

**REPUBLIC OF NAMIBIA**



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

**JUDGMENT**

Case number: HC-MD-CIV-ACT-CON-2023/03285

In the matter between:

**ENGEN NAMIBIA (PTY) LTD**

**PLAINTIFF**

and

**DENISE CARMEN JENNIFER BILLY**

**FIRST DEFENDANT**

**QUERIDA'S TRADING ENTERPRISES (PTY) LTD**

**SECOND DEFENDANT**

**Neutral citation:** *Engen Namibia (Pty) Ltd v Billy* (HC-MD-CIV-ACT-CON-2023/03285) [2024] NAHCMD 135 (27 March 2024)

**Coram:** DE JAGER AJ

**Heard:** 5 March 2024

**Delivered:** 27 March 2024

**Flynote:** Practice – Summary judgment – Principles restated – First claim for payment of goods sold and delivered and levies payable under a marketing licence agreement which first defendant breached – Second claim for reimbursing plaintiff for discharging first defendant's debt to a third party – Third claim for declaring immovable property executable under a mortgage bond

passed by first defendant in favour of plaintiff over property as security for payment of money that may at any time be or become due and owing to plaintiff arising from any cause whatsoever – Defence that part of claim one prescribed is a bona fide defence – Defence that a notarial deed of lease concluded prior to, and leading to, conclusion of the marketing licence agreement is an agreement contrary to s 23 or 26 of the Competition Act 2 of 2003 and therefore unenforceable considered.

Jurisdiction – Court – Over private law disputes for contraventions of the Act – Depends upon proper construction of the Act – Section 52 does not oust court's jurisdiction, nor reserve jurisdiction exclusively to Competition Commission – Court arguably retained original jurisdiction for such disputes – If procedures under the Act are inadequate, affected person could arguably be allowed to approach court directly dependent on facts and circumstances of case and nature of dispute and relief – Court could arguably hear matter as first instance court even though Commission not approached and Commission did not decide the prohibition was infringed – Court arguably has jurisdiction to declare agreement infringing the Act unenforceable if procedures under the Act are inadequate – Court cannot find claim for N\$7 556 029,74 is unanswerable – On papers before court, if first defendant is correct that the lease contravenes the Act, that could constitute a bona fide defence to the claim for N\$7 556 029,74 – Unnecessary to decide defence that the particulars of claim are possibly technically defective.

No defence against claim for reimbursement – Case made on *negotiorum gestor* or extended *negotiorum gestor* for liquidated amount in money – Reimbursement claim valid and secured by bond – No defence to claim declaring property executable following undisputed reimbursement claim – Plaintiff occupies property – Property not first defendant's primary home or leased to third party as home – Summary judgment granted in part.

**Summary:** The plaintiff claims for summary judgment against the first defendant. The plaintiff's claim is threefold based on three causes of action. The first claim is for payment of several million Namibian dollars for goods sold and delivered and for forecourt levies and quick shop gross monthly turnover levies

payable under a written marketing licence agreement concluded between the plaintiff and the first defendant (the MLA), which the first defendant breached. The second claim is for the reimbursement of N\$133 969 paid by the plaintiff to a third party in respect of the first defendant's debt to NORED for arrear electricity charges incurred by the first defendant at certain immovable property (the property), thereby discharging the first defendant's debt to NORED. The third claim is for an order declaring the property executable under a mortgage bond (the bond) executed by the first defendant in favour of the plaintiff over the property as security for the payment of money that may at any time be or become due and owing to the plaintiff arising from any cause whatsoever. A prescription defence is raised against part of claim one and the plaintiff reduced the amount claimed from N\$9 161 373,28 to N\$7 556 029,74. No defence is raised against the second claim. Two further defences are raised against the first and third claims. The first defence is that a notarial deed of lease (the lease) concluded between the plaintiff and the first defendant prior to, and leading to, the MLA is an agreement contrary to ss 23 and 26 of the Competition Act 2 of 2003 (the Act), and therefore unenforceable. The second defence is that there is a possible technical defect in the particulars of claim as the plaintiff failed to annex to it an interest sheet and interest calculations for the plaintiff's compound interest claim following claim one.

*Held that* to determine the summary judgment application, the court should consider whether, if the lease amounts to 'a prohibition' under s 23 (the Part I prohibition) or s 26 (the Part II prohibition) of the Act, could that constitute a bona fide defence.

*Held that* in principle, where a statute provides remedies for duties created in the statute not existing under the common law, a person is limited to those remedies and may not seek common law remedies in the court, but whether the court has jurisdiction over private law disputes for contraventions of the Act would depend upon a proper construction of the Act.

*Held that* s 52 of the Act does not oust the court's jurisdiction to hear private law disputes for contraventions of the Act, nor does it reserve jurisdiction over such disputes exclusively to the Commission, and the Act does not say that such an

affected person may not approach the court directly for relief. Arguably the court retained its original jurisdiction over such disputes. The only restriction in the Act for a person to approach the court directly is under s 54 if a person suffered damages due to an infringement of the Part I or Part II prohibition and such a person was awarded damages in a consent agreement or if such a person was not awarded damages in a consent agreement, but the Act is silent on what the position would be if such a person did not approach the Commission at all. Arguably the restriction under s 54 does not apply to the first defendant.

*Held that* a person affected by the Part I or Part II prohibition may lodge a complaint with the Commission, and in circumstances where the procedures under the Act are inadequate for the relief required, arguably like in the matter at hand, such a person could arguably be allowed to approach the court directly for appropriate relief and that could arguably depend on the facts and circumstances of the case, the nature of the dispute, and the nature of the relief sought.

*Held that* in an unlawful competition (private law) dispute based on contraventions of the Act, as in the matter at hand, it is arguable that the court could hear the matter as a first instance court even though the affected person, like the first defendant in the matter at hand, did not approach the Commission for relief and the Commission did not decide that the Part I or Part II prohibition was infringed.

*Held that* if the procedures under the Act are inadequate for the relief required, as arguably in the matter at hand, and even though the Act does not expressly say that the Part I or Part II prohibition results in unenforceability or that such agreement is void or can be declared void, it is arguable that the court could have jurisdiction to declare the lease an infringement of the Part I or Part II prohibition and unenforceable.

