

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-CON-2018/04960

In the matter between:

NATURAL NAMIBIA MEAT PRODUCERS (PTY) LTD

PLAINTIFF

and

COUNCIL FOR THE TOWN OF ARANOS

DEFENDANT

Neutral Citation: *Natural Namibia Meat Producers (Pty) Ltd v Council for the Town of Aranos* (HC-MD-CIV-ACT-CON-2018/04960) [2022] NAHCMD 682 (13 December 2022)

Coram: UEITELE J

Heard: 15 July 2022

Delivered: 13 December 2022

Flynote: Practice – payment of interest and the difference between compound interest, simple interest and *mora* interest discussed -legal principles restated.

Summary: The plaintiff is Natural Namibian Meat Producers (Pty) Ltd, a private company duly incorporated in terms of the company laws of Namibia. The defendant, Council for the Town of Aranos, is a local authority council established in terms of the Local Authorities Act. Pursuant to the Local Authorities Act and the Electricity Act, the

plaintiff and the defendant concluded a verbal agreement in terms of which the defendant would supply electricity to the plaintiff.

The plaintiff alleging that the defendant breached the material terms of the oral agreement, in that, during the period of October 2004 to April 2017 the defendant charged the plaintiff for electricity it supplied to the plaintiff in excess of the applicable approved rates and agreed tariffs, referred a complaint to the Electricity Control Board. The Electricity Control Board investigated the complaint and on 21 December 2018 concluded that the defendant overcharged the defendant.

Alleging that it suffered damages as a result of having been overcharged by the defendant, the plaintiff commenced proceedings for the repayment of the monies overpaid, while the defendant in a counterclaim alleged that the plaintiff up to September 2020, underpaid or did not pay for the actual costs of the electricity that it consumed.

Prior to trial, the parties settled the bulk of the dispute, in that the plaintiff admitted it was undercharged in certain respects, while the defendant admitted it overcharged in other respects, with the balance to be set off. The remainder of the claim being N\$ 1 084 273,31, in favour of the plaintiff, the parties could not agree whether the defendant was entitled to charge interest on that amount.

Held that, the Local Authorities Act, empowers the defendant to, supply electricity or gas to residents in its area. The supply of the electricity must be regulated by an agreement and the defendant being a juristic person has the capacity to concluded contracts or agreements in respect of its obligation to supply electricity.

Held that, if a debtor is late with payment of a money obligation under a contract, the creditor is entitled to claim *mora* interest on the outstanding debt due to the debtor's failure to make payment on the due date and *mora* interest is a common law right.

Held that, at common law the plaintiff is entitled to *mora* interest. *Mora* interest in a case like the present constitutes a form of damages for breach of contract. As a result, the plaintiff is entitled to payment of interest at the prescribed rate on the outstanding credit,

and which interest rate applicable is the rate prescribed in terms of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975).

ORDER

1. The defendant must credit the plaintiff's account in the amount of N\$ 1 084 273, 31 Plus VAT and interest on the amount of N\$ 1 084 273, 31 at the prescribed rate of interest reckoned from 10 January 2019 to the date of crediting the plaintiff's account.
 2. In the alternative to the order set out in paragraph [1], the defendant must pay to the plaintiff the amount of N\$ 1 084 273,31 Plus VAT and interest on the amount of N\$ 1 084 273, 31 at the prescribed rate of interest reckoned from 10 January 2019 to the date of final payment.
 3. The defendant must pay the plaintiff's costs of suit.
 4. The matter is regarded as finalised and is removed from the roll.
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JUDGMENT

UEITELE J:

Introduction

[1] Interest, which Centlivres CJ described as *'the life-blood of finance'*,¹ is what this matter is about. The plaintiff is Natural Namibian Meat Producers (Pty) Ltd, a private company duly incorporated in terms of the company laws applicable in the Republic of Namibia while the defendant is the Council for the Town of Aranos, a local authority council established in terms of the Local Authorities Act 23 of 1992 (as amended).²

¹ In the matter of *Linton v Corser* 1952 (3) SA 685 (A) at 695G.

² Local Authorities Act, 1992 (Act No 23 of 1992).

[2] On 03 December 2018, the plaintiff commenced action in this court in terms of which it sought the following relief:

'1 An order directing the defendant to credit the plaintiff's account in the amount of N\$1,084,273.31, alternatively payment in the amount of N \$1,084,273.31.

