REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between: Case no: I 3829/2011

JEAN-MARIE LAUER **PLAINTIFF**

and

PHILLIP MÜLLER **FIRST DEFENDANT**

BRIGITTA MÜLLER **SECOND DEFENDANT**

Neutral citation: *Lauer v Müller* (I 3829/2011) [2021] NAHCMD 577 (09 December 2021)

Coram: GEIER J

Heard: **02-06 June 2014; 11-14 November 2014; 1-12 June 2015; 21-22 September 2015; 6-17 June 2016; 19–20 January 2017; 23 January 2017; 25–27 January 2017; 30-31 January 2017; 1-3 February 2017; 8 May 2017; 10-12 May 2017; 15 May 2017; 17-19 May 2017; 23 October 2017; 25–27 October 2017; 30 October 2017; 1–3 November 2017; 29 January 2018; 30–31 January 2018; 1–2 February 2018; 5–6 February 2018; 8–9 February 2018; 13–16 February 2018; 18-22 June 2018; 26 June 2018.**

Reserved: **21 January 2021**

Delivered: **09 December 2021**

Flynote: Practice - Pleadings - Amendment - Court will refuse amendment where the issues on which the parties where directed to trial where encapsulated in a pre-trial order and where a subsequent application for leave to amend the pleadings does not at the same time seek leave to have the pre-trial order consequentially varied in order to bring it in line with the sought amendments

Enrichment - General enrichment action - Requirements for liability - Defendant has to have been enriched - Plaintiff has to have been impoverished - Defendant's enrichment has to have been at expense of plaintiff- Enrichment has to have been unjustified (sine causa) –

Enrichment – Presumption of enrichment - A presumption of enrichment arises when money is paid or goods are delivered. A defendant then bears the onus to prove that he has not been enriched.

Enrichment – Onus of proof – a plaintiff can in principle claim the maximum amount that the enrichment has caused and a defendant is entitled to plead the reduction or total loss of any enrichment. The onus to prove any reduction or loss however lies on the defendant.

Donation — What constitutes — Law generally regards it improbable that a person will gratuitously part with money as a gesture of liberality — Defendant alleging donation bearing onus to prove such donation. Principles adopted in *Taapopi v Ndafediva* 2012 (2) NR 599 (HC) applied.

Practice and procedure - Claims sounding in foreign currency - in principle, there is no absolute bar to an order for payment in a stipulated foreign currency and that, generally, the conversion from Namibian Dollars to the foreign currency in question is to be made on the date when payment is actually made.

Summary: The plaintiff transferred certain funds to the defendants to enable the building of a house, two hunters' bungalows, the purchase of a solar system, olive trees and game on the defendants' farm. The plaintiff reclaimed these funds transferred for the house, bungalows and solar system on the basis of unjust enrichment. The defendants resisted such claim essentially contending that the

moneys transferred for these purposes constituted a gift or donation, which was not repayable. The court accepted in principle that the defendants had been enriched through the admitted transfer and receipt of the transferred funds, which created a rebuttable presumption of enrichment, which the defendants failed to discharge. The question whether or not resultant enrichment was unjustified or not thus hinged on the resolution of whether or not the transferred funds constituted a gift or donation. In this regard the defendants attracted a further onus as a donation is not presumed and he who alleges a gift, ought to prove it. The defendants also failed to discharge this onus and the presumption against the gratuitous giving away of property. The court thus concluded that all the issues formulated in the governing pre-trail order, in regard to claim 1, had to be answered in favour of the plaintiff and that generally it could thus be said that the plaintiff had thus succeeded in establishing the requirements for his enrichment claim. Claim 1, save for the reduction by one half of the expenses incurred for the solar system was thus granted.

The plaintiff's second claim relating to the funds advanced in respect of the olives turned on the question whether or not the plaintiff had proved that the sum advanced in this regard constituted a repayable loan. The court held that the plaintiff was unable to prove his pleaded case in this regard and Claim 2 was thus dismissed.

As far as Claim 3 was concerned, the claim relating to the refund of the amount advanced for the purchase of animals the court found that this was loan that was repayable and Claim 3 was thus determined in favour of the plaintiff.

As each party had achieved a measure of success the court ordered that each party pay its own costs.

ORDERS

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1. The application for leave to amend, dated 27 January 2020, is dismissed with costs, such costs to include the costs of one instructed- and one instructing counsel.

