REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

Case no: I 1751/2007

In the matter between:

WILLEM DU TOIT **PLAINTIFF**

and

ALETTA CATHERINA DREYER **1ST DEFENDANT**

WILLEM DREYER **2ND DEFENDANT**

ZARIS FARMING CC **3RD DEFENDANT**

Neutral citation: *Du Toit v Dreyer* (I 1751/2007) [2013] NAHCMD 64 (08 March 2013)

Coram: DAMASEB, JP

Heard: **18 July 2011; 23 - 27 January 2012; 11 - 13 April 2012; 8 - 11 October 2012; 22 - 23 October 2012 and 3 - 6 December 2012.**

Delivered: **08 March 2013.**

Flynote: Contract – Purchase and sale of Agricultural land – 'Foreigner' – Minister's consent required – Certificate of waiver not a requirement at that point – Consent not obtained – Agreement null and void *ab initio* – Both parties contributed to the illegality - *Par delictum* rule applicable – Restitution allowed of purchase price only and not interest.

Summary: Contract – Purchase and sale of agricultural land – Purchaser "foreigner" in terms of the Agricultural (Commercial) Land Reform Act 6 of 1995 – Section 58,59

applicable – Minister's prior consent had to be obtained before any acquisition of controlling interest in a company or corporation passed to a foreign national – Agreement entered into in February 2003 before amendment of Act making certificate of waiver necessary also where controlling interest passed to foreigner in corporation, but such requirement not necessary at time agreement concluded – When agreement concluded no ministerial consent obtained – Agreement therefore illegal and void *ab initio* – Court finding both parties contributed to illegality and therefore what applied was par delictum rule and not *turpus* causa – Restitution intergrum not applicable – Plaintiff's turpitude greater than defendants' – Court allowing restitution to plaintiff to do justice between 'man and man but only to extent of purchase price – Interest at prescribed rate denied as doing so would enforce illegal contract – Costs not allowed to either party because of reprehensible conduct by both in conduct of litigation plaintiff also denied costs because of his disrespect for laws of land.

ORDER

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1. The defendants are ordered to pay to the plaintiff the amount of N$672 000, jointly and severally, the one paying, the other to be absolved;
2. The defendants are ordered to pay interest at the prescribed rate of 20% per annum on the sum of N$ 672 000 from the date of this judgment to the date of payment at the rate prescribed by law.
3. Each party shall pay their own costs.

JUDGMENT

DAMASEB JP:

Introduction:

[1] This is a difficult case. It is difficult because it raises, in a very real way and on a human level, conflict between the need on the one hand to do justice between man and man and, on the other, the importance of exacting respect for the law of the land. At the

core of the dispute before court is a failed transaction involving the acquisition by a foreigner of a corporate entity that owns agricultural land in Namibia. Namibian law[1] places restrictions on foreigners' access to and ownership of agricultural land. It is the product of the country's political past which was described by this court in the case of *Kessl v Minister of Lands Resettlement and Two Similar Cases*[2] as 'the product of an intensive effort by the Namibian Government to address the need for land reform'.[3] The Chief Justice charachterised it as follows in *Schweiger v Muller*[4]:

'It is evident …that the legislative purpose [of the LRA] is to provide for the acquisition of agricultural land by the state for the objective of land reform. Once such land has been acquired, the primary beneficiaries thereof are those Namibian citizens who do not own or have the use of any land or adequate agricultural land and foremost those Namibian citizens who have been disadvantaged by past discriminatory laws or practices. In a nutshell, therefore, the purpose of the Act is, amongst other things, to address the pressing issue of land reform, a perennial problem associated with this country's history. It is apparent from the relevant provisions of the Act that the purpose is also to regulate the acquisition of land by foreign nationals.'

[2] The LRA in its Preamble states the following:

'To provide for the acquisition of agricultural land by the State for the purposes of land reform and for the allocation of such land to Namibian citizens who do not own or otherwise have the use of any or of adequate agricultural land, and foremost to those Namibian citizens who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices; to vest in the State a preferent right to purchase agricultural land for the purposes of the Act; to provide for the compulsory acquisition of certain agricultural land by the State for the purposes of the Act; to regulate the acquisition of agricultural land by foreign nationals; to establish a Lands Tribunal and determine its jurisdiction; and to provide for matters connected therewith.'

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[1] Agricultural (Commercial) Land Reform Act 6 of 1995 ('LRA').
[2] 2008 (1) NR 167.
[3] At 173I.
[4] Case No. SA 3/2005 (unreported) at para 20.

[3] The LRA as it was applicable at the time the transaction giving rise to the present dispute was concluded[5], contained the following provisions on acquisition of agricultural land. Section 17 of the Land Reform Act reads:

> '. . . The state shall have a preferent right to purchase agricultural land whenever any owner of such land intents to alienate such land. . . '

It means that the Namibian State has a preferent right to acquire agricultural land that becomes available on the market. In terms of s 17(2) no agreement for the alienation of agricultural land shall be of any force or effect until the owner of the land in question has first offered such land to the state and has been furnished with a certificate of waiver in respect of such land.

[4] Section 58(1) in relevant part states as follows:

> 'Notwithstanding anything to the contrary in any other law contained, but subject to subsection (2) and section 62[6], <u>no foreign national</u>[7] shall, after the date of commencement of this Part, without the prior written consent of the Minister, <u>be competent</u>-
>
> (a) to acquire agricultural land through registration of transfer of ownership in the deeds registry; or

[5] The agreement was concluded on 18 February 2003. There was then an amendment to the Act in March 2003 which required the obtaining of a certificate of waiver where controlling interest in a corporation passed to a foreigner. That amendment only came into effect on 1 March 2003 and did not apply to the agreement which is the subject matter of the present dispute. An issue initially arose whether it became applicable on account of alleged subsequent novation of the agreement requiring obtaining of a certificate of waiver in terms of the new statutory regime. That issue no longer falls for resolution in way the parties have now defined the ambit of their dispute.

[6] Section 62(1) states: The provisions of this Part shall not apply to the acquisition of agricultural land by a foreign national-

(a) By virtue of any succession ab intestatio or testamentary disposition;
(b) Which is a public company conducting business as a banking institution…
(c) Which is a company of which the shares are listed on a licensed stock exchange in Namibia as defined in section 1 of the Stock Exchanges Control Act, 1985…

(2) The Minister may-

(a) notwithstanding anything to the contrary in this Act contained, after consultation with the Minister of Agriculture, Water and Rural Development , by notice in the Gazette exclude from the application of the provisions of this Part any agricultural land or nay category of such land or any category of persons.

(b) at any time vary or withdraw in like manner such notice.

[7] Defined amongst others as ' a person who is not a Namibian citizen' and 'n relation to a close corporation , a close corporation in which the controlling interest is not held by Namibian citizens or 'a company incorporated in Namibia in which the controlling interest is not held by Namibian citizens or by a company or close corporation in which the controlling interest is held by Namibian citizens.

(b) to enter into an agreement with any other person whereby any right to the occupation or possession of agricultural land or possession of agricultural land or a portion of such land is conferred upon the foreign national-

(i) for a period exceeding 10 years; or

(ii) for an indefinite period or for a fixed period of less than 10 years , but which is renewable from time to time, and without it being a condition of such agreement that the right of occupation or possession of the land concerned shall not exceed a period of 10 years in total.