*Held that* if the lease is threatened due to the alleged contraventions of the Act and the MLA which flows from it is arguably threatened in turn, the first defendant's indebtedness to the plaintiff for N\$7 556 029,74 would not necessarily be extinguished thereby, but if the first defendant is correct that the

lease contravenes the Act, it is arguable that, on the plaintiff's papers now before the court, the plaintiff would not succeed with its claim for N\$7 556 029,74.

*Held that* the court cannot, at this stage of the proceedings, find that the plaintiff's claim for N\$7 556 029,74 is unanswerable, and the court finds that, on the papers now before it, if the first defendant is correct that the lease contravenes the Act, that could constitute a bona fide defence to the claim for N\$7 556 029,74, and whereas the compound interest claim follows the claim for N\$7 556 029,74, the court does not consider the defence that the particulars of claim are possibly technically defective.

*Held that* no defence is raised against the claim for reimbursement of the payment made by the plaintiff to a third party discharging the first defendant's debt to NORED, and the particulars of claim make a case for that claim on the *negotiorum gestor* or the extended *negotiorum gestor* for a liquidated amount in money.

*Held that* the first defendant, who is the registered owner of the property, passed the bond in favour of the plaintiff over the property, and under the bond, the first defendant bound herself for the due and punctual payment to the plaintiff of all monies as were at the time of its execution or may hereafter be owing by the first defendant to the plaintiff from any cause howsoever arising, and as security for the payment of sums of money that may at any time be or become due and owing to the plaintiff arising from any cause whatsoever, the first defendant bound the property as a first mortgage.

*Held that* the plaintiff's claim for reimbursement for having discharged the first defendant's debt to NORED is a valid claim secured under the bond, and the first defendant did not raise any defence to the claim for an order declaring the property executable following the plaintiff's undisputed reimbursement claim.

*Held that* whereas the plaintiff is the bondholder, a nulla bona return is not required, and the first defendant did not present facts and or circumstances in the context of r 108 why the property should not be declared executable. The

relevant circumstances presented by the plaintiff in that regard are undisputed. Moreover, the plaintiff occupies the property, and the property is not the first defendant's primary home, nor is it leased to a third party as a home.

*Held that* the summary judgment application should succeed in part.

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**ORDER**

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1. Summary judgment is granted in favour of the plaintiff against the first defendant for an order in the following terms:

(a) Payment in the amount of N\$133 969.

(b) Payment of simple interest on the amount of N\$133 969 at the prescribed mora rate of 20% per annum from the date of service of the summons (18 July 2020) until the date of payment.

(c) The following immovable property is declared executable:

CERTAIN	Erf No 7502 (Portion of Erf 5679) Ongwediva Extension 13
SITUATE	In the Town of Ongwediva Registration Division 'A' Oshana Region
MEASURING	4220 (four two two zero) square metres
HELD	Under Certificate of Registered Title T2375/2010

(d) Payment of costs of suit as between attorney and client such costs to include the costs of one instructing and one instructed counsel, but for the summary judgment application costs are capped under r 32(11).

2. The first defendant is given leave to defend the remainder of the plaintiff's claims, interest and costs thereon.

3. The parties shall file a further case plan on or before 11 April 2024.

4. The matter is postponed to 17 April 2024 at 08:30 for a further case planning conference.

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## JUDGMENT

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DE JAGER AJ:

### Introduction

[1] The plaintiff seeks summary judgment against the first defendant. The summary judgment application filed of record is for:

(a) Payment of N\$9 161 373,28 together with compound interest on each constituent amount contained in POC3 to the particulars of claim at the prime lending rate from time to time plus 4% per annum from when each constituent amount became due until the date of payment (including interest exceeding N\$75 000 per month for 21 May 2022 to 21 November 2022).

(b) Payment of N\$133 969 together with simple interest thereon at 20% per annum from service of the summons to date of payment.

(c) Declaring certain immovable property executable.

(d) Costs on an attorney own client scale, including costs of one instructing and one instructed counsel.

[2] No relief is sought against the second defendant, who was cited in so far as it may have an interest in the matter.

[3] For the summary judgment application, costs more than that provided in High Court r 32(11) are not sought.

[4] The summary judgment application is opposed on the basis that the first defendant has a bona fide defence. There are no procedural issues (technical defences) regarding the summary judgment application.

### The claims

[5] Apart from interest and costs, the plaintiff has three claims based on three causes of action. The first claim for N\$9 161 373,28 is based on breach of contract. The second claim for N\$133 969, a liquidated amount in money, is based on delict, the *negotiorum gestor* or extended *negotiorum gestor*. The third claim for declaring certain immovable property executable is based on a mortgage bond. The particulars of the claims are as follows, most of which are not disputed in the affidavit resisting summary judgment.

[6] The first defendant is the registered owner of the immovable property sought to be declared executable (the property).

[7] In November 2011, the plaintiff and the first defendant concluded a notarial deed of lease over the property (the lease), which was registered against the property's title in December 2011.

[8] Some of the terms of the lease relied on are as follows. The first defendant lets the property to the plaintiff. The lease shall commence on 14 December 2011. The tenancy shall remain in force for a period, including the initial period of 15 years from the streaming date, and expire upon the expiry date of the initial period. The plaintiff is entitled to sublet the property, give up occupation, or appoint a licensee to conduct certain business at the property without the first defendant's consent and without reference to her. The plaintiff shall remain liable to the first defendant for its obligations. The plaintiff shall offer the first defendant the first opportunity either to be appointed as the licensee or to nominate a proposed dealer to be appointed as the licensee who shall comply with the plaintiff's standard appointment criteria, agree to pay the rental and licence fees under the plaintiff's policies and enter into the plaintiff's



standard marketing licence agreement and/or other standard documentation required in the plaintiff's sole discretion.

[9] The plaintiff complied with its obligations under the lease. The plaintiff currently occupies the property, and it offered the first defendant the first opportunity to be appointed as the licensee for the business at the property.

[10] In November 2012, and in accordance with clause 10.3 of the lease,<sup>1</sup> the plaintiff and the first defendant concluded a written marketing licence agreement (the MLA). The court concludes from the undisputed facts that the first defendant accepted the plaintiff's offer to be appointed as the licensee, hence the conclusion of the MLA.

