sum of N$156 678,66 being the balance due and payable in respect of moneys lent and advanced on the overdraft account number 11000154964 (new account number 013297000726) by the plaintiff to the defendants at the defendants' special instance and request. Simple Summons issued from the office of the registrar on 20 March 2007. Thereafter the plaintiff filed a Declaration, and it was issued from the office of the registrar on 25 March 2009. It is the issuance of the Declaration that is the subject matter of the special plea on the basis of extinctive prescription; and it is dealt with below.

[3] The provenance of this case lies in the time the second defendant approached the plaintiff's officials, particularly Ms Kipping (a witness for the plaintiff), to open an account with the first defendant as the account name. At that time there had existed in the books of the plaintiff's more than one account with the first

defendant as the account name. The explanation – as I understand it – is that every time the first defendant was engaged in a new project a separate account was opened for any such new project specifically.

[4] The second defendant approached the plaintiff's officials, particularly Ms Kipping, in the first week of April 2005 to open an account with the plaintiff's Main Branch (in Windhoek) with the first defendant as the account name and for a specific project, namely 'TB Project'. The second defendant's request was accompanied by certain documents which are gathered in the plaintiff's bundle of discovered documents ('the Bundle'), eg (a) Resolution by a Company to Obtain Banking Facilities (p 9 of the Bundle), (b) Passport details of the second defendant (p 6 of the Bundle), (c) Passport details of the third defendant (p 7 of the Bundle), (d) Passport details of the fourth defendant (pp 8.1, 8.2 and 8.3 of the Bundle), and (e) a letter (dated 4 April 2005) on the headed paper of the first defendant and under the hand of the second defendant, and in his capacity as Director of the first defendant (p 11 of the Bundle). The title of the letter reads: 'Re: Board Resolution – Opening of a current account'. This letter is so important in the present proceeding – as shall become apparent in due course – that I reproduce the contents here:

'Re: Board Resolution – Opening of a current account

The board of Trustees on its meeting held on the April 1, 2005 hereby resolved to open a current account for the new Global Fund Supported TB Project.

The name of the account is to be: Global Fund TB Project.

The following members are signatories to the account.

1. Mr Heinrich Amushila (ie the fourth defendant)
2. Ms Reinette Louw (ie the third defendant)
3. Mr Lucky Brinkman (ie the second defendant)

Any two of the signatories are mandated to sign for transaction purposes.

For further clarifications please contact us at 0812500070.

Yours truly
(Lucky Brinkman)
(Signature)'

[5] The contents and import of the 4 April 2005 letter is confirmed by the defendants when they affixed their signatures to 'Resolution by a Company to Obtain Banking Facilities', a proforma produced by the plaintiff for use by the defendants (and presumably other prospective clients) (p 9 of the Bundle). Kipping filled it in, in her handwriting the words 'The Namibian Tuberculosis Association', according to information – as I find – supplied to her by the second defendant, after the printed words 'At Meeting of the Board of Directors of'. The second defendant and the third defendant confirmed to the plaintiff that there had in fact been such a meeting of the 'Board of Trustees' of the Namibia Tuberculosis Association (the first defendant) when they completed the document as follows:

'(Signature)
Director: Lucky Brinkman (the second defendant)'

'(Signature)
Secretary: Renette Louw (the third defendant)'

And the document is '(D)ated at Windhoek on the 1st day of April 2005'.

[6] When he approached the plaintiff's officials, as aforesaid, the second defendant informed Kipping that a new account with the first defendant as the account name was to be opened for a specific Project, namely the 'TB Project' under the Global Fund. Armed with the information and the aforementioned documents given to her by the second defendant, Kipping proceeded to carry through the process required for the opening of such account. In that regard, Kipping completed the part of the 'Certificate of Signing Authorities – Business Accounts' (p 4 of the Bundle), that is, before the details beginning with 'WE, THE UNDERSIGNED ….' Each of the three defendants individually completed the rest of the proforma relating

to him or her. In this regard the following entries are significant for our present purposes:

'Heinrich Amushila: Trustee: 69012900727 (Identity Number): Specimen Signature (signed by him)';

'Renette Louw: Trustee: 6512050800317 (Identity Number): Specimen Signature (signed by her)'; and

'Lucky Brinkman: Director: 7009240000590 (Identity Number): Specimen Signature (signed by him)'.