Claim 1

2. The first and second defendants are to pay the amounts of €198 019-17 and N$ 263 161-23, plus interest on the aforesaid amounts, at the rate of 20% per *annum a tempore morae* to date of payment, jointly and severally, the one paying the other to be absolved;

Claim 2

3. This claim is dismissed.

Claim 3

4. The first and second defendants are to pay the amount of €21 252-00, plus interest on the aforesaid amount at the rate of 20% per *annum* from 20 April 2009 to date of payment, jointly and severally, the one paying, the other to be absolved;

5. Each party is to pay its own costs.

JUDGMENT

GEIER J:

[1] South of the Equator, in Africa, lies the beautiful 8000 hectare farm Okatare, which is situated in the north-west of Namibia, in the Damaraland region, some 480kms north-west of the capital city of Windhoek and a mere 140km from the Etosha National Park. Apparently 'Okatare has some breath- taking landscapes and the extra- ordinary beauty of the region never fails to inspire and charm both local- and foreign visitors. Namibia's healthy dry climate, its incredible variety of flora and fauna and ever- changing scenery make for an ideal travel destination in the mist of untouched horizons'.

[2] Accommodation in Okatare encompasses 'comfortable fully furnished rooms or bungalows, each with an *ensuite* bathroom. All rooms have hot water and daily cleaning and laundry services are available. The main farm house is a colonial style farm house set in a beautiful rocky landscape surrounded by an indigenous garden. A traditionally set lapa, overlooking a sparkling pool offer a superior place to relax during the day or to enjoy a meal in the evening. Each room renders excellent game viewing opportunities, with an abundance of kudu, springbok and gemsbok'.

[3] It was in such glowing terms that the farm and some of its amenities were described on the internet. Similar information was also apparent from a brochure handed in as an exhibit at the trial.

[4] Sometime in 2008 the plaintiff, a French national, and his then consort became enchanted with the farm Okatare during one of their visits to Namibia. It was then that the plaintiff, who owns three factories in France, became desirous to obtain a tranquil place of his own for re-generation purposes. The idea was borne to build a house and bungalows on farm Okatare so that the plaintiff could, on a regular basis, come to Namibia and enjoy some peace and quiet and so recharge his batteries. Initially a good and hearty relationship prevailed between the plaintiff and his wife and Mr and Mrs Mueller, the first and second defendants in this matter, the first defendant then also being the owner of Okatare. It was during harmonious times that the intended house and two hunters' bungalows where built. In addition the plaintiff invested also in the upgrading of a solar system on the farm, provided funds for the establishment of an olive grove, a long-held dream of the second defendant, and for the purchase of additional game.

[5] Subsequently, and as unfortunately happened, the relationship between the parties soured as a result of which the plaintiff is now claiming the repayment of €198 019.17 and N$526 322.47 in respect of the house, the bungalows and the solar system, the sum of €50 000 in relation to some 4000 olive trees which were to be planted and €21 252.00 in respect of moneys advanced in regard to the purchase of game intended to repopulate the farm.

[6] The defendants defended this action - and - in the main - contend that the monies advanced in respect of the bungalows, the house, solar system and the olives trees constituted a gift by the plaintiff given to them out of pure generosity, which was not repayable. In regard to the monies advanced for the purchase of game, the defendants pleaded that such monies would only have become repayable through monies earned from hunters brought by the plaintiff to Okatare. As the plaintiff failed to do so he had waived his right to reclaim these monies. It was essentially against this general background that the parties went to trial.

[7] The action was instituted in November 2011. The matter was enrolled for the first time for trail during June 2014. An extensive trial ensued, which 'consumed' nearly 80 court days, spanning over a period of more than 5 years. At the close of argument on 28 September 2019 counsel for the plaintiff indicated that the plaintiff, now, intended to amend his particulars of claim. This delayed the finalization of the case even further. After the amendment process was completed, which entailed the bringing of the necessary notice and a subsequent application, which was also opposed, the parties eventually waived their right to oral argument and counsel were agreed that the court should determine the amendment application on the papers - and also - and at the same time - deliver its judgment on the merits of this case. This was a startling concession, as surely the possibility could not be excluded that should the court grant any of the amendments this would entail not only possible consequential amendments to the defendants' pleadings, but would probably also come with the re-opening of the parties' respective cases and the hearing of further oral evidence on the amended issues.

Resolution: application for leave to amend

[8] Be that as it may. Although the parties exchanged extensive heads of argument in regard to the opposed application for leave to amend which had so been allowed to develop it is clear that that the application, which only seeks leave to amend the pleadings is doomed to failure in the absence of an application for leave to also vary the court's pre-trial order at the same time. It is clear that the issues encapsulated in the pre-trial order made in this instance override the issues formulated in the pleadings originally and that the parties, thereafter, went to trial with reference to the issues formulated, for this purpose, in the pre-trial order.

