

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-ACT-OTH-2020/02266

In the matter between:

DAVID JOHN BRUNI

PLAINTIFF

and

TULIVE CAPITAL (PTY) LTD

FIRST DEFENDANT

IYALOO JEREMIAH NANGOLO

SECOND DEFENDANT

STEPHANUS ADRIAAN OOSTHUIZEN

THIRD DEFENDANT

WICLIFF BONNY DAMASEB

FOURTH DEFENDANT

Neutral citation: *Bruni v Tulive Capital (Pty) Ltd* (HC-MD-CIV-ACT-OTH-2020/02266) [2020] NAHCMD 536 (16 November 2020)

Coram: **PRINSLOO J**

Heard: 23 October 2020

Delivered: **16 November 2020**

Reasons: **20 November 2020**

Flynote: Application for Summary Judgment – Defence raised of: (a) affidavit verifying facts and cause of action contradictory and mutually exclusive and (b) agreement reached between the parties transgresses s 39 of the Banking Institutions

Act, therefore SME Bank cannot enforce it – As amount due and payable is undisputed the matter of *Kelnic Construction (Pty) Ltd v Cadilu Fishing (Pty) Ltd*, wherein Supreme Court held that in light of the admission of liability in respect of the amount the uncertainty created by verifying mutually destructive causes of action falls away, is applicable to the facts before this court – Section 39(1) of the Act does not in itself expressly provide that a transaction in breach thereof will be null and void – Further, *Par delictum* rule under the circumstances must be subordinate to the overriding consideration of public policy. To serve the public interest the defendant should repay the amount advanced to it in spite of contravention of s 39 of the Act.

Summary: In the particulars of claim the plaintiff sketches a situation where certain individuals referred to as the '*dramatis personae*' in conjunction with third party entities perpetrated fraud on a grand scale. The investigations into the said fraudulent schemes led to the uncovering of approximately N\$ 247 545 004 which was misappropriated from the SME Bank. As a result of the theft the SME Bank was forced into liquidation.

On 2 February 2015 the SME Bank and Tulive entered into a discretionary agreement wherein SME Bank appointed Tulive to manage investments on its behalf and to receive funds for purposes of the investment.

In terms of the discretionary agreement Tulive acknowledged that the SME Bank invested the sum of N\$ 10 000 000 on 24 March 2015 in respect of which the funds had to be invested by Tulive with a guaranteed return on the said investment to the SME Bank at the rate of 13% per annum. SME Bank's Manager: Treasury Back Office was instructed to transfer the amount of N\$ 10 000 000 from the SME Bank account at the Bank of Namibia to Tulive's bank account held at Nedbank Namibia Limited. Once the funds were received in the bank account of Tulive the defendants dealt with the money as if it were their own. The first defendant first defendant transferred money back to the SME Bank during the period 2015 to 2017 consisting of three different payments. The last payment was made in June 2017 and since then the first defendant's account became dormant.

The plaintiffs issued summons against the defendants for payment of N\$ 13 138 906.80 plus interest and costs. The claims as set out in the particulars of claim consist of the following: (a) main claim is based on s 31 the Insolvency Act; (b) the first alternative claim is for specific performance of the discretionary agreement, including the claim based on a guaranteed return on investment of the N\$ 10 000 000; (c) the second alternative claim is based on the provisions of s 39 of the Banking Institutions Act; and (d) the second main claim is against the second defendant only for travel and accommodation expenses unlawfully incurred between the first defendant and the SME Bank.

In the present matter the plaintiff applies for a summary judgment application and relies on the first alternative claim for specific performance and does not proceed on the second main claim against the second defendant. The first defendant opposed the application for summary judgement and raised two defence in opposition to the summary judgment, ie firstly that the affidavit by Ms Pearson verifying the facts and the cause of action is contradictory and mutually exclusive and secondly, the agreement reached between the parties transgresses s 39 of the Banking Institutions Act, therefore the SME Bank cannot enforce it.

The first defendant did not file a defence on the merits of the matter but relies on an exception to resist the summary judgment application.

Held that as the amount due and payable is undisputed the matter of *Kelnic Construction (Pty) Ltd v Cadilu Fishing (Pty) Ltd*, wherein the Supreme Court held that in light of the admission of liability in respect of the amount the uncertainty created by verifying mutually destructive causes of action falls away, is applicable to the facts before court.

Held that s 39(1) of the Act does not in itself expressly provide that a transaction in breach thereof will be null and void. A contravention of s 39(1) and (2) constitutes an offence in terms of s 73(1) of the Act but upon proper construction of the Act in respect of s 39 the legislature did not intend that a failure to comply therewith would render a particular transaction null and void but rather that the legislature was

content with the criminal penalties and sanctions imposed on whomever contravened s 39(1) and (2).

Held that as the agreement is valid, the claim for unjustified enrichment falls away and so does the exception that the first defendant raised as a defence to resist the application for summary judgment.

