REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Number: HC-MD-CIV-ACT-CON-2021/01259

In the matter between:

SHARED ADVERTISING CC T/A SHARED PETROLEUM	**PLAINTIFF**

and

IN TOUCH CARGO NAMIBIA (PTY) LTD	**1ST DEFENDANT**
GIDEON ANDRIES DAVID OBERHOLZER	**2ND DEFENDANT**
WILHELM GEORGE PETRUS LAUBSCHER	**3RD DEFENDANT**
ANTON PRETORIUS	**4TH DEFENDANT**
MINISTER OF MINES AND ENERGY OF NAMIBIA	**5TH DEFENDANT**
ATTORNEY GENERAL OF NAMIBIA	**6TH DEFENDANT**

Neutral Citation: *Shared Advertising CC t/a Shared Petroleum v In Touch Cargo Namibia (Pty) Ltd* (HC-MD-CIV-ACT-CON-2021/01259) [2022] NAHCMD 485 (9 September 2022)

Coram: RAKOW J

Heard: **15 August 2022**

Delivered: **9 September 2022**

Reasons: **15 September 2022**

Flynote: Civil procedure – Pleadings – Exceptions – Contracts forbidden by statute – Validity of Contracts forbidden by statute – Intention of the legislator- consequences of an agreement declared null and void-contracts forbidden by statute are not enforceable and thus no consequences can flow from it – Enrichment – Enrichment must be extensively pleaded and proved – Exceptions upheld.

Summary: The cause of action against the first to fourth defendants arose, according to the particulars of claim, from a partly written, partly oral contract entered into between the first defendant and the plaintiff for the supply and sale of fuel to the first defendant. The second to fourth defendants bound themselves as sureties and co-principal debtors to the plaintiff for the debts of the first defendant. This was in terms of a number of agreements, which were entered into between the parties over the period 5 October 2015 to 1 November 2018. All the agreements entered into for that specified period dealt with the sale and supply of fuel to the first defendant with the other three defendants signing as sureties and co-principal debtors at various times.

The defendants raised exceptions against the amended particulars of claim by the plaintiff premised on the jurisdictional fact, according to the defendants, that the amended particulars of claim do not contain the necessary averments to sustain a cause of action and/or fail to disclose a cause of action against the defendants.

Held that, the question is therefore whether, the subordinate legislation is applicable in the current matter or whether it needs to be proved as alleged by the plaintiff.

Held that, when looking at the specific action that is condemned by the legislation, it is important to determine the intention of the legislator with the specific clause and to interpret it within the said ambit. In this instance, the court finds that to enforce a contract like the one before court would be to allow conduct which the Minister specifically saw fit to render as a criminal offence and as such the contract is illegal, and therefore grounds 1, 2 and 3 of the exception must succeed.

Held further that, unenforceable agreements can form the basis of enrichment claims, but, in order for the court to determine whether it indeed supports an enrichment claim, it must be decided on a case by case basis, applying the general principles. It is however necessary to allege the exact terms of the enrichment. Ground 4 is therefore dismissed but ground 5 is successful in so far as the specific detail of the enrichment must be alleged.

ORDER

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1. The exception is successful in that grounds 1,2,3,6 are upheld and ground 5 is partially upheld; ground 4 is dismissed.
2. Costs of the application are awarded to the defendants.
3. The plaintiff is granted 14 days to rectify the grounds for the exception, where necessary.
4. The matter is postponed to 4 October 2022 at 15h30 for a status hearing.

JUDGMENT

RAKOW J:

Introduction

[1] The plaintiff before court is Shared Advertising CC t/a Shared Petroleum, a close corporation and holder of a retail license for dispensing fuel. Touch Cargo Namibia, a private company, is the first defendant, Gideon Andries David Oberholzer is the second defendant, Wilhelm George Petrus Laubscher is the third defendant and Anton Pretorius the fourth defendant. The matter is no longer proceeding against the fifth and sixth defendants.

Background

[2] The cause of action against the first to fourth defendants arose, according to the particulars of claim, from a partly written, partly oral contracts entered into between the first defendant and the plaintiff for the supply and sale of fuel to the first defendant. The second to fourth defendants bound themselves as sureties and co-principal debtors to the plaintiff for the debts of the first defendant. This was in terms of a number of agreements, which were entered into between the parties over the period 5 October 2015 to 1 November 2018. All the agreements entered into for that specified period dealt with the sale and supply of fuel to the first defendant with the other three defendants signing as sureties and co-principal debtors at various times.

[3] At all relevant times, the fuel so provided was provided by the plaintiff and/or its agent Green Bio Energy Namibia CC which was the holder of the retail fuel license for dispensing points at Lagerhein Road Walvis Bay and at Republic road no 1 Otavi. In terms of the agreement, the plaintiff undertook to sell fuel to the first defendant at a price determined by the plaintiff from time to time, minus a percentage agreed upon from time to time as a rebate for prompt payment. The agreement further, in clause 2.1 of the Terms and Conditions Incorporating Suretyship, provided that:

> '(a)ll sales will be on a strictly cash basis, with payment secured in advance unless the seller in its sole discretion agrees to extend the purchaser's credit terms.'

