

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: HC-MD-CIV-ACT-CON-2017/02613

In the matter between:

STANDARD BANK NAMIBIA

PLAINTIFF

and

DIVUNDU RAINBOW RIVER LODGE CC

FIRST DEFENDANT

GIDEON JOHANNES DE WAAL

SECOND DEFENDANT

Neutral citation: *Standard Bank Namibia v Divundu Rainbow River Lodge* (HC-MD-CIV-ACT-CON-2017/02613) [2019] NAHCMD 234 (01 July 2019)

Coram: PRINSLOO J

Heard: 11-14 March; 25 March; 29 March and 01 July 2019

Delivered: 01 July 2019

Reasons: 11 July 2019

Flynote: Merchant agreement – Same not having been signed by both parties –
Reliance by a party to the said agreement – existence and validity of said agreement –

Effect thereof – Denial of existence of an agreement because it was not signed - Such denial bad in law.

Liability of a debt - Nature and content of the agreement regulating the relationship between the parties, the resultant breaches and effect thereof – The parties' respective liabilities in consequence of the alleged breach

Banking Institutions – Bank - Client relationship – The relationship between a bank and its client is based on contract and is essentially that of creditor and debtor with the underlying nature of mandate.

Legislation – FIA and POCA – the said Acts superimpose certain (implied) terms on the bank/client relationship – However, one of these implied terms imposes an obligation on a banking institution, in terms of s 33 (3) of FIA, in which the disclosure of suspected fraudulence is prohibited.

Summary: The plaintiff instituted action against both the first and second defendant, in which the claim is premised upon an alleged breach of a disputed written merchant agreement purportedly entered into between plaintiff and first defendant. The plaintiff seeks that second defendant be held liable for the debts of the first defendant and seeks payment of the amount of N\$ 1 951 420.73 by the defendants jointly and severally, the one paying the other to be absolved. The defendants however resist plaintiff's claim on the basis of a denial of the existence of a written merchant agreement, and counter-claim for damages arising out of plaintiff's alleged breach of its mandate to properly and prudently scrutinize fraudulent card transactions. First Defendant accordingly seeks an order against the plaintiff in the amount of N\$ 2 659 168.01.

Held that plaintiff did not act fraudulently or facilitated fraud or money laundering. There is no evidence before Court to find that the plaintiff was negligent in any way and

therefore the defence of apportionment of damage in terms of Apportionment of Damage Act, 34 of 1956, does not apply.

Held further that second defendant's denial of the merchant agreement is mainly premised on the fact that an unsigned agreement was attached to the particulars of claim. Denying the existence of an agreement simply because it was not signed is a bad defence in law. An agreement was therefore in place, be it in writing or oral and therefore the plaintiff and first defendant are bound by the terms of the merchant agreement.

Held further that the liability of second defendant must be determined with reference to the provisions of s 64 (1) of the Close Corporations Act. The evidence reveals that the second defendant, in effecting payments to the booking agents, factually deprived the first defendant of income and burdened it with VAT obligations in respect of income it did not receive. Second defendant is therefore liable for first defendant's debts.

Held further that the second defendant conceded that the first defendant was credited with proceeds emanating from fraudulent activity and therefore the defendants can in law not suffer damages arising from the very proceeds as testified by the second defendant. First defendant's counterclaim must therefore be rejected as unsustainable. The counterclaim must fail.

ORDER

1. The Plaintiff's claim succeeds and the defendants are ordered, jointly and severally, the one paying the other to be absolved, to pay plaintiff the amount of N\$ 1 951 420.73.
2. Interest *a tempore morae* on the N\$ 1 951 420.73 from 23 December 2016 to 31 January 2019.

3. Interest *a tempore morae* on the N\$ 1 411 420.73 from 01 February 2019 to final date of payment.
4. Cost of suit, such costs to include the costs of two legal practitioners, where engaged.
5. The counterclaim is dismissed with costs, such costs to include the costs of two legal practitioners, where engaged.
6. The matter is regarded as finalized and is removed from the roll.

JUDGMENT

PRINSLOO J

Introduction

[1] The plaintiff in this action, a Namibian commercial bank registered in accordance with the Banking Institutions Act No 2 of 1998, instituted action against both Divundu Rainbow River Lodge CC (herein the first defendant), a close corporation registered in accordance with the Close Corporations Act, 1988, and Mr Gideon Johannes De Waal (herein the second defendant) who holds 100% members' interest in first defendant. In essence plaintiff's claim is premised upon an alleged breach of a disputed written merchant agreement purportedly entered into between plaintiff and first defendant during September 2010.

[2] The plaintiff accordingly seeks against the defendants an order in the following terms:

- (a) Declaring the second defendant liable for the debts of the first defendant;
- (b) Payment of the amount of N\$ 1 951 420.73 by the defendants jointly and severally, the one paying the other to be absolved;

- (c) Mora interest on the aforesaid amount at the rate of 20% p/a;
- (d) Cost on a scale as between counsel and client;
- (e) Further and/or alternative relief.

[3] The defendants resist plaintiff's claim on the basis of a denial of the existence of a written merchant agreement, and counter-claim for damages arising out of plaintiff's alleged breach of its mandate to properly and prudently scrutinize fraudulent card transactions. First Defendant accordingly seeks an order against the plaintiff in the following terms:

- (a) Payment in the amount of N\$ 2 659 168.01;
- (b) Interest a *tempore morae* on the aforesaid amount at the rate of 20% p/a;
- (c) Costs of suit on a scale as between counsel and client;
- (d) Further and/or alternative relief.

Background facts

[4] The defendants were active banking clients of plaintiff at all material times relevant to this dispute. During the period 03 October 2016 to 23 December 2016 the defendants manually processed approximately 109 manual card transactions in excess of N\$ 9 million. Of these transactions 69 failed due to the restrictions placed on it by the respective card issuers. 40 of the transactions in the amount of N\$ 2 673 398.10 were credited to the first defendant's bank account. The transactions were intended as payments for bookings made at first defendant's accommodation establishment, and were facilitated through booking agents with whom second defendant coordinated the arrangements.

[5] Plaintiff's claims against the card issuers, subsequent to crediting first defendant's account, resulted in certain disputed transactions by the card holders. These disputes gave rise to the initiation of investigations and resultant criminal proceedings instituted against both the defendants in terms of the provisions of the

Prevention of Organized Crime Act (herein referred to as POCA)¹. On 01 February 2019 this court, per Angula, DJP granted certain orders pursuant to an application by the Prosecutor – General for forfeiture of defendants’ property (positive bank balances held with plaintiff) in terms of s 61 of the Prevention of Organized Crime Act.² A total amount of N\$ 540 385.03 was ordered to be released from the operation of forfeiture and by consent of the defendants agreed to be paid to the plaintiff herein.

