REPORTABLE

CASE NO: SA 50/2013

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

WESSEL HENDRIK MOOLMAN	**First Appellant**
MARINDA STELLA MOOLMAN	**Second Appellant**
and	
JEANDRE DEVELOPMENT CC	**Respondent**

Coram: DAMASEB DCJ, SMUTS JA and HOFF AJA

Heard: **05 November 2015**

Delivered: **03 December 2015**

APPEAL JUDGMENT

SMUTS JA (DAMASEB DCJ and HOFF AJA concurring):

[1] The respondent was the plaintiff in the High Court. It instituted an action against the appellants (defendants) for payment of the sum of N$244 572,40 plus interest and costs. An amount of N$228 703,61 was however claimed at the trial. For the sake of convenience, I refer to the parties as in the trial.

Preliminary issues

[2] Before referring to the factual background giving rise to this appeal, there are preliminary issues first to be dealt with.

[3] In the respondent's (plaintiff's) heads of argument three points of non-compliance with the rules of this court are raised. In the first instance, the point is taken that the appellants' (defendants') heads of argument were filed out of time. The point is also taken that the second defendant's power of attorney, due on 16 August 2013 was only filed on 22 August 2013. In the third place, the respondent also contends that the appellants failed to comply with rule 8(3) by not notifying the registrar that security was filed when copies of the record were lodged with the registrar in September 2013. This failure, so the plaintiff contends, results in the appeal being deemed to have been withdrawn under rule 5.

[4] A few days after the heads were filed, an application for condonation was forthcoming from the appellants. Condonation was sought for filing the heads of argument 4 days late and the power of attorney in 2013 which was also 4 court days late. The appellants also sought condonation in the event that this court were to find that there was non-compliance with rule 8(3). But the appellant did not bring a conditional application for re-instatement of the appeal. Mr van Vuuren who appeared for the plaintiff correctly contended that if there were non-compliance with rule 8(3), the appeal would be deemed to be withdrawn and reinstatement would be required which had not been sought – even conditionally. It was,

however contended on behalf of the defendants that there had not been a failure to comply with rule 8(3).

[5] The uncontested background facts relating to security are these. At the time security was to be filed, the parties could not agree on the amount. The defendants had rightly contested the exorbitant amount of N$100 000 demanded on behalf of the plaintiff. The registrar of the High Court was on 3 September 2013 requested to determine the amount of security under rule 8(4). On 16 September 2013, the assistant registrar of the High Court fixed security in the amount of N$19 764. On the very next day, 17 September 2013, the defendants' legal practitioner of record filed a bond of security in that amount with the registrar of this court under cover of a filing notice which was directed to and served on the registrar (and also served on the respondent's legal practitioners) on the same day.

[6] The copies of the record had been timeously lodged at the registrar of the High Court on 30 August 2013 and bearing the date stamp of the registrar of this court on 18 September 2013.

[7] Mr van Vuuren argued that the appellants had failed to comply with rule 8(3), because they had failed to inform the registrar in writing whether they had entered into security or been released from doing so. This subrule provides:

> 'If the execution of a judgment is suspended pending appeal, the appellant shall when copies of the record are lodged with the registrar, inform the registrar in writing whether he or she –

(a) has entered into security in terms of this rule; or

(b) has been released from that obligation, either by virtue of waiver by the respondent or release by the court appealed from, as contemplated in subrule (2).

and failure to inform the registrar accordingly within the period referred to in rule 5 (5) shall be deemed to be failure to comply with the provision of that rule'.

[8] Mr van Vuuren argued that it was insufficient for the appellants to file a bond of security under cover of a filing notice directed to the registrar. He contended that the appellants were required to separately inform the registrar that security had been entered into. Mr van Vuuren sought support for his position in an extract of a judgment of this court in *Shilongo v Church Council of the Evangelical Lutheran Church in Namibia* 2014 (1) NR 166 (SC) where the following was stated:

'[13] Rule 8(3) on the other hand impels the appellant to inform the registrar in writing whether he or she has entered into security or has been released from that obligation. The applicant has not so informed the registrar either. What he did was simply to annex the bond of security to the application for condonation for the late lodging of the record. This is not what the rule requires. As such, it was evidently not complied with.'

[9] This passage is to be seen and understood within the context of the facts of that matter. There the record had been lodged hopelessly out of time – more than two and a half months late. Security was filed on the same day as the record was lodged. Condonation was sought for these failures and yet another failure to comply with the rules. But no application was made for reinstatement, as would be

required because the failure to lodge the record in compliance with rule 5(5) and to inform the registrar of the position of security. These failures had the consequence in that matter of the appeal lapsing.

[10] The facts in *Shilongo* are clearly distinguishable from those in this matter. In this matter the record was lodged in time, as was the bond of security, under cover of a filing notice directed to the registrar. Mr van Vuuren argued that this did not comply with the rule as the registrar had not been informed by notice in terms of rule 8(3) as the wording of the filing notice did not expressly inform the registrar whether security had been entered into or not or was not necessary. This, even though the filing notice under the heading of this case and directed to the registrar stated:

> 'Kindly take notice that the following document is filed herewith:
> BOND OF SECURITY.'

Attached to this filing notice was the bond of security in the required amount.

[11] Mr van Vuuren contends that this does not strictly comply with rule 8(3) because it does not follow the wording of rule 8(3). But it clearly conveys what the subrule requires – apprising the registrar as to the status of security. Indeed, it could hardly be clearer in doing so. It states that security in the required amount had been entered into and attached the bond. The purpose of the rule is after all to apprise the registrar whether an appeal is proceeding and whether the requisites

relating to security had been met. The defendants as appellants plainly did so in the filing notice with its attachment, even if the wording of the rule had not been slavishly followed to the letter in the filing notice. But that would have served no purpose at all as a statement about being released from security would obviously not arise. The overall purpose of the subrule had been unequivocally served. The rules of this court are to be understood conceptually and contextually.

[12] What Mr van Vuuren suggests should have occurred is plainly pointless. This point taking can only be described as an exercise in sterile formalism which is to be deprecated. It is an attempt in vain to elevate form over substance and serves only to result in the incurrence of unnecessary costs and a wastage of the time of this court.

[13] As to the late filing of heads of argument and the power of attorney in September 2013, these were both four court days late. In the exercise of my discretion, I would grant condonation for these non-compliances. I would do so because of the short time period involved and the lack of resultant prejudice and convenience to the court and the respondent.

[14] I now turn to the factual background to this appeal.

Factual background

[15] The plaintiff based its claim upon an oral agreement between the parties concluded in May 2007. The agreement concerned the construction of the defendants' residential dwelling in Mariental.

