REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 5042/2014

In the matter between:

SOCIAL SECURITY COMMISSION **PLAINTIFF**

And

BARMINAS RICK KUKURI **FIRST DEFENDANT**
MINISTER OF FINANCE **SECOND DEFENDANT**
MINISTER OF LABOUR **THIRD DEFENDANT**

Neutral citation: *Social Security Commission v Kukuri* (I 5042/2014)[2015] NAHCMD 79 (31 March 2015)

Coram: KAUTA, AJ
Heard: 12 March 2015
Delivered: 31 March 2015

Flynotes: Practice – Judgments and orders – Summary judgment – Applicant's claim based on unjustified enrichment and misrepresentation – Respondent's defence is that the amounts were approved by appointing authority – Section 22 of State-Owned Enterprise Governance Act, 2006(Act 2 of 2006) (SOE Act) precluding Plaintiff from remunerating any member without consent of both the portfolio Minister and Minister of Finance – Court satisfied that respondent has no *bona fide* defence to applicant's claim – Plaintiff cannot act *ultra vires* its powers – Plaintiff bound by its

creative deed, ie Social Security Act, 1994 (Act 34 of 1994) and SOE Act – Summary judgment granted.

ORDER

The Application for Summary Judgment is granted with cost, such cost to include the costs of one instructing and two instructed counsel.

JUDGMENT

KAUTA, AJ:

[1] This is an application for summary judgment against the first defendant ('Respondent hereinafter'). The second and third defendants were merely cited for any interest they may have and no relief is sought against them. As such the second and third defendants did not defend the action and consequently abide the decision of this court.

[2] What was once a fiduciary relationship between the plaintiff and respondent has no doubt turn into a nasty brawl. The plaintiffs, Chief Executive Officer, is demanding payment of N$ 238 564.25 from the respondent. It is now left in the hands of this court to resolve the hostility between the parties. Abraham Lincoln is often quoted having affirmed that: 'Discourage litigation. Persuade your neighbours to compromise whenever they can. Point out to them how the nominal winner is often a real loser – in fees, expenses and waste of time.'

[3] Shortly, after the advent of the New Year, the respondent was served with summons in this matter demanding that he pays, N$ 238 564.25 together with 20% interest per annum *a tempore morae*, alternatively, from date of judgment to date of final payment and costs. On the 13th January 2015, the respondent filed his intention

to defend the action. The particulars of claim of the plaintiff, *inter alia*, allege the following:

1. 'The plaintiff –

1.1 Is a creature of statute, established in terms of section 3 of the Act;

1.2 Is constituted as provided for in section 4 of the Act, which section – in pertinent part – provides that the plaintiff shall be constituted, and its members, including the chairperson and the deputy chairperson of the plaintiff (comprising part of the plaintiff's Commission), shall be appointed in accordance with, and for a period as determined under, sections 14 and 15 of the State-owned Enterprises Governance Act, 2006 ("the SOE Act");

1.3 Is a State-owned enterprises as envisaged in the SOE Act, its portfolio Minister being the third defendant;

1.4 Is subject to Part IV of the SOE Act, section 13 (2) of the SOE Act providing that any provision contained in the establishing Act (including the Act) or constituent document or memorandum of association and articles of association of a State-owned enterprise (including the plaintiff) which is contrary to a provision of Part IV of the SOE Act must be construed as if it had been amended correspondingly with the provisions of Part IV of the SOE Act.

2. Section 22 (1) of the SOE Act (falling under Part IV of the SOE Act) provides that the remuneration and allowances payable to the members and alternate members of a board of a State-owned enterprise (including the members of the Commission constituted in terms of Section 4 of the Act) contemplated in section must be determined by the portfolio Minister (*in casu* the third defendant) with the concurrence of the second defendant and with due regard to any directives laid down by the State-owned Enterprises Governance Council under section 4 of the SOE Act.

