

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**  
**RULING IN TERMS OF RULE 64**

Case No: HC-MD-CIV-ACT-CON-2018/02750

In the matter between:

**CANOCOPY (PTY) LTD**

**PLAINTIFF**

**and**

**TELECOM NAMIBIA LTD**

**FIRST DEFENDANT**

**STANDARD BANK NAMIBIA LTD**

**SECOND DEFENDANT**

**Neutral Citation:** *Canocopy (Pty) Ltd v Telecom Namibia Ltd* (HC-MD-CIV-ACT-CON-2018/02750) [2021] NAHCMD 201 (26 April 2021)

**CORAM:** PRINSLOO J

**Heard:** 30 March 2021

**Delivered:** 26 April 2021

**Reasons:** 03 May 2021

**Flynote:** Procedure – Notice in terms of rule 64 containing unconditional settlement offer – Offer to settle not including a tender for costs – An unconditional offer does not stay or terminate the proceedings and there is no obligations upon the plaintiff to accept it – Held plaintiff is entitled to cost and interest on amount tendered.

**Summary:** The plaintiff issued summons in respect of the defendants on 17 July 2018. The summons was served and on 23 July 2018 the first defendant entered its notice of intention to defend the matter. The plaintiff's claim against the first defendant consist of two claims. Claim 1 is based on alternative causes of action, all relating to the rental or use of office equipment made available by the plaintiff to the first defendant. On 25 March 2021 the first defendant served a tender in terms of rule 64 on the plaintiff. On 26 March 2021 the plaintiff accepted the tender without prejudice to the plaintiff's rights to proceed with the balance of its balance of its claim as set out in any of its prayers of the amended particulars of claim because the tender is unconditional.

On 26 March 2021 when the plaintiff filed its acceptance of the tender the plaintiff also placed the defendant on notice that it wishes to present arguments to court on the issue of cost, which was not tendered, and interest on the amount tendered.

The defendant is of the view that it did not tender the interest sought as it is a matter for evidence and the defendant is entitled to a hearing on this specific aspect and further submitted that the court cannot go beyond the tender as this issue cannot be determined on the basis of a tender.

*Held that* it is common cause that the defendant made an unconditional offer of settlement in respect of the alternative claim of enrichment which constituted part settlement of the plaintiff's claim, as well a tender in respect of interest for a specific period of time. This offer to settle did not include a tender for costs.

*Held that* an unconditional offer is the offer without prejudice coupled with a denial of liability. If the plaintiff accepts the offer the claim is extinguished and he has no further recourse against the defendant.

*Held further that* an unconditional offer to settle on the other hand is designed for a case where the defendant admits his liability in respect of the claim, either in whole or in part. If he admits in part, the plaintiff may accept the offer and proceed with his claim for the balance of the claim at his peril. An unconditional offer does not stay or

terminate the proceedings and there is no obligations upon the plaintiff to accept it. This means that the plaintiff may reject the offer and increase his claim by amendment.

*Held that* the general position is that if the debt is liquidated and the day for performance is fixed, *mora* operates *ex re* and no demand (*interpellatio*) is necessary to place the defendant in *mora*. The creditor is then entitled, in keeping with general principles, to *mora* interest from the day for performance. Interest starts running from due date automatically and no 'fault' or 'wrongfulness' is required.

*Held that* the purpose behind the Rule is clear. It is designed to enable a defendant to avoid further litigation, and failing that to avoid liability for the costs of such litigation. The rule is there not only to benefit a particular defendant, but for the public good, generally.

*Held that* an offer in terms of Rule 64 is part of the mechanism established by that rule for the effective settlement of disputes and to bring an end to the litigation. By accepting the tender and further indicating that the current proceedings can bring end to the litigation would be in agreement with the rule but to proceed with the extensive litigation on the issue of cost and interest would surely cause rule 64 to fail in its purpose.

*Held accordingly that* the plaintiff is entitled to cost as it substantially succeeded in its claim. The fact that a higher amount was claimed than the tender that was accepted does not alter the fact that the Plaintiff is the successful party in considering the question of costs and that the grounds raised by the defendant for its failure to tender the costs have no merits.

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### ORDER

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The court grants an order in favour of the Plaintiff in the following terms:

- a) Interest: Interest on the amount of N\$ 1,834,201.00 for the period from February 2019 to August 2020 as well as after March 2021 to date of final payment calculated at the rate of 20% per annum; and
- b) Costs:
  - a. Cost on a party and party scale to date of hearing on 30 March 2021 (including the cost of argument) and, including the cost of the first defendant's withdrawal of its counterclaim, such costs to include the cost of one instructing and two instructed counsel.
  - b. No order as to cost in respect of the plaintiff's expert witness summary on the disputed signatures issue;
  - c. No order as to costs in respect of the plaintiff's amendments.

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## JUDGMENT

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PRINSLOO J,

### Introduction

[1] The plaintiff issued summons in respect of the first defendant on 17 July 2018. The summons was served and on 23 July 2018 the first defendant entered its notice of intention to defend the matter. For purposes of this ruling the only relevant defendant is the first defendant to whom I will hereafter merely refer as the defendant.