[6] Plaintiff, in relying on a disputed written merchant agreement purportedly entered into between first defendant and itself, debited first defendant’s positive balance in its bank account, resulting in an unpaid balance of N\$ 1 951 420.73 representing the amount claimed in this action. Plaintiff seeks to hold the Second Defendant liable for such amount on the basis of s 64 of the Close Corporations Act.³

[7] The first defendant, through the agency of second defendant, whom in turn worked with two foreign-based agents, accepted block bookings for the period November – December 2016 pursuant to the transactions processed during the period 17 November 2016 to 23 December 2016. As the prospective guests were not physically present when payments were made at first defendant the transactions were manually processed by the second defendant via the point of sale device presented for payment to plaintiff.

[8] The defendants not only dispute plaintiff’s claim but also instituted a counterclaim, alleging that the chargebacks by plaintiff in the amount of N\$ 2 659 168.01 constitute a loss to them as no other bookings were accepted during the relevant period. They accordingly seek an award of damages in such amount against plaintiff.

The pleadings

¹ 29 of 2009.

² *Prosecutor-General v Standard Bank Namibia Limited* (POCA 6/2017) [2019] NAHCMD 13 (1 February 2019).

³ 26 of 1988.

Particulars of claim

[9] The plaintiff avers that on or about 22 September 2010 and at Windhoek it entered into a written merchant agreement with the first defendant who, at the time, was represented by its member, a certain Johanna Cornelia Bean. An unsigned and undated document titled Merchant Agreement (hereinafter referred to as the agreement) was attached to plaintiff's particulars of claim. The salient terms of the agreement were: (a) plaintiff provides the requisite equipment (Point-of-Sale device / POS), maintenance, service and training; (b) defendant only accepts valid and current cards presented for payment; (c) plaintiff was entitled and irrevocably authorized to debit defendant's bank account with any chargebacks effected; (d) manual entries must be accompanied by a card imprint, alternatively a scanned copy of front and back of card, together with a valid authorization code obtained from plaintiff; (e) defendant indemnifies plaintiff for all disputed transactions done manually on the POS.

[10] The plaintiff avers that it complied with all its obligations, and that the first defendant, in breach of the terms relating to processing of manual transactions, occasioned chargebacks constituting losses to the plaintiff in the amount of N\$ 1 951 420.73 which was credited to first defendant's account during the period 17 November 2016 to 23 December 2016. It further raises three alternative claims for a similar claim amount, founded on unjustified enrichment.

Defendant's plea

[11] The defendants, in disputing the plaintiff's claim, filed a joint plea. The defendants denied the existence of a merchant agreement and raised three further defences to the claim of the plaintiff, namely:

- a) estoppel;
- b) voluntary assumption of risk; and

c) contributory negligence and apportionment of damages in terms of the Apportionment of Damages Act, 34 of 1956.

[12] The defendants deny the existence of the agreement and, in consequence, dispute the terms and conditions thereof. Defendants further allege that plaintiff failed to comply with its statutory duties imposed by the Financial Intelligence Act⁴ (herein referred to as FIA) and POCA. First defendant admits that it processed card transactions during the period 17 November 2016 to 23 December 2016 but denies that same were done negligently or fraudulently.

[13] The defendants further admit that a portion of the card transactions were credited by plaintiff to first defendant's bank account but put plaintiff to the proof of the exact amounts credited. They admit that several card transactions were declined by card issuers but put plaintiff to the proof of the actual approved card transactions and its value. Defendants deny knowledge of the chargeback claims. Notwithstanding, they acknowledge that plaintiff informed them that an amount of N\$ 374 192.86 was recovered. Defendants plead that plaintiff recovered a further amount of N\$ 361 018.00, which should serve to reduce plaintiff's claim. Furthermore, defendants plead that the amounts of N\$ 349 375.26 were frozen in their bank accounts with plaintiff and should serve to correspondingly reduce plaintiff's claim. The defendants allege that the amount of N\$ 1 474 858.86 paid out as commission to third parties, should be discounted against plaintiff's claim.

[14] The defendants allege that the plaintiff cleared the sum of N\$ 1 951 420.73 into the first defendant's bank account and they acted on the correctness of the facts as represented by plaintiff and, to their detriment, appropriated some of the monies. Defendants admit that plaintiff may have erroneously credited first defendant's account with N\$ 1 951 420.73 but plead that they acted to their detriment on the correctness of the facts represented by plaintiff. They deny being unjustifiably enriched at the expense of plaintiff in the claim amount, and further dispute liability on the basis of an alleged

⁴ 3 of 2007.

negligent conduct of plaintiff in failing to comply with its statutory duties. Lastly, it is alleged that the plaintiff voluntarily assumed the risk inherent in card transactions, thus negating defendants' fault, and that plaintiff is estopped from claiming from the defendants as it investigated suspicious transactions on first defendant's account on 01 and 12 December 2016 respectively.

Counterclaim

[15] The defendants counterclaim against the plaintiff, averring that the relationship between the parties is premised upon, and regulated by mandate arising from a banker and client relationship. It is within this context, so it is alleged, that the plaintiff undertook to check transactions and keep safe all monies credited into first defendant's bank account. It is alleged that during 2016 the first defendant, duly represented by second defendant, mandated plaintiff via written electronic mandates to process several card transactions for credit to the first defendant. It is alleged that the defendants do not have copies of such electronic mandates.

[16] Defendants aver that during the period 17 November – 23 December 2016 the plaintiff checked, verified and approved approximately 40 card transactions and credited first defendant's bank account with an amount of N\$ 2 659 168.01. The tacit and/or implied terms of the mandate were averred to be (a) that plaintiff would verify each card transaction, (b) investigate suspicion and/or fraud and inform defendants accordingly, (c) act with due diligence and care as required of an accountable banking institution; (d) stop all fraudulent card transactions; and (e) only clear and credit non-fraudulent monies into first defendant's bank account. Furthermore, that the FIA and the POCA superimpose certain terms on the traditional bank-client relationship.

[17] It is averred that the plaintiff, in breach of its mandate, failed to (a) properly investigate the fraudulent card transactions; (b) stop fraudulent card transactions, money transfers and fraudulent credits; and (c) inform first defendant that the card transactions are fraudulent. In consequence of the aforesaid breach the first defendant

suffered damages and/or loss of lodge bookings as from 17 November 2016 in the form of chargeback claims in the amount of N\$ 2 659 168.01.

Plea to counterclaim

[18] Plaintiff denies the mandate and its purported breach, together with the averred tacit and implied terms, and alleges that it acted in terms of the written merchant agreement. It alleges that, in terms of such written agreement, it processed approximately 40 card transactions and in consequence credited first defendant's bank account with the amount of N\$ 2 673 391.01. It further alleges that it acted with due care in investigating the chargeback claims when received, and instituted criminal proceedings which resulted in the POCA Case 6/2017. Plaintiff accordingly denies that first defendant suffered losses or damages.

Issues to be determined by this court

[19] The parties were ordered to trial on the issues formulated in their joint pre-trial report, the factual disputes effectively centering on a determination of the nature and content of the agreement regulating the relationship between the parties, the resultant breaches and effect thereof. The issues of law for determination at trial were identified as the parties' respective liabilities in consequence of the alleged breach, second defendant's liability for the debts of first defendant, and the defences of estoppel and voluntary assumption of risk raised in defence to plaintiff's alternative claims.

