REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGEMENT

Case no: HC-MD-CIV-ACT-CON-2018/04954

In the matter between:

NEDBANK NAMIBIA LIMITED **PLAINTIFF**

and

FRANCISKUS FABIANUS KRUGER **1ST DEFENDANT**
WALBURGA KELEBEMANG KRUGER **2ND DEFENDANT**

Neutral citation: *Nedbank Namibia Limited v Kruger* (HC-MD-CIV-ACT-CON-2018/04954) [2022] NAHCMD 21 (1 February 2023)

Coram: TOMMASI J
Heard: **20, 22 & 24 June 2022 and 4 August 2022.**
Delivered: 1 February 2023

Flynote: Contract – Application of the Credit Agreements Act, 75 of 1980 – Contract - Proclamation No. AG 17 of 27 May 1981 determines that the provisions of the Act shall apply to credit transaction of a cash price of not more than R100 000 over a period of longer than three months' – This limit was withdrawn on 28 June 2016, which was after the conclusion of this agreement entered into on 6 November 2012 – Credit Agreement not applicable.

Prescription – a claim of vindication of ownership of property is not a 'debt' as envisaged by the Prescription Act.
Contract – Plaintiff's right to cancel the contract without notice contained in a cancellation clause known as a *lex commissoria*. – Upon breach the plaintiff is entitled to cancel the agreement.

Summary: The parties entered into an instalment sale agreement and the plaintiff claimed that first defendant breached the agreement by failing to pay the instalments when it became due. The default occurred during 2015 and 2016 but summons was only issued during 2018 when the plaintiff instituted action for cancellation of the agreement, restoration of possession of the motor vehicle, forfeiture of the amounts paid and cost on an attorney and client costs. The first defendant did not testify. The court found that the plaintiff proved the breach and was entitled to cancelation of the agreement and for possession to be restored to the plaintiff, forfeiture of the amounts paid and cost on an attorney and client scale as agreed. No finding was made in respect of the damages as no claim for damages was included in the relief which the plaintiff sought herein.

ORDER

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1. The Agreement between the parties is cancelled;
2. The first defendant must immediately restore the motor vehicle, a 2012 Nissan NP300 2.5 D DC 4x4 motor vehicle with engine no. YD25422267T and chassis No. ADNCPUD22Z0029038 to the plaintiff and failing compliance therewith within 30 days from date of this order, authorizing and directing the Deputy Sheriff to take the said vehicle into his possession and deliver it to the plaintiff.
3. The amounts paid by the first defendant in terms of the agreement be and are hereby declared forfeited in favour of the plaintiff;
4. First defendant is to pay the costs of the plaintiff on an attorney and client scale.

JUDGMENT

TOMMASI J:

[1] The plaintiff's claim herein arises from breach by the first defendant of an instalment sale agreement. The first defendant, is married in community of property to the second defendant, purchased a new vehicle from the plaintiff. The defendants entered an appearance to defend. The first defendant filed a plea but did not file any witness statements and did not testify. This matter is therefore determined on the pleadings and the evidence adduced by the plaintiff.

[2] On 6 November 2012 the parties entered into a written instalment sale agreement in terms whereof the first defendant purchased a Nissan NP300 2.5D DC 4x4 motor vehicle from the plaintiff for the sum of N$309 822,84. This amount includes a single insurance premium of N$11 067 and finance charges at 9.5% p.a. in the amount of N$48 270,01. It was agreed that the first defendant would pay 54 equal monthly instalments of N$5 737,46 commencing on 25 November 2012 and each subsequent instalment was payable on the 25th day of each successive month until 25 March 2017. The vehicle was delivered to first defendant.

