**REPUBLIC OF NAMIBIA**

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

**JUDGMENT**

Case No.: HC-MD-CIV-ACT-CON-2017/04051

In the matter between:

**CARIBBEANA JAZZ PIZZA AND BEER GARDEN CC T/A ZUR OASIS PLATEAU PIZZA AND BEERGARDEN** **PLAINTIFF**

**and**

| | |
|---|---|
| **LA TANGENI TRADING CC** | **FIRST DEFENDANT** |
| **OIVA KANDIWAPA AMUTHENU** | **SECOND DEFENDANT** |
| **BACH STREET DEVELOPMENT(PTY) LTD** | **THIRD DEFENDANT** |
| **FRANZ XAVIER WECHSLBERGER** | **FOURTH DEFENDANT** |

**Neutral Citation:** *Caribbeana Jazz Pizza and Beer Garden CC t/a Zur Oasis Plateau Pizza and Beergarden v La Tangeni Trading CC* (HC-MD-CIV-ACT-CON-2017/04051) [2021] NAHCMD 252 (17 May 2021)

**Coram:** PRINSLOO J

**Heard:** **3 to 7 February 2020; 10 July 2020; 30 September 2020; 9 to 11 November 2020 and 17 February 2021**

**Delivered:** **17 May 2021**

**Reasons:** **24 May 2021**

**Flynote: Civil Practice** – Law of Contracts and Agreements – Breach of Contract – Onus of Proof – Plaintiff unincorporated at time of entering into agreement – Plaintiff failing to call witness expert to corroborate its claims – Court finding plainitff failed to proof its case on a balance of probabilities.

**Summary:** The plaintiff, by way of amended particulars of claim, brought an action against the defendants wherein the plaintiff's premised its cause of action on a lease agreement which was concluded between itself and Zur Oasis Plateau Pizza and Beer Garden. At the time of entering into the agreement with the first defendant, the plaintiff was unincorporated. The plaintiff pleads that its member in writing authorised Mr Antonio Mendonca's actions and consented to and ratified the agreement within a reasonable time after the plaintiff was incorporated and, in doing so, adopted the agreement as the plaintiff's own.

The plaintiff pleaded that from 1 April 2016 to 20 August 2016, it renovated the premises concerned with the consent of the first defendant. In terms of the agreement, the plaintiff made additions and improvements to the property. The plaintiff pleaded that the improvements included work to the ceilings, walls, floors, all doors and windows. The plaintiff did the renovations to operate a pizza restaurant and beer garden on the premises.

The plaintiff pleaded that the first and second defendants fraudulently alternatively negligently misrepresented the fact that they are entitled to lease or sublease the property to the plaintiff. The plaintiff further pleaded that it would never have entered into the said agreement if the said parties did not make the said representation. As a result of the misrepresentation, the plaintiff suffered damages in the amount of N$ 702 928.52

The defendants filed a special plea of *locus standi* as the plaintiff's cause of action is premised on the lease agreement, which was concluded between the entity of Zur Oasis Plateau Pizza & Beergarden with registration number 2016/886 and the first defendant. Accordingly, the defendants pleaded that the plaintiff was not a party to

the agreement and that the lessee on the lease agreement is an independent entity with its own CC registration number, different from that of the plaintiff.

On the merits, the defendants pleaded that if the plaintiff was indeed not yet incorporated or registered, the plaintiff could not have been able to conclude a valid contract at the time. In addition to that, the plaintiff and the lessee could not change the terms of the agreement or ratify the agreement unilaterally and without the written consent of the first defendant.

The defendants further pleaded that the lessee was not authorised to make any structural alterations to the property. The lessee's responsibility was limited to maintaining the interior and not making alterations or changing the interior. However, the lessee made an unlawful addition to the outside of the property by adding an outer structure not authorised by the lessor or any of the defendants. As a result, the City of Windhoek issued an Illegal Building Activities Notice. The defendants pleaded that due to this unlawful act of the lessee, the lease agreement was terminated with immediate effect.

*Held* that the court is satisfied that improvements were effected to the premises because that is quite evident from photographs presented to the court by the plaintiff but this court was not placed in the position to make a finding that the value of the material purchased by the plaintiff on a cash basis and Tiba Gas and Oil Consulting CC was used in the process of the renovation. Therefore, court is not able to determine what extent, if at all, the value of the property was enhanced.

*Held that* there is no evidence before the court as to the increase of the value of the premises of the third defendant. The plaintiff would have been able to accomplish this by engaging a quantity surveyor who would have been able to make a cost assessment of the material needed for the renovation work and how much the premises' value or the property, for that matter, increased.

*Held further that* the improvement to the premises is disputed by the defendants, and there is a disagreement on the value of the improvements, and as a result, the plaintiff had to produce acceptable evidence to establish whether the property has

been improved in value and the plaintiff was unable to do so. Resultantly the plaintiff failed to prove that the third defendant was enriched and, if so, in what amount.

*Held further that* it is common cause that issues of the value of the property are not those within the ordinary knowledge and expertise of the court and must perforce be proved by admissible expert evidence. The plaintiff did not call any such expert witness. There is no evidence of what the alleged improvements were and what their value was.

*Held further that* the burden to prove the existence of the contract, the parties thereto and terms of the contract relied on for the relief prayed for rests on the plaintiff in this matter, and it is clear that the plaintiff is unable to do so.

---

**ORDER**

---

The plaintiff's claims are dismissed with costs.

---

**JUDGMENT**

---

PRINSLOO J

Introduction

[1] The plaintiff is Caribbeana Jazz Pizza and Beer Garden CC t/a Zur Oasis Plateau Pizza and Beergarden, who instituted an action against LA Tangeni Trading CC, Oiva Kandiwapa Amuthenu, Bach Street Development(Pty) Ltd and Franz Xavier Wechslberger, the defendants herein.

[2] At the commencement of this judgment, it is vital to put it into context. The case's progression to date is that at the closing of the plaintiff's case, the defendants brought an application for absolution from the instance, which was dismissed.[1].

[1] *Caribbeana Jazz Pizza and Beer Garden CC t/a Zur Oasis Plateau Pizza and Beergarden v La Tangeni Trading CC* (HC-MD-CIV-ACT-CON-2017/04051) [2020] NAHCMD 449 (30 September 2020)

The plaintiff’s claims

[3] The plaintiff, by way of amended particulars of claim, brought an action against the defendants wherein the plaintiff's premised its cause of action on a lease agreement which was concluded between itself and Zur Oasis Plateau Pizza and Beer Garden. On 16 March 2016, the pre-incorporated plaintiff represented by Mr Antonio Mendonca concluded a written lease agreement with the first defendant represented by the second defendant regarding a property situated at Erf 6 Bach Street, Windhoek West, which the third defendant owned.

[4] At the time of entering into the agreement with the first defendant, the plaintiff was unincorporated. The plaintiff pleads that its member in writing authorised Mr Antonio Mendonca's actions and consented to and ratified the agreement within a reasonable time after the plaintiff was incorporated and, in doing so, adopted the agreement as the plaintiff's own.

[5] It is the plaintiff’s case that the terms of the agreement were that the plaintiff would lease the property from the first defendant for 60 calendar months. The months' March and April 2016 would be construction months. The plaintiff would not pay rent for the period 1 May 2016 to 1 November 2016 as the plaintiff undertook to fund certain structural changes and renovations to the premises. It would appear from the record that the parties agreed that the plaintiff would pay a rental amount of N$ 20 000 per month and would pay a N$ 20 000 deposit upon signing the agreement, which the plaintiff accordingly complied with. The said deposit was paid on 30 March 2016 to the first defendant.