2 Interest on the amount of N\$1,084,273.31 at the rate of 20% per annum calculated from 1 May 2017 to date of final payment.

3 Cost of suit including the costs of one instructing and one instructed counsel. Further or alternative relief.'

[3] The defendant defended the plaintiff's claim and pleaded to the plaintiff's particulars of claim. In addition to pleading to the plaintiff's claim, the defendant also instituted a counterclaim against the plaintiff. In its counterclaim, the defendant sought payment from the plaintiff in the amount of N\$ 3 514 78,07.

Brief background

[4] The brief background facts which gave rise to the plaintiff's claim and the defendant's counterclaim are these. The defendant, as alluded to earlier, is a local authority council established in terms of the Local Authorities Act. In terms of s 30(1)(f) of the Local Authorities Act, the plaintiff is empowered to, 'subject to the provisions of Part X and the Electricity Act No 2 of 2000,³ supply electricity or gas to the residents in its area'. Pursuant to the Local Authorities Act, and the Electricity Act, the plaintiff and the defendant concluded a verbal agreement in terms of which the defendant would supply electricity to the plaintiff.

[5] The plaintiff alleging that the defendant breached the material terms of the oral agreement, in that, during the period of October 2004 to April 2017, the defendant charged the plaintiff for electricity it supplied to the plaintiff in excess of the applicable approved rates and agreed tariffs, referred a complaint to the Electricity Control Board.

³ The Electricity Act, 2000 (Act No. 2 of 2000) was repealed by the Electricity Act, 2007 (Act No. 4 of 2007).

The Electricity Control Board investigated the complaint and on 21 December 2018, concluded that:

‘... for the period October 2004 to April 2017, ATC⁴ overcharged NNMP⁵ total net amount of N\$ 888,196.28 excluding VAT.

The Council is referred to the Economic Rules as per *Government Gazette* No.5949 section 10 (7), that states, *"If an adjustment is made as regards the quantity of electricity consumed by a customer, the adjustment and any claims between a licensee and a customer for overcharging or undercharging of electricity provided may not exceed the period prescribed by the law regulating the prescription of claims in Namibia."*

In the event that a three year prescription period is applied, the total net amount overcharged by the Council for the period May 2014 to April 2017, is N\$ 1,084,273.31 excluding VAT. This amount is higher than the full disputed amount due to the fact that before May 2014, there were periods that NNMP was undercharged. However the last three years NNMP was overcharged by N\$ 1,084,273.31 excluding VAT.

The Council is requested to communicate and engage NNMP on their proposed repayment or reconciliation terms within 14 days to NNMP.’

[6] Alleging that it suffered damages as a result of having been overcharged by the defendant, the plaintiff commenced proceedings claiming the relief that I have referred to in paragraph [2] of this judgment. As I indicated earlier, the defendant, in addition to pleading to the plaintiff’s claim, alleged that the plaintiff up to September 2020, underpaid or did not pay for the actual costs of the electricity that it consumed. The defendant alleged that as at the end of October 2020, the plaintiff’s outstanding debtors account amounted to N\$ 2 370 253,84, while the outstanding interest amounted to N\$ 1 144 527,23, and thus counterclaimed the amount of N\$ 3 514 78,07.

Process leading to trial

⁴ ATC refers to Aranos Town Council, the defendant.

⁵ NNMP refers to Namibia Natural Meat Producers (Pty) Ltd, the plaintiff.

[7] After the parties exchanged pleadings the matter was referred to court-connected mediation as contemplated by rule 38 read with rule 39 of the Rules of the High Court⁶ and Practice Directive 19,⁷ after which the matter was set down for a pre-trial conference. After the pre-trial conference the court on 28 June 2022, issued a pre-trial order. The pre-trial order amongst other matters set out, in paragraph 2 the questions of law the court is required to resolve at the trial and in paragraph 3 the factual issues that are not in dispute between the parties. The relevant paragraphs 2 and 3 of the pre-trial order read as follows:

‘2 ISSUES OF LAW IN DISPUTE TO BE RESOLVED DURING THE TRIAL.

2.1 Whether defendant is liable to pay or credit the plaintiff the amount of N\$ 1,084,273.31 plus VAT and interest calculated at 20% per annum on N\$ 1,084,273.31 from 1 May 2017 to date of final payment.

2.2 Whether the plaintiff is liable to pay the defendant N\$ 3,514,781.07 plus interest thereon from date of judgement to date of final payment.

