REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-ACT-CON-2019/02327

In the matter between:

ADDI INVESTMENT AFRICA (PTY) LTD **PLAINTIFF**

and

THE MINISTER OF WORKS AND TRANSPORT **1ST DEFENDANT**

WILLEM GOEIEMAN **2ND DEFENDANT**

Neutral citation: *Addi Investment Africa (Pty) Ltd v The Minister of Works and Transport* (HC-CIV-ACT-CON-2019/02327) [2022] NAHCMD 673 (9 December 2022)

Coram: PRINSLOO J
Heard: **6-7 September 2022**
Delivered: **9 December 2022**

Flynote: Action proceedings – Contract law – Alleged construction agreement – Non-compliance with the Public Procurement Act – Section 7(1) of the Tender Board of Namibia Act 16 of 1996 – Agreement had to have been concluded in terms of the Public Procurement Act set in place in order for it to be legal, lawful and enforceable – Unjustified enrichment – Plaintiff is entitled to payment.

Summary: The plaintiff, through its particulars of claim, sued for payment in the amount of N$2 489 140,50 in terms of an alleged construction agreement. The plaintiff filed a summary judgment application after the matter became defended. However, the said application was removed from the roll on the hearing date. The plaintiff filed a notice to amend its particulars of claim despite the defences raised in the answering affidavit opposing summary judgment. The first defendant excepted to the particulars of claim on the grounds that the particulars of claim failed to disclose a cause of action and/or were vague and embarrassing. The plaintiff again filed a notice of intention to amend its particulars of claim on 7 August 2020. The first defendant objected to the proposed amendment because it would still render the particulars of claim excipiable on several grounds. The plaintiff persisted and brought an application for leave to amend its particulars of claim, which was opposed but was granted. The matter proceeded to pre-trial wherein the parties identified the issues in fact and in law to be determined but at the trial stages amended the pre-trial report.

At the commencement of the trial, Mr Chibwana, acting on behalf of the plaintiff, informed the court that the plaintiff no longer persisted in its allegation that there was a lease agreement. He also indicated that the plaintiff would no longer rely on any claim based on an acknowledgement of debt.

Held that: in terms of the requirements that formulate an agreement but, Mr Chibwana with all due respect, has lost sight of the fact that the plaintiff was dealing with a ministry within government (the State) and that the Public Procurement Act provides the State and its agencies the power to contract and in doing so prescribes the formalities relating to the exercise of the States powers to contract. Mr Chibwana can refer the court to an agreement entered into, but surely Mr Chibwana cannot expect the court to look at the agreement in isolation. The agreement had to have been concluded in terms of the said Act set in place in order for it to be legal, lawful and enforceable.

Held that: It is clear from the Act that only the board or an entity to which the board has lawfully delegated its power could, pursuant to the award of the tender, contract

or conclude an agreement on behalf of the State and its clear from the facts in this matter that this was not the case.

Held further that: The court is convinced that the plaintiff carried out the demolition works in the mistaken but reasonable belief that the demolition works were due to the defendants by the plaintiff in terms of an agreement, because of the fact that the second defendant and Treasury authorised the demolition of the structures by the plaintiff. The plaintiff is entitled to payment for the demolition work done for the first defendant at Erf 58/59 Okahandja.

ORDER

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1. The plaintiff's main claim is dismissed.
2. The plaintiff's alternative claim of unjustified enrichment for N$1 298 162,49 is granted with costs. Such costs to include one instructing and one instructed counsel.
3. The matter is regarded as finalised and removed from the roll.

JUDGMENT

PRINSLOO J:

Introduction

[1] The parties in this matter are Addi Investment Africa (Pty) Ltd, a company with limited liability with its main place of business in Windhoek, Namibia. The first defendant is the Minister of Works and Transport, cited in his official capacity as the State Representative. The second defendant is Mr Willlem Goeieman, cited in his official capacity as the Executive Director of the first defendant.

