

NOT REPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: I 2839/2013

E&L MVULA DEVELOPMENT PROPERTIES

PLAINTIFF

and

AFRICA AUTONET CC t/a PACIFIC MOTORS

DEFENDANT

Neutral citation: *E&L Mvula Development Properties v Africa Autonet CC t/a Pacific Motors* (I 2839/2013) [2019] NAHCMD 100 (12 April 2019)

Coram: PRINSLOO J

Heard: 15 May 2017-18 May 2017; 30 May 2017; 17 July 2017; 19 February 2018
- 21 February 2018; 14 November 2018

Delivered: 12 April 2019

Reasons: 16 April 2019

Flynote: Law of contract – Mutually exclusive agreements –Illegal substratum – An agreement that has an illegal substratum is illegal and void ab initio and incapable of being enforced.

Summary: The plaintiff instituted action against the defendant for an order confirming the termination of the lease agreements between the parties; an order ejecting the defendant from the premises; and payment by the defendant in the amount of N\$ 4 508 555.70 plus N\$ 95 785.63 per month as from 1 July 2014 until date of vacation of the premises. The action was opposed by the defendant. The parties signed two lease agreements in which the defendant was, in terms of the first agreement, requested to pay N\$ 10 000 to the plaintiff by way of cheque made out in the name of a certain Mr Mvula, who was a member of the plaintiff at the time the lease agreements were concluded and the second agreement in the amount of N\$ 35 000 required the defendant to pay that amount to Mr Mvula in US Dollars, in cash in accordance with the exchange rate at that time.

Held – The plaintiff relied on two written lease agreements in terms of which it received a combined monthly rental in respect of the exact same premises. There is no differentiation in the description of the premises as well as the terms of the agreements. The property is leased as one premises. It has become abundantly clear that the two lease agreements cannot be separated from the legality issue. Having considered the evidence before me, it is my respectful view that the purpose of concluding the second lease agreement was to avoid the payment of tax.

Held further – The court cannot come to the assistance of the plaintiff where it approaches this court with dirty hands and then expect this court to enforce the illegal lease agreements.

Held further – Accordingly, the plaintiff was party to an illegality, prohibited by law and therefore not entitled to enforce its claim.

ORDER

1. The claim of the plaintiff is hereby dismissed with costs, such costs to include the cost of one instructing and two instructed counsel.
 2. Defendant's counterclaim is enforceable against the third party and not the plaintiff as the lease agreements were found to be illegal and unenforceable.
 3. For purposes of this judgment the experts Mrs Jeanette Lynn Falck and Mrs Dawn Adams are declared as necessary experts.
 4. The Registrar is directed to bring this judgment to the attention of the relevant officials at the Ministry of Finance: Inland Revenue for their attention and consideration.
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JUDGMENT

PRINSLOO J

Introduction

[1] The plaintiff in this matter is E&L Mvula Development Properties CC, a close corporation duly registered and incorporated as such in accordance with the applicable close corporation laws of the Republic of Namibia, and the defendant is Africa Autonet CC t/a Pacific Motors equally registered as a close corporation, as set out above.

[2] At the commencement of this judgment it is important to put it into context. The progression of the case to date is that at the closing of the plaintiff's case the defendant brought an application for absolution from the instance which was dismissed. During the

course of this judgment, where necessary, reference will be made to the absolution ruling wherein a number of legal issues were discussed and the evidence of the plaintiff and its witnesses were comprehensively summarized. The neutral citation for that judgment is *E&L Mvula Development Properties v Africa Autonet CC t/a Pacific Motors* (I 2839/2013) [2017] NAHCMD 248 (17 July 2017)

The pleadings

Particulars of claim

[3] In the amended particulars of claim plaintiff pleaded that the plaintiff, represented by Erastus Mvula and the defendant, represented by Faizur Rahman concluded two written lease agreements on 3 October 2005, in terms of which the plaintiff leased to the defendant a property referred to as Erf A Oshikango, measuring 1,5024 hectares. Both agreements are in identical terms, save that in the one, the rental is for an amount of N\$10 000 and in the other, the rental is for an amount of N\$35 000. For purposes of this judgment I will refer to them as the 'N\$ 10 000 lease agreement' and the 'N\$ 35 000 lease agreement', where necessary.

[4] These agreements were both for a period of 5 years, commencing on 1 January 2005 to 31 December 2010, with an option to renew the lease for a further term of 5 years upon providing 1 months' notice of the defendant's intention to exercise the option to renew.

[5] The plaintiff pleaded that the defendant complied with its obligation in terms of the lease agreements by the payment of monthly rental up and until 5 October 2009.

[6] However, despite demand, the defendant failed to pay rental from 1 November 2009 to date of summons. The plaintiff pleaded that the total rental due as at 30 June 2014 was N\$ 4 508 555.71.

[7] In the alternative, the plaintiff pleaded that insofar as the lease agreements were not renewed the defendant remained in occupation of the premises and the plaintiff suffered damages in the amount of N\$ 4 508 555.71, and continues to suffer damage of N\$ 95 785.63 per month, which would constitute reasonable rental for the premises.

[8] In the further alternative the plaintiff pleaded that the defendant cancelled the lease agreement on 23 October 2013, which cancellation the plaintiff accepts. Despite the cancellation of the agreement the defendant fails and refuses to pay the outstanding rental up to date of cancellation and remains in occupation of the premises and refuses to vacate the premises, causing the plaintiff damages in the amount of N\$ 95 785.63 per month which constitutes reasonable rental for the premises and in the premise the plaintiff is entitled to evict the defendant.

[9] The plaintiff therefore seeks the following relief against the defendant:

1. An order confirming the termination of the agreements between the parties.
2. An order ejecting the defendant from the premises.
3. Payment in the amount of N\$4 508 555.70 plus N\$95 785.63 per month as from 1 July 2014 until date of vacation of the premises.
4. Interest on the above amount at the rate of 20% a tempore morae calculated on the rental due on a monthly basis from 8 November 2009 and on the 8th of every succeeding month until payment of all the outstanding rental.
5. Cost of suit, such cost to include the cost of one instructing and two instructed counsel.
6. Further and or alternative relief.'