Held that the *par delictum* will only be applicable as far as it relates to the public interest. The *par delictum* rule under the circumstances must be subordinate to the overriding consideration of public policy. To serve the public interest the defendant should repay the amount advanced to it in spite of contravention of s 39 of the Act.

ORDER

Summary judgment is granted in favour of the Plaintiff in respect of the First Defendant in the following terms:

1. Payment in the amount of N\$ 13 138 906.80.
2. Interest on the amount of N\$ 13 138 906.80 at the rate of 13% per annum from 16 June 2020 until date of final payment in respect of the Plaintiff's claim for specific performance.
3. Cost of one instructing and two instructed counsel where so employed.

JUDGMENT

PRINSLOO J

The parties

[1] The plaintiffs are the duly appointed final liquidators of the Small and Medium Enterprise Bank ('SME Bank') in liquidation.

[2] The plaintiffs are moving for an application for summary judgment against the first defendant, Tulive Capital (Pty) Ltd ('Tulive').

[3] I will refer to the parties as they are in the main action.

Background

[4] In the particulars of claim the plaintiff endeavour to set out the background in this matter in as much detail as possible. The plaintiff sketches a situation where certain individuals referred to as the '*dramatis personae*' in conjunction with third party entities perpetrated fraud on a grand scale. The investigations into the said fraudulent schemes led to the uncovering of approximately N\$ 247 545 004 which was misappropriated from the SME Bank. As a result of the theft the SME Bank was forced into liquidation.

[5] On 2 February 2015 the SME Bank and Tulive entered into a discretionary agreement wherein SME Bank appointed Tulive to manage investments on its behalf and to receive funds for purposes of the investment. At the time of the agreement the SME Bank was represented by Mr Tawanda Mumvuma,¹ to whom the plaintiffs refer to as a *personae dramatis* as set out above in para 4.

[6] In terms of the discretionary agreement (POC 4) Tulive acknowledged that the SME Bank invested the sum of N\$ 10 000 000 on 24 March 2015 in respect of which the funds had to be invested by Tulive with a guaranteed return on the said investment to the SME Bank at the rate of 13% per annum.

[7] On 23 March 2015 the SME Bank's Chief Executive Officer, Mr Mumvuma and General Manager: Treasury, Alec Gore instructed the SME Bank's Treasury Back Office, in writing, to open an investment account in the Bank's books in the name of Tulive. On the next day, 24 March 2015 the said gentlemen, in writing, instructed SME Bank's Manager: Treasury Back Office to transfer the amount of N\$

¹ The Director and CEO of SME Bank as of 2012 until Bank of Namibia took over management of the SME Bank on 1 March 2017.

10 000 000 from the SME Bank account at the Bank of Namibia to Tulive's bank account held at Nedbank Namibia Limited. In pursuance of the aforementioned written instructions the said amount was duly transferred into the Tulive's bank account.

[8] Once the funds were received in the bank account of Tulive the defendants dealt with the money as if it were their own. The flow of the money from the account of the first defendant is set out in detail in the particulars of claim and I do not intend to replicate it for purposes of this ruling. If one considers the flow of the money from the account of the first defendant it would appear that certain monies were transferred back to the SME Bank during the period 2015 to 2017 consisting of three different payments. The last one was made in June 2017. This is one of the last transactions made in the first defendant's account and save for small credits for interest and debits for bank charges this account of the first defendant became dormant, according to the plaintiff.

[9] After the liquidation of the SME Bank, this court authorized a Commission of Enquiry into the affairs of SME Bank in terms of s 423 and 424 of the Companies Act.² The plaintiffs subpoenaed the second and third defendants to give evidence at the Commission of Enquiry and during these proceedings the second and third defendants testified (also on behalf of the first defendant, Tulive), confirming that:

- a) the first defendant, Tulive, entered into an agreement with the SME Bank called a Discretionary Agreement. This agreement guaranteed a 13% per annum return on the said investment;
- b) the first defendant received the amount of N\$ 10 000 000 from the SME Bank;
- c) the first defendant had to invest the N\$ 10 000 000 for and on behalf of SME Bank;
- d) the N\$ 10 000 000, other than the amounts repaid to the SME Bank, was lost.

² Act 28 of 2004.

[10] The plaintiffs issued summons against the defendants for payment of N\$ 138 906.80 plus interest and costs.³ The claims as set out in the particulars of claim consist of the following:

- a) Main claim is based on s 31 the Insolvency Act.
- b) The first alternative claim is advanced and based on the fact that in the event the court finds that the plaintiff's main claim in terms of the Insolvency Act cannot succeed and on the supposition that the discretionary agreement is indeed a valid agreement, in that event the plaintiff's claim is for specific performance of the discretionary agreement, including the claim based on a guaranteed return on investment of the N\$ 10 000 000. The plaintiffs pleaded that only in the event that the court finds that the plaintiffs are not entitled to specific performance and given the first defendant's lack of repentance, the plaintiffs accepts the first defendant's repudiation and reclaims the amount of N\$ 10 000 000.
- c) The second alternative claim is based on the provisions of s 39 of the Banking Institutions Act⁴, which prohibits any banking institution from conducting any financial business or transaction which is not usually or ordinarily conducted by a banking institution, such as the transactions entered into by and between the first defendant and the SME Bank when they entered into the discretionary agreement.
- d) The second main claim is against the second defendant only for travel and accommodation expenses unlawfully incurred between the first defendant and the SME Bank.