[11] Some of the terms of the MLA relied on are as follows. The plaintiff granted the first defendant a licence to market and sell the plaintiff's products under its licence at the property subject to the MLA. In consideration for the licence, the first defendant agreed to pay the plaintiff a monthly licence fee comprising a forecourt levy and a quick shop gross monthly turnover levy payable on or before the fifth business day of the following month. The first defendant shall always maintain adequate stock of the plaintiff's products at the property. The first defendant shall purchase the plaintiff's products from the plaintiff in cash or another method as the plaintiff may agree in writing. Failure to pay for delivered products shall entitle the plaintiff to cease making deliveries until outstanding amounts are paid or arrangements for deferred payments are concluded, and failure to comply with any provision of that subclause shall entitle the plaintiff to cancel the MLA forthwith. If the MLA is terminated under clause 16 thereof, the first defendant shall immediately repay any outstanding

<sup>1</sup> 10.2 The Lessee shall be entitled to sub-let the Premises (or any portion thereof) or to give up occupation or possession of the Premises (or any portion thereof), or to appoint a licensee to conduct the Business without the Lessor's consent and without reference to the Lessor. However, the Lessee shall remain liable to the Lessor for the obligations undertaken by it in terms of the provisions of this agreement.

10.3 Notwithstanding the provisions of clause 10.2 above the Lessee shall, subject to the proviso hereunder, offer the Lessor the first opportunity either to be appointed as the Licensee in respect of the Business on the Premises or, alternatively, to nominate the Proposed Dealer so to be appointed as the Licensee. Any such appointment shall however be subject to the specific understanding that the Lessor or the Proposed Dealer, as the case may be, shall comply in all respects with the Lessee's standard criteria in respect of the appointment of licensees, shall agree to pay the rental and/or license fees in terms of the Lessee's policies and enter into the Lessee's standard Marketing License Agreement and/or any other standard documentation which may, in the sole discretion of the Lessee, be required under the circumstances.

amount on which interest at 4% above the ruling prime bank overdraft rate of a leading commercial bank in the country, as published from time to time, shall be recoverable without demand. A certificate on the plaintiff's stationery, signed by a director or senior manager of the plaintiff, constitutes prima facie proof of the existence of the debt and the amount of the first defendant's indebtedness. Amongst others, if the first defendant fails to pay any amount due under the MLA on the due date and if the first defendant breaches any material term of the MLA, the plaintiff shall be entitled to forthwith terminate the MLA by notice in writing.

[12] The plaintiff supplied the first defendant with products. The first defendant breached the MLA as she failed to timely pay various amounts due thereunder on their due dates. The amount of N\$9 161 373,28 consists of petrol, lubricants and diesel sold and delivered by the plaintiff to the first defendant, forecourt levies and quick shop gross monthly turnover levies due and payable by the first defendant to the plaintiff. POC3 to the particulars of claim lists the invoices issued to the first defendant and their respective due dates in the grand total of N\$9 161 373,28. POC4 to the particulars of claim is a copy of a certificate of indebtedness on the plaintiff's stationery signed by the plaintiff's managing director confirming the grand total amount. The first defendant furthermore breached the MLA as she failed to continuously maintain adequate stock of the plaintiff's products at the property.

[13] The plaintiff cancelled the MLA on 13 April 2022 due to the first defendant's continued breaches. Despite demand, N\$9 161 373,28 remains due and owing, and the first defendant is indebted to the plaintiff in that amount which she fails, neglects and/or refuses to pay.

[14] In May 2022, the parties concluded a written deed of settlement under another case number, whereby, amongst others, the plaintiff waived its claim for interest to the value of N\$75 000 per month from 21 May 2022 to 21 November 2022.

[15] Under the MLA, the first defendant is liable for the electricity she consumes at the property. As of 7 May 2022, the arrear electricity charges owed

to NORED on the property are N\$133 969. POC6 to the particulars of claim reflects those outstanding electricity charges.

[16] On 20 May 2023, and in line with the deed of settlement referred to above, the plaintiff handed the property over to a third party for it to conduct the business at the property. The third party settled the outstanding electricity charges to NORED as the electricity to the property was cut and the third party required electricity to trade from the property.

[17] On 7 June 2023, the plaintiff reimbursed the third party for the electricity paid by it to NORED. Proof of the reimbursement is annexed to the particulars of claim as POC7A, and the subsequent invoice by the third party to the plaintiff for the payment is annexed as POC7B. In so paying, the plaintiff had the bona fide intention to benefit the first defendant, unaware of the payment. The payment benefitted the first defendant as her debt to NORED became discharged, and the plaintiff always intended to be recompensated for its payment. Through that payment, the first defendant was unduly enriched at the plaintiff's expense for N\$133 969.

[18] The plaintiff is the holder of a mortgage bond executed by the first defendant in favour of the plaintiff (the bond). The first defendant bound herself for the due and punctual payment to the plaintiff of all monies as were at the time of the bond's execution or may thereafter become owing by the first defendant to the plaintiff from any cause, howsoever arising.

[19] Some of the terms of the bond relied on are as follows. As security for the payment of the capital amount and additional sum contained in the bond and all other sums of money claimable under the bond or that may at any time be or become due and owing to the plaintiff arising from any cause whatsoever and for the due performance of the conditions of the bond, the first defendant bound the property as a first mortgage. All amounts payable under the bond shall be paid on demand. The plaintiff may charge interest on any amount not paid at the maximum permissible rate in Namibia. The first defendant shall pay all legal expenses in suing for recovery of any money claimable under the bond, including costs between attorney and client. In the event of a default stipulated

in the bond, including failing punctually to pay, at the option of the plaintiff, any sum whatsoever owing by the first defendant to the plaintiff shall be considered as legally claimable and due forthwith without notice and without having been specially placed in default by reason of such failure. A certificate signed by any manager or accountant of the plaintiff or any person acting in any such capacity showing the amount owing shall be sufficient and satisfactory proof for the purpose of obtaining summary judgment under the bond and it shall rest with the first defendant to prove that such amount is not owing.

[20] The first defendant was informed of the plaintiff's intention to seek an order declaring the property executable under r 108(2), and the plaintiff's notice under r 108(2)(a) is annexed to the particulars of claim. The first defendant was invited to place relevant facts and/or circumstances before the court to show why the property should not be declared executable simultaneously with judgment. The relevant circumstances provided by the plaintiff are as follows. The first defendant's indebtedness to the plaintiff is substantial. No alternative reasonable means exist through which the first defendant can satisfy the debt other than declaring the property executable. The first defendant specifically hypothecated the property to the plaintiff as security for her indebtedness. The property is a commercial premises occupied by the plaintiff. The property is not the primary home of the first defendant, nor is it leased to a third party as a home.