[2] In the amended particulars of claim of the plaintiff, the Government of Namibia is cited as a party to the proceedings. Although relief is sought against the Government of Namibia, it was never joined as a party to the proceedings.

[3] The main combatants in this matter are the plaintiff and the first defendant.

[4] The plaintiff issued a summons, claiming payment of N$2 489 140,50 for demolition services rendered in terms of an alleged construction agreement between itself and the first defendant ("the Minister").

Background

[5] The plaintiff, through its particulars of claim, sued for payment in the amount of N$2 489 140,50 in terms of an alleged construction agreement. The plaintiff filed a summary judgment application after the matter became defended. However, the said application was removed from the roll on the hearing date. The plaintiff filed a notice to amend its particulars of claim despite the defences raised in the answering affidavit opposing summary judgment. The first defendant excepted to the particulars of claim on the grounds that the particulars of claim failed to disclose a cause of action and/or were vague and embarrassing. The plaintiff again filed a notice of intention to amend its particulars of claim on 7 August 2020. The first defendant objected to the proposed amendment because it would still render the particulars of claim excipiable on several grounds.

[6] The plaintiff persisted and brought an application for leave to amend its particulars of claim, which was opposed but was granted.

[7] In its amended particulars of claim, the plaintiff claims that it is the lessee in respect of Erf 58/59 Okahandja, Khomas Region and as a result of a 25-year lease entered into between the plaintiff and the first defendant. The plaintiff further relies on the main claim based on an agreement and an alternative claim based on unjustified enrichment. The contractual claim is based on a written agreement allegedly entered on 25 February 2019. The plaintiff further pleads that on 17 May 2019, the second defendant, in his capacity as accounting officer for the first

defendant, acknowledged the first defendant's indebtedness to the plaintiff in the sum of N$2 489 140,50, being the fees due to the plaintiff for the demolition work carried out.

[8] The unjust enrichment claim that plaintiff relies on is based on improvements made to the premises at Erf 58/59 Okahandja, in the mistaken but reasonable belief that the demolition works were allocated to the defendants from the plaintiff. The plaintiff further pleaded, in the alternative, that if there was non-compliance with statutory requirements in entering into the agreement, then the mistaken belief was reasonable in the circumstances and that the works were carried out on the authorisation by the second defendant and treasury acting on behalf of the first defendant.

[9] At the commencement of the trial, Mr Chibwana, acting on behalf of the plaintiff, informed the court that the plaintiff no longer persisted in its allegation that there was a lease agreement. He also indicated that the plaintiff would no longer rely on any claim based on an acknowledgement of debt.

[10] Mr Chibwana submitted that the first defendant has the onus to start leading evidence because it alleges illegality. Mr Chibwana further sought a ruling from the court in this regard. Ms Bassingthwaighte, on behalf of the first defendant, opposed this application launched from the bar and submitted that the plaintiff is required to first prove the contract, alternatively, the elements of its alternative claim and that, even though there are issues which the first defendant bears the onus for, the plaintiff has the onus to start.

[11] The court took Mr Chibwana to task on the specific issue and further pointed out that a joint expert report was filed of record and that the parties should take the time also to address these issues. The matter was then adjourned until 10h00 on 6 September 2022.

[12] The parties proceeded to file an amended joint draft pre-trial order with leave of the court which also contained a report of the joint position of the experts. The experts, insofar as it relates to the unjustified enrichment claim, agreed that the reasonable market-related costs for the demolition works are as per the calculations

of the first defendant's expert, based on the annual tender rates of the Ministry of Works and Transport, being an amount of N$1,298,162.49 (inclusive of VAT). As a result of the agreement reached, the parties also agreed that it would no longer be necessary to call the experts as witnesses.

[13] The issues remaining for determination appear from the pre-trial order issued by the court on 7 September 2022, which was further limited, and upon resumption of the matter on 6 September 2022, the plaintiff no longer persisted with its application that the defendants had the onus to start.