[11] For purposes of the summary judgment application the plaintiffs are relying on the first alternative claim for specific performance. In light thereof it is not necessary to consider or discuss the remainder of the claims for purposes of the current ruling. The plaintiffs indicated that they are not pursuing the second main claim against the second defendant for purposes of the summary judgment application.

³ Calculated as follows: Capital advanced on 24 March 2015: N\$ 10 000 000 plus 13% per annum from 24/03/2015 to 06/04/2017 minus N\$ 1 300 000 paid on 7/04/2017, plus interest from 08/04/2017 to 19/06/2017, minus N\$ 3 598 741 on 20/06/2017, plus interest at 13% from 21/06/2017 to 27/06/2017, less payment of N\$ 48 296.45 on 28/06/2017, plus further interest at 13% per annum from 29/06/2017 to 16/06/2017.

⁴ Act 2 of 1998.

[12] In respect of the claim for specific performance the plaintiffs pleaded that in the event that the court finds that the discretionary agreement is a valid agreement then the plaintiffs allege that the first defendant breached the guarantee stipulated in the agreement (POC 4) as attached to the particulars of claim, by failing to pay the SME Bank the guaranteed 13% per annum return on the investment.

Applicable legal principles in regards to summary judgment

[13] The applicable principles in regards to summary judgments applications are trite and I see no need to restate it. I will however keep in my mental spectacle a reminder that during the current enquiry the court must determine firstly, that the plaintiffs have established its claim clearly on the papers and secondly, whether the defendant has fully disclosed the nature and grounds of the defence raised in the action and the material facts upon which it is founded on the facts disclosed in the affidavit, and whether the defendant appear to have, as to either the whole or part of the claim, a defence which is bona fide and good in law. If satisfied, the court must refuse summary judgment, either wholly or in part, as the case may be.

Opposing affidavit

[14] Mr Iyaloo Nangolo, the Managing Director of Tulive, deposed to the opposing affidavit in opposition to the summary judgment application. The first issue raised in the opposing affidavit is the fact that Ms Pearson verified the causes of action underpinning each claim in the circumstances where such claims, albeit in the alternative, are based upon factual and legal circumstances which are mutually destructive.

[15] It was maintained that Ms Pearson cannot verify two alternative causes of action which are mutually destructive alternative factual versions. Mr Nangolo maintained that in the premise, it cannot be said that the plaintiff has an unanswerable case as it is clear that the allegations fundamental to the alternative claims asserted have in effect been verified and contradicted in the same breath.

[16] By way of example the deponent stated that Annexure POC 4 is said to be valid for purposes of the claim based on specific performance, yet also to be null and void for purposes of the alternative claim based on the legal contention that the agreement is not in compliance with s 39 of the Banking Institutions Act. Mr Nangolo stated that while it is well established that pleadings of inconsistent versions in the alternative is proper a witness like Ms Pearson is in a different position because she does not testify about conclusions of law but about facts.

[17] Mr Nangolo further submitted in respect of the claim for specific performance that the claim is dependent on the court finding that the agreement (POC 4) is valid. Mr Nangolo avers that the first defendant was unaware that the agreement between the parties was concluded without the authority of the Board of the SME Bank. He further states that in light of this fact the conclusion of the agreement does not constitute financial business or a transaction which is 'usually or ordinarily' conducted by the banking institutions in terms of the Banking Institutions Act or any other law and as a result, *ex facie* the POC4 it contravenes the provisions of s 39 of the Act. He further submitted that to that extent any performance in respect of this agreement will constitute a criminal offence. He thus concluded that there is no factual or legal basis to justify a claim for specific performance and that the court will not order the first defendant to perform in respect of an agreement in circumstances where such a performance would constitute a criminal offence.

[18] In support of his contentions Mr Nangolo referred to s 39(1)⁵ and (2)⁶ read with s 73(1)⁷ of the Banking Institutions Act. He further stated that the provisions of s

⁵ 39. (1) A banking institution shall only conduct financial business or transactions which are usually or ordinarily conducted by banking institutions in terms of this Act or of any other law. (2) A banking institution shall not, subject to subsection (6), conduct, or have any direct interest in, any activities relating to merchandise, trade, industry, insurance, mining, agriculture, fisheries or commerce unless such activities - (a) are permitted in terms of subsection (1); or (b) may, in exceptional circumstances, be necessary in the course of - (i) the banking business of the banking institution, or in the course of the satisfaction of debts which may be incurred as a result of such banking business; or (ii) any trusteeship or the administration of the estate of a deceased person.