[2] The plaintiff's claim against the defendant consist of two claims. Claim 1 is based on alternative causes of action, all relating to the rental or use of office equipment made available by the plaintiff to the first defendant.

[3] Claim 2 deals with ancillary claims founded in contract, for goods sold and delivered and services rendered by the plaintiff to the first defendant.

### Rule 64 offer to settle

[4] The trial in the matter was scheduled to commence on 29 March 2021 as it was set down for hearing from 29 March 2021 to 1 April 2021.

[5] On 25 March 2021 the defendant served a tender in terms of rule 64<sup>1</sup> on the plaintiff.

[6] The tender in terms of rule 64 by the defendant reads as follows:

**'KINDLY TAKE NOTICE** that the above First Defendant herewith unconditionally tenders, in terms of Rule 64 of the Rules of Court, to pay an amount of N\$ 1 834 201.00 (One Million Eight Hundred and Thirty Four Thousand Two Hundred and One Namibian Dollars) in respect of the Plaintiff's claim for enrichment founded on the First Defendant's use of Plaintiff's machines together with interest in an amount of N\$ 244 560.13 ( Two Hundred and Forty Four Thousand Five Hundred and Sixty Namibian Dollars and Thirteen cents) which interest is calculated at the rate of 20% per annum from September 2020 to March 2021. First Defendant thus so tenders to pay a total amount of N\$ 2 078 761.13 (Two Million Seventy Eight Thousand and Seven Hundred and Sixty one Namibian Dollars and Thirteen Cents).

**KINDLY TAKE NOTICE FURTHER** that the aforesaid First Defendant contends that it is not liable for legal costs in respect of the above amount based on the fact that the Plaintiff's causa is not founded on the same basis on which the aforesaid First Defendant acknowledges liability for payment Plaintiff's the total amount payable to the Plaintiff for the First Defendant's use of Plaintiff's photocopy machines after the expiration of the agreement between Plaintiff and the First Defendant.

**KINDLY TAKE NOTICE FURTHER** that the aforesaid First Defendant contends that Plaintiff is further not entitled to legal costs on the basis that its claim is founded on fraudulent documents or purported contractual documents which to the knowledge of the Plaintiff was never intended to be binding between Plaintiff and the First Defendant and the Plaintiff thus approaches the Court with unclean hands.'

[7] On 26 March 2021 the plaintiff accepted the tender and responded as follows:

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<sup>1</sup> Rules of the High Court of Namibia.

'2. The plaintiff hereby accepts the first defendant's tender for the amount of N\$ 2,078,761.31 being N\$ 1,834,201.00 in capital and N\$244,560.13 in interest calculated at the rate of 20% per annum from September 2020 to March 2021.

3. The acceptance is without prejudice to the plaintiff's rights to proceed with the balance of its balance of its claim as set out in any of its prayers 1 to 34 of its amended particulars of claim, which the plaintiff is entitled to do given that the tender is unconditional.

4. The Plaintiff intends to proceed with argument (both orally and in writing) on the papers before court and when the matter is called for hearing during the week 29 March 2021, or thereafter, on the basis that it is, on the basis of the first defendant's tender, entitled to :

a) interest on the amount of N\$ 1,834,201.00 for the period from February 2019 to August 2020 as well as after March 2021 to date of final payment calculated at the rate of 20% per annum;

b) cost on a party and party scale to date of hearing (including the cost of argument) and, including the cost of the first defendant's withdrawn counterclaim, such cost to include the costs of one instructing and two instructed legal practitioner; and to seek an order on that basis.

5. The plaintiff intends to await the judgment on the aspects referred to in paragraph 4 above and to thereafter elect whether or not it shall proceed with the balance of its claims.'

#### Legal principles in respect of rule 64

[8] Rule 64 stipulates that:

'(1) In an action where a sum of money is claimed, either alone or with other relief, the defendant may at any time unconditionally or without prejudice make a written offer to settle the plaintiff's claim and the offer must be signed either by the defendant or by his or her legal practitioner if the latter has been authorized in writing to sign.

(2) Where the plaintiff claims the performance of some act by the defendant, the defendant may at any time tender either unconditionally or without prejudice to perform the act and, unless the act has to be performed by the defendant personally, he or she must execute an irrevocable power or attorney authorizing the performance of the act which he or she must deliver to the registrar together with the tender.

(3) .....

(4) .....

(5) Notice of an offer or tender in terms of this rule must be given to all parties to the action and it must state whether the-

(a) offer or tender is unconditional or without prejudice as an offer of settlement;

(b) offer or tender is accompanied by an offer to pay all or only part of the costs of the party to whom the offer or tender is made and further whether it is subject to conditions stated in the offer or tender;

(c) offer or tender is made by way of settlement of both the claim and costs or of the claim only; and

(d) defendant disclaims liability for the payment of costs or for part thereof, in which case the reason for such disclaimer must be given and the action may then be set down on the question of costs alone.

(6) A plaintiff or a party referred to in subrule (3) may within 10 days after the receipt of the notice referred to in subrule (5) or thereafter with the written consent of the defendant or third party or on the order of court given on such condition as the court may consider to be fair, accept an offer or tender, after which the registrar having satisfied himself or herself that the requirements of this subrule have been complied with, must hand over the power of attorney referred to in subrule (2) to the plaintiff or to his or her legal practitioner.