3. At times material hereto –

3.1 The first defendant was the plaintiff's chairperson (and member of Commission), and served in that position until or about November 2013. As such, the first defendant stood in a fiduciary relationship towards the plaintiff;

3.2 The first defendant – *inter alia* in terms of section 18 (2) of the SOE Act and the applicable common law – was subject to the following conditions and had the following duties and responsibilities vis-à-vis the plaintiff, including –

3.2.1 To at all times act honestly in the performance of the functions of his office;

3.2.2 To at all times exercise a reasonable degree of care and diligence in the performance of his functions;

3.2.3 After he ceased to be a member of the board of a State-owned enterprise, to not make improper use of information acquired by virtue of his position as such a member to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the State-owned enterprise;

3.2.4 Not to make use of his position as a member to gain, directly or indirectly, an advantage for himself or for any other person or cause detriment to the State-owned enterprise;

3.2.5 To act in good faith towards the plaintiff, and to exercise his powers as chairperson for the benefit of the plaintiff, and to avoid a conflict between his own interests and those of the plaintiff.

4. During or about the following periods, the first defendant received the following sums from the plaintiff, purportedly as members' remuneration or allowances, totaling NAD 776,411.74 and computed and arrived at as follows –

4.1	January to February 2012	-	NAD 47,457.00
4.2	March 2012 – February 2013	-	NAD 437,381.75
4.3	March 2013 – October 2013	-	NAD 291,573.00
			NAD 776,411.74

5. The afore-pleaded total includes the sum of NAD 238,564.25 ("the claim amount"), computed and arrived at as follows –

5.1	January to February 2012	-	NAD 14,869.50
5.2	March 2012 – February 2013	-	NAD 131,619.25
5.3	March 2013 – October 2013	-	NAD 92,075.50
			NAD 238,564.25'

6. The claim amount was paid to the first defendant in non-compliance with the provisions of section 22 (1) of the SOE Act in that the second defendant did not concur with any such amount being payable to the first defendant as members' remuneration or allowances and as envisaged in paragraph 6 above.

7. The claim amount comprises the difference between total paid to the first defendant by the plaintiff (during the period January 2012 to October 2013) and the amount which the first defendant was lawfully entitled to receive (during the same period) as members' remuneration or allowances pursuant to the mandatory provisions of section 22(1) of the SOE Act.

MAIN CLAIM

8. The claim amount was paid by the plaintiff to the first defendant in the *bona fide* and reasonable (but mistaken) belief that the first defendant was lawfully entitled to receive same as part of the first defendant's members' remuneration or allowances.

9. The claim amount was not owing to the first defendant for the reasons as set out in paragraph 10 above.

10. The first defendant nevertheless appropriated the claim amount.

11. In the result, the first defendant was unjustly enriched at the expense of the plaintiff and is liable to repay the claim amount to the plaintiff, which claim amount was neither due nor payable by the plaintiff to the first defendant.

FIRST ALTERNATIVE CLAIM

12. During January 2012 to October 2013 and at Windhoek, the plaintiff, in error, paid the claim amount to the first defendant.

13. The claim amount was neither due nor owing to the first defendant.

14. The first defendant was enriched unjustly by the claim amount at the expense of the plaintiff.

SECOND ALTERNATIVE CLAIM

15. During January 2012 to October 2013, the plaintiff paid the claim amount to the first defendant.

16. As a consequence, the first defendant was unjustly enriched and the plaintiff was correspondingly unjustly impoverished at the expense of the plaintiff.

17. The said impoverishment was without cause.

THIRD ALTERNATIVE CLAIM

18. The first defendant, during or about January 2012, negligently (and without having taken reasonable care in establishing the correctness of the statement alternatively representation) misstated alternatively misrepresented to the plaintiff that he was lawfully entitled to receive the claim amount as part of his members' remuneration or allowances and that it was in the discretion of the third defendant to increase the first defendant's members' remuneration or allowances.

19. The afore-pleaded misstatement alternatively misrepresentation was wrongful in that the first defendant – by virtue of the office he occupied at times material hereto

and as pleaded in paragraph 7 above – owed the plaintiff a legal duty not to make a misstatement or misrepresentation.

20. The afore-pleaded misstatement alternatively misrepresentation was false in that –

20.1 The claim amount was paid to the first defendant in non-compliance with the provisions of section 22 (1) of the SOE Act in that the second defendant did not concur with any such amount being payable to the first defendant as members' remuneration or allowances and as envisaged in paragraph 6 above;

20.2 It was not within the discretion of the third defendant to increase the first defendant's members' remuneration or allowances;

20.3 The first defendant was not legally entitled to receive the claim amount as part of the members' remuneration or allowances.