⁶ (2) A banking institution shall not, subject to subsection (6), conduct, or have any direct interest in, any activities relating to merchandise, trade, industry, insurance, mining, agriculture, fisheries or commerce unless such activities - (a) are permitted in terms of subsection (1); or (b) may, in exceptional circumstances, be necessary in the course of - (i) the banking business of the banking institution, or in the course of the satisfaction of debts which may be incurred as a result of such banking business; or (ii) any trusteeship or the administration of the estate of a deceased person.

⁷ 73. (1) A banking institution or controlling company which contravenes or fails to comply with - (a) any provision of section 8(2), 12(2), 12D and 12E, 14, 16(1), 19(1) or (4), 20(1)(a), (2)(a) or (5), 21(1), (4), (6) or (7), 27(2), 30(1)(a), (b) or (c), 31(2) or (3), 32, 35, 36(1), 37(1), 39(1) or (2), 40(1) or (2), 41(1) or (2), 42(2) or (4), 43(1) or (2), 45(4), 46(1) or (2)(a), 47(2)(b) or (3), 48, 53(1), 54(1), 55(1), 61(1), 62(1) or 63; or (b) any notice, demand, instruction or request made or issued under any section

39 of the Act gives rise to the sanctions provided, inter alia, in sections 39(5), 72 and 73 of the Act, which does not afford a remedy to the banking institution or its duly appointed liquidators to recover the amounts paid by it in breach of s 39, therefore the plaintiffs' remedy must lie elsewhere.

[19] Mr Nangolo also raised the issue of a prior affidavit of Mr Bruni, the first plaintiff, deposed to in the application which served before this court⁸ to establish a commission of enquiry into the affairs of the SME Bank. It is contended that Mr Bruni stated in this affidavit that the amount of N\$ 10 000 000 invested by the SME Bank in Tulive 'also transgresses s 39(1) and 39(2) of the Banking Institutions Act, 1998'. Mr Nangolo maintains that in light of the earlier affidavit of Mr Bruni he cannot confirm under oath that the affidavit of Ms Pearson, verifying the cause of action, is true and correct. The reason being that Ms Pearson purports to verify the plaintiff's cause of action in respect of the claim for specific performance, which is premised upon the agreement (POC 4) attached to the particulars of claim as being valid, whereas Mr Bruni in his affidavit of 15 February 2018 stated the opposite, thereby creating a conflict between the respective statements which is destructive of the claim asserted by the plaintiffs for specific performance.

Arguments on behalf of the parties

[20] Both counsel in this matter advanced complex and detailed arguments on behalf of their clients and it is not possible to replicate their arguments for purposes of this ruling but I will as far as possible attempt to extract the major points raised by the respective counsel.

On behalf of the plaintiff

[21] Mr Heathcote submitted first and foremost that the first defendant does not have a *bona fide* defence to any of the claims raised by the plaintiff. He argues that nowhere in the opposing papers does the first defendant dispute its liability in

referred to in paragraph (a); or (c) any order, direction or instruction made or issued under section 6(2)(f), 8(4)(b), 15(5), 39(4) or 52(9); or (d) any condition or requirement laid down under section 8(3), or (4), 36(2), 47(5), 49(5) or 50, shall be guilty of an offence.

⁸ Under case number HC-MD-CIV-MOT-EXP-2018/00041.

respect of the amount due. Mr Heathcote argued that the defence that Tulive raises regarding the verifying affidavit by Ms Pearson and the allegation that she verified mutually destructive causes of actions has no merits if it is considered that the amount claimed by the plaintiffs is not in dispute. In this regard the court was referred to *Kelnic Construction (Pty) Ltd v Cadilu Fishing (Pty) Ltd*,⁹ wherein the Supreme Court held that in light of the admission of liability in respect of the amount the uncertainty created by verifying mutually destructive causes of action falls away.

[22] Mr Heathcote further submitted that Tulive's position that the agreement transgressed s 39 of the Act would result in the fact that the plaintiffs can neither enforce the agreement nor have a claim based on enrichment which is bizarre because on that supposition the N\$ 10 000 000 advanced to Tulive would amount to some sort of a gift, which is not the case.

[23] Mr Heathcote referred this court to two different maxims to be considered during this court's judgment, ie the *par delictum* rule¹⁰ as well as the *ex turpi causa* rule¹¹ (to be considered only in the event that the agreement is found to be null and void and no causa exists between the parties) and argued that the *par delictum* rule has a very wide range of application and will find application in the current matter as it did in *Claud Bosch Architects cc v Auas Business Enterprise 123 (Pty) Ltd*¹² where the court held that even if there was legal non-compliances that specific performance should be ordered.

[24] Mr Heathcote further referred the court to *Patel v Mirza*,¹³ a judgment by the House of Lords, which may be helpful to assist the court to distinguish between the formation of a contract and the execution thereof and submitted that the Banking Institutions Act is only applicable in so far as the formation of the agreement, and if it is accepted that the agreement was not concluded as part of an ordinary banking

⁹ 1998 NR 198.

¹⁰ It is a descriptive phrase that indicates that parties involved in an action are equally culpable for the wrong committed. In simple terms, when the parties to a legal controversy are in *par delictum*, neither can they obtain affirmative relief from the court, since both are at equal fault or of equal guilty.