Defendants' plea

[10] In the defendant's further amended plea the defendant admitted the two agreements were concluded but raised the following defences:

- 10.1 The plaintiff's claim for arrear rental for the period 1 November 2009 to 30 September 2010 has prescribed. The total amount affected is N\$ 760 439.64.
- 10.2 The contracts are void for vagueness because:
 - 10.2.1 the premises forming the subject matter of the action is not identified, as such "Erf A Oshikango measuring 1,5024 Ha" does not exist nor is it identifiable.
 - 10.2.2 only a commercially viable thing can be let.
- 10.3 The contracts are void by virtue of the following:
 - 10.3.1 non-compliance with the provisions of section 30(1)(t) read with section 63 of the Local Authorities Act, 1992.
 - 10.3.2 the plaintiff could not lease the land as it is public/municipal land.
The Frye principle does not apply to public/municipal land.
- 10.4 Annexure "B" is unenforceable as it had an illegal substratum, its aim being to enable plaintiff to avoid paying taxes to the Government.
- 10.5 The plaintiff, at the time of the conclusion of the agreement, had no right, title and interest to the property and was as a result not entitled to enter into the lease agreement or claim any rental in respect thereof. It unlawfully, fraudulently and, adverse to the rights of the owner of the property, collected rent from the defendant.
- 10.6 The plaintiff in clauses 12, 13, 14 and 16 warranted that it was the owner of the leased premises. The defendant acted on the warranty that the plaintiff is the owner of the premises and had it not been for the false and fraudulent warranty, the defendant would not have entered into the agreement and paid rent. As a result, defendant cancelled the agreement and therefore, as from the period subsequent to such cancellation plaintiff could not and did not suffer damages.
- 10.7 As the plaintiff was not the owner of, nor had any right, title and interest in the property, there is no basis upon which it has suffered any damages.

- 10.8 A non-owner cannot suffer damages in respect of occupation of a property belonging to a third party and no exception to this rule is alleged by the plaintiff.
- 10.9 The plaintiff is not entitled to evict the defendant because the plaintiff cannot and did not state it can make good the defect in the title.
- 10.10 The amount of N\$ 95,785.63 does not constitute reasonable rental.
- 10.11 The plaintiff cannot evict defendant as it has an improvement lien, which is enforceable against the whole world for the improvements it effected to the property. In this regard the defendant alleged that it was at all relevant times under the bona fide but mistaken belief that the plaintiff is the owner of the property and that the clause containing the option to purchase would be valid and enforceable.

[11] The defendant also instituted a counterclaim for damages for the amount actually expended in respect of improvements it effected to the property on the alleged fraudulent misrepresentation by the plaintiff.

Pre-trial order

[12] In terms of the pre-trial order the parties were directed to trial the following:

'12.1 Issues of fact: Ad pleadings:

12.1.1 Whether the description of the leased premises in the lease agreement is sufficiently identifiable for purposes of determining whether the lease agreement is void for vagueness.

12.1.2 Whether annexure "B" (the second lease agreement) was concluded with an illegal substratum to enable the plaintiff to avoid paying taxes to the Namibian Government and whether this results in it being of no force and effect between the parties thereto.

12.1.3 Whether the plaintiff unlawfully, fraudulently and adverse the right of the owner of the premises, collected and seeks to collect rental from the defendant.

12.1.4 Whether the defendant acted on the plaintiff's warranty that it is the owner, when it made improvements on the premises.

12.1.5 What improvements were made on the premises by the defendant?

12.1.6 What the amount of enrichment is.

12.1.7 What the value of the improvements on the premises is.

12.1.8 The amount of damages suffered by the plaintiff and whether the amount of N\$ 95,785.63 constituted reasonable rental.

12.1.9 What the reasonable rental for the premises is.

12.2 Issues of law:

12.2.1 Whether the premises described in the lease agreements is sufficiently identifiable.

12.2.2 Whether the plaintiff's claim or a portion of its claim for rental has prescribed.

12.2.3 Whether the defendant's claim in respect of improvements has become prescribed and hence whether the defendant can still rely on an improvement lien to avoid eviction.

12.2.4 Whether the defendant's alleged improvement lien is a valid defence to the plaintiff's claim.

12.2.5 Whether the plaintiff can suffer damages from defendant's failure / refusal to pay rent.

12.2.6 Whether the plaintiff is a bone fide or mala fide possessor of the premises, and if it is a mala fide possessor, when it became such.

12.2.7 Whether the plaintiff can evict the defendant from the premises.

12.2.8 Whether section 30(1) (t) read with section 63 of the Local Authorities Act 1992 is applicable to the lease agreement.

12.2.9 Whether the plaintiff is entitled to sue for rent from the defendant in the circumstances.

12.2.10 Whether the defendant's improvement lien is enforceable against the plaintiff or the world.'

Common cause facts

[13] The common cause facts can be set out as follows:

- 13.1 The first agreement reached between the parties dates back to 2003 for a rental amount of N\$ 10 000 per month.
- 13.2 The parties (duly represented) concluded a further two lease agreements on 3 October 2005 at Oshakati, which was a renewal of the 2003 rental agreement.
- 13.3 The plaintiff let to the defendant a property situated at Erf A Oshikango measuring 1,5042 hectares, at a combined monthly rental of N\$ 45 000.00.
- 13.4 The plaintiff is not the owner of the premises.
- 13.5 The defendant occupies the premises from January 2006 to date (initially in terms of the two lease agreements in question.)
- 13.6 The defendant has not paid rental to the plaintiff as of 1 November 2009 but has been and still is paying the rates and taxes for the property on a monthly basis to the Helao Nafidi Town Council.
- 13.7 The defendant became aware on 12 November 2009 that the premises does not belong to the plaintiff.
- 13.8 The lease terminated 31 December 2010 and the lease agreements were not renewed.
- 13.9 A letter was directed on behalf of the defendant to the Department of Works declaring its willingness to pay the monthly rental amount.
- 13.10 The premises was registered in the name of Helao Nafidi Town Council at the time that Mr Mvula was issued with the PTO. The property was subsequently transferred and registered to the Government for administrative purposes, during 2006.
- 13.11 The rent for the period November 2009 to September 2010 has prescribed.

[14] During the hearing of the matter the plaintiff conceded that the portion of the claim dated from 1 November 2009 to 30 October 2010 has prescribed. In turn the

defendant conceded that its delictual claim for damages has prescribed but stands on its improvement lien which did not prescribe.

[15] The plaintiff concede to the value of approximately N\$ 1 900 000.00 in respect of the lien value contracted for by the defendant.

Plaintiff's evidence

[16] At the closing of the plaintiff's case, the defendants brought an application for absolution from the instance which I dismissed because I was satisfied that there is evidence upon which a reasonable court, applying its mind to such evidence, could or might find for the plaintiff. As indicated earlier I had comprehensively summarized the plaintiff's evidence in the absolution ruling¹ and it should be regarded as being incorporated as part of this judgment.

Defendant's evidence

[17] Three witnesses testified on behalf of the defendant, i.e. Mr Habibur Rahman, Ms Jaenette Lynne Falck and Ms Dawn Adams.