[3] On 12 November 2018. i.e more than a year after 25 March 2017, the plaintiff's legal practitioner addressed a letter to the first defendant giving notice of repossession in terms of section 11 of the Credit agreements Act, 1980 (Act 75 of 1980). The address is P.O. Box 86891, Eros. This was not the address which was provided in terms of the agreement as the *dommicilum citandi et executandi.* The plaintiff claims that the Credit Agreement Act is not applicable to the agreement. The first defendant disputes that proper notice was given as the address is not the address which appears on the instalment sale agreement. First defendant takes issue with the fact that the plaintiff relies on the Act but at the same time pleads that it is not applicable. He is of the view that the plaintiff acquiesced or represented to the defendant that no default occurred.

[4] On 3 December 2018 the plaintiff instituted action for cancelation, the immediate restoration of the motor vehicle; forfeiture of the amounts paid by the first defendant in terms of the agreement to the plaintiff; and costs on an attorney and client scale.

[5] The first defendant, in his plea, denied that the principle debt is correct as the plaintiff was not entitled or permitted to add the amount of N$11 067 in respect of insurance. He pleaded that he obtained insurance cover for the motor vehicle separately and provided plaintiff with a cover letter. The plaintiff adduced evidence of the defendant's application for credit life insurance which the first defendant signed on 26 September 2012. This document reflects that the single premium was N$11 067.

[6] The plaintiff pleaded that it is a material term of the agreement that it would remain the owner of the vehicle until all the payments have been made. The first defendant disputes that the plaintiff is the owner. The defendant pleaded that he paid all the amounts due during the currency of the agreement and that the ownership therefore vested in him as at the date of final payment i.e 25 March 2017. He pleaded that the plaintiff's claim prescribed on 25 March 2017.

[7] The plaintiff avers that the first defendant breached the agreement by failing to pay the instalments for the months of April and December 2015 and February, October and December 2016 totaling N$39 665,16 on the due date. The plaintiff handed into evidence a Loan Statement dated 5 November 2018. In terms of this loan statement the following is evident:

(a) The interest rate as at the date of the statement is 10.75% per annum;
(b) The arrear interest charged commenced on 12 March 2015 i.e before the first default by the first defendant in April 2015;
(c) Payment was received for the months April and December 2015 and February, October and December 2016 and reversed (The payment for 25 April 2015 was reversed only during August 2015);
(d) a tracing fee in the amount of N$14 95 was added on 3 November 2018;

(e) the outstanding amount on 3 November 2018 amounts to N$39 660.06; and
(f) The interest calculated from 25 March 2017 to 3 November 2018 amounts to N$7 753.05 bringing the outstanding total to N$47 413.11.

[8] The certificate of balance handed into evidence reflects that the full outstanding balance at 3 November 2018 is N$47 413,11 and that debit interest of 16.8% pa was charged being the maximum rate in terms of the Usury Act, calculated daily, charged monthly in arrears and compounded from 3 November 2018 until date of payment is added to the outstanding balance from 3 November 2018 to date of payment. The certificate also indicate that the prime interest rate at the time was 10.50% per annum. The plaintiff pleaded that the agreement further stipulates that a certificate by any manager whose authority need not be proved, shall be *prima facie* evidence of the amount of first defendant's indebtedness.

[9] The defendant denied that he was in arrears and disputed the outstanding balance as per the certificate of balance. He pleaded that the court in any event does not have jurisdiction to hear the matter in light of the amount outstanding.

[10] The plaintiff avers that, in terms of the agreement, the first defendant would be liable for costs and disbursements including legal costs on an attorney and client scale and costs incurred in recovering possession and thereafter in disposing the vehicle such as cost incurred in tracing the first defendant or the vehicle in the event of first defendant's breach of the agreement.

[11] The plaintiff pleaded that it is entitled to repossess the vehicle, obtain an order for forfeiture of the payments made by the defendant and deduct from the total purchase price the deposit and instalments paid, such value as the vehicle may have upon its return to the plaintiff and such reduction of finance charges to which the First defendant may be entitled. The plaintiff pleaded that it would be unable to determine the amount due until such time as the value of the vehicle has been determined and this can only be done at the time the vehicle is returned to the plaintiff.