The evidence is clear and sufficient that two of these people could sign any instrument respecting this TB Project account, with the first defendant as the account name, including withdrawing and transferring moneys from that account.

[7] As respects 'Cheque Account Opening Form Estate/Trust' (p 3 of the Bundle), too, Kipping completed the parts of the proforma beginning with 'Main' and ending with 'Windhoek'. The signatures appearing on the 'Opening Form' are those of the defendants, and the signatures were affixed on the Form individually by the defendants themselves. The same applies to the Business Account Signature Card (p 5 of the Bundle). Kipping filled in 'NAMTA (The Namibian Tuberculosis Association)', and the three lines following after it were filled in by the defendants individually thus:

'Heinrich Amushila: Trustee: Specimen Signature (and his signature)'; 'Renette Louw: Trustee: Specimen Signature (and her signature)'; and 'Lucky Brinkman: Director: Specimen Signature (and his signature)'.

[8] Other relevant documents in the Bundle are these: A letter dated 18 May 2005, under the hand of Dr K Shangula, the Permanent Secretary of Ministry of Health and Social Services (MOHSS) and Chairperson of NACCATUM. The letter is entitled 'Global Fund Individual Recipient Contract Agreement' and is addressed – significantly – to:

‘Mr L Brinkman (second defendant)
Namibia Tuberculosis Association
P O Box 60653
Katutura’

[9] Dr Shangula informs the second defendant, ‘Director’ of the Namibia Tuberculosis Association, that funds under the Global Fund were expected soon. The letter encloses a signed copy of the Project Grant Agreement (under the aupices of the Namibia Global Fund Programme) entered into between MOHSS (as the Principal Recipient) and the Namibia Tuberculosis Association (the first defendant) as the Individual Recipient. In the agreement the following relevant entries are crucial:

‘12. Individual Recipient Contact Person Name: Lucky Brinkman (the second defendant)
Title: Director
. …’

Furthermore, the Agreement is entered into on behalf of the Tuberculosis Association of Namibia (the first defendant) by – significantly – ‘Lucky Brinkman, Director’ (ie the second defendant), and is witnessed by the third defendant. Additionally, at para 15 of the Agreement is the following telltale and significant entry:

‘(Name): Lucky Brinkman
(Title: Director)’

[10] After having satisfied herself that the information and documents put at her disposal by the second defendant were sufficient for the opening of the account as requested by the second respondent, Kipping approached the Department whose responsibility it was to physically open the account. And so enters Ms Rochelle Kruger (another plaintiff witness) who was entitled to approve or reject the application to open the TB Project account. On the strength of the aforementioned documents and information that were placed before her by Kipping, Kruger approved the opening of the account at the plaintiff’s Main Branch (in Windhoek) with the first

defendant as the account name, i.e. The Namibia Tuberculosis Association, and in respect of the Association's TB Project account.

[11] In his testimony the second defendant states more than once and with great verve that he was authorized by the Board of Trustees of the Namibia Tuberculosis Association Trust of which he was employed as its Director to open an account at the plaintiff's with that Trust as the account name, and that is what, according to him, he did. It is the second defendant's further testimony that he was also authorized to obtain an overdraft facility for the Trust to enable the Trust to carry out its activities until funds that were to be made available to the Trust by the Global Fund (under the aupices of MOSS) were received. Resulting from the second defendant's request an overdraft account (Number 1609145224) was opened for the benefit of the first defendant at the special instance and request of the second defendant, as described previously.