The evidence

Plaintiff's case

[20] Two witnesses were called to testify on behalf of the plaintiff. The first was Mr Pumba Muundja, an internal forensic investigator of plaintiff, and Ms Uanjengua Katjjuanjo, plaintiff's operations control manager.

Mr Pumba Muundja

[21] Mr Muundja testified that in his capacity as forensic investigator he acts as plaintiff's representative in all internal investigations of financial crimes, and as such has access to all records of plaintiff. He related that on 24 December 2016 he received an alert from plaintiff's card fraud detection unit situated in South Africa regarding a series of suspicious foreign credit card transactions manually processed on a point of sale (POS) device at Divundu Rainbow River Lodge – Merchant number 141000013560 with bank account number 2419055451.

[22] The witness explained that a transaction on the POS system is done by the merchant. It is received by the plaintiff, who send it to the card issuing bank. Communication in digital format is relayed to the issuing bank through payment associations namely Visa or Mastercard. The issuing bank will decide if they will release the funds. If the transaction is approved by the issuing bank then the monies is received by the plaintiff in the form of a settlement file.

[23] The monies is made available to the merchant and the plaintiff carries the risk from the time that the money is made available to the merchant until such time that the settlement file is received from issuing bank.

[24] The witness testified that a report regarding a fraudulent transaction will normally not be reported within the three day risk period when the transactions involves international banks. This would be more probable if the transaction involves local banks. It should also be born in mind that notification of fraud is dependent on the issuing bank.

[25] It was Mr Muundja's further evidence that on 23 December 2016 he received a merchant investigation request from plaintiff's card detection unit based in

Johannesburg, Republic of South Africa. He explained that the investigation request was prompted by an alert which was created on plaintiff's PRM (proactive risk management) system which detects matters such as questionably large transactions and excessive declines. Such request was in respect of the first defendant with merchant identification number 141000013560 which was allocated on 21 September 2010.

[26] In consequence of such report he then proceeded to conduct an investigation and confirmed that there was a spiking increase in the value of card transactions from a monthly average of N\$ 52 854 to N\$ 409 707.38, and that all these transactions were processed manually. The witness testified that as at 24 December 2016 the plaintiff received chargebacks amounting to N\$ 329 960. He testified in detail about the process which is followed when a manual card transaction is engaged, up to and including the processes involving chargebacks. Following these findings he then contacted the second defendant in order to obtain copies of the manual transactions which formed part of the chargebacks which were reported as fraudulent by the issuing banks. He maintains that the second defendant was not in a position to provide him the requested documents.

[27] Subsequently the second defendant provided the witness with a printout copy of an authorization letter wherein one Ms Carmen Zammit granted the first defendant authorization to charge against her credit cards fees for hotel booking and international flights. Further to this the second defendant provided the witness with an invoice issued to a certain Mr Ben Woodcock, apparently a booking agent, reflecting a reservation at first defendant for the said Ms Carmen Zammit for the period 28 December 2016 – 07 January 2017, amounting to N\$ 382 500 of which N\$ 158 846.69 was agent commission for Mr Ben Woodcock. The latter provided the second defendant with scanned copies of three credits cards allegedly belonging Ms Carmen Zammit.

[28] The witness proceeded to identify the issuing bank of these credit cards and established that the three cards were issued by the same foreign bank (USAA Savings

Bank) in Las Vegas, Nevada and the United States of America, and this created further suspicion on his part. He cross-checked the three credit cards against the chargeback report he received and identified one amount of N\$ 127 500 processed by the defendants on 01 December 2016 included in the list. He received a further charge back report dated 12 January 2017 indicating that the total value of the disputed transactions due to fraud increased to N\$ 1 523 756.10.

[29] The witness testified that he examined the first defendant's merchant transaction journal which revealed that during the period 03 October – 23 December 2016 a total of 109 manual transactions in the sum of N\$ 9 464 940.60 were processed. He explained that manual processing on a POS device is an added and not a standard feature, and is subject to the terms of a merchant agreement. Of these manual transactions a total of 40 transactions in the amount of N\$ 2 673 398.10 was credited to the first defendant's bank account. 69 manual transactions failed to be processed due to restrictions placed on the cards by the respective card issuers. One transaction of N\$ 14 230.00, manually processed on 03 October 2016, was confirmed as valid by the issuing bank in South Africa. Ultimately transactions in the sum of N\$ 2 308 388.18 was disputed by the card holders and the card issuing banks forwarded chargeback claims in the said amount to the plaintiff. After the amount of N\$ 356 967.45 were recovered by Nedbank South Africa the balance due to the plaintiff was reduced to N\$ 1 951 420.73.

[30] He further testified that following receipt of the chargeback report dated 10 January 2017 he met with the second defendant in person and was able to confirm the suspicion regarding the fraudulent operations of the booking agents. He identified that after receipt of the credits in first defendant's account the first defendant made transfers to South African bank accounts: (a) on 06 December 2016 an amount of N\$ 150 000 (b) on 07 December 2016 an amount of N\$ 158 000 (c) on 10 December 2016 an amount of N\$ 133 680 (d) on 10 December 2016 an amount of N\$ 117 000 (e) on 11 December 2016 an amount of N\$ 209 048 (f) on 14 December 2016 an amount of N\$ 158 000 (g) on 21 December 2016 an amount of N\$ 374 192 (h) on 21 December 2016 an amount of N\$ 361 018. On 21 December 2016 an amount of N\$ 840 210.86 was transferred

from the account of the first defendant to the account of second defendant. From this amount payments set out in (g) and (h) were made.

[31] The witness testified that further to his meeting with the second defendant he advised that criminal charges be laid as the card holders reported the transactions as fraudulent. In addition to the advice given second defendant also then proceeded to report the matter to the Namibian Police which resulted in the Prosecutor General obtaining a preservation of property order in respect of the defendants' positive balances in their accounts held at the plaintiff bank. He testified that his investigations revealed that the first defendant failed to act prudently when processing the card details provided by the booking agent and as a result the transactions resulted in chargebacks. Furthermore, that in accordance with clauses 10.1 and 10.1.2 of the merchant agreement the plaintiff was entitled and irrevocably authorized to debit the chargebacks (N\$ 1 951 420.73) from the first defendant's bank account.

[32] During cross-examination the witness testified on the issue of chargebacks that from the date of raising a dispute until date of resolving there exist a window of 120 days. A dispute must be raised with the issuing bank within 40 days from date of the transaction and this dispute then goes through the chargeback process. From the date of raising the dispute through chargeback the dispute must be resolved between the issuer (issuing bank), the acquirer (the instructing bank) and the merchant before the 120 days is over.

[33] The witness testified that a dispute raised through chargeback does not automatically equate to fraud. However, if there is a whole number of declined transactions in respect of a specific merchant within a short period of time it will justify investigation.