[12] The matter was allocated to a case managing judge who on 23 February 2022 enrolled the matter on the floating roll for 20 to 24 June 2022. The parties were ordered to attend roll call on 17 June 2022. On 14 June the first defendant, acting in person, filed a Notice of Inability to attend trial. The reason advanced therein was that the first defendant was due to undergo surgery on 17 June 2022 and would only be discharged on 20 or 21 June 2021. On 20 June 2022 the court directed the defendants to file an application for postponement before noon on 21 June 2021 failing which the matter would proceed. This order was communicated telephonically to the first defendant. The matter was postponed to 22 June 2022. The first defendant filed an affidavit on 22 June 2022. The application for postponement was heard on 22 June 2022 and the court postponed the matter to 24 June 2022 for hearing.

[13] The plaintiff called its Manager of Pre-Legal Collections Department Mr Wessels to testify on behalf of plaintiff. He testified as to how the purchase price was calculated and arrived at and that same included life insurance. He indicated that the interest rate was not fixed over the duration of the contract but linked to the prime rate which fluctuates. He testified as to the defendant's breach or failure to pay the instalments on due dates. Although he was not personally involved, he had access to and insight of all the records of the plaintiff and that he acts as the plaintiff's representative in all vehicle and asset debt related matters. He acquired personal knowledge of the status of the defendant's file and he has in his custody and control the documents contained therein as part of the performance of his duties as a manager.

[14] The first defendant, acting in person, during cross examination took issue with the fact that the item "Loan Disbursement" dated 25 February 2015 in the amount of N$129 870.94 appeared on the loan statement whereas the agreement was entered into on 6 November 2012. Mr Wessels explained that there was a system change but testified that he was not involved in the process. He was unable to give an account of the first defendant's statement of account before 12 March 2015, the date from which the transactions are recorded on the Loan Statement.

[15] Mr Wessels testified that the account is credited with the amount received and if no payment is received the payment is reversed. He acknowledged that the payment received from the first defendant on 25 April 2015 was only reversed on 24 August 2015. The remaining payments were reversed the same day.

[16] The first defendant probed the witness if he had any knowledge of any notices sent to him to inform him of the default but he was unable to testify whether any notice was given to the first defendant. He confirmed that the period for which he gave authorization for the debit order was stopped on 25 March 2017. First defendant pointed out that the banking details which appears on the form titled "Application Instalment Credit-Individuals" is different from the bank account from which the payments were received. The witness confirmed this difference. Certain discrepancies in the amounts received by the first defendant and the amounts reversed by plaintiff were confirmed by the witness.

[17] The first defendant queried the amount claimed for the tracing. The witness confirmed that a tracing agent was appointed but he did not succeed in tracing the first defendant. No account of the tracing agent was adduced into evidence.

[18] The first defendant wanted to know why interest was charged on arrears before the date of his first default ie 25 April 2015. The witness speculated that there might have been arrears prior to the first default on the loan statement and indicated that the statement is not the entire statement. The first defendant complained that the loan statement handed into evidence was only disclosed to him during 2021.

Issues for determination

[19] Many issues were raised by the defendant in argument. The court, for sake of clarity will deal with the following preliminary issues: (a) the alleged bias of the presiding judge and the failure of the managing judge to also sit as the presiding judge; (b) Non-compliance with the rules for service of the order dated 20 June 2022; (c) The jurisdiction of the court; (d) Plaintiff's authority to institute action authorization; and (e) prescription.

Preliminary Issues

(a) Bias and Managing Judge viz a viz the Presiding Judge

[20] The first defendant raised the issue of possible bias in that the court remarked during the hearing of the application for postponement that a cost order may be given against the defendant. He also raised the point that the managing judge was a different judge to the presiding judge and that this was contrary to the provisions of Rule 21 and 22.

[21] Ms Kuzeeko argues that rule 21 read with rule 22 provides that the managing judge's roll ends at Pre-Trial at which stage a trial date is allocated.

[22] No application for the recusal of the presiding judge was brought on the grounds mentioned in argument. In light of the fact that no formal application to this effect was brought, this court would not express itself in respect of the first respondent's remarks made in argument. The court is reminded of the fact that judicial officers have a duty to sit in any case in which they are not obliged to recuse themselves.