Although a pre-trial order can be varied it is also clear that it stands until varied. This is precisely the situation that prevails in this matter. The pre-trial order stands and continues to stand in the absence of any appropriate relief sought in that regard. This demonstrates that the application for leave to amend the particulars of claim, on its own, will be ineffective and will constitute a *brutum fulmen*, if granted. The application can thus not be granted in the absence of a simultaneous application to have the pre-trial order consequentially varied to bring it in line with the sought amendments, should they be granted. The application for leave to amend dated 27 January 2020 thus fails for these reasons and falls to be dismissed with costs, including the costs of one instructed- and one instructing counsel.

Further general observations

[9] I will now proceed to reproduce the respective arguments made on behalf of the parties – the claims are in essence three - in order to then come to a decision on each claim.

[10] In this regard it should still be mentioned that the plaintiff himself testified in support of his case, for which purpose also three further witnesses where called, namely Mrs Nicole Grabski, (Lauer), and Messrs Jean-Pierre de Villiers and Jean-Pierre Nicolas. For the defendants, both the first and second defendants, Mr Phillip Mueller and Mrs Brigitta Mueller testified, as well as a Mrs Emce Dodds.

[11] As the trial spanned over the years 2014 to 2019 during which the various witnesses had to testify about incidents which occurred mainly during the period 2007 to 2010 their ability to testify accurately was obviously affected by the lapse of time.

The claims

Claim 1

[12] For payment of the amounts of €198 019-17 and N$ 526 322-47 plus interest on the aforesaid amounts at the rate of 20% per *annum a tempore morae* to date of payment.

Claim 2

[13] For payment of the amount of € 50 000-00, plus Interest on the aforesaid amount at the rate of 20% per *annum a tempore morae* to date of payment.

Claim 3

[14] For payment of the amount of €21 252-00, plus interest on the aforesaid amount at the rate of 20% per *annum* from 20 April 2009 to date of payment.

[15] There was also a fourth claim, which the parties managed to resolve.

Argument on behalf of the plaintiff

[16] In his heads of argument, Mr Mouton, counsel for the plaintiff, introduced the grounds on which his client's claims were founded then as follows:

'(4) Ad claim 1 : During or about October to November 2008 and at Farm Okatare (the property), in the Outjo district Namibia, the Plaintiff and Defendants entered into an oral agreement in terms whereof the Plaintiff agreed with the Defendants to pay for the construction and fitting of a dwelling for the Plaintiff and his partner and the construction and fitting of two hunters bungalows on the property so as to expand the hunting operations of the Defendants on the property, on the following conditions:

(4.1) That the Defendants would procure the transfer of the land on which the dwelling was to be constructed, to the Plaintiff so that the Plaintiff would have it as his sole and exclusive property.

(4.2) The Defendants would procure for the Plaintiff and Plaintiff's partner, Miss Nicole Grabsky permanent residents permits to enable both the Plaintiff and his partner to reside in Namibia on a permanent basis.

(5) In anticipation of the transfer of the land to the Plaintiff and the acquisition for permanent residence, Plaintiff, during the period November 2008 and April 2009, advanced the sum of €198 019-17 (One Hundred and Ninety Eight Thousand and Nineteen Euro and Seventeen Cent) and N$ 526 322-47 (Five Hundred and Twenty Six Thousand Three

Hundred and Twenty Two Namibia Dollars and Forty Seven Dollars) to the Defendant for the construction and fitting of the dwelling and the two hunters bungalows on the property. The amount of N$ 526 322-47 (Five Hundred and Twenty Six Thousand Three Hundred and Twenty Two Namibia Dollars and Forty Seven Dollars) was inclusive of the solar system so installed on the farm Okatare.

(6) The monies Plaintiff so advanced to the Defendants were made in the *bona fide* and reasonable believe that the Defendants would take all such steps necessary to cause transfer of the land on which the dwelling was erected to be effected to the Plaintiff, once completed and to acquire the said permanent resident permits.

(7) Pursuant to the payments made by Plaintiff listed at paragraph 5 above, Defendants proceeded to construct, complete and fit the dwelling and two bungalows on the property but have failed to take all steps necessary to cause transfer of the land on which the dwelling was erected to be made to the Plaintiff and to acquire the permanent resident permits for the Plaintiff and Nicole Lauer.

(8) The Defendants whom are the owners and remain in possession of the property and the dwelling and two bungalows constructed on the property, have been unduly enriched with the aforesaid improvements on the property at the expense of the Plaintiff and have the use and enjoyment of both the dwelling and the two hunters bungalows and are unwilling or unable to cause transfer of the land on which the dwelling was constructed to be effected to the Plaintiff and to obtain the permanent resident permits for the Plaintiff and his partner.

IN THE ALTERNATIVE

(9) The Defendants knew that the Plaintiff would act on their representations that they would effect transfers of the land on which the dwelling was constructed, to Plaintiff once completed and further that they would acquire permanent residents for the Plaintiff and his partner.