¹¹ *Ex turpi causa non oritur actio* (Latin "from a dishonorable cause, an action does not arise") is a legal doctrine which states that a plaintiff will be unable to pursue legal remedy if it arises in connection with his own illegal act.

¹² (SA 41/2016) [2018] NASC 3 (06 February 2018).

¹³ 2016 UKSC 42 [2017] AC 468.

practice then the formation of the contract might have been a criminal offence. However, Mr Heathcote submitted that in the current proceedings the court is not dealing with the formation of the agreement but the execution thereof.

[25] Counsel submitted that the question in the matter before court is not if the *par delictum* rule is applicable to the facts, because it will always be, but whether the agreement was valid or not. In this regard the court must consider the policy of the legislature ie what does the legislature protect and if one applies the *par delictum* rule the court must decide if the rule follows the policy of the legislature or cause harm thereto.

[26] Mr Heathcote argued that in the current matter the *par delictum* rule should be relaxed in the interest of public and in order to do justice between man and man. In this regard the court was referred to *Afrisure CC and Another v Watson NO and Another*¹⁴ wherein the court found that public policy dictates that the exception to the general *par delictum* rule must be subordinate to the overriding consideration of public policy and in that the strict application of the *par delictum* rule in those circumstances must be relaxed as dictated by public policy. Mr Heathcote submitted that in the current case it is imperative for the protection of the public interest that the court relax the *par delictum* rule and enforce the claim for specific performance as the public interest will be harmed should the court refuse to enforce the plaintiffs' claim. In this regard the court was referred to para 120 of the *Patel* matter.

Arguments on behalf of the first defendant

[27] Mr Fitzgerald disagrees with the position of the plaintiff that the merits of this matter is not disputed and argues that the current matter must be distinguished from the *Kelnic Construction* matter wherein the liability of the respondent was admitted. He argued that in the matter before court the first defendant raised its exception to technically incorrect papers and referred the court to the case of *Namibian Airports*

¹⁴ 2009 (2) SA 127 (SCA).

*Company Limited v Conradie*¹⁵ as well as to *Jagger & Co Ltd v Mohammed*¹⁶ in this regard.

[28] Mr Fitzgerald further argued that the affidavit verifying the causes of action has mutually destructive alternative factual versions and a different *facta probanda* has been verified in the alternative. Counsel argued that the claim for specific performance is premised on the supposition that the discretionary agreement is a valid agreement whereas on the other hand the claim for unjustified enrichment postulates the position that there is no valid agreement. Counsel referred to *Diesel Power Plant Hire CC v Master Diggers (Pty) Ltd*¹⁷ in this regard. Counsel further referred the court to the affidavit of Mr Bruni who stated in an earlier affidavit that there was a transgression to s 39 of the Act which is contra the submission of Ms Pearson.

[29] On the specific performance claim, which is the principle claim for the plaintiffs in this application, Counsel submitted that specific performance is an equitable discretionary remedy, which the court should not enforce. The reason why the claim for specific performance is not enforceable is: a) the court will not enforce an agreement that constitutes a crime, and b) the court will have regard to the admitted turpitude of the *dramatis personae* and will not enforce the agreement under the circumstances.

[30] Mr Fitzgerald further submitted that the court cannot rely on the *Claude Bosch* matter as the facts before this court is materially distinguishable from that of *Claude Bosch*. Counsel argued that in the *Claude Bosch* matter the court was doubtful that the mischief addressed by s 13(1) (b) of the Architects and Quantity Surveyors Act¹⁸ would constitute a criminal offence in the overall context of that Act. Counsel submitted that the work was done by a registered architect and there was no prejudice. Therefore in the context of that case there was also no 'obvious or engrained disgrace' or 'unremitting impropriety' at play. Mr Fitzgerald argues that the contrary is present in the current matter as the functionaries of the SME Bank set out

¹⁵ 2007 (1) NR 375 (HC) para 13.

¹⁶ 1956 (2) SA 736 (C).

¹⁷ 1992 (2) SA 295 (W).

¹⁸ Act 13 of 1979.

on committing deliberate fraudulent actions when they entered into the agreement, ie their actions were a deliberate and wilful transgression of the Act.

[31] Mr Fitzgerald urged the court not to follow the *Claude Bosch* matter as same is confined to the peculiar facts of that case but that the court should rather consider and follow the *Patel v Mizra*¹⁹ matter to which Mr Heathcote also referred. Mr Fitzgerald referred the court to a number of paragraphs in the *Patel* judgment that are of relevance. The paragraphs referred to is paras 10, 15, 115, 121, 145, 146, 161, 163 and 203. (As these are extensive paragraphs referred to I will not duplicate for purposes of this ruling.)

[32] Mr Fitzgerald submitted that the alternative claim of unjustified enrichment does not get out of the starting blocks in this matter as the legislature never intended for an agreement in contravention with of s 39 of the Act to be a nullity. Therefore the *ex turpi causa* rule finds no application.