[4] The plaintiff in the particulars of claim indicates that this was indeed the case and that it had, at its sole discretion, orally agreed to extend credit terms to the first defendant on an ongoing basis. The plaintiff, in the alternative, if the terms of the agreement are held null and void, which is denied, also pleads that it provided fuel to the first defendant which was not paid, and as such, the first plaintiff was unlawfully enriched. The total claim amount is for N$4 264 206.52.

[5] The matter at hand, however, is that the first, second, third and fourth defendants have raised an exception in terms of rule 57(2) of the rules against the plaintiff's amended particulars of claim dated 18 February 2022. The exception is premised on the jurisdictional fact, according to the defendants, that the amended particulars of claim do

not contain the necessary averments to sustain a cause of action and/or fail to disclose a cause of action against the defendants.

The exception

[6] For purposes of this ruling it is necessary to fully quote the exception that was raised by the defendant. In its notice, six grounds were raised together with a general introduction to these exceptions, and they are as follows:

'Plaintiff in its amended particulars of claim no longer challenges the constitutionality of Regulation 35 of the Petroleum Products Regulations ("the Regulations"), under the Petroleum Products Act 13 of 1990 ("the Act"). In law the plaintiff is bound to the provisions of regulation 35(1) which provides as follows:

> ". . .No retail licence-holder may dispense any fuel directly into the tank of a fuel driven vehicle or vessel otherwise than against payment in cash, and no person shall receive fuel from a retail licence-holder so dispensing it to such person directly into the tank of such vehicle or vessel otherwise than against payment in cash. . ."

EXCEPTION – NO CAUSE OF ACTION ALTERNATIVELY DO NOT CONTAIN AVERMENTS NECESSARY TO SUSTAIN A CAUSE OF ACTION
GROUND 1:
1.1 Plaintiff in paragraph 17.1 of the amended particulars of claim avers that it is a retail license holder for dispensing fuel at its place of business being 13 Holstein Road, Lafrenz Industrial, Windhoek.

1.2 The following definitions under the Regulations are apposite to the context of this matter:
". . ."relevant premises" means - (a) in the case of a retail licence-holder, the licensed premises…
"retail licence" means a licence issued in terms of regulation;
"retail licence-holder" means the holder of a retail licence;
"retail outlet" means any place from where fuel is sold or is offered for
sale to consumers for purposes of use or consumption;
"retail sale" means the sale of fuel at a retail outlet. . .

7. (1) The following general conditions apply to all retail licences:

(a) The retail licence-holder shall at all times comply with the Act and these Regulations and all other applicable laws, including laws relating to labour, safety, hazardous substances, security, health and environment. . .

…

(g) the retail licence-holder shall at all times hold such permits, licences and certificates relating to the sale of petroleum products and other services provided at the retail outlet, as may be required by any other law; and . . . .

(h) the retail licence-holder may not obtain fuel by means of wholesale sale for purposes of retail sale from any person other than a wholesale licence-holder. . .

8. (1) A retail licence-holder may only sell fuel in bulk quantities by dispensing it directly into –

(a) a container, other than the tank of a vehicle, used for the storage of fuel; or

(b) the tank of a vehicle with a mass of 3 500 kilograms or more for purposes of propelling such vehicle, and for the purposes of this section,
"vehicle" includes any ship or other kind of vessel. . .

9. (I) A retail licence-holder shall commence with retail sales at the licensed premises within a period of six months after the date on which a retail licence has been issued to the licence-holder….

14. (1) The following general conditions apply to all wholesale licences:

(a) The wholesale licence-holder shall at all times comply with the Act, these Regulations and all other applicable laws, including laws relating to labour, safety, hazardous substances, security, health and environment;

(b) the wholesale licence-holder may sell fuel only in bulk quantities;

(c) if the wholesale licence-holder sells fuel to any person other than a retail licence-holder, certificate-holder, Government institution, local authority or regional council, the provisions of regulation 8 shall apply, with the necessary changes. . .

29. . .
(2) A retail licence is not transferable except by way of amendment of the licence under regulation 30. . .

1.3 In paragraph 15.2 of the amended particulars of claim the plaintiff avers as follows:

> ". . .Green Bio Energy Namibia CC ("Green Bio"), the holder of retail licenses for its dispensing points at Langerhein Rd, Walvis Bay (licence number R/474/2017), and at Republic Rd no 1, Main Road, Otavi (licence number R/478/2017), in its capacity as duly appointed agent of the plaintiff, received fuel from the plaintiff and supplied fuel to the first defendant from its above two dispensing points. . ."

1.4. In terms of the provisions of Regulation 7(h) read with Regulations 8 the plaintiff, in law, may not supply fuel to Green Bio Energy Namibia CC, the latter being a retailer and the former not being a wholesale supplier or holding a wholesale license.

1.5. In terms of the provisions of Regulation 9 read with the provisions of Regulations 1 and 8 the plaintiff, in law, and on the averments of the plaintiff, the plaintiff may not dispense fuel at another premises other than its premises at 13 Holstein Road, Lafrenz Industrial, Windhoek.

1.6. In paragraph 15.2 the plaintiff alleges that fuel was dispensed to the first defendant at Langerhein Road Walvis Bay and Republic Road No.1, Main Rooad, Otavi, being addresses other than the plaintiff's retail outlet for dispensing fuel, being Holstein Road, Lafrenz Industrial, Windhoek.

1.7. The plaintiff makes no allegation that Langerhein Road Walvis Bay and Republic Road No.1, Main Road, Otavi, are retail outlets under its retail license entitling the plaintiff to dispense fuel at such other addresses, either through an agent or otherwise.