[6] The plaintiff pleaded that from 1 April 2016 to 20 August 2016, it renovated the premises concerned with the consent of the first defendant. In terms of the agreement, the plaintiff made additions and improvements to the property. The plaintiff pleaded that the improvements included work to the ceilings, walls, floors, all doors and windows. The plaintiff did the renovations to operate a pizza restaurant and beer garden on the premises.

[7] The plaintiff pleaded that the cost of the renovations, inclusive of material, labour, trades and sundries, amounted to N$ 679 061.91, as set out in Schedule 1 to the particulars of claim.

[8] The plaintiff pleaded that it also expended an amount of N$3 866.61, which was necessary costs paid to the City of Windhoek for the plaintiff's health certificate and trading licence.

[9] The plaintiff further pleaded that a material term of the agreement between it and the first defendant was that it would enjoy undisturbed possession and enjoyment of the premises from at least 16 March 2016 to 30 June 2021. However, the first defendant breached this material term of the agreement because, during August/September 2016, the plaintiff was dispossessed of the property and evicted by the first and/or second and/or third and/or fourth defendants.

[10] The plaintiff pleaded that the first and second defendants fraudulently alternatively negligently misrepresented the fact that they are entitled to lease or sublease the property to the plaintiff. The plaintiff further pleaded that it would never have entered into the said agreement if the said parties did not make the said representation. As a result of the misrepresentation, the plaintiff suffered damages in the amount of N$ 702 928.52, which is calculated as follows:

a) Wasted costs of renovating the premises in the amount of N$ 679 061.91;
b) An amount of N$ 3 866.61 paid to the City of Windhoek for the plaintiff's health certificate and trading licences.
c) An amount of N$ 20 000 paid in terms of the agreement as a deposit.

[11] In respect of claim 1 (first alternative) against the first defendant, the plaintiff pleaded that the continuing material breach of the agreement coupled with its inability to remedy its breach constituted a repudiation of the agreement and by virtue of the first defendant's breach /repudiation the plaintiff suffered the amount of N$ 702 928.52.

[12] The second alternative to claim one relates to the second defendant, who allegedly made fraudulent alternatively negligent representation to the plaintiff that the first defendant authorised him to enter into the lease agreement. As a result of the misrepresentation, the plaintiff suffered damages as set out above.

[13] The plaintiff also pleaded that the second defendant carried on the business of the first defendant in a fraudulent alternatively in a grossly negligent manner as contemplated in s 64[2] of the Close Corporation Act, Act 26 of 1988 and sought declaratory relief in this regard in terms of s 65[3] of the said Act (This claim made by the plaintiff, however, fell away during the trial.)

[14] Further to claim one and against the third defendant, the plaintiff pleaded unjust enrichment in that the third defendant was the owner of the property of which the plaintiff was the bona fide alternatively the lawful occupier, which property the plaintiff improved to the tune of N$ 679 061.91. The plaintiff claims that in so far as these improvements were necessary, it would be entitled to a payment of N$ 679 061.91, or in so far as the improvement were useful, payment of the lesser of either the sum of the increase in value of the property brought on as a result of the useful expenses or repayment of the amount of N$ 679 061.91, which was the actual costs of the improvements.

---

[2] 64. (1) If it at any time appears that any business of a corporation was or is being carried on recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose, a Court may on the application of the Master, or any creditor, member or liquidator of the corporation, declare that any person who was knowingly a party to the carrying on of the business in any such manner, shall be personally liable for all or any of such debts or other liabilities of the corporation as the Court may direct, and the Court may give such further orders as it considers proper for the purpose of giving effect to the declaration and enforcing that liability.

[3] **Powers of Court in case of abuse of separate juristic personality of corporation**

65. Whenever a Court on application by an interested person, or in any proceedings in which a corporation is involved, finds that the incorporation of, or any use of, that corporation, constitutes a gross abuse of the juristic personality of the corporation as a separate entity, the Court may declare that the corporation is to be deemed not to be a juristic person in respect of such rights, obligations or liabilities of the corporation, or of such member or members thereof, or of such other person or persons, as are specified in the declaration, and the Court may give such further order or orders as it may deem fit in order to give effect to such declaration.

[15] Claim 2 relates to all the defendants jointly and severally. In this regard, the plaintiff pleaded that during the material time and to operate a pizzeria and beer garden from the said premises, it purchased and installed items set out in a movable assets list that the plaintiff attached to the particulars of claim. Accordingly, the plaintiff claims the return of the movable assets alternatively, in lieu of payment of the reasonable replacement value of the listed items ( as per Scheduled 2 to the particulars of claim).

[16] As a result, the plaintiff sought the following orders:

'Ad claim 1:

1st Alternative:

1. Payment in the sum of N$ 702 928.52;
2. Interest on the aforementioned amount at a rate of 20% per annum from the date of the summons until date of payment of the aforementioned amount in full.

2nd Alternative:

3. Declaring that the second defendant at all material times carried on the business of the first defendant in a fraudulent alternatively grossly negligent manner as contemplated in section 64(1) of the Close Corporation Act, Act 26 of 1988.
4. Declaring that in the premises and in terms of section 65 of the Close Corporation Act, Act 26 of 1988 that the first defendant is to be deemed not to be a juristic person in respect of such rights, obligations or liabilities of the first defendant or of the second defendant.
5. Payment in the sum of N$ 702 928.52.
6. Interest on the aforesaid amount at a rate of 20% per annum from the date of summons until date of payment of the aforesaid amount in full.

3rd Alternative:

7. In so far as the improvements were useful improvements payment of the lesser amount of either:
   - 7.1 The sum of the increase in value of the property brought on as a result of the useful expenses, or
   - 7.2 Repayment of the amount of N$ 679 061.91, which was the actual cost of improvements.
8. Interest on the aforesaid amount at a rate of 20% per annum from the date of judgment until date of payment of the aforesaid amount in full.

Claim 2 as against all the defendants jointly and severally

9. Delivery of the items/movable assets listed in Schedule 2.
10. Failing delivery, payment of the value of the aforementioned items/movables assets calculated on the day of trial.

Ad all claims

11. Cost of suit inclusive of the costs to employ one instructing and one instructed counsel.
12. Further and/or alternative relief.'

[17] It is important to note that the plaintiff has since abandoned prayers 1, 2, 3 and 4, and the plaintiff is only pursuing its claims from prayers 5 to 11.

Defendants' plea

[18] The defendants filed a special plea of *locus standi* as the plaintiff's cause of action is premised on the lease agreement, which was concluded between the entity of Zur Oasis Plateau Pizza & Beergarden with registration number 2016/886 and the first defendant. Accordingly, the defendants pleaded that the plaintiff was not a party to the agreement and that the lessee on the lease agreement is an independent entity with its own CC registration number, different from that of the plaintiff.

[19] On the merits, the defendants pleaded that if the plaintiff was indeed not yet incorporated or registered, the plaintiff could not have been able to conclude a valid contract at the time. In addition to that, the plaintiff and the lessee could not change the terms of the agreement or ratify the agreement unilaterally and without the written consent of the first defendant.