[34] On a question posed by Mr Swanepoel, counsel for the defendant, of when the plaintiff finds a transaction to be fraudulent, if it will stop the transaction, the witness testified that the plaintiff may do so if a good reason exist for not releasing the funds. He

testified that it needs to be pre-determined that it is fraud. Therefore there needs to be sufficient evidence of that from the cardholder.

[35] The witness was asked if the plaintiff will pay out if a transaction is fraudulent. He testified that if the plaintiff knows that the merchant is willingly and knowingly processing fraudulent card transactions the plaintiff will terminate the relationship with the merchant and remove the terminal from the merchant's premises.

[36] He further testified that if the plaintiff is not aware that the merchant is acting fraudulently, as no investigation was instituted, then the plaintiff will release payment to the merchant in terms of the merchant agreement wherein it is agreed that the plaintiff would release the funds upon receiving valid approval of the issuing bank. The witness testified that in terms of the merchant agreement the plaintiff does not hold funds back.

[37] In case of fraud the funds are returned to the issuing bank. He testified that a hold can only be put on a merchant account subject to investigation.

[38] Mr Muundjua testified that the money in the first defendants account was not held back as the transactions relating to the first defendant account was already done by the time he started investigating the matter around 26 December 2016. He also emphasized that Mr Banze from Standard Bank South Africa RoA division was not an investigator on the matter, although stationed in the hub in South Africa which received chargebacks.

[39] The witness testified that he was aware of Zammit and Woodcock because of a previous incident with the Hilton Hotel, Windhoek and Indulge in Swakopmund. He stated however that it was not clear what their relationship with defendants were. After the interview with the second defendant on 10 January 2017 he was satisfied that it was transactions involving the same group and the same *modus operandi* and that the transactions were indeed fraudulent.

Uanjengua Katjuanja

[40] The witness testified that she is employed as plaintiff's Operations Control Manager. Her department is involved with incidents related to losses suffered by plaintiff, and is alerted of incidents through a system referred to as the incident management system. Upon receipt of incident reports from any given business unit she analyses the incident in order to determine the cause and value of the loss sustained, and to advise business units on preventative measure in order to minimize losses. Where losses are suffered it is captured on a system referred to as ARM5. Mitigating controls are then loaded on action tracking in order to ensure that similar incidents do not occur.

[41] She testified that on 08 February 2017 an incident report was raised by Mr Muundja under the project name "suspected merchant fraud", indicating that there was a potential loss of N\$ 2 659 168.10, an actual loss of N\$ 2 117 429.49, and a possible recovery of N\$ 541 675.61 arising from chargebacks. Her department established that the loss was occasioned by chargebacks received from card holders. The witness explained that chargebacks arise whenever there is a complaint by a customer regarding the fraudulent use of their credit card or debit card. She further reference to the process regarding chargebacks as testified by Mr Muundja, and explained the procedures involved when a card transaction is activated.

[42] The witness further testified that a daily chargeback report is sent to Standard Bank Africa via Network International (NI) by VISA or MasterCard, depending on who the corresponding association is. Network International accounts for the chargeback amounts by debiting the outward suspense account and crediting settlement suspense account of VISA or MasterCard. The funds on the two settlement accounts are then routed through a settlement process to the various associations by NI. She testified that in order to clear the VISA and MasterCard outward suspense accounts the Standard Bank Africa reconciliation team will process the following entries: debit the chargeback account and credit the outward suspense account. The debit on the chargeback

suspense is then transferred to losses. The plaintiff investigates transaction queries and claims the amount from the merchant if complaints are genuine or valid.

[43] According to the witness' evidence it was established that the chargebacks relevant to first defendant resulted from manual processing of cards through the use of plaintiff's POS device. When the chargeback came through the chargeback team in Johannesburg, Republic of South Africa debited the plaintiff's settlement account with the amount of the chargeback. Upon receipt of the chargebacks the reconciliation department determined that the plaintiff had as at 29 March 2017 honoured chargebacks in the amount of N\$ 2 307 704.75. A further chargeback of N\$ 683.43 was honoured by plaintiff on 08 May 2017, bringing the total chargebacks honoured by plaintiff to N\$ 2 308 388. The witness explained with reference to documents how the amount was calculated.

[44] The witness further testified, with the aid of documents, that plaintiff recalled from Nedbank South Africa an amount of N\$ 374 192.86 of which only an amount of N\$ 356 967.45 was recovered. She stated that, as a result of this payment received from Nedbank South Africa the positive balance due by first defendant to plaintiff in terms of the merchant agreement was N\$ 1 951 420.73. Upon determination of the actual loss the relevant business unit of plaintiff was instructed to debit the merchant's (first defendant) account with the chargeback in accordance with the merchant agreement.

[45] According to the witness the instruction given to the relevant business unit could not be given effect to as the account was subject to a preservation order under POCA 6/2017. As a result the internal process that would allow plaintiff to debit the account of first defendant with the amount of chargebacks was suspended pending the finalization of the POCA matter. She further stated that even in the absent of the preservation order the plaintiff would not have been in a position to exercise its rights as the first defendant had failed to keep a sufficient credit balance which would enable plaintiff to debit the sum of N\$ 1 951 420.73.

[46] Lastly, the witness testified that the terms of the merchant agreement were that, inter alia, the merchant shall (a) only accept valid and current cards presented by cardholders for payment; (b) honour each valid card that is presented by the cardholder for payment; and (c) not have the right to set a minimum monetary value for transactions. She further testified that in terms of the merchant agreement the first defendant assumed all risk and losses for any activity performed on the POS devices resulting in either disputes or fraudulent activities. In conclusion the witness' evidence was that the first defendant's failure to comply with the terms of the merchant agreement resulted in the plaintiff's impoverishment in the sum of N\$ 1 951 420.73 together with interest.

Defendants' case

[47] The Defendants filed witness statements in respect of Mr Gideon Johannes De Waal and Ms Johanna Cornelia Bean. However, only Mr Gideon Johannes De Waal was called to testify on behalf of the defendants.

Gideon Johannes De Waal

[48] Mr De Waal testified that he is the sole member of the first defendant. According to him the plaintiff, around 1 and 12 December 2016, investigated suspicious transactions that occurred on first defendant's bank account, and that certain transactions were suspended pending investigation. On 01 December 2016 he received an email from a certain Mr Louis Banze from Integrated Operational Risk, Rest of Africa Acquiring (ROA) Detection. The said Mr Banze enquired about certain card number transactions and requested all information at hand regarding the transactions which appeared suspicious. On 01 December 2016 the witness responded via email and provided the requested information.

[49] The witness testified that in light of Standard Bank's investigation, on 02 December 2016 they froze and held back an amount of N\$ 382 500 in the bank account

of first defendant. He stated that Standard Bank investigated the suspicious transactions as per the email of Mr Banze and held back three amounts, ie N\$ 127 500.00 x 3 = N\$ 382 500.00. He further stated that he was satisfied that Standard Bank investigated the transactions and understood that they would stop and report any suspicious or fraudulent transactions. According to him Standard Bank only informed him that the transactions were suspicious, and not that the transactions were fraudulent. He stated further that Standard bank cleared and released the monies into his account on 06 December 2016, together with other monies in the sum of N\$ 396 730.