21. As a consequence of the afore-pleaded misstatement alternatively misrepresentation, the plaintiff – to its prejudice – included the claim amount in the members' remuneration or allowances paid by the plaintiff to the first defendant.

22. In the premises, the plaintiff suffered damages in the amount of the claim amount.

FOURTH ALTERNATIVE CLAIM

23. In breach of the first defendant's fiduciary duties towards the plaintiff (constituting a breach of trust), the first defendant –

23.1 Misstated alternatively misrepresented to the plaintiff that he was lawfully entitled to receive the claim amount as part of his members' remuneration or allowances and that it was in the discretion of the third defendant to increase the first defendant's members' remuneration or allowances;

23.2 Received and appropriated the claim amount;

23.3 Failed to repay the claim amount to the plaintiff, notwithstanding the first defendant's attention having been drawn to the non-compliance with section 22 (1) of the SOE Act (pleaded in paragraph 10 above).

24. In doing so, the first defendant acted for his own benefit and to the prejudice of the plaintiff.

25. In the premises, the plaintiff suffered damages in the amount of the claim amount.

AD ALL CLAIMS

26. Demand notwithstanding, alternatively summons constituting demand, the first defendant fails to repay the claim amount (or any part thereof) to the plaintiff.

WHEREFORE the plaintiff claims from the first defendant –

(a) Payment in the amount of NAD 238,564.25.
(b) Interest in the aforementioned amount at the rate of 20% per annum *a tempore morae* alternatively from date of judgment to date of final payment thereof.
(c) Costs of suit, including the costs of one instructing and two instructed counsel.
(d) Further or alternative relief.'

[4] The respondent, having filed a Notice of Intention to Defend, the plaintiff filed an Application for Summary Judgment on the grounds that the respondent does not have a *bona fide* defence and defended the matter solely for the purpose of delay. To resist the Summary Judgment Application the respondent filed an Opposing Affidavit setting out the basis of his defence.

[5] The respondent's defence to the plaintiff's Application for Summary Judgment is concisely stated in the heads of argument as follows:

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(i) he denies that it does not have a bona fide defence and that appearance to defend has been entered solely for the purpose of delay;

(ii) defendant has defences in that the amounts claimed were earned properly by the defendant, the amounts were approved by the appointing authority, namely the portfolio Minister as per the decision of appointing the defendant as the Chairperson of the plaintiff;

(iii) The defendant also denies that the amounts paid to him as part of his remuneration were paid in error or by mistake;

(iv) The defendant denies that he negligently misstated to the plaintiff or any one that he was entitled to the amount claimed';

(v) On a proper consideration of the law, the cause of action of plaintiff is not only untenable but is unsustainable on the facts currently serving before the Honourable Court; and

(vi) The amount claimed by the applicant is disputed and applicant is put to the proof thereof.'

[6] As the applicant is a creature of statute and a State-owned enterprise, s 14 and 15 of the State-Owned Enterprise Governance Act, 2006(Act 2 of 2006) applies. Section 13(2) of the State-Owned Enterprise Act provides that –

'Any provision contained in the establishing Act or constituent document or memorandum of association and articles of association of a State-owned enterprise which is contrary to a provision of this Part must be construed as if it had been amended correspondingly with the provisions of this Part.'

[7] Remuneration and allowances payable to members and alternate members of a board of a State-Owned Enterprise (including members of the plaintiff's Commission constituted in terms of s 4 of the Act) is addressed in s 22(1) of the SOE Act (falling under Part VI of the SOE Act), which provides that:

'(1) The remuneration and allowances payable to the members and alternate members of a board of a State-Owned Enterprise must be determined by the portfolio Minister with the concurrence of the Minister of Finance and with due regard to any directives laid down by the Council under Section 4.'