[33] Mr Fitzgerald confirms that the parties are in agreement that the discretionary agreement is valid and although valid the first defendant maintains that it is unenforceable at this stage by means of summary judgment due to the measure of turpitude by the functionaries of the bank. Counsel further argued that if the court considers the degree of turpitude between that of the *dramatis personae* and that of the defendants then on that comparison the court should not relax the *par delictum* rule. Counsel contended that the SME Bank went in to the agreement with open eyes and that the money was lost due to bad investments.

[34] In conclusion Mr Fitzgerald submitted that the application for summary judgment should be dismissed as the first defendant has made out an arguable defence.

Common cause facts

[35] It is common cause that the amount of N\$ 10 000 000 was paid over to Tulive in terms of a discretionary agreement.

¹⁹ Supra at footnote 14.

[36] It is common cause that Tulive received the amount of N\$ 10 000 000 and expended this amount as set out in para 12 to 19 of the particulars of claim.

[37] Pursuant to having heard the arguments advanced by the parties, it is common cause that the agreement between the parties is valid.

[38] It is common cause that the SME Bank was guaranteed a return of 13 % per annum and that such payment was not made to the SME Bank.

[39] It is common cause that the amount of N\$ 13 138 906.80 plus interest is due to the SME Bank.

Discussion

[40] The defence raised by the first defendant in opposing the summary judgment application is basically two-fold, firstly that the affidavit by Ms Pearson verifying the facts and the cause of action is contradictory and mutually exclusive and secondly, the agreement reached between the parties transgresses the provisions of the Banking Institutions Act and based on that fact the SME Bank cannot enforce it.

[41] What is evident from the defence raised is that Tulive does not allege that the money is not due to the SME Bank or that the calculations were incorrect or that the money was not received by Tulive, instead the first defendant alleges that there is no factual or legal basis to justify a claim for specific performance as it would constitute a criminal offence. This court can therefore safely accept that the amount in question is not in dispute.

[42] There can be no argument that the defences raised by the first defendant are technical in nature but it is the contention by counsel that the first defendant need not go into the merits of their defence and can resist an application for summary judgment by raising an exception. I therefore take note that the exception is raised on the verifying affidavit and not on the particulars of claim.

Mutually exclusive or alternative causes of action verified

[43] Rule 60(2) provides that:

‘The plaintiff must deliver notice of the application which must be accompanied by an affidavit made by him or her or by any other person who can swear positively to the facts –

- (a) verifying the cause of action and the amount, if any, claimed; and
- (b) stating that in his or her opinion there is no *bona fide* defence to the action and that notice of intention to defend has been delivered solely for the purpose of delay.’

[44] A verifying affidavit is often underestimated as to the degree of importance it has in an application for summary judgment, especially in a case where the summons contains mutually exclusive or alternative causes of action. Pleading of inconsistent versions in the alternative is entirely proper but what is of importance is that where two mutually destructive versions of *facta probanda* are relied on in support of alternative causes of action set out in a summons, the verifying affidavit of the applicant in a summary judgment application must choose between the alternative versions of the facts, for otherwise it will be self-contradictory.²⁰ If the deponent purports to verify each of the two mutually destructive or alternative versions he/she could not be said to have verified either of them.²¹

[45] It is also open to a deponent in support of a summary judgment to verify a particular cause of action where a number of causes of action appear in the summons, even if they are mutually destructive of one another.²² There is no argument between the parties in this regard.

[46] Ms Tania Pearson, the Legal Advisor of the SME Bank Limited (in liquidation) deposed an affidavit substantially in the form prescribed by Rule 60 (2) verifying the cause of action. In her affidavit Ms Pearson stated as follows:

²⁰ Herbstein and Van Winsen *The Civil Practice of the High Courts of South Africa* 5th ed at 526-527.

²¹ *Barclays National Bank Ltd v Smith* 1975 (4) SA 675 (D).

²² Supra footnote 22 at 682D-E.

'I verify the amount and the Plaintiffs' cause of action in respect of the claim for specific performance, alternatively the claim based on the same facts, but on the legal contention that the agreement is null and void for want of compliance with s 39 of the Banking Institutions Act, 1998, for the respective amounts claimed and the allegations made in the plaintiffs' summons in respect of the claim for specific performance, alternatively the claimed (sic) based on section 39 of the Banking Institutions Act, 1998, against the First Defendant.'

[47] The first defendant pleads that there is a contradiction between what Ms Pearson said in her affidavit and what Mr Bruni said in his affidavit dated 15 February 2018 under case number HC-MD-CIV-MOT-EXP-2018/00041, in support of the application to establish a commission of inquiry into the affairs of the SME Bank. In his affidavit Mr Bruni stated that the amount of N\$ 10 000 000 invested by the SME Bank in Tulive 'also transgresses s 39(1) and 39(2) of the Banking Institutions Act, 1998.'

[48] Having considered the two affidavits I must say I fail to see the contradictions between the affidavit of Mr Bruni and that of Ms Pearson.