[50] Mr De Waal further testified that around December 2016, shortly after he became the owner of first defendant, he entered into transactions with a certain Ben Woodcock and William Coleman (the agents) who made block bookings via email at Divundu Rainbow River Lodge. He stated that first defendant prudently requested all information from the agents and obtained all the information of the relevant card holders before presenting it for payment, with its valid authorization codes. The witness stated that the first defendant has complied with plaintiff's payment requirements and submitted the payments accordingly for processing.

[51] He testified that on 12 December 2016 Mr Banze again requested information regarding the sales in the amount of N\$ 343 388 which he forwarded to him. According to the witness Standard Bank investigated the transactions and the monies were cleared and released into the first defendant's bank account on 12 December 2016. He stated that he was grateful that the transactions were investigated by Standard Bank and he was satisfied that they applied their mind to all the bank transactions, properly investigated the documents relating to the transactions and therefore released the monies.

[52] He stated that neither he nor any other person authorized to act on behalf of first defendant ever signed the written agreement on which the plaintiff relies. He accordingly disputed the existence of a binding agreement and the terms thereof. Mr De Waal testified that he and the first defendant hold bank accounts with the plaintiff and

there is a business relationship and the terms of such relationship need to be determined. He further testified that the first defendant, represented by himself, during 2016 mandated plaintiff via electronic mandates to process several electronic card transactions to be credited to first defendant's account. He said that the only record of such mandates is the entries on the bank statements of first defendant.

[53] The witness testified that during the period 17 November – 23 December 2016 the plaintiff checked, verified and approved around 40 card transactions and that plaintiff credited the related monies to first defendant's account. He stated that the FIA and the POC imposed obligations on plaintiff as an accountable institution. According to him, it was a tacit and/or implied term that plaintiff would check and verify each card transaction, investigate each transaction if it seems suspicious or fraudulent and advise its client accordingly. Furthermore, the witness testified that in terms of such tacit and/or implied terms the plaintiff had an obligation to stop fraudulent card transactions and only clear and credit non-fraudulent monies into first defendant's bank account. He stated that the plaintiff failed to comply with such tacit and/or implied terms and in consequence breached the terms of mandate.

[54] Mr De Waal related that on 26 December 2016 Mr Pumba Muundja contacted him and he was informed that there are some suspicious activities on the bank account of first defendant. According to the witness he then informed Mr Muundja that a certain Mr Banze of plaintiff investigated the transactions and that he provided Mr Muundja with the contact details of Mr Banze. The witness concluded that it was clear that plaintiff knew of the suspicious transactions as far back as 01 December 2016, and speculated that Mr Banze must have reported the transactions to Mr Muundja or other departments of plaintiff before 24 December 2016. He testified that he met Mr Muundja on 10 January 2017 and established that the latter knew of other fraudulent activities of Ben Woodcock.

[55] The witness testified that after the booking agents made the bookings and the payments cleared and received by first defendant he proceeded to effect payments to

the agents' designated accounts. He disavowed any knowledge of fraudulence with respect to the relevant card transactions. On 10 January 2017 he opened a criminal case of fraud under Windhoek CR 314/01/2017. The witness thereafter testified at length about the process leading up to the confiscation orders referenced under the POCA case⁵. The witness further testified that he and first defendant acted on the correctness of the representation of plaintiff when the monies were cleared into first defendant's bank account, and thus proceeded to utilize some of the funds. He stated that the representation of the plaintiff that the transactions have been checked and verified was negligently made as the funds were proceeds of fraudulent activities and should not have been cleared, and that in the result the first defendant suffered damages and loss of income.

[56] The witness admitted that certain payments were made from the bank account of the first defendant and the second defendant to the fraudulent agents' bank accounts, as follows:

- (a) N\$ 150 000 on 06/12/216 to Joe and Brothers Trading;
- (b) N\$ 158 000 on 7/12/2016 to Joe and Brothers Trading;
- (c) N\$ 133 680 on 10/12/2016 to KJ Krako⁶;
- (d) N\$ 117 000 on 10/12/2016 to Joe Brothers Trading;
- (e) N\$ 209 048 on 14/12/2016 to Joe Brothers Trading;
- (f) N\$ 105 000 on 14/12/2016 to TK Global Consultancy⁷;
- (g) N\$ 374 192.86 on 21/12/2016 to Eddie Ajayi⁸;
- (h) N\$ 361 018 on 21/12/2016 to Joe Brothers Trading.

Total payment to agents N\$ 1 608 538.86.

⁵ Supra, footnote 1.

⁶ This amount was returned by ABSA Bank on 15/12/2016 to the account of the first defendant.

⁷ This amount was recovered and returned by Standard Bank SA on 20/12/2016 to the account of the first defendant.

⁸ This amount was first transferred from the first defendant's bank account to the account of the second defendant before it was transferred to Nedbank SA. The amount of N\$ 356 967.45 was recovered and returned to the plaintiff.

[57] With regard to the total payment to the agents Mr De Waal testified that the sum of N\$ 133 680 and N\$ 105 000 must be subtracted as these amounts have been credited back to the first defendant's bank account. He further submitted that the balance of N\$ 1 474 858.86 should be deducted from the chargeback account of N\$ 2 308 388.18 as these amounts were paid out due to the negligent actions of the plaintiff.

[58] Mr De Waal further testified that the first defendant's total exposure and loss is approximately N\$ 2 659 168.01. This amount should be equal or close to the total amount of bookings charged and invoiced by the first defendant to the agents Mr Woodcock and Mr Coleman. Mr De Waal testified from the amount of N\$ 2 659 168.01 the amount of N\$ 1 608 538.86, which constitute the payments to the agents, should be deducted and the balance of N\$ 1 050 629.15 would then constitute the loss of accommodation and damages suffered by the first defendant or N\$ 1 078 954.84⁹ being the total value of bookings made by the two booking agents.

[59] He testified that they could not accept further requests for bookings from other guests as the dates were blocked, booked and paid for by the booking agents. He stated that they would not have declined further booking requests from other clients had plaintiff informed them within time that the transactions being investigated were fraudulent.

[60] During cross-examination Mr De Waal strongly denied that he acted fraudulent in any way. When confronted regarding the payment of the agent's commission Mr De Waal testified that he got instructions to pay the money into the account of Joe and Brothers Trading but stated that he did not have the instructions available at court. Mr De Waal was questioned as to why agent's commission was paid over in respect of invoices that does not reflect such agent's commission. In this regard the witness stated that some of the invoices must be read together and stated that the reason why the figures in the first defendant's bank statement is not exactly the amounts as set out in the invoices can be explained by the fact that the money is processed in batches by the

⁹ Bookings in respect of Mr Woodcock in the amount of N\$ 832 300.45 and in respect of Mr Colman bookings in the amount of N\$ 246 654.39. Total amount N\$ 1 078 954.84.

plaintiff and therefor payments can be batched together. He however conceded that the amount of N\$ 995 666 in total was paid to Joe and Brothers Trading in respect of agent's commission.