1.8. It follows that the plaintiff's amended particulars of claim as read with the annexures thereto, consequently, do not disclose a cause of action, alternatively, does not contain averments necessary to sustain a cause of action against the defendants.

GROUND 2:

2.1 In paragraphs 6 to 15.3 read with paragraphs 25 to 26 and 30 to 36 of the amended particulars of claim the plaintiff avers the alleged conclusion of various agreements which in

essence provide for the sale of fuel to the first defendant on credit. The surety agreements are directly relevant to the alleged credit agreements.

2.2 By virtue of the provisions of Regulation 35(1) the agreements concluded are in contravention of the said provisions of the Regulations and are unlawful agreements. As a further consequence no lawful or valid surety agreements also exist.

2.3 It follows that the plaintiff's amended particulars of claim as read with the annexures thereto, consequently, do not disclose a cause of action, alternatively do not contain averments necessary to sustain a cause of action against the defendants.

GROUND 3:

3.1 The plaintiff's claim for rectification under paragraphs 16 to 24.5 read with prayer 1 including the sub-paragraphs 1.1 to 1.5 read further with the annexures to the amended particulars of claim, seek to rectify the written business application forms (alleged agreements) and surety agreements contained in the business application forms.

3.2 Upon a proper reading of the business application forms together with the allegations of the plaintiff it is apparent that they serve the purpose of dispensing and selling fuel to the defendants on credit, in contravention of Regulation 35 of the Petroleum Products Regulations, under the Petroleum Products Act 13 of 1990.

3.3 In law rectification cannot be sought or granted of an agreement or agreements that are unlawful and/or constitute a contravention of the law.

3.4 It follows that the plaintiff's amended particulars of claim as read with the annexures thereto, consequently, do not disclose a cause of action, alternatively do not contain averments necessary to sustain a cause of action against the defendants.

GROUND 4:

4.1 The plaintiff in the alternative in paragraph 38 including the sub-paragraphs claims as against all the defendants based on alleged enrichment.

4.2 In law the plaintiff may not rely on a claim for enrichment where agreements are in existence – yet unlawful. The provisions of Regulation 35 render the agreements relied upon by

the plaintiff unlawful. The *condictio ob turpem iniustam causam* – on which plaintiff's enrichment claim is apparently based – does not lie in the absence of an alleged defect causing the contracts to be vitiated, and even more so where plaintiff claims "specific performance" under the guise of enrichment. In short, the existence of an agreement, albeit an unlawful one, does not support any enrichment claim.

4.3 It follows that the plaintiff's amended particulars of claim as read with the annexures thereto, consequently, do not disclose a cause of action, alternatively do not contain averments necessary to sustain a cause of action against the defendants.

GROUND 5:

5.1 The plaintiff in the alternative in paragraph 38 including the sub-paragraphs claims as against all the defendants based on alleged enrichment.

5.2 The amount that plaintiff seeks to claim under enrichment is the exact same amount it claims under the alleged agreements for the dispensing and sale of the fuel.

5.3 In law the plaintiff can only claim an amount that it is, in essence, out of pocket, and may not claim profit, interest or the costs of levies. The plaintiff, under its claim for alleged enrichment, claims the alleged purchase price for the fuel dispensed and sold and such amount that includes the plaintiff's profit, costs of levies and interest.

5.4 The plaintiff must allege – which is not done – that it has been impoverished, and the first defendant enriched, in an amount equal to the plaintiff's out of pocket expenses – ignoring levies and the like which must be paid to the Government of Namibia – or the actual value of the fuel – ignoring levies and the like again by which first defendant was enriched, while plaintiff must then only claim the lesser amount. The particulars of claim lack such allegations.

5.5 It follows that the plaintiff's amended particulars of claim as read with the annexures thereto, consequently, do not disclose a cause of action, alternatively do not contain averments necessary to sustain a cause of action against the defendants.

GROUND 6:

6.1 The plaintiff's claim under enrichment as formulated under paragraph 38 of the amended particulars of claim, is on the plaintiff's own averments, a claim distinctly separate and alternative

to the plaintiff's intended claims under the alleged unlawful agreements, and the allegations under paragraph 38 only relate to the first defendant.

6.2 As such the terms and provisions of the agreements alleged by the plaintiff do not find application to the plaintiff's alternative claim premised on enrichment and accordingly the claims against the second to fourth defendants premised on the alleged surety agreements fall by the wayside.

6.3 In short and in sum, the sureties do not operate in favour of the plaintiff in respect of an enrichment claim.

6.4 In the prayers sought by the plaintiff, it inter alia seeks against all the defendants and in terms of the alternative claim premised on enrichment, payment by all the defendants jointly and severally the one paying the other to be absolved of the amounts of N$ 4 809 570.37 and N$ 985 792.31 and interest on such amounts without a lawful bases thereof being pleaded under the alternative claim and while in law and on the version alleged by the plaintiff under its alternative claim, only the first defendant was allegedly enriched.

6.5 It follows that the plaintiff's amended particulars of claim as read with the annexures thereto, consequently, do not disclose a cause of action, alternatively do not contain averments necessary to sustain a cause of action against the defendants.'