(10) These representations were material and were made with the intention to induce the Plaintiff to advance the aforesaid sums to the Defendants.

(11) Plaintiff relying on the truth of the representations made by the Defendants made payments to the Defendants in the aforesaid amounts for the construction and fitting of the dwelling and two hunters bungalows.

(12) The representations were false in that the Defendants knew or reasonably should have known that;

a) The portion of land which were to be transferred to the Plaintiff was agricultural land;

b) By the operation of the Agricultural (Commercial) Land Reform Act 6 of 1995 the Plaintiff as a foreigner would not be in a position to acquire such agricultural land;

c) By the operation of the Sub division of Agricultural Land Act 70 of 1970 that the Minister would not allow the sub division of the property.

(13) The Defendants were intentional alternatively negligent in making the representation because they knew, alternatively reasonably should have known, in the further alternative, did not make proper enquiries as to the legislative framework under which such transfer could or could not be effected and the acquisition of permanent residence for the Plaintiff and his partner could or could not be obtained.

(14) As a consequence of the Defendants representations plaintiff has suffered damages in the amounts of €198 019-17 and N$ 526 322-47 …'.

Ad claim 2

(15) On the 6th of November 2008 the Plaintiff agreed to lend and advance to the Defendants, at their special instance and request, the amount of €50 000-00 (Fifty Thousand Euro) on the following conditions:

(a) that Defendants would use the amount so advanced to grow an Olive grove on 5 hectares of land on the property;

(b) that the Defendants would purchase 4 000 olive trees to commence the project;

(c) that the Defendants would commence the project within a reasonable time after Plaintiff transferred the money.

(16) Plaintiff proceeded to transfer to the Defendants the sum of €50 000-00 (Fifty Thousand Euro) on the 6th of November 2008 under the aforesaid conditions.

(17) The Defendants failed to meet the aforesaid conditions, but appropriated the sum of €50 000-00 (Fifty Thousand Euro). As such the Defendants repudiated the loan agreement which repudiation the Plaintiff has accepted alternatively hereby accepts.

(18) The Defendants are accordingly liable to repay the Plaintiff the amount of €50 000-00 (Fifty Thousand Euro).

Ad Claim 3 :

(19) On the 20th of April 2009 the Plaintiff agreed to lend and advance to the Defendants, at their special instance and request, the amount of €21 252-00 (Twenty One Thousand Two Hundred and Fifty Two Euro) for the purchase of game to repopulate the property.

(20) The parties agreed that the amount of €21 252-00 (Twenty One Thousand Two Hundred and Fifty Two Euro) would be repaid from the earnings Defendants would derive from Defendants; hunting operations on the property.

(21) Notwithstanding Defendants continuing hunting operations during the period 2009, 2010 and 2011, the Defendants have failed to make any payments to Plaintiff to service the loan of €21 252-00 (Twenty One Thousand Two Hundred and Fifty Two Euro).

(22) As such, Defendants have breached the loan agreement and are liable to make payment to the Plaintiff in the amount of €21 252-00 (Twenty One Thousand Two Hundred and Fifty Two Euro), which amount, demand notwithstanding, the Defendants fail and or refuse to pay to Plaintiff.'

[17] The pleaded defences to these claims were where also summed up by plaintiff's counsel:

> 'Ad claim 1 :
>
> (3.1) The Defendants had a similar and previous idea with a certain Guy Balhade(r)e to build a "bungalow" on the farm Okatare which project was taken over by the Plaintiff.
>
> (3.2) The Plaintiff in an e-mail dated the 26th of July 2010 advised the Defendant that the construction of the "bungalow" and the money for the "olives" were a gift.

(3.3) The Defendants in the Plea denied have used the said "house" and "hunters bungalows."

Ad the alternative claim :

4. The Defendants denied having made any representations whether negligent or otherwise and pleaded that they acted merely as conduits in advising the Plaintiff to contact an Agent namely Marietha Bower Agency to assist.

5. The Defendants further pleaded that the Plaintiff's Application for Permanent Residence was subsequently rejected in a letter dated the 21st of October 2009.

6. It was also pleaded by the Defendants that the Plaintiff at his own instant constructed the bungalow and effected payment to the Defendants voluntarily which the Plaintiff later indicated was a "gift".'

Ad claim 2 :

7. The Defendants in essence pleaded that the Plaintiff donated the money to the Defendants out pure liberality.

8. The Defendants further pleaded that the purchasing of the olive trees and preparation for the planting were made timeously and within a reasonable period from receiving the donated money.

Ad claim 3 :

9. The Defendants admitted that an oral agreement existed in terms whereof the Plaintiff lend and advanced monies to the Defendants in terms whereof game were to be purchased.