(2) If at any time after the commencement of this Part the controlling interest in any company or close corporation which is the owner of agricultural land passes to any foreign national, it shall be deemed, for the purposes of subsection (1) (a), that such company or close corporation acquired the agricultural land in question on the date on which the controlling interest so passed.' (My underlining for emphasis)

[5] Section 59 in turn states:

'Acquisition and holding of agricultural land for foreign national

No person shall acquire and hold, as a nominee owner, on behalf or in the interest of any foreign national any agricultural land if the Minister's written consent therefor has not been obtained as required by section 58.

An agreement which breached s 58(1) *(b)* (ii) of the LRA was described in *Schweiger by* the Justice in as follows:

'In so far as the invalid agreement therefore purported to grant the respondent the right of occupation and possession of commercial agricultural land for a period exceeding ten years apparently without first complying with the requisites set out in the Act, such agreement falls foul of the provisions of s 58(b) (ii) of the Act, is illegal and void *ab initio*.' (My underlining for emphasis)

[6] It is clear from s 58 (1)*(a)* read with subsec (2) that the alienation and transfer of a 'controlling interest' in a company or close corporation owning agricultural land is subject to the Minister's consent if such acquisition is by a foreign national. Section 60

of the LRA empowers the Minister to either order the sale of the land acquired by a foreign national in breach of s 85(1)*(a)* or to acquire it in accordance with Part IV.[8] Breach of s 58 does not attract criminal sanctions. Two things are apparent from this: the first is that an agreement for the alienation and transfer of a controlling interest in a close corporation without the consent of the Minister is illegal and void *ab initio*. Secondly, by empowering the Minister to compulsorily acquire such land for the purpose of land reform, the LRA links the prohibition against ownership of land by foreign nationals to the public policy imperative of availing agricultural land to previously disadvantaged Namibians.

[7] It is common cause that the plaintiff, a South African national, is a 'foreign national' and as such hit by the provisions of s 58(1)*(a)* read with subsec (2) of the LRA. It also common cause that he, on 18 February 2003, executed (with the first and second defendants as 'sellers') a deed of sale to buy members' interest in a Close Corporation, Zaris Farming CC ('third defendant'), whose only asset was a farm, Zaris - Oos No. 195, Maltahöhe. Farm Zaris, it is also common cause, is agricultural land as contemplated in the LRA. The first and second defendants are Namibians who held 50% shares each in the third defendant. In terms of this written agreement, the plaintiff would become the 100% shareholder in the third defendant. As consideration for the 100% members' interest in the third defendant, the plaintiff agreed to, on their behalf, honor their liability for the acquisition of a flat at Sand and See Complex, Swakopmund ('the flat') - in terms of the offer for the flat as advertised by the developer of the complex.

[8] The agreement between the parties reads as follows:

'Sales Agreement: Farm Zaris

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[8] Compulsory Acquisition of Agricultural Land for the purpose of land Reform in terms of s 14(2) which states:

'The minister shall under subsection (1) be competent to acquire-

(a) Any agricultural land offered for sale to the Minister in terms of section 17(4);
(b) Any agricultural land classified as under-utilised and in terms of subsection (3)
(c) Any agricultural land or portion or portions of such land classified as excessive land in terms of subsection (3); or

Any agricultural land acquired by a foreign national, or by a nominee owner on behalf or in the interest of a foreign national, in contravention of section 58 or 59.

Zaris CC, property of W & AC Dreyer, is sold to W du Toit on the following terms:

4 payments of R168, 000 payable on the following dates:

28/02/03

12/04/03

11/07/03

17/10/03.'

2 payments of R84 000 payable upon completion of the Sand & See Flats around 15 December '03 and the following [one] on registration of the flat. Transfer of shares will be effected upon payment of the last installment.'

The pleadings

History of pleadings

[9] When the present action commenced in 2005, the plaintiff's main claim was predicated on fraudulent misrepresentation. The amount claimed was N$ 672 000.[9] The defendants denied fraudulent misrepresentation but consistently admitted the purchase price. The pleadings on which this case ended up being adjudicated are radically different from those which brought it to life.

The pleadings in their amended form can be summarised as follows:

The plaintiff

[10] The ultimate amended particulars of claim are dated 20 June 2011 and contain a main claim and two alternative claims. The basis of the claim remains the agreement dated 18 February 2003. The plaintiff alleges that he, in compliance therewith, made payments towards the flat in return for the defendants' members' interest in the third defendant. He alleges that when the agreement was entered into the parties erroneously assumed that a waiver certificate was required in terms of the LRA and that what was required in terms of the law as it stood was the Minister's consent for the acquisition by the plaintiff of the defendants' members' interest in the third defendant.[10] It

[9] Being the amount which, it is common cause, the plaintiff paid towards the flat on behalf of the defendants. It fell short of the total purchase price of N$840 000 for which the flat was advertised because of the disputes that arose.

[10] There is the further averment in the alternative allegation that a waiver certificate was additionally required in the event the court finds that the agreement was subsequently novated. Nothing turns on that in view of the fact that in the way the case has crystallized I no longer need to decide whether or not the agreement was novated.

is alleged further that the Minister’s consent was not obtained and as a result the agreement was canceled. Since possession of farm Zaris was then returned to the agreement was canceled and the plaintiff became entitled to the repayment of the purchase price of N$ 672 000 with interest *a tempore morae* at the prescribed rate of 20% interest per annum.

[11] The first alternative claim is founded on the premise that the agreement was subject to the suspensive condition that the Minister’s prior consent would be obtained and that the payment of the purchase price was done in the *bona fide* belief that such consent would be obtained. Since such consent was not obtained the agreement was canceled and the farm returned to the defendants and that the defendants were enriched in respect of the purchase price, entitling plaintiff to repayment thereof, with interest.

[12] The second alternative claim is conditional upon the court finding that the agreement is void for being in conflict with s 58 because of the absence of the Minister’s consent. It is alleged that the defendants in that regard induced the plaintiff into entering into the agreement representing to him that the sale of the members’ interest was lawful. It is alleged that the plaintiff was thus induced by the representation and that, had he known that the sale was not lawful, he would not have entered into the agreement. The particulars allege that the plaintiff was at the time not aware that the agreement was in conflict with s 58, alternatively that neither party was aware of the illegality. In support of this claim the plaintiff alleges that, acting on the assumption that the agreement was lawful, he made the payments for the flat and that, to the extent the defendants were enriched thereby, they are obliged to repay same to him. It is alleged that given the enrichment it is in the interests of public policy that the defendants repay the purchase price in order to prevent injustice to the plaintiff.

The defendants’ plea and counterclaim

[13] In their amended plea filed of record on 23 March 2012[11], the defendants proceed from the premise that because of an error common to the parties the agreement of 18 February 'does not correctly record the full and precise terms and conditions' agreed by the parties and that it stands to be corrected to reflect that the purchase price agreed was N$ 1m and that the plaintiff was to take 'all necessary steps and assure that all the requirements of the' of the LRA were complied with, with the reasonable cooperation of the defendants. They also plead that the original agreement was novated by two other subsequent agreements. In the way the case has crystallized I need not decide whether or not there was a novation or not. The defendants admit receiving payment of the N$ 672 000 and although they do not specifically deny it was from the plaintiff, put him to the proof. They allege that the plaintiff failed to take reasonable steps to comply with the LRA and that they canceled the agreement but not on the grounds alleged by the plaintiff. The defendants deny making the representations attributed to them by the plaintiff, alleging that it was the plaintiff who 'pursued' the defendants and 'convinced them to sell' their members' interest in third defendant. They plead specifically that the plaintiff assured them that as foreign national he had previously acquired agricultural land and knew how to go about getting it legally, by taking all necessary steps to ensure that the transaction would be lawful for the registration of the members' interest into his name.