[20] The defendants further pleaded that the lessee was not authorised to make any structural alterations to the property. The lessee's responsibility was limited to maintaining the interior and not making alterations or changing the interior. However, the lessee made an unlawful addition to the outside of the property by adding an outer structure not authorised by the lessor or any of the defendants. As a result, the City of Windhoek issued an Illegal Building Activities Notice. The defendants pleaded that due to this unlawful act of the lessee, the lease agreement was terminated with immediate effect.

[21] The defendants admitted that the payment of N$ 20 000 was made according to the agreement but further pleaded that the material necessary to effect the lawful renovations to the building was procured by the first defendant, and the lessee only attended to the interior decorations to the property. The defendants denied that any of the items contained in the schedule to the plaintiff's particulars of claim were used to renovate the property.

[22] The defendants further pleaded that on 19 September 2017, Mr Antonio Mendonca arrived at the property accompanied by the members of the Namibian Police and removed all the movables that he had on the property, including the decorative materials. At the time, the second defendant, although present, was not allowed to account for what was removed from the property as the members of the Namibian Police restrained him. Mr Mendonca also did not provide an inventory for what was removed, but he removed all the items he said belonged to the plaintiff.

[23] On the issue of the plaintiff's undisturbed occupation of the premises, the defendants pleaded that the first defendant leased the property from the third defendant, and the said lease agreement did not allow subleasing without the consent of the third defendant. The first defendant pleaded that it was unaware of this clause when entering into the lease agreement with the lessee and only became aware of it when the City of Windhoek brought the issue of the illegal structure to the attention of the third defendant. Thus, the first and the second defendant deny any allegations of fraudulent or negligent representation as pleaded by the plaintiff.

[24] On the issue of the improvements, the defendants pleaded that the lessee only brought movable items, which were removed and further denied that neither the plaintiff nor the lessee made any improvements to the property and, as a result, no benefits accrued to the third defendant.

<u>Evidence adduced</u>

*Plaintiff’s case*

[25] On behalf of the plaintiff, Mr Antonio Mendonca testified that he and Ms Sannette Timbo are the members of the plaintiff, and he is authorised to testify on behalf of the plaintiff.

[26] Mr Mendonca testified that the plaintiff is a close corporation with limited liability registered under registration number CC/2016/07016, and it was incorporated on 1 June 2016 in Windhoek.

[27] Mr Mendonca testified that he got acquainted with the Zur Oasis Bar when it was still under the management of one Mr Masire. When the bar closed in 2016, Mr Mendonca approached the second defendant, who apparently purchased the property, regarding a business venture. He had an idea for a specific type of entertainment establishment and thought it would work well at the premises. Mr Mendonca then negotiated a lease agreement with the second defendant.

[28] Initially, Mr Mendonca was presented with a pro-forma lease agreement, but he was not satisfied with it and caused a new agreement to be drafted, which was duly entered into by the parties on 16 March 2016.

[29] Mr Mendonca initially registered the defensive name of 'Zur Oasis Plateau Pizza and Beergarden'. The lessee in the lease agreement is referred to as Zur Oasis Plateau Pizza and Beergarden with registration number CC/2016/0886. After entering into the lease agreement, the plaintiff was registered as 'Carribbeana Jazz Pizza and Beer Garden CC. Both members of the plaintiff consented to the plaintiff adopting the lease contract as its own and as such, ratified the pre-incorporated contract. Thus, the lease agreement was entered into between the plaintiff and the first defendant, who was repreresented by the the second defendant at all material times.

[30] Mr Mendonca proceeded to confirm the express and or implied terms of the agreement as set out in the particulars of claim and confirmed that the plaintiff proceeded to pay the deposit of N$ 20 000.

[31] Mr Mendonca then set out to convert the property in the Caribbean theme that he envisioned. The witness submitted multiple photographs to court to illustrate the condition of the property pre-renovation and during the renovation period.

[32] Mr Mendonca testified that the renovations and development of the premises were an expensive and costly undertaking. In support of his contentions, the witness referred the court to Schedule 1 to the particulars of claim setting out the money expended on suppliers like Megabuild, Megatech, Pennypinchers, Agra and Cashbuild, to name a few. According to Schedule 1, expenses in respect of supplies and materials added up to N$ 297 761.91. In addition, the witness submitted several invoices in support of the amount claimed in respect of material. The majority of the renovations were funded by the witness's other business venture by the name of Tiba Oil and Gas Consulting CC.

[33] Mr Mendonca further testified that the renovation further came to a high labour cost as well. The witness testified that the plaintiff employed informal contractors for the actual demolition, building, electrical and plumbing work, and as such, their services were paid for in cash. According to the testimony of Mr Mendonca, the labour costs amounted to N$ 381 300. However, the witness was unable to submit any source document in support of the payment of labour costs.

[34] Once the renovations were done, Mr Mendonca contacted the City of Windhoek to obtain a fitness certificate. After the Health Inspector did the inspection, the plaintiff was issued a fitness certificate.

[35] During June/July 2016, the renovations were completed, and the premises was decorated and furnished according to the vision of Mr Mendonca. As a result, the plaintiff was essentially ready to start trading; however, the liquor licence for the premises was still outstanding, and there was still a few touch-ups that needed to be done and final electricity work.

[36] The electrician, Mr Heiko, had a key to the premises to do the final electricity work. However, towards the end of July 2016/early August 2016, he contacted Mr

Mendonca to inform him that the premises was locked and that he could not access it.

[37] Mr Mendonca went to the premises to determine what the problem was and why the contractor was locked out. The witness testified that at that stage, he determined that the first defendant was not the owner of the property but instead the third defendant.

[38] Mr Mendonca obtained the phone number of the fourth defendant, and he immediately called the fourth defendant to set up a meeting to discuss the state of affairs. Mr Mendonca and Ms Timbo flew to Ondangwa to meet with the fourth defendant.

[39] Mr Mendonca testified that he recognised the fourth defendant when he met him as he had previously seen him on the premises. When he saw the fourth defendant at the premises initially he was brought under the impression that the fourth defendant was from an air conditioner company and between the fourth defendant and the second defendant Mr Mendonca was advised regarding the installation of a wooden deck in the beer garden area.

[40] During the meeting, the fourth defendant informed Mr Mendonca that the second defendant was neither the owner of the premises nor was he entitled to sublease the premises. However, the fourth defendant assured Mr Mendonca that he would be travelling to Windhoek to come and resolve the situation.

[41] This did not happen, and on 2 August 2016, Mr Mendonca received a letter from the defendants' legal practitioner written on behalf of the first defendant, in essence, confirming that the first defendant is not the owner of the property and that it was not authorised to sublease the premises to the plaintiff. The letter further contended that the plaintiff caused structural changes to the building without the necessary municipal approval and that this was done contrary to the agreement between the plaintiff and the first defendant.

[42] This letter also indicated that as a result thereof, the contract between the plaintiff and the first defendant was void and that the first defendant is cancelling the agreement. The plaintiff was directed to stop any activity on the premises and to vacate the premises with immediate effect.

[43] This letter prompted Mr Mendonca to approach his erstwhile legal practitioner, and a letter was directed to the defendants' legal practitioner wherein the plaintiff demanded payment of N$ 870 456.45.

[44] Mr Mendonca testified that several letters were exchanged between the legal practitioners, and the plaintiff launched a spoliation application seeking to repossess the plaintiff's property[4]. This application did not succeed, and as a result, the plaintiff was evicted, and this status quo remains to date.