10. The Defendants however pleaded that such loan would be repaid from monies earned from hunters send to Okatare by the Plaintiff but that the Plaintiff failed to have send hunters to Okatare.

11. Defendants also pleaded that the Plaintiff waived his right to reclaim the loaned monies in an e-mail dated the 15th of July 2010 if he was awarded a Temporary Residence Permit.

12. It was also pleaded that the Plaintiff later unilaterally revoked the aforesaid condition in an e-mail dated the 28th of July 2010.'

[18] The pre-trial order of 1 October 2013 then ordered that :

'2. The parties are directed to trial on the issues as formulated in paragraphs 1 to 14 and (ii) of the parties' proposed pre-trial order dated 25 September 2013.'

[19] The referred to issues, as formulated by the parties, where:

'Ad claim one

1) Whether the parties entered into an oral agreement in terms of which they agreed that Plaintiff would pay for the construction and fitting of a dwelling for Plaintiff and his partner and the construction of two hunters bungalows on the property so as to expand Defendants hunting operations on the property under the conditions pleaded at 4.1 to 4.2 of the Plaintiff's particulars of claim;

2) Whether the conditions had been fulfilled;

3) Whether the Defendants have been unduly enriched with the improvements to the property;

4) Whether the construction of the dwelling and the two bungalows was purely for the use and enjoyment of the Plaintiff, whenever he visited Namibia;

5) Whether the construction of the dwelling and the two bungalows was a gift, alternatively donation from Plaintiff to the Defendant's.

Ad alternative claim

6) Whether the Defendants made the representations as alleged and whether these representations were made with the intention to induce the Plaintiff to advance the said sums of money to the Defendants;

7) Whether the representations were made intentionally or negligently;

8) Whether the representations were false;

9) Whether the Plaintiff suffered damages as a result of the representations in the amount of €198 019-17 and N$526 322-47;

10) Whether the payment effected was done voluntarily by Plaintiff and whether they constituted a "gift";

Ad claim two

11) Whether the amount advanced by Plaintiff constituted a loan to defendants as pleaded pursuant to the terms and conditions pleaded at paragraph 15 of Plaintiff's particulars of claim;

12) Whether the amount so advanced was a donation out of pure liberality from the Plaintiff;

Ad claim three

13) What the terms and conditions were of the oral agreement concluded between the parties, relating to the purchase of game;

14) Whether the Plaintiff waived his rights to claim the amount of €21252-00 as alleged by Defendants;

II. The issues of law are:

(a) Whether the amounts advanced to the Defendants by Plaintiff were advanced out pure liberality and whether they constituted a donation.'

[20] Counsel also summed up the essence of plaintiff's evidence and also that of the other witnesses to the effect that;

> '15.1 The First Defendant gave him permission to build a house on the farm Okatare.

15.2 The First Defendant represented to him that the land surrounding such house would be transferred into his name and that he would receive title to such land on which house and bungalows are built.

15.3 The First Defendant informed and represented to the Plaintiff that he (First Defendant) knows the Minister of Finance and that, he (First Defendant) would be able to secure Permanent Residence for the Plaintiff and his wife Nicole Lauer.
See: Annexure "BM2" as attached to the First Defendant's Witness Statement

15.4 That such Permanent Residence would be secured and/or obtained within a period of 6 months.

15.5 Had he have known that he would not have received title to the land on which the house and two bungalows were built then he would not have built such house and two bungalows.

15.6 Had he have known that Permanent Residence will not be secured and/or granted to him and Nicole Lauer then he would not have constructed such house and two bungalows on the farm Okatare.

15.7 That he never donated the house and/or two bungalows to the Defendants as alleged or at all.

Ad claim 2:

16. The Plaintiff testified that he forwarded an amount of €50 000-00 (Fifty Thousand Euro) to the Second Defendant in order to establish an olive plantation on condition that such a loan/amount be repaid after 5 (five) years and when the 1st harvest of olives have been reaped.

17. The Plaintiff testified that the Second Defendant undertook to repay the loan of €50 000-00 (Fifty Thousand Euro) with regard to the olives after 5 (five) years because the cultivating of olives takes 5 (five) years to establish itself and to start producing fruits.

18. The Plaintiff denied that he ever informed either the First and/or Second Defendants that the payment of €50 000-00 (Fifty Thousand Euro) in respect of the establishment of an olive plantation and/or for the cultivation of olives, was a gift.

19. The understanding was all along that the loan amount of €50 000-00 (Fifty Thousand Euro) would be repaid after 5 (five) years and that such period of 5 (five) years had since lapsed.

Ad claim 3

20. The Plaintiff testified that the amount of €21 252-00 (Twenty One Thousand Two Hundred and Fifty Two Euro) was lend and advanced to the defendants in order to purchase game to re-populate the farm Okatare.