(7)- (8).....

(9) Where an offer or tender accepted in terms of this rule is not stated to be in satisfaction of a plaintiff's claim and costs the party to whom the offer or tender is made may apply to the managing judge or to court, after notice of not less than five days to the other parties, for an order for costs.

(10) An offer or tender in terms of this rule made 'without prejudice' must not be disclosed to the court at any time before judgment has been given and reference to such offer or tender must not appear on any file in the office of the registrar containing the papers in the cause or matter.

(11) .....

(12) The fact that an offer or tender referred to in this rule has been made may be brought to the notice of a judge after judgment has been given as a factor relevant to the question of costs.

(13) A party who, contrary to this rule, personally or through any person representing him or her discloses an offer or tender referred to in this rule to the judge or the court is liable to have cost given against him or her even if he or she is successful in the action<sup>2</sup>.

[9] In terms of rule 64(5) a litigant can file a notice of an offer or tender either conditionally or without prejudice as an offer of settlement.

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<sup>2</sup> See *Prior t/a Pro Security v Jacobs t/a Southern Engineering* 2007 (2) NR 564 (HC).

[10] An unconditional offer is the offer without prejudice coupled with a denial of liability. If the plaintiff accepts the offer the claim is extinguished and he has no further recourse against the defendant.

[11] An unconditional offer to settle on the other hand is designed for a case where the defendant admits his liability in respect of the claim, either in whole or in part. If he admits in part, the plaintiff may accept the offer and proceed with his claim for the balance of the claim at his peril<sup>3</sup>. An unconditional offer does not stay or terminate the proceedings and there is no obligations upon the plaintiff to accept it. This means that the plaintiff may reject the offer and increase his claim by amendment<sup>4</sup>.

[12] In *Naylor and Another v Jansen* 2007 (1) SA 16 (SCA) Cloete JA discussed the purpose of rule 34<sup>5</sup> as follows:

[13] The purpose behind the Rule is clear. It is designed to enable a defendant to avoid further litigation, and failing that to avoid liability for the costs of such litigation. The rule is there not only to benefit a particular defendant, but for the public good, generally as Denning LJ made clear in *Findlay v Railway Executive*<sup>6</sup>:

'The hardship on the plaintiff in the instant case has to be weighed against the disadvantages which would ensue if plaintiffs generally who have been offered reasonable compensation were allowed to go to trial and run up costs with impunity. The public good is better secured by allowing plaintiffs to go on to trial at their own risk generally as to costs.'

[13] The court went further and cautioned that courts should take account of the purpose behind the rule and not give orders that undermine it.

[14] In his article published in the *De Rebus*<sup>7</sup> wherein FR van Zyl discussed the *Naylor* matter, he stated as follows:

'Accordingly in the context of litigation, the rule provides an incentive to the reasonable and prudent litigant who makes an informed and concerted effort to bring

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<sup>3</sup> *Van Rensburg v AA Mutual Insurance Co Ltd* 1969 (4) SA 360 (E) at 364E; *Gush v Protea Insurance Co Ltd* 1973 (4) SA 286 (E).

<sup>4</sup> *Molete v Union National South British Insurance Co Ltd* 1982 (4) SA 178 (W).

<sup>5</sup> Rule 34 in terms of South African Rules of Court, which is similar to our Rule 64.

<sup>6</sup> *Findlay v Railway Executive* [1950] 2 All ER 969 (CA) at 972E-F, approved in *Garner v Cleggs* [1983] 2 All ER 398 (CA) at 403A-C.

<sup>7</sup> Know the rules! Understanding the correct interpretation of r 34 of the uniform rules of court *De Rebus* 2015 (Oct) DR 40.



litigation to an end, as well as a disincentive to the intransigent and unreasonable litigant. The incentive lies in the risk attendant on the court exercising its discretion with regard to costs. A litigant faced with the choice of disputing liability *in toto* for making an offer of settlement may well, regard being had to the purpose of the rule, be said to bring to an end at least that part of the litigation by making an offer of settlement. Such an approach would be consistent with the purpose of the rule and may also be considered as advancing the public good.'

[15] It is common cause in the matter before me that the defendant made an unconditional offer of settlement in respect of the alternative claim of enrichment which constituted part settlement of the plaintiff's claim, as well a tender in respect of interest for a specific period of time. This offer to settle did not include a tender for costs.

[16] By filing the tender in terms of rule 64 the defendant admitted liability in respect of that portion of the claim.

[17] The defendant's counsel was however of the view that the plaintiff's acceptance of the tender was not unconditional as a result of the wording in the acceptance of the offer and more specifically para 3 thereof wherein the plaintiff stated:

'The acceptance is without prejudice to the plaintiff's rights to proceed with the balance of its balance of its claim as set out in any of its prayers 1 to 34 of its amended particulars of claim, which the plaintiff is entitled to do given that the tender is unconditional.'

#### *Rule 64(9)*

[18] On 26 March 2021 when the plaintiff filed its acceptance of the tender the plaintiff also placed the defendant on notice that it wishes to present argument to court on the issue of cost, which was not tendered, and interest on the amount tendered.