[61] When questioned regarding the Zammit transactions Mr De Waal stated that he received instructions to charge for hotel booking and international flight tickets but confirmed that this instruction did not contain an actual booking. He however testified that this instruction could have been telephonic or by e-mail. He did not state which one it was. Mr De Waal further confirmed on a question of Mr Kauta, counsel for the plaintiff, that the instruction or authorization letter did not authorize the first defendant to charge the amount of N\$ 382 000, he however stated that the letter gave authorization to charge the credit cards but no amount was stipulated.

[62] Mr De Waal confirmed that he processed this payment on 01 December 2016 in five different transactions of N\$ 127 500 each in respect of four different credit card numbers and two of those transactions were declined. The transactions relating to the Zammit authorization were all approved and Mr De Waal confirmed that the transactions relating to two of those credit cards were chargebacks but stated that at that stage he did not even know the meaning of the word chargeback.

[63] Mr De Waal was also confronted about large amounts of money that was transferred from the first defendant's bank account into his personal account. This was with specific reference to the sum of N\$ 840 210.86. In this regard the witness testified that the funds was transferred to his account as the commission of the two agents had to be paid and there was a problem with wi-fi and power supply at the lodge. He therefor completed the transactions whilst in town. The agent's commission paid over at the time was N\$ 374 192.86 and N\$ 361 018.00.

[64] During cross-examination Mr De Waal was also questioned in depth as to the invoices issued to Messrs Woodcock and Coleman and that if considered critically it would appear that after the payment of the commission and the VAT that the first

defendant would possibly suffer a loss. Mr De Waal strongly disagreed with the contentions of counsel in this regard.

[65] Mr De Waal confirmed that the chargebacks started 21 November 2016 and continued to 23 December 2016, when he was contacted by Mr Muundjua, informing him of the investigation.

[66] In conclusion, the witness testified that he did not act recklessly, negligently and without the necessary degree of care when he operated the business of the first defendant, and that he had no intention, in conducting the business of first defendant, to defraud the plaintiff.

Onus of proof

[67] Whilst liability is disputed, a reference to the facts admitted in plea, and the basis for defendants' counterclaim, lead to the irrefragable conclusion that the plaintiff's claim amount is admitted. Plaintiff bears the onus to establish its entitlement to reclaim the said amount from the defendants. With respect to the counterclaim the defendants bear the onus to establish the damages claimed and quantum of loss.

Evaluation of the evidence

[68] In adopting the well-established principle for resolving factual disputes¹⁰ I consider the credibility of the various factual witnesses, their reliability, and the probabilities in order to determine liability of the parties if any.

[69] Mr Muundjua and Mrs Katjuanojo testifying on behalf of the Plaintiff both acquitted themselves well on the witness stand. Both these witnesses were subjected to thorough cross-examination by Mr Swanepoel, however these witnesses remained constant in their evidence.

¹⁰ *Stellenbosch Farmers' Winery Group Ltd & another v Martell et Cie & others* 2003 (1) SA 11 (SCA).

[70] The cross-examination of Mr Muundjua yielded very little in favor of the defendants. The cross-examination of Mrs Katjiuanjo also did not yield much, however, this witness conceded during cross-examination that the balance of N\$ 64 000 that remained in the personal account of the second defendant after the POCA judgment was satisfied, was incorrectly transferred to an unclaimed balance account. The witness testified that the banking system of the plaintiff allocated the second defendant's account dormant status. She further stated that this money was retained to mitigate the loss of the plaintiff but conceded that this was incorrectly done.

[71] The only witness who testified on behalf of the defendants was Mr De Waal. Unfortunately the second defendant, Mr De Waal did not impress me as much as a witness. I distinctly got the impression that the witness attempted to down play his role in this matter and sought to place all the blame at the door of the plaintiff, whom he maintained had the duty not to act negligently.

[72] I find it hard to believe that Mr De Waal could believe that all these transactions were *bona fide*. Mr De Waal had difficulty in explaining why the agent commission, for two different booking agents, was paid out in spite of the fact that the invoices, save one, did not reflect such agent's commission and why the commission was then paid into bank accounts that had no reference to the agents concerned. There was also no indication of the so-called instructions of the payment of the agent's commission before court.

[73] The agent's commission that the second defendant paid over without question was exorbitant amounts of money. Interestingly enough the one so-called agent operated from United Kingdom and the other one from China and both used bank accounts in South Africa.

[74] Mr De Waal was unwilling to make concessions on the contention of counsel that the transactions between 21 November 2016 and 23 December 2016 was done

fraudulently but conceded that the findings as made in the POCA judgment in this regards remains valid as no appeal was lodged against the findings of the Honorable Angula DJP.

[75] The findings in this regard was that the second defendant facilitated the transactions although he knew or should have known that the transactions were fraudulent or unauthorized by the legitimate cardholders¹¹. Mr De Waal in effect stated that the findings are disputed but he accepts that these findings were made by a court of competent jurisdiction.

[76] I have to concur with the Honorable Angula DJP in his finding that the second defendant knew or should have known that he is engaging in fraudulent transactions. I am fortified in my finding when one carefully considers the business figures of the first defendant.

[77] What other conclusions can this court draw from the evidence that in a period of less than three months (03 October 2016 to 23 December 2016) 109 transactions in the sum of N\$ 9 464 940.60 were processed, of which 69 of these failed due to the restrictions placed on it by the respective card issuers? Of the 40 of the transactions in the amount of N\$ 2 673 398.10 that were credited to the first defendant's bank account, the sum of N\$ 2 308 388.18 turned out to be disputed transactions in the form of chargebacks. Also, bearing in mind that the first defendant is a business that averaged N\$ 52 854.00 for the period January to October 2016 and which then increased to N\$ 409 707.34 in November 2016 alone. Noticeably all these transactions were processed manually, which meant the actual cards were not available.

Common cause facts:

[78] The following facts appears to be common cause:

¹¹ Paragraph 25 of the judgment.

- (a) that both the defendants are clients of the plaintiff and therefore had a bank/client relationship with each other.
- (b) a POS device belonging to the plaintiff was installed at first defendant from approximately 2010 to early 2017 when the device was removed by the plaintiff.
- (c) the second defendant facilitated the transactions manually on behalf of the first defendant, which in turn meant that the actual credit cards were not physically available at the time of processing the transactions.
- (d) the plaintiff credited a sum of N\$ 2 673 389.01 to the account of the first defendant.
- (e) the second defendant made payments to fraudulent agents in the amount of N\$ 1 608 538.86 from the amount so credited to the second defendant.
- (f) the sum of N\$ 540 385.03 was returned to the plaintiff by virtue of the POCA judgment and this amount must be ultimately deducted from the amount due and owing to the plaintiff, should the court find in favor of the plaintiff;

The applicable legal principles and the application thereof to the facts

Bank - Client relationship

[79] The parties are in agreement that the relationship between a bank and its client is based on contract and is essentially that of creditor and debtor with the underlying nature of mandate.