The arguments by the parties

[7] For the defendants, who raised the exceptions, it was argued that there are basically two issues which they want to raise, one being that for a contract to be enforceable, it needs to be legal and if the contract is found to be null and void, then there can be no enrichment claim. If the court finds that the contract between these parties is enforceable, then such enforcement will cause the parties to commit a crime as it is a crime to buy fuel on credit.

[8] They further argued that for the enrichment claim to be successful, the party claiming must allege that the party who received for example, the fuel, was enriched and the party who gave or delivered the fuel without receiving payment, was deprived. The

party who was deprived, must further prove exactly what it was deprived of and cannot claim the total outstanding amount because it can for instance, not claim the levies payable automatically, unless if such levies were paid over.

[9] For the plaintiff, it was argued that the common law provides that one needs to plead and prove subordinate or third tier legislation. If this is found to still be the case, it will do away with the first three grounds raised in the exception. It is further not correct therefore to raise this objection in an exception, it should be raised as a special plea. The enrichment claim is based on a reliance of admission of indebtness and comes only into play if the contract is found to be null and void. It was further argued that in the particulars of claim at para 38, the necessary allegations with regard to enrichment were made, being that the alternative claim arises in circumstances where it is held that the agreement is null and void; the first defendant was unjustifiably enriched; this was at the expense of the plaintiff; when the first defendant received fuel from the plaintiff at a cost of N$3 749 189.24; and that the first to fourth defendants were all parties to the agreement and are equally *indictio.*

[10] In reply, Mr. Heathcote stressed that the position in *Raad vir Kuratore vir Warmbad Plase v Bester*[1] regarding third-tier legislation which was the common law position, has changed with the introduction of the Civil Proceedings Evidence Act 25 of 1965 and the *Oudekraal* principle.[2]

General principles regarding exceptions

[11] The basis of an exception is found in rule 45(5) and 45(6) of the Rules of the High Court which requires that:

'(5) Every pleading must be divided into paragraphs, including subparagraphs, which must be consecutively numerically numbered and must contain a clear and concise statement of the material facts on which the pleader relies for his or her claim, defence or answer to any pleading, with sufficient particularity to enable the opposite party to rely and in particular set out –

[1] *Raad vir Kuratore vir Warmbad Plase v Bester* 1954 (3) SA 71 (T).
[2] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* (41/2003) [2004] ZASCA 48; [2004] 3 All SA 1 (SCA) (28 May 2004).

(a) The nature of the claim, including the cause of action; or

(b) . . . .

(c) Such particulars of any claim, defence or other matter pleaded by the party as are necessary to enable the opposite party to identify the case that the pleading requires him or her to meet.

(6) Every allegation in the particulars of claim or counterclaim must be dealt with specifically and not evasively or vaguely.'

[12] Pleadings must therefore be lucid and logical and in an intelligible form and comply with rule 45.

[13] Rule 57 of the Rules of the High Court deals with exceptions and reads as follows:

'57. (1) Where a pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or a defence, the opposing party may deliver an exception thereto within the period allowed for the purpose in the case plan order or in the absence of provision for such period, within such time as directed by the managing judge or the court for such purpose on directions in terms of rule 32(4) being sought by the party wishing to except.'

[14] When deciding on an exception, one should bear in mind what was said in *Colonial Industries Ltd v Provincial Insurance Co Ltd* 1920 CPD 627 at 630:

'Now the form of pleading known as an exception is a valuable part of our system of procedure if legitimately employed: its principal use is to raise and obtain a speedy and economical decision of questions of law which are apparent on the face of the pleadings: it also serves as a means of taking objection to pleadings which are not sufficiently detailed or otherwise lack lucidity and are thus embarrassing. Under the name of "demurrer" it grew under the old English practice into a most pernicious evil: the Courts of Law abnegating their functions as Courts of Justice directly countenanced and encouraged the ingenuity of counsel in drafting fine "demurrers" which ignored the rights on which they were called to adjudicate. I think that the possibility of such abuse of legal proceedings should be jealously watched and that save in the instance where an exception is taken for the purpose of raising a substantive question of law which may have the effect of settling the dispute between the parties, an excipient should make out a very clear, strong case before he should be allowed to succeed '

[15] And also in *South African National Parks v Ras*[3], Van Heerden J quoting some writers, said the following:

'The court should not look at a pleading with a magnifying glass of too high power. It is the duty of the court when an exception is taken to a pleading first to see if there is a point of law to be decided which will dispose of the case in whole or in part. If there is not, then it must see if there is an embarrassment which is real as a result of the faults in the pleadings to which exception is taken. Unless the excipient can satisfy the court that there is such a point of law or such real embarrassment the exception should be dismissed.'

[16] In *Van Straten NO and Another v Namibia Financial Institutions Supervisory Authority and Another*[4] the following was said regarding the approach to be followed in the determination of exceptions. The court said:

'Where an exception is taken on the grounds that no cause of action is disclosed or is sustainable on the particulars of claim, two aspects are to be emphasised. Firstly, for the purpose of deciding the exception, the facts as alleged in the plaintiff's pleadings are taken as correct. In the second place, it is incumbent upon an excipient to persuade this court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed. Stated otherwise, only if no possible evidence led on the pleadings can disclose a cause of action, will the particulars of claim be found to be excipiable.'