Habibur Rahman

[18] Mr Rahman is the manager of the defendant. He testified that the defendant took occupancy of the unregistered erf, a consolidation of portions of Erven 15 and 16, Oshikango on 28 October 2003. On that same day a lease agreement was entered between Mr Mohammed Norman on behalf of the defendant and Mr Erastus Mvula on behalf of the plaintiff. The written lease agreement, dated 28 October 2003 indicated that the lease period will be for a period of 2 years until expiry thereof on 31 December 2005. The monthly rental was N\$ 10 000.00. The defendant remained in occupation of the premises until 3 October 2005 when a further lease agreement was entered into by

¹ *E&L Mvula Development Properties v Africa Autonet CC t/a Pacific Motors* (I 2839/2013) [2017] NAHCMD 248 (17 July 2017).

the defendant, represented by Mr Faizur Rahman, in his capacity as manager of the defendant, and Mr Erastus Mvula, on behalf of the plaintiff for a further five year period, commencing from 01 January 2006 until its expiry on 31 December 2010. The rental amount payable in terms of the lease was also N\$ 10 000.00.

[19] On the same date a further lease agreement was entered into for a rental amount of N\$ 35 000.00. According to the witness the second lease agreement was entered into on request of Mr Mvula, and was done in an attempt by Mr Mvula to avoid paying taxes to the Government.

[20] Mr Rahman further testified that during the period of lease which commenced on 01 January 2006 the defendant was requested to pay the separate rental amounts to Mr Mvula directly. The defendant was requested to pay the N\$ 10 000.00 by way of cheque made out in the name of "Erastus Mvula", to be handed to Mr Mvula personally and the additional rental amount of N 35 000.00 was to be paid to Mr Mvula in US Dollar, in cash, in accordance to the current exchange rate at that time. This cash amount had to be handed to Mr Mvula personally on the due date.

[21] According to the witness payment of the N\$ 10 000 lease agreement was not recorded by means of receipts as he was of the opinion that the cheques would serve as proof of payment as the cheques were made out in the name of Mr Mvula. The additional payment in the amount of N\$ 35 000 were however recorded by way of receipts.

[22] Mr Rahman testified, on a question put to him by Mr Heathcote, counsel for the defendant, that the two agreements were Mr Mvula's idea and that the two lease agreements were prepared by him as well. He further testified that it was also on the insistence of Mr Mvula that the N\$ 35 000 be paid in US Dollar. The receipt book would remain in the possession of Mr Mvula and when payment was made Mr Mvula would count the cash himself and test the money. This was apparently a time consuming process during which time either Faizur Rahman, or the witness would complete the

invoice. The invoice would reflect the relevant exchange that was agreed between Mr Mvula and either Faizur Rahman or the witness, in the instance that Faizur was out of the country. Mr Rahman stated that if the book was with the defendant, as alleged by Mr Mvula, then he would have been in possession of the original invoices. Mr Rahman was adamant that payment was effected in US Dollars in cash and not Namibian Dollars.

[23] On 08 August 2006 Mr Mvula offered the defendant an initial first purchase offer for the premises, in terms of clause 13 of the lease agreements entered into on 3 October 2005. The purchase price would be \$900,000 USD, which would exclude any additional agent's commission. An offer in the amount of N\$ 3 000 000 was made on behalf of the defendant to Mr Mvula to purchase the premises but the said offer was rejected by Mr Mvula.

[24] During April 2008 the property was again offered to the defendant for purchase in the amount of \$1 000 000 USD. The defendant then submitted a letter to the Helao Nafidi Town Council asking permission to purchase the premises based on Mr Mvula's offer of purchase. The defendant apparently never received any response herein.

[25] Mr Rahman testified that on 2 October 2008 he received a fax from J van Tonder Accountants CC which advised that Mr Mvula sold his members' interest in the plaintiff to a new owner. Mr Rahman was further advised that the defendant should pay the full rental including VAT for October 2008 and that the cheques will be collected from the defendant's offices. The cheques were accordingly uplifted at the defendant's offices by an employee from J van Tonder Accountants CC. The cheques totaled in the amount of N\$ 40 041.50 and N\$ 11 449.

[26] Mr Rahman testified that he requested a tax invoice in the name of the plaintiff which he only received on 16 January 2009. The defendant was issued with a tax invoice in the amount of N\$ 65 190.10 and in addition thereto VAT, which the witness testified-was the incorrect amount. He then corresponded with Mr Van Tonder objecting to the invoice. On 6 February 2009 Mr Rahman received a tax invoice for the rental

including VAT, in addition he was requested to deposit the money into the plaintiff's bank account. The defendant proceeded to deposit the amount of N\$ 63 395.97 into the plaintiff's bank account under the name of E and L Mvula Development Properties CC.

[27] The witness further testified that during February 2009 he took issue with the fact that Mr Mvula sold the property whilst the defendant was not given the opportunity to purchase the said property. During October 2009 a meeting was arranged between the defendant and Helao Nafidi Town Council. According to the witness this meeting was attended to by the Permanent Secretary of the Ministry of Regional and Local Government, Housing and Rural Development, Mr Erastus Negonga. Mr Rahman testified that during this meeting it came to his attention that the property concerned belonged to the Government of the Republic of Namibia.

[28] Pursuant to the meeting a letter was addressed to the defendant's legal representative to brief them on the outcome of the meeting and sought further legal advice as to where the rental amount should be paid considering the fact that the plaintiff was not the owner of the property concerned. On 09 November 2009 the defendant received a response from their legal practitioners, Messrs Koep and Partners, informing the defendant that since the plaintiff is not the owner of the property and does not have the right to occupy the property and whereas the property belonged to the Namibian Government the rental payment should be made into the trust account of Koep and Partners. Mr Van Tonder was copied into this correspondence. From the 9th of November 2009 the defendant then deposited the rental payment into the said trust account.

[29] On 23 February 2010 the defendant's legal representative sent a letter to the Permanent Secretary of Works and Transport enquiring whether the payment should be transferred to their account as the premises belongs to the Government but no response was received in this regard.

[30] Mr Rahman testified that Mr Huang, the new sole member of the plaintiff, approached him in April 2010 to enquire why the rent was not paid into the account of

the plaintiff. Mr Huang was referred to the defendant's legal practitioners. Mr Huang also offered the defendant a different premises in Oshikango and communicated as much to Mr Rahman, who in turn requested that he want the said offer to be put in writing but he apparently did not receive feedback from Mr Huang.