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[8] Mr Töttemeyer, senior counsel for the plaintiff, rightly submitted that the respondent concedes that –

8.1 He received the claim amount;

8.2 Section 22(1) of the SOE Act is applicable in the circumstances;

8.3 He has not repaid the claim amount to the plaintiff.

[9] He further submitted that rule 60(5)(b) enjoins the respondent to satisfy the court by affidavit (or oral evidence given with leave of the court) that he has a bona fide defence to the action and the affidavit or evidence must disclose fully the nature and grounds of the defence and the material facts relied on.

[10] Mr Töttemeyer submitted that the affidavit of the respondent, resisting summary judgment – 'falls well short of the requirements of rule 60(5)(b)'. To strengthen the above submission he juxtaposed by way of argument the respondent's purported defences averred in the affidavit resisting summary judgment with his submissions as follows –

'10.1 The purported approval of the third defendant to remunerate the respondent at the 'upper quartile in tier two' is – by operation of law – subject to the requirements of section 22(1) of the SOE Act. And consequently the respondent cannot rely on *ultra vires* and illegal conduct as a valid defence.

[10.2] The general rule is that non-compliance with a statutory prescription results in nullity *a fortiori*, if it is a statutory prerequisite for validity.

See Standard Bank v Estate van Rhyn 1925 AD 266 at 274

Messenger of the Magistrate's Court, Durban v Pillay 1952 (3) SA 678 (A) at 683 C-D

Springs Town Council v Macdonald; Springs Town Council v Badenhorst 1968 (2) SA 114 (T) at 120 D-F

Ex Parte Oosthuysen 1995 (2) SA 694 (T) at 696 E-F

Seagul's Cry CC v Council fo the Municipality of Swakopmund and Others 2009 (2) NR 769 (HC) at 778 E

[10.3] Section 22 (1) is peremptory and the object of the legislation would be frustrated if there was a disregard of the prescription. The concurrence or agreement of the second defendant is a peremptory requirement, without which no valid decision to pay a sum including the claim amount to the respondent could be, and was taken.

See Devenish, Interpretation of Statutes, generally at chapter 9, p 223 ff

[10.4] The respondent's defense of "substantial compliance" with section 22 (1) of the SOE Act based on permission of the third defendant has no merit. In addition to the permission of the third defendant – and as a separate and independent requirement – the concurrence of the second defendant is required. Central to the applicant's case is the absence of the concurrence of the second defendant.

[10.5] The respondent's principal defense that section 22 of the SOE Act was – in fact – complied with, is based on vague and broad allegations which skirt around various crucial aspects. On this score, the respondent *inter alia* –

10.5.1 Does not state as a fact that the claim amount formed part of the "remuneration" which allegedly found its way into the budget of the applicant;

10.5.2 Does not allege as a positive fact that the (relevant) budget was "submitted for approval to the Council of State Owned Enterprises", and – in any event – provides no detail, if so, when, where, how and by whom this was done;

10.5.3 Does not allege that the (relevant and claim amount inclusive) budget was approved;

10.5.4 Does not state that the second defendant attended and participated in any meeting at which the (relevant) budget was considered and/or approved.'

[11] Mr Phatela, counsel for the respondent, submitted that summary judgment must be refused if the respondent discloses facts which, accepting the truth thereof, or if proved at a trial, will constitute a defence and that the respondent is *bona fide.* He submits in this matter that respondent has more than met the requirements for resisting summary judgment.

[12] He further submitted that the word '*fully'* should not be given a literal meaning but:

*'*The word 'fully' connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence.'[1]

[13] He further submitted that when regard is had to requirements of Article 12 of the Namibian Constitution, it is absolutely vital that the respondent be afforded an opportunity to defend the main action especially when he has disclosed facts which if proved at the trial would constitute a defence.

[14] The cornerstone of Mr Phatela's, argument was that not every non-compliance with a stature results in a nullity or should be visited with illegality. He relied on *Namundjebo Tilahun N.O. v Northgate Properties (Pty) Ltd & Others*[2] where the court quoted with approval *The City of Tswane Metropolitan Municipality v RPM Bricks,* 2008 (3) (SCA) that:

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[1]See: Namibia Breweries Limited v Serrao 2007 (1) NR 49 at 52 citing with approval Corbett J in Maharaj v Barclays National Bank Ltd 1976 (1) SA 48 (A) at 426 C-D

[2] (SA 33-2011)[2013] NASC 12 (7 October 2013) at 30-31.