21. The Plaintiff further testified that the agreement under which such amount of €21 252-00 (Twenty One Thousand Two Hundred and Fifty Two Euro) was lend and advanced to the Defendants be repaid to the Plaintiff from funds generated from the hunting operations, was never met in that the Defendants, despite hunting operations on the farm Okatare since such an amount was lend and advanced to the Defendants, never repaid the amount or any portion thereof.

Ad claims 1, 2 and 3

22. The Plaintiff testified with reference to Exhibits "AA1" and "AA2" that the then legal practitioner of the Defendants i.e. Mr. Chris Brandt forwarded a letter to the Plaintiff in terms whereof Mr. Brandt stated that the response of the Defendants (upon the demand for payment by the Defendants) of the aforesaid amounts so advanced were retyped word for word.

23. In terms of Exhibit "AA1" and "AA2" the Defendants stated *inter alia* that;

23.1 Olives – was offered by the Plaintiff "There was never a request for that". Exhibit "AA1" and "AA2" however does not mention that such amount for the olives was offered as a gift or that such "offer" was accepted by the Defendants.

23.2 Bungalows – Bungalows were donated (given as a gift) by the Plaintiff to the Defendant family. This (bungalows) was never requested or even considered that apart from the house also bungalows would be build. It was allegedly a spontaneous decision by Mr. Lauer (Plaintiff) generous gift that was accepted with thanks and therefore non-refundable.

23.3 The aforesaid is however contrary to the Plea of the Defendant which is clearly to the effect that the Plaintiff "took over the project regarding the construction of a bungalow on Okatare. An undertaking which was initially to be effected by one Gay Balhadere. The drawings of Mr. Balhadere included the construction of a house and two bungalows.

23.4 House – this was allegedly built by the Plaintiff so that he could hear the grass grow in Namibia. The reason for the permission by the First Plaintiff to build this house on Okatare was merely to allow Mr. Lauer happiness and harmony. Exhibits "AA1" and "AA2" however does not mention that said house was given as a "gift" or that such house was ever occupied as a gift.

23.5 Solar – the existing battery/generator system was adequate for the Okatare household but due to the construction of the house, the bungalows and ironing room, the existing system was overloaded. Since the Defendants family did not have the "cash flow" to erect such a large solar system, the Plaintiff undertook to pay all the costs. With the aid of hunters, clients which the Plaintiff would find, it was planned by the Defendant family, to repay half of the expenses over an indefinite period of time.

23.6 Animals – these animals are fully repayable upon agreement. Under these circumstances, the First Defendant will undertake to repay these animals without interest at N$2 000-00 (Two Thousand Namibia Dollars) per month as from January 2011. Should there be more income in different months, the First Defendant would pay more in such months. Otherwise N$2 000-00 (Two Thousand Namibia Dollars) per month.

24. The Plaintiff continued to testify that he has received no repayment with regard to the undertaking that the animals would have been required by monthly payments of N$2 000-00 (Two Thousand Namibia Dollars).

Application for permanent residence and/or temporary residence

25. The Plaintiff testified, with reference to Exhibit "JJ", that he never knew or had any intention to have applied or a "Temporary Work or Study Permit" but that it was always told to him that Application will be made by the Defendants to obtain permanent residence in Namibia.

See: Exhibit "MM1" and "MM2" and "BM2" attached to First Defendants Witness Statement

Donation

26. With reference to Exhibit "D1" to "D4" it is clear from the evidence of the Plaintiff that;

26.1 He (Plaintiff), along with the Defendants, wants to talk about the outstanding debts such as the animals and the solar.

26.2 He (Plaintiff), along with the Defendants, wants to discuss (speak) about the issues pertaining the olives, bungalow and the solar.

Nicole Lauer (Grapski)

27. Nicole Lauer testified exactly the same as the Plaintiff and mainly to the extent that;

27.1 The Plaintiff was given permission to construct a house on the farm Okatare and that it was represented to them (Plaintiff) that they would receive title to the land upon which such house and bungalows were to be constructed.

27.2 They (Plaintiff) and Nicole Lauer would obtain permanent resident permits in Namibia within 6 (six) months.

27.3 The Defendants would repay the €50 000-00 (Fifty Thousand Euro) to the Plaintiff after 5 (five) years when the 1st harvest of the olives became due.

27.4 The Defendants would repay the amount of €21 252-00 (Twenty One Thousand Two Hundred and Fifty Two Euro) so lend and advanced to the Defendants in respect of the animals.

27.5 The Defendant would repay half the amount expended on the installation of the solar system and that there was no solar system on the farm Okatare prior to the one installed by Alency and paid for by the Plaintiff.