[12] Thus, on 4 April 2005 to 15 October 2006 – or thereabouts – the plaintiff lent and advanced to the first defendant moneys in respect of the overdraft account which the plaintiff had opened for the benefit of the first defendant at the special instance and request of the second defendant, and from which withdrawals and transfers were made by the three defendants on diverse occasions and in respect of which an amount of N$156 678,66 stands as unrepaid debt.

[13] From the evidence I make the following factual findings. When the second defendant went to the plaintiff's Main Branch (in Windhoek) in the first week of April 2005 to open the aforementioned TB Project Account he very well knew and was very much aware that he was not the Director of the first defendant and so he could not be its authorized representative to transact banking business on behalf of the first defendant with the plaintiff. Despite having such clear knowledge the second defendant, nevertheless, presented the plaintiff with the aforementioned letter addressed to the 'Manager Nedbank (the plaintiff), Windhoek', dated 4 April 2005. There are crucial particulars contained in that letter; see para 4.

[14] As the second defendant himself conceded (in his response to a request from the court to clarify the issue), with the aforementioned documents and information

that the second defendant presented to the plaintiff's officials at the plaintiff's Main Branch (in Windhoek) any reasonable person would indubitably conclude that the plaintiff was dealing with the first defendant through its Director and authorized representative. Indeed, the testimonies of Kipping and Kruger were that if they had known that the second defendant and the fourth defendant did not have authority to open the account they would not have opened the account and granted overdraft facilities on the account. The documents are at pp 3, 4, 11, 12.1, 13.1 and 13.2 of the Bundle. I have found previously that the second defendant was not the Director and authorized representative of the first defendant. He falsely represented to the plaintiff that he was such official in such capacity and, therefore, authorized to open an account with the first defendant as the account name and also to obtain an overdraft facility in respect of that account under which the aforementioned moneys were lent and advanced to the first defendant at, as I have also found previously, the special instance and request of the second defendant.

[15] In this regard, I also find that the Namibian Tuberculosis Association and the Namibian Tuberculosis Association Trust are two absolutely distinct and separate entities – no matter what acronyms and abbreviations are used on diverse occasions by different persons to describe any one of them. That the two entities might have cooperated with each other in the activities connected with the reduction of the incidence of TB in Namibia is of no moment and of no consequence at all in the present proceeding. This finding puts paid to Mr Kaumbi's submission that the Trust succeeded the Association. There is no credible evidence to that effect; and I do not think that is a legal possibility.

[16] The second defendant did not place before the court one iota of documentary evidence to establish that he did indeed open an account at the plaintiff's Main Branch (in Windhoek) with the Namibia Tuberculosis Association Trust as the account name. It is clear to me that when the second defendant opened the account and obtained an overdraft facility against that account, as described previously, and together with the three defendants withdrew and transferred moneys from that overdraft account, he intended to deceive and defraud the plaintiff: the overdraft

facility was never intended for the Namibia Tuberculosis Association Trust (of which he says he was the Director) for the simple reason that the second defendant had not opened an account with the Trust as the account name, as I have found previously. Furthermore, I find that the overdraft facility was extended to the first defendant at his special instance and request: he secured the overdraft facility and opened the overdraft account on the strength of the aforementioned information and documents that he had placed before the plaintiff's officials at its Main Branch (in Windhoek).

[17] Having taken into account all these factual findings, the conclusion is inescapable that with a carefully thought out wrongful scheme the second defendant set out with one singular intention, that is, to falsely represent to the plaintiff that he was the Director and authorized representative of the first defendant and authorized to open an account at the plaintiff's Main Branch (in Windhoek) and to open an overdraft account under that account and withdraw and transfer moneys from that account together with either of the two other defendants – his confederates in this wrongful and intentional conduct.

[18] In his authoritative work *Law of Delict*, PQR Boberg (1989) at 108 states that the well-established liability for fraudulent misrepresentation shows that economic loss caused intentionally is clearly wrongful. And to succeed in the Aquilian action, the plaintiff must prove *damnum* – a calculable pecuniary loss or diminution in his or her patrimony resulting from the defendant's unlawful and culpable conduct. The plaintiff must also prove that the consequence of the actual loss was intended.