'*[11] It is important at the outset to distinguish between two separate, often interwoven, yet distinctly different 'categories' of cases. The distinction ought to be clear enough conceptually. And yet, as the present matter amply demonstrates, it is not always truly discerned. I am referring to the distinction between an act beyond or in excess of the legal powers of a public authority (the first category), on the one hand, and the irregular or informal exercise of power granted (the second category), on the other. That broad distinction lies at the heart of the present appeal, for the successful invocation of the doctrine of estoppels may depend upon it.*

[12] In the second category, persons contracting in good faith with a statutory body or its agents are not bound, in the absence of knowledge to the contrary, to enquire whether the relevant internal arrangements or formalities have been satisfied, but are entitled to assume that all the necessary arrangements or formalities have indeed been complied with. Such persons may then rely on estoppels if the defence raised is that the relevant internal arrangements or formalities were not complied with.

[13] As to the first category: failure by a statutory body to comply with provisions which the legislature has prescribed for the validity of a specified transaction cannot be remedied by estoppel because that would give validity to a transaction which is unlawful and therefore ultra vires. (Reference to authorities omitted).'[3]

[15] The respondent, he argues, has indicated that he will raise a collateral challenge against the plaintiff's claim. For this proposition, he relies on the *dictum* of the South African Supreme Court of Appeal in *Kouga Municipality v Bellingan.*[4] As to the principle of illegality, Mr Phatela argues that the court observed in *Rally for Democracy and Progress v Electoral Commission of Namibia*[5] that the rule of law is one of the principles upon which our State is founded. The principle of legality is one of the incidents that flow from the rule of law. It follows then that by virtue of the presumption of regularity, administrative acts – even those that may later be found to have been invalid – attract legal consequences until they are set aside or avoided.

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[3]Supra, para 57.
[4]2012 (2) SA 95 (SCA) at para 12.
[5]2010 (2) NR 487 (SC) at para 23.

[16] Relying on *Black Range Mining Pty (Ltd) v Minister of Mines and Energy NO & Others*[6] at para 19 stated the following:

'In the Rally for Democracy and Progress matter at paras 68-69, this Court distilled from case law and academic writing the principles relating to a collateral challenge to the validity of an administrative decision which may be summarized as follows:

1. *A collateral challenge may only be used if the right remedy is sought by the right person in the right proceedings;*

2. *Generally speaking and in an instance where an individual is required by an administrative authority to do or to refrain from doing a particular thing, if he or she doubts the lawfulness of the administrative act in question, the individual may choose to treat it as void and await developments. Enforcement proceedings will have to be brought by the administrative authority involved, and the individual will be able to raise the voidness of the administrative act in question as a defence.*

3. *It will generally avail a person to mount a collateral challenge to the validity of an administrative act where he or she is threatened by a public authority with coercive action, precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question.*

4. *Collateral challenges may not be allowed where evidence is needed to substantiate the claim, or where the decision maker is not a party to the proceedings, or where the claimant has not suffered any direct prejudice as a result of the alleged invalidity.*

5. *A collateral challenge bears on a procedural decision.'*

[17] Mr Phatela submits that as a general principle, a collateral challenge to an administrative act or decision occurs when the act or decision is challenged in proceedings whose primary object is not the setting aside or modification of that act or decision. The general thread that runs through the case law is that a collateral challenge may be allowed where an element of coercion exists: a typical example is

[6](SA 09/2011) [2014] NASC 4 (26 March 2014).

where the subject is threatened with coercive action by a public authority into doing something or refraining from doing something and the subject challenges the administrative act in question 'precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question'.

THE LAW

Rule 60(5)(b):

[18] Rule 60(5)(2) and (b) of the Rules of the High Court provide that:

'(5) On the hearing of an application for summary judgment the defendant may-

(a) where applicable give security .....; or

(b) satisfy the court by-

(i) affidavit, which must be delivered before 12h00 on the court day but one before the day on which the application is to be heard; or

(ii) oral evidence, given with the leave of the court, of himself or herself or of any other person who can swear positively to the fact, that he or she has a bona fide defence to the action and the affidavit or evidence must disclose fully the nature and grounds of the defence and the material facts relied on.' (my underlining only for emphasis).