27.6 The Plaintiff never donated the house and the 2 (two) bungalows to the Defendants.

27.7 Although the Defendant's deny that there was no solar system on the farm prior to the Plaintiff and Nicole Lauer having built the house and bungalows, the

existence of only a battery/generator system (not a solar system) is borne out by exhibit "AA1" and "AA2" in which the defendants clearly stated that "the existing batter/generator system was adequate for the Okatare household".

27.8 The aforesaid is also borne out by the witness De Viliers who testified that when they visited Okatare with the Plaintiff during 2010 that there was only a battery/generator system and not a solar system on the farm Okatare.

27.9 Brigitte Muller also testified that she along with the Plaintiff and Nicole Lauer visited Bower agencies on the 10th of November 2008 and on the 16th of February 2011 which evidence was proved false by virtue of:

(a) The testimony of Jean Pierre De Villiers who testified that Brigitte Muller was on the farm Okatare on the 10th of November 2008 and did not accompany them to Windhoek and that she therefore could not and did not visit Bower Agencies along with the Plaintiff and Nicole Lauer who was also in Windhoek on the 10th of November 2008.

(b) Photos taken by Nicole Lauer on the same date proving that the Plaintiff along with Jean Pierre Nicola were hunting from early morning and during the afternoon on the 16th of February 2011.

(c) Testifying and confirming that the Plaintiff, Nicole Lauer along with Nicolas were hunting on the 16th of February 2011 from early morning until and during the afternoon on the 16th of February 2011.

(d) Nicolas testify that Brigitte Muller did not accompany her husband when he fetched them i.e. Nicole Lauer, when they arrived in Windhoek on the 15th of February 2011 and that they left for Okatare on the same date.

(e) Nicolas also testified that Brigitte Muller was not in Windhoek on the 15th of February 2011 when they i.e. Plaintiff, Nicole Lauer, and himself were fetched at Windhoek by the 1st Defendant on the 15th of February 2011.

27.10 It must consequently be accepted that the Second Defendant's evidence is false and not to be relied upon especially the evidence given about the events relating to the 10th of November 2008 and to the 16th of February 2011.'

[21] Mr Mouton then addressed the probabilities, which according to him favoured the plaintiff's version and from which it became clear that the defendants merely 'pretended' that permanent residence had been applied for on behalf of the plaintiff and his wife and that this was especially so as :

> '41.1 The Second Defendant clearly in an e-mail dated the 15th of November 2008 stated and acknowledges that the "Application for Temporary Work and Study Permit" so made on behalf of the Plaintiff and Nicole Lauer relates to the "Application for Permanent Residence".
>
> *See: Exhibits "MM1" and "MM2"*
>
> 41.2 The Immigration Control Act 7 of 1993 clearly does not provide for an "Application for Temporary Residence".
>
> 41.3 The Plaintiff and Nicole Lauer clearly did not have any intention to either "work" and or "study" in Namibia.
>
> 41.4 The Plaintiff and Nicole Lauer testified that they never visited "Bouwer Agencies" and neither did they ever meet either Marieth Bower and/or Emce Dodds.

43. Despite the fact that the Defendants as well as Emce Dodds testified that the Plaintiff and Nicole Lauer visited the offices of Bower agencies on numerous occasions, the evidence is clear that such evidence are false especially since;

> 42.1 During her testimony Emce Dodds could not provide any specific dates when such alleged visits occurred although she in her Witness Statement referred to the 10th of November 2008 and the 15th of February 2009 when the Plaintiff allegedly visited the offices of Bower Agencies but when she was confronted with Exhibits "GGGG1" to 4 she changed her vision.
>
> 42.2 Plaintiff and Nicole Lauer cannot speak nor read any English and as a result had to rely on either the First or Second Defendant to translate for them as Emce Dodds and Marietha Bower could not speak either French or German.
>
> 42.3 Despite the fact that the Second Defendant testified that she along with the Plaintiff and Nicole Lauer visited the offices of Bower agencies on the 16th of February 2009 photographs were submitted which clearly indicate that such evidence

is false as the Plaintiff, First Defendant along with Mr. Jean Pierre Nicolas is depicted on such photographs when hunting occurred on the farm Okatare at approximately 10:28 and 17:14 respectively on the 16th of February 2009 when Nicole Lauer took such photographs.

See; Exhibits "GGGG 1 to 4"

42.4 When the Second Defendant was confronted with such Exhibits i.e. "GGGG1 to 4", she unfoundedly and cunningly suggested that the date and time on Exhibits "GGGG 1 to 4" could have been photoshop(p)ed which resulted in the Plaintiff re-opening his case to call Mr. Nicolas who testified that they indeed arrived in Windhoek on the 15th of February 2009, drove through to Okatare on the 15th of February 2009 and started hunting on the 16th of February 2009. As a result could not have been in Windhoek on the 16th of February 2009.