[45] Mr Mendonca testified that as a result of the defendants' failure to return the plaintiff's property (as per Schedule 2 to the particulars of claim), he approached the Namibian Police for assistance. With the Police assistance 14 bar chairs, two bar benches, three outdoor benches and three red benches, to the approximate value of N$ 70 100, were returned to the plaintiff. Mr Mendonca testified that kitchen appliances, artwork, bar counters, etc., to the approximate value of N$ 307 700 are still unaccounted for.

[46] Mr Mendonca testified that these items belong to the plaintiff and if the defendants are unable to return the property to the plaintiff, then the defendants are liable to pay the amount as mentioned above.
This concluded the plaintiff's case.

*Defendants' case*

[47] Two witnesses were called to testify on behalf of the defendants' case, namely Mr Oiva Amuthenu and Mr Franz Wechslberger.

---

[4] HC-MD-CIV-MOT-GEN-2016/00285.

[48] Mr Amuthenu testified that he is the sole member of the first defendant, and during August 2015, the first defendant entered into a lease agreement with the third defendant in respect of Erf 6 Bach Street, Windhoek.

[49] Mr Amuthenu testified that the said property contains several buildings, and some of these buildings required renovations with which he commenced. In February 2016, Mr Mendonca representing Zur Oasis Plateau Pizza and Beer Garden CC (Zur Oasis), approached him and requested to lease one of the buildings alternatively to enter into a joint venture agreement between Zur Oasis and the first defendant. Pursuant to the discussions, the first defendant and Zur Oasis Plateau Pizza and Beer Garden CC entered into a lease agreement.

[50] According to the testimony of Mr Amuthenu, the terms agreed upon between the first defendant and Zur Oasis was that several renovations had to be done in respect of the building and that the first defendant would supply the building materials, while Zur Oasis would pay for the contractors, who would do the renovations to the building. Mr Amuthenu testified that the reason for the arrangement was because he already procured the building materials.

[51] The renovations were due to be done during April/May 2016, and instead of the repayment of the amount paid to the contractors, Zur Oasis would not pay rent for a period of six months, commencing on 1 May 2016 to November 2016.

[52] Mr Amuthenu testified that although the renovations were scheduled to be completed within two months, Zur Oasis did not pay the contractors. As a result, the first defendant paid for the contractors who completed the work done on the building.

[53] Then, towards the end of July, officials from the City of Windhoek arrived on the property to complete an inspection thereof. Mr Amuthenu testified that shortly after that, he was contacted by the fourth defendant and confronted with the fact that according to the officials of the City of Windhoek, he erected a wooden structure on the property that was not consistent with the building plans.

[54] The witness stated that he then informed the fourth defendant that Zur Oasis erected the structure and was located on the portion leased to Zur Oasis. Mr Amuthenu testified that the fourth defendant told him that the lease agreement concluded between the first defendant and Zur Oasis had to be cancelled immediately as the first defendant had no right to sub-lease the property to a third party. The fourth defendant further informed him that failure to do so would result in the cancellation of the lease agreement between the first defendant and the third defendant.

[55] According to Mr Amuthenu, he informed Mr Mendonca of the turn of events, but as Mr Mendonca was not agreeable to the cancellation of the lease agreement, he approached his legal practitioner to address the issue with Mr Mendonca in his capacity as a member of Zur Oasis.

[56] Mr Amuthenu testified that on 10 August 2016, Mr Mendonca, himself and their respective legal representatives visited the premises to enable Mr Mendonca to point out the renovations that he effected and paid for, to have a bill of quantity drawn up by a quantity surveyor, which would allow the parties to determine the amount owed by the first defendant to Zur Oasis, if any. The witness testified that Mr Mendonca failed to point out such renovations and indicated that he would return the following day with a quantity surveyor to do a bill of costs. However, Mr Mendonca never returned with a quantity surveyor. Instead, he forwarded a letter from his legal representative to the first and third defendants requesting it to consider a tripartite lease agreement. The third defendant was not agreeable to the suggestion, and Mr Mendonca was informed accordingly. At this stage, the lease agreement was terminated between the parties.

[57] Mr Amuthenu testified that on 24 August 2016 and 6 September 2016, Mr Mendonca opened a criminal case against him for theft by false pretences and malicious damage to property, respectively. Mr Amuthenu was arrested as a result of the malicious damage to property charge.

[58] Under case number HC-MD-CIV-MOT-GEN-2016/00285, Mr Mendonca also applied to the High Court to restore possession of the premises, but this application was unsuccessful.

[59] Mr Amuthenu testified that on 19 September 2016 Mr Mendonca accompanied by the Namibian Police, arrived at the leased premises. Mr Amuthenu was placed in handcuffs and detained in a room on the premises whilst Mr Mendonca removed chairs, counters, tables and several other items from the premises by truck. Mr Amuthenu testified that he could not see everything that was removed, neither did Mr Mendonca provide him with an inventory of the items removed. Once Mr Mendonca removed the items, the Police officials removed the handcuffs, and Mr Amuthenu proceeded to contact his legal practitioner of record to inform him of the state of affairs.

[60] Once his legal practitioner arrived on the premises and insisted on seeing the search warrant that enabled the police to act in the manner in which they did, both the police and Mr Mendonca decided to take their leave. However, by that time, the plaintiff removed all the movables.

[61] Mr Amuthenu testified that the plaintiff failed to substantiate its claim and maintained that the plaintiff never suffered any damages and testified that the only sum received was N$ 20 000 in respect of deposit (from Zur Oasis).

[62] The next witness called on behalf of the defendant was Mr Franz Wechslberger, the fourth defendant, a memeber of the third defendant, Mr Wechslberger testified that the third defendant entered into a lease agreement with the first defendant regarding Erf 6 Bach Street, Windhoek.

[63] Mr Wechslberger testified that towards the end of July 2016, he was informed by the officials of the City of Windhoek that they conducted an inspection of the property mentioned above and that there was a wooden structure that is inconsistent with the available building plans. As a result, he then contacted Mr Amuthenu to enquire about the said structure.

[64] Mr Wechslberger testified that Mr Amuthenu informed him that the structure in question was constructed by Mr Mendonca, the representative of Zur Oasis Plateau Pizza & Beergarder ( Zur Oasis) and that the said structure was situated on the portion of the property leased by Zur Oasis.

[65] Mr Wechslberger informed Mr Amuthenu that he should cancel the lease agreement with Zur Oasis immediately as the first defendant had no right to sublease the property without prior consent of the third defendant. Mr Wechslberger testified that he further informed Mr Amuthenu that he intended to restrict access to the property to curtail further construction of structures inconsistent with building plans.

[66] Mr Wechslberger testified that the City of Windhoek subsequently issued a notice of illegal building activities on 23 August 2016.

[67] The witness testified that on or about 12 August 2016, he was informed by Mr Amuthenu that the representative of Zur Oasis proposed a tripartite lease agreement between the first and third defendant and Zur Oasis, but the witness indicated that he rejected the proposal.

[68] On the issue of improvements to the building, Mr Wechslberger testified that the plaintiff never added any value to the building, and if value was added to the building, the first defendant did such.