[16] The plaintiff is in the business of property development and has accounts with local building suppliers in Mariental. In essence, the plaintiff claims that, in terms of the oral agreement, it would facilitate the construction of the defendants' dwelling by permitting the defendants to purchase goods and materials on its accounts with the suppliers. A further term of the oral agreement contended for was that the plaintiff would recommend builders to the defendants and that the selected builder would likewise submit his invoices to the plaintiff for payment for the services rendered in constructing the defendants' dwelling. The plaintiff further contended that it would settle the invoices of suppliers and of the builder on behalf of the defendants and that the defendants would ultimately be liable to reimburse the plaintiff.

[17] Although not pleaded in the particulars of claim, the underlying reason for this arrangement emerged as common cause in evidence. The defendants were not in a position to fund the construction of the dwelling. They needed to obtain a home loan from a commercial bank. It was common cause that the defendants would not qualify for a home loan to cover all the costs from a commercial bank as owner builders. To qualify for loan financing, it was necessary for an owner wanting to erect a dwelling to engage a recognised building contractor or developer, registered with the different commercial banks, to construct the

dwelling. In the absence of doing so, the defendants as owner-builders would need to pay a significant portion as a deposit for a home loan. (An earlier application by the defendants as owner builders to Bank Windhoek Limited was met with a response requiring a significant portion to be self-funded which the defendants were not in a position to do.) It also emerged as common cause that the parties agreed that the plaintiff would provide a quotation for the construction of the defendants' house to the defendants for the purpose of supporting an application for a home loan with one of the commercial banks. In this case, it was First National Bank Limited (FNB) to which the application for a home loan was directed and which granted that home loan on the strength of the plaintiff's quotation to the defendants. This was because the plaintiff was registered as a building contractor or developer with the bank in question.

[18] The plaintiff pleaded that in terms of the oral agreement, the defendants would ultimately be liable for all invoices it paid on their behalf. It was further alleged in the particulars of claim that the construction works were completed in January 2009 and that the defendants' account for building supplies and services paid for by the plaintiff amounted to N$729 354,80. It further emerged as common cause that the defendants had paid the total amount of N$484 782,40 to the plaintiff, leaving the balance of N$244 572,40 claimed in the action. At the trial, it was the plaintiff's case that the total amount expended on behalf of the defendants was N$713 480,01 and the amount claimed was N$228 702,61.

[19] The plaintiff also claimed that amount on three alternative bases. The first and third alternatives are based on unjust enrichment. The second alternative claim is for recompensement of the sum on the basis that the plaintiff incurred liability to various creditors of the defendants in that sum and that the defendants benefited from their debts being discharged and were liable to recompense the plaintiff in that sum.

[20] The defendants' defence was, shortly stated, that they had concluded a written agreement comprising their acceptance of the plaintiff's written quotation in the sum of N$500 000. They consequently pleaded that they were not liable for any amount in excess of the sum contained in the quotation. Their plea also stated that the plaintiff was to build the house pursuant to this agreement and that they were not involved in its construction. They denied owing the plaintiff any money at all.

The evidence

[21] At the trial, the plaintiff's sole member, a Mr Fourie, testified that the terms of the oral agreement were in accordance with what was pleaded in the particulars of claim. He further confirmed that he had prepared the quotation (in the sum of N$500 000) for the sole purpose of enabling the defendants to obtain a home loan from their bank. He accepted in cross-examination that, in the absence of the quotation, they would not have qualified for a home loan as owner builders and that they needed a quotation from a registered contractor or developer for that purpose. He further testified that he merely recommended a builder and

occasionally provided some advice and had not attended to the construction of the house as a developer or contractor, as the quotation clearly contemplated.

[22] In his evidence, Mr Fourie aptly described his role as one of facilitating the securing of a home loan which would then be paid to the plaintiff upon completion of the building project. Pursuant to this arrangement, the plaintiff would settle invoices of suppliers as well as the builder's invoices and would be reimbursed from the proceeds of the home loan. Mr Fourie thus referred to the nature of the relationship as a 'facilitation agreement'. But he contended that the defendants would be liable for the full amount of all invoices paid on their behalf – whether or not the initial home loan covered those expenses. He did not explain the plaintiff's counter presentation for this facilitating role, but said that the plaintiff made no profit or mark-up on the amounts paid on behalf of the defendants and also did not charge them a consulting fee. Mr Fourie also said that he was not a close friend of the defendants. But he was not pressed on the plaintiff's counter presentation – an issue I turn to below.

[23] It also emerged as common cause that when the pens were being set out for the construction of the steel structure for the dwelling, the defendants instructed the steel contractor to increase the size of the house to a significant extent. It was also common cause that the defendants' original sketch plan of the dwelling had formed the basis for the preparation of the plaintiff's quotation. The plaintiff's Mr Fourie also testified that there were a number of other amendments to the original sketch plan (in addition to enlarging the steel structure and thus the

size of the house). These all constituted additional work and resulted in expenditure and had been at the instance of the defendants.

[24] Mr Fourie gave evidence that the plaintiff received the sum of N$484 782,40 from FNB on behalf of the defendants (from the home loan). But he said the actual amount paid by the plaintiff on their behalf totalled N$713 486,01. He also stated - and was supported by the evidence of the bank's valuer - that the total value of the dwelling well exceeded the total sum the plaintiff had dispersed on behalf of the defendants for its construction. Mr Fourie pointed out that the defendants had obtained two further loans from FNB, presumably to finance the additional costs, but said that they had failed to pay the plaintiff the full amount paid on their behalf.

[25] Mr Fourie's account of the contractual relationship between the parties was corroborated by evidence given by the suppliers and builders who had been involved in the project. Their testimony was to the effect that the supplies were at the instance of the defendants who had selected the items and that the invoices were submitted to and paid by the plaintiff. The plaintiff had not been involved in selecting, securing and ordering supplies except in the sense of making available its open and running accounts with suppliers for that purpose. The invoices (directed to the plaintiff) specified that the items were supplied to the defendants. The builders testified that they had acted on the defendants' instructions throughout. The evidence of the suppliers and builders was not disturbed in material respects in cross-examination.

[26] In the course of his evidence-in-chief, Mr Fourie, stated that he is a registered accountant and explained that an invoice was to be directed to the plaintiff (in its name) 'for VAT (value-added tax) purposes'. He also said that the arrangement with the defendants in facilitating their bond and making payments on their behalf was 'the same transaction' he did with the Steyns.