[31] With respect to the property in dispute the witness testified that the property had to be cleared of landmines and obstructive bushes, which made mobility and construction impossible. Once the property was cleared the defendant erected several infrastructures, which included a main office building, a carport, a store carport, parking bays, shade net bays, a store corner and a gatehouse. These improvements were only done after the 2005 lease agreement was signed between the parties. He testified further that the improvements were made purely with the recurring presentation from the plaintiff that he was the owner of the property and that the plaintiff will eventually sell the property to the defendant. Mr Rahman confirmed that all the improvements were effected with the knowledge and consent of the plaintiff. It is the defendant's evidence that it would not have entered into the agreement with the plaintiff if it was clear that the plaintiff was not the owner of the property, nor would the defendant have made the improvements to the property.

[32] In respect of the rent payment Mr Rahman testified that from the moment that plaintiff received direct deposits of the monthly rental and not by means of cheques and cash payment anymore, it was to legalize the plaintiff's books and tax/VAT records. Mr Rahman also expressed a number of issues wherein, in his opinion, Mr Mvula made certain misrepresentation to the defendant and Helao Nafidi Town Council as well as to Mr Huang, who bought the members interest in the plaintiff.

[33] According to Mr Rahman the lease agreements came to an end at the end of December 2010 and the defendant gave no notice to the plaintiff that it wish to renew the lease agreements.

Dawn Adams

[34] Ms Adams holds a BSc degree in Quantity Surveying from the University of Cape Town obtained in 1991 and holds a diploma in Real Estate Valuation from the University of Stellenbosch and a certificate in Arbitration with the Association of Arbitrators of Southern Africa. Ms Adams is also registered with the Namibian Council for Architects and Quantity Surveyors since 1995. Ms Adams has more than 23 years' experience as a quantity surveyor.

[35] Ms Adams testified that she prepared a valuation report on the construction work done at the principal place of business of Africa Autonet CC t/a Pacific Motors situated at an unregistered Erf, a consolidation of portions of erven 15 and 16, Oshikango.

[36] Ms Adams testified regarding the estimated replacement costs in addition to the calculation sheet reflecting the de-escalation construction cost of the said premises. The said calculations were done at three intervals, namely June 2006 (latest lease agreement entered into between the parties), August 2012 (when the summons was issued) and June 2016 (when the pleadings closed).

[37] The costs at the various dates are calculated using the JBCC Haylett Indices for the escalation of the construction costs based on the June 2016 lease agreement.

[38] Ms Adams testified that the construction cost was based on the measurement of the building costs in accordance with the standard system of measurement of builders' work encompassed in the estimating module of the Bill of Quantities. She proceeded to break each element of the building costs into the various Haylett working groups to compare the total value at each date with the calculated costs of each date using only one working group.

[39] Using this methodology Ms Adams concluded that the valuation based on the labour and material costs (apportionment of each index into labour, material and plant based on JBCC CPAP publication as at 17 February 2011) was:

- a) June 2006 -N\$ 2 327 724
- b) August 2013 -N\$ 3 816 847.33
- c) June 2016 -N\$ 4 428 735.11

[40] During cross-examination Ms Adams confirmed that the figures were based on estimations but submitted that it was fair estimation as the actual costs could not be substantiated with invoices.

[41] When invited to comment as to why there is a substantial difference between this estimation and that of Ms Falck the witness indicated that she was unable to assist.

Jeanette Lynn Falck

[42] Ms Falck obtained a B Comm. with Business Economics, Industrial Psychology and Economics from Stellenbosch in 1990 and a B.Comm Honours in Business Economics from Stellenbosch University in 1991. Ms Falck testified that she is a Professional Valuer with the South African Council for the Property Valuers Profession. She is also a certified estate agent having completed the South African Estate Agents Board Examination in 1991 and in addition thereto she is a qualified Civil Commercial Mediator. Ms Falck has 20 years' experience as a Professional Valuer and Chartered Surveyor.

[43] Ms Falck testified that she was requested to prepare a report of contributing values of the buildings and infrastructure of the property, i.e. Africa Autonet CC t/a Pacific Motors situated at an unregistered Erf, consolidation of portions of Erven 15 and 16, Oshikango.

[44] Ms Falck testified on the valuation of the contributing values of the buildings and infrastructure on the particular property and the reasonable rental for the particular property at two intervals, namely when summons was issued in August 2013; and close of pleadings in June 2016.

[45] Ms Falck explained that in her report she determined the contributing value of the buildings and infrastructure of the property through assessing the total market value as well as the market value of the land as if unimproved. The difference between these values will be the contributing value of the buildings and infrastructure. By deductive reasoning and calculation from the values established and assessing comparable rentals of commercial and industrial properties in Oshikango the witness determined the reasonable rental amount for purposes of her report.

[46] The witness testified that she did extensive market research to determine the highest and best use of the properties under an open market scenario and using the aforementioned methodology for the valuation of the contributing values of the buildings and infrastructure on the property in questions and concluded that the values are as follows:

- (a) August 2013 -N\$ 1 839 177
- (b) June 2016 -N\$ 1 997 258

[47] In addition, using the aforementioned methodology the reasonable rent of the relevant intervals for the particular property were:

- (a) N\$ 29 976 at August 2013 which renders the contractual rental at the amount of approximately N\$ 72 260 per month as unrealistic.
- (b) N\$ 34 075 at June 2016.

Submissions by the parties at the closing of the defendant's case

On behalf of the plaintiff

[48] The plaintiff, still represented by Ms Shimming-Chase, SC, argued that if the court takes into consideration the calculations as submitted to court regarding the amount due to the plaintiff, the claim of the defendant is extinguished. It was argued that

the defendant was only able to provide proof of an actual payment it made with regard to the 25 shade net carports of an amount of N\$ 123 000. Counsel submitted that since the defendant's claim is for actual costs incurred in effecting the improvements, the plaintiff's liability, if any, should be determined at the time when the improvements were effected. The defendant seem to rely on the evidence of Ms Adams to sustain its claim. Ms Adams determined a value as at June 2006, August 2013 and June 2016. Counsel submitted that none of these dates are relevant because according to the evidence of Mr Rahman the improvements were effected between February 2006 and April 2006. The nearest date to that is June 2016 and Ms Adams estimated replacement as at June 2006 to be N\$ 2 327 724.67 inclusive of VAT. Counsel submitted that the plaintiff's claim, even if based on reasonable rental as determined by the defendant's expert, by far exceeds the defendant's claim.

[49] Counsel proceeded to address the defences raised on behalf of the defendant as follows:

Illegal substratum

[50] In reply to the defendant's case that the lease agreement for rental in the amount of N\$ 35 000 is unenforceable as it has an illegal substratum, counsel argued that the defendant bears the onus of proof to satisfy the court that the said agreement had an illegal substratum and its aim was to enable the plaintiff to avoid paying taxes to the Government.