#### The defences

[21] The court now turns to the defences raised in the affidavit resisting summary judgment.

[22] For the claim of N\$9 161 373,28, the first defendant says all claims prior to 18 July 2020, when the summons was served, prescribed. The plaintiff, in response, prays that the amount of N\$9 161 373,28 be substituted with the amount of N\$7 556 029,74. POC3 to the particulars of claim, which is a statement setting out, amongst others, the invoices issued to the first defendant, the invoice numbers, the invoice dates and amounts due by the first defendant, was reproduced as an attachment to the plaintiff's heads of argument with the

alleged prescribed amounts to be subtracted from the grand total of N\$9 161 373,28 highlighted in colour, showing a substitute grand total of N\$7 556 029,74. The defendant did not take issue with the reproduced POC3 or the substituted amount but says the question remains whether she has a bona fide defence to the remaining claim for N\$7 556 029,74.

[23] Apart from the prescription defence, the affidavit resisting summary judgment raises the following two further defences.

[24] Firstly, the lease is an agreement contrary to s 23 of the Competition Act 2 of 2003 (the Act). For that defence, the affidavit resisting summary judgment provides the following particulars.

(a) The lease is an agreement between parties in a vertical relationship. The plaintiff is a supplier of the first defendant. The lease's object was to prevent and substantially lessen competition in the trade of fuel and related products in the north of Namibia and to prevent new entrants in the property, not only under the Engen brand but also other brands.

(b) The lease directly fixed the trading conditions for the sale of the property. The lease limited the first defendant's ability to voluntarily sell her property to other players in the market, limited or controlled the free property market, and hampered development and investment in the area.

(c) The plaintiff, specifically and with design, applied dissimilar conditions to equivalent transactions to the first defendant than to its other retail outlets. Other traders are only afforded 24 hours to pay for fuel and diesel, and they are not granted credit for such extensive and substantial amounts before a service station is closed.

(d) The plaintiff kept supplying the first defendant until October 2021, when she already defaulted on daily payments for petrol and diesel. The reason is that the plaintiff had a hold over the property under the lease, and the plaintiff wanted to accumulate debt so it could force the first defendant into a sale and sell her property in execution only to 'cover' the debt.

(e) The lease placed the first defendant at a competitive disadvantage in the following ways. In October 2021, the plaintiff terminated the fuel supply. In May 2022, a court order confirmed the deed of settlement to hold back on a sale in execution and allow the first defendant an opportunity to sell the property and pay the debt. During the six months that followed, three bona fide offers were made and none of them materialised. The 'Simon offer' did not materialise despite the offeror proving to be in funds for N\$16 000 000, and the offer was retracted after months of negotiations due to restrictions caused by the lease. The 'Agrippa offer' for N\$14 000 000 followed the same road after months of negotiations as the plaintiff ignored approaches from the first defendant's counsel and the offeror to discuss the terms of a marketing licence agreement. The 'Lucien offer', nominated by the first defendant, was equally not receiving any attention from the plaintiff. Agrippa, having one other Engen service station, and Lucien, being a former Engen finance manager, are both reputable players in the fuel industry and well-known to the plaintiff.

(f) Seeing that, under the lease, the plaintiff remained the lessee for fifteen years and, thereafter, the lease is renewable at the plaintiff's instance for a further five years, during which period the plaintiff still has a right to occupy the property at a market-related rent, any prospective buyer would have an empty shell of the property until 2026 as such buyer would have ownership but would not be able to occupy it without a marketing licence agreement from the plaintiff.

(g) The conclusion of the lease bars other players, including players interested in renting from the plaintiff, from 'commercially' buying the property from the first defendant. All three offerors were satisfied to trade under the Engen brand. The plaintiff held the voluntary sale of the property hostage. If the plaintiff had agreed to enter into a marketing licence agreement with one of the two 'serious buyers', the first defendant would have been able to sell the property and settle the debt by November 2022.

(h) There was no 'commercial' reason for the plaintiff to refuse the offers other than to have their own buyers line up and get the property at forced sale value, which practice fits the provisions of the Act.

(i) The plaintiff does not have a retail petroleum licence and cannot occupy the property itself. If the plaintiff wants the outlet to trade, it must find someone with a licence and allow such a person to rent from it.

[25] The second defence, apart from the prescription defence, relates to the claim for compound interest following the claim for N\$9 161 373,28. The first defendant contends the claim for compound interest is contrary to High Court r 45(5)(c) and (6). The first defendant argues that it should have been set out in an interest sheet annexed to the particulars of claim and the calculations would have been clear to her and the court, and it would have assisted her in pleading to the interest claim. She contends it would have enabled her to better understand the case she must meet, and it would have given 'her judicial oversight' on the interest calculations until the date of summons. The first defendant is considering her position therein as she is advised that she can raise a notice to except as to why the pleading does not contain interest calculations to the date of summons.

[26] The first defendant prays that the summary judgment application be dismissed with costs on an attorney and own client scale under r 32(11) and that the first defendant be granted leave to defend.

#### Principles of summary judgment proceedings

[27] The parties referred to cases on the principles of summary judgment proceedings. Those principles are undisputed. The court highlights the following principles discerned from those cases and from *DI Savino v Nedbank Namibia Ltd*:<sup>2</sup>

(a) Summary judgment is an extraordinary remedy. It results in a final judgment without affording a party the opportunity to be heard at a trial. The court requires strict compliance with the rules. The court grants summary judgment only where the claim is unanswerable.<sup>3</sup>

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<sup>2</sup> *DI Savino v Nedbank Namibia Ltd* 2012 (2) NR 507 (SC).

<sup>3</sup> *Kelnic Construction (Pty) Ltd v Cadilu Fishing (Pty) Ltd* 1998 NR 198 (HC) at 201C-F.