2.3 Whether the defendant is entitled to charge the plaintiff any interest, in law, on the (alleged) overdue accounts.

3 ALL RELEVANT FACTS NOT IN DISPUTE

3.1. ...

3.11 The defendant, during the period of October 2004 to April 2017 charged the plaintiff for electricity supplied in excess of the applicable approved rates and tariffs, in an amount of N\$1,084,273.31 which amount excludes Value Added Tax ('VAT').

3.12 The plaintiff has suffered damages in the amount of N\$ 1,084,273.31 plus VAT and interest calculated at 20% per annum on N\$ 1,084,273.31 from 1 May 2017 to date of final payment.

⁶ Rules of the High Court of Namibia published under Government Notice No. 4 of January 2014.

⁷ The High Court Practice Directions published under Government Notice No. 67 of 2014. The Judge President has, for the orderly conduct of proceedings in any cause or matter, issued practice directions under rule 3(3) read with subrule (4) of the High Court Rules.

3.13 ...

3.14 The defendant refuses to credit the plaintiff's account or pay the plaintiff the amount of N\$ 1,084,273.31 plus VAT and interest calculated thereon at 20% per annum calculated from 1 May 2017 to date of final payment.

3.15 ...

3.16 That the defendant's claim (if any and if proved), must be set-off by the amount of N\$1,084,273.31 plus VAT thereon and with interest thereon at the rate of 20% per annum calculated from 1 May 2017 to date of final payment.'

[8] Subsequent to the court having issued the pre-trial order referred to in the preceding paragraph, the parties settled the bulk of the dispute between them. In this regard, the parties resolved and agreed:

(a) that the defendant admits that it overcharged the plaintiff with an amount of N\$1 084 273 - 31 plus VAT and that the defendant, owed the plaintiff the amount of N\$1 084 273-31 plus VAT; and

(b) that the plaintiff underpaid the defendant for the electricity it consumed in the amount of N\$ 2 370 253 - 84 and that it owed the defendant the amount of N\$ 2 370 253 - 84; and

(c) to set-off of their respective claims.

[9] The defendant abandoned its claim of interest in the amount of N\$1 144 527,23 due to the fact that the defendant allegedly did not determine the levy of interest on unpaid debts by notice in the Government Gazette as prescribed by section 30(1)(u)(ii) of the Local Authorities Act.

[10] The only issue on which the parties did not reach agreement is the question of whether or not the plaintiff is entitled to an order for 20 percent interest on the amount of N\$ 1 084 273,31 plus VAT calculated from 1 May 2017, to date of final payment; and the question of costs of the action. As a result of the disagreement, the parties resolved

to, in terms of rule 63 present a written statement of facts in the form of a special case for adjudication. The rule 63 notice reads as follows:

'1 The parties have resolved the majority of the issues in dispute, as recorded in the Pre-Trial Order of 28 June 2022, and as a consequence, the remaining issue to be determined is an issue of law which, in terms of Rule 63(9), requires no further evidence to be adduced in addition to facts admitted to below, the pleadings filed on record and the Pre-Trial Order dated 28 June 2022.

RULE 63 (2) - ADMITTED FACTS:

2 In this regard, the parties have resolved and agreed to the following:

- 2.1. The plaintiff's claim of N\$1,084,273.31 plus VAT is admitted by the defendant.
- 2.2. The defendant's counterclaim of N\$ 2,370,253.84 is admitted by the plaintiff.
- 2.3. The defendant's counterclaim for interest in the amount of N\$1,144,527.23 is not persisted with due to the fact that the defendant did not determine the levy of interest on unpaid debts by notice in the Government Gazette as prescribed by section 30(1)(u)(ii) of the Local Authorities Act 23 of 1992 (as amended).
- 2.4. The plaintiff's special plea of prescription is not persisted with due to the provisions of section 65(2) of the Local Authorities Act 23 of 1992 (as amended).
- 2.5. The parties agree to a set-off of their respective claims.

REMAINING ISSUES TO BE DETERMINED:

3. The remaining issue to be determined by this Honourable Court is:

- 3.1. whether or not the plaintiff is entitled to an order for 20% interest on the amount of N\$1,084,273.31 plus VAT calculated from 1 May 2017 to date of final payment;
and
- 3.2. Costs of suit.