[51] Counsel argued that on the face of the N\$ 35 000 agreement there is nothing illegal. There is nothing in its substance or form which is in contravention of any statute which renders it invalid. The aim of the lease agreements were to lease the property to the defendant and the defendant took occupation of the property and has been occupying it to date. The defendant also paid rent in terms of the said agreements until 2010.

[52] Counsel does not deny that the agreement to separate the lease in two agreements was to evade the payment of taxes but indicated that that was the subject of an agreement between Mr Mvula, in his personal capacity, and the defendant and that the plaintiff, i.e. the close corporation, did not form a party to that agreement. This separate agreement made orally between Mr Mvula and the defendant did not only result in the non-payment of the VAT to the Receiver of Revenue but also resulted in the plaintiff not receiving the full rental amount in respect of the lease of the premises. Counsel therefore submitted that the plaintiff cannot be bound by this illegality and that the illegal conduct on the part of Mr Mvula cannot be imputed to the plaintiff as Mr Mvula himself is a *particeps criminalis*².

[53] Counsel further pointed out that Mr Mvula was not the sole member of the plaintiff and that there was no evidence that he was solely responsible for the management of the plaintiff.

Counterclaim

[54] On the issue of the counterclaim counsel submitted that it contradicts the entire theme of the defendant's defence to the plaintiff's claim. It is argued that in the plea the theme is that the agreement is either void or unenforceable, yet in the counterclaim, which is not a conditional counterclaim, is based on a breach of the terms of the agreement and an allegation that the defendant was entitled to cancel the agreement.

[55] In conclusion counsel argued that it is common cause that the defendant was given occupation of the premises by the plaintiff based on the lease agreements. The defendant remains in such occupation.

On behalf of the defendant

² The word appears to be *particeps criminis*. S v Van den Berg 1979 (1) SA 208 (D) at 212; Van Straten NO and another v Namibia Financial Institutions Supervisory Authority and another 2016 (3) NR 747 (SC) at 767-768 at par 76-79.

[56] Mr Heathcote, SC, still appearing on behalf of the defendant, as a preface to his argument, submitted that the plaintiff's claims are in the alternative to each other and only one of the claims can succeed and therefore the plaintiff is obliged to choose one of the three. On the first alternative claim counsel points out that if one have regard to the statement of '*Insofar as these lease agreements were not renewed*' it is clear that there is no contract or agreement that could be terminated.

[57] On the third alternative claim counsel argued that a non-existing contract cannot come into existence because it is cancelled in the alternative and on the assumption (as pleaded by the defendant) that a renewal did take place. It is submitted that the argument in the plaintiff's third alternative is wholly untenable because it appears to suggest that some or other law exists which stipulates that, if no contract exists, a contract can be created by cancellation of the non-existing contract. It appears to be a cause of action based on some form of estoppel.

[58] Further on the claim of the plaintiff counsel argued that if it is assumed for a moment that a valid contract came into existence, which the defendant disputes, the plaintiff may have relied on the Frey-Principle to claim rent (not damages) until the expiry of the original lease term. The defendant stopped paying the monthly rent at the end of October 2009 and the original lease terminated on 31 December 2010 however, the rent for the period November 2009 to September 2010 prescribed, which leaves the amount remaining on the rent due as N\$ 55 126.93, excluding VAT, provided it was a valid lease agreement.

[59] Counsel argued that it is wholly impermissible to claim damages for loss of patrimony in respect of property which does not belong to the plaintiff. He also pointed out that the plaintiff did not plead or prove that a tacit relocation took place (refer to *Golden Fried Chicken (Pty) Ltd v Sirad Fried Foods CC 200 (1) SA 822 (SCA)*). In the matter *in casu* there is no notion of tacit relocation where the defendant refused to pay any further rent, offered any amount outstanding to the Government, and did not renew the lease. Once the lease lapsed the defendant was occupying the property of a third

party it being state or municipal land and therefore the plaintiff cannot claim damages in respect of the property of a third party.

Agreements are mutually exclusive and cannot exist together

[60] Counsel insisted that the issue of the mutually exclusive agreement cannot be separated from the legality issues. He submitted that the two contracts are mutually destructive and after all the evidence was led, the plaintiff still did not prove that it is entitled to rely on both agreements, or on any of the two. He submitted that by the very fact that both the agreements were signed on the same day destroys the plaintiff's cause of action.

Illegal substratum

[61] Counsel argued that the entire lease agreements were tainted by illegality. The plaintiff claims eviction and payment of arrear rental, i.e. specific performance. The agreement tainted by illegality is unenforceable and the plaintiff who is a party to the illegality, cannot claim specific performance of an illegal contract. Counsel conceded that an illegal contract can be separated from a legal one but in *casu* the plaintiff relies on one rental agreement, comprising of two written documents. Although two separate agreements were signed, the parties treated them as if one agreement was concluded.

[62] Resultantly the lease agreement (consisting of both written agreements) should be met with invalidity and counsel urged this court to refuse to enforce the agreement relied upon by the plaintiff. In this regard the court was referred to *Accolla v Pillay t/a Newlands Sports Bar Liquor Store*³

[63] It was pointed out that the principle applicable is that the Court shall not render assistance in accordance with law to those who defies the law. The issue of degrees of turpitude does not play a role when specific performance is sought. It was submitted

³ 2010 (3) SA 116 (KZD).

that the issue here is not *par delictum* rule, which deals with restitution after performance has taken place in terms of an illegal agreement.

[64] Counsel argued that the degree of turpitude is only relevant in relation to issues other than specific performance of the contract. Counsel called upon the court to reject the plaintiff's version in which event only the turpitude of the plaintiff remains, as the plaintiff did not only aver that the defendant merely participated in the illegal actions of the plaintiff, but that it was the defendant that engaged in the illegal conduct. However, should the court find that the degree of turpitude is relevant, then the plaintiff still fails on a balance of probability as the defendant was not involved and had no turpitude. If on the other hand the court finds that turpitude is not a requirement or irrelevant when specific performance is claimed, the plaintiff can on its own version not succeed when it accuses the defendant of turpitude.