[19] In the case of *De Savino v Nedbank*,[7] the Supreme Court set out the enquiry that the court must conduct in summary judgment in the following words:

'first, had the defendant 'fully' disclosed the nature and grounds of the defence to be raised in the action and the material facts upon which it was founded; and, second, on the facts disclosed in the affidavit, did the defendant appear to have, as to either the whole or part of the claim, a defence which was bona fide and good in law. If the court was satisfied on these matters, it must refuse summary judgment, either in relation to the whole or part of the claim, as the case might be.'[8]

[7] *De Savino v Nedbank* 2012 (2) NR 507 at 516 para [24].
[8] supra at 516 para [27 – 28].

[20] In the *Namibia Breweries Limited v Serrao*[9] at [para 4], the court held that rule 32(5) – similar to rule 60(5) – confers discretion on the court, so that even if the defendant's affidavit does not meet fully the requirements of the rule, the court may nonetheless refuse to grant summary judgment. Van Winsen J's insightful exposition on what a court should take into account when exercising such discretion is instructive: The Courts – quite rightly – never tire of pointing out the drastic consequences of a summary judgment order and that the natural corollary to this is that such an order will only be given if the Court can be persuaded on the evidence before it that plaintiff has what has sometimes been referred to as an unanswerable case.

IS THE PLAINTIFF'S CASE UNANSWERABLE?

[21] In *Maharaj v Barclays National Bank Ltd*[10] the court at 426 stated that –

'while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material fact upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence.'

[22] In *Gilinsky and Another v Superb Launderers and Dry Cleaners (Pty) Ltd*[11] the court at 810A stated that:

'it follows therefore, that if the allegations in the defendant's affidavit … are equivocal or incomplete or open to conjecture then the requirements of the rule in question have not been complied with.'

[23] In the matter of *Kelnic Construction (Pty) Ltd v Cadilu Fishing (Pty) Ltd*[12] at 201C – F Strydom JP (as he then was) said the following:

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[9] 2007 (1) NR 49 (HC) at 52- 53.
[10] 1976 (1) SA 418 (A).
[11] 1978 (3) SA 807 (C).
[12] 1998 NR 198 (HC).

'There can be no doubt … that summary judgement is an extraordinary remedy which does result in a final judgment against a party without affording that party the opportunity to be heard at a trial. For this reason courts have required strict compliance with the rules and only granted summary judgments in instances where the applicant's claim is unanswerable.' [Own emphasis added.]

[24] In the case of *Commercial Bank of Namibia Ltd v Transcontinental Trading*[13] at 143E – I, Hannah AJ (as the then was) stated that:

'First it is necessary to consider what it is that a respondent to an application for summary judgment has to do in order to successfully resist such an application. In terms of rule 32(3) he may either give security to the plaintiff for any judgment which may be given or satisfy the court by affidavit … that he … has a *bona fide* defence to the action, and such affidavit … shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.'

[25] Where the defence is based on facts averred by the defendant the court is not concerned with determining whether or not there is a balance of probabilities in favour of the one party or the other. All that the court enquires into is: (a) whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law. If satisfied on these matters the court must refuse summary judgment, whether wholly or in part of the claim. The word 'fully', as used in the context of the rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with facts and evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence …' [14]

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[13]1991 NR 135 (HC); 1992 (2) SA 66.
[14]Maharaj v Barclays National Bank Ltd *supra* at 426B.

[26] Teek J, in the case of *Namibia Petroleum (Pty) Ltd v Vermaak*[15] took the matter further and said the following:

'At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required as of a plea; nor does the court examine it by the standard of pleadings.'

[27] The word 'fully' requires that sufficient detail of the nature and grounds of the defence must be disclosed in order to enable the Court to consider whether or not a *bona fide* defence – or … whether the defence is a good one and is honestly made.[16] In order to determine whether the defence raised by the respondent constitutes a good defence in a law and whether it appears to be *bona fide* the court must be fully appraised of the material facts upon which defendant relies with sufficient particularity and completeness as to enable the court to hold that if the statements in fact are found to be correct, judgment should be given for respondent.[17]

[28] The defence must therefore not be averred in a manner which appears in all the circumstances to be' needlessly bald, vague or sketchy.'