RULE 63 (2) — PARTIES' INDIVIDUAL CONTENTIONS:*On behalf of the plaintiff:*

4. The plaintiff respectfully submits that it is entitled to an order for 20% interest on the amount of N\$1,084,273.31 plus VAT calculated from 1 May 2017 to date of final payment on the basis that it was agreed to between the parties in terms of paragraphs 3.11, 3.12, 3.14 and 3.16 of the Pre-Trial Order dated 28 June 2022.

On behalf of the defendant:

5. The defendant respectfully submits that the plaintiff is not entitled to an order for 20% interest on the amount of N\$1,084,273.31 plus VAT calculated from 1 May 2017 to date of final payment on the basis that despite the aforementioned pre-trial agreements outlined in paragraph 4 herein, the interest portion of the Plaintiff's claim formed part of the overall disputed amount as per paragraph 2.1 of the Pre-Trial Order dated 28 June 2022. The Defendant therefore respectfully submits that the Honourable Court should determine same as a question of law.

6. The defendant takes no issue with the claim amount of N\$1,084,273.31 plus the VAT as it stands.'

The issue for determination

[11] This is a case stated by the plaintiff and the defendant in terms of rule 63 for adjudication by the court. In this matter, the plaintiff and the defendant agree that the defendant owes the plaintiff the amount of N\$ 1 084 273,31 plus VAT on that amount. The parties are, however, in disagreement as to whether or not the plaintiff is entitled to interest on the amount of N\$ 1 084 273,31 plus VAT (I will, in this judgment refer to the amount of N\$ 1 084 273,31 plus VAT as the 'capital sum'). As result of their disagreement, the parties in terms of rule 63(9) requested the court to, as a matter of law to determine whether or not the plaintiff is entitled to interest on the amount N\$ 1 084 273,31 plus VAT which the defendant has admitted it owes the plaintiff.

The legal principles

[12] I find it appropriate to, before I consider the question that confronts me, set out some of the legal principles with regard to payment of interest. In the matter of *Land Agricultural Development Bank of South Africa v Ryton Estates (Pty) Ltd and Other*,⁸ the South African Supreme Court of Appeal held that interest remains interest and no method of accounting (such as capitalisation) can change its nature. It further stated that contractual interest may be compound interest or simple interest. Compound interest is interest on capital plus accrued interest. If compound interest is not provided for in an agreement, only simple interest on the capital will be payable in terms of the agreement.

[13] The court proceeded and stated that *mora* interest, on the other hand, is something fundamentally different. It is not payable in terms of an agreement, but constitutes compensation for loss or damage resulting from a breach of contract, specifically *mora debitoris*. This principle was reaffirmed in the matter of *Crookes Brothers Limited v Regional Land Claims Commission for the Province of Mpumalanga and Others*,⁹ where the Supreme Court of Appeal held that even in the absence of a contractual obligation to pay interest, where a debtor is in *mora* in regard to the payment of a monetary obligation under a contract, his creditor is entitled to be compensated by an award of interest for the loss or damage that he has suffered as a result of not having received his money on due date.

[14] The matter of *Bellairs v Hodnett and Another*,¹⁰ explains the nature of *mora* interest as follows:

‘It may be accepted that the award of interest to a creditor, where his debtor is in *mora* in regard to the payment of a monetary obligation under a contract, is, in the absence of a contractual obligation to pay interest, based upon the principle that the creditor is entitled to be compensated for the loss or damage that he has suffered as a result of not receiving his money on due date (*Becker v Stusser*, 1910 CPD 289 at p 294). This loss is assessed on the basis of allowing interest on the capital sum owing over the period of *mora* (see *Koch v Panovka* 1933 NPD 776). Admittedly, it is pointed out by Steyn, *Mora Debitoris*, p 86, that there were

⁸ *Land Agricultural Development Bank of South Africa v Ryton Estates (Pty) Ltd and Other* [2013] 4 All SA 385 (SCA).

⁹ *Crookes Brothers Limited v Regional Land Claims Commission for the Province of Mpumalanga and Others* [2013] 2 All SA 1 (SCA).