[23] The first defendant from the outset indicated that the judge who was allocated to manage the matter ought to have been the judge who presided over the trial as provided for in terms of rule 21 read with rule 22 of the Rules of Court.

[24] Rule 21 provides as follow:

'(1) The control and management of every case filed at the court vests in the court and not in the parties or their legal practitioners.
(2) As soon as appearance to defend has been entered by a defendant in an action the registrar must, with the approval of the Judge-President, docket-allocate the case to a managing judge who must manage it as provided in this Part until conclusion.'

Rule 22 (1) provides as follows:

'(1) From docket allocation of a case until the trial or hearing the managing judge controls and manages the procedure and processes relating to the case'

[25] The clear meaning of Rule 22 (1) is that a matter is allocated to a Managing judge up to trial or hearing stage. Rule 21 specifically mentions that the managing judge must manage it “as provided in this Part”. Part 3 i.e. Rules 17 to Rule 39 of the Rules deal with Case Management. Part 10 of the rules deals with the trial and where it refers to the proceedings during a trail, eg Rule 93; it makes reference to “the presiding judge” as opposed to the “managing judge”. The managing judge, in terms of the Practice Directive 56(6) may enroll up to seven matters on the floating roll. It would not be possible for the managing judge to preside over seven matters in the three to five days allocated for matters on the floating roll. The first defendant’s interpretation of Rule 21 and 22 is clearly not correct.

[26] The above points raised in respect of the presiding judge are for the above stated reasons considered to be unmeritorious and without substance.

(b) Non-compliance with the rules for service of the order dated 20 June 2022

[27] The first defendant complained that the order dated 20 June 2022 was not served in accordance with the rule. Ms Kuzeeko argued that the defendant appeared on the date the matter was postponed and was aware of the contents of the order. Referring to the matter of *Witvlei Meat (Pty) Ltd and Others v Disciplinary Committee for Legal Practitioners and Others* 2013 (1) NR 245 (HC) para 17 where Smuts JA commented that the fundamental purpose of service is after all to bring the matter to the attention of a party, including having the benefit of an explanation as to the meaning and nature of the process. She argues that the defendant failed to show the prejudice he suffered.

[28] The first defendant sought a postponement which was not rule compliant. He simply filed a notice of inability to attend the hearing which was not rule compliant. The first respondent was called by the judge’s clerk and the contents of the order were communicated to him by his own admission. The first respondent appeared at court which is an indication that he was aware of the contents of the court order and evidently no prejudice was suffered by the first defendant. He was granted a short postponement to recover from his surgery and on 24 June 2022 indicated that he was ready to proceed.

(c) The Jurisdiction of the court

[29] The first defendant submits that the court is not clothed with jurisdiction for the following reasons:

(a) In terms of clause 19 (a) of the agreement he consented to the jurisdiction of the magistrate's court and the parties are bound to this clause. He argues that clause 19(b) which provides that the plaintiff may institute action in any division of the High Court having jurisdiction, does not assist the plaintiff as the agreement cannot oust statute regulating the issue of jurisdiction.

(b) The amount which is presented in the loan statement falls within the jurisdiction of the Magistrates Court. He submits that section 29(1)(e) of the Magistrates Court Act 1944 finds application.

[30] The jurisdiction of the Magistrates is determined by the provisions of section 29 (*e*) of the Magistrate's Court Act. The Magistrates Court is a creature of statute and its jurisdiction is confined within the four corners of the statute. This court however has inherent jurisdiction to hear all matters, including matters falling within the jurisdiction of the Magistrate's court, unless its jurisdiction is specifically excluded by statute.

[31] There is therefore no merit in the first defendant's submission that this court does not have jurisdiction to hear the matter.

(d) Authority to institute action

[32] The defendant argues that the witness and the legal practitioner lacked the authorization to act on behalf of plaintiff. The witness testified that he gave instructions to the legal practitioner yet failed to provide documentary evidence that he is authorized to give such instructions.