[80] The position in our law regarding the bank-client relationship was succinctly set out in *Pinto v First National Bank of Namibia Ltd*¹² and accepted by Geier J to be the following:

‘The following is accepted in respect of this relationship:

¹²

(A 98/2011) [2012] NAHCMD 43 (31 October 2012) at page 16 to 17 of the judgment.

- a) The right of reversal of a credit based on a cheque which is dishonoured is implied by law as well as by banking custom and usage.¹³ In general a credit can be reversed for any legitimate reason.¹⁴
- b) When as a result of some conduct of the bank the client believes his account has a credit in the amount of the cheque deposited and he withdraws money the bank may under certain circumstances be stopped from reclaiming the money.¹⁵ This principle does not prevent the bank from reversing the entry, especially when it transpires the money may be proceeds of crime.
- c) It is a fundamental principle that the risk of non-payment, for whatever reason, of a cheque deposited for collection, falls on the customer and not on the bank.¹⁶
- d) Money paid into the bank account of a client becomes the property of the bank. This only happens if the bank has no reason to believe it had been stolen or obtained by fraud.¹⁷ Ownership never vests in the client.
- a) A collecting bank owes a duty towards the drawee bank to ascertain that payment is being collected on behalf of a person who is entitled to it.¹⁸ It is submitted this implies that once the collecting bank is informed that a cheque is drawn in respect of proceeds of crime it is under a duty to ensure its client does not have access to the money.
- b) In general a collecting bank should exercise reasonable care in the collection of cheques on behalf of its customers.¹⁹
- c) Although the underlying agreement is one of mandate the contract between the bank and its client must yield to applicable legislation regardless of whether the statute applies to contract or it has become a contractual term imposed by the statute.²⁰ It is submitted this means that POCA, FIA and the Act inform the relationship.
- d) Public policy considerations are also at play here. It is submitted that even if applicant had a 'right' to the money (which he does not in this case) the supervening illegality of him accessing it excused FNB of any obligation to permit him to do so.'

¹³ *Standard Bank of SA Ltd v SARWAN* [2002] 3 All SA 49 (W) at 55

¹⁴ *Nedbank Ltd v Pestana* 2009 (2) SA 189 (SCA) para 9.

¹⁵ *ABSA Bank Ltd v I W Blumberg and Wilkinson* 1997 (3) SA 669 (SCA) at 684-485

¹⁶ *SARWAN supra* p 55.

¹⁷ *Commissioner of Customs and Excise v Bank of Lisbon International Ltd and Another* 1994 (1) SA 205 (N) at p 208 H-I; *S v Kearney* 1964 (2) SA 495 (A) at 502-503. See also: *ABSA Bank Ltd v Intensive Air (Pty) Ltd and Others* 2011 (2) SA 275 (SCA)

¹⁸ Malan *op.cit* p 434-435.

¹⁹ Malan *op.cit* p 442-443.

²⁰ *Eskom v First National Bank of Southern Africa Ltd* 1995 (2) S 386 (A) and *CHHC Trading supra* at para 19.

Did the plaintiff facilitate the fraud or acted negligently?

[81] The defendants argued that the court in the context of the *Pinto* case must consider the plaintiff's fault, facilitating fraud (and money laundering) and/or contributory negligence. It was argued that the plaintiff negligently represented, by conduct and through its actions, by not stopping chargebacks of fraudulent card transaction that the transactions have been checked and verified and the monies were cleared by the plaintiff. The defendant further argued that the plaintiff is at fault in that it failed to properly investigate the suspicious card transactions and allowed the money to be released into the first defendant's bank account.

[82] The defendant further maintained that the plaintiff is at fault in failing to inform the first defendant of the chargebacks and failed to stop and recover the chargeback monies in the first defendant's bank account when it was available as from 30 November 2016 to 16 December 2016 and 20 December 2016 to 23 December 2016. Therefore, so argued the defendants, the plaintiff should not be allowed to recover the amounts paid to the fraudulent agents.

[83] I agree with the defendants that FIA and POCA superimpose certain (implied) terms on the bank/client relationship. However, one of these implied terms imposes an obligation on the plaintiff, in terms of s 33 (3) of FIA, in which the disclosure of suspected fraudulence is prohibited. The plaintiff was, absence a direction contemplated in s 42 of FIA, permitted²¹ to continue with the relevant transactions.

[84] The defendants made much of the fact that the plaintiff was aware at the beginning of December 2016 that chargebacks were received and that Mr Banze at the RoA offices of the plaintiff was making enquiries in respect of suspicious card transactions and the chargebacks received on 16 December 2016 was not stopped and reversed.

²¹ S 41 of FIA.

[85] It would appear that Mr Banze did due diligence in inquiring from the second defendant regarding the suspicious transactions, more specifically the Claire Zammit transactions. The second defendant provided that correspondence and copies of the relevant cards. These funds were credited to the account of the first defendant and at the end of the day these transactions did not form part of the chargebacks as no dispute was raised by the lapse of the 120 days.

[86] The inquiry by Mr Banze did not constitute an investigation. The investigation was launched by Mr Muundjua on 26 December 2016 and the fraudulence came to the fore on 10 January 2017 when Mr Muundjua had the interview with the second defendant and subsequent to that a criminal case was opened.

[87] Mr Muundjua went to great lengths to explain the system to the court and the necessity to comply with the 120 day period. It is clear that not every chargeback constitute fraud. It is further clear that the plaintiff cannot summarily draw an inference that a transaction is fraudulent merely because it appears to be suspicious. An investigation needs to be done before any determination can be made in this regard and before any funds that were approved by the issuing bank can be held back.

[88] Mr Muundjua conceded that he was acquainted with the names of the relevant 'agents' but explained that it was not clear what the relationship between the defendants and these 'agents' were and could at the very most report suspicious transactions in terms of FIA.

[89] Having had regard to the evidence before me I cannot find that the plaintiff acted fraudulently or facilitated fraud or money laundering for that matter. There is also no evidence before me to find that the plaintiff was negligent in any way and therefore the defence of apportionment of damage in terms of Apportionment of Damage Act, 34 of 1956, does not apply.

Estoppel and voluntary assumption of risk

[90] It is the defendants' contention that the amounts paid must be deducted from the plaintiff's claim pursuant to the POCA case 6/2017. It is not disputed that the monies credited to the first defendant's account constituted proceeds of crime. A bank in the position of plaintiff may reverse a credit on a customer's account for any legitimate reason.²² It must follow that absent sufficient funds to effect the reversal, such as where the funds have been withdrawn, a bank would be entitled to claim repayment. This disposes of the need to determine defendants' alternative defences of estoppel and voluntary assumption of risk.