[27] The plaintiff also called Ms A Steyn, also from Mariental, to give evidence. Ms Steyn testified that she and her husband as owner builders had entered into a similar 'facilitation agreement' with the plaintiff in terms whereof the plaintiff provided them with a quotation for the construction of their home for the purpose of obtaining a home loan from their bank, even though it was neither the plaintiff's nor their intention that the plaintiff would build their home. A home loan was obtained on the strength of this quotation and in accordance with this arrangement. She said that the invoices were directed to the plaintiff which paid for supplies. The builder had been supervised by Mr and Mrs Steyn and the plaintiff was reimbursed for its payments through the proceeds of their home loan. Ms Steyn testified that the plaintiff made no profit or mark-up on the supplies, but said that the plaintiff 'received the VAT due on the accounts'. The invoices were in the name of the plaintiff which meant that they could conceivably be utilised and claimed as input tax by the plaintiff in accordance with the Value-Added Tax Act 10 of 2000 (the VAT Act).

[28] The defendants both gave evidence. They testified that the plaintiff's quotation was utilised in their application in order to qualify for a home loan and confirmed that it was necessary for a registered contractor or developer to provide such a quotation so as to succeed with that application. This had also been put to Mr Fourie by defendants' counsel in cross-examination. Defendants' counsel also put to Mr Fourie in cross-examination that this amounted to deceiving FNB and that the agreement was unenforceable because it was based upon a fraud on FNB. Plaintiff's counsel however objected to this line of questioning on the grounds that the issue was not pleaded. It is entirely correct that a defence of unenforceability of a contract is to be properly pleaded.[1] It was however open to the trial court to have pursued the issue as courts may *mero motu* decline to enforce an agreement which is against public policy or is illegal, as is further explained below. But the defendants' evidence diverged from the plaintiff's from that point onwards. The defendants stated that their acceptance of the quotation constituted a building contract between themselves and the plaintiff and that they were only liable for the sum of N$484 782,40 which they paid. They denied being liable for any further amounts and stated that they had contracted with the plaintiff to construct the dwelling for that sum.

[29] In the course of cross-examination, the first defendant accepted that the plans had changed in several respects after the quotation had been provided. These changes included increasing the size of the house. He accepted that the construction costs would significantly increase as a consequence. The first

[1] Wasmuth v Jacobs 1987 (4) SA 614 (SWA).

defendant was obliged to concede that during the construction process the defendants had given instructions to the builders and had very regularly attended at the site. The defendants also accepted that they had attended to the purchasing of the materials and supplies as well as the installation of certain items.

[30] The defendants confirmed taking out further loans from the bank and did not essentially dispute that the plaintiff had paid the total amount of N$713 486,01 for the project and that this was for their benefit. The defendants conceded that they had not obtained any revised quotations from the plaintiff in the course of the construction work, despite the fact that the amended plans resulted in additional work on their instructions. The defendants also did not dispute that there had been increased costs and, as owners of the dwelling, they had benefited from the incurrence of those costs. The defendants also failed to explain the difference between the amount paid by them (N$484 782,40) and the amount of N$480 000 which they said was payable by them under the quotation.

[31] The defendants also called the manager of the Mariental branch of FNB, Mr G Louw. He testified that FNB as well as other commercial banks would not grant home loans to owner builders to the extent as occurred in this matter. An owner would instead need to engage a recognised building contractor or developer, registered with the bank, to undertake the building works in order to qualify for such a home loan. He testified that this requirement is consistently applied. He categorically stated that in this instance, his bank would not have granted a home loan to the defendants to construct their own dwelling as owner builders and that a

registered developer, such as the plaintiff, would need to be engaged by them to construct their dwelling in order to qualify for a home loan. The developer would be paid for the construction work after their completion and upon approval by a bank valuator certifying the due completion of the work. Mr Louw's evidence on these aspects was not disturbed in cross-examination. It was also corroborated by the bank's valuator who confirmed the requirement of a quotation from a building contractor in order to qualify for a home loan if an owner wanted to erect a dwelling.

The approach of the trial court

[32] The High Court rejected the defendants' evidence that the quotation constituted the agreement between the parties (that the plaintiff would construct a house at that price). The court below did so on the basis that the defendants had not signed the quotation.

[33] As to the conflicting testimony on behalf of the plaintiff on the one hand and that of the defendants on the other, the High Court essentially found in favour of the plaintiff and rejected the account of the defendants where it conflicted with the plaintiff's case. The court did so after carefully analysing the evidence not only of Mr Fourie but also of the suppliers and builders who were called by the plaintiff. The court found that their evidence corroborated that of Mr Fourie and also accorded with the probabilities. The court found that the defendants' version was riddled with inconsistencies and was not credible.

[34] The trial court found that the plaintiff had prepared its quotation for the purpose of enabling the defendants to obtain a home loan from FNB and that the bank would otherwise not have granted the loan to the defendants in the absence of a registered developer agreeing to undertake the building project as per the quotation. The court found that, in order to reduce costs for the defendants, the parties agreed that the defendants would themselves build their house and that the plaintiff would assist them by providing the quotation to 'facilitate' the loan and attend to the payment of all invoices from suppliers and the builders to be paid from the proceeds of the home loan. The court acknowledged that the agreement between the parties differed from the terms of the letter of undertaking received by the plaintiff from the bank pursuant to the home loan. That letter of undertaking also referred to the sum of N$400 000 being held at the disposal of the plaintiff which would be paid upon completion of the dwelling.

[35] The trial court found that the underhand agreement between the parties was to the effect that the plaintiff would assist the defendants in the enterprise of building their home and not make a profit at their expense, in order to assist them to save costs but that they would be liable for the payments made by the plaintiff on their behalf.

[36] The court concluded that an agreement to this effect between the parties was enforceable and found that the defendants were liable to make payment of the balance of N$228 703,61 to the plaintiff.

The appeal

[37] In the defendants' heads of argument, the point was taken that the agreement contended for by the plaintiff, being based upon deceiving FNB, was unenforceable as being against public policy and that its claim should have failed in the High Court. It was also argued that the defendants' version should in any event be preferred and that the appeal should also succeed for that reason.

[38] In the plaintiff's heads of argument, the aspect of unenforceability of the agreement was not dealt with except by responding that the issue had not been pleaded and that the defendants' were obliged to do so if they wanted to rely on the issue. The merits of the point were surprisingly not addressed.

[39] At the instance of the court, the parties were then notified three weeks in advance of the hearing of the appeal that supplementary written argument (as well as oral argument at the hearing) was invited on the following questions:

> '1. Is the agreement contended for by the respondent unenforceable by reason of being against public policy in that the appellants and respondent entered an agreement to induce First National Bank to advance a loan secured by a mortgage bond which would not have occurred if the true nature of the agreement had been disclosed to that bank? If so, argument is invited on the consequences of unenforceability of the agreement including whether the respondent established enrichment and its extent.
>
> 2. In so far as the respondent may have claimed the invoices paid by the respondent as part of the contractual scheme as input tax for VAT purposes, what taxable supply as contemplated by the VAT Act, 2000 did

> the respondent engage in to which the invoices were directly connected, given the fact he said he did not charge a consultancy or similar type of fee and given the definition of taxable activity involving the supply of goods or services for consideration? In the absence of a taxable supply, by claiming such invoices as input VAT, would this be in conflict with s 18 (read with s 4 and the definition sections) of the VAT Act, 2000? If so, what would the consequences be for the agreement as contended for by the plaintiff?'