[14] The plaintiff called one witness, Mr John Sylvanus John and closed its case. The first defendant closed its case without calling any further witnesses. During the discussions between the parties, plaintiff's counsel also indicated that it would not be seeking any relief against the first defendant. The first defendant was cited in his official capacity acting on behalf of the second defendant. In any event, it is common cause that Mr Goeieman is no longer the Executive Director of the first defendant.

Amended Pre-trial

[15] The parties outlined the issues of fact to be resolved at the trial as follows:

1. Whether the demolition works were carried out by the plaintiff in the mistaken but reasonable belief that the demolition works were due to the defendants by the plaintiff in terms of the agreement.

[16] The issues of law to be resolved at the trial were outlined as follows:

2. Whether annexures 1 to 4 to the particulars of claim evidences the agreement as pleaded by the plaintiff in paragraphs 6 and 8 of the amended particulars of claim. It is the first defendant's position that this gives rise to a factual and legal dispute in respect of which the plaintiff bears the onus.

3. Whether the defendants have been enriched at the plaintiff's expenses in the amount of N$1 298 162,49.

4. Whether the agreement alleged by the plaintiff is illegal, unlawful and therefore unenforceable as a result of what is pleaded in paragraphs 15.1 to 15.5 of the first defendant's plea, on account of the fact that the plaintiff's services were not procured in accordance with any of the formal competitive processes contemplated in the Public Procurement Act and did not meet the requirements of section 36.

5. Whether the procurement of plaintiff's services meets the requirements of ss 33, 36 and 38 and whether such procurement was done on the basis of ss 33, 36 and 38 of the Public Procurement Act.

6. Whether the agreement is a nullity as a result of non-compliance with the Public Procurement Act.

7. Whether the agreement entered into by the plaintiff with the defendants is illegal, unlawful and unenforceable for the reason that it was entered into in contravention of the provisions of the Public Procurement Act 15 of 2015.

8. Whether plaintiff's aforesaid belief (paragraph 1.1 hereof) was reasonable and excusable considering that the second defendant wrote a letter to the plaintiff to do the demolition works and Treasury authorised the demolition of the structures (according to the first defendant, the authorisation was for the Ministry of Works to do the demolition of the structures).

Issues to be determined

[17] The parties listed a long list of issues to be resolved by the court, however, the court is of the view that the crucial issue for determination in this matter is whether the agreement concluded between the plaintiff and the defendant is a valid agreement as required under the Public Procurement Act. Secondly, whether the defendants have been enriched at the plaintiff's expenses in the amount of N$1 298 162,49.

Evidence adduced

[18] As stated above, the plaintiff called one witness, Mr John Sylvanus John and closed its case. The first defendant closed its case without calling any witnesses.

Plaintiff's witness: John Sylvanus John

[19] Mr John confirmed in evidence that he is a member and executive director of the plaintiff. Mr John stated that in January 2017, in pursuit of business opportunities, he drafted a proposal, which was later sent to the first defendant in his capacity as managing director of the plaintiff. The proposal was to lease the government property known as Okahandja Hotel situated in the CBD at Erf 58 and 59 Okahandja. Mr John further states that the proposal was based on the nature of the business the plaintiff was engaged in, which was hospitality and entertainment services, amongst others.

[20] Mr John testified that on 13 February 2017, the first defendant responded to the aforesaid proposal and informed the plaintiff that they had no objection to leasing the Erf 58/59, known as Okahandja Hotel, to the plaintiff on the terms as envisaged in the proposal. Mr John further testified that the first defendant informed the plaintiff that the lease agreement should commence from 31 March 2018 for 25 years, subject to the lease agreement being registered with the Deeds office.