(b) The defendant must set out a bona fide defence. Where the defence is based upon facts whereby material facts in the particulars of claim are disputed or new facts are alleged, the court does not decide those issues to determine where the balance of probabilities lies. The defendant must fully disclose the nature and grounds of the defence and the material facts whereupon it is founded. On the facts disclosed in the affidavit, the defendant must have a defence which is bona fide and good in law. If the court is satisfied with those matters, it must refuse summary judgment. While it is not required of a defendant to exhaustively deal with the facts and the evidence relied upon to substantiate the defence, a defendant must at least disclose a defence and the material facts whereupon it is based with sufficient particularity and completeness to enable the court to decide whether a bona fide defence was disclosed. If an affidavit resisting summary judgment does not meet the requirements of r 60(5), the defect may be cured by reference to other documents properly before the court. The court looks at the matter on all the documents properly before it.<sup>4</sup>

(c) Apart from the foregoing, there is no onus on a defendant.<sup>5</sup>

(d) The court does not determine whether the defendant is correct. It enquires whether a triable and arguable issue with a reasonable possibility that the defendant may succeed at trial was put forward. In other words, if those facts are true, would a defence be established?<sup>6</sup>

(e) Summary judgment is a drastic remedy. The court should be slow to disallow a new point. The defendant may attack the validity of summary judgment on any aspect.<sup>7</sup>

(f) The court cannot exercise its discretion and refuse summary judgment on a hunch that a defence may lurk somewhere in the defendant's allegations. The discretion must be exercised on facts placed before the court.<sup>8</sup>

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<sup>4</sup> *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423.

<sup>5</sup> *Kramp v Rostami* 1998 NR 79 (HC0 at 82C-I).

<sup>6</sup> *DI Savino v Nedbank Namibia Ltd* supra para 26.

<sup>7</sup> *Barminus Rick Kukuri v Social Security Commission* (2016/02512) [2017] NAHCMD 159 (9 June 2017) para 14.

<sup>8</sup> *Moder v Teets t/a Neyer's Garage Nachfolger* 1997 NR 122 (HC) at 125.



### The arguments

[28] The first defendant argues that the plaintiff's claim is based on an unenforceable lease as it is an agreement contrary to ss 23 and 26 of the Act. According to the first defendant, the lease may have an illegal substratum and be void ab initio. She says she can raise a counterclaim which may prevent the sale of her property. In response to the plaintiff's heads of argument, she says public policy encompasses the notion of doing simple justice between individuals and therefore, a court is to declare a contract contrary to public policy only where its enforcement would lead to an improper result and the manifestation of an element of public harm. She, however, does not say that the lease is contrary to public policy, nor does she say so in the affidavit resisting summary judgment. The first defendant's view is that it is not required of her in summary judgment proceedings to do so. She says the depth of the dispute remains to be pleaded. The first defendant argues that the principle *pacta sunt servanda* should bow to the Act as it did, so she says, to Labour and consumer protection legislation, and those modern-day limitations on the principle, a new era of law, setting a new public moral, must be ventilated in courts to set precedents for new modern-day values.

[29] Sections 23 and 26 of the Act read as follows:

'Restrictive practices prohibited

23. (1) Agreements between undertakings, decisions by associations of undertakings or concerted practices by undertakings which have as their object or effect the prevention or substantial lessening of competition in trade in any goods or services in Namibia, or a part of Namibia, are prohibited, unless they are exempt in accordance with the provisions of Part III of this Chapter.

(2) Agreements and concerted practices contemplated in subsection (1), include agreements concluded between -

- (a) parties in a horizontal relationship, being undertakings trading in competition; or
- (b) parties in a vertical relationship, being an undertaking and its suppliers or customers or both.

(3) Without prejudice to the generality of the provisions of subsection (1), that subsection applies in particular to any agreement, decision or concerted practice which

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- (a) directly or indirectly fixes purchase or selling prices or any other trading conditions;
- (b) divides markets by allocating customers, suppliers, areas or specific types of goods or services;
- (c) involves collusive tendering;
- (d) involves a practice of minimum resale price maintenance;
- (e) limits or controls production, market outlets or access, technical development or investment;
- (f) applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (g) makes the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject of the contracts.

(4) Paragraph (d) of subsection (3) does not prevent a supplier or producer of goods or services from recommending a resale price to a reseller of the goods or a provider of the service, provided -

- (a) it is expressly stipulated by the supplier or producer to the reseller or provider that the recommended price is not binding; and
- (b) if any product, or any document or thing relating to any product or service, bears a price affixed or applied by the supplier or producer, the words "recommended price" appear next to the price so affixed or applied.

(5) It is presumed that an agreement or a concerted practice of the nature prohibited by subsection (1) exists between two or more undertakings if -

- (a) any one of the undertakings owns a significant interest in the other or they have at least one director or one substantial shareholder in common; and
- (b) any combination of the undertakings engages in any of the practices mentioned in subsection (3).

(6) The presumption created by subsection (5) may be rebutted if an undertaking or a director or shareholder concerned establishes that a reasonable basis exists to conclude that any practice in which any of the undertakings engaged was a normal commercial response to conditions prevailing in the market.

(7) For the purposes of subsection (5), "director" includes -

- (a) a director of a company as defined in the Companies Act, 1973 (Act No. 61 of 1973);
- (b) a member of a close corporation as defined in the Close Corporations Act, 1988 (Act No. 26 of 1988);
- (c) a trustee of a trust; or
- (d) in relation to an undertaking conducted by an individual or a partnership, the owner of the undertaking or a partner of the partnership.

(8) Subsection (1) does not apply in respect of an agreement entered into between, or a practice engaged in by -

- (a) a company and its wholly owned subsidiary, as contemplated in section 1 of the Companies Act, 1973, or a wholly owned subsidiary of that subsidiary company; or
- (b) undertakings other than companies, each of which is owned or controlled by the same person or persons.'

'Abuse of dominant position

26. (1) Any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market in Namibia, or a part of Namibia, is prohibited.

(2) Without prejudice to the generality of subsection (1), abuse of a dominant position includes -

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting or restricting production, market outlets or market access, investment, technical development or technological progress;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties; and
- (d) making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject-matter of the contracts.'

[30] The plaintiff argues that the first defendant makes sweeping, vague and unsubstantiated allegations, she is grasping at straws, and the defence is contrived and raised as an afterthought to avoid summary judgment. It argues

that for the period 2011 (when the lease was concluded) to December 2023 (when the affidavit resisting summary judgment was filed), the first defendant never alleged that the lease contravened the Act, and she never submitted a complaint to the Competition Commission (the Commission). The plaintiff contends the first defendant failed to state in the affidavit resisting summary judgment what the effect of the alleged contravention would be on the plaintiff's claim for payment. According to the plaintiff, there would be no effect as the Act does not provide that such agreement is void or that it can be declared void, and it certainly does not provide that debts incurred under such agreement need not be paid. The plaintiff argues that after an investigation under ss 33 to 35 of the Act, the Commission may propose to make a decision under s 36, and following representations under ss 36 and 37, the Commission may institute proceedings in the court for the relief set out in s 38, and none of that relief would extinguish the first defendant's indebtedness to the plaintiff.