[40] The second question was included by reason of Mr Fourie's statement in evidence that he had requested an invoice to be in the plaintiff's name 'for VAT purposes' and Ms Steyn's evidence – that the plaintiff had 'received VAT due on the accounts' paid by the plaintiff on their behalf. This latter evidence was elicited by plaintiff's counsel in response to a question as to whether the plaintiff made a profit in the context of her evidence of a similar transaction with the plaintiff as that of the defendants. That was the purpose of her testimony, having been called by the plaintiff to support its version of the arrangement with the defendants. It also followed Mr Fourie's unqualified statement that the 'transaction' with the Steyns was the same as that with the defendants. Ms Steyn proceeded to elaborate by stating that there was no mark-up added by the plaintiff in respect of the invoices paid for building supplies (paid by the plaintiff on behalf of the Steyns). Ms Steyn's evidence was essentially that the plaintiff's counter-presentation for facilitating their home loan and making payments of invoices was that it would receive a VAT benefit for doing so. Ms Steyn's statement is also to be considered in the context of his evidence: his unqualified statement that invoices were to be in the plaintiff's name 'for VAT purposes' and that the plaintiff charged no consultancy fee, nor did it 'mark-up' the prices of supplies on the invoices paid by it.

[41] There was also no indication in the plaintiff's evidence of a taxable supply as contemplated by the VAT Act on the part of the plaintiff directly connected to deducting or claiming VAT on the invoices as input tax. On the contrary, the evidence pointed against a taxable supply, given the lack of any consideration in any proper sense.

[42] The import of the second question related to the principles underlying the imposition of VAT within the context of the provisions of the VAT Act. The nature of VAT is a tax on the value added by each vendor or supplier in the production or distribution chain. VAT is imposed as a tax each time a taxable supply of goods or services takes place except when it is zero-rated or exempt from VAT.[2] VAT is thus to be charged on every taxable supply made by a person registered for VAT in terms of s 6(1) of the VAT Act subject to the exceptions referred to. A taxable supply is defined to mean 'any supply of goods or services in the furtherance of a taxable activity . . . .'[3]

[43] Taxable activity is in turn widely defined in s 4 as including any activity carried on continuously or regularly in Namibia which involves the supply of goods or services for consideration. Consideration also has a wide definition, meaning 'the total amount in money or kind paid or payable . . . for the supply . . . by a person, including any duties, levies, fees and charges (other than tax) . . . paid or

[2]De Koker v Kruger*: Value-Added Tax in South Africa: Commentary* (updated loose leaf bundle, first published 2004) at 2-1.

[3]Section 1.

payable on, or by reason of, the supply reduced by price discounts or rebates allowed and accounted for at the time of supply . . .'[4]. (Emphasis supplied.) The VAT imposed by every registered person on the supply of goods or services is known as output tax. The actual tax payable by a registered person is calculated under s 18 as the total amount of output tax less the total amount of input tax. A registered person is thus entitled to deduct any input incurred by or charged to it. Where an activity is zero-rated, there is no output tax charged on that activity and payable by a registered person in respect of it.

[44] In order to claim input VAT, it would need to be in respect of taxable supplies, as defined, made to the registered person – essentially meaning the activity of supplying goods or services for consideration.

[45] In the absence of a consideration, there would be no taxable supply on the part of the plaintiff to charge output tax from which input tax could be legitimately deducted. VAT paid on trading stock and the like can only be claimed as input tax in the course of making taxable supplies.

[46] The fact that the supply of goods or services comprising the erection of a building used exclusively for residential purposes is a zero-rated supply for the purposes of s 9 read with Schedule III of the Act[5] would not, in my view, assist or avail the plaintiff. There are two reasons for this. Firstly, s 9 of the VAT Act, dealing

[4]Section 1.

[5]Para 2(y) of Schedule III.

with zero rating, would not apply to the plaintiff's dealings with the defendants. That is because s 9(1) provides:

> '(1) Where, but for this section, a supply of goods or services would be charged with tax imposed under section 6(1)*(a)*, any such supply shall, subject to compliance with subsection (2), be charged with tax at the rate of zero percent if that supply is specified in paragraph 2 of Schedule III as a zero-rated supply.'

[47] This section would not arise as the plaintiff's service would not otherwise attract tax imposed under s 6(1) because it would not entail a taxable supply, given the lack of any consideration. In the second instance, input tax could in any event not be claimed or deducted by reason of s 18*(a)*(i) because the taxable supply had not in any proper sense been a supply to the registered person, being the plaintiff. They had in reality been supplies and services to the defendants. The invoices were merely made out in the plaintiff's name (and were not supplies to it) as the evidence unequivocally shows.

[48] Supplementary argument was filed shortly before the hearing by both parties.

[49] The respondent's supplementary heads did not deal with the VAT question. It was merely pointed out that this court is confined to the record and no VAT issues had been raised in the pleadings, the pre-trial order or in evidence. It was also pointed out that the issue had not been raised by the defendants in cross-examination of Mr Fourie or Ms Steyn. It was also curiously said that Ms Steyn's evidence 'relates to the Steyn matter'. But this negates the purpose of her

testimony. She was after all called at the plaintiff's instance – to show that their (the Steyns') arrangement with the plaintiff was the same as that of the defendants as was also unequivocally stated by Mr Fourie. Counsel is thus entirely incorrect in stating that no VAT issues were raised in evidence. Ms Steyn's unqualified statement on VAT had in fact been elicited by plaintiff's counsel in her evidence-in-chief. There was no attempt to clarify or qualify it with her. Furthermore, Mr Fourie's statement on VAT had been volunteered by him during his evidence-in-chief as well. He is after all a registered accountant and would have appreciated not only the import of his own statement, but more importantly Ms Steyn's evidence. It was open to him to have instructed counsel to clarify that aspect if this was considered necessary by him. This did not occur. Nor was there any application for him to return to the witness box to explain the issue.

[50] Whilst it is certainly correct for the plaintiff's counsel to assert in his supplementary heads that the issue had at no stage been put to Mr Fourie in cross-examination, the further statement that the plaintiff was not 'afforded an opportunity to explain any issues on VAT' holds much less water in the circumstances.