[19] The plaintiff's position in this regard was reiterated when the parties appeared in court on 29 March 2021 and the matter was postponed until 30 March

2021 to enable the parties to prepare and argue the matter. This was done in an effort to limit the cost herein as the matter was already set down for the week for hearing.

[20] The procedure followed in this regard was not strictly in terms of the rules however as neither parties took issue with the method adopted, I found it prudent to allow the parties to argue the issue of costs arising from the tender in terms of rule 64(9).

#### Argument on behalf of the parties

[21] Both counsels advanced very able arguments not only in their written heads of arguments but also in their supplementary oral arguments. These arguments were comprehensive and I will not attempt to replicate them. If in the course of this judgment I use the words 'submit' and 'argue' and their derivatives, they must be understood to encompass both the heads of arguments and the oral submissions made in court.

#### *On behalf of the plaintiff*

[22] At the commencement of his argument Mr Tötemeyer stated that it is the plaintiff's position that if it succeeds in obtaining an order for costs as a result of the tender the plaintiff will not pursue the balance of claim 1, nor will it pursue claim 2, which appears to be for a fairly insignificant sum, and it will thus be the end of the matter.

[23] Mr Tötemeyer submitted that the tender was in respect of plaintiff's claim for enrichment and that the defendant admits liability in that amount so tendered. In the tender the defendant also tendered interest in a specific amount but denied liability in respect of any costs.

[23] Mr Tötemeyer argued that contrary to the believes of the defendant the acceptance of the tender by the plaintiff was not conditional merely because it indicated in its notice of acceptance that the said acceptance is without prejudice to the plaintiff's rights to proceed with the balance of the claim.

[24] Mr Tötemeyer argued that where there is an unconditional tender the plaintiff can accept the tender but as of right it will be entitled to proceed with the balance of its claim. If the plaintiff then proceeds with its claim then it must deduct what was accepted and paid in terms of the acceptance from whatever amount the plaintiff may ultimately succeed with.

[25] Mr Tötemeyer argued that the plaintiff's acceptance of the tender is without prejudice to its right to proceed with the balance of the claim is the exercise of its rights, which does not make the acceptance of the said tender conditional. Counsel argued that in principle the plaintiff is allowed to proceed with the balance of the amounts claimed but submitted that the plaintiff is of the opinion that it is important to determine the issues of costs and interest upfront as it may determine whether the matter will proceed further and if so, to what extent.

#### Cost

[26] On the issue of costs Mr Tötemeyer contended that there is no need for the court to hear evidence on the issue of costs as it will literally result in a two to three week trial just to proof the plaintiff's entitlement to cost at the end of the trial. Mr Tötemeyer argued that the defendant should have tendered that costs as the plaintiff is entitled thereto and if it is required to proceed with the trial to proof its entitlement to cost then the plaintiff might as well pursue the balance of the claim on a 'in for a penny in for a pound' basis as the evidence would be the same.

[27] Mr Tötemeyer relied on the *Channel Life Namibia v Finance in Education (Pty) Ltd*<sup>8</sup> for his contention that the court can determine the issue of cost on the matter at its disposal.

[28] On the issue of legal costs Mr Tötemeyer argued that the defendant's tender was unconditional and the effect of an unconditional tender was dealt with in *Akwenye v Amadhila*<sup>9</sup>. Counsel further argued that rule 64 provides for such a tender

<sup>8</sup> *Channel Life Namibia v Finance in Education (Pty) Ltd* 2004 NR 125 (HC) at 126.

<sup>9</sup> *Akwenye v Amadhila* 2018 (4) NR 1090 (HC) at para 19.

and also provides that such a tender may be accompanied by an offer to pay all or any of the plaintiff's costs and it also provides that if the defendant disclaims costs the reason for such disclaimer must be given and the actions may then be set down of the question of costs alone.

[29] Counsel argued that the relevant principles to follow are two-fold. Firstly, even if a plaintiff recovers, even by reason of his own fault, no more than half or even a relatively modest percentage of its claim, a plaintiff will nevertheless be awarded costs as long as a plaintiff succeeds, as such a plaintiff had to go to court in order to obtain an award. Secondly, it is a salutary rule that, the fact that a defendant could have the claim amount reduced, does not mean that the plaintiff is not entitled to costs.

[30] Counsel further referred to *Fripp v Gibbon & Co*<sup>10</sup> wherein it was held that if the broad issue is whether the one or the other party is to succeed in recovering a balance, and where the real issue is whether the one owed the other a balance, the court is justified in awarding costs to the party in whose favour the balance is found.

[31] Mr Tötemeyer argued that the object of a tender is to avoid costs and if possible to bring an end to the litigation and by making a tender a litigant can avoid liability for cost of such litigation. In order for such a litigant to protect itself against a cost order the litigant should make a tender and such a tender should include the tender for costs.

[32] The tender in the current matter did not include a tender for cost and the reasons advanced as per the tender is that the plaintiff's causa is not founded on the same basis on which the defendant acknowledged liability and the plaintiff's claim is founded on fraudulent documents or purported contractual documents, which to the knowledge of the plaintiff was never intended to be binding between the plaintiff and the defendant and the plaintiff approached the court with unclean hands.