[31] Section 38 of the Act reads as follows:

'Action following investigation

38. After consideration of any written representations made in terms of section 36(2)(c) (i) and of any matters raised at a conference held in accordance with section 37, the Commission may institute proceedings in the Court against the undertaking or undertakings concerned for an order –

- (a) declaring the conduct which is the subject matter of the Commission's investigation, to constitute an infringement of the Part I or the Part II prohibition;
- (b) restraining the undertaking or undertakings from engaging in that conduct;
- (c) directing any action to be taken by the undertaking or undertakings concerned to remedy or reverse the infringement or the effects thereof;
- (d) imposing a pecuniary penalty; or
- (e) granting any other appropriate relief.'

[32] The plaintiff further argues that under s 52 of the Act, the court 'only' has jurisdiction to hear and determine any matter arising from the proceedings instituted in terms of the Act. As a result, so it says, the court cannot grant any relief pursuant to the defence raised even if the matter is referred to trial.

[33] Section 52 of the Act reads as follows:

‘Jurisdiction of court

52. Without prejudice to the powers vested in the Court, the Court has jurisdiction to hear and determine any matter arising from proceedings instituted in terms of this Act.’

[34] According to the plaintiff, the fact that it received three offers but could not clinch a sale does not constitute a defence to the claim for payment. It says there is no authority that the lease is anti-competitive, unlawfully limits her rights or contravenes the Act. It argues that the first defendant could sell the property to whomever she chooses should the plaintiff not exercise its right of pre-emption and provided the third party is bona fide and, if it is sold, ‘huur gaat voor koop’ and the plaintiff is entitled to exercise its existing rights under the lease. It says it is thus no defence that the purchaser will acquire an empty shell. The first defendant freely and voluntarily agreed to the terms of the lease, and *pacta sunt servanda* applies, so it says.

[35] The plaintiff points out that the first defendant received the full rental of N\$1 620 000 in November 2011 for the initial fifteen-year period of the lease. It further points out that the plaintiff settled the second defendant’s loan in the amount of N\$6 888 000 with the Development Bank of Namibia for the development costs of the structures erected on the property when the lease was concluded. It says that, under the bond, the first defendant acknowledged her indebtedness to the plaintiff for those two amounts of money, but those amounts are not the subject matter of the plaintiff’s current claims. The current claims are for the goods sold and delivered and levies payable under the MLA and for reimbursement of the plaintiff discharging the first defendant’s debt to NORED, all of which are also covered by the bond.

[36] According to the plaintiff, the complaint that the first defendant was treated too leniently or more favourably than others is no defence to an admitted indebtedness.

The determination

[37] Other than what is set out above under the heading 'the defences', the allegations in the particulars of claim are undisputed.

[38] Against that undisputed backdrop and the principles of summary judgment proceedings, the court now deals with the defences raised in the affidavit resisting summary judgment, but it also considers new defences raised in the first defendant's heads of argument.<sup>9</sup>

[39] The court firstly deals with the defence that the lease agreement contravenes the Act.

[40] To determine the summary judgment application, the court should consider whether, if the first defendant's allegations are true, could they constitute a bona fide defence. In other words, if the lease amounts to 'a prohibition' under s 23 (the Part I prohibition) or s 26 (the Part II prohibition) of the Act, could that constitute a bona fide defence?

[41] Neither of the parties provided authority to support or oppose the defence that the lease contravenes the Act. The parties' arguments to support or oppose that defence are based on their own submissions in light of the Act's provisions and the documents before the court.

[42] Neethling *Van Heerden-Neethling Unlawful Competition* 2 ed at 15 to 16 deals with the interface between public and private competition law and states that there is 'cohesion or interaction between those two areas of competition law'. Their common object is 'the existence of free and lawful competition'. It is stated that 'one and the same competitive act may in a suitable case give rise to a remedy under both the law of unlawful competition [private law] and the law regarding the maintenance and promotion of competition [public law]'. In a footnote to that statement, it is stated:

'. . . . The respective remedies may, of course, be different. In the case of unlawful competition the remedies are the Aquilian action and the interdict . . . In the case of an infringement of the Competition Act 90 of 1998, an interdict may be granted

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<sup>9</sup> *Barminus Rick Kukuri v Social Security Commission* (2016/02512) [2017] NAHCMD 159 (9 June 2017) para 14.

(a civil court lacks jurisdiction to grant an interdict in competition matters: see s 65(2)(b) of the Act<sup>10</sup>), but the competition authorities are, except for damages awarded in accordance with a consent order . . . not empowered to award damages to persons prejudiced as a result of anti-competitive conduct . . . Be that as it may, a person who has suffered damage as a result of an alleged prohibited practice is only entitled to commence an action for damages in a civil court once the Competition Tribunal or the Competition Appeal Court has found the conduct to be a prohibited practice (s 65(6)(b) of the Act; infra 58-59)<sup>11</sup>

[43] Two examples are provided of that concurrence of remedies, and it is stated that similarly:

‘the transgression of provisions of the Competition Act may simultaneously lead to a remedy in terms of the Act, and to a delictual action for unlawful competition in the form of competition in breach of a statutory duty. Seen in this light, the law regarding the maintenance and promotion of competition may, under certain circumstances, play an important role in the application of the law of unlawful competition.’

[44] The author, amongst others, refers to:

‘Loubser 2000 *Acta Juridica* 191 indeed suggests that the provisions of the Competition Act 89 of 1998 provide a policy framework not only for public competition law, but also for delictual competition actions. Vice versa, Brooks in Neethling (ed) *Unlawful Competition* 134-135 opines that a prior decision by a court that certain conduct constitutes unlawful competition, could serve to convince the relevant administrative body . . . that this anti-competitive conduct should be declared unlawful.’

[45] The author also refers to *Silver Crystal Trading (Pty) Ltd v Namibia Diamond Corporation (Pty) Ltd*<sup>12</sup> regarding the previous South African Maintenance and Promotion of Competition Act 96 of 1979, where the plaintiff sought summary judgment against a defendant for goods sold and delivered and services rendered. In opposition, the defendant averred that it had a counterclaim as the plaintiff’s act in refusing to supply the defendant goods save on a certain condition contravened the provisions of that Act. The court held the

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<sup>10</sup> The Namibian Competition Act does not contain such a provision.