[69] During cross-examination, when confronted with the photographs presented by the plaintiff, Mr Wechslberger testified that the electrical and plumbing work was all done by his people and insisted that whatever the plaintiff did was decorative. The witness, however, conceded that the premises were in a state of dilapidation but stated that Mr Amuthenu was tasked to renovate the premises. The witness testified that there was an agreement with the first defendant that the third defendant would provide the labour and Mr Amuthenu or the first defendant would give the material for the renovations.

Closing arguments

*On behalf of the plaintiff*

[70] Mr Boesak argued that firstly the plaintiff’s case is premised on the grounds that the second defendant fraudulently, alternatively negligently represented to the

plaintiff that the first defendant was the owner of the property in question, which then induced the plaintiff to enter into a lease agreement with the first defendant.

[71] Secondly, the plaintiff's claim against the third defendant is based on enrichment of the third defendant's property.

[72] Mr Boesak argued that the special plea raised by the defendants is based on the ground that the plaintiff does not have *locus standi* to institute proceedings. The reasoning being that the lease agreement was between Zur Oasis Plateau Pizza and Beergarden, with registration number 2016/0886 and the first defendant. However, Mr Boesak argued that the plaintiff's claim is not solely based on the lease agreement and that the substratum of the claim turns on the renovations done by the plaintiff, who, through the agency of Mr Mendonca, effectively expended the necessary expenses.

[73] Counsel further argued that the plaintiff made several concessions, which resulted in it abandoning its claim based on contract. Therefore, the defendant's special plea has no merit and should fail.

[74] Mr Boesak argued that the court should reject the defendants' evidence because it is false and contained multiple contradictions.

[75] In respect of the second defendant's evidence, Mr Boesak argued that in his evidence-in-chief, the witness alleged that the plaintiff failed to pay its workers, which resulted in him (the second defendant) having to settle the plaintiff's debt in this regard. Mr Boesak argued that this is highly improbable that the second defendant paid the plaintiff's workers because the plaintiff brought the workers, and the second defendant had nothing to do with them. The only reason proffered by the second defendant as to why he paid the workers was because they went to the Labour Commissioner's Office.

[76] A further contradiction referred to by Counsel is the concessions that the second defendant made regarding who supplied the renovation material. In this regard, the second defendant conceded that the plaintiff installed the ceiling by using his own money, the plaintiff painted the inside walls, the metal inserts in the counters

were purchased by the plaintiff. Mr Boesak argued that it is improbable that the plaintiff did not supply the material to renovate the premises.

[77] Mr Boesak argued that the letter from the City of Windhoek, which is the cause for the cancellation of the lease agreement, is highly controversial. Mr Boesak asserted that it is the second and fourth defendants' version that the fourth defendant called the second defendant during the end of July 2016 due to the letter received regarding the illegal structure; however, the letter is dated 23 August 2016. Mr Boesak argued that it is more surprising that the second defendant does not know what wooden structure was referred to, which was allegedly inconsistent with the building plans.

[78] In respect of the fourth witnesses evidence, Mr Boesak argued that the fourth defendant's evidence is mainly centred on informing the second defendant about the illegal wooden structure. Yet, it appears that the fourth defendant was not aware of the fact that the plaintiff was renovating the property.

[79] Mr Boesak submitted that what is controversial is the fact that the fourth defendant stated that there was different sets of workers, i.e. those of the second defendant and the plaintiff and his workers. However, this fact never came out in any of the evidence of the parties.

[80] Mr Boesak argued that the evidence of the fourth defendant is unreliable due to the contradictions.

[81] In conclusion, Mr Boesak argued that the plaintiff's version of events is true and accurate and therefore acceptable, contrary to the defendants' evidence. Mr Boesak argued that the plaintiff has proven that he paid a deposit of N$ 20 000. In addition, the plaintiff has established through photographs that it affected renovations to the property concerned, which substantially increased the property's value. Counsel, however, conceded that there is no concrete evidence of the subsequent valuation as the plaintiff adduced no evidence in this regard.

[82] On the issue of misrepresentation regarding the property ownership, Mr Boesak argued that the plaintiff proved that the second defendant misled it in the circumstances.

[83] Mr Boesak submitted that the crucial issue that stands to be adjudicated by this court relates to the value of the renovations or improvements effected by the plaintiff.

[84] Mr Boesak submitted that the plaintiff has proven that it installed equipment or purchased equipment to the value of N$ 285 264.91 as depicted in Schedule 1 and that the renovations were proven by virtue of tax invoices from various entities; paid N$ 20 000 deposit and paid N$ 3 866.61 for the City of Windhoek compliance certificate.

[85] In so far as the claim for movables, Mr Boesak submitted that the plaintiff has proven that he left the items as per Schedule 2 at the defendants' premises apart from the items removed with the assistance of the Namibian Police. Accordingly, counsel argued that as a result, the plaintiff is entitled to the return of its movables. Counsel, in this regard, also conceded that the plaintiff was unable to proof the value of the items as per Schedule 2.

*On behalf of the defendants*

[86] Mr Ntinda, from the onset, argued that the defendants persist with their special plea of *locus standi* and that the plaintiff is not a party to the agreement between the lessee and the first defendant. Mr Ntinda argued that the plaintiff's counsel now claims that the cause of action is no longer contractual but places it under delict; however, if one ignores the contract, then the lease agreement is ignored, which diminishes the cause of action, and if that is the case then there is no claim against the first defendant.

[87] Mr Ntinda submitted that the averment by the plaintiff that the plaintiff allegedly ratified the lease agreement in accordance with s 53[5] of the Close Corporation Act. Mr Ntinda referred the court to the plaintiff’s founding statement and

[5] **Pre-incorporation contracts**

certificate of incorporation[6] and argued that it is clear from the exhibits that the plaintiff is indeed not a party to the lease agreement.

[88] Mr Ntinda referred to the lease agreement between the lessee and the first defendant and drew the court's attention to the following (regarding the evidence of Mr Mendonca):

a) That the lease agreement does not state that the contract was being concluded on behalf of the plaintiff who is not yet registered and that ratification will be done once the plaintiff is registered;
b) No written resolution or anything in writing (as required by s 53) exist in which the plaintiff ratified the lease agreement;
c) Mr Mendonca provided no other evidence as to why the plaintiff should rely on the lease agreement as to its own.

[89] Mr Ntinda referred the court in this regard to *Lethale and Associates CC v Molope Bakeries (Pty) Ltd*[7] wherein the court found that it is trite law that a legal entity, be it a company or a close corporation, has no existence as such until the process of its incorporation is completed and a contract purportedly entered into by it before it comes into existence is, therefore, a nullity. The court further stated that even if the contract was after incorporation ceded or adopted by the corporation, such extrinsic evidence relating thereto and introducing a completely new party to the contract would offend the parol evidence rule. And lastly, the court stated that a plaintiff could not lead evidence to alter the contract upon which it relies as constituting the cause of action to which it was never a party.

---

53. (1) Any contract in writing entered into by a person professing to act as an agent or a trustee for a corporation not yet formed, may after its incorporation be ratified or adopted by such corporation as if the corporation had been duly incorporated at the time when the contract was entered into.

(2) <u>The ratification</u> or adoption by a corporation referred to in subsection (1) <u>shall be in the form of a consent in writing of all the members of the corporation, given within a time specified in the contract or, if no time is specified, within a reasonable time after incorporation</u>.

[6] Exhibits A1 and A2, respectively.