[33] Mr Tötemeyer contended that none of the grounds advanced can be of assistance to the defendant to escape liability and advanced the following reasons:

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<sup>10</sup> *Fripp v Gibbon & Co* 1913 AD 354 at 359.

- a) The first defendant's unconditional tender was made in respect of the 'plaintiff's claim for enrichment founded on the first defendant's use of the plaintiff's machines'. This is based on a contractual measure that is the same amount which the plaintiff used to found one of its contractual claims, to which the enrichment claim is an alternative. Counsel argued that it is irrelevant what methods of calculation was used by the respective parties it remains an admitted liability in respect of the use of the plaintiff's machines, being part of the plaintiff's claim in respect of those machines and in respect the relevant period.
- b) The allegation concerning fraud which were made in respect of one of the plaintiff's contractual claims is irrelevant to the defendant's tender which is for the admitted use of machines during a certain period dating back to 2017, for which it did not pay the plaintiff as yet. No fraud was alleged in respect of the plaintiff's enrichment claim or in respect of the contractual claim in respect of which the monthly payment was N\$ 193 466.80. The counterclaim in which allegations of fraud and forgery have been made was subsequently withdrawn, also without tendering costs. The alleged fraud has no relation to the admitted use of the machines to which the tender relates.

[34] Mr Tötemeyer conceded that the plaintiff must be liable for the cost incurred as a result of amendments sought to the pleadings of the plaintiff and indicated that the plaintiff will not insist on said costs. In respect of the cost after the tender was accepted Mr Tötemeyer argued that the defendant only belatedly (two court days before trial) filed its tender at which time the plaintiff had fully prepared for the upcoming trial. Further to that the failure by the defendant to tender any costs forced the plaintiff to proceed with the current argument in order to recover its costs.

### *Interest*

[35] Mr Tötemeyer argued that the plaintiff is entitled to interest on the amount of N\$ 1 834 201 for the period February 2019 to August 2020 as well as from March 2021 until date of final payment.

[36] In support of this contention Mr Tötemeyer argued that the amount of N\$ 1 834 201 was on the defendant's own calculations due by end of January 2019 and as a result the defendant is liable for interest as from the date that the claim amount become due. Counsel further argued that all liquidated amounts bear interest from the date that the amount became due and it is irrelevant whether the amount is based in contract or delict<sup>11</sup>. Counsel argued that from the defendant's own calculation it was clear that the calculation of the N\$ 1 834 201 was a matter of simple addition and subtracting.

[37] Mr Tötemeyer submitted that the interest was due from which the complete cause of action has arisen in respect of those amounts and since the tender is for the use of the machines for specific months ending on 31 January 2019, and therefore the plaintiff is entitled to interest calculated from that date in respect of the tender amount.

*Arguments on behalf of the defendant*

[38] Mr Narib indicated that the defendant takes no issue with the legal principles relating to rule 64 as set out by the plaintiff, however the defendant takes issue with the fact that the plaintiff set conditions for the acceptance of the tender and by implication the plaintiff is saying it accepts the tender but it reserve the right to proceed on the balance of its claim, if it does not get what it is asking for now.

[39] Mr Narib argues that the plaintiff therefore wants the court to make findings and an order that extends beyond the tender made by the defendant in order to include additional interest as well as legal costs, which the plaintiff argues that it is entitled to.

[40] Mr Narib argues that the defendant is entitled in terms of the rules to make a tender that does not include a tender for costs. Mr Narib argues that the plaintiff should have then proceeded in terms of rule 64(9) by applying to the managing judge on notice of no less than 5 days to the defendant for an order of costs. In this instance the plaintiff did not do so.

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<sup>11</sup> *Kleyhans v Van der Westhuizen* NO 1970 (1) SA 565 (O) at 567 A-D.

[41] Mr Narib submitted that the plaintiff approached the court on a matter on which the merits has not been resolved as yet for an order of interest and costs after the defendant has set out its reasons for not tendering the outstanding interests and costs.

[42] Mr Narib contended that if the merits between the parties have been resolved completely and the only issue remaining is an issue of costs then the matter can be set down in terms of rule 64(9) and the parties can debate the issue of whether the plaintiff is deserving of its costs or not, based on the pleadings and the pre-trial order.

[43] However, as the issues are far from being resolved between the parties the plaintiff might decide to pursue its claim in that regard and the matter must go to trial during which proceeding the defendant may succeed with its defence entitling it to a portion of its costs, not associated with the basis on which it accepted liability for the amount claimed and an order issued by this court at this early stage will prejudice the issue of costs. Mr Narib therefore contended that the court should make no orders at this stage in respect of interest or cost and that these issues should stand over until the end of the trial.

[44] Mr Narib submitted that the plaintiff wants the court to draw a number of important inferences from the calculations made by Ms Plaatjes (although the plaintiff's interpretation of the calculations are correct). Counsel contended that there is no acceptance of the contract by the defendant that the plaintiff relies upon. The defendant tendered the amount on the basis of enrichment and not contractual damages. Mr Narib maintained that the calculation by Ms Plaatjes is convenient for purposes of calculation of determining the reasonable amount per month.