[33] This issue was not raised as a dispute in the pleadings and it is therefore inappropriate to raise it for the first time during argument. This issue would therefore not be considered. The plaintiff is in any event not required to file a power of attorney in terms of the Rules and if this was an issue which the first defendant wanted to place in dispute, he ought to have done so in his plea. No such issue was raised in his plea.

(e) Prescription

[34] The defendant argues that the plaintiff's claim prescribed. He argues that the debt falls due on the dates the instalments were due and were not paid. He submits that the plaintiff opted to issue summons for the return of the vehicle (*rei vindicatio*) but that this does not interrupt prescription. The first defendant submitted that the matter of *Empire Fishing Company (Pty) Ltd vs Dumeni* (HC-MD-CIV-ACT-CON-2021/00191) [2022] NAHCMD 76 (24 February 2022) is not applicable as the underlying liability is a debt.

[35] Ms Kuzeeko argued that prescription was not raised as a special plea but was raised for the first time in closing argument. She nevertheless advanced that the prescription does not start to run before an election is made referring in this regard to the matter of *Miracle Mile Investments 67 (Pty) Ltd and Another v Standard Bank of SA Ltd* 2017 (1) SA 185 (SCA).

[36] The first defendant raised the issue of prescription in his plea but same was not incorporated as part of the pre-trial order. He expounded fully on this aspect in his heads of argument. The first defendant's plea raises the issue of prescription and as such this court must consider it.

[37] In *Empire Fishing Company (Pty) Ltd vs Dumeni* (HC-MD-CIV-ACT-CON-2021/00191) [2022] NAHCMD 76 (24 February 2022), an unreported matter, the court held that a vindicatory claim does not constitute a 'debt' as envisaged by s 11 of the Prescription Act and differed from *Ongopolo Mining Ltd v Uris Safari Lodge (Pty) Ltd and Others* 2014 (1) NR 290 (HC). In differing from the Ongepolo decision Judge Sibeya points out that that the Supreme Court in *Council of The Itireleng*

Village Community and Another v Madi And Others 2017 (4) NR 1127 (SC) applied the decision of *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) (2016 (6). He also makes reference of the matter of *Absa Bank Ltd v Keet* 2015 (4) SA 474 (SCA) which is on point. In the *Keet* matter the appellant's bank brought an action in the High Court seeking confirmation of its cancellation of an instalment sale agreement and recovery of the vehicle when the respondent defaulted on payments. The Supreme Court of Appeal held that a claim for *rei vindicatio* does not constitute a 'debt'.

[38] This court agrees with the approach adopted in the *Empire Fishing* matter and conclude that the plaintiff's vindicatory claim does not constitute a debt as envisaged by s11 of the Prescription Act. The first defendant's plea that the plaintiff's claim for restoration of possession has prescribed, is accordingly dismissed.

Discussion on Disputed Issues identified in Pre-Trial Order

(a) Purchase price of the vehicle

[39] The first defendant took no issue with the purchase price, the life insurance premium included in the purchase price during cross examination and in argument. This evidence is not controverted and it must be accepted that the first defendant agreed to the amount as set out in the instalment sale agreement.

(b) Admissibility of evidence

[40] The first defendant argued that the account statement which contains the liability, remains unproved and the evidence adduced is thus not a credible document. He in the same breath argues that it is not admissible for the following reasons:

(a) It is not a continuous record but a reconstruction of the purported record;

(b) The plaintiff did not plead the liability claimed in the statement except the unpaid instalments. The defendants were also not able to respond to the statement as same was suppressed;

(c) There is no supporting affidavit that it is a computer printout of the records of the plaintiff;

(d) The statement and the witness statement do not comply with section 29 read with section 32 of the Civil Proceedings Evidence Act, 1965 (Act 25 of 1965).