[14] The defendants deny that the agreement was illegal in nature and that it was in fact lawful and that it was at all times possible for the parties to comply with the LRA as long as the plaintiff took the necessary steps towards that end.[12] They plead that only later did they discover that the plaintiff had no *bona fide* intention to comply with the LRA and that in fact he intended to circumvent s 58 by introducing a sham Namibian member as a 51% interest holder in the third defendant, making him in delicto (potior est conditio possidentis) and as such not entitled to restitution on the assumption he made the purchase price. They deny unjust enrichment or that they are obliged to repay the plaintiff. They also deny that public policy dictates plaintiff being restituted.

[11] The amended counterclaim (infra) was filed on the same date.

[12] To this the plaintiff replicated that he, with the defendants' knowledge, intended to include a Namibian member in order to purchase the members' interest.

Counterclaims

[15] The defendants counterclaim and seek to have those claims off-set against any restitution the court may order. The first counterclaim is predicated on the plaintiff taking possession of the farm following the agreement and remaining there for a period of 18 months and that on account of the cancellation of the agreement the defendants were deprived of possession, occupation and use of the farm. The plaintiff, it is said, unlawfully occupied the farm and grazed his livestock thereon and conducted a hunting lodge business. They allege that the plaintiff was therefore unjustly enriched at the defendants' expense in the fair and reasonable value of N$15 000 per month, entitling the defendants to repayment in the amount of N$ 270 000.

[16] The second counterclaim is a *rei vindicatio* for specified goods which the plaintiff was allegedly in possession of knowing they belonged to the defendants. The amount of N$ 95 000 is claimed as representing the value of those goods. The third counterclaim is for alleged use of the farm as a hunting rest camp for which the total amount of N$ 240 000 is claimed. The last claim is for wood allegedly illegally harvested by the plaintiff on the farm during his occupancy totaling N$ 40 000. Interest and costs are claimed on all claims.

[17] Plaintiff's case is that these claims were introduced by the defendants in an attempt to defeat his claim for restitution as the only way the defendants can escape repaying the moneys paid on their behalf is if they are the innocent parties in the failed transaction and are able to prove damages which they can off-set against the amount they are liable to restitute. The plaintiff maintains that the defendants failed to prove any damages and therefore the need does not arise for the court to determine who bears the responsibility for the failure of the agreement.

[18] It is the defendants' case though that unknown to them the plaintiff, through his purchase of the members' interest in the third defendant, attempted to acquire

agricultural land in Namibia contrary to s 58 (1)*(a)* and (2) and thus turned the contract into an illegal one. That illegality has the result, the defendants maintain, that the normal rule of contract that restitution follows termination, does not apply. The defendants' case is that they were not privy to the illegality perpetrated by the plaintiff and that his having at some stage informed the first defendant that he had in the past hoodwinked the Namibian authorities in the way he acquired farm Montana, and intended to do the same in respect of Farm Zaris, does not make them complicit in the *turpus* perpetrated by the plaintiff.

[19] There is common ground between the parties that the sales agreement came to an end in August 2004 and that the defendants repossessed the farm and retained the benefit of the N$ 672 000 paid on their behalf by the plaintiff towards the purchase price for the flat. There is a monumental dispute about who was responsible for the agreement not being implemented as either side accuses the other of bearing the responsibility. It is common cause that the parties erroneously assumed that the Minister's waiver was necessary, and each accused the other for failing to obtain it in order for the agreement to take effect. It is now accepted by both parties that the correct legal position as obtained when the agreement was concluded is that what was required was the Minister's consent.[13] The plaintiff's case is that the reason why the sale did not materialize is irrelevant and that the amount of N$ 672 000 should be returned, with interest at the legal rate. That is indeed so if it is an ordinary cancellation of contract and if restitution applies.[14]

[20] The defendants stand to benefit substantially if the *turpus causa* rule applies: They had the flat paid for by the plaintiff and later sold it for a handsome profit. In addition, they retained the farm and sold it for a profit. The plaintiff would walk away with nothing.[15] The defendants who benefitted in this way are bound to restore to the plaintiff

[13] Section 58(1)(a) and (2) of the LRA.
[14] Baker v Porbert 1985 (3) SA 429 (N) at 438G-H.
[15] As Mr. Frank submitted, and I didn't understand Mr. Nel to dispute that seriously, the defendants benefited from the termination of the contract ad still enjoy the fruits of the plaintiff's N$ 672 000. They sold the ft for N$ 1.1 Million when it cost them N$ 840 000 and they sold the farm Zaris for N$ 3.5 million against the backdrop that they had agreed with the plaintiff to sell it for N$ 840 000.

that which he gave to them if what prevails is a cancellation of contract for whatever cause. It is common cause that the defendants will escape liability only in two circumstances: If they have made out the case of a valid counterclaim against the plaintiff in respect of .the damages allegedly caused by the plaintiff , or if I find that the plaintiff's conduct in the way he went about acquiring ownership of the third defendant was *turpus causa.*

[21] It is common cause between the parties that the following consequences flow from an illegal contract: the first is expressed by the *in turpus causa*[16] rule, ie the principle that from a dishonourable cause an action does not arise is absolute and admits no exception. Therefore, if the plaintiff alone was *in turpus causa*, I am left with no discretion to do 'justice between man and man'. It is only if the facts of the case establish *in pari delicto potior est conditio defendentis* (in equal fault the condition of the defending party is better) that I have the discretion to allow the plaintiff to recover the money paid to the defendants pursuant to the illegal agreement so as to prevent manifest injustice.[17] Thus, however, unconscionable it may seem, if plaintiff was in *turpus causa* he is without any remedy. The public policy rationale for the rule is stated to be: the *ex turpis cause non oritur action* rule as laid out in the Namibian Supreme Court decision in the case of *Ferrari v Ruch*[18] prohibits a party from suing on the agreement which is declared to be void.

[22] The defendants have squarely raised on the pleadings and in evidence the defence that the plaintiff acted in *fraus legis* the LRA in seeking to acquire ownership of the third defendant - the corporate entity that owned the agricultural land. They rely on his conduct in a previous transaction (Montana); his conduct in respect of the current transaction, and his contemporaneous statements made to the defendants in the course of the negotiations that led to the execution of the agreement for the purchase of the members' interest in third defendant. Given that the defence raised by the defendants is an absolute defence to the plaintiff's claim and that their counterclaims are relied on

[16] *Ex turpi causa non oritur actio*.

[17] See the dictum of Shivute CJ in *Heinrich Schweiger v Ericka Kathe Muller*, case no SA 3/2005, delivered on 12 October 2012 at 15, para 25.

[18] 1994 NR 287 (SC) at 296C-G.

only if their defence based on *turpus causa* fails, it is inevitable for the court to deal with that issue first.

[23] It is common cause between the parties that at the time the sales agreement was concluded the plaintiff had stated to the defendants that he would employ a similar arrangement as he did when he bought farm Montana.