¹⁰ *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A) at 1145D-G and 1146H-1147A.

differences of opinion among the writers on Roman-Dutch law on the question as to whether *mora* interest was lucrative, punitive or compensatory; and that, since interest is payable without the creditor having to prove that he has suffered loss and even where the debtor can show that the creditor would not have used the capital sum owing, this question has not lost its significance. Nevertheless, as emphasized by CENTLIVRES, CJ, in *Linton v Corser* 1952 (3) SA 685 (AD) at p 695, interest is today the “*life-blood of finance*” and under modern conditions a debtor who is tardy in the due payment of a monetary obligation will almost invariably deprive his creditor of the productive use of the money and thereby cause him loss. It is for this loss that the award of *mora* interest seeks to compensate the creditor.

... As previously pointed out, *mora* interest in a case like the present constitutes a form of damages for breach of contract. The general principle in the assessment of such damages is that the sufferer by the breach should be placed in the position he would have occupied had the contract been performed, so far as this can be done by the payment of money and without undue hardship to the defaulting party. Accordingly, such damages only are awarded as flow naturally from the breach or as may reasonably be supposed to have been in the contemplation of the contracting parties as likely to result therefrom (*Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at p 22). In awarding *mora* interest to a creditor who has not received due payment of a monetary debt owed under contract, the Court seeks to place him in the position he would have occupied had due payment been made. The Court acts on the assumption that, had due payment been made, the capital sum would have been productively employed by the creditor during the period of *mora* and the interest consequently represents the damages flowing naturally from the breach of contract.’

[15] In the matter of *West Rand Estates, Ltd v New Zealand Insurance Co, Ltd*,¹¹ the court held that:

‘In connection with a claim for interest we have to consider the question of *mora*, and the distinction between an action for liquidated and unliquidated damages. Liability for the payment of interest through delay in the performance of his obligation or duty by the defendant may arise in one of two ways. Interest may be due from the nature of the case, where, for instance, the time for performance is fixed either by agreement or the law (*mora ex re*); or where, in the absence of such agreement, the defendant has been called upon to perform his obligation (*mora ex persona*). In the former case no *interpellation* is necessary; in the latter the debtor must be formally called upon for performance. But we must bear in mind that a defendant cannot be said to be in *mora* unless he knows the nature of his duty or obligation; that is to say

¹¹ *West Rand Estates, Ltd v New Zealand Insurance Co, Ltd* 1926 AD 173 at 195-196.

when and how much he has to pay. Hence a claim for unliquidated damages, which have to be investigated and ascertained, does not bear interest. But, as *certum est quod certum reddi potest*, circumstances may occur to take a case out of the operation of this rule.

The parties may, for instance, investigate and agree as to the amount of damage sustained, and from that moment the liability of the debtor for interest upon the agreed amount may well be considered to have commenced. It seems fair and reasonable that the defendant should indemnify the plaintiff for the full loss suffered, and this admits of the payment of interest as well, once the damage has been ascertained and agreed upon between them (cf. Grotius, 3.24.19).'

[16] This principle is succinctly stated in Christie,¹² as follows: 'When a debtor's contractual obligation is to pay money, and he is in *mora*, the general damages that flow naturally from the breach will be interest *a tempore morae*'.

[17] I accept that parties may by agreement exclude liability for *mora* interest. The effect of an agreement of that kind is to exempt a party from common law liability for damages for breach of contract. Such agreement must be clear and unambiguous. As Marais JA said in *First National Bank of SA Ltd v Rosenblum & Another*:¹³

'In matters of contract the parties are taken to have intended their legal rights and obligations to be governed by the common law unless they have plainly and unambiguously indicated the contrary. Where one of the parties wishes to be absolved either wholly or partially from an obligation or liability which would or could arise at common law under a contract of the kind which the parties intend to conclude, it is for that party to ensure that the extent to which he, she or it is to be absolved is plainly spelt out.'

[18] From the cases that I have referred to in the preceding paragraphs a number of principles emanating from a creditor's right to claim interest may be formulated as follows:

(a) If a debtor is late with the payment of a money obligation under a contract, the creditor is entitled to claim *mora* interest on the outstanding debt due to the debtor's failure to make payment on the due date.

¹² R H Christie. *The Law of Contract in South Africa*, 6 ed (2011) at 530.

¹³ *First National Bank of SA Ltd v Rosenblum & Another* 2001 (4) SA 189 (SCA) at 195H.