[7] (282/98) [1999] ZANWHC2 (16 September 1999).

[90] Further to this, Mr Ntinda referred the court to the Supreme Court decision in *Heidrun Diekmann Interior Lifestyles CC v L& B Commercial Services (Pty) Ltd*[8] where the court dealt with the aspect of instituting an action based on the contract to which an entity is not a party.

[91] Mr Ntinda further pointed out that the lease agreement (exhibit B) also contains a non-variation clause, i.e. clause (p) and argued that where parties bound themselves to a non-variation clause, it is not permissible to vary it unless it is reduced to writing and agreed to by both parties.

[92] The provision of clause (o) was also brought to the attention of the court, which states that 'neither party relies entering into this agreement on warranties, representations, disclosure or expression of opinion, which has not been incorporated into this agreement as warranties or undertakings. Mr Ntinda argued that the plaintiff appears to suggest that anyone, including the plaintiff's only witness, can claim for alleged damages arising from the contract.

[93] Mr Ntinda submitted that the plaintiff (having not been a party to the contract) did not ratify the contract as required by law, nor did it conclude a new contract with the defendants and can therefore not rely on the lease agreement as its own. Thus, the plaintiff has no *locus standi* to base its cause of action on a contract to which it is not a party to. Therefore, on this point alone, the plaintiff's claim stands to be dismissed.

[94] On the issue of damages or quantum Mr Ntinda argued that the plaintiff failed to submit the relevant evidence to prove any quantum claimed. Mr Ntinda argued with reference to *Swakopmund Airfield v Council of the Municipality*[9] that in the case of an enrichment claim, the onus is on the plaintiff to prove unjust enrichment at the plaintiff's expense. Mr Ntinda argued that this onus could be acquitted by proving the amount expended on the improvements as well as proving to what extent the value of the property was enhanced thereby. Whichever is the lesser amount would

---

[8] 2015 (2) NR 303 SC.

[9] 2013 (1) NR 205 at p 215.

constitute the sum by which the lessor was enriched and the lessee impoverished by the improvements brought about by him.

[95] Mr Ntinda argued that the plaintiff had the onus to prove that the improvements made (assuming they were made) were useful and necessary, by which the owner is enriched. However, in the current matter, the plaintiff failed to submit any evidence whatsoever on the value of the property, which was allegedly enhanced, and Mr Ntinda submitted that this omission was fatal.

[96] Mr Ntinda argued that Mr Mendonca categorically stated that he had no knowledge of construction on his own admission. Counsel argues that as a result, the witness cannot testify to the improvements made on the property, let alone determine if they were useful or necessary.

[97] Mr Ntinda is adamant that the improvement value could only be determined through an expert like a quantity surveyor. The first and second defendant invited Mr Mendonca to seek the services of such a professional, but he chose not to and instead approached the court to quantify the plaintiff's claim. Mr Ntinda argued that the cross-examination of Mr Mendonca made it clear that he could not state which items of the invoices presented to the court were used for improvements.

[98] Mr Ntinda urged the court to decline the offer by the plaintiff to come up with the quantum in the circumstances where the plaintiff submitted no proof in that regard. Finally, Mr Ntinda reminded the court that Mr Mendonca conceded that the calculation or computation of the schedule attached to the particulars of claim is wrong.

[99] In respect of the invoices submitted in support of its claim regarding the improvements, Mr Ntinda contended that Mr Mendonca conceded that not all the invoices submitted was that of the plaintiff as a number of the invoices related to Tiba Gas and Oil Consulting, a sister company of the plaintiff. Mr Ntinda also argued that the witness, Mr Mendonca, was not the one who was responsible for the compilation of the invoices and could therefore not independently verify that the invoices were indeed in respect of purchases made to use on the property in question. Mr Ntinda

argued that there was no proof before court that Tiba Gas and Oil Consulting authorised the plaintiff to utilise those invoices.

[100] From the evidence of Mr Mendonca, the plaintiff purchased some of the material as per Schedule 1 to construct items as per Schedule 2 (movable items). Yet, the witness did not specify which of the items as contained in Schedule 2.

[101] Mr Ntinda argued that the defendants' witnesses testified that the alleged improvements were all decorative and not improvements to the building as such. Therefore the plaintiff's so-called improvements do not resort to necessary and useful improvements and could not be claimed.

[102] Regarding the plaintiff's claim for delivery of its movable items, alternatively the payment of the value of the said items, Mr Ntinda argued that the undisputed evidence before the court is that :

a) Both Mr Mendonca and the second defendant agreed that there were some of the plaintiff's moveable items on the premises;
b) Both these witnesses agreed that the plaintiff attended the premises with the Namibian Police and removed items from the premises;
c) The plaintiff did not present an inventory to the court of the items that it removed from the premises, and it remains an issue in dispute;
d) The second defendant remains steadfast that none of the plaintiff's items remained in the building;
e) The plaintiff did not produce any invoice or acceptable evidence by a sworn valuator regarding the value of the items that the plaintiff is claiming.

[103] Mr Ntinda submitted that the case for the plaintiff is bad in fact and law and that the plaintiff’s action stands to be dismissed with costs.

<u>Issues for determination</u>

[104] The matter before me is of such a nature that the court could not consider the disputed issues without having the benefit of hearing all the evidence as it would not be appropriate to consider the plaintiff's case *in vacuo*. This resulted in the refusal of the application for absolution from the instance.

[105] I now had the opportunity to hear all the evidence presented in this matter, and after having done so, it is my considered view that can decide this matter.

a) Whether the plaintiff is indeed a party to the proceedings and whether it has *locus standi*;
b) Enrichment and quantum;
c) Delivery of movable items alternatively value of such items.

The applicable law and application to the facts

*Locus standi*

[106] It is common cause that the Zur Oasis was unincorporated at the time of entering into the lease agreement with the first defendant. Zur Oasis had its own registration number, and it appears that the name was the defensive name registered at the time. Then in June 2016, Caribbeana Jazz Pizza and Beer Garden CC t/a Zur Oasis Plateau Pizza and Beergarden was registered under its own registration number.

[107] It is further common cause between the parties that the plaintiff was not a party to the lease agreement and counsel for the plaintiff maintained that the plaintiff ratified the lease agreement in accordance with s 54 of the Close Corporations Act[10].

[108] S 53 of the Act provides as follows:

'**Pre-incorporation contracts 53**

(1) Any contract in writing entered into by a person professing to act as an agent or a trustee for a corporation not yet formed, may after its incorporation be ratified or adopted by such corporation as if the corporation had been duly incorporated at the time when the contract was entered into.

(2) The ratification or adoption by a corporation referred to in subsection (1) shall be in the form of a consent in writing of all the members of the corporation, given within a time specified in the contract or, if no time is specified, within a reasonable time after incorporation.

[10] Act 26 of 1988.

[109] I was referred to the *Lethale* case[11] by Mr Ntinda, wherein the court held as follows concerning ratifications:

'It is trite law that a legal entity, be it a company or a close corporation, has no existence as such until the process of its incorporation is completed and a contract purportedly entered into by it before it comes into existence is, therefore, a nullity. As stated by Trollip JA in *Sentrale Kunsmis Korporasie (Edms) Bpk v N.K.P Kunsmisverspreiders (Edms) Bpk* 1970 (3) SA 367 (AD) for the company-

> "to become entitled to the rights or bound by the duties hereunder, a fresh contract in those terms had to be entered into between the parties after its incorporation…"

In my view, the above remarks apply *mutatis mutandis* to a close corporation.