Summary of parties' unlawful conduct

The Montana transaction

[24] The plaintiff is no stranger to the workings of the LRA. He had gone through an agricultural land acquisition transaction before when he purchased farm Montana. The evidence establishes on a balance of probabilities that he had acquired farm Montana in breach of the law by soliciting a Namibian citizen to become a nominal shareholder. He did that by making pastor van Niekerk sign a blank share transfer form, which would enable him to retransfer the shares to himself or anyone else at any time. Pastor van Niekerk did not pay for the shares; did not participate in the running of the business; received no dividend from any profit; did not see any financial statements of the business and, most importantly, when the farm Montanan was sold in an outright sale of land transaction sold he neither knew of the fact nor received any benefit from the sale. The plaintiff was for all intends and purposes the absolute and sole owner of a corporate entity Avril 67 (Pty) Ltd that owned farm Montana. He provided all the capital, he took all decisions on the business and him, and him alone, could and did decide when to dispose of it, for what consideration and what was to become of the profit.

[25] I find the following evidence in respect of the Montana transaction particularly remarkable: The plaintiff bought farm Montana in 2001 and the *modus operandi* employed entailed formation of a separate company Avril 67(Pty) Ltd that was the corporate vehicle used to own farm Montana. A Namibian partner, Mr. Bertus Van Niekerk was to be the majority shareholder in the said company. Mr van Niekerk came to testify as a witness under a subpoena *duces tecum* on behalf of the defendants. From his evidence, it became clear that when the plaintiff approached him in respect of

the Montana transaction , it was on the understanding that he would own in 51% of the shares in Avril 67 (Pty) Ltd and the plaintiff would own 49 %. It is not in dispute that but for the fact that Mr van Niekerk, a Namibian national, held 51% shares in Avril 67 (Pty) Ltd, its acquisition of Montana would have run foul of s 58(2) of the Land Reform Act . Although Mr van Niekerk had thus, in law, become the beneficial owner of 51% shares in Avril 67, he was not issued with a share certificate and was excluded from the daily running of either Avril 67 or farm Montana. That the plaintiff invited Mr. van Niekerk to become a shareholder in Avril 67, not to accord him the full rights of a shareholder, but to create an impression that he was a shareholder, is apparent from the following evidence of Mr. van Niekerk:

(a) Mr. van Niekerk did not pay for the shares and made no contributions;

(b) Mr. van Niekerk was not issued with a share certificate;

(c) The plaintiff made it possible for him at any time and without consulting Mr van Niekerk to transfer the 51% shares held by the latter to himself or anyone he chose by means of this blank share transfer form executed by Mr van Niekerk and retained by the plaintiff. As Mr van Niekerk explained to the court, the plaintiff had at the time explained to him that it was some kind of insurance that in the event of van Niekerk's death, the 51 % shares he held in Avril 67 (Pty) Ltd would not pass over to his estate or relatives and that Mr Van Niekerk's heirs would have no claims against the plaintiff on account of the shares he held in Avril 67 (Pty) Ltd. The clear implication of this is that although, in law, Mr Van Niekerk held 51 % shares in Avril 67 (Pty) Ltd , the plaintiff's intention was not to accord him the full rights of ownership over those shares. That by according 51% shares to Mr van Niekerk, the plaintiff intended to give the outward appearance that the plaintiff, as a foreign national, did not hold the controlling interests in Avril 67 is as clear as day light.

[26] The file manager from Price Waterhouse Coopers (PWC) who had first-hand knowledge about the affairs of the plaintiff and Avril 67, one Mr. Pieter Du Toit, testified that the plaintiff had at some stage proceeded to transfer the 51% shares held by Mr

van Niekerk in Avril 67(Pty) Ltd to himself and thus became the 100% owner of that corporate entity . According to this witness that became a matter of some concern within PWC because it fell foul of s 58 of the LRA, and the plaintiff was advised to have the matter rectified. Although there was some dispute about why exactly the matter was not attended to and the rectification not done, the following is very clear:

(a) the plaintiff was aware that at the point in time when he became 100% shareholder of Avril 67, he had breached s 58(1)*(a)* and (2) of the LRA;

(b) Mr van Niekerk whose 51% shares the plaintiff transferred to himself had no real say over them and that he (the plaintiff), and he alone, could decide what to do with those shares and thus making Mr van Niekerk a sham shareholder;

(c) that although he had become aware of the breach of the law, there was no urgency on the plaintiff's part to rectify the situation and that, to this day, that situation remained un-rectified;

(d) It was clear from the evidence of both the plaintiff and Mr. van Niekerk that Avril 67 (Pty) Ltd (as owner of farm Montana) was sold in 2008 for N$ 500 000 realising a profit of N$ 230 000. Mr. van Niekerk did not share in the profits realized from the sale of farm Montana. Not only did he not have any say over whether or not the company was to be sold , he was also not consulted on the purchase prize – all indicating that the 51 % he held in Avril 67 (Pty) Ltd was a sham. Although it was suggested on behalf of the plaintiff in re-examination and cross-examination of Mr. van Niekerk that that was so because all the capital in the venture had been provided by the plaintiff who, alone, bore the financial brunt of the farm's operation, it does not displace the all-important inference that Mr van Niekerk was a shareholder in name only, an inference buttressed by the equally telling evidence led at the trial at some length that Mr van Niekerk did not see any financial statements, did not participate in any shareholder meeting; and exercised no power over Avril 67 (Pty) Ltd in any shape or form as a shareholder would do in terms of the law. This was in clear breach of sec 59 prohibiting a person from acquiring and holding as a nominee owner

any interest in agricultural land on behalf of a foreign national. The question that arises but not one for decision in this case, is whether in the Montana transaction sec 61(2) *(b)* was not breached. It arises in this way: Section 61(1) states that the registrar of deed shall not register any transfer of agricultural land unless there is submitted to him or her a statement under oath or affirmation by the transferee , declaring his nationality and whether or not the land to be transferred will be held by him or her on behalf or in the interest of any other person and giving particulars of the name and nationality of that person. If in the statement the transferee declares that he or she is not a Namibian citizen or will be held by him on behalf of a person who is not a Namibian citizen, the Minister's written approval referred to in s 58 must be provide. A false representation in such statement is an offence making the maker thereof liable to a fine not exceeding N$ 20 000 or to imprisonment not exceeding five years or both.

[27] The evidence in respect of the Montana transaction is relevant in that it sheds light on and gives colour to Mrs. Dreyer's (first defendant's) testimony (which is admitted by the plaintiff) that the plaintiff had told her that he intended to deploy the same *modus operandi* as he did in the case of Montana for the acquisition of farm Zaris. To the extent that the evidence in respect of the farm Montana transaction is relevant in explaining the plaintiff's state of mind as he went about consummating the purchase of the third defendant (owner of agricultural land) I make the finding, based on the evidence I summarised and replete from the record, that in acquiring Avril 67, the plaintiff had successfully consummated a simulated transaction to circumvent s 58 and s 59 of the LRA.

[28] Since farm Montana was sold and the plaintiff had by so doing divested himself of any interest he held in farm Montana, it is therefore not possible for the Minister to invoke his powers in terms of s 60(1)*(a)* supra of the LRA. Given that no criminal offence ensued from the breach of s 58(1)*(a),* no criminal prosecution is possible

against the plaintiff from his flouting of the Act as regards the farm Montana transaction, unless s 61 was breached as stated above.