[17] In this instance, it is a point of law that is raised by the defendants. They allege that the contract is unenforceable and if the court enforces the terms of the contract, the court would be directing the defendants to perform a criminal act as the regulations clearly make the sale of fuel on credit illegal. It must be noted that at this stage, the sale of fuel on credit was not part of the original contract but only became part of the agreement by an explicit oral agreement between the parties, as alleged by the plaintiff and in its sole discretion.

[18] For purposes of this judgement, I will deal with some of the grounds so raised jointly and some separately as each of them ends with the phrase ‘that it follows that the

[3] *South African National Parks v Ras* 2002 (2) SA 537 (C) at 541.
[4] *Van Straten NO and Another v Namibia Financial Institutions Supervisory Authority and Another* 2016 (3) NR 747 (SC) para 18.

plaintiff's amended particulars of claim as read with the annexures thereto, consequently, do not disclose a cause of action, alternatively does not contain the averments necessary to sustain a cause of action against the defendants.'

Grounds 1, 2 and 3

[19] The plaintiff contends that in terms of *Raad vir Kuratore vir Warmbad Plase v Bester*[5] this exception is not good in law as this case ruled that:

'(a) claim which by reason of the provisions of a statute is unenforceable does not disclose a cause of action and can be excepted to because the courts take judicial cognisance of statutes and the validity of a statute cannot ordinarily be challenged, whereas a claim which may possibly not be enforceable by reason of the provisions of a regulation cannot be excepted to as not disclosing a cause of action since not only do the courts not take judicial cognisance of regulations but in addition the regulation may itself not be valid, and until it has been proved the question of its validity does not arise.'

Basically, the defence against grounds 1, 2 and 3 is that the court cannot take judicial notice of subordinate legislation as it needs to be proved.

[20] On behalf of the defendants, it was argued that this position was changed when the then new Civil Proceedings Evidence Act 25 of 1965 came into operation. They further allege that in terms of the provisions of Regulation 7*(h)* read with Regulations 8 the plaintiff, in law, may not supply fuel to Green Bio Energy Namibia CC, the latter being a retailer and the former not being a wholesale supplier or holding a wholesale license and in terms of the provisions of Regulation 9 read with the provisions of Regulations 1 and 8 the plaintiff, in law, and on the averments of the plaintiff, the plaintiff may not dispense fuel at another premises other than its premises at 13 Holstein Road, Lafrenz Industrial, Windhoek.

[21] Furthermore, that in paragraph 15.2 the plaintiff alleges that fuel was dispensed to the first defendant at Langerhein Road, Walvis Bay and Republic Road No.1, Main Road,

[5] *Raad vir Kuratore vir Warmbad Plase v Bester 1954* (3) SA 71 (T).

Otavi, being addresses not listed as plaintiff's retail outlet for dispensing fuel. All these premises are dispensing fuel in terms of subordinate legislation, if the terms can be stretched this far (there are likely to be other challenges towards the dispensing of the fuel).

[22] The question is therefore whether the subordinate legislation is applicable in the current matter or whether it needs to be proved as alleged by the plaintiff. So, in essence, is *Warmbad plase*[6] still applicable or not?

[23] It is however clear that the act us the following:

'5. (I) Judicial notice shall be taken of any law or government published notice, or Gazette or in the Official Gazette of the territory of South-West Africa . . . .
And then under section 5(2)
(2) A copy of the Gazette or of the said Official Gazette, or a copy of such law, notice or other matter purporting to be printed under the superintendence or authority of the Government printer, shall, on its mere production, be evidence of the contents of such law, notice or other matter, as the case may be.'

[24] This therefore, by reason of applicability, must be correct with regard to the content of the regulations being applicable. The defendant no longer bears the burden of proving that the said regulation was indeed made. In this matter it is further not necessary as the plaintiff clearly in its particulars of claim sets out the legal position as understood under the applicable legislation in paragraphs 27 and 28.

[25] The court should therefore have regard to third tier legislation as the common law position was overtaken by the 1965 Act and the position which existed in *Warmbad plase*[7].

[26] As such, the proposition by Mr. Heathcote on behalf of the defendants is that the court must find that the contract cannot be enforced because such enforcement will result in a crime being committed. In *Commissioner for Inland Revenue v Insolvent*

[6] Supra.
[7] Supra.

Estate Botha t/a 'Trio Kulture'[8], the court referred to a number of decisions and said the following regarding contracts forbidden by statute, which is what we in essence have in the current matter. [9] These comments read as follows:

‘ Since a contract which is forbidden by statute is illegal and void, a Court is bound to take cognisance of such illegality; and it cannot be asked to enforce or to uphold or to ratify such a contract: *Cape Dairy and General Livestock Auctioneers v Sim* 1924 AD 167 at 170. It is sometimes said that any juristic act performed in defiance of a statutory prohibition is not only ineffective, but further that it should notionally be thought away. Thus in *Schierhout v Minister of Justice* 1926 AD 99, Innes CJ, having cited the Code 1.14.5, remarked at 109:

> “ So that what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done - and that whether the lawgiver has expressly so decreed or not; the mere prohibition operates to nullify the act.”

Such general propositions are useful to stress the concept that *inter partes* an illegal jural act is devoid of legal consequence. But from such convenient generalisations it is not to be inferred that because an agreement is illegal a Court will in all circumstances and for all purposes turn a blind eye to its conclusion; or deny its very existence. As pointed out by Van den Heever J in *Van der Westhuizen v Engelbrecht and Spouse; Engelbrecht v Engelbrecht* 1942 OPD 191 at 199:

> “When we say a juristic act is void or voidable, we pass judgment upon it from various points of view, basing our judgment upon the degree or direction of its effectiveness. . .” And at 200:

> “. . . (J)uristic acts may be impugned from varying directions and to different degrees.”