[45] In respect of the criticism by the plaintiff in respect of the defendant's 'tenders' made in the plea and the pre-trial Mr Narib argued that although it was not a formal tender in terms of the Rules of Court the plaintiff knew well enough what the defendant was intending to pay. This according to counsel is a factor to be considered in respect of the plaintiff's costs so claimed for purposes of preparation. In addition thereto Mr Narib urged the court to consider the defence raised by the

defendant in relation to the plaintiff's claim founded in contract, i.e. that the contract(s) are not binding as a result of fraud and reiterated that the court cannot at this stage of the proceedings consider the issue of costs.

[46] Mr Narib conceded that if there is an unequivocal acceptance of a tender that in terms of the rules the plaintiff would ordinarily be entitled to costs, cost occasioned by the portion of the claim of enrichment on which the defendant accepted liability. However, in the instance where there is a substantial portion of the claim that remains it may influence the court in how it apportions the costs in the event that the defendant is proportionally successful or fraud is established.

[47] Mr Narib submitted that the defendant did not tender the interest sought as it is a matter for evidence and the defendant is entitled to a hearing on this specific aspect and further submitted that the court cannot go beyond the tender as this issue cannot be determined on the basis of a tender. The plaintiff calculated and extrapolated but it does not leave the plaintiff with evidence. The defendant is entitled to present evidence as to why it only tendered interest for a specific period.

[48] Mr Narib submitted that the parties reached stalemate because the plaintiff indicated that if they do not get the interest and costs sought it will proceed with the action and the defendant's position is that the amount tendered is as much as it is prepared to pay and anything else the plaintiff wishes to enforce it must present evidence and prove it.

### Discussion

[49] It is common cause that the defendant made an unconditional offer of settlement in terms of the alternative claim of enrichment, which constituted a partial settlement of the plaintiff's claim, as well as a tender in respect of interest for a specific period of time. This offer to settle did not include a tender for costs.

[50] It is further common cause that the plaintiff can accept the offer or tender and sue for the balance of its claim and if the plaintiff accepts the unconditional tender the plaintiff will proceed with the action at its own peril.



[51] The defendant took issue with the wording of the acceptance of the offer and more specifically para 3 thereof wherein the defendant stated:

'The acceptance is without prejudice to the plaintiff's rights to proceed with the balance of its balance of its claim as set out in any of its prayers 1 to 34 of its amended particulars of claim, which the plaintiff is entitled to do given that the tender is unconditional.'

[52] I do not consider this criticism of the acceptance of the tender as persuasive. I do not understand the wording of para 3 as anything but an unconditional acceptance of the tender as it flows *ex lege* from rule 64(5) that the defendant may prosecute the remainder of its claim.

[53] The defendant is further of the view that the plaintiff cannot succeed in its application to enforce cost and interest as it was not tendered and that the court can only decide the issue of cost and additional interest at the end of the trial once the court heard all the evidence. The defendant's counsel is adamant that the court cannot decide the matter on the papers.

*Considering the matter on the papers*

[54] The question that therefore begs an answer is whether the court can decide these issues on the papers before her.

[55] In the *Channel Live* matter<sup>12</sup> the court was called upon to adjudicate upon the question of costs and the question arose whether the court should consider the merits of the case in order to do so. Damaseb J (as he then was) found as follows:

'In my view there can be no hard and fast rule. There may very well be cases where the Court will have no other choice but to consider the merits of the matter in order to make an appropriate cost allocation, while there will, doubtless, be others where the Court make an appropriate cost allocation based on the 'material at its disposal', without regard to the merits of the case. Each will be treated on its own facts.'

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<sup>12</sup> See footnote 8 above.

[56] Essentially this court only need to determine the issue of interest on the papers as the parties argued the issue of the cost of the tender in terms of rule 64(9) before me.

[57] I have considered the papers, which consists of comprehensive pleadings as well as pre-trial. The latter consisted of no less than 68 pages and from the pleadings and the pre-trial I will indeed be able to make a finding on the issue of interest and in respect of costs as well.

[58] From the papers before me it is clear that the defendant admits liability for the reasonable rental of the equipment of the plaintiff, which is essentially what this action is all about. The defendant admitted that they had possession and use of the equipment for a particular period in the defendant's plea and the pre-trial order. The issue of what reasonable rental would be was addressed by the calculation made by Ms Plaatjes, Financial Controller: Accounts Payable within the Finance department of Telecom Namibia Limited (Telecom). Ms Plaatjes calculated the reasonable rental according to the rental amount as set out in the first alternative claim (contractual claim), i.e. N\$ 193 466.80.

[59] In the proposed pre-trial order, which was made an order of court on 16 July 2020 the following is set out in para 1.33.8:

‘The first defendant accordingly tenders (at the time) reasonable rental, as found by this court for the period 31 July 2017 to 31 August 2018 during which the first defendant had possession and made use of the rental equipment of the plaintiff.’