[19] From the totality of the evidence, I have no difficulty – not even a modicum of difficulty – in finding that the second defendant's conduct constitutes fraudulent misrepresentation. I have also no difficulty – none at all – in finding that the plaintiff has succeeded in proving *damnum* resulting from the second defendant's and the fourth defendant's (I deal with the fourth defendant in some detail below) unlawful and culpable conduct. I also find that the plaintiff has proved that the consequence of the actual loss that it has suffered was intended by the second defendant and the

fourth defendant (bar the third defendant who, as I have said previously, is not before this court in this proceeding).

[20] I now consider the position of the fourth defendant in some detail. In the opening of the aforementioned TB Project account Kipping dealt with the second defendant only. Kipping did not have any dealings with the fourth defendant. But this fact alone, which Mr Kamanja is so much enamoured with, cannot absolve the fourth defendant from liability. The fourth defendant testified that he was a trustee of the Namibia Tuberculosis Association Trust and as a trustee of that Trust he was given responsibility by the Board of Trustees of that Trust to assist in the opening of an account with that Trust as the account name, and also to be a signatory of any such bank account. In this regard, I reiterate the factual finding I made previously that the Namibia Tuberculosis Association and the Namibia Tuberculosis Association Trust are not the one and same entity.

[21] The gravamen of the fourth defendant's defence is primarily that he was 'a member, officer and signatory of the first defendant at the relevant time' and, therefore, he cannot be held liable for what he did for and on behalf of the first defendant. This averment is extremely baseless. The fourth defendant did not place before the court any relevant and credible documentary evidence to establish that he was a 'member and officer' of the first defendant, the Namibian Tuberculosis Association. The evidence I accept is that he was a trustee of an entity called the Namibian Tuberculosis Association Trust; and as I have said more than once, the Namibian Tuberculosis Association (the plaintiff) and the Namibian Tuberculosis Association Trust are not, and cannot be, the one and the same entity. As I say, the fourth defendant's defence has always been that he was a trustee of an organization called the Namibian Tuberculosis Association Trust, and as a trustee of that Trust, he was authorized to be a signatory of a bank account to be opened with the Trust as the account name. But none of the documents on which the fourth defendant affixed his signature and which were used for the purpose of opening the bank account and for withdrawing and transferring moneys from the overdraft account opened in respect of the first defendant's TB Project account, including the Signature Card, bears any such name as the Namibian Tuberculosis Association Trust. I reject as palpably false the fourth defendant's rearguard testimony that he was selected by

the Board of Trustees of an entity called the Namibian Tuberculosis Association Trust of which he was a trustee to be a signatory to the financial transactions of another entity, that is, the first defendant, as respects its Bank account. And so, Mr Kamanja submitted, the fourth defendant did not make false representation. For the reasons stated, this submission has with respect, no merit. None at all.

[22] It must be remembered that the fourth defendant has a Diploma in Community Development obtained from the University of South Africa (UNISA). He is, therefore, not some illiterate person who did not know what he was signing for, that is, when he affixed his signature to the documents referred to previously and which were presented to the plaintiff's officials; and, *a fortiori*, there is not one credible grain of evidence placed before the court by the fourth defendant to establish that the fourth defendant did ask the second defendant or the Board of Trustees of the Namibian Tuberculosis Association Trust (of which as I have said *ad nauseam* he was a member) why he was being made to sign banking documents respecting another entity (the first defendant) and signing cheques and other instruments in respect of the bank account of that entity for the purpose of withdrawing and transferring moneys from that entity's bank account. I am firmly of the opinion that no such credible evidence was placed before the court because the fourth defendant was part of the second defendant's grand intentional and unlawful conduct to make fraudulent misrepresentation to the plaintiff, which fraudulent misrepresentation has occasioned actual pecuniary loss to the plaintiff. It follows that in my judgement the fourth defendant fully associated himself with, and participated fully in, the fraudulent misrepresentation. There was, doubtless, intentional falsehood stamped unmistakably upon the whole conduct of the defendants.