Even assuming, in favour of the plaintiff, that the contract was, subsequent to incorporation, ceded or adopted by the corporation, such extrinsic evidence relating thereto and introducing a completely new party to the contract will offend the parol evidence rule. It would also be unfair and unjust for the defendant to be bound by the internal arrangements of the partnership of which arrangements it might not have knowledge of and/or consented to.

I was referred by the excipient's counsel to authorities such as R H Christie "The Law of Contract in South Africa 3rd edition, at page 212; *Johnston v Leal* 1980 (3) SA 927 (A) 943 B and Hoffmann and Zefferett "The South African Law of Evidence", 4th edition, at page 312", in which the principles relating to the parol evidence rule are clearly delineated. I do not propose to deal with such authorities in any great detail in this judgment because the general principles are quite clear and they were not really disputed on behalf of the plaintiff. Suffice it to state that the plaintiff cannot lead evidence to alter the contract upon which it relies as constituting the cause of action and to which it was never a party. This was elaborated by Corbett J A in the unanimous decision in the case of *Levin v Drieprok Properties (Pty) Ltd* 1975 (2) 597 AD in which the learned judge quoted with approval (at 407 E-F) the passage from the American Jurisprudence, 2nd edition, vol 17, section 42 that-

> "….everyone has a right to select and determine with whom he will contract and another cannot be thrust upon him without his consent, regardless of whether the offeror has special reasons for contracting with the offeree than someone else..."

In all the circumstances, I have come to the conclusion that the citation of and reference to the plaintiff in the particulars of claim as a party to the contract is not and cannot be correct.'

[110] If one has reference to the *Lethale* matter, it is clear that the plaintiff could not unilaterally alter the lease agreement between Zur Oasis and the first defendant and

[11] See footnote 7 supra.

summarily make the agreement its own without the consent of the first defendant. It is common cause that no such consent was obtained from the first defendant.

[111] I must agree with Mr Ntinda that the first defendant did not enter into a lease agreement with the plaintiff, and the plaintiff, as a result, would not be the correct party before the court to prosecute this matter.

[112] The burden to prove the existence of the contract, <u>the parties thereto</u> and terms of the contract relied on for the relief prayed for rests on the plaintiff in this matter, and it is clear that the plaintiff is unable to do so.

[113] It is noticeable that the plaintiff took an about-turn in this matter as Mr Boesak argued in closing that the plaintiff is not relying on the lease agreement but that the substratum for its claim lies in the unjust enrichment of the third defendant.

[114] The question that immediately arises is where does this plaintiff's new position leave the first defendant? In its pleadings, the plaintiff pleaded that the first defendant and/or the second defendant made fraudulent alternatively negligent misrepresentations resulting in the plaintiff suffering damages. It is essential to note in this regard that the plaintiff's counsel already conceded its claim against the second and fourth defendants at the close of the plaintiff's case.

[115] Therefore, if the second defendant is no longer to be considered, it only leaves the first defendant in respect of the plaintiff's contractual claim. Suppose the plaintiff is no longer relying on the lease agreement, which appears to be the only relation between the plaintiff and the first defendant. In that case, the cause of action against the first defendant falls away, and the plaintiff would thus not be entitled to any relief in respect of the first defendant.

*Enrichment*

[116] It is common cause that the third defendant is the owner of the property concerned and that there was no lease agreement between the plaintiff and the third

defendant. It is further common cause that the plaintiff is no longer in possession of the premises, and an enrichment lien does not apply to the matter at hand.

[117] Although the plaintiff is no longer relying on the lease agreement, it is the plaintiff's case that it made improvements to the premises of the third defendant as a result of the lease agreement, which made provision that the plaintiff could do renovations. In lieu of the renovations, it would not pay rent for a period of six months.

[118] Mr Mendonca testified that as a result of the lease agreement, he, as a member of the plaintiff, proceeded to effect improvements to the premises at the costs of the plaintiff and Tiba Gas and Oil CC Consulting CC as the property was a state of disrepair.

[119] Mr Wechlsberger, a member of the third defendant, confirmed that the premises required renovations but testified that the first defendant did the renovations and whatever the plaintiff did was luxury improvements.

[120] In *Lechoana v. Cloete & Others*[12] the court distinguished between three categories of expenses and corresponding improvements, namely:

(a) Necessary expenses *(impensae necessarie),* which are expenses incurred by one in the preservation or conservation of the property of another.

(b) Useful expenses *(impensae utilis)* incurred on the property. Useful expenses are those which although not necessary, improve the usefulness and possibly the economic value of the property.

(c) Luxurious expenses *(impensae voluptuariae)* are those that are neither useful nor necessary but serve only to adorn and sometimes increase the value of the property.

[121] The plaintiff as the 'lessee' or bona fide occupier would have an enrichment claim for recovery of expenses that were necessary for the preservation of the

[12] *Lechoana v. Cloete & Others* 1925 AD 536, at 547.

property as well as the costs incurred in effecting useful improvements to the property[13].

[122] However, to succeed with its claim, the plaintiff has the onus to prove its enrichment claim and will discharge the said onus by proving the amount expended on the improvements as well as to what extent it enhanced the value of the property. Whichever is the lesser amount would constitute the sum by which the lessor was enriched, and the lessee impoverished brought about by it.

[123] The plaintiff must thus show that the improvements made were firstly useful and secondly that they were necessary improvement by which the third defendant was enriched.

[124] The plaintiff produced various invoices issued by Megabuild, Megatech, Pennypinchers, Agra, Cashbuild, Nipko, Ark Trading and City Sand and Bricks, to name a few. It is the evidence of Mr Mendonca that all these material purchased by the plaintiff was used to effect the improvements.

[125] The defendants challenged the authenticity of these invoices, but the court dealt with the objections raised in this regard during the trial. The invoices purporting to be issued by the aforementioned service providers were, according to Mr Mendonca, for various materials, including the supply and erection of burglar bars for the windows, tiles, basins and paint, etc.

[126] I take no issue that the items were bought and paid for by either the plaintiff or Tiba Gas and Oil Consulting CC. However, several issues arose during the trial regarding the improvements pleaded by the plaintiff being:

(a) Firstly the defendants raised a question regarding the invoices issued to Tiba Gas and Oil CC and whether the plaintiff could prove that the material purchased under Tiba Gas and Oil Consulting CC was indeed used in the renovations of the premises concerned.

---

[13] *Swakopmund Airfield v Council of the Municipality of Swakopmund* 2013 (1) NR 205 SC at para [40].

.

(b) Secondly, it would also appear that Mr. Mendonca was not in charge of the purchases made in respect of the material from the respective service providers, and that became clear from an Agra tax invoice which included the purchase of groceries, clothing and shoes, dog food etc. for of the amount of hundreds of dollars, which is now claimed from the defendants. Finally, on this score, it is also important to note that the plaintiff purchased specific equipment to make improvements, e.g. a tile cutter, impact drill[14], screw driver set, angle grinder[15], brooms and mops, socket sets and spanners[16], etc., the plaintiff is claiming the costs thereof from the defendants. Some of these invoices were issued prior to the date of the lease agreement.

(c) Thirdly the defendants took issue with whether the renovations or improvements pleaded was useful and necessary as the second and the fourth defendants testified that the first defendant was tasked with the property's renovations, which included the premises in question.