The farm Zaris transaction

[29] The first defendant, Mrs. Dreyer, testified that she enquired from the plaintiff as to how he could own land in Namibia in light of the fact that he was a South African citizen and that he informed her that he knew how to deceive the Namibian authorities and that he would use the same method he used in purchasing Montana to acquire farm Zaris. The evidence shows that when the Du Toit family (plaintiff, his wife and their son) and the Dreyer Family(the defendants) met in Swakopmund on 03 February 2003, the second defendant informed the plaintiff, in the presence of his wife, that they were prepared to sell to the plaintiff their members interest in the third defendant if, in return, he agreed to honor the defendants' liability for the acquisition of the flat in terms of the offer for the flat as advertised by the developer of the flat. A deed of sale, prepared by the second defendant, was then concluded between the plaintiff and the second defendant. I set out the agreement in full in paragraph 8 of this judgment.

[30] The effect of this agreement is clear: the defendants had agreed to sell their members' interest in the third defendant to the plaintiff who they knew was a foreigner. The heading to the written instrument makes clear that the subject of the sale was farm Zaris which is agricultural land and thus hit by s 58 of the Land Reform Act. Had the defendants sought and obtained informed advice[19] it would have been clear to them that the agreement in the form they executed it, breached s 58 of the Land Reform Act as it purported to transfer their members interest in third defendant to the plaintiff(a foreign national) alone without Ministerial consent[20]. The defendants' suggestion that it was agreed with the plaintiff that he would comply with all the necessary legal requirements of the LRA before the plaintiff took transfer of their members' interest is difficult to reconcile with the objective facts in this case: How could they have assumed

[19] Which it is reasonable to have expected them to do against the backdrop of their asking the plaintiff, how as a foreigner, he was able to acquire agricultural land in Namibia- a state of mind which demonstrates that they harboured the suspicion that their agreement with the plaintiff might be subject to regulation, thus imposing a duty on them to act carefully.

[20] That is the reasoning behind the finding in the *Schweige*r that the agreement was illegal and void ab initio.

that such consent could be had for the asking? The Minister might well have refused the consent. Secondly, it is clear from the evidence that it was on the very day of the signing of the agreement that the first defendant procured the plaintiff to go to the attorneys attending to the transfer of the flat into defendants' name in order to make the first payment. The obligations of the parties kicked in the moment the payment was made, for the defendants had then the expectation that the plaintiff would continue to make the payments in terms of it. In fact the fact that the parties considered their respective rights and obligations to have kicked in is further demonstrated by the fact that the defendants gave possession of the farm to the plaintiff at once and even begun to sell off to him some of their property which was on the farm. The probabilities do not favour the version that the plaintiffs expected the plaintiff to honor his commitments towards the purchase of the flat on the basis of what he was still to do to comply with the 'necessary requirements' of the LRA. It negates prudence that they would on the expectation of his complying with those unspecified requirements have given occupation of the farm to the plaintiff, as stated by the plaintiff and confirmed by witness Pierre Visser , on the basis that especially the first defendant said that the farm was the plaintiff's as long as he paid for the flat.

[31] The suggestion by Mr Nel, on behalf of the defendants that the inclusion of a Namibian as a member holding 51% interest in Zaris Farming CC was legal as long as it was a genuine transaction and that the defendants were blameless in that they were not privy to the fact that the plaintiff intended to execute a simulated transaction using a Namibian, overlooks the fact that the genesis of the illegality was the agreement executed by the defendants with the plaintiff, allowing him to take transfer into his name of all of the members interest in the third defendant. The agreement was already illegal and *void ab initio* as at that date: it did not so become because the plaintiff had intended to bring in a sham member into the close corporation. The fact that the first defendant asked the plaintiff how he, as a foreigner, was able to acquire land in Namibia is clear evidence that *she* was aware of a restriction on foreigners to own land in Namibia. The evidence shows that she had conveyed her discussion with the plaintiff on that issue the second defendant who too must therefore be taken to have shared the awareness

of the need for Ministerial consent with the second defendant. The evidence of the plaintiff and his wife, the two defendants and Mr Visser left me with in no doubt that the second defendant had some obsession with the flat and *that*, in my view, blinded the defendants to the need to exercise caution and to, at the very least, seek informed advice to make sure that the agreement to transfer all the members interest in the third defendant to the plaintiff was permissible under Namibian law. The defendants therefore must bear their share of blame for the illegal contract executed on 3 February 2003.

[32] Not only is it common cause, but the plaintiff admitted, that he intended to replicate the Montana transaction in his endeavour to acquire farm Zaris. The defendants place great store by this fact. I am satisfied that the manner in which the Montana transaction was done was in *fraus legis* as it was a simulated transaction.[21] Mr Nel argued that the evidence shows that the defendants were not privy to the plaintiff's illegal plan to execute the contract as, unknown to them, the plaintiff did not have a *bona fide* intention to conclude the sale of the members' interest in a lawful way. Mr Nel also added that the plaintiff reneged on the original purchase price of N$ 1 m and sought to acquire the farm at a bargain.

[33] I find it established on a preponderance of probabilities that the plaintiff intended to replicate in the farm Zaris transaction a simulated s 58(1)*(a)* and (2) - proof transaction. I find no evidence on the record to support the inference that the defendants made common cause with him in that endeavour. What is clear though is that the launching pad for the carrying out of that nefarious scheme was the agreement entered into by the parties on 18 February 2003, which, per se, breached s 58 of the LRA. The defendants cannot eat their proverbial cake and have it. The approach to the issue that is taken on their behalf is contrived and self-serving: On the one hand they maintain (obviously to escape the *in pari delictum rule*) that they were not privy to the plaintiff's intention to introduce a sham of 51% member into third defendant but agreed

[21] Which is a dishonest transaction in that the parties to the transaction do not intend it to have the legal effect it purports to convey: Michau v Maize Board 2003 (6) SA 459(SCA). In casu the legal effect conveyed is that Mr. van Niekerk was a genuine shareholder when in effect he was a nominee of the plaintiff. It is dishonest in that the plaintiff by so doing shielded himself from the prohibition against having a controlling interest in a corporation that owns agricultural land while not having the Minister's consent.

with him, so they say and the argument goes, that the plaintiff would ‘ensure that all statutory requirements are met before the members’ interest could be transferred to him’. On their version therefore, before the plaintiff could have the members’ interest transferred into his name, *he* had (but not the defendants) to comply with ‘all statutory requirements’ – yet they say they did not know what those requirements were and relied on the plaintiff who said he knew the process as he had done it before. Curiously, the defendants proceeded at once to procure the plaintiff to start making payments on their behalf in respect of the coveted flat. What if the ‘statutory requirements’ were not met for a reason other than the plaintiff’s doing?

[34] I am satisfied on a balance of probabilities that the defendants considered and regarded the 18 February 2003 agreement as the operative agreement that bound the parties to the sale of the members’ interest in third defendant and therefore activated the corresponding obligation to pay for the flat on their behalf. It is that agreement that breached s 58(1) *(a)* and (2) of the LRA. It is untenable to argue that the 18 February 2003 agreement was not illegal. The consent the plaintiff had to obtain from the Minister was only possible based on an agreement with the members of the third defendant. That agreement shows that he was to be the 100% member of the third defendant. There was no other agreement. How else could the plaintiff have proceeded to have the founding statement amended at the Companies office if it was not on the strength of that agreement? All these questions and issues arise logically from the evidence and arguments of the defendants. Accordingly, I do not accept Mr Nel’s premise that the illegality existed only in the intended scheme of the plaintiff.