[27] When looking at the specific action that is condemned by the legislation, it is important to in some way or manner determine the intention of the legislature with the specific clause and to interpret it within the said ambit. In the matter of *Claud Bosch Architects CC v Auas Business Enterprises Number 123 (Pty) Ltd*[10] the court dealt with a clause in the Architects’ and Quantity Surveyors Act 13 of 1979 which contains a prohibition against the performance of architectural services by a non-registered person

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[8] *Commissioner for Inland Revenue v Insolvent Estate Botha t/a 'Trio Kulture'* 1990 (2) SA 548 (A).
[9] *Of the Petroleum Products Regulations government notice* 155 of 23 June 2000.
[10] *Claud Bosch Architects CC v Auas Business Enterprises Number* 123 (Pty) Ltd 2018 (1) NR 155.

and non-natural person and this prohibition created a criminal offence in terms of s 13(1) *(b)* of this Act. In the High Court it was found that where a closed corporation performed architectural services to a client, such an agreement would be unenforceable as a result of the prohibition. This was an exception raised in the High Court and dealt with as such.

[28] In this matter the Supreme Court proceeded and looked at the statutory scheme of the above act in determining the intention of the legislature. Smuts JA proceeded and looked at the principles of interpretation of statutes and quoted from the case of *Namibian Association of Medical Aid Funds and Others v Namibia Competition Commission and Another*[11]:

'[39] This court in T*otal Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC*[12]recently referred to the approach to be followed in the construction of text and cited the lucid articulation by Wallis JA of the approach to interpretation in South Africa in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[13]:

> " Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances I attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.

[11] In *Namibian Association of Medical Aid Funds and Others v Namibia Competition Commission and Another* 2017 (3) NR 853 (SC) paras 39 – 41.
[12] *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC* 2015 (3) NR 733 (SC) paras 17 – 20.
[13] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) ([2012] 2 All SA 262; [2012] ZASCA 13) para 18.

[40] In the Total matter, this court also referred to the approach in England[14] and concluded:[15]

> "What is clear is that the courts in both the United Kingdom and in South Africa have accepted that the context in which a document is drafted is relevant to its construction in all circumstances, not only when the language of the contract appears ambiguous. That approach is consistent with our common-sense understanding that the meaning of words is, to a significant extent, determined by the context in which they are uttered. In my view, Namibian courts should also approach the question of construction on the basis that context is always relevant, regardless of whether the language is ambiguous or not.

[41] To paraphrase what was stated by this court in Total, the approach to interpretation would entail assessing the meaning of the words used within their statutory context, as well as against the broader purpose of the Act.'"[16]

[29] The court continues and found that the primary purpose of the Act is to provide for the registration of architects with the council. The question therefore that needs to be determined, according to *Claud Bosch*, is whether the Act 'prohibits an agreement by a non-natural person to provide architectural services and further intends that such an agreement is void and unenforceable.'[17]

[30] Smuts JA then proceeds in his judgement and says the following:

'If an agreement to that effect is itself expressly prohibited, it would invariably follow that they are unenforceable. This court in *Ferrari v Ruch*[18] made it clear that agreements prohibited by law are unenforceable by virtue of the operation of the maxim *ex turpi causa non oritur.*[19] The court in *Ferrari* confirmed the common law position that this maxim would not admit of exceptions as opposed to the *maxim in pari delicto potior est conditio defendentis* which restricts the rights of offending parties to avoid the consequences of their performance or part performance of such prohibited contracts. The latter maxim admits of exceptions to prevent manifest injustice and

[14] As set out by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912 – 913.
[15] *Total* supra para 19.
[16] *Total* supra in para 19.
[17] *Claud Bosch* supra at 30.
[18] *Ferrari v Ruch* 1994 NR 287 (SC).
[19] At 296D – G.

inequity,[20] often referred to as the relaxation of the *par delictum* rule. As was stressed in Ferrari, the object of this *par delictum* maxim is 'to discourage illegal or immoral conduct, by refusing the help of the courts to delinquents who part with their money or chattels in furtherance of prohibited agreements, but if it was never capable of relaxation, it might perpetuate immorality and cause gross injustice in some cases'.[21]

[31] In this matter, the court found that the s 13 does not expressly visit an agreement made by a legal person other than a natural person to perform architectural work with invalidity. The purpose of s 13 is to ensure that architectural work is done by an architect and as such, architects performed the work for and on behalf of the legal person.

Intention of the regulations

[32] These regulations were regulations made by the Minister of Mines and Energy under the Petroleum Products and Energy Act 13 of 1990. The purpose of this act, according to the Act is:

> 'To provide measures for the saving of petroleum products and an economy in the cost of the distribution thereof, and for the maintenance of a price therefore; for control of the furnishing of certain information regarding petroleum products; and for the rendering of services of a particular kind, or services of a particular standard, in connection with motor vehicles; for the establishment of the National Energy Fund and for the utilization thereof; for the establishment of the National Energy Council and the functions thereof; for the imposition of levies on energy sources; and to provide for matters incidental thereto.'