[49] The first defendant attacks the verifying affidavit without raising his defence on the merits, which leaves a host of issues as common cause. Ordinarily the court would find that the papers of a plaintiff is technically incorrect in the event where a deponent verifies opposing or mutually destructive causes of actions.

[50] This is not the case in the matter in casu. In para 39 of this judgment I noted that the amount of N\$ 13 138 906.80 plus interest which is due to the SME Bank is common cause. The defendant elected not to raise a defence in this matter and as such the issue of the amount due to the SME Bank is regarded as admitted. Therefore, as the amount is regarded as admitted I am of the view that the technical defence regarding the verifying affidavit falls within the ambit of the *Kelnic Construction* matter,²³ as argued by Mr Heathcote.

²³ Supra footnote 10.

[51] The issue of the verification of mutually contradictory or mutually exclusive causes of action was considered in *Kelnic Construction*. In this matter the applicant sued the respondent for payment of services rendered. After the respondent filed a notice to defend the applicant applied for summary judgment. The respondent admitted its indebtedness but raised a number of points *in limine* and one of these points *in limine* was that the applicant had verified two mutually destructive causes of action.

[52] The court in its judgment discussed summary judgment as an extraordinary remedy which requires strict compliance with the rules. The court stated that summary judgment should only be granted if the applicant's claim is unanswerable, however Strydom JP (as he then was) proceeded to state as follows:

'However, as was pointed out by Mr Töttemeyer, the Court should not only look at the documents of the applicant, but at all the documents also those filed by the respondent. Where a respondent, as is the case here, admits his indebtedness in a fixed amount it seems to me that the reason why Courts require strict compliance with the procedural aspects of the Rule, has fallen away. This is so because the Court can be satisfied on the assurance of the respondent himself that he is in fact indebted to the applicant in the amount admitted by him and furthermore that he has no defence in regard to such amount. If any uncertainty was created by the plaintiff's verification of the cause of action that in my opinion was removed by the admission which was made by the respondent.'

[53] The current matter is on all fours with the *Kelnic* matter and the defendant is clearly indebted to the SME Bank in the fixed amount N\$ 13 138 906.80 and thus the strict compliance with the procedural aspects of the rule falls away.

[54] Further to this it is clear that both the alternative causes of action are ultimately based on the discretionary agreement and I agree with plaintiff's counsel that the alternative causes of action complement each other.

[55] I am therefore of the view that this defence cannot be sustained.

Exception

[56] The first defendant alleges that the alternative claims upon which the plaintiffs rely is excipiable on the basis that it either discloses no cause of action or is alternatively vague and embarrassing. The alternative claims that the first defendant refers to is: a) the claim of specific performance (the plaintiff's principle claim for these proceedings) b) claim for repudiation of the agreement and lastly the claim that is reliant on s 39 of the Banking Institutions Act.

[57] The alternative claim for repudiation of the agreement is not under consideration for purposes of this proceedings and this cause of action was also not verified and no further discussion in this regard is warranted. The alternative claim in terms of s 39 of the Banking Institutions Act is dependent on the court finding that the agreement (POC 4) is null and void and as a result the plaintiff claims for unjustified enrichment in this regard. It is my understanding of the papers of the first defendant that its exception lies against this specific alternative claim.

[58] As indicated earlier in the judgment the first defendant took the position of not disclosing its defence on the merits but to rather raise an exception in respect of the plaintiff's alternative claims.

[59] The first defendant find support for its contention in this regard in the *Jagger* matter referred to above.²⁴ In the *Jagger* matter summons was issued claiming payment of a sum of money for goods sold and delivered. In the subsequent affidavit made by the applicant in the summary judgment application the applicant failed to make certain averments ie the applicant failed to allege delivery of the goods or tender of delivery. The respondent opposed the summary judgment application on the grounds that the respondent has a *bona fide* defence, the alleged defence being that the declaration filed by the applicant does not disclose a cause of action. The court found that there can be no doubt that there was substance in the exception but stated further that it is not for the court to decide the exception because the exception is not before it but accepted that there was substance in the exception.

²⁴ Supra footnote 17.

[60] It is in this context the court said the following:²⁵

'The exception which has been taken goes to the root of the action and amounts to this, that even if the applicant should prove all the facts alleged by him in his declaration he would still not succeed. That, in my opinion, amounts to a defence to the action. There are cases, which occur to me in which a defendant could resist summary judgment without going into the merits of the dispute at all. For example, a defendant who is sued for the recovery of a debt, which is admittedly due, but in a Court which has no jurisdiction. In such a case an allegation of absence of jurisdiction would, in my opinion, constitute a defence to the action. In the same way a defendant who has a good legal defence on the version of the facts alleged by the plaintiff, has a good defence to the action if he raises that legal defence, even though he may also have a defence on the facts which he does not wish to raise at that stage of the proceedings. In the present case the respondent, by taking the exception which he has taken has, in my view, shown that he has a bona fide defence to the action.'