- (b) The creditor is entitled to claim this interest even without a specific contractual provision to pay interest. *Mora* interest constitutes compensation for loss resulting from a breach of contract and is not governed nor dependant on an agreement. *Mora* interest is a common law right, meaning that it automatically applies to contracts unless it is expressly, plainly and unambiguously excluded by agreement between the parties.
- (c) If the contract fixes the time for payment, no demand is necessary to place the debtor in default and interest is payable from the date on which payment was due.
- (d) If the claim is for unliquidated damages the defendant cannot be in *mora* until the *quantum* of damages has been fixed by a judgment of the court or by agreement between the parties.
- (e) Where the parties have fixed the amount of damages by agreement the damages are no longer unliquidated and interest on the agreed amount is payable from the date of the agreement or the date of demand whichever is later.
- (f) If a contract or agreement is silent on the rate of interest, then interest can be claimed at the prescribed rate. *Mora* interest can only be claimed at the prescribed rate.

Discussion

[19] Ms Meyer who appeared for the defendant argued that the plaintiff relies on paragraphs 3.11, 3.12, 3.14, and 3.16 of the Pre-trial Order of 28 June 2022, (which I have quoted earlier on in this judgment) for its claim that the parties have agreed that the defendant is liable to pay the capital sum claimed plus VAT and interest at the rate of 20% per annum as from 1 May 2017 to date of payment. She argued that the reliance on those paragraphs to claim entitlement to interest is misplaced because, so she argued, those paragraphs contradicts paragraph 2.1 of the same pre-trial order of 28 June 2022. She further argued that despite the fact that the parties agreed (in paragraphs 3.11, 3.12, 3.14, and 3.16), that the defendant is liable to pay the capital sum determined by the Electricity Control Board plus VAT and interest, paragraph 2.1 of the Pre-Trial Order of 28 June 2022, still correctly conveys the parties' desire for the Court to determine whether the plaintiff is entitled to interest on the capital sum.

[20] Ms Meyer further argued that the inclusion of paragraphs 3.11, 3.12, 3.14, and 3.16 in the Pre-trial Order of 28 June 2022, gave rise to a question whether the defendant had the necessary authority to agree to pay interest if same is not provided in its constituent instrument namely, the Local Authorities Act. Ms Meyer continued and argued that the answer to the question is a firm 'no'. She argued that the defendant being a body created by the Local Authorities Act, to carry out functions in terms of the Act, is bound by the provisions thereof as a creature of statute. For this argument, she relied on the matter of *ABB Namibia (Pty) Ltd v Central Procurement Board of Namibia and Others*.¹⁴

[21] I am of the view that in the light of the principles that I have set out in this judgment, it is not necessary to resolve the contradictions in the pre-trial order of 28 June 2022, nor is it necessary to resolve or answer to the question that Ms Meyer says arose as a result of the parties' inclusion of paragraphs 3.11, 3.12, 3.14, and 3.16 in the Pre-trial Order of 28 June 2022.

[22] I say so for the following reasons. First, section 3(1) of the Local Authorities Act provides that:

'3 (1) Subject to the provisions of this section, the Minister may from time to time by notice in the *Gazette* establish any area specified in such notice as the area of a local authority, and declare such area to be a municipality, town or village under the name specified in such notice.'

And section 6(1) & (3) provided that:

'6. (1) The affairs of –
(a) ...

(b) a town shall be governed by a town council consisting of such number of members, but not less than seven and not more than 12, as may be determined and specified by the Minister in the notice establishing the town;

(c) ...

¹⁴ *ABB Namibia (Pty) Ltd v Central Procurement Board of Namibia and Others* 2021 (3) NR 770 (HC).

(3) A municipal council, town council and village council shall under its name be a juristic person.'

[23] A juristic person is a social entity, a community or an association of people which has a distinct existence, independent right of existence from its members or shareholders under the law. It can be 'the bearer of judicial capacities and subjective rights' and the accompanying legal entitlements and obligations, just like a natural person, for example it has the right to possess property in its own name, acquires rights, assumes obligations and responsibilities, signs contracts and agreements and can be sued or institute legal proceedings exactly like a natural person. Although it is independent of the natural persons who are its members, it acts through them.

[24] As I alluded to earlier in this judgment, s 30(1)(f) of the Local Authorities Act, empowers the defendant to, supply electricity or gas to the residents in its area. The supply of the electricity must surely be regulated by an agreement and the defendant being a juristic person has the capacity to conclude contracts or agreements in respect of its obligation to supply electricity. It thus follows the defendant has the power to conclude an agreement with respect to the electricity that it has supplied to an inhabitant within its area. The argument by Ms Meyer that the inclusion of paragraphs 3.11, 3.12, 3.14, and 3.16 in the Pre-trial Order of 28 June 2022, gave rise to the question of the defendant's authority to conclude an agreement in respect of payment of interest, is with respect unsustainable.