<sup>11</sup> The Namibian Competition Act contains a similar provision to be interpreted in the context of the Namibian Act.

<sup>12</sup> *Silver Crystal Trading (Pty) Ltd v Namibia Diamond Corporation (Pty) Ltd* 1983 (4) SA 884 (D).

act complained of had the effect of interfering with the free conduct of the defendant's trade which impaired its right to attract trade in consequence whereof it suffered damages. The act by which that right was impaired was an act which parliament declared a criminal offence and, therefore, unlawful. In those circumstances, summary judgment was refused.

[46] Considering the Act, what it says and does not say, the book and case law referred to above (in a Namibian context), and on the papers now before the court, the court finds that, if the lease constitutes 'a prohibition' under s 23 (the Part I prohibition) or s 26 (the Part II prohibition) of the Act, it could constitute a bona fide defence to the claim for payment of N\$7 556 029,74.

[47] The court is aware that the Namibian Competition Act 2 of 2003 differs from its South African counterparts referenced in the book above. The court is also mindful that the preceding authority was decided on the basis that the right-impeding act was an act which parliament declared a criminal offence. Therefore, the book and preceding authority are considered with caution and applied only to the extent not precluded by Namibian law.

[48] With that in mind, the court's finding is supported by the following.

[49] The court does not agree with the plaintiff's submissions that under s 52, the court:

'only has jurisdiction to hear and determine any matter arising from the proceedings instituted in terms of this Act, i.e. instituted by the Commission in terms of section 38, after having followed all the preceding procedures.

This Court therefore cannot grant any relief pursuant to this 'defence', even if the matter were referred to trial. This Court is not empowered to embark upon an investigation under the Competition Act.'

[50] In principle, where a statute provides remedies for duties created in the statute not existing under the common law, a person is limited to those remedies and may not seek common law remedies in the court.<sup>13</sup> However,

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<sup>13</sup> J R de Ville *Judicial Review of Administrative Action in South Africa* Revised First ed at 473.



whether the court has jurisdiction over private law disputes for contraventions of the Act would depend upon a proper construction of the Act.

[51] Section 52 of the Act provides that ‘without prejudice to the powers vested’ in the court, it has jurisdiction to hear and determine any matter arising from proceedings instituted in terms of the Act. It does not say ‘only’ as argued by the plaintiff. Article 80(2) of the Namibian Constitution vested the court with original jurisdiction. It states:

‘The High Court shall have original jurisdiction to hear and adjudicate upon all civil disputes and criminal prosecutions, including cases which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder. The High Court shall also have jurisdiction to hear and adjudicate upon appeals from Lower Courts.’

[52] The principle of subsidiarity requires consideration and was dealt with in the majority judgment of *Masule v Prime Minister of the Republic of Namibia and Others*<sup>14</sup> as follows:

[34] The principle has been stated as follows by the South African Constitutional Court in *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) (2015 (12) BCLR 1407; [2015] ZACC 31) para 54 – ‘where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution’.

. . . .

[38] I will further demonstrate why the *Onesmus dictum* should be approached with caution. In Namibia, challenges to unfair dismissals must in the first instance be ventilated through the conciliation and arbitration machinery created by the Labour Act, with only review and appeal jurisdiction vesting in the Labour Court. Similarly, in electoral disputes, the High Court is not the first instance forum in those disputes that the legislature has reserved for magistrates’ courts, styled electoral tribunals. Is it implied that since those legislative measures were not the result of a constitutional amendment, the High Court retains original jurisdiction?

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<sup>14</sup> *Masule v Prime Minister of the Republic of Namibia and Others* 2022 (1) NR 10 (SC) para 34 to 41.

[39] Therefore, unlike Mainga JA, I am not prepared to endorse the view expressed in Onemus without subjecting it to the scrutiny of the subsidiarity principle. In my view, there can be circumstances where the legislature may design dispute resolution mechanisms that litigants must have resort to without approaching the High Court as the first instance forum. Where the legislature makes provision for a dispute resolution machinery which restricts the right of access to the High Court in the first instance, the true test in my view is whether it curtails the right to such extent that it in effect denies the right of access to a competent court guaranteed under art 12(1) of the Constitution.'

[53] Where does that leave the matter at hand?

[54] Section 52 of the Act does not expressly or otherwise oust the court's jurisdiction to hear private law disputes for contraventions of the Act, nor does it reserve jurisdiction over such disputes for the Commission. The Act does not say that such an affected person may not approach the court directly for relief. Arguably the court retained its original jurisdiction over such disputes. If it was the legislature's intention to oust the court's jurisdiction over such disputes, it would have done so. The only restriction in the Act for a person to approach the court directly is under s 54 if a person suffered damages due to an infringement of the Part I or Part II prohibition and such a person was awarded damages in a consent agreement or if such a person was not awarded damages in a consent agreement. The Act is, however, silent on what the position would be if such a person did not approach the Commission at all. Section 54 of the Act, dealing with civil actions and jurisdiction, provides as follows:

'Civil actions and jurisdiction

54. (1) A person who has suffered damage as a result of an infringement of the Part I or the Part II prohibition may not commence an action in any court for an award of damages or for the assessment of damages if that person has been awarded damages in a consent agreement confirmed in accordance with section 40.

(2) If a person who has not been awarded damages in a consent agreement contemplated in subsection (1) institutes proceedings in a court for an award of damages allegedly suffered as a result of an infringement of the Part I or the Part II prohibition, that person must file with the Registrar of the Court or the Clerk of the

Court a notice from the chairperson of the Commission in the prescribed form certifying, either –

(a) that the conduct on which the action is based has been found by the Court, following proceedings instituted by the Commission in terms of section 38, to be an infringement of the Part I or the Part II prohibition, and stating the date of that finding;

or

(b) that a consent agreement was confirmed in accordance with section 40 in relation to the conduct on which the action is based, and that no award for damages is provided for in that agreement for the benefit of the plaintiff, and stating the reasons therefor; or

(c) that, following an investigation by the Commission in accordance with Part IV of Chapter 3 into the conduct on which the action is based, the Commission has decided not to take any action contemplated in section 38, and stating the reasons for the Commission's decision; or

(d) that the Commission, having received a complaint or a request to investigate an alleged infringement of the Part I or the Part II prohibition in respect of the conduct on which the action is based, has in terms of section 33(2) decided not to conduct an investigation, and stating the reasons for the Commission's decision.'