[60] This specific paragraph was accompanied with a footnote, which by implication is incorporated into the pre-trial order, which referred to the calculation of Ms Plaatjes in her witness statement. The said footnote reads as follows:

‘ According to the first defendant, the reasonable rental referred to in paragraph 5.3.8<sup>13</sup> of its amended plea, is what Ms Plaatjes calculated as per her witness statement with the period to be extended to the total period as calculated by Ms Plaatjes in her witness statement.’

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<sup>13</sup> ‘First defendant accordingly tenders reasonable rental, as found by this Honourable Court for the period 31 July 2017 to 31 August 2018, during which the first defendant had possession and made use of the rental equipment of the plaintiff.’

[61] The reconciliation by Ms Plaatjes was discovered and a copy thereof was attached to the papers before me. Ms Plaatjes made clear calculations in her statement in support of the amount that was payable to the plaintiff and that was the amount eventually tendered. As indicated above the calculations were made at a rental amount of N\$ 193 466.80 for period 31 July 2017 to August 2018 and then for a lesser amounts for the months November 2018 to January 2019. From the reconciliation it is clear that certain credit notes were passed and there was also reference to invoices for space rental. The due amount was calculated as N\$ 1 834 201, which included N\$ 1 639 118 plus N\$ 195 083 for 'space rental'<sup>14</sup>.

[62] Having considered the pleadings and having had the benefit of hearing the oral arguments by the parties on the issue of interest and costs I am quite satisfied that the matter of costs and interest can be determined on 'the material at the disposal' of the court.

*Continuation of the action*

[63] Mr Narib insisted that the merits has not been settled between the parties, however counsel for the plaintiff repeated on record that the plaintiff will desist with any further prosecution of the claim in the event of it being successful in its application.

[64] What I find surprising is that in spite of the commitment by senior counsel on record the defendant's persisted in its position that the matter should go to trial to adjudicate the issue of interest and costs.

[65] The approach of the defendant would result in the plaintiff being forced into trial in order to lead evidence to prove its entitlement to costs and interest. By estimation the trial in this matter would take approximately two to three weeks. The cost of such an exercise will be mind-boggling. It is therefore understandable that the plaintiff's position would be that in such instance it might just as well pursue the remainder of its claim. However, the matter might not stop at a judgment at the end of the trial. There is also the possibility of an appeal that might follow.

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<sup>14</sup> Figures rounded off to the nearest zero.

[66] In my mind it is unconceivable to allow parties to engage in a three week trial just to determine the issue of interest and costs after the plaintiff unconditionally accepted the tender and during argument on the issue of costs indicated repeatedly that the prosecution will not be further pursued in the event of it being successful in its application.

[67] The court in *Naylor*<sup>15</sup> further referred to *Doyle v Salgado (2)* wherein Clayden FJ put the position as follows<sup>16</sup>:

'In cases in which the continuance of the action cannot be justified on some ground apart from the recovery of money, as for example to establish a disputed right, the Courts, in exercising the discretion to award costs, must obviously be concerned to ensure that the rules do not fail in this purpose.'

[68] An offer in terms of Rule 64 is part of the mechanism established by that rule for the effective settlement of disputes and to bring an end to the litigation. By accepting the tender and further indicating that the current proceedings can bring end to the litigation would be in agreement with the rule but to proceed with the extensive litigation on the issue of cost and interest would surely cause rule 64 to fail in its purpose.

## Costs

[69] It is settled law that regardless of the terms of a settlement offer, a court retains its wide discretion on costs. In *Herbstein & Van Winsen - Civil Practice of the High Courts of South Africa*<sup>17</sup> the learned authors stated that 'generally speaking, unless there is reason not to do so, the court's discretion is exercised by awarding the costs incurred after the date of the offer to the defendant although the court may decide that the circumstances do not warrant such an order'. The reverse position in my view would also apply.

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<sup>15</sup> See footnote 5 above.

<sup>16</sup> 1958 (1) SA 41 (FC) at 43A.

<sup>17</sup> 5<sup>th</sup> ed Volume 1 pages 624 to 627.

[70] In *Naylor v Jansen*<sup>18</sup>, the court highlighted two considerations to be borne in mind by a judge in exercising discretion for this purpose. The first is the purpose behind rule 34 and the second is the judge's unfettered discretion.

[71] The defendant disclaims the liability to cost on the basis of the plaintiff's *causa* is not founded on the same basis as the defendant's acknowledgement of liability and that the plaintiff's computation of the amount payable in respect of the enrichment claim is materially different from the computation of the defendant and secondly the plaintiff's claim is based on fraudulent documents.

[72] Mr Tötemeyer correctly argued that neither these grounds come to the assistance of the defendant in its attempt to evade liability.

[73] It is clear that the basis for calculation of the enrichment claim is founded in the amount payable in one of the contractual claims. I agree that the method of calculation is irrelevant for the current proceedings, especially as the defendant conceded that the basis for the calculation of the reasonable use of the machines was actually founded in one of the contractual claims.

[74] The issue of the alleged fraudulent documents on which the plaintiff's main claim is based is also of no moment as the alleged fraud was not alleged in respect of the enrichment claim of the plaintiff but in respect of the contractual claim or claims, which will in any event not be prosecuted.