[33] The Minister therefore has powers to provide for measures for the saving of petroleum products and an economy in the cost of the distribution thereof. It is further true that the economy of Namibia relies greatly on the availability of fuel and the costs associated with transportation of products to and from Namibia. We further rely on the importation of a vast number of items, such as, the costs of fuel impacts on the over-all

[20] At 296E – F. Also see *Schweiger v Müller 2013 (1) NR 87 (SC) and Moolman and Another v Jeandre Development* CC 2016 (2) NR 322 (SC) para 67.
[21] At 296G – H.

performance of the economy. It is therefore expected from the Minister to introduce measures to regulate the sale and the places of sale of fuel as well as to introduce measures to curb unnecessary cost increases to the fuel price. The court finds that this is what the minister did with the introduction of reg 35.

[34] It is clear from reading the regulation that it specifically prohibits the dispensing of fuel into any vessel or vehicle against payment in cash. The regulation goes further and also prohibits the receiving of fuel into any vehicle of vessel other than against the payment of cash. It is clear from the reading of this regulation as to what exactly is prohibited and criminalized under ss (4). The regulation also sets out clearly what is considered as payment in cash, which included payment in notes and coins which is legal tender in Namibia, travelers' cheques, postal orders etc. It further introduces an alternative scheme to a credit agreement scheme in that the regulation provides for a scheme called an advance payment scheme where a party can make an advance payment to the retail license holder and then receive fuel until such payment is depleted.

[35] Unlike the purpose of s 13 of Architects' and Quantity Surveyors Act 13 of 1979, which purpose was found to have a qualified architect perform architectural services, reg 35 of the Petroleum Products Regulations specifically prohibits the selling of and/or buying of fuel for anything other than cash.

[36] In this instance the court finds that to enforce a contract like the one before court would be to allow conduct which the Minister specifically saw fit to render as a criminal offence and as such the contract is illegal, and therefore grounds 1, 2 and 3 of the exception must succeed.

Grounds 6

[37] I will first deal with ground 6 of the exception. This exception deals with the fact that the plaintiff seeks judgement on an enrichment claim against all four defendants jointly and severally based on the allegation that they were all enriched by receiving fuel which they did not pay for, in terms of the agreement. There is however no allegation that

they independently, separate from the fuel which was delivered to the first defendant, received any benefit or was enriched in any way. Their enrichment is squarely based on the surety they signed with respect to the original credit agreement with the plaintiff.

[38] Whether this is a general surety for the debts of the first defendant or a specific surety for the debt of the first defendant in terms of the agreement will depend on the wording used when describing the type of surety that was given by the second, third and fourth defendants. The portion of the agreement dealing with the suretyship reads as follows:

> 'In the event that the purchasers is a corporate entity, then the signatory hereto accepts joint and several liability with the purchaser as surety and co-principle debtor for amounts which may become due to the Seller at any time in terms of this agreement.'

[39] In terms of the discussion above of the first three grounds of the exception, it must be clear that the agreement is void and unenforceable and as such, taking into account the wording of the clause dealing with suretyship, the second, third and fourth defendants cannot be held accountable on an enrichment claim and as such, ground 6 must also be unsuccessful.

Grounds 4 and 5

[40] Grounds 4 and 5 of the exception relates to the enrichment claim which was brought in the alternative to the main claim based on the contract. Ground 4 claims that in law the plaintiff may not rely on a claim for enrichment where agreements are in existence but it is found to be unlawful. Ground 5 relates to the allegation which needs to be made regarding the amount that plaintiff claims under enrichment and that it should be the exact amount for which the plaintiff was out of pocket, and may not claim profit, interest or the costs of levies.

[41] It is important to refer to the discussion on conclusions in *Jajbhay v Cassim*[22] when considering the results of an illegal contract. Stratford CJ stated as follows:

[22] *Jajbhay v Cassim* 1939 AD 537 Case no SA 41/2016.

'With this brief survey of the law as hitherto developed in this country (and with grateful acknowledgment of my Brother's researches) I am now in a position to formulate some conclusions. The first is that we must definitely reject the English law as expounded in the English decided cases. In my humble view many of them do not rest on any sound principle nor are they harmonious (see Street's Law of Gaming ch 6). The second is that the rule expressed in the maxim *in pari delicto potior est conditio defendentis* is not one that can or ought to be applied in all cases, that it is subject to exceptions which in each case must be found to exist only by regard to the principle of public policy. Thirdly, I have considered the desirability of expressing in the form of a general rule all possible exceptions to the application of the rule itself. It cannot, of course, be said (as Lord Thurlow said) that a *restitutio in integrum* should always be allowed, for this, as Story points out, nullifies the maxim. Following Hailsham's statement of the law one might say, speaking generally, that restitution will be granted in cases where the illegal contract has not been substantially carried out, and not in those cases where the contract has been substantially performed. But such a rule, though affording us some guidance, must be subordinated to the overriding consideration of public policy (which I repeat does not disregard the claims of justice between man and man). Thus I reach my third conclusion, which is that Courts of law are free to reject or grant a prayer for restoration of something given under an illegal contract, being guided in each case by the principle which underlies and inspired the maxim. And in this last connection I think a Court should not disregard the various degrees of turpitude in delictual contracts. And when the delict falls within the category of crimes, a civil court can reasonably suppose that the criminal law has provided an adequate deterring punishment and therefore, ordinarily speaking, should not by its order increase the punishment of the one delinquent and lessen it of the other by enriching one to the detriment of the other. And it follows from what I have said above, in cases where public policy is not foreseeably affected by a grant or a refusal of the relief claimed, that a Court of law might well decide in favour of doing justice between the individuals concerned and so prevent unjust enrichment.'