[51] In oral argument, plaintiff's counsel was even briefer on the issue. In response to a question if he could point to any evidence on record to indicate a taxable supply on the part of the plaintiff, which would be directly connected to claiming or deducting input VAT, he declined to be drawn, stating that he is not a tax expert. This despite the factual nature of the question and the three week's

advance notice given of the issue being raised by the court. He understandably did not assert that the plaintiffs' services to the defendants comprised the erection of a residential dwelling and were zero-related under s 9 read with Schedule III, because on his client's version, the plaintiff's services did not comprise the erection of the defendant's dwelling.

[52] Counsel also argued that the plaintiff's rights to a fair trial under Art 12 of the Constitution should be adhered to and that a finding of a violation of VAT legislation without being afforded the opportunity in evidence to answer to the issue may tend to violate those rights.

[53] These proceedings relate to the enforcement of an agreement contended for by the plaintiff and alternative claims based on enrichment. This issue is relevant on both scores. If the agreement was structured to artificially manufacture a claim of input tax in conflict with the VAT Act, then it may be illegal and unenforceable on that account. Secondly, in considering a claim based upon enrichment – where the plaintiff would have the onus to establish the requisites for such a claim, including the extent of the plaintiff's impoverishment – claiming the VAT portions of invoices paid on behalf of the defendants as input tax would be relevant in establishing the extent of the plaintiff's impoverishment. If the plaintiff had claimed the VAT portions of those invoices and received a refund or credit for them, then this would be highly relevant to the question of the extent of the plaintiff's impoverishment, (the extent to being actually out of pocket) particularly in the light of Ms Steyn's unqualified evidence that the plaintiff received a form of VAT

based benefit (instead of a mark-up) by way of counter-prestation for the same form of facilitation arrangement.

[54] Furthermore, if it were to be found that the agreement was illegal as against public policy, then in doing simple justice between individuals the extent to which the plaintiff had actually been out of pocket is highly relevant. In keeping with the tenor and spirit of Art 12, the plaintiff was given three weeks' notice of questions of this nature being raised on appeal to afford an adequate opportunity to address the question with reference to the record and the statutory provisions in these contexts. The attempt to avoid addressing the question with reference to Art 12 is thus entirely misplaced.

[55] Plaintiff's counsel was however prepared to point out that there was no direct statement in the record that input VAT had been claimed on the invoices paid on behalf of the defendants. That is correct. His unsolicited statement concerning the invoices being in the name of the plaintiff for VAT purposes and that the arrangement was the same as the Steyns' as well as the evidence of Ms Steyn solicited on the plaintiff's behalf certainly give rise to drawing an inference that this is what occurred. Certainly this inference is more probable than any other reasonable inference. Mr Fourie's disavowal of receiving consideration for the plaintiff's services in the form of a mark-up or a consultancy fee would not only furthermore tend to raise questions as to whether there was any taxable supply connected to the claiming of input VAT, but is also consistent with an inference being drawn that input tax was claimed. In view of the conclusion reached on the

first question set out above, it is not necessary to further canvass the question as to whether the contract would be illegal and unenforceable on this score. But it remains relevant in determining the extent to which the plaintiff was out of pocket in so far as it relates to the requisite of impoverishment for an enrichment claim and in doing simple justice between the parties, as is set out below.

[56] I turn to address the issues raised in this appeal.

What was the true relationship between the parties?

[57] The primary focus of defendants' counsel on appeal was understandably the unenforceability of the oral agreement on public policy grounds.

[58] In order to address that question, the true relationship between the parties is to be determined. The plaintiff's and defendants' versions as to their contractual relationship were largely mutually destructive of each other. Mr Mouton on appeal continued to pursue the line adopted by the defendants in the High Court, that the true agreement was represented by the acceptance of the quotation and that the defendants had performed in full.

[59] The High Court correctly rejected that version. It was not only internally inconsistent with itself and the pleadings, but an examination of the defendants' testimony in the context of the totality of the evidence demonstrates that they were not credible witnesses and that their version was also fundamentally at variance with the probabilities as well as the conduct of the parties. The High Court's careful

assessment of these factors cannot be faulted. The defendants' opportunistic approach is also inconsistent with the terms of the quotation itself which also provided:

> 'Due to frequent price changes, size of buildings or price might change thereafter.' (sic)

[60] It would follow that its finding that the agreement between the parties was as testified by the plaintiff is well-founded. It also accorded with the pleadings, save for the reference to the deceit to FNB which emerged in evidence at the trial and which was common cause. This aspect is also more consistent with the plaintiff's version of the agreement between the parties.

[61] It also follows that the muted attack upon the judgment of the High Court in accepting the plaintiff's version as to the agreement and rejecting the defendants' must fail.

Enforceability on public policy grounds

[62] In *Sasfin (Pty) Ltd v Beukes* 1989(1) SA 1 (A), the Appellate Division of South Africa, at a time when it was the highest court of appeal in respect of Namibia, following a long line of cases, held that the common law does not recognise and will not enforce contracts contrary to public policy.[6] The majority in *Sasfin* explained that an agreement which is contrary to public policy is one 'opposed to the interests of the State, or of justice or of the public' and that:

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[6] *Op cit* at 7H-I (*Sasfin*).

> 'The interests of the community or the public are therefore of paramount importance in relation to the concept of public policy. Agreements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy, not be enforced.'[7]

[63] In the post constitutional order in South Africa, the concept of public policy in this context was further developed by the Constitutional Court in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) to entail:

> 'Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values which underlie it. Indeed, the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law.'[8]

And further:

> 'What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.'[9]

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[7] *Sasfin op cit* at p 8C-D.

[8] *Op cit* para 28 and 29.

[9] Para 28 and 29.

[64] This was stated in the context of a constitutional challenge upon a time-limitation clause in an insurance agreement – a term limiting the right to seek redress in a court. That court found that it would be contrary to public policy to enforce a time-limitation clause that does not afford the person bound by it an adequate and fair opportunity to seek judicial redress primarily by reason of the constitutional right to a fair trial. Notions of fairness and justice were found to inform public policy within that context.

[65] The position set out in *Sasfin*, as refined by *Barkhuizen*, also reflects the common law in Namibia, subject to the values embodied in the Namibian Constitution informing public policy for the purpose of the common law in Namibia.