Res extra commercium, Groot Placaat Boek III and Section 30(1) (t) read with section 63 of the Local Authorities Act, 23 of 1993

[65] To a large extent Mr Heathcote repeated his argument advanced during the absolution application and I will not repeat the bulk thereof. The gravamen of his argument is the following:

- a) that the decree dated 15 September 1620 on pages 734 and 735 of the Groot Placaat Boek in terms of which disposal of property of the County or the State without a resolution to that effect is null and void as part of the common law, which was codified into legislation but the common law not repealed.
- b) that the Placaat is clear in that it prohibits and declares null and void, any action which 'disposes of, sold, changed, pledged or in any other way relinquished, directly or indirectly.' The net of the Placaat is cast as wide as possible.
- c) It is maintained that 'relinquish' would also include lease.

- d) that at common law there has always been a prohibition against the disposal and/or lease of state land and on the date that the lease agreements were signed the Placaat applied and the said lease agreements are *contra* the Placaat.

The defendant's lien

[66] Mr Heathcote argued that the value of the defendant's lien is the lesser amount of the expenses actually incurred and the amount with which the value of the property was increased as a result of improvements. According to the defendant's evidence the lesser amount as stated above amounts to N\$ 1 997 258.

Lease is inchoate, void and unenforceable

[67] The defendant persisted with this point and argues that the diagram was in existence at the time of conclusion of the two lease agreements and was not pleaded by the plaintiff, neither is there a claim for rectification of the two agreements to annex a document to the two lease agreements.

Evaluation of the evidence

[68] This court had the benefit of hearing a number of witnesses which consisted of expert witnesses, the new sole member of the plaintiff, Mr Huang and the very two important witnesses, Mr Mvula and Mr Rahman.

[69] Mr Huang was not a party to the agreement and he was unable to take the matter any further. The evidence of the experts were of formal nature to assist the court in deciding on the issue of reasonable rental and the value of the improvement. However, as it will become clear hereunder the evidence of the experts, although of valuable assistance to this court, did not take the matter much further.

[70] The two witnesses whose evidence plays a crucial part in deciding this matter is that of Mr Mvula and Mr Rahman.

[71] Mr Habibur Rahman was also not party to the conclusion of the agreement however he was, in his capacity as manager of the defendant, involved in the payment of the monthly rent together with his cousin Mr Faizur Rahman. He also found certain documents, for example invoices and the copies of the lease agreements in the files of the defendant after he took up his position as the manager of the defendant. He was also involved in the day to day running of the defendant and dealings with Mr Mvula.

[72] At first the evidence of Mr Mvula appeared to be credible but he fell apart during cross-examination. Mr Mvula also inadvertently spilled the proverbial beans that one of the lease agreements were meant to be off the books. During cross-examination Mr Mvula was also taken to task about his ownership of the property in question and the sale of the member's interest in the plaintiff to Mr Huang without the plaintiff being the owner of the property as Mr Mvula was not in possession of a title deed and in fact to date Mr Huang has been unable to obtain a title deed.

[73] It is common cause that the plaintiff was not registered for VAT at the time of the conclusion of the agreements. The defendant on the other hand was in the import/export business and was duly registered for VAT and as such the VAT could be re-claimed from the Department of Inland Revenue within the Ministry of Finance.

[74] When the court considers the probabilities and improbabilities of the witnesses' evidence before it a few issues stand out.

[75] Mr Mvula in his evidence made himself look like the innocent party in this dealings yet he insisted on receiving the money in US Dollars. Mr Mvula denied this fact but this was clear from the tax invoices that the exchange rate was calculated and there is no reason to calculate exchange rate if payment is made in Namibian Dollars.

[76] The defendant paid the N\$ 10 000 monthly rental per cheque and there was no reason why the N\$ 35 000 could not be paid by cheque as well. Interestingly, the invoice book remained with Mr Mvula and this much is clear because if the defendants had the book they could have produced it in court but they only had the original invoices. In that case Mr Mvula would have the original invoices and not *vice versa*.

[77] A further interesting fact is that the agreements were drafted by Mr Mvula or at his instance. This does not add up with Mr Mvula's version of how this matter went down.

[78] It would appear that the only party that could derive any financial benefit from the fact that a portion of the rental was 'off the book' would have been Mr Mvula. If the N\$35 000 rental was declared to the Receiver of Revenue as 'income' consequently, the plaintiff would have to pay income tax thereon, and the defendant in turn could reclaim the VAT amounts.

[79] It is common cause that when Mr Huang bought the member's interest in the close corporation the defendant was informed to pay the full amount of the rental over, inclusive of VAT, to the plaintiff's bookkeeper. This payment was accordingly done until such time that the defendant realized that the plaintiff was not the owner of the property and then stopped making the monthly payment as of November 2009.

[80] The defendant had no issue in paying the VAT. This is another indication that the defendant had no reason to avoid paying the VAT.

[81] The version presented to this court by Mr Mvula is full of improbabilities and the plaintiff's version, as to how the agreements were concluded, stands to be rejected.

The burden of proof and the evidential burden

[82] I can do no better than to refer to the comprehensive summary made by Damaseb JP in *Dannecker v Leopard Tours Car & Camping Hire CC*⁴

'It is trite that he who alleges must prove. A duty rests on a litigant to adduce evidence that is sufficient to persuade a court, at the end of the trial, that his or her claim or defence, as the case may be should succeed. A three-legged approach was stated in *Pillay v Krishna* 1946 AD 946 at 951-2 as follows: The first rule is that the party who claims something from another in a court of law has the duty to satisfy the court that it is entitled to the relief sought. Secondly, where the party against whom the claim is made sets up a special defence, it is regarded in respect of that defence as being the claimant: for the special defence to be upheld the defendant must satisfy the court that it is entitled to succeed on it. As the learned authors Zeffert *et al South African law of Evidence* (2ed) at 57 argue, the first two rules have been read to mean that the plaintiff must first prove his or her claim unless it be admitted and then the defendant his plea since he is the plaintiff as far as that goes. The third rule is that he who asserts proves and not he who denies: a mere denial of facts which is absolute does not place the burden of proof on he who denies but rather on the one who alleges. As was observed by Davis AJA, each party may bear a burden of proof on several and distinct issues save that the burden on proving the claim supersedes the burden of proving the defence.⁵

Issues for determination

[83] This court must determine the validity of the lease agreement and if the defendant has a lien against the plaintiff

The absolution judgment

[84] In the application by the defendant for absolution from the instance a number of issues were raised on which the application was based, i.e.:

- (a) The lease is inchoate, void and unenforceable;

⁴(I 2909/2006) [2016] NAHCMD 381 (5 December 2016).

⁵ Supra at 953.

- (b) The agreements in existence would be mutually exclusive and not exist together;
- (c) Illegal substratum;
- (d) *Res extra commercium* and Groot Placaat Boek III;
- (e) Section 30(1) (t) read with section 63 of the Local Authorities Act, No. 23 of 1992.