[23] I, of course, accept the evidence that the plaintiff's officials, particularly Kipping, dealt with only the second defendant at all material times but it is my firm view that this aspect does not, and cannot, in virtue of my conclusion and reasoning above, assist the fourth defendant at all. As a matter of law, there is not only one way, (that is, personal contact) by which a person may make representation to another person. Representation is by action or conduct and they may take the form of personal oral contact or distant spoken words or distant written words. That much Mr Kamanja appreciate and agrees. In the instant proceeding, I find that the written

words that were endorsed and signed for by the fourth defendant appearing in the aforementioned pages 3, 4 and 5 (and others) of the Bundle constitute the fourth defendant's representation to the plaintiff; and they were made falsely and intentionally, as I have found previously. Thus, the fourth defendant's conduct, like the second defendant's conduct, is unlawful and culpable conduct which has resulted in the plaintiff's calculable pecuniary loss or diminution in its patrimony which, like in the case of the second defendant, was intended. It follows inevitably, therefore, that the defendants are jointly liable for the aforementioned fraudulent misrepresentation and the resultant pecuniary loss or diminution in the plaintiff's patrimony. As R H Christie writes, 'It is equally … clear that a fraudulent agent is personally liable for his fraudulent misrepresentation ….' (*The Law of Contract in South Africa* 5 ed (2006) p 273).

[24] Accordingly, in sum, I find that the second defendant and fourth defendant are jointly liable for the fraudulent misrepresentation perpetrated against the plaintiff and for the consequence of the actual loss suffered by the plaintiff, as set out in the pleadings, which they intended. This conclusion disposes of the fourth defendant's special plea outlined in paras (i), (ii), (iii), (iv), (vi) and (vii) thereof and with which the second defendant makes common cause. I conclude that the second and fourth defendants are fraudulent agents and are, therefore, personally liable for their fraudulent misrepresentation.

[25] The reasoning and conclusions in the preceeding para 24 relate to, and dispose of, the submission by Mr Kamanja (and Mr Kaumbi took up the refrain) that since Summons was not served on the first defendant the present proceedings are a nullity; and refers the court to *Knouwds NO v Josea and Another* 2007 (2) NR 792 for support. This argument is, with respect, oversimplistic and fallacious on various grounds. For example, neither Mr Kamanja nor Mr Kaumbi represents the first defendant. Both counsel cannot, therefore, hold brief for the first defendant. None of their clients is 'the affected party' (to borrow the language of Damaseb JP in *Knouwds NO* para 23). But, more important, *Knouwds NO* concerns an application brought ex parte. The *ratio* of that case is encapsulated in the words which were stated to repel counsel's argument that 'all (that) the applicant(s) was required to do

was to serve the rule nisi only without the founding papers whose fruit the order is ….' Damaseb JP stated thus in para 18:

'To require only service of a court order on a respondent against whom relief was obtained ex parte is, in my view, inherently unfair and unjust.'

[26] Accordingly, in my view, *Knouwds NO* is distinguishable from the present case in those significant respects. In the instant case which concerns action proceedings, four defendants are cited. The third is not before this court in these proceedings as I have said more than once previously, because, as Mr Mouton informed the court, judgment had already been obtained against her. The second defendant and the fourth defendant are being sued because they fraudulently misrepresented to the plaintiff that they had the first defendant's authority to act in the way they did on behalf of the first defendant, and the plaintiff has suffered pecuniary loss as a direct result. *A fortiori*, the plaintiff made real efforts to serve papers on the first defendant to no avail. It means an opportunity was given to the first defendant to be heard, but it failed to take up that opportunity. In those circumstances, the train of justice could leave the station without the first defendant being on board. I am supported in my decision by rule 40(3) of the rules of court. Thus, there is no rule of law which says that a plaintiff cannot have his or her claim in an action determined until and unless all the defendants appear in court, including situations where genuine and sufficient attempts to serve process on a particular defendant (in the instant case the first defendant) have failed through no fault of the plaintiff. In any case - and this is important – the point now being argued from the Bar by Mr Kamanja and Mr Kaumbi has never being the case of the second defendant or the fourth defendant in their individual pleas, and I have concluded previously that the defendants are fraudulent agents and they have appeared for the trial which concerns their fraudulent misrepresentation.