[27] In the case of *Kramp v Rostami*[18], Teek J said:

'The test in an application of this nature is for the respondent to set out a *bona fide* defence in his answering affidavit. There is no onus on him apart from setting out the facts which in the absence of a trial would satisfy the court that he has a *bona fide* defence in order to entitle the court to decline applicant's application for summary judgment.'

[28] I shall now proceed to deal with respondent's defence on the merits to determine whether or not it is a *bona fide* one. The approach of the Courts in this regard is clear:

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[15]1998 NR 155 (HC),
[16]Herb Dyers (Pty) Ltd v Mohamed and Another 1965 (1) SA 31 (T).
[17]Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 426, Breytenbach v Fiat A (Edms); Bpk 1976 (2) SA 226 (T) at 3421A.
[18]1998 NR 79 (HC) at 82C – I

"The Courts have over a number of years formulated what is required of defendant in order that his affidavit may comply with the terms of this rule. The defendant must satisfy the court that he has a defence which, if proved, would constitute an answer to the claim and that he is advancing it honestly. The latter portion of the rule sets out what must be stated in an affidavit to put the court into a position to satisfy itself whether or not a *bona fide* defence has been disclosed. It requires the affidavit to state (a) the nature, and (b) the grounds of the defence and (c) the material facts relied upon to establish such a defence and these requirements must be stated 'fully'. It follows, therefore, that if the allegations in the defendant's affidavit relative to these factors are equivocal or incomplete or open to conjecture then the requirements of the rule in question have not been complied with.'[19]

[29] The word fully mentioned in the rules is not meant to be given its literal meaning and it is "sufficient for the respondent to set out facts so as to persuade the court that it has a *bona fide* defence to the claim. But if the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the court to consider in relation to the requirement of bona fides – and grant the application sought.

IS THE PLAITNIFF'S CLAIM UNANSWERABLE?

[30] To answer the above question, it's important to understand and appreciate the plaintiff's case. The plaintiff's principal causes of action are based on various alternative enrichment claims, including the *condictio sine causa,* the *condictio indebiti,* the *condictio ob turpem vel iniustam causam* and a general enrichment action. It is trite that a valid basis for such causes of action is the return or repayment of a performance which was not owed (for instance because it was illegal).[20]

[31] The high water mark of the respondents defence to the plaintiff's claim is that:

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[19]'*Gilinsky and Another v Superb Launderers and Dry Cleaners (Pty) Ltd 1978 (3) SA 801 (C) at 809H - 810A.*

[20]First National Bank of SA Ltd v Perry NO [2001] 3 All SA 331 (A); Afrisure v Watson [2009] 1 All SA 1 (SCA); Govender v Standard Bank of SA Ltd [1984] 2 All SA 497 (C).

(a) there was substantial compliance with section 22(1) of the SOE Act;
(b) the plaintiff's claim is bad in law unless plaintiff review and set aside the approval of the third defendant to pay the respondent the claim amount (collateral challenge defence);
(c) the plaintiff is estopped;
(d) the court must exercise its discretion to refuse summary judgement, presumably because it's an extra-ordinary remedy.

[32] Section 22(1) of the SOE Act calls for the presence of three jurisdictional factors. They are: approval by portfolio Minister, concurrence by Minister of Finance and conformity with directive of the State-Owned Enterprise Governance Council.

[33] As regards the substantial compliance with a statute, argument of the respondent in itself is an admission that s 22(1) of the SOE Act was not complied with. It is clear from the papers that this argument is premised on the approval of the portfolio Minister only. It is also common cause that the two other jurisdictional factors were not complied with. Mr Phatela was unable to provide case authority for his submission during argument. I am not surprise because, with respect, the argument loses sight of its premise.