[41] The court admitted the statement into evidence and it was marked an exhibit. The reasons are set out herein. Rule 28 (7) (b) provides that:

'When the parties prepare a case management report referred to in rule 24 for the purpose of the case management conference -

(a) the discovery affidavit referred to in subrule (4) must form part of such report;

(b) unless a document, analogue or digital recording listed under subrule (4)(a) is specifically disputed for whatever reason, it must be regarded as admissible without further proof, but not that the contents thereof are true;

(c) if the admissibility of a document, analogue or digital recording referred to in subrule (4) is disputed, the party disputing it must briefly state the basis for the dispute in the report.'

[42] The plaintiff discovered the document on 5 November 2021. On 9 November 2021 the parties signed a joint case management report. The report simply reflects that the parties have filed their respective discovery affidavits. No mention is made concerning the admissibility of the statement and consequently no basis for the dispute has been recorded in the case management report. The admissibility was raised as a dispute only at Pre-Trial stage and the admissibility of the statement was left for the court to determine. In light of the first defendant's non-compliance with Rule 28 (7) the court ruled that the document was admissible. The first defendant in any event erroneously relies on section 32 of the Civil Proceedings Evidence Act, 1965 (Act 25 of 1965) which is not applicable where the bank is party.

(c) <u>Ownership of the vehicle</u>

[43] The overwhelming, uncontested evidence is that the first defendant breached the agreement by failing to pay the aforementioned five instalments. The terms of the agreement (clause 2 (a)) clearly stipulate that ownership of the goods would remain with the plaintiff until the first defendant paid all the amounts due in terms of the

agreement. The agreement does not provide for the lapsing of the agreement by effluxion of time but clearly provide that all payments must be made for ownership to pass. There are payments still outstanding and the ownership therefore remain with plaintiff.

(d) Application of the Credit Agreements Act/ Notice of Cancellation

[44] The first defendant, despite the pre-trial order clearly stipulating that the Credit Agreements Act is not applicable argues that the Act has been amended in 2016 making it applicable to the current agreement between the parties. His argument is that by the time the cause of action arose and the matter was brought to court in 2018, the Act was amended and therefore applicable. The first defendant raised this issue in his plea and argument and this court is of the view that it ought to be discussed for the sake of clarity.

[45] In *Standard Bank v Silas Hafeni Nekwaya* Case No: SA 95/20201 delivered 1 December 2022 the legal position is set as follow:

'[44] The legal point in this appeal in a nutshell is to the following effect:

The Credit Agreements Act 75 of 1980 provides in s 2(1) that the 'provisions of this Act shall apply to such credit agreements or categories of credit agreements as the Minister may determine from time to time by notice in the Gazette: . . .'.

[45] The Minister by way of the Credit Agreements Proclamation No. AG 17 of 27 May 1981, under the powers vested in him by s 2 of the Act, determined that the provisions of the Act shall apply to 'any transaction referred to in paragraph (a) of the definition of "credit transaction" in section 1 of the said Act' . . . 'against payment of a cash price of not more than R100 000 over a period of longer than three months'.

[46] In GN 141, GG 6052, 28 June 2016 the Minister under s 2 of the Act withdrew Notice No. AG 17 of 27 May 1981.

[47] The instalment sale agreement between the appellant and the respondent was concluded and signed by the parties on 11 December 2015. At this stage, the provisions of the Act were applicable only to those credit agreements where the cash price of the goods normally sold by the credit grantor was '. . . not more than R100 000 . . .'. The cash price of

the motor vehicle sold to the respondent was N$2 078 433,60 which is an amount more than N$100 000. Thus the provisions of the Act were not applicable to the credit agreements between the parties. Notice No. AG 17 of 27 May 1981 was withdrawn on 28 June 2016, which was after the conclusion of the agreement.

[48] It is trite that 'a statute is presumed not to apply retrospectively, unless it is expressly or by necessary implication provided otherwise in the relevant legislation. It is for that reason presumed that the legislature only intends to regulate future matters. Unless a contrary intention appears from new legislation which repeals previous legislation, it is presumed that no repeal of an existing statute has been enacted in relation to transactions completed prior to such existing statute being repealed.'