[35] Mr Nel in his final submissions argued that the plaintiff’s lack of bona fides in the way he sought to obtain ownership of third defendant (as owner of agricultural land) must be seen together with his equally reprehensible snatching at a bargain in reneging on the parties’ agreement on the purchase price which, he argued, the evidence showed was N$ 1 m but the plaintiff ‘blackmailed’ the defendants into accepting was N$ 840 000. Given the rather strong tone in which that allegation is made, I think it is important that I deal with this matter so that my views on it are clear for the record.

[36] It is alleged by the plaintiff that the purchase price was N$ 840 000 as evidenced by the agreement that both parties signed. The defendants' case is that the written agreement of 18 February 2003 is not a complete memorial of their agreement on the purchase price and that when the parties realised that a mistake was made, the plaintiff subsequently agreed that he would offer an acknowledgement of debt for the balance of N$160 000 to bring the total purchase price to N$ 1m. The plaintiff denies such an agreement and the probabilities favor his version.

<u>Facts and Circumstances Favoring the inference that the agreed purchase prize was N$ 840 000 and not N$1m.</u>

[37] The written agreement entered into between the parties makes no mention of the alleged purchase price of N$ 1 million. Additionally, the defendants had the opportunity at a very early stage to put the matter right but did not. They both testified that they discovered the mistake the very day that the document was prepared and signed but did not immediately bring it to the plaintiff's attention with the request that they put the common mistake right at once. It bears mention that the agreement of 18 February 2003 was prepared by the second defendant. From the first moment they had the opportunity to plead to the plaintiff's claim that the agreed purchase price was N$840,000, the defendants admitted that to be the case. That line of pleading continued well into the trial. It was only after evidence begun to be led that the suggestion was made that the purchase price was N$1m, followed by a change in the plea.

[38] The first defendant suggested in evidence (and only in cross-examination) that the error had been pointed out to the first legal practitioner of record who promised to rectify it and, for good measure, to come to court and confirm the fact. That lawyer was never called as a witness. The difficulty for the defendants is that even the next legal practitioner of record who ought then to have been instructed by them to put the matter right did not do so but in pleadings continued to admit as true the allegation that the purchase price was N$ 840 000. Mrs. Dreyer confirmed to the court that she had the

opportunity to consult with Mr. Heathcote who settled the initial plea. It is not probable that such a mistake would have been made if the same facts now put before court apropos the purchase price were presented to Mr. Heathcote. Mrs. Dreyer testified that at every point where the purchase price of N$ 1 m was mooted, the plaintiff showed no interest at all and appeared to think that it was too much.

[39] Both defendants maintained that the amount of N$ 1 m was proposed by them in order to discourage the plaintiff's interest in the farm as they considered it part of their retirement plan. The evidence of the defendants, particularly Mr Dreyer's, that the plaintiff put pressure on them to sell the farm to him, sit uncomfortably with the fact that:

(a) the initiative that ultimately led to the conclusion of the deed of sale, was initiated by Mrs Dreyer;

(b) the transaction was directly linked to the purchase of the flat which Mrs Dreyer, the evidence shows, had become obsessed with. Had the plaintiff not agreed to the transaction, the option held by Mrs Dreyer for 28 February 2003 would have fallen away. It speaks volumes that Mrs Dreyer procured the plaintiff to go to the estate agent conducting the transaction for the property developer to make a first installment under the payment schedule contained in the brochure for the flat.

[40] Since much was made of it during the trial, I wish to make clear that I find as preposterous the suggestion that the plaintiff must have had some ulterior motive in not wanting a lawyer to draft the deed of sale, first offering to draft the deed of sale himself but at the last minute insisting that the second defendant does it. It does not appear to me as common sense that the plaintiff would have had greater room for mischief by drafting the agreement himself than if the defendants did. It really requires no rocket science to reduce to paper the simple proposition that the parties agree to the sale of the members' interest for N$ 1m. After all, Mrs. Dreyer testified that when she became interested in the flat , she called the plaintiff and put the proposition to him in which he became interested, principally because it afforded him the opportunity to pay the purchase price in installments. Would a reasonable *pater familias* (seller) in such

circumstances not take the simple precaution to prepare a written instrument that commits the prospective buyer to the sum of N$ 1 million? Mr. and Mrs. Dreyer had the possibility to seek the assistance of their son-in-law (an advocate) to prepare the most rudimentary legal instrument that memorialized the transaction between them and the plaintiff. They did not and now seek to have an adverse inference drawn against the plaintiff for not wanting a lawyer to draft the contract and putting pressure on them to do so. In so far as it may later become relevant, I find that the agreed purchase price was that alleged by the plaintiff and not the N$1m alleged by the defendants.

[41] Two consequences follow from the finding that the 18 February agreement was illegal and that the plaintiff acted in *fraus legis*: the first is that the matter cannot be approached as an ordinary contractual claim in view of the illegality tainting the contract between the parties and ,therefore, restitution under the normal rules of contract does not find application.[22] The second consequence is that given that the defendants had themselves been privy to the illegal contract, the *turpus causa* rule does not apply. In my view, the fact that the plaintiff intended to act in fraud of the law is a factor not attributable to the defendants and for that reason lessens their guilt (confined as it is to the original illegality of the agreement), but one that aggravates the guilt of the plaintiff as it includes the original illegality and the fact that he had clearly intended to engage in a simulated transaction in the same way he did with the Montana transaction. The only evidence that the applicant relies on for the inference that the defendants were complicit (in the event that it is found that the plaintiff intended to mislead the authorities) is the evidence of the first defendant , that upon her asking the plaintiff how he, as a foreigner, was able to acquire land in Namibia, he had told her that he is able to deceive the authorities' and that he had experience in these matters as he had done a similar previous transaction and knew what he was doing. There is no suggestion on his part and certainly no admissible evidence that the defendants knew that the plaintiff intended to allocate 51% interest in the third defendant in order to circumvent the law. Accordingly, the plaintiff bears more culpability than the defendants’.

[22] *Heinrich Schweiger v Ericka Kathe Muller*, case no SA 3/2005, delivered on 12 October 2012 at 13 para 22.

[42] Mr. Frank submitted that in the event that I find (as I do) that the par delictum rule apples , the rule should be relaxed because the plaintiff was not aware of the illegality at the date of the conclusion of the agreement[23] and to avoid unjust enrichment of the defendants in retaining the money paid by the plaintiff, the farm and the flat.

The law in Namibia on consequences of an unlawful contract

[43] Where an agreement is prohibited by law and the parties thereto are in *par delicto* - as a general rule neither can get relief from the operation of the contract unless the party seeking relief from the court can establish that he or she did not act dishonorably.[24] The rule is based on the 'clean hands' doctrine that holds that the court ought not to render assistance to those whose aims are inimical to public policy and the imperative that the courts should seek to deter illegality by denying recovery by parties to such transaction.[25] In Ferrari *v Ruch*[26] the supreme court held that although the aim of the *par delictum* rule is to deny the help of the court to persons who part with money in furtherance of an illegal transaction, the rule may be relaxed to avoid injustice and to do justice between man and man. Mahomed CJ approved *Jajbay v Cassim*[27] in Ferrari.[28] Stradford CJ in *Jahbhay v Cassim* 1939 AD 537 stated (at 544):

'. . . . Courts of law are free to reject or grant a prayer for restoration of something given under an illegal contract, being guided in each case by the principle, which underlies and inspired the maxim . . . a court should not disregard the various degrees of turpitude in delictual contracts. And when the delict falls within the category of crimes, a civil court can reasonably suppose that the criminal law has provided an adequate deterring punishment and therefore, ordinarily speaking, should not by its order increase the punishment of the one delinquent and lessen it of the other by enriching one to the detriment of the other. . . in cases where public

[23] A suggestion that I cannot agree with. He might not have known just in what form permission was required, but from his Montana experience the probabilities are that he knew that the agreement he concluded could not be implemented in the way that he concluded it with the defendants.
[24] Du Bois (Ed) *Wille's principles of South African Law* 9 Ed (2007) p 1064-1065.
[25]*Heinrich Schweiger v Ericka Kathe Muller*, case no SA 3/2005, delivered on 12 October 2012, para 21.
[26] 1994 NR 287I - 288C and 296G - 297G; see also *Jajbhay v Cassim* 1939; *Rall v Bester* 1951 (3) SA 541 at 545.
[27]1939 AD 537.
[28] At 296G-297G.

policy is not foreseeably affected by a grant or a refusal of the relief claimed, that a court of law might well decide in favour of doing justice between individuals concerned and so prevent unjust enrichment.'