[21] Mr John testified that after they finalised the lease agreement and after attending to the premises with architects and engineers, he was advised by Mr Munyengeterwa from Ben Kathindi Architect that no value could be affixed to the building in the dilapidated state that it was in and that the building would need to be demolished because it was at risk of collapsing. He was further advised that the building was beyond rescue and that any renovations done to it could cause it to collapse.

[22] Mr John testified that the advice received prompted him to send a further proposal to the first defendant for the demolition of the building and lease of erf

58/59, Okahandja. The proposal was sent through a letter directed to the first and second defendants.

[23] Mr John further states that the first defendant instructed the personnel of the Fixed Asset Management Division and the Capital Projects Management Division to assess the structural soundness of the Okahandja Hotel. Mr John testified that the person who carried out the assessment prepared a report which stated that Erf 58/59 was structurally unsound and beyond repair, hence, demolition and erection of a new structure was the only plausible option.

[24] Mr John further outlined that on or about November 2018, the plaintiff received a letter from the Permanent Secretary of Treasury addressed to the Permanent Secretary of the first defendant. Mr John testified that the letter states that the Treasury authorised the demolishing and erection of the new building, except that the new building was to be office accommodation. Treasury further rejected the proposal to lease Erf 58/59 to the plaintiff and advised that should any investor be interested in entering into Public Private Partnerships (PPP), such should be done with the PPP Directorate of the Ministry of Works and Transport.

[25] Mr John testified that he was thereafter advised by a certain Mrs Akuberts, an employee of the first defendant, to provide the first defendant with a quotation for the demolition works. Mr John states that on 12 December 2018, the plaintiff provided a quotation to the first and second defendants regarding the costs of carrying out the demolition work at Erf 58/59 Okahandja. The quotation was to the value of N$2 489 140,50. Mr John conveys that the first defendant acknowledged receipt of the plaintiff's quotation. On 25 February 2019, the second defendant acting on behalf of the first defendant, notified the plaintiff that Treasury approved the demolition of Erf 58/59, Okahandja. According to Mr John, the second defendant accepted the plaintiff's offer to carry out the demolition work. As a result, the second defendant appointed the plaintiff to carry out the demolition work on 25 February 2019.

[26] Upon closing the plaintiff's case, the first defendant closed its case without leading any evidence.

Arguments advanced

Plaintiff

[27] Mr Chibwana argues that in the event that the plaintiff can establish the existence of an agreement, he would submit that the question related to whether or not the agreement was lawful is a question that cannot in law be determined because there is no case instituted either by way of a direct review application or by way of a counterclaim in these proceedings, in terms of which the first defendant seeks to review and set aside the administrative decision by the second defendant to award the demolition contract.

[28] Mr Chibwana further argues that the *lis* that this Court must determine does not relate to a review of the second defendant's decisions and conduct. As a result, the plea alleging illegality, nullity and voidness of the agreement may not be determined as a matter of law.

[29] Mr Chibwana further argues that the principle of regularity finds application in the present instance, in the context he has already addressed in argument. Counsel further stated that the principle was explained in the South African decision of *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others.*[1] Mr Chibwana refers the court to other case law in relation to the principle of regularity but concluded that the principle of regularity stands as a legal hurdle to the defence that the first defendant seeks to rely on.

[30] Mr Chibwana submits that a collateral challenge is not available to the first defendant and he relied on the decision of *Black Range Mining (Pty) Ltd v Minister of Mines and Energy N.O and Others,*[2] where the Supreme Court sets out the requirements for a collateral challenge to an administrative decision.

[31] Mr Chibwana argues that the first defendant is a public official and the conduct in question is conducted by persons that are subject to the authority of the first defendant, the first defendant places reliance on Article 41 of the Constitution for

[1] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) para 26.
[2] *Black Range Mining (Pty) Ltd v Minister of Mines and Energy N.O and Others* (SA 09/2011) [2014] NASC 4 (26 March 2014).

this contention. Mr Chibwana submits that the first concerning feature in this matter is the failure of the first defendant and his officials to come before this Honourable Court and place a version of events. There is no version from the first defendant or his officials before this court placing the evidence by the plaintiff in dispute. The only version before the Court is the plaintiff's version as per Mr Chibwana's argument.