[66] What is also clear from the authorities is that a court would determine in any given case whether a contract is contrary to public policy. The majority in *Sasfin* referred to an early exposition of the common law on the issue thus articulated by Innes CJ in *Eastwood v Shepstone* 1902 TS 294 p 302:

> 'Now this Court has the power to treat as void and to refuse in any way to recognise contracts and transactions which are against public policy or contrary to good morals. It is a power not to be hastily or rashly exercised; but when once it is clear that any arrangement is against public policy, the Court would be wanting in its duty if it hesitated to declare such an arrangement void. What we have to look to is the tendency of the proposed transaction, not its actually proved result.'

and proceeded thus:

> 'No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power.'[10]

[67] The court in *Sasfin* also stressed the importance of freedom of contract and that public policy favours the utmost freedom of contract.[11] This principle was also emphasised by the Constitutional Court in *Barkhuizen*.[12] In both matters, the courts also held that public policy takes into account the doing of simple justice between individuals[13]. This consideration was also stressed by this court in the context of the relaxation of the *par delictum* rule in *Ferrari v Ruch* 1994 NR 287 (SC) *(Ferrari)*, followed in *Schweiger v Muller* 2012 (1) NR 87 (SC) *(Schweiger).* These latter cases concerned agreements prohibited by statute and thus found to be illegal and unenforceable and where a relaxation of the *par delictum* rule was permitted in order to bring about simple justice between the parties.

[68] The question arises as to whether the oral agreement contended for, being premised upon deceit and a fraudulent misrepresentation to the bank, is against public policy and unenforceable.

Application of principles

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[10] *Sasfin* at p 9A-B.

[11] *Op cit* at 9E.

[12] *Op cit* para 30.

[13] *Sasfin* at 9G and *Barkhuizen* in para 51, *Jajbhay v Cassim* 1939 AD 537 at 544.

[69] Plaintiff's counsel argued that the defendants are precluded from relying upon the oral agreement as being against public policy because this point had not been raised in their pleadings. It is certainly correct that pleadings define the issues between litigants and that they are confined to those issues in trial. This fundamental principle is trenchantly reinforced by the principles which underpin judicial case management. Plainly litigants seeking to rely upon illegality must plead it, as was stressed by a full bench of the High Court in *Courtney-Clarke v Bassingthwaighte* 1990 NR 89 (HC).[14] If reliance is placed upon a section in a statute, this should be pleaded. Despite this, the full bench made it clear in *Courtney-Clarke*[15] that, if it appears on the face of a contract or emerges in evidence that it is illegal as being against public policy, a court would not enforce that agreement.[16]

[70] As had also occurred in *Courtney-Clarke*, the defendants in this matter did not raise illegality in their pleadings, although there was an unsuccessful attempt to do so in cross-examination. In *Courtney-Clarke*, there were two contracts which were found to be interlocking. The hire purchase agreement was found to be illegal. It was interlocking with an oral agreement sought to be relied upon in that matter. The illegality of the hire purchase agreement resulted in the unenforceability of the oral agreement relied upon,[17] raised and decided on appeal.

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[14] *Op cit* at 95B.

[15] *Op cit* at p 95E.

[16] *Op cit* p 95E-F. See also Christie, *The Law of Contract in South Africa* (5ed) p 343 et seq.

[17] *Op cit* p 96A-C.

[71] It is common cause that the plaintiff provided its quotation to the defendants to be utilised by the latter in their application for a home loan. That quotation was designed to create a false impression that the plaintiff was contracted to erect the dwelling in question as a developer or would do so. That was how it was intended to be understood and also how it was in fact understood by FNB's Mariental branch manager to whom it was directed. Its purpose was to deceive that bank into granting a home loan to the defendants who would not otherwise have qualified for a home loan of that magnitude. This consequence was confirmed by the bank's manager and accepted by both parties.

[72] This deceit was the foundation of and went to the very root of the oral agreement which the plaintiff sought to enforce. Although stated in a different factual context, the statement by Innes CJ in *Wells v South African Alumenite Company* 1927 AD 69 is pertinent:

> 'On grounds of public policy the law will not recognise an undertaking by which one of the contracting parties binds himself to condone and submit to the fraudulent conduct of the other. The Courts will not lend themselves to the enforcement of such a stipulation; for to do so would be to protect and encourage fraud.'[18]

[73] Despite the different setting, these sentiments would also find application in this case – where the parties colluded to deceive FNB. To enforce the resulting oral agreement would protect and encourage fraud. Fraud, after all, unravels

[18] *Op cit* at p 72.

everything, as was stressed by the Judge President in *Maletzky v Zaaluka* 2013 (3) NR 649 (HC) para 4 in the context of a simulated transaction *in fraudem legis*.

[74] Plaintiff's counsel contended that the parties' underhand agreement was a separate transaction from the home loan application and separate from the relationship between the defendants and the bank. Whilst it is entirely correct that the bank was not a party to the oral agreement reached between the parties, the home loan application to the bank and the fraud and deceit involved in it were integral components of the oral agreement contended for by the plaintiff. It was its foundation and not its mere motivation. Their agreement was premised on fraud and deceit. Contracts so premised upon fraud and deceit are immoral and inimical to the community. They run counter to social and economic expedience and offend the principle of the rule of law enshrined in Art 1 of the Constitution. They are thus against public policy and unenforceable.

[75] Mr van Vuuren further argued that it was for FNB to raise the matter and contended that it had not sustained prejudice by reason of the joint deceit of the parties. This submission cannot be upheld. The fact that FNB has not raised the issue and has also not sustained financial prejudice as a result of the fraud are not dispositive of the question as to whether the agreement is against public policy and unenforceable. That bank was not party to the action and may also not in any event have raised the issue after its discovery because the value of the dwelling secured by the mortgage bond exceeded the bank's exposure under the home loan and the defendants' ability to repay the loan was not an issue. But there is

clearly prejudice to a financial institution if bond applications directed to it are tainted by and indeed based upon fraud and deceit, as had occurred in this matter.

The plaintiff's claim for enrichment and the *par delictum* rule

[76] Plaintiff's counsel argued that, in the event of the oral agreement being found to be unenforceable, the plaintiff had met the requisites of an enrichment action on the grounds of an excusable error on the part of the plaintiff. This contention however fails to take into account one of the elements of this form of enrichment action, namely payments being made upon an error which is found to be excusable.[19]

[77] This form of enrichment action can find no application where payments are made pursuant to an agreement found to be illegal and unenforceable by reason of being contrary to public policy because it is based upon fraud. Quite apart from the deceitful conduct of the parties excluding any notion of excusability or reasonableness, it is by no means clear to me how it could be contended that the payments were made in error when they were deliberately done pursuant to an arrangement based upon a fraudulent misrepresentation calculated to deceive. Nor was there evidence on the part of the plaintiff as to any error on its part. Nor did plaintiff's counsel endeavour to explain the nature and ambit of the plaintiff's error with reference to the record and inferential reasoning. This requisite for a *condictio indebiti* or *conditio sine causa* was not met by the plaintiff. Its claim for

[19] *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue & another* 1992 (4) SA 202 (A); *Bowman, De Wet and Du Plessis NNO & others v Fidelity Bank Ltd* 1997 (2) SA 35 (A) applied by the full bench of the High Court in *Seaflower Whitefish Corporation Ltd v Namibian Ports Authority* 2000 NR 57 (HC) at 63C-J.

enrichment on this basis must therefore fail. Counsel for the plaintiff did not argue for a general enrichment action, eloquently mooted but not decided in *McCarthy Retails Ltd v Short Distance Carriers CC* 2001 (3) SA 482 (SCA) at 489-491. Subsequent judgments of the South African Supreme Court of Appeal have however not as yet embraced such a general enrichment action.[20] In the absence of full argument on this issue – plaintiff's counsel only relying upon the *condition indebiti*[21] – a consideration of that interesting question must await another day.