[75] I do not agree that the defendant's right to costs will be prejudiced by considering it during the current proceedings. In fact the contrary will become clear if one considers the history of the matter, to which I will make a brief reference.

#### *Brief history of the matter*

[76] If one considers the history of the matter then one would see that the defendant made a tender in its plea on 17 September 2019 but it was not a formal tender and it did not include an amount tendered for, nor did the defendant tender costs, or interest or a specific amount.

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<sup>18</sup> 2007 (1) SA 16 (SCA) at 22 G.

[77] In the pre-trial in July 2020 the defendant again 'tenders' an amount for monthly use of machines and it quantifies it with reference to the calculations but again no further specifics, no tender for costs, no tender for interest, it does not say on what basis it is tendered, i.e. unconditionally or as a compromise, or whatever the case may be.

[78] The matter proceeded and the parties filed witness statements at the directions of the court and a trial date was allocated.

[79] The tender was eventually made two days prior to the trial date and yet again the defendant failed to tender costs resultantly causing the plaintiff to bring an application to secure its costs.

[80] The defendant is very critical of the way in which the plaintiff conducted the trial and because of that reason the defendant may succeed and obtain a portion of the costs, however, this is clearly an instance where the criticism would apply to the defendant itself.

[81] As a result of the defendant's belatedness the plaintiff had to appoint counsel and prepare for trial whereas the defendant could have avoided all this and have protected itself from its liability to cost by formally pleading the tender timeously.

[82] Further to that during the course of the judicial case management procedure the defendant also withdrew its counterclaim and also tendered no costs. It is trite that when a party withdraws its counterclaim and it did not tender costs then the other party would be entitled to cost of the counterclaim up to the withdrawal and the current matter is no exception thereto.

*Is the plaintiff entitled to costs?*

[83] I am satisfied that the plaintiff is entitled to cost as it substantially succeeded in its claim. The fact that a higher amount was claimed than the tender that was

accepted does not alter the fact that the Plaintiff is the successful party in considering the question of costs.

[84] I am satisfied that the grounds raised by the defendant for its failure to tender the costs have no merits.

[85] The costs that the plaintiff is entitled to obviously excludes the costs as a result of the amendments effected by the plaintiff. The plaintiff conceded that the defendant should not be held liable for these costs as it was an indulgence sought by the plaintiff. The plaintiff further indicated that it will not seek an order for the costs in respect of the expert summary and the report on the issue of the alleged fraud and disputed signature.

### *Interest*

[86] The defendant only tendered interest on the amount of N\$ 1 834 201 for the period September 2020 to March 2021.

[87] On defendant's own calculation it is liable to the plaintiff in the amount of N\$ 1 834 201 and on the defendant's reconciliation this amount was due on 31 January 2019 and the defendant was therefore in *mora* from the said date.

[88] The general position is that if the debt is liquidated and the day for performance is fixed, *mora* operates *ex re* and no demand (*interpellatio*) is necessary to place the defendant in *mora*. The creditor is then entitled, in keeping with general principles, to *mora* interest from the day for performance<sup>19</sup>. Interest starts running from due date automatically and no 'fault' or 'wrongfulness' is required<sup>20</sup>.

[89] There is no question that the amount due by the defendant is a liquidated amount. That is clear the calculations by Ms Plaatjes which appears to be a mere exercise of addition and subtraction.

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<sup>19</sup>*Westrand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 195 to 196. GB Bradfield Christie's Law of Contract South Africa 7ed (2016) from page 590, para 13.2.2

<sup>20</sup> *Scoin Trading (Pty) Ltd v Bernstein* NO 2011 (2) SA 118 (SCA) at para [20], pp. 122 I to 123 D.

[90] *Christie's Law of Contract South Africa*<sup>21</sup> states as follows on the issue of period of *mora* and the interest:

'When a debtor's contractual obligation is to pay money, and he is *in mora*, the general damages that flow naturally from the breach will be interest *a tempore morae*.'

[91] The amount of interest is therefore due as from the date when a complete cause of action has arisen in respect of those amounts and since the use of the machines for the specific months ended at the end of January 2019 it entitles the plaintiff to the interest on the amount of N\$ 1 834 201 from the said date.

Order:

The court grants an order in favour of the Plaintiff in the following terms:

- a) Interest: Interest on the amount of N\$ 1,834,201.00 for the period from February 2019 to August 2020 as well as after March 2021 to date of final payment calculated at the rate of 20% per annum; and
- b) Costs:
  - a. Cost on a party and party scale to date of hearing on 30 March 2021 (including the cost of argument) and, including the cost of the first defendant's withdrawal of its counterclaim, such costs to include the cost of one instructing and two instructed counsel.
  - b. No order as to cost in respect of the plaintiff's expert witness summary on the disputed signatures issue;
  - c. No order as to costs in respect of the plaintiff's amendments.

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J S Prinsloo

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<sup>21</sup> R H Christie. *The Law of Contract in South Africa*, 6 ed (2011) at 530.





## APPEARANCES:

For the Plaintiff:

Adv R Tötemeyer assisted by B de Jager  
Instructed by Behrens and Pfeifer  
Windhoek

For the First Defendant:

Adv G Narib  
Instructed by Metcalfe Beukes Attorneys