[32] Mr Chibwana argues that it is trite that a contract comes into being when there is an offer and acceptance of that offer and submits that based on *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors*,[3] the background is relevant where a dispute arises as to the interpretation to be accorded to an agreement. Counsel for the plaintiff states that in this instance the background is a proposal made on 20 February 2017 by the plaintiff to the defendant, that proposal is Exhibit B. It is common cause that Treasury did not accept the proposal. It is however Treasury's position that the structures on Erf 58/59 Okahandja be demolished.

[33] Mr Chibwana argues that on the facts it is plainly evident that an agreement was entered into, the scope of the work is plainly set out in the quotation, the proposed cost of the works is set out in the quotation and the 25 February 2019 letter is plainly an acceptance of the quotation. Counsel for the plaintiff continues and states that the final straw was the further letter by the plaintiff dated 27 February 2019, which sets out to the second defendant the view by the plaintiff that the proposal and quotation submitted were considered and subsequently the plaintiff was appointed to do the work at a price of N$2 489 140,50. Mr Chibwana states that there was no letter sent by the second defendant disputing the view expressed in the plaintiff's 27 February 2019 letter. Counsel further states that there was no version disputing the view expressed as per counsel for the plaintiff's arguments.

[34] Mr Chibwana argued that that the enrichment is common cause, the value of the enrichment is common cause and the fact that the enrichment was at the expense of the plaintiff is also common cause. The first defendant at its' own risk chose not to lead evidence to deal with the onus on it, to demonstrate that it was not

[3] *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors* (SA 9 of 2013) [2015] NASC 10 (30 April 2015).

enriched by the value of the services rendered to it by the plaintiff. Mr Chibwana referred the court to the *JD Botha*[4] case in relation to onus.

First Defendant

[35] Ms Bassingthwaighte on behalf of the first defendant pointed out during argument the evidence adduced by the plaintiffs witness, Mr John, in comparison to what stood in the plaintiffs witness statement and the pleadings and affidavits that were filed is at odds with each other. Ms Bassingthwaighte further argued that the plaintiff's case was that the agreement was concluded between the plaintiff and the second defendant representing the first defendant, but that the persons with whom the plaintiff had these discussions were never mentioned. Counsel further states that these discussions, which seemingly resulted in variations of the terms of the agreement, were also held after 25 February 2019, which is the date when the plaintiff claims that the agreement was concluded and was held with persons other than the second defendant.

[36] Ms Bassingthwaighte argues that if regard is had to the letter of Treasury, it would appear that at the time when Treasury's decision was made, no amounts, specifically relevant to the cost of the demolition works, were made known to it and in any event, Treasury only approved demolition by the Ministry of Works and Transport. Counsel further argues that the Treasury letter is dated 26 June 2018 and also contains a date stamp of 27 June 2018, which must be the date on which it was received by the Ministry. This was almost 6 months before the plaintiff gave its quotation. Furthermore, Counsel states that the second defendant's letter simply states that the plaintiff must commence with the work. It does not state that the plaintiff's quotation is accepted and that the work is to be done on the basis of that quotation.

[37] Ms Bassingthwaighte reasons that the plaintiff bears the onus of proving the contract and its terms and that the plaintiff has failed to discharge its onus in proving that an agreement was concluded, and that it was concluded on the terms as alleged

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[4] *J D Botha and Sons Signs (Pty) Limited v Multi Cranes and Platforms (Pty) Limited* (A3049/2019) [2019] ZAGPJHC 522 (13 December 2019).

by the plaintiff in its amended particulars of claim. Counsel therefore further argues, that the plaintiff's claim must be dismissed with costs. Counsel contends that on the basis of the plaintiff's concessions with regards to non-compliance with the provisions of the Public Procurement Act, the agreement is stillborn, it is a nullity as no contract could have come into being unless the provisions of the Public Procurement Act were complied with.