[34] The premise of the substantial compliance argument must be the approval of the portfolio Minister. What was that approval? The respondent, attached the approval to its papers. The approval is contained in a terse letter, written by the respondent on the 18th of January 2012. This letter was written to the portfolio Minister. It is a request, by the respondent for a 'review' of the respondent's remuneration based on his experience of three years with plaintiff. The request was based on best practice perspective taking 'into account the directives of the GG Number 4538 dated 12 August 2010'. The portfolio Minister was informed by the respondent that it was within his discretion to approve higher remuneration in accordance with the Social Security Act, 1994 (Act 34 of 1994) and no Cabinet approval is needed. Furthermore, the approval of the higher remuneration seems to

have been a pre-condition for acceptance by the respondent of his re-appointment presumably as Chairperson or member.

[35] From the above exposition of the approval it is clear that:

(a) the letter was not written to the SOE Governance Council nor to the Minister of Finance; and
(b) the letter was written to the portfolio Minister to exercise a discretion in accordance with the Social Security Act, 1994 (Act 34 of 1994).

[36] To argue, then that there is substantial compliance with the SOE Act, based on a letter and resultant decision based on the Social Security Act, is not only self-serving but misconceived. Furthermore, to argue that the Minister of Finance was consulted in the above circumstances is preposterous. That applies to the argument that since the budget of the plaintiff serves before Council, and the Minister of Finance sits on Council, he was consulted and perhaps consented. It is not surprising that in the circumstances in which the respondent wrote this letter, he did not contemplate for it to go to the State-Owned Enterprise Governance Council and there is no proof that it did. Hence the absence of consent by the Minister of Finance.

[37] The plaintiff's claim is that absent consent of the Minister of Finance, the claim amount was paid to the respondent in error, mistake or through misrepresentation and the respondent having been enriched must pay back. I reject that the defence of substantial compliance raised is *bona fide* for the above reasons.

[38] As for the collateral challenge defence, it appears to me, the argument advanced on behalf of the respondent is that the portfolio Minister's approval as an administrative decision stands and must be honoured until lawfully set aside in a Court of law. As such the plaintiff's claim should not succeed unless the approval is set aside.

[39] The principles relating to collateral challenge are set out above. At best for the respondent, the approval by the portfolio Minister created a contractual relationship between the respondent, plaintiff and portfolio Minister. That contract in itself is void or illegal for want of compliance with s 13 and 22(1) of the State-Owned Enterprise Act. Will a collateral challenge arise in these circumstances? Even assuming the portfolio Minister's approval to be administrative, it's obvious illegality prevents the defence of collateral challenge, if it is a defence at all.

[40] The estoppel point raised by the respondent, is neatly dealt with by JC Sonnekus as follows –

'The rule that public policy does not permit estoppel to operate in circumstances where its application would produce a result which is not permitted by law, necessarily involves that a plea of estoppel will not be upheld if its effect would be to render enforceable what the law, be it common law or statute law, has in the public interest declared to be illegal or invalid.

…

Where a statute requires that certain formalities have to be complied with in order to render a transaction valid, a failure to comply with such formalities cannot be remedied by estoppel.

Estoppel cannot be employed to give effect to that which the law does not permit. A statutory or corporate body, which only has such powers and duties as are entrusted to or imposed upon it by law or by its constitution, cannot, therefore, be bound by estoppel to do something which is beyond its powers, or to refrain from doing something which is its duty to do.[21]

[41] I agree that summary judgment is an extra ordinary remedy. Nevertheless, it is a lawful remedy open to a plaintiff with an unanswerable claim. I further decline to follow the submissions by the respondent that I must decline the application for

[21]JC Sonnekus, *The Law of Estoppel in South Africa,* at 171, 172, 179; Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd [2001] 4 All SA 273 (A).

summary judgment simply because this court has such a discretion. In my view, any discretion by the court must be exercised according to the rules of reason and justice, not according to private opinions.

THE ORDER

[42] In conclusion, I am not satisfied that the respondent has set out a *bona fide* defence which is good in law to the plaintiff's claim. In the result, the application for summary judgment is granted with costs, such costs include the costs of one instructing and two instructed counsel.

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P KAUTA

Acting Judge

Appearances:

For Plaintiffs:	Adv R Tőttemeyer (Assisted by Adv D Obbes)
Instructed by:	ENSAFRICA I NAMIBIA, Windhoek

For 1st Defendant:	Adv T Phatela (Assisted by Mr D H Conradie)
Instructed by:	CONRADIE & DAMASEB, Windhoek.