[25] Secondly, because of the principles that; if a debtor is late with payment of a money obligation under a contract, the creditor is entitled to claim *mora* interest on the outstanding debt due to the debtor's failure to make payment on the due date and *mora* interest is a common law right, meaning that it automatically applies to contracts unless it is expressly, plainly and unambiguously excluded by agreement between the parties, the contradictions of paragraph 2.1 and paragraphs 3.11, 3.12, 3.14, and 3.16 of the Pre-trial Order become irrelevant, because the defendant's obligation to pay *mora* interest on the outstanding debt due to its failure to make payment on the due date arises from the common law and is thus not dependent on the agreement of the parties.

[26] In this matter, the plaintiff's claim was until 21 December 2018 unliquidated, the defendant could thus not be in *mora*, but as soon as the Electricity Control Board determined the amount that was in dispute between the parties the amount became liquidated and from that moment the liability of the defendant for interest upon the agreed amount commenced.

[27] The term *mora* simply means delay or default. When the contract fixes the time for performance, *mora (mora ex re)* arises from the contract itself and no demand (*interpellatio*) is necessary to place the debtor in *mora*. In contrast, where the contract does not contain an express or tacit stipulation in regard to the date when performance is due, a demand (*interpellatio*) becomes necessary to put the debtor in *mora*. This is referred to as *mora ex persona*.¹⁵ The purpose of *mora* interest is therefore to place the plaintiff in the position that it would have been in had the defendant performed in terms of the undertaking.

[28] In this matter, the defendant, by a letter dated 10 January 2019, which was attached to its written heads of arguments, admitted its indebtedness to the plaintiff in the capital sum. In my view the obligation to pay interest on the admitted amount of N\$ 1 084 273,31 plus VAT on that amount commences from that day, that is, 10 January 2019.

[29] I have thus come to the conclusion that in the light of the authorities that I have referred to in this judgment the question to be adjudicated is therefore answered in favour of the plaintiff, namely that, at common law the plaintiff is entitled to *mora* interest. *Mora* interest in a case like the present constitutes a form of damages for breach of contract. In the present matter the parties did not agree on the rate of interest. It follows that the rate applicable is the rate prescribed in terms of the Prescribed Rate of Interest Act 55 of 1975.

Costs

[30] What is left is the question of costs. The basic rule with regard to costs is that all costs unless expressly otherwise enacted are in the discretion of the judge, and the

¹⁵ See *Scoin Trading (Pty) Ltd v Bernstein NO 2011 (2) SA 118 (SCA)* paras 11 & 12.

discretion must be exercised judicially,¹⁶ that is, not arbitrarily an award of costs ought to be fair and just between the parties.¹⁷ It has also been held that another general rule is that the successful party must be awarded his or her costs, and the rule ought not to be departed from without good grounds.¹⁸ But the rule is subject to the abovementioned overriding principle that the award of costs is in the discretion of the judge (it depends upon the circumstances of the particular case).

[31] In my view, the plaintiff was substantially successful and no special circumstances were placed before me to depart from the general rules and for that reason, I find that the plaintiff is entitled to its costs. I therefore making the following order:

1. The defendant must credit the plaintiff's account in the amount of N\$ 1 084 273,31 Plus VAT and interest at the prescribed rate of interest reckoned from 10 January 2019 to the date of crediting the plaintiff's account.
2. In the alternative to the order set out in paragraph [1], the defendant must pay to the plaintiff's account in the amount of N\$ 1 084 273,31 Plus VAT and interest at the prescribed rate of interest reckoned from 10 January 2019 to the date of final payment.
3. The defendant must pay the plaintiff's costs of suit.
4. The matter is regarded as finalised and is removed from the roll.

S F I UEITELE
JUDGE

¹⁶ *Hailulu v Director of the Anti-Corruption Commission and Others 2014 (1) NR 62 (HC)*.

¹⁷ *Fripp v Gibbon & Co 1913 AD 354*.

¹⁸ *Letsitele Stores (Pty) Ltd v Roets 1959 (4) SA 579 (T)*.

APPEARANCES:

PLAINTIFF:

C Visser
of Koep & Partners, Windhoek

DEFENDANT:

M Meyer
of Government Attorney, Windhoek