Applicable law

[38] Section 7(1) of the Tender Board of Namibia Act 16 of 1996 (the Act) outlines the powers and functions of the board, which includes the following:

'(1)Unless otherwise provided in this Act or any other law, the Board shall be responsible for the procurement of goods and services for the Government, and, subject to the provisions of any other Act of Parliament, for the arrangement of the letting or hiring of anything or the acquisition or granting of any right for or on behalf of the Government, and for the disposal of Government property, and may for that purpose-

(a) on behalf of the Government conclude an agreement with any person within or outside Namibia for the furnishing of goods or services to the Government or for the letting or hiring of anything or the acquisition or granting of any right for or on behalf of the Government or for the disposal of Government property;
(b) with a view to conclude an agreement contemplated in paragraph (a), invite tenders and determine the manner in which and the conditions subject to which such tenders shall be submitted;
(c) inspect and test or cause to be inspected and tested goods and services which are offered or which are or have been furnished in terms of an agreement concluded under this section, and anything offered for hire;
(d) accept or reject any tender for the conclusion of an agreement contemplated in paragraph (a);
(e) take steps or cause steps to be taken to enforce any agreement;'

[39] Section 16(1) of the Act is also crucial in this case, as it deals with the acceptance of tenders and the entry into force of an agreement. It proves that the board must in every particular case:

'(1)(a) notify the tenderers concerned in writing of the acceptance or rejection of their tenders, as the case may be, and the name of the tenderer whose tender has been accepted by the Board shall be made known to all the other tenderers;
(b) on the written request of a tenderer, give reasons for the acceptance or rejection of his or her tender.
(2)Where in terms of a title of tender –

(a) a written agreement is required to be concluded after the acceptance of a tender, the Board and the tenderer concerned shall, within 30 days from the date on which that tenderer was notified accordingly in terms of subsection (1)(a) or within such extended period as the Board may determine, enter into such an agreement;
(b) a written agreement is not required to be so concluded, an agreement shall come into force on the date on which the tenderer concerned is notified in terms of subsection (1)(a) of the acceptance of his or her tender.

(3) If, in the circumstances contemplated in subsection (2)(a), the tenderer fails to enter into an agreement within the period mentioned in that subsection or, if that period has been extended by the Board, within the extended period, or if the tenderer, when required to do so, fails to furnish the required security for the performance of the agreement, the Board may withdraw its acceptance of the tender in question and –

(a) accept any other tender from among the tenders submitted to it; or
(b) invite tenders afresh.'

Discussion

[40] In having set out the relevant statutory framework applicable to the facts of this case, I turn to applying the applicable laws to the facts in this case. In the Supreme Court case, *Newpoint Electronic Solutions (Pty) Ltd v Permanent Secretary, Office of the Prime Minister*[5], the court stated the following with regards to contractual agreements:

[5] *Newpoint Electronic Solutions (Pty) Ltd v Permanent Secretary, Office of the Prime Minister* (SA 15 of 2022) [2022] NASC 31 (03 October 2022).

'[54] A contract is of course an agreement, which is binding at law. Therefore, the first enquiry is whether, on the facts of this matter, a valid agreement, was entered into between the appellant and the respondents'.

[41] Mr Chibwana argued that on the facts it is plainly evident that an agreement was entered and he base it on when there is an offer and acceptance of that offer and submits that based on the *Total judgment.* In argument Mr Chibwana further stated that there is two ways that a party can prove the existence of a contract, namely (a) consensus and the other (b) a reasonable reliance. Mr Chibwana submitted that the question would be whether by their words or conduct, the other party led a party in the reasonable belief that consensus was reached.