[44] The *ratio decidendi* of *Ferrari* can be summed up as follows: The first principle is that the Court will not come to the assistance of a litigant who parts with money or chattels in furtherance of prohibited agreements. The Court may relax the rule in order to do simple justice between individual and individual. There are no fixed rules when the Court will relax the rule. The following considerations are however relevant to such an inquiry:

(a) would not relaxing the rule unjustly enrich one party at the expense of another ? ;
(b) awareness of the prohibition of the agreement by law is not by itself a bar for a plaintiff who seeks relaxation of the rule and to seek the recovery of the moneys or property transferred to the adversary pursuant to such agreement;
(c) relaxation of the rule can be legitimately resisted if it has the indirect effect of enforcing an illegal agreement.
(d) awareness of illegality of the agreement by the plaintiff is not a bar by itself to the recovery of moneys or the property transferred to the adversary.
(e) the relative degrees of turpitude attaching to the contact of the parties in entering and implementing the unlawful agreement are relevant considerations.
(f) the *par delictum* rule should be relaxed in appropriate cases to prevent manifest injustice.

[45] The common law was recently restated by Shivute CJ in *Schweiger v Muller* .[29] The learned Chief Justice observed that while a prohibited agreement 'cannot be enforced by virtue of the well-known maxim *ex turpi causa non oritur actio* (from a dishonourable cause an action does not arise) which is absolute and admits no

[29] Case No. SA 3/2005 (unreported), delivered on 12 October 2012 at para 25-26.

exception, the maxim in *pari delicto est conditio defendentis* (in equal fault the condition of the defending party is better) in some cases it may be relaxed to allow a plaintiff to recover money paid or property delivered to a defendant pursuant to an illegal agreement so as to prevent manifest injustice.'

[46] In argument, Mr Nel placed accent on the part of the dicta in *Jahbay* which suggest that where public policy is a predominant consideration for the prohibition in defiance of which the illegal contract was concluded no relaxation of the *par delictum* rule is permissible. He argued on the strength that there is a clear public policy consideration behind the LRA and that for that reason the in *par delictum* rule should not be relaxed in order to do simple justice between individual and individual. Without meaning any disrespect to this line of reasoning, it does not arise because in my view of this case, both parties bear some responsibility for the illegal agreement that was entered into. That is the basis for my finding that in this case *turpus causa* does not apply and that the parties are in *par delictum.* Mahomed CJ recognised in *Ferrari v Ruch* that the relative degrees of turpitude attaching to the contact of the parties in entering and implementing the unlawful agreement is a relevant consideration in determining whether the rule should be relaxed in a particular case. In my view, it must follow that the parties' relative degrees of turpitude is equally a relevant consideration in determining the extent to which restitution must be allowed.

[47] The parties' relative degrees of turpitude is, in the present case, relevant to both determining if the rule should be relaxed and the extent to which restitution must be allowed. I am satisfied that this is a proper case to relax the *par delictum* rule to avoid manifest injustice and in order to allow for some restitution to the plaintiff as not doing so in circumstances where the defendants are, although to a lesser extent, party to an unlawful agreement will have the effect of unjustly enriching them disproportionately. The plaintiff and the defendants must share the blame for the fact that they executed a contract on 3 February 2003 which allowed the plaintiff to become absolute owner of the members' interests in the third defendant. Either side knew (the plaintiff because of his previous land acquisition deal relating to Montana) or the defendants (on their own

admission evidenced by their direct inquiry to the plaintiff as described earlier) that Namibian law placed a restriction on a foreigner's ownership of agricultural land. That alone must have placed them on the guard and to seek legal advice to ensure that their agreement complied with the law.

[48] Given that the defendants share some blame for the illegal contract, the parties are *in pari delictum*. The unenforceability of the agreement arises from its non-compliance with s 58, whether or not the parties were aware of its illegality and in that respect the defendants contributed to the illegality as much as the plaintiff. That then leaves me to consider the issue of interest claimed by the plaintiff.

<u>The claim for interest</u>

[49] From *Ferrari* and *Schweiger* the following further principles can be distilled when it comes to interest arising from an illegal agreement: The Court will be loath to order interest on the capital sum paid under the unenforceable contract if doing so indirectly constitutes enforcing all the material terms of the unenforceable contract. Interest on capital must be dealt with separately and the court should determine whether in respect of each the defendant was unjustly enriched. Doing justice between individual and individual may be achieved by putting both parties in the position they were in immediately prior to the conclusion of the illegal agreement. That is the route followed by the Supreme Court in *Shweiger*.

[50] Mr Nel pointed out in argument that to allow an order of interest as prayed by the plaintiff will have the effect that for the nine years and more, the amount the defendants must pay to the plaintiff will come to about N$ 1 321 600, on top of the principal amount of N$672 000. This is a substantial sum considering that interest is payable until the debt is liquidated. The Supreme Court has cautioned that interest should not be granted where doing so has the effect of enforcing the unlawful agreement. What is claimed in this case is not interest agreed between the parties but interest *tempore morae on the prescribed rate*. In effect, the interest claimed is aimed at enforcing the claim for restitution under the normal principles of contract law, which, as I have found, are not

applicable for the reason that the parties' contract is an illegal one and that the plaintiff acted more dishonorably than the defendants in the process. Restitution upon relaxation of the *par delictum* rule is not equivalent to restitution following cancellation of contract. The former is granted to avoid manifest injustice while the latter follows as a matter of law and as of right. In my view, therefore, granting interest to the plaintiff as claimed will have the effect of indirectly enforcing the illegal agreement. That is not permissible.

[51] Although the present case is distinguishable from *Schweiger* in that in that case the court had not found any evidence that the money received had been invested or had added interest in any other manner (in the sense of bearing 'fruits' for the party enriched) [30], sight cannot be lost of the fact that in the case before me, during a period of about 18 months the plaintiff was in occupation of farm Zaris, carried on farming there and for all practical purposes acted as if he were the owner of the farm. That, in my view, is a not inconsiderable recompense for the interest he might have earned had he invested the money. That the plaintiff lost out on additional interest on his money because of the long lapse of time between when he vacated the farm and the finalization of this case is not in doubt. However, it is the result of tactics deployed in the course of the trial for which the plaintiff is responsible in equal measure as the defendants as more fully explained in the part of this judgment where I deal with the issue of costs.