[49] The agreement herein was concluded between the parties on 6 November 2012. It is clear that the Credit Agreement Act is also not applicable as the purchase price of the vehicle herein exceeds the amount of N$100 000. The plaintiff although it sent out a notice in terms of section 11 of the Credit Agreements Act, was not required by statute to do so. It was also not required in terms of the agreement between the parties.

[50] The address to which the notice was sent is in fact the address given by the first defendant in his application form even though the address does not appear as an address in the agreement where the first defendant would accept notices. The plaintiff provided proof of postage and the plaintiff's witness testified that the notice was sent as a matter of practice. The evidence before this court shows that the first defendant was notified and there is no reason for this court to conclude that first defendant did not receive it.

(e) <u>Did the plaintiff prove breach by first defendant?</u>

[51] The uncontested evidence by the plaintiff's witness is that the first defendant failed to honour his undertaking to pay all the instalments on the dates due. The loan statement handed into evidence supports his statement as it is evident that the instalments for April and December 2015 and February, October and December 2016 were received and reversed. It is of no consequence whether it was returned on the same day or later. This is *prima facie* evidence that first defendant did not pay

the instalments on the due date and it calls for a response by the first defendant. The first defendant pleaded that he paid the instalments but failed to adduce evidence to support his plea. There is no evidence that the instalments were paid from another bank account so it is of no moment that a different bank account was given on the first defendant's application form.

[52] The first defendant argues that the debit order of 25 April 2015 was only returned as unpaid on 24 August 2015. The defendant submitted that it ought to have been returned the same day if there was insufficient funds. This is of no consequence. The question is simply whether the first defendant paid the instalment which was due on 24 April 2015. The plaintiff testified that he failed to pay it and the amount with which his account was credited was reversed in August 2018. This allegation was met with no rebuttal.

[53] The conclusion that the first defendant breached the agreement is unavoidable.

(f) Did the plaintiff legally cancel the agreement

[54] In *National Address Buro v South West African Broadcasting Corporation* 1991 NR 35 (HC) the court at page 49 (A-C)

'…parties frequently include in their contract a cancellation clause known as a *lex commissoria*. In *North Vaal Mineral Co Ltd v Lovasz* 1961 (3) SA 604 (T) at 606C Jansen J, referring to a particular contract with which he was dealing, said:

'Clause 9 is a lex commissoria (in the wide sense of a stipulation conferring a right to cancel upon a breach of the contract to which it is appended, whether it is a contract of sale or any other contract). It confers a right (viz to cancel) upon the fulfilment of a condition.'

[55] Clause 10 of the agreement between the parties gives the plaintiff the right to cancel the agreement if there had been a default by the first defendant in punctual payment of any instalment. No notice of cancellation is required in terms of the agreement. The plaintiff thus reserved the right to cancel and the court under these circumstances will order a cancellation of the agreement.

[56] It is therefore this court's finding that the plaintiff is entitled to an order for the cancellation of the agreement.

(g) Did the arrears amount to N$39 665.16 on 3 November 2018/ liquidity of damages / remedies upon termination?

[57] The loan statement reflects that the outstanding balance on 3 November 2018 was N$39 660.06 differing from paragraph 6 of the particulars of claim which gives the outstanding balance at N$39 665.16. The first defendant also highlighted some discrepancies in the loan statement which raises concerns regarding the accuracy of the loan statement. One of the discrepancies concerns the arrear rental which is charged to the account prior to the first default in April 2015. The first defendant argues that the item 'arrears charged' in the sum of N$5 906.13 on 12 March 2015 could not be charged to the outstanding amount as it is plaintiff's case that the first default occurred on 25 April 2015. It is not clear why this amount in arrear interest has been charged to the account of the first defendant.

[58] The first defendant indicated that the item 'Loan Disbursement' appearing of the statement dated 25 February 2015 in the sum of N$129 870,94 could not be correct as the parties entered into an agreement during November 2012. He maintains that this is a re-constructed statement which starts with a zero balance. The statement does not reflect the original loan disbursement and the finance charges as at November 2012.