[27] All these reasoning and conclusions repel submissions by Mr Kamanja and Mr Kaumbi that the plaintiff should have pursued the first defendant for satisfaction of its claim. The submissions, with respect, have no merit. It is as clear as day that the plaintiff has pursued the first defendant by citing it in this action. In sum, as Mr Mouton submitted – and correctly in my opinion – the first defendant has been sued

in its own name. The first defendant's failure to act upon the Summons cannot be placed at the door of the plaintiff, as aforesaid; and that cannot deny the plaintiff its right of action and its right to determination of its claim by this court in these proceedings.

[28] I pass to consider the fourth defendant's last special plea on extinctive prescription and which, in terms of the Pre-trial order (para (b) (ii)), is also an issue of law to be determined by this court. The plaintiff's Summons, instituting the present action, was issued by the registrar on 20 March 2007, and the Declaration thereto on 25 March 2009, as aforesaid. This means that the Summons interrupted the running of extinctive prescription. But the matter does not end there. Mr Kamanja's submission – if I understood him well – is that since the Declaration was issued on 25 March 2009 the alternative claim (which appears in the Declaration) has prescribed in terms of the Prescription Act 68 of 1969 and so, according to counsel, 'the time allowed to claim has passed.' Counsel finds support for his argument in *Basfour 2482 (Pty) Ltd v Atlantic Meat Market* 2011 (1) NR 164 (HC).

[29] Mr Mouton's argument in the opposite direction is along these lines. There is sufficient information in the simple Summons to the effect that the plaintiff's claim is for a debt or liquidated demand. I accept Mr Mouton's argument that the Declaration, which is required by rule 20 of the rules of court in cases where only a simple Summons has been issued, has not altered the claim of the plaintiff as set out in the Summons. The claim remains a claim for a debt or liquidated demand, that is, the plaintiff claims the repayment of N$156 678,66, being the balance due and payable in respect of moneys lent and advanced on overdraft account number 11000154964 (new number 013297000726) by the plaintiff to the defendants at the defendants' special instance and request. Thus, I find that the simple Summons requires a Declaration in the adjudication of the claim by the Court; and *in casu* the Declaration merely clarifies and particularizes the claim, including the alternative claim based on fraudulent misrepresentation.

[30] It is not open to dispute that the remedies available to an aggrieved party in the case where he or she has been induced to enter into a contract on the ground of fraudulent misrepresentation differs from a case where his or her complaint is that

the other party has failed to make good warranty incorporated as a term of the contract. In the first case the aggrieved party's action is based on delict and he or she chooses not to claim rescission of the contract; he or she may content himself or herself with a claim for damages, the measure of which is determined by the extent of the loss suffered by the aggrieved party by reason of the falsity of the representation (*Prima Toy Holdings (Pty) Ltd v Rosenberg* 1974 (2) SA 477 (C); Christie op cit pp 271 – 272).