[78] This court in *Ferrari,* and followed in *Schweiger,* confirmed the common law position that agreements prohibited by law cannot be enforceable by virtue of the maxim *ex turpi causa non oritur actio* (translated in *Schweiger* as 'from a dishonourable cause, an action does not arise').[22] This principle is absolute and admits no exception.[23] Related to this principle is the maxim *in pari delicto potior est conditio defendentis* which restricts the right of the offending parties to avoid the consequence of their performance or part performance of illegal contracts. This second maxim, (translated in *Schweiger* as 'in equal fault, the condition of the

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[20]*Absa Bank Ltd v Leech NO* 2001 (4) SA 132 (SCA); *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 113; *Jacquesson v Minister of Finance* 2006 (3) SA 334 (SCA); *Affirmative Portfolios CC v Transnet Ltd t/a Metro Rail* 2009 (1) SA 196; *Afrisure CC & another v Watson NO & another* 2009 (2) SA 127 (SCA); *Lagator McKennor Inc & another v Shea & another* 2010 (1) SA 35 (SCA); *Leeuw v First National Bank Limited* 2010 (3) SA 410 (SCA).

[21]The *conditio indebiti* may be open to a party to reclaim performance made in terms of an invalid contract, it would seem that the *condition sine causa* is more frequently used in those circumstances (*Enocon Construction (Pty) Ltd v Palm Sixteen (Pty) Ltd* 1972 (4) SA 511 (T). But this would not apply if the reason for invalidity is because illegality on the grounds of being prohibited by stature or against public policy, as is explained below.

[22]*Op cit* para 25.

[23]*Schweiger* para 25.

defendant party is better'),[24] however permits exceptions to prevent manifest injustice and inequity between individuals.[25] The rationale behind these maxims was lucidly explained by Mohamed CJ in *Ferrari* with extensive reference to authority (mostly excluded in this quotation):

> 'The object of the maxim in *pari delicto potior est conditio defendentis* is clearly to discourage illegal or immoral conduct, by refusing the help of the courts to delinquents who part with money or chattels in furtherance of prohibited agreements, but, if it was never capable of relaxation, it might perpetuate immorality and cause gross injustice in some cases (for example, where a seller of a prohibited article refuses to deliver the prohibited article but still retains the purchase price which has been paid to him).
>
> Since *Jajbhay's* case therefore the Courts in Southern Africa have often relaxed the strict operation of the maxim in *pari delicto potior est conditio defendentis* in order to do simple justice between man and man . . . . It is difficult and even undesirable to lay down fixed rules to define the circumstances which would permit the relaxation of the *par delictum* rule, but there are clearly some considerations which are relevant to such an enquiry.
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> (1) It is clearly relevant to enquire whether one party would unjustly be enriched at the expense of another if the rule in *pari delicto potior conditio defendentis* is not relaxed in a particular case. (*Jajbhay's* case supra at 545.) This appears to be the dominant underlying motivation for the relaxation of the rule in (certain cited) cases.
>
> (2) On the other hand the relaxation of the rule can legitimately be resisted if it has the indirect effect of enforcing the illegal agreement.

[24] *Op cit* para 25.

[25] *Ferrari* at 296E-H following *Jajbhay v Cassim* 1939 AD 537.

> (3) The fact that the plaintiff who seeks the relaxation of the rule was aware of the fact that the agreement entered into with the defendant was prohibited by law, is not by itself a bar against his claim for recovery of moneys or property which he has transferred to his adversary, pursuant to such an agreement. (*Jajbhay v Cassim* (supra at 549), *Petersen v Jajbhay* and *Osman v Reis (supra*).) The logical corollary of that proposition must be that the relative degrees of turpitude attaching to the conduct of the parties in entering and implementing the unlawful agreement, is a relevant consideration in determining whether the rule should be relaxed in a particular case (*Jajbhay v Cassim* (supra at 544)).'[26]

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

[80] The question arises as to whether the *par delictum* rule should be relaxed in this matter to enable the plaintiff to claim back sums expended on behalf of the defendants. As was pointed out by this court in *Schweiger,*[28] Mohamed CJ in *Ferrari* approached the questions of capital and interest separately. The court in *Ferrari* permitted a party to recover the capital transfers of a loan made which was

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[26]*Op cit* at 296G-297G and quoted with approval in *Schweiger* para 25.

[27]See generally Christie, *The Law of Contracts in South Africa (5ed, 2006)* at 391-395 and especially at 395.

[28]*Op cit* para 25.

prohibited by foreign exchange regulations. The court found that an order requiring the defendant to pay the interest agreed upon would amount to an order indirectly enforcing the prohibited agreement which was not permissible. The court in *Ferrari* refused a claim for interest on the sums loaned to the defendant.

[81] Applying the principles set out in *Ferrari* to this matter, the plaintiff claims that it expended a total sum of N$713 480,01 on behalf of the defendants in furtherance of their scheme. The total sum so expended was largely in respect of building materials supplied and building related contractors in respect of the construction of the defendants' home. The defendants acknowledged that they benefited from the payments made on their behalf. They did not contest a valuator's evidence that the fair value of their structure after completion exceeded that sum. It is common cause that the sum of N$484 782,40 was paid to the plaintiff on their behalf. That leaves the balance of N$228 702,61 which was the amount granted by the High Court in its judgment in favour of the plaintiff.

[82] Whilst the defendants have clearly been enriched to the extent of sums paid on their behalf, it is not clear to me that the plaintiff established that this was the extent to which it is out of pocket. Despite having paid amounts on behalf of the defendants, the inference to be drawn from the unequivocal evidence is that the VAT portions of invoices so paid were claimed as input tax for VAT purposes. In the context of enrichment and doing justice between parties, the plaintiff however bears the onus to establish the extent of its impoverishment. Given the evidence on VAT and the inference which arises, it would follow that the plaintiff has not

established that its estate was impoverished to the extent claimed. The plaintiff would however only be out of pocket to the extent of the sums actually paid on behalf of the defendants less VAT deducted or refunded.