[85] During the course of my judgment I made the following findings on the issues raised, which have a final effect:

- (a) On the issue that the leased premises were sufficiently identified or identifiable⁶: It is the Defendant's case that the property is not identified or identifiable due to the fact that the annexure identifying the property was not attached to the lease agreements and as a result the lease is inchoate, void and unenforceable.

In the context of the lease agreement(s) the property is referred as Erf A, Oshikango, measuring 1,5024 m² and also with reference to documentation available regarding the property it would appear that the particular property is generally identified as such and I was satisfied that the property is sufficiently identified or identifiable.

- (b) On the issue that the *res extra commercium* and the Groot Placaat Boek III applied to the lease agreements: The argument advanced on behalf of the defendant is that the land has never been transferred by State into private ownership, or to a particular public body, and for which no title deed exists, and therefore it is state land unless there is proof to the contrary⁷. The land therefor constitutes *res extra commercium* and thus the lease agreement is null and void.

⁶ *E & L Mvula Development Properties // Africa Autonet CC t/a Pacific Motors* (I 2839/2013) [2017] NAHCMD 248 (17 July 2017) at paragraphs 64-73.

⁷ Defendant's heads of arguments paragraph 15.

My finding in this regard was that State land that is not common property (*res ominus communes*) or public property (*res publica*) does not appear to fall in category of *res extra commercium* as proposed by the defendant.

In respect of the Groot Placaat Boek III (GPB) the court was referred to the decree dated 15 September 1620 in terms of which disposal of property of the County or the State without a resolution to that effect is null and void. This decree was issued to the Knighthood, Nobility and Cities of Holland and West Frisia, representing the State of these lands.

The argument was advanced on behalf of the defendant that as the subject property is state/municipal land in terms of GPB the lease agreement entered into between the parties without the permission of the state/municipality would be null and void. Although the majority of the decree deals with disposing of state property, it also refers to 'relinquish in any way', which the defendant submitted that the wording of the decree is so wide it could be interpreted to include lease.

After having heard the discussion of the history relating to the said decree I found that the GPB of 1620 did not find application in the current set of facts.

- (c) On the applicability of s 30(1) (t) read with s 63 of the Local Authorities Act, 23 of 1993: The defendant maintained that the lease agreement was entered into contrary to the provisions of the Local Authorities Act as the consent of the Minister was not granted in respect of the lease agreement.

It was my finding that as neither party fell within the definition of section 30(1) (t) of the Local Authorities Act which, by definition, prohibited a municipality, a township and a village from selling, hypothecating or otherwise dispose of or

encumber any immovable property, without the prior approval of the Minister, the said sections could not find application.

Discussion and application of the applicable law

[86] In my view it is not necessary to revisit the issues raised on behalf of the Defendant during the absolution application. I ruled on the majority of the defence raised on behalf of the defendant in my absolution judgment. The two defences that I did not make a ruling on were firstly the issue of whether the agreements in existence would be mutually exclusive and could not exist together, and secondly whether the two lease agreements which are identical in nature have an illegal substratum.

[87] My findings with regard to the latter issue was that this is an issue that could not be considered without having the benefit of hearing all the evidence and that it would not be appropriate to consider the plaintiff's case *in vacuo*.

[88] I now had the opportunity to hear all the evidence presented in this matter and after having done so it is my considered view that this matter can be decided on one point and probably the most important one of all, as it cuts to the heart of this matter, is whether the lease agreements are tainted with illegality and whether the second lease agreement has an illegal substratum.

[89] It is the case of the defendant that the rental agreements are a nullity. It is the argument by the defendant that the sole purpose of concluding the second lease agreement in the terms as it was, was at the insistence of Mr Mvula in order to avoid the payment of tax.

[90] As was discussed before, the plaintiff and the defendant are not in agreement as to who initiated the second agreement. Mr Mvula was adamant that the defendant insisted on a second lease agreement and Mr Rahman insisted it was at the instance of Mr Mvula.

[91] As could be seen from the evaluation of the evidence of the witnesses' the probabilities favors the version of the defendant. The person who would gain from this under handed agreement was Mr Mvula.

[92] It was argued on behalf of the plaintiff that Mr Mvula acted in his personal capacity as a *particeps criminis* and that no blame can be laid at the door of the plaintiff.

[93] I fail to understand this argument since Mr Mvula was acting on behalf of the plaintiff and conducting the business of the plaintiff by entering into a lease agreement on behalf of the close corporation for the benefit of the close corporation and thereby binding the close corporation to such an agreement. The plaintiff can therefore in my opinion be held liable for Mr Mvula's actions, whether he was the sole member of the plaintiff or not. As correctly pointed out by the defendant the plaintiff cannot argue that where Mr Mvula did something illegal then he acts in his personal capacity and where he did something right, he does so on behalf of the plaintiff.

[94] I indicated in the absolution judgment that I am not able to determine the degrees of turpitude of the parties and whether there are certain degrees of turpitude at that point of the proceedings.

[95] It was pointed out to this court that turpitude is only relevant in relation to issues other than specific performance, which argument I find to be sound. The stance of the plaintiff is that the defendant solely initiated the illegal conduct and he was the innocent party. Mr Mvula does not allege only a certain degree of participation in the illegal scheme but effectively alleged it was the defendant's brainchild, however from the earlier discussion in respect of the evaluation of the evidence, the plaintiff's version in this regard was rejected and the defendant's version was accepted. This then results in the only turpitude that remains is that of the plaintiff and it is not necessary to consider the degree of turpitude.

[96] I elected not to consider the issue of the mutual exclusivity of the lease agreements during the absolution ruling as it was not pleaded but only raised during cross-examination of Mr Huang and it appeared that it would be prejudicial to the plaintiff. Even though the outcome of the matter *in casu* does not rest on this issue it has become abundantly clear upon considering all the evidence before me that the two lease agreements cannot be separated from the legality issue.

[97] The plaintiff relies on two written lease agreements in terms of which it received a combined monthly rental in respect of the exact same premises. There is no differentiation in the description of the premises, for example where different portions of the premises are rented out. It is leased as one premises, namely 'Erf "A", Oshikango as detailed in the attached schedule, marked "A" and being in extent of 1, 5024 hectares.

[98] Whereas each lease agreement should technically be seen as a complete agreement in its own right, on the defendant's version, the plaintiff's claim must fail as the two agreements cannot exist together. If the court accept that the lease agreements are one indivisible lease agreement as pleaded by the plaintiff then further issues arises namely, that if one of the lease agreements are found to be tainted with illegality logic dictates that the other agreement will be tainted as well.