[59] The statement includes an amount in the sum of N$1 495.00 for a tracing fee on 23 July 2018. His submission is that the plaintiff has his residential address but employed the services of a tracing agent. No report regarding the tracing agent's fee was provided as evidence for this item on the statement.

[60] The first defendant takes issue with the rate of interest charged. He submits that the statement indicates that the current interest rate is 10.75% p/a yet the plaintiff claims that it is 16.80% p/a on 3 December 2018 ie when summons was issued. First defendant submits that it should be 9.50% p/a which is a non-variable

finance rate stipulated in the agreement. It is indeed so that the evidence adduced herein by the plaintiff does not clearly or even consistently provide the variable interest rate at the time the amount fell due.

[61] First defendant submits that the agreement does not stipulate that the rate is variable. He holds the view that the Usury Act is not applicable as the principal debt exceeds the amount of N$100 000. He further submits that the variable rate was not pleaded in the Plaintiff's particulars of claim. The agreement however in clause 10 (d) provides that if the word "fixed" or "non-variable" do not appear next to the finance charges in the agreement, then the rate would be variable.

[62] First defendant further argues that the maximum rate applicable according the Usury Act is prime rate multiplied by 1.6[1] and in this case the plaintiff calculated the interest rate at the time as 10.5% per annum multiplied by 1.6 to arrive at 16.8% per annum which he maintains is incorrect. This calculation according the first defendant is not applicable in light of the fact that Usury Act is not applicable.

[62] The first defendant points us that the statement reflects that the plaintiff calculates the monthly interest on the arrears on a month to month basis until 27 March 2017 when the agreement comes to an end but add a lump sum in respect of the interest charged on arrears in the sum of N$7 753.05 on 03 November 2018. The defendant therefore has no way of determining how this amount was calculated and arrived at.

[63] In conclusion he submits that the alleged arrear amounts are not liquidated amounts and cannot be conclusively determined by the court without further proof.

[64] Some of these issues raised are meritorious but misplaced. The loan account statement indeed contains a number of anomalies and does not appear to be accurate. The certificate of balance would therefore also not be accurate. These issues raise concerns in respect of the amount outstanding. The plaintiff however is not claiming specific performance but elected to cancel the agreement, claim repossession of the vehicle and forfeiture of the amounts paid by first defendant in accordance with clause 10(b) of the agreement.

[1] See General Notice 196 of 2004

[65] What remains to be determined is the liquidated damages which the plaintiff maintains can only be calculated when the vehicle is returned to it. The current matter does not call upon the court to make a finding as to the damages which the plaintiff is entitled to. It is evident that the plaintiff, by electing to act in terms of clause 10(d) must lodge a claim for damages and it is clear that the first defendant would oppose such a claim. All these facts may be relevant when such a claim is instituted.

Conclusion

[66] For purposes of this judgment the court must determine whether the plaintiff is entitled to cancel the agreement, restoration of possession of the vehicle and forfeiture of the amounts paid. Having considered the above the court is satisfied that the plaintiff must succeed with its claim against the first defendant.

Costs

[67] The costs is as agreed between the parties.

[68] In the premises the following order is made:

1. The Agreement between the parties is cancelled;
2. The first defendant must immediately restore the motor vehicle, a 2012 Nissan NP300 2.5 D DC 4x4 motor vehicle with engine no. YD25422267T and chassis No. ADNCPUD22Z0029038 to the plaintiff and failing compliance therewith within 30 days from date of this order, authorizing and directing the Deputy Sheriff to take the said vehicle into his possession and deliver it to the plaintiff.
3. The amounts paid by the first defendant in terms of the agreement be and are hereby declared forfeited in favour of the plaintiff;
4. First defendant is to pay the costs of the plaintiff on an attorney and client scale.

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M Tommasi

Judge

APPEARANCES:

PLAINTIFF:	M Kuzeeko Of Dr Weder, Kauta & Hoveka, Windhoek
DEFENDANT:	F Kruger (in person), Windhoek