[42] Whereas the first defendant in its plea provided the following within para 15:

> 15.1. The agreement alleged by the plaintiff is an agreement for the procurement of a service by a public entity (for the disposal of a State asset) as contemplated in section 3 of the Public Procurement Act, Act 15 of 2015 ("Public Procurement Act");
> 15.2. Whilst any disposal of a State Asset must be authorized by Treasury in terms of the State Finance Act, Treasury did not and does not have the power to authorise the procurement of services by a public entity for such disposal;
> 15.3. Treasury only granted authorisation for the demolition of the buildings / structures on the property by the Ministry of Works and Transport itself, and not by the plaintiff;
> 15.4. The procurement of services by a public entity which in terms of section 1 of the Public Procurement Act includes government ministries, must be done in accordance with and in terms of the processes prescribed in the Public Procurement Act;
> 15.5. In terms of section 3 read with sections 27, 33, 36 and 38 a public entity must procure services in accordance with a formal competitive process, save in those circumstances provided for in sections 33, 36 and 38;
> 15.6. The purported procurement of the plaintiff's services to demolish the structures on the property was not done in accordance with any of the formal

competitive processes contemplated in the Public Procurement Act and did not meet the requirements set out in sections 33, 36 and 38;

15.7. In the premises, the purported procurement of the plaintiff's services was in contravention of the Public Procurement Act.

[43] In my view, the arguments advanced hereinabove by Mr Chibwana in terms of an agreement do not hold water, and I base my opinion on the following findings in the case of *Newpoint Electronic Solutions (Pty) Ltd,* which reads as follows:

'[58] In my view, the Act does not alter or purport to alter the common law by excluding the State or its agencies' power to contract or conclude agreements. In fact, the Act recognises the State and its agencies' powers to contract, but prescribes the formalities relating to the exercise of the State's power to contract. It goes without saying that the State, as an artificial or legal *persona*, can only exercise its powers through some natural person or a constituted entity or body and that is what the Act regulates. The question that then arises is which functionary or entity has the power to conclude agreements on behalf of the State.

[59] When it comes to the procurement of services on behalf of the State, s 7(1) of the Act provides the answer to that question. Section 7(1) clearly provides that:

''*Unless otherwise provided in this Act or any other law, the Board shall be responsible for the procurement of goods and services for the Government* . . . .'

[60] Section 21 of the Act, amongst other matters, provides that the provisions of this Act shall apply in respect of the procurement of all goods and services, by offices, ministries, and agencies for or on behalf of the Government. The section creates some exceptions but those exceptions are not relevant to this matter. It thus follow that the reference in s 7 to any other law cannot be interpreted to mean the common law. There is therefore no merit in the submission that the Office of the Prime Minister can, based on the State's prerogative power to conclude contracts, disregard the formalities prescribed by the Act, because s 21 clearly states that the Act applies to the Office of the Prime Minister.

[61] As I observed earlier, 'power' in legal parlance means lawfully authorised power. Public authorities possess only so much power as is lawfully authorised. I therefore conclude that only the board or an entity, to which the board has properly delegated its power, could,

pursuant to an award of a tender, conclude contracts or agreements for the procurement of services on behalf of the State'.

[44] I agree with Mr Chibwana in terms of the requirements that formulate an agreement but, Mr Chibwana with all due respect, has lost sight of the fact that the plaintiff was dealing with a ministry within government (the State) and that the Public Procurement Act provides the State and its agencies the power to contract and in doing so prescribes the formalities relating to the exercise of the States powers to contract. Mr Chibwana can refer the court to an agreement entered into, but surely Mr Chibwana cannot expect the court to look at the agreement in isolation. The agreement had to have been concluded in terms of the said Act set in place in order for it to be legal, lawful and enforceable.

[45] It is clear from the Act that only the board or an entity to which the board has lawfully delegated its power could, pursuant to the award of the tender, contract or conclude an agreement on behalf of the State and its clear from the facts in this matter that this was not the case.