[99] As one indivisible agreement the tainted agreement cannot be separated from the legal agreement as one cannot tell which of the two agreements were signed first.

[100] It is now common cause that one of the agreements were entered into with the aim of having it 'off the books' and there is no doubt in my mind that it was done for the purpose of avoiding to pay tax/VAT.

[101] The question on what the status of the two agreements of this nature would be was addressed in *Accolla v Pillay t/a Newlands Sports Bar Liquor Store*⁸ where it was set out in the head note of the case as follows:

'The plaintiff sought provisional sentence against the defendant in respect of four cheques for R300 000 each. The cheques were issued with the same underlying *causa*, namely the purchase price of a business purchased by the defendant. The terms and conditions of the sale were contained in two documents, an agreement of sale for the business for R900 000 (which amount was to be provided in the form of three postdated cheques), and a document entitled 'Consent to Judgment', in which the defendant and P consented to judgment in an amount of R3 100 000. In terms of the consent, (a) the defendant and P acknowledged an inability to make payment; (b) the plaintiff granted an extension of time for payment; and (c) the defendant and P undertook to make an initial payment of R1 million and deliver seven postdated cheques for a further R300 000 each. The defendant accordingly paid R1 million and delivered ten postdated cheques. The defendant subsequently countermanded payment in respect of four of the cheques (the basis for the provisional sentence), alleging certain material facts had not been disclosed before the sale. In the provisional sentence proceedings the defendant's position was that the splitting of the purchase price into amounts of R900 000 and R3 100 000 was to save the seller capital gains tax by deceiving the Receiver of Revenue into levying a lesser amount; accordingly the plaintiff was party to an illegality, prohibited by statute, and not entitled to enforce the cheques.'

[102] In his judgment Swain J found as follows:

'[13] Considering the most unusual manner in which the sale was structured and the direct allegation by the defendant, that it was done in order to save the seller the payment of capital gains tax, an explanation by the plaintiff, or his attorney, was required...

And

[16] What has now to be decided is whether this conclusion renders the contract of sale illegal and unenforceable, with the consequence that a party to the contract cannot claim specific performance or payment, in terms of the contract. (Christie *The Law of Contract in South Africa* 5 ed at p 391.)'

⁸ Supra at footnote 2.

[103] The court found in that matter that given the fact that the parties had entered into a conspiracy to defraud the receiver, the consequences of visiting invalidity upon the transaction would not be inequitable or disproportional. The court further held that if the sale agreement is illegal and unenforceable, the plaintiff, who was a party to the illegality, cannot claim payment in terms of the contract.

[104] In *Madzyire v Makwabarara* and others⁹ the facts also relates to a second contract entered into with the aim of evading tax. In this matter two agreements were entered into. The first one reflects a price, a portion of which was to be paid as deposit. The second signed about two weeks later, showed the price as being half of that shown in the first contract, and without requirement to pay a deposit. The applicant paid the higher price. The respondents alleged that the second agreement was drawn up in order to reduce the cost of transfer fees and stamp duties; the applicant alleged that the agreement was intended to avoid problems with the first respondent's family about the purchase price.

[105] I will refer to the mini summary of the case where the court held as follows:

'... the second agreement was a continuation of the first and if the purpose was to defeat the *fidus* then the whole transaction is tainted by illegality.In any event, it is a universal principle of common law that any agreement whose claim is to deprive the *fidus* of revenue is illegal and therefore void ab initio and incapable of being enforced.'¹⁰

[106] The court further held that

'The second agreement being a continuation of the first agreement, in that the first reflected the real contract between the parties and the second intended to facilitate under payment by either one or both of the parties of stamp duties and capital gains tax, the first agreement itself was an illegal agreement. An illegal agreement is void of legal effect. The effect of an agreement being illegal is that neither party can bring an action founded on the agreement. The fact that the application paid the full sum of the purchase price did not validate the agreement. Although in

⁹ [2013] JOL 30109 (ZH).

¹⁰ Set out in the Mini Summary of the case.

suitable cases the court will relax the *par delictum* rule and order restitution to be made, the applicant had not sought that remedy. He only sought specific performance, which could not be granted.¹¹

[107] To date this court cannot comprehend why there was a need to enter into two lease agreements with the exact same terms but with different lease amounts and yet it was argued on behalf of the plaintiff that there was nothing wrong with having two lease agreements in place.

[108] In my opinion, the plaintiff could not come up with any reasonable explanation for the two lease agreements. The only reason, as already discussed, was to avoid the payment of tax. This behavior causes the two lease agreements to be illegal and therefore void ab initio and incapable of being enforced. The plaintiff falls far short in proving its case on a balance of probabilities and this court cannot come to the assistance of the plaintiff where it approaches this court with dirty hands and then expect this court to enforce the illegal lease agreements. On the other hand the defendant succeeded in discharging the onus of proving that the lease agreements had an illegal substratum.

In conclusion

[109] In light of the fact that the lease agreements were found to be illegal and without force it would mean there is nothing for the plaintiff to rely on. The plaintiff is therefore not in the position to evict the defendant in respect of what is remaining of the lease agreement as it should be born in mind the lease agreement was cancelled in October 2010 and not renewed which left three months of the remaining lease period that was not paid.

[110] It is also common cause that the property belongs to the Government of Namibia and therefore the plaintiff cannot claim damages in respect of a third party's property and the only party that will be able to evict the defendant from the property, in light of

¹¹ As set out in the Mini Summary of the case.

the finding that the agreements are a nullity, is the owner of the property, namely the Government of Namibia.

[111] It is not necessary to deal with the defendant's improvement lien as this lien can be enforced against the lawful owner of the property. I am however satisfied that the defendant has proven its lien on a balance of probabilities for the lesser amount as calculated by Mrs Falck, in the amount of N\$ 1 997 258.00.

[112] My order is therefor as follows:

1. The claim of the plaintiff is hereby dismissed with costs, such costs to include the cost of one instructing and two instructed counsel.
2. Defendant's counterclaim is enforceable against the third party and not the plaintiff as the lease agreements were found to be illegally and unenforceable.
3. For purposes of this judgment the experts Mrs Jeanette Lynn Falck and Mrs Dawn Adams are declared as necessary experts.
4. The Registrar is directed to bring this judgment to the attention of the relevant officials at the Ministry of Finance: Inland Revenue for their attention and consideration.

JS Prinsloo
Judge

APPEARANCES

PLAINTIFF:
Bassinghthwaite)

Adv E Schimming Chase SC (assisted by N

Instructed by Sisa Namandje &

Co

DEFENDANTS:
Campbell

Adv R Heathcote SC (assisted by Y

Instructed by Koep &

Partners