[55] There is no allegation that the first defendant lodged a complaint with the Commission, and it is not the first defendant's case that she suffered damages. Therefore, arguably, the restriction under s 54 does not apply to the first defendant.

[56] A person affected by the Part I or Part II prohibition may lodge a complaint with the Commission, and in circumstances where the procedures under the Act are inadequate for the relief required, arguably like in the matter at hand, such a person could arguably be allowed to approach the court directly for appropriate relief. Whether a person could be allowed to do so could arguably depend on the facts and circumstances of the case, the nature of the dispute, and the nature of the relief sought.

[57] In an unlawful competition (private law) dispute based on a contravention of the Act, as in the matter at hand, it is arguable that the court could hear the matter as a court of first instance even though the affected person, like the first defendant in the matter at hand, did not approach the Commission for relief and the Commission did not decide that the Part I or Part II prohibition was infringed.

[58] A restrictive practice under s 23 (the Part I prohibition) and an abuse of a dominant position under s 26 (the Part II prohibition) are both 'prohibited' under the Act. The first defendant argues the lease is unenforceable and void ab initio because it contravenes ss 23 and 26. The first defendant contends she 'can raise a counterclaim, which may prevent the sale of her property'. She says she might succeed in setting the lease aside and getting a restitution order 'against her'. The particulars on which she bases those conclusions are set out in the affidavit resisting summary judgment. The plaintiff says the Act does not say that the Part I or Part II prohibition results in unenforceability and s 38 does not make provision for an order declaring such an agreement void. The effect of the plaintiff's argument is that the procedures under the Act are inadequate for the relief required by the first defendant. Therefore, even though the Act does not expressly say that the Part I or Part II prohibition results in unenforceability or that such an agreement is void or can be declared void, it is arguable that the court could have jurisdiction to declare the lease an infringement of the Part I or Part II prohibition and unenforceable.

[59] According to the particulars of claim, the MLA was concluded 'in accordance with the provisions of clause 10.3 of the' lease. The plaintiff says its claim for N\$7 556 029,74 is based on the lease and the MLA. The MLA flows from the lease. In other words, had it not been for the lease, the MLA would arguably not exist. If the lease is threatened due to the alleged contraventions of the Act, the existence of the MLA is arguably also threatened. If the MLA is threatened, the first defendant's indebtedness to the plaintiff for N\$7 556 029,74 would not necessarily be extinguished thereby, but if the first defendant is correct that the lease contravenes the Act, it is arguable that, on the plaintiff's papers now before the court, the plaintiff would not succeed with its claim for N\$7 556 029,74.

[60] Yes, the affidavit resisting summary judgment is not a model example affidavit of its sort, but summary judgment remains an extraordinary and drastic remedy reserved for unanswerable cases. The court does not, in the summary judgment application, determine whether the first defendant is correct, but triable and arguable issues are raised. The court cannot, at this stage of the

proceedings, find that the plaintiff's claim for N\$7 556 029,74 is unanswerable and the court finds that, on the papers now before it, if the first defendant is correct that the lease contravenes the Act, that could constitute a bona fide defence to the claim for N\$7 556 029,74.

[61] Whereas the compound interest claim follows the claim for N\$7 556 029,74, the court does not consider the defence that the particulars of claim are possibly technically defective.

[62] No defence is raised against the claim for reimbursement of the payment made by the plaintiff to a third party discharging the first defendant's debt to NORED. The particulars of claim make a case for that claim on the *negotiorum gestor* or the extended *negotiorum gestor* for a liquidated amount in money.

[63] The court now deals with the claim to have the property declared executable.

[64] The first defendant, who is the registered owner of the property, passed the bond in favour of the plaintiff over the property. Under the bond, the first defendant bound herself for the due and punctual payment to the plaintiff 'of all monies as are now or may hereafter be owing by' the first defendant to the plaintiff 'from any cause howsoever arising'. Furthermore, as security for the payment of '. . . all other sums of money . . . that may at any time be or become due and owing' to the plaintiff 'arising from any cause whatsoever', the first defendant bound the property as a first mortgage.

[65] The plaintiff's claim for reimbursement for having discharged the first defendant's debt to NORED is a valid claim secured under the bond.

[66] The first defendant did not raise any defence to the claim to have the property declared executable under the plaintiff's undisputed reimbursement claim.

[67] The plaintiff is the bondholder. As such, the plaintiff does not require a return of any process which may have been issued against the first defendant's

movable property from which it appears that she has insufficient movable property to satisfy the debt as envisaged in r 108(1(a)).

[68] Despite having been invited to do so, the first defendant did not present facts and or circumstances, in the context of r 108, why the property should not be declared executable. The relevant circumstances presented by the plaintiff in that regard are undisputed.

[69] Moreover, the plaintiff occupies the property, the property is not the first defendant's primary home, nor is it leased to a third party as a home.

[70] The court alerted the plaintiff that the bond refers to 'attorney and client costs', not 'attorney and own client costs', as claimed. The plaintiff accepted that.

### Conclusion

[71] It follows that the summary judgment application should succeed in part.

[72] It is ordered that:

1. Summary judgment is granted in favour of the plaintiff against the first defendant for an order in the following terms:

(a) Payment in the amount of N\$133 969.

(b) Payment of simple interest on the amount of N\$133 969 at the prescribed mora rate of 20% per annum from the date of service of the summons (18 July 2020) until the date of payment.

(c) The following immovable property is declared executable:

CERTAIN	Erf No 7502 (Portion of Erf 5679) Ongwediva Extension 13
SITUATE	In the Town of Ongwediva Registration Division 'A' Oshana Region

MEASURING        4220 (four two two zero) square metres  
HELD                Under Certificate of Registered Title T2375/2010

(d) Payment of costs of suit as between attorney and client such costs to include the costs of one instructing and one instructed counsel, but for the summary judgment application costs are capped under r 32(11).

2. The first defendant is given leave to defend the remainder of the plaintiff's claims, interest and costs thereon.

3. The parties shall file a further case plan on or before 11 April 2024.

4. The matter is postponed to 17 April 2024 at 08:30 for a further case planning conference.

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B de Jager  
Acting Judge

APPEARANCES

PLAINTIFF:

G Dicks

Instructed by Ellis & Partners Legal Practitioners

Windhoek

DEFENDANTS:

L S von Bach

Of Leezhel Mouton & Associates Incorporated

Windhoek