[91] The uncontroverted evidence established that the defendants made successive large withdrawals following the credits on first defendant's account. In consequence the first defendant's account had an insufficient credit balance to effect the reversals, giving rise to the institution of this action. It was not disputed that the defendants made material concessions during the POCA case which had the effect of certain amounts being paid over to plaintiff by consent.

The merchant agreement

[92] The second defendant denied that the first defendant or its proxy entered into a written merchant agreement with the plaintiff. It is common cause that the second defendant did not enter into this agreement as he only bought the CC during 2016. However, it should be noted that Mrs Johanna Cornelia Bean, who was apparently the owner of the first defendant in 2010 when the POS device was installed, was not called as a witness to corroborate the denial of the second defendant. A witness statement was filed on behalf of this witness and she is clearly available to testify. Yet in spite of the fact that the defendants defence rest on this very crucial point the defendants opted not to call her. Clearly the court can draw a negative inference from the defendants' failure to call this witness.

²² *Nedbank Ltd v Pestana* 2009 (2) SA 189 (SCA) at para [9], cited with approval in *Pinto v First National Bank of Namibia Ltd* (A 98/2011) [2012] NAHCMD 43 (31 October 2012).

[93] It would appear that the second defendant's denial of the merchant agreement is mainly premised on the fact that an unsigned agreement was attached to the particulars of claim.

[94] In *Air Liquide Namibia (Pty) Ltd v Afrinam Investments (Pty) Ltd*²³, Ueitele J held as follows:

[24] The question that confronts me is therefore whether the defence that the written agreement which is annexed to the plaintiff's particulars of claim is not valid because it was not signed on behalf of the defendants, is a good defence in law. It is trite that where the parties are shown to have been *ad idem* as to the material conditions of the contract, the *onus* of proving an agreement that legal validity should be postponed until the due execution of a written document lies upon the party who alleges it.²⁴ In the case of *Goldblatt v Freemantle*²⁵ the court held that any contract may be [orally] entered into, writing is not essential to contractual validity.²⁶ I have therefore reached the conclusion that denying the existence of an agreement simply because it was not signed is a bad defence in law.'

[95] It is common cause that the first defendant was in possession of the POS device since 2010. Subsequent to the incidents that led to the matter before me the POS device was removed. It is the undisputed evidence of Mr Muundjua that in order for a client to process a transaction manually there must be an agreement in place and the use of the device is subject to the terms of the merchant agreement.

[96] I am accordingly satisfied that an agreement was in place, be it in writing or oral and therefor the plaintiff and first defendant are bound by the terms of the merchant agreement.

Documents discovered and hearsay evidence

²³ (HC-MD-CIV-ACT-CON-2017/03356) [2018] NAHCMD 123 (11 May 2018)

²⁴ See *First National Bank Ltd v Avtjoglou* 2000 (1) SA 989 (C).

²⁵ *Goldblatt v Freemantle* 1920 AD 123 at 128.

²⁶ *Goldblatt* was followed in *Menelaou v Gerber and Others* 1988 (3) SA 342 (T).

[97] Another issue that was raised during trial by counsel for the defendant and which I need to rule on was the defendants' objection to the use of documents on the basis that it constituted hearsay evidence and were not authentic. This specifically relates to the report of Mr Muundjua regarding the chargebacks and the subsequent report drafted by Ms Katjiuanjo based on the aforesaid report. This objection was raised by the defendant in respect of documents that were actually discovered by the defendants themselves.

[98] The arguments advanced in respect of the admissibility of the chargeback reports and the authenticity thereof should have been addressed in judicial case management stage. The pre-trial indicated that all the documents discovered will be used as exhibit and the parties had agreed in this regard. If the defendants had any issue with the documents (which I must emphasize again, was discovered by the defendants), the party disputing should have briefly stated the basis for the dispute in the case management report as clearly stipulated in rule 28 (7)(c) of the High Court Rules. This was not done. It would be opportunistic to raise this issue during trial.

[99] Direct oral evidence were presented by Mr Muundjua and Ms Katjiuanjo on chargeback report and subsequent reports that followed and the veracity of their evidence in this regard was extensively tested during cross-examination. I am satisfied that as bank officials in their respective positions they had the relevant records under their direct control and that the reports are admissible.

[100] In any event the defendant relied on the contents of the relevant report in their plea and on the correctness of the facts represented by the plaintiff. The defendants cross-examined on the reports and relied on the contents of the report. Therefore, pleading in the manner it did the defendants opened the door for the admission of the contents of the report.

Conclusion on the main claim

[101] Having considered the evidence before me I am satisfied that the plaintiff has proven its main claim on a balance of probabilities. I do not need to address any of the alternative claims in light of this finding.

[102] The liability of second defendant must be determined with reference to the provisions of s 64 (1) of the Close Corporations Act²⁷. It is clear that the plaintiff is a person entitled to seek relief in terms of this section. The evidence reveals that the second defendant, in effecting payments to the booking agents, factually deprived the first defendant of income and burdened it with VAT obligations in respect of income it did not receive. This alone constitutes a jurisdictional fact which in terms of s 64 (1) of the Act makes the second defendant liable for first defendant's debts.

Counterclaim

[103] During cross-examination the second defendant conceded that the first defendant was credited with proceeds emanating from fraudulent activity and therefore the defendants can in law not suffer damages arising from the very proceeds as testified in chief by the second defendant.

[104] First defendant's counterclaim must be rejected as unsustainable. Given the prohibition created in s 33 (3) of FIA, the plaintiff was barred from acting in the manner alleged by first defendant. The mandate underscoring the relationship on which defendants rely in any event entitled plaintiff to reverse the credits effected on first defendant's account. It follows that the counterclaim must fail.

Interest

[105] In terms of the POCA judgment delivered on 01 February 2019 enjoined the plaintiff to deduct the sum of N\$ 540 385.03 from the defendants' account, which will effectively reduce the plaintiff's claim to N\$ 1 411 420.73.

²⁷ 28 of 1988.

[106] In view of the POCA judgment the interest must be adjusted accordingly and I am in agreement that it would be fair that there must be distinguished between the interest *a tempore morae* before the POCA judgment and thereafter. As the plaintiff must reduce the capital claim amount with the sum returned to it the interest *a tempore morae* must run from 01 February 2019 on the reduced amount.

[107] In the result, my order is as follows:

1. The Plaintiff's claim succeeds and the defendants are ordered, jointly and severally, the one paying the other to be absolved, to pay plaintiff the amount of N\$ 1 951 420.73.
2. Interest *a tempore morae* on the N\$ 1 951 420.73 from 23 December 2016 to 31 January 2019.
3. Interest *a tempore morae* on the N\$ 1 411 420.73 from 01 February 2019 to final date of payment.
4. Cost of suit, such costs to include the costs of two legal practitioners, where engaged.
5. The counterclaim is dismissed with costs, such costs to include the costs of two legal practitioners, where engaged.
6. The matter is regarded as finalized and is removed from the roll.

JS Prinsloo

Judge

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