[31] Thus, it is well recognized in our law that where by reason of the default of a party to a contract a remedy sounding either in delict or *ex contractu* accrues to the aggrieved party, the latter may choose whether to seek redress on the basis of the contract or on the ground of delict. In the present action the plaintiff's alternative claim which is clarified and particularized in the Declaration is on the ground of delict based on fraudulent misrepresentation. I, therefore, accept Mr Mouton's submission that the particulars of the alternative claim in the Declaration form the basis – in the alternative – on which the demand was made as set out in the Summons. The Declaration, without which the Summons would not see the light of day in the court, does not, therefore, in my view, in this proceeding alter the plaintiff's claim clearly set out in the Summons, and therefore his right of action. I find, therefore, that the claim for debt or liquidated demand in the Summons is clarified and particularized in the Declaration. Thus, as to the alternative claim in the Declaration; what the Declaration does thereanent is to clarify and particularize the basis upon which the claim formulated in general terms in the Summons is based, that is, in delict, as the alternative claim. I am of the view, therefore, that the Declaration does not introduce a new or different cause of action, considering the conclusion I have drawn above upon reliance on *Prima Holdings (Pty) Lt v Rosenberg*.

[32] Accordingly, I conclude that the Declaration does not raise a new cause of action from that which is set out in the Summons. *A priori*, the Declaration does not whittle away the plaintiff's right of action initiated in the simple Summons in general terms. In the Declaration where it particularizes the basis of the action the plaintiff chooses to claim in the alternative, too, on the basis of delict because it was induced to enter into the contract on the ground of fraudulent misrepresentation. These reasons impel me to the conclusion that the Summons, which was issued before

extinctive prescription had run out, must perforce go together with the Declaration, and if that is so, then it cannot seriously be argued that the alternative claim in the Declaration has prescribed: the Summons and the Declaration are not severable in the circumstances of this case and in terms of the rules of court, as I have shown previously.

[33] For these reasons I hold firmly that the defendants' special plea based on extinctive prescription also fails.

[34] From the totality of the evidence and based on the aforegoing reasoning and conclusions I come to the reasonable conclusion that the plaintiff has proved the alternative claim and the defendants have not established any credible and acceptable facts that beget their defence. Accordingly, judgment is for the plaintiff with costs on the alternative claim. That being the case, I see no good reason to consider the main claim, too.

[35] As to the amount of the claim; I accept Mr Mouton's submission that the amount lent and advanced, as aforesaid, was N$115 000,42; however, with compound interest added to it since it was an unsecured debt, the amount came to stand at N$156 678,66 as indicated in the Summons and, it is based on, and arises from, para 2 of the NEDBANK Cheque Account Opening Form (Annexure 'A' to the plaintiff's Declaration).

[36] I now proceed to consider the issue of costs. Not content with causing pecuniary loss to the plaintiff on the basis of fraudulent misrepresentation the second defendant and the fourth defendant have put the plaintiff to expense in legal costs in order to defeat the defence of the defendants which can only be characterized as frivolous and vexatious. Upon the authorities (eg *Willem Adrian van Rhyn N.O v Namibia Motor Sports Federation and Others* Case No. A 36/2006 (unreported) where the authorities are gathered; *Namibia Grape Growers and Exporters v Ministry of Mines and Energy* 2004 NR 194 (SC)), I am of the opinion that this is truly a proper case where the defendants ought to be mulcted in special costs. But I have restrained myself from making such costs order on account of the fact such that scale of costs is not claimed by the plaintiff.

[37] For all the aforegoing reasons, I make the following order:

(a) The special pleas raised by the defendants are dismissed.

(b) Judgment for the plaintiff in the amount of N$156 678,66, plus simple interest on that amount at the rate of 20 per cent per annum calculated from 16 October 2006 until date of full and final payment to the plaintiff by the second defendant and the fourth defendant jointly and severally; the one paying , the other to be absolved.

(c) The second defendant and fourth defendant must pay the plaintiff's costs, jointly and severally; the one paying, the other to be absolved on the scale as between party and party, and the costs include such costs as are occasioned by the employment of one instructing counsel and one instructed counsel.

C Parker

Acting Judge

APPEARANCES

PLAINTIFF:	C Mouton Instructed by P F Koep & Partners, Windhoek
SECOND DEFENDANT:	J R Kaumbi Of Kaumbi-Shikale Inc., Windhoek
FOURTH DEFENDANT:	A E J Kamanja Of Sisa Namandje & Co. Inc., Windhoek