[61] The court however also pointed out the dangers in the event of a party who solely relies on an exception in order to resist summary judgment and stated as follows:²⁶

'The contentions, although appealing at first sight, cannot I think succeed. Whilst there may be cases – and I express no view on the point- in which a defendant who has a valid complaint as to the form of the declaration, which complaint entitles him successfully to except to the declaration or to have portions of it struck out, may, in the absence of any allegation by him as to the merits of the dispute, fail to satisfy a Court that he has a bona fide defence to the action.'

[62] S 39 of the Act is headed 'Restrictions on commercial activities' and permits a banking institution, like the SME Bank, to conduct only financial business or transactions 'which are usually or ordinarily conducted' by banking institutions in terms of the Act or any other law. The first defendant avers that the contravention of s 39 constitutes a criminal offence and as a result performance in terms of the discretionary agreement would constitute a criminal offence.

²⁵ Supra footnote 17 at 738 C-D.

²⁶ Supra footnote 16 at 738 B- C.

[63] After having heard both counsel argue it is clear that both counsel are in agreement that s 39(1) of the Act does not in itself expressly provide that a transaction in breach thereof will be null and void. A contravention of s 39(1) and (2) constitutes an offence in terms of s 73(1) of the Act but both counsel are further in agreement that upon proper construction of the Act in respect of s 39 the legislature did not intend that a failure to comply therewith would render a particular transaction null and void but rather that the legislature was content with the criminal penalties and sanctions imposed on whomever contravened s 39(1) and (2).

[64] I am in agreement with the interpretation of the learned counsel in this regard and agree that the agreement filed under POC4 is a valid agreement. The result of this finding is that the alternative claim of unjustified enrichment falls away. This alternative claim would only be relevant in the event that the court found the agreement to be null and void. This also then results in the exception falling away and together with it the first defence to the application for summary judgment. This then leaves the first defendant to cling on for dear life on the reasons advanced as to why specific performance should not be granted.

Should the claim for specific performance be enforced in spite of the transgression of s 39?

[65] Mr Heathcote argued that if the agreement reached between the parties is valid then there is no reason why the agreement should not be enforced. Mr Fitzgerald however holds a different view. He conceded that specific performance is an equitable discretionary remedy but that the court should not enforce this claim due to the turpitude on the part of banking officials who deliberately set out to transgress the Act and the fact that performance in this context would amount to a criminal offence.

[66] It is common cause that the functionaries of the bank or also referred to as the *dramatis personae* contravened s 39 of the Act as the discretionary agreement does not fall within the normal business of the bank and it is further common cause that they defrauded the SME Bank of millions of dollars, but what is also common cause

is that the relevant officials entered into an agreement in terms of which the first defendant had to repay the SME Bank at a rate of 13% per annum. Mr Heathcote argued that it is not an offence in terms of the Banking Institutions Act to repay the monies advanced as per the terms of the agreement.

[67] The SME Bank advanced a sum of N\$ 10 000 000 to the first defendant and the first defendant's position is that the plaintiff (the bank in this instance) went into this agreement with open eyes, well aware of the risks involved. Tulive is before this court shrugging its proverbial shoulders and say 'sorry we made a bad investment and the money was lost. All of the N\$ 10 000 000 is lost.'

[68] The first defendant raises a defence to say that it cannot now perform in terms of the agreement as it will constitute a criminal offence. Surely that argument cannot stand.

[69] The claim against the first defendant is just one of many brought by the plaintiffs in an effort to recover the monies of the SME Bank that is misappropriated. I am of the view that this court needs to take a firm stance by not allowing defendants who have no bona fide defence to manipulate the system and delay the enforcement of claims by the plaintiffs. Obviously each case must be dealt with on its merits and if there are merits then that defendant will be entitled to its day in court but if not then I am of the view it will severely harm public interest to allow a defendant to escape liability and not repay what it received in terms of a valid agreement.

[70] I heard in-depth arguments on the *par delictum* rule but I am of the view that the *par delictum* rule will only be applicable as far as it relates to the public interest. The *par delictum* rule under the circumstances must be subordinate to the overriding consideration of public policy.²⁷ To serve the public interest the defendant should repay the amount advanced to it in spite of the contravention of s 39 of the Act.

[71] Having considered all the facts before me I must conclude that the second defence raised can also not succeed and I must further conclude that first defendant

²⁷ Supra footnote 15 para 47.

has no bona fide defence against the claim of the plaintiffs and the application for summary judgment must succeed.

Order

[72] My order is therefore as set out hereunder.

Summary judgment is granted in favour of the Plaintiff in respect of the First Defendant in the following terms:

1. Payment in the amount of N\$ 13 138 906.80.
2. Interest on the amount of N\$ 13 138 906.80 at the rate of 13% per annum from 16 June 2020 until date of final payment in respect of the Plaintiff's claim for specific performance.
3. Cost of one instructing and two instructed counsel where so employed.

JS Prinsloo
Judge

APPEARANCES:

PLAINTIFF:

R Heathcote SC

On the instructions of Francois Erasmus and Partners,
Windhoek

DEFENDANT:

M Fitzgerald SC

On the instructions of Ellis Shilengudwa Inc
Windhoek