[83] What did clearly emerge is that the plaintiff did not charge the defendants a consideration by way of a fee or mark-up in the supplies. It would seem that there was no taxable supply as defined in the VAT Act to which amounts could be claimed as input tax, even if the supply is claimed as zero-rated. This would mean that deductions of that nature *prima facie* would at best be questionable. It would be for the Commissioner for Inland Revenue to investigate if input VAT was lawfully claimed in respect of invoices paid on behalf of the defendants. Given the evidence by both the plaintiffs' principal and given on its behalf, the registrar is directed to provide a copy of this judgment to the Commissioner of Inland Revenue.

[84] Counsel for both parties were invited to make submissions as to whether interest on the sums disbursed by the plaintiff should be ordered and, if so, from when interest should be payable to order to dispense justice between the parties.

[85] Mr van Vuuren correctly conceded that interest in the context of unjust enrichment is a complex question. He submitted that the conduct of the defendants should be taken into account and the degrees of their turpitude in the exercise of the court's discretion, as well stated in *Ferrari*.

[86] Mr Mouton argued that *mora* interest at 20 percent way exceeded market related rates and would amount to a considerable benefit to the plaintiff as it would exceed what could possibly be earned on the amount. Whilst no evidence as to applicable interest rates was placed before the trial court, it is a notorious fact, which this court may take judicial notice of, that the legal rate of 20 percent exceeds by far the rates offered by commercial banks.

[87] In applying the principles set out in *Ferrari* and *Schweiger*, it is my view that the *par delictum* rule should be relaxed to permit the plaintiff to recover the total extent to which it has been impoverished or is out of pocket by making the payments on behalf of the defendants. Given the evidence on VAT and the inference which arises from it, this would mean that the VAT portions of those invoices claimed should be deducted from the total payments. It would seem that the total amount paid on behalf of the defendants would not be the sum upon which input tax would arise. Although almost all the invoices which made up the total included VAT, there are some components of the total sum upon which input VAT would not be claimed.

[88] Before taking into account the plaintiff's benefit for input tax, the total amount includes the sum of N$44 709,89 for interest charged by the plaintiff on amounts expended in terms of the agreement. This should first be deducted from the total amount of N$713 480,01. There was no evidence that the plaintiff paid the component amounts but rather that it charged interest at a flat rate of 16,75 percent on the defendants' outstanding balance rather than paying interest as a

disbursement. To permit charges of this nature would be tantamount to enforcing the illegal agreement between the parties which is precluded by the first maxim (*ex turpi causa non oritur action)*. This leaves an amount of N$668 770,12 expended on behalf of the defendants.

[89] It is apparent from certain of the invoices provided as exhibits, that one of the builders did not charge VAT as he was presumably not registered for VAT. The total amount of payments to this builder are reflected to be in the sum of N$109 325,48. The plaintiff would not have been able to claim any benefit on this amount.

[90] Although invoices were not supplied for every amount reflected in the plaintiff's statement which forms part of the record, the remaining balance of N$559 44,64 would appear to approximate the total sum upon which input tax was claimed (in the absence of all component invoices, this figure is taken, given the onus upon the plaintiff to establish its impoverishment). As VAT is charged at 15 percent, the input tax claimed upon this sum would be arrived at by multiplying that amount by 15 and then dividing that sum by 115. That is a matter of simple arithmetics. The amount of input tax which would be claimed upon N$559 444,64 is thus N$72 971,04. [If the latter sum is subtracted from the former it would represent 15 percent of that total (N$486 473,60), hence the use of the formula]. The sum of N$72 971,04 would thus appear to approximate the benefit received by the plaintiff as input tax for VAT purposes. This sum together with interest charged in the amount of N$44 709,89 are thus to be deducted from the plaintiff's claim, leaving a balance of N$111 021,68. That is the capital sum reflecting the

extent of the plaintiff being out of pocket and impoverished for the purpose of doing justice between the parties. The High Court should have awarded this sum to the plaintiff as the extent to which it had established in the evidence that it had been actually out of pocket in making disbursements on behalf of the defendants.

[91] To award interest prior to judgment would have the effect of enforcing the illegal contract. An order to that effect should not in my view be made. Interest should only run from the date of judgment in the High Court as the sum reflects the extent of unjust enrichment established with effect from that date.

Costs

[92] The plaintiff is found to be entitled to be repaid the extent of being out of pocket of what was actually disbursed by it on behalf of the defendants less what it received as input VAT. Although this is considerably less than that claimed and recovered in the High Court, the plaintiff can be said to have been substantially successful in its trial action and thus partially successful on appeal.

[93] The defendants have had a measure of success on appeal because of the reduced amount of capital to be repaid and the ruling on interest.

[94] The general rule concerning costs is that costs follow the event, subject to the overriding principle that a court has a discretion in awarding costs.[29] Misconduct of the parties is a ground which may justify a court in departing from

[29] *Union Government (Minister of Railways and Harbours) v Heiberg* 1919 AD 477 at 484.

the general rule on costs – if a court is satisfied that a party or parties have been guilty of improper, dishonest or discreditable conduct.[30]

[95] In this case, both the plaintiff and defendants colluded to perpetrate a fraud on FNB. This amounts to improper and dishonest conduct and warrants the grave censure of this court. The plaintiff, in seeking to enforce a contract based upon fraud and deceit, should be deprived of a costs award as a consequence.

[96] The fact that the defendants opportunistically latched onto the fraudulent quotation in an unprincipled manner in a bid to escape liability for payments from which they benefited from may render their conduct even more morally reprehensible. But the perpetration of fraud by both parties on FNB in my view should deprive both of them any costs – both in the trial and on appeal.

Order

[97] The following order is made:

1. The appeal succeeds in part and the order of the High Court is set aside and substituted by the following:

‘(a) Judgment is entered against the defendants jointly and severally, the one paying the other to be absolved, for payment

[30]Cillers, Loots, Nel: *Herbstein & Van Winsen: The Civil Practice of the High Courts of South Africa* (5ed, 2009) Vol 2 at p 966.

of the sum of N$111 021,68 together with interest on this amount at the rate of 20% per annum as from 20 June 2013 to date of payment.

(b) No order is made in respect of the costs of suit in the trial.'

2. No order is made in respect of the costs of appeal.

3. The registrar is directed to bring this judgment to the attention of the Commissioner of Inland Revenue.

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SMUTS JA

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DAMASEB DCJ

_____
HOFF AJA

APPEARANCES

APPELLANTS:	C J Mouton Instructed by Grobler & Co
RESPONDENT:	A van Vuuren Instructed by MB de Klerk & Associates