[42] In *Moolman and Another v Jeandre Development*[23], the following was stated:

'This court in *Ferrari*, and followed in *Schweiger*, confirmed the common-law position that agreements prohibited by law cannot be enforceable by virtue of the maxim ex turpi causa non oritur actio (translated in Schweiger as 'from a dishonourable cause, an action does not arise'). This principle is absolute and admits no exception. Related to this principle is the maxim *in pari*

[23] *Moolman and Another v Jeandre Development CC* 2016 (2) NR 322 (SC).

delicto potior est condition defendentis which restricts the right of the offending parties to avoid the consequence of their performance or part performance of illegal contracts. This second maxim (translated in *Schweiger* as 'in equal fault, the condition of the defendant party is better'), however permits exceptions to prevent manifest injustice and inequity between individuals.[24] The rationale behind these maxims was lucidly explained by Mohamed CJ in *Ferrari* with extensive reference to authority (mostly excluded in this quotation):

> "The object of the maxim in *pari delicto potior est conditio defendentis* is clearly to discourage illegal or immoral conduct, by refusing the help of C the courts to delinquents who part with money or chattels in furtherance of prohibited agreements, but, if it was never capable of relaxation, it might perpetuate immorality and cause gross injustice in some cases (for example, where a seller of a prohibited article refuses to deliver the prohibited article but still retains the purchase price which has been paid to him).
>
> Since *Jajbhay's*[25] case therefore the Courts in Southern Africa have often relaxed the strict operation of the maxim in *pari delicto potior est conditio defendentis* in order to do "simple justice between man and man"

It is difficult and even undesirable to lay down fixed rules to define the circumstances which would permit the relaxation of the *par delictum* rule, but there are clearly some considerations which are relevant to such an enquiry.

(1) It is clearly relevant to enquire whether one party would unjustly be enriched at the expense of another if the rule in *pari delicto potior conditio defendentis* is not relaxed in a particular case. *(Jajbhay's* case supra at 545). This appears to be the dominant underlying motivation for the relaxation of the rule in (certain cited) cases…

(2) On the other hand the relaxation of the rule can legitimately be resisted if it has the indirect effect of enforcing the illegal agreement. . . .

(3) The fact that the plaintiff who seeks the relaxation of the rule was aware of the fact that the agreement entered into with the defendant was prohibited by law, is not by itself a bar against his claim for recovery of moneys or property which he has transferred to his adversary, pursuant to such an agreement. (*Jajbhay v Cassim* (supra at 549), *Petersen v Jajbhay and Osman v Reis* (supra).) The logical corollary of that proposition must be that the relative degrees of turpitude attaching to the conduct of the parties in entering and implementing the unlawful agreement, is a

[24] Ferrari at 296E – H following *Jajbhay v Cassim* supra.
[25] Supra.

relevant consideration in determining whether the rule should be relaxed in a particular case (*Jajbhay v Cassim* (supra at 544)).”[26]

[79] Although *Ferrari and Schweiger* concerned contracts prohibited by statute, the common law visits the same consequence of voidness and unenforceability on contracts that are illegal by reason of being against public policy.[27] The object of the two maxims discussed above is to discourage illegal or criminal conduct by refusing the aid of the court to delinquents involved in them. Those considerations apply with equal force to contracts void for being against public policy, particularly those involving fraud, as had occurred in this matter.

[80] The question arises as to whether the *par delictum* rule should be relaxed in this matter to enable the plaintiff to claim back sums expended on behalf of the defendants. As was pointed out by this court in *Schweiger*, Mohamed CJ in *Ferrari* approached the questions of capital and interest separately. The court in *Ferrari* permitted a party to recover the capital transfers of a loan made which was prohibited by foreign exchange regulations. The court found that an order requiring the defendant to pay the interest agreed upon would amount to an order indirectly enforcing the prohibited agreement which was not permissible. The court in Ferrari refused a claim for interest on the sums loaned to the defendant.‘

[43] From the above it is clear that unenforceable agreements can form the basis of enrichment claims but in order for the court to determine whether it indeed supports an enrichment claim, it must be decided on a case by case basis, applying the general principles. It is however necessary to allege the exact terms of the enrichment. Ground 4 is therefore dismissed but ground 5 is successful in so far as the specific detail of the enrichment must be alleged.

Order:

1. The exception is successful in that grounds 1,2,3,6 are upheld and ground 5 is partially upheld; ground 4 is dismissed.
2. Costs of the application are awarded to the defendants.
3. The plaintiff is granted 14 days to rectify the grounds for the exception, where necessary.

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[26] Op cit at 296G – 297G and quoted with approval in Schweiger para 25.
[27] See generally Christie *The Law of Contracts in South Africa* 5 ed (2006) at 391 – 395.

4. The matter is postponed to 4 October 2022 at 15h30 for a status hearing.

_____

E Rakow

Judge

APPEARANCES:

Plaintiffs:	JP JONES (with him I Hohne) Instructed by Hohne & Co., Windhoek
Defendants:	R Heathcote (with him Van Vuuren) Instructed by Delport Legal Practitioners, Windhoek