(d) Fourthly, the defendants raised the question whether the third defendant was enriched due to the renovations.

[127] Having considered the evidence, I am satisfied that improvements were effected to the premises because that is quite evident from photographs presented to the court by the plaintiff. I also have no issue in finding that the plaintiff affected some improvements to the property, but this court was not placed in the position to make a finding that the value of the material purchased by the plaintiff on a cash basis and Tiba Gas and Oil Consulting CC was used in the process of the renovation. Therefore, I am also not able to determine what extent, if at all, the value of the property was enhanced.

[128] The plaintiff makes no distinction as to the necessary and useful nature of the improvements effected by the plaintiff. I must assume that necessary expenses are concerning the claim for reimbursement for expenditure of money or material on the preservation of the premises. The plaintiff also claimed for his labour costs to effect the renovations in the amount of N$ 381 300; however, the plaintiff was unable to

[14] Pennypinchers dated 4 June 2016.

[15] Megabuild dated 2 March 2016.

[16] Nipko dated 2 February 2013, 11 March 2016 and 14 April 2016.

produce any source documents for the payment of the labour costs, and the counsel for the plaintiff conceded as much.

[129] This court does not know what the useful improvements were, if any. This poses a further problem for the plaintiff because in respect of the useful improvements, the amount of compensation is limited to the amount by which the value of the property has been increased or the amount of the expenses incurred by the plaintiff, whichever is the less[17]. There is no evidence before the court as to the increase of the value of the premises of the third defendant. The plaintiff would have been able to accomplish this by engaging a quantity surveyor who would have been able to make a cost assessment of the material needed for the renovation work and how much the premises' value or the property, for that matter, increased.

[130] Instead of using the services of a quantity surveyor, the plaintiff decided to rely on a set of photographs, which is of no assistance to determine whether the property value was increased.

[131] The improvement to the premises is disputed by the defendants, and there is a disagreement on the value of the improvements, and as a result, the plaintiff had to produce acceptable evidence to establish whether the property has been improved in value and the plaintiff was unable to do so. Resultantly the plaintiff failed to prove that the third defendant was enriched and, if so, in what amount.

[132] In *Billy v Mendonca*[18] defendant's second alternative counter-claim. In that claim, he claims the property's market value, alleging that the plaintiff was enriched at his expense in the amount of N$ 3 Million. In the said case Masuku J stated as follows:

> '[44] <u>It is common cause that issues of the value of the property are not those within the ordinary knowledge and expertise of the court and must perforce be proved by admissible expert evidence. The defendant did not call any such expert witness. There is no evidence of what the alleged improvements were and what their value was.</u>

---

[17] *Rhoode v De Kock* (45/12) [2012] ZASCA 179 (29 November 2012) at para 15.

[18] (I 3954/2013) [2020] NAHCMD 242 (18 June 2020).

[45] In this regard, the court was referred to *Smith v Mountain Oaks Winery (Pty) Ltd*[19] where the respondents failed to quantify the damages allegedly suffered as a result of an alleged misrepresentation by the appellant. The court reasoned that, 'The respondents alleged that they are not in a position to quantify the damages that will be suffered as such damages will only become apparent as their reputation and business relationships are affected. This therefore means that the respondents could not prove that they suffered damages as a result of the representation'. The appeal was accordingly upheld and the judgment of the lower court was set aside and replaced.

[46] It is good law that a party, which claims damages, based on some unlawful or negligent act of another, is bound to prove the damages incurred thereby. Failure to do so, amounts to that party having failed to prove all the essentials of the claim and this justifies the court in granting absolution from the instance because to ask rhetorically, how else can the court compute the damages as it cannot assess and declare the same from a mere thumb-suck?' (my underlining)

[133] I must therefore decline to come up with the quantum in the matter before me, where the plaintiff has failed to prove the same.

*Delivery of movable items alternatively value of such items.*

[134] The last issue to consider is the delivery of the movable items, alternatively the value of such items. As per schedule 2 of the particulars of claim, the plaintiff sets out a list of items that include fridges, cupboards, a portable bar with lights, benches, chairs, wine rack, bar counter, artwork, etc., to the approximate value of N$ 377 800.

[135] It is common cause that the plaintiff removed movables from the premises when he attended to the premises together with the Namibian Police. It is common cause that the second defendant was detained at the time.

[136] According to Mr Mendonca, he made an inventory of the items removed; however, the inventory is not before the court. The plaintiff also failed to call any of the police officers that attended the premises with him to confirm which movables were removed.

[19] (1003/2018) [2019] ZASCA 123 (26 September 2019), para 18, per Mokgohloa JA.

[137] In this regard, the defendants are adamant that the plaintiff removed all its movables and that none remained on the third defendant's premises.

[138] As with the issue of quantum, the nature of the movable items that were on the premises was pertinently placed in dispute, as was the value thereof and which items were removed from the premises by the plaintiff. Yet, the plaintiff called only one witness, Mr Mendonca, to testify in this regard even though there must have been several witnesses available to attest to the fact.

[139] Many of the movable items were manufactured by the plaintiff for e.g. the bar counter and wine rack. The actual value of these manufactured items is unknown to the court. The plaintiff allocated values to these items, but it is not clear what the value of the items is based on. The plaintiff did not call a professional valuator to give a professional valuation regarding any of the items.

[140] A further issue raised by the defendants is the fact that the plaintiff bought material with which some of the movable items were manufactured; however, the plaintiff is claiming for the material as well as the estimated value of the movable items. There is no indication that the value of the materials was factored into the value of the manufactured items; if not, there would be duplication in the claim amounts of the plaintiff.

[141] This court can't make an order regarding the delivery of the property as it is not clear where the movables are. It is further impossible for this court to make an order as to the payment of the value either as there are no invoices or acceptable evidence presented to this court as to the value of the movable property or to quantify it at trial.

[142] To reinforce this point one must just have regard to the items that have invoices, for example the red benches (or loungers) that the plaintiff removed from the premises which was bought from Auction King[20] for N$ 3000 for a pair yet in its schedule 2 the plaintiff alleges a value of N$ 12 500 for three benches. A further example is the wooden benches, which were also removed from the premises, which

[20] Invoice dated 31 March 2016.

were bought from Auction King for N$ 1 500 (for 3 benches), yet the plaintiff alleges in schedule 2 that the value of two of these wooden benches is N$17 000.

[143] Clearly, this court cannot rely on the values attributed by the plaintiff to the movable items.

Conclusion

[144] Having due regard to what has been discussed above, the court is fortified in the conclusion that for the reasons advanced above that the claim(s) by the plaintiff failed to prove its case on a balance of probabilities and stands to be dismissed.

[145] In conclusion, the only remaining issue that I wish to address is the payment of the N$ 20 000 deposit that is common cause that was paid to the first defendant. However, the payment was made on behalf of Zur Oasis and not on behalf of the plaintiff, and therefore, the court cannot make an order in this regard either.

Order

[146] The plaintiff's claims are dismissed with costs.

____________________

JS Prinsloo

APPEARANCES:

| | |
|---|---|
| For the Plaintiff: | Adv Boesak<br>On the instructions of<br>Brockerhoff and Associates<br>Windhoek |
| For the Defendants: | Mr Ntinda<br>Of Sisa Namandje & Co Inc<br>Windhoek |