[46] Mr Chibwana also raised an issue of unjust enrichment whereby he stated in argument that in the event that the court finds that the agreement was a nullity then that finding establishes one of the requirements for unjust enrichment. Mr Chibwana takes it further by arguing that whatever work was done was done without just cause.

[47] Mr Chibwana further stated that is common cause that an invoice was submitted by the Plaintiff on 27 February 2019 in respect of the demolition works in the sum of N$2 489 140,50 and that such an invoice was certified as correct by the first defendant's officials on 25 March 2019.

[48] Mr Chibwana further referred the court to the case of *The Government of the Republic of Namibia (Minister of Safety and Security) v Ipinge*[6] which sets out the essential elements necessary for a claim for unjust enrichment to succeed, the Court stated as follows:

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[6] *Government of Republic of Namibia (Minister of Safety and Security) v Ipinge* (739 of 2012) [2014] NAHCMD 196 (23 June 2014).

"[19] The elements of unjust enrichment are:
(a) the defendant must be enriched;
(b) the plaintiff must be impoverished;
(c) the defendant's enrichment must be at the expense of the plaintiff; and
(d) the enrichment must be unjustified or sine causa."

[49] Ms Bassingthwaighte argued that, in terms of the plaintiff's alternative claim for unjust enrichment, it is not quite clear from the plaintiff's amended particulars of claim which enrichment action it relies on. Ms Bassingthwaighte stated that it seems, however, that the plaintiff relies on the condictio indebiti. The condictio indebiti permits a party who, owing to an excusable error, made a payment or delivered a thing in the mistaken belief that the payment or delivery was owing, to claim return of the thing delivered or repayment from the recipient to the extent that the recipient was enriched at the expense of the claimant. Counsel states that this enrichment action will find application where the agreement is invalid.

[50] Ms Bassingthwaighte continued and stated that a party who relies on this enrichment action must allege and prove the following:

a) A transfer of property or payment of money in the bona fide and reasonable but mistaken belief that it is owed;

b) There was no legal or natural obligation to make the transfer or payment – i.e. that it was in debiti or sine cause, e.g. if the agreement is invalid (but not illegal) for want of compliance with statutory requirements;

c) The error must have been reasonable;

d) That the defendant was enriched as a result of the transfer of property or payment of money at the expense of the plaintiff who is impoverished as a result.

[51] Ms Bassingthwaighte argued after stating the above elements that the plaintiff did not make all the essential allegations required to found a claim based on the condictio indebiti and that it did not lead all the evidence to prove such claim.

Counsel states that there was no transfer of property or payment of money to the first defendant. In any event, the plaintiff alleges that it rendered the services in terms of the agreement, thus, there was a cause, although illegal.

[52] The court is convinced that the plaintiff carried out the demolition works in the mistaken but reasonable belief that the demolition works were due to the defendants by the plaintiff in terms of an agreement, because of the fact that the second defendant and Treasury authorised the demolition of the structures by the plaintiff.

[53] At this juncture it is crucial for the court to point out that the experts of both the plaintiff and the defendant have agreed on the amount for the value of the work done as being N$1 298 162,49 as outlined in paragraph 2.2 of the amended pre-trial report.

[54] The plaintiff is entiltled to payment for the demolition work done for the first defendant at Erf 58/59 Okahandja.

[55] My order is therefore as follows:

1. The plaintiff's main claim is dismiss.
2. The plaintiff's alternative claim of unjustified enrichment in the amount of N$1 298 162,49 is granted with costs. Such costs to include one instructing and one instructed counsel.
3. The matter is regarded as finalised and removed from the roll.

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JS PRINSLOO

Judge

APPEARANCES

PLAINTIFF:	T Chibwana (with him N Enkali) Instructed by Kadhila Amoomo Legal Practitioners, Windhoek
FIRST AND SECOND DEFENDANT:	N Bassingthwaighte (with her H Harker) Instructed by LorentzAngula Inc., Windhoek