

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: I 3249/2014

In the matter between:

**WILDLIFE ASSIGNMENT INTERNATIONAL (PTY) LTD**

**PLAINTIFF**

and

**HERBERT HENLE T/A NAMIB GAME SERVICES**

**DEFENDANT**

**Neutral citation:** *Wildlife Assignment International (Pty) Ltd v Herbert Henle t/a Namib Game Services* (I 3249/2014) [2019] NAHCMD 105 (16 April 2019)

**Coram:** MILLER, AJ

**Heard:** 09 July 2018

**Delivered:** 16 April 2019

**Flynote:** Contract – Interpretation – Whether or not the provisions of the Prescribed Rate of the Interest Act 55 of 1975 became applicable or not, avoiding the requirement on paying interest on a capital amount becoming due – Court of the view that no special circumstances exist relating to this debt in that the agreement was an ordinary

transaction in the normal course of business – Interest resultantly to be paid as per the agreement.

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### ORDER

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1. The defendant is ordered to pay interest on the capital sums claimed in claim 1 at the rate of 20% percent per annum *a tempore mora*.
  2. The defendant must pay the cost relating to claim 1 including the costs of one instructing and two instructed counsel.
  3. The plaintiff must pay the cost relating to claim 2 including the costs of one instructing and one instructed counsel.
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### JUDGMENT

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MILLER AJ:

- [1] In this matter two issues require final determination. They are:
- (a) Whether the defendant is liable to pay interest on the capital amount claimed by the plaintiff under claim 1 and
  - (b) What order as to costs of the action will be appropriate.

[2] With regard to the first issue raised it is common cause that the capital sum became due and payable as at October 2012. The defendant who seeks to avoid paying interest on the sum relies on the provisions of the Prescribed Rate of Interest Act 55 of 1975. The Act and more particularly section 1(1) of the Act reads as follows:

“(1) If a debt bears interest at the rate of which the interest is calculated is not governed by any other law or by an agreement in a trade custom or in any other manner, such

interest shall be calculated at the rate prescribed under subsection (2) as at the time when such interest begins to run, unless a court of law, on the grounds of special circumstances relating to that debt, orders otherwise.”

[3] From my reading of the particular section of the Act, it appears that the prescribed rate of interest on the capital amount will accrue unless:

- a) The transaction determining the debt contains an agreement as to whom the rate of interest will be, or;
- b) There exists a legislative provision which prescribes the rate of interest applicable to the specific type of debt, or;
- c) A court of law orders otherwise because it is of the view that there are special circumstances relating to that debt.

[4] It is apparent from the papers that the debt in issue in claim 1 arises from an oral agreement concluded between the plaintiff and the defendant on or about February or March 2011 in terms of which the parties would export nine elephants to Mexico. The agreement further provides that after the expenses incurred were deducted, the parties would share the profits on a 50/50 basis. It was furthermore agreed that the reconciliation done by the plaintiff's Dr. van Niekerk relating to this transaction was correct. That much is apparent from the pre-trial order in this matter. (Paragraphs 32(c) 5<sup>th</sup> of the court order).

[5] It is in my view apparent that there are no special circumstances relating to this debt. It was an ordinary transaction in the normal course of business containing an agreement for the export of nine elephants and a 50/50 division of the profits after the expenses incurred were deducted. These were itemized in the reconciliation done by Dr. van Niekerk which was accepted as being correct by the defendant.

[6] In seeking to make its case that there were 'special circumstances', Mr T. Bernard called the defendant as a witness. He was the only witness to be called. The evidence of the defendant centers around a completely different debt arising from the sale of buffalos by the defendant to either the plaintiff or a certain Mr Krog. It relates to an entirely different transaction as the one which forms the subject of claim 1. If there are to be 'special circumstances' relating to that debt, the fact remains that they have nothing in common with one another. The defendant adopts the stance that all the different transactions had to be bundled together in order to determine the issue of the defendant's indebtedness. I do not agree. The debt from the transaction in claim 1 is a distinct and different debt arising from facts and circumstances different from the debt testified to by the defendant. It is separate in terms of time, merchandise and terms as to payment, being the payment of 50% of the next proceeds of that transaction. It is not dependent on or have any relation to the transaction referred to by the defendant.

[7] The debt in claim 1 became fixed in its terms once the reconciliation was done by Dr. van Niekerk. The debt referred to by the defendant has its own terms and conditions. It arose in different circumstances and relates to the sale and export of different animals to an entirely different entity. Moreover, if the defendant's contention that the transactions were to be handled together, is correct there remains no explanation why he agreed to the reconciliation done by Dr. van Niekerk.

[8] The transaction mentioned by the defendant is not in relation to a debt owed by him, but rather a debt owed to him. The Act, simply not does not apply to those facts. It was suggested that all the different transactions between the parties, were to be reconciled with one another in order to determine the ultimate liability, if any of the defendant. There was no agreement to that effect. The evidence of the defendant shows that the parties differed as to whether such an approach should be adopted.

[9] I am in any event not persuaded that the evidence of the defendant makes out a case for the existence of special circumstances, ever if I were to accept that there had to be a reconciliation of all the transactions. The term "special circumstances relating to the debt" is not defined in the Act. Counsel for the parties did not refer me to any

authority in that regard. Mr Barnard for the defendant suggested that it is all about fairness. I do not agree. If the legislature had “fairness” in mind, it would have said so.

[10] The term “substantial and compelling circumstances” is one more associated with criminal law. There exist various enactments requiring a court to impose a prescribed minimum sentence unless there are substantial and compelling circumstances which warrant a lesser sentence (State v J.B; SA 18/2013). The correct approach appears to be that all the facts must be taken into consideration and that each case will be considered on its own facts. There need not be circumstances which can be termed “extraordinary”.

[11] The thrust of the defendant’s evidence is that the amount owed to him was paid into a bank account in Botswana and thereafter transferred to another account in Germany and that he was not aware or made aware of these transactions. He seems to suggest that he should have been notified of the fact that the payment had been made. The bank accounts are that of the defendant and one would ordinarily expect that the holder of the account would know about deposits into the account from time to time. The defendant on his version was passive and made no effort to establish what was happening to the bank accounts held by him. If that is indeed the case, he only has himself to blame if a deposit was made into the account and he did not notice it. I also find it improbable that the banker in Botswana, Mr Louis Beukes, would transfer the amount to Germany without a mandate from the defendant as he was the holder of the account at that bank.

[12] I find that even in relation to the debt no special circumstances exist.

[13] I turn to the issue of costs. The award of costs is in the discretion of the trial court. In this case the plaintiff was successful with regard to claim 1. The plaintiff withdrew claim 2 at the commencement of the trial. I consider that the appropriate order would be that the defendant will bear the costs of claim 1 and the plaintiff the costs relating to claim 2.

[14] I make the following orders:

- a) The defendant is ordered to pay interest on the capital sums claimed in claim 1 at the rate of 20% percent per annum *a temporae mora*.
- b) The defendant must pay the cost relating to claim 1 including the costs of one instructing and two instructed counsel.
- c) The plaintiff must pay the cost relating to claim 2 including the costs of one instructing and one instructed counsel.

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Miller, AJ  
Acting

APPEARANCES:

PLAINTIFF:

Phillip Barnard

Instructed by Du Pisani Legal Practitioners

DEFENDANT:

Theo Barnard

Instructed by Berens & Pfeiffer