[52] The plaintiff intended to go beyond the original sin created by the 18 February agreement by being intent on introducing a sham 51% member into the third defendant in the same way he did with the farm Montana transaction. He therefore bears greater blame than the defendants do. The defendants on the other hand stand to benefit disproportionately from the illegal contract if the *in par delictum* rule were not relaxed to do simple justice between the parties. Public interest demands in this case that the plaintiff be refunded the moneys he paid to the defendants towards the purchase price of the flat. Granting him his claim for interest of 20% a tempore morae would have the effect that he benefits from his illegal conduct. I would therefore deny him interest on the

[30] Whereas in the case at bar the defendants received the benefit of the flat which they sold on for a profit, and retained the farm and then sold it for a profit.

claim. It will be unjust to the plaintiff if I do not order the defendants to pay interest from the date of judgment to the date the moneys are paid back in terms of this order.

Costs

[53] Plaintiff prays for a special costs order because of what plaintiff's counsel argues was the undue prolonging of the matter by the defendants. On the other hand, the defendants pray for a costs order against the plaintiff on the scale of attorney and client for what is charachterised by defendants' as the fraudulent and dishonest scheme employed by the plaintiff to obtain a controlling interest in the third defendant and the unfounded allegations made by the plaintiff against the defendants.

[54] Costs is a matter within the court's discretion. Ordinarily, costs must follow the event. The plaintiff has succeeded in obtaining an order granting him restitution of the purchase price, while the defendants successfully resisted his claim for interest. That fact alone would have led me, in my discretion, to deny either side an order for costs. However, there is more than that. The manner in which this case was litigated calls for censure of both parties. There has, in my view, been after the fact rationalisation by either party during the course of the trial. To a greater or lesser extent, both parties amended pleadings or tailored evidence to suit the circumstances. The very extensive amendment by both sides had the result that the case to be finally adjudicated was very different from the one originally pleaded by the parties. That much is common cause.

Reprehensible conduct by the parties

The plaintiff

[55] This case was commenced by the plaintiff principally relying on the alleged fraudulent misrepresentation by the defendants. It was alleged that the defendants knowing that the sales agreement between the parties was illegal 'expressly misrepresented' to the plaintiff that it was a lawful agreement. It was very late in the day after denials in the plea that this stance was abandoned. Remarkably, the plaintiff feigned ignorance of the allegations of fraud against the defendants under cross-examination and implied that it was made without his instruction. I reject that suggestion

as palpably false and agree with Mr Nel that if indeed that were the case, his legal practitioners of record would have taken the stand to say so to the court. It is trite that allegations of fraud should not be made lightly and if made require strong evidence to be sustained.[31] The plaintiff acted most reprehensibly in making allegations of fraud against the defendants, which he could not sustain. That calls for censure.

[56] Another aspect of the plaintiff's conduct that calls for censure is the fact that he laid baseless charges of criminal conduct against the second defendant, which were so palpably unmeritorious that he never even pursued them and had hard time explaining in court why he did not pursue them to their logical conclusion. It was obvious to me that the reason nothing came of these charges was not lack of interest on the part of the authorities but his lack of interest in them. The inference that he initiated them in order to gain some advantage over the defendants over their dispute is inescapable. Another incident is a denial made by the plaintiff through the cross-examination of the first defendant that she met with the plaintiff on farm Zaris on the weekend of 2 March 2003. He based the denial on the assertion made by counsel on his instruction that he could not have met the second defendant as alleged by her because on that date he was in South Africa and that his passport would prove as much. That allegation too had to be retracted because, when produced, his passport proved the contrary. Considering that the challenge to the first defendant's version of events was made to place her testimony in unfavorable light in preference for his, such false instruction to counsel is most reprehensible.

[57] These incidents compel me to agree with the suggestion made by Mr Nel in argument that the 'pattern of instructions given by the plaintiff to his legal representatives to launch very serious attacks' on the characters of the defendants were 'unsubstantiated and false'. In addition to all these considerations, the evidence amply demonstrated that he is a man who showed no respect for the laws of Namibia. He successfully flouted the laws of Namibia once and had the audacity to try to do so a second time. The least the courts of this land can do is to frown upon his conduct by

[31]Compare , Courtney-Clarke v Bassingthwaighte 1991 (1) SA 684 at 689F-G.

denying him the costs of seeking legal redress from the courts of the land whose laws he has shown blatant and callous disrespect.

The defendants

[58] The defendants' counterclaimed against the plaintiff in respect of kudus shot on the farm and the alleged use by the plaintiff of the farm as a rest camp. Additionally, they claimed the return of moveable property allegedly appropriated by the plaintiff or damages. They gave very detailed and heart-wrenching evidence about the destruction caused to the farm by the plaintiff but all that evidence counted for nothing because no damages were claimed against the plaintiff for the alleged damage. Mr. Dreyer explained in evidence that he chose not to bring a claim in respect of such damage because it would have required him to lead expert evidence to prove the damages, but curiously, the defendants called an expert (Mr Hennes) in an attempt to prove the claim in respect of the value of the property allegedly retained by the plaintiff and in respect of which *rei vindicatio* was sought.

[59] I agree with Mr Frank's submission that Mr Hennes came nowhere near proving the values of any of the items he was called upon to prove. The defendants' counterclaims were clearly intended to avoid liability to repay the plaintiff's money paid on their behalf in respect of the flat in the event of the court finding that the normal rules of contract applied to the case. The raft of them was so meritless that the defendants abandoned them any event , and so much of them as survived were clearly not proved, including the claim for occupational rental in respect of which no basis whatsoever was laid for the quantum claimed. It bears mention that the defendants also relied on prescription. Extensive pleadings were exchanged in that regard and plaintiff's counsel also dealt at some length in their heads of argument with the plea of prescription. It was however abandoned by the defendants and not as much as mentioned in their heads of argument. Another issue that is worth mentioning is the persistent non-admission by the defendants that the N$672 000 was paid by the plaintiff and putting him to the proof thereof. Considerable time was spent ventilating this issue at the trial. Clearly it was not warranted because it was so obvious that the moneys were paid by the plaintiff. The

defendants had even in the past offered to repay same to him. This strategy also added to the costs of this matter.

[60] To the extent that I attribute reprehensible conduct to a party for abandoning a particular plea or point, it is important to explain that I do not do so lightly, for the parties must be allowed in our adversarial system to pursue any claim or defence that they feel they are entitled to under law. It is therefore not so much the fact that it was made and abandoned that is the problem, but the ease with which it was abandoned after considerable court time and parties' resources were spent. That raises the inference that it was not made with serious intent but to wear down the opponent. Several postponements occurred because of the ever-changing stances of the parties and this case took much longer than what the real issues in dispute merited. The case commenced in 2005 and was only finalised in 2012. The parties must share the blame.

[61] I will therefore not apportion any blame to one party for the manner in which this case was litigated. I will accordingly make an order that each party bear their own costs. I make the following order:

1. The defendants are ordered to pay to the plaintiff the amount of N$672 000, jointly and severally, the one paying, the other to be absolved ;
2. The defendants are ordered to pay interest at the prescribed rate of 20% per annum on the sum of N$ 762 000 from the date of this judgment to the date of payment at the rate prescribed by law.
3. Each party shall pay their own costs.

P T DAMASEB

JUDGE-PRESIDENT

APPEARANCES

PLAINTIFF:	T J FRANK, SC (with him G DICKS) Instructed by Du Toit and Associates, Windhoek
FIRST and SECOND DEFENDANT:	T J NEL Instructed by Francois Erasmus & partners, Windhoek