See: Exhibit "LLLLL2"

42.5 The Second Defendant, also testified that she also accompanied the Plaintiff and Nicole Lauer to Bower Agencies on the 10th of November 2008 yet Mr. Phillipe de Villiers testified that Brigitte Muller (Second Defendant) never came to Windhoek on that day as she stayed in Okatare on the 10th of November 2008 when the Plaintiff, Nicole Lauer, the First Defendant and Phillipe de Villiers along with his wife left Okatare early in the morning of the 10th of November 2008 for Windhoek as the Plaintiff and Nicole Lauer had an appointment with the builder Ben Pretorius whereafter the First Defendant took them to Windhoek airport from where they departed late that afternoon for Europe.

See: Exhibit "KKKKK"

44. The Second Defendant testified that it was a heavy and difficult decision to have allowed the Plaintiff to build a house and two bungalows in the farm Okatare because she had to also take the future of her children into consideration yet she and the First Defendant also allowed a certain Mr. Gary Balhadere to draw architectural plans for a house and two bungalows to be built on the farm Okatare by Balhadere for his own use and enjoyment. So, the Defendants also and previously gave consent to Mr. Balhadere to build a house and two bungalows (exactly the same idea as the Plaintiff was allowed to do) on the farm Okatare. Luckily for Mr. Balhadere it seems that he realized the crooked plan timeously and did not proceed with the building of the house and the two bungalows.

45. Even before the dispute between the Plaintiff and the Defendant's commenced, the Plaintiff on the 30th of March 2010 wrote an e-mail to the Defendants in which he questioned the sincerity of the promises made to him which were as follows;

> 44.1 "Did you do anything regarding the Permanent Residence for Nicole. Phillip at the time said to me "That's no problem, I know the Minister" was that bluff or the truth?"
>
> 44.2 "Ps Please tell me the truth regarding the Agreement for Residence [??]. I believe less and less in it."
>
> *See: Annexure "BM2" attached to First Defendant's Witness Statement.*

46. The Plaintiff nevertheless received no reply (denial) to annexure "BM2" and the Second Defendant could also not refer the court to a response from either of the Defendants to annexure "BM2" and as a result it must be accepted that such promises as to "permanent residence" had been made.

47. The Defendant never enquired and/or followed up from this "new person" which they have allegedly found and who was "helping" them as to what transpired with the "residence permit" especially since it was only going to take "one week" to finalize such residence permits.

See: Exhibits "PP1" and "PP2" and Exhibit "E2"

48. The aforesaid especially since the Defendants testified that "all debts" will be waived by the Plaintiff once he has received his "permanent residence. A negative inference must be drawn.

See: Exhibit "D1 to "D4"

49. The Second Defendant testified she" exaggerated" and actually lied about the so-called officials" whom were doing them a favour as is mentioned and referred to in Exhibits "G1" and "G2". The evidence of the Defendants consequently and generally, ought not to be believed.

50. The First and Second Defendant admitted that the 20 (twenty) year "Lease Agreement" so entered into with the Plaintiff was actually a fraud and a fabrication. The evidence of the Defendants consequently and generally ought not to be believed.

See: Exhibit "H"

51. Although the Defendants maintained and testified that the Plaintiff took over the architectural plans from Balhadere (which plans according to the testimony of the Second Defendant included the building of two bungalows) the Defendant also maintained that such bungalows "were never requested or even <u>considered</u> that apart from the house, also bungalows would be built."

See: Exhibits "AA1" and "AA2"

52. With regard to the allegations that the house/"bungalow" and olives were a gift, there is no evidence that such were given as a gift or that the Defendants at any stage prior to the dispute between the parties ever treated such house/bungalows or olives as a gift or, that the Defendants ever accepted such house/bungalows and or olives as gifts.

See: Exhibits "D2", "D3" and "D4" and Exhibits "F1" and "F2" and Exhibits "J1" and "J2"

53. The Second Defendant testified that she did not know and was not told that the Plaintiff and Nicole Lauer wanted to settle in Namibia permanently yet she completed annexures "JJ" and "RRRR" stating that the Plaintiff and Nicole Lauer intends to live permanently in Namibia.'

[22] After dealing with the legal requirements pertaining to donations Mr Mouton rounded off his argument by submitting:

'54. The Principal Alternative Claim of the Plaintiff is founded on enrichment and more specifically regarding the house, 2 bungalows, solar system and animals which were built and paid for by the Plaintiff on the farm Okatare.

55. Regard to the defence of the Defendants as referred to hereinbefore and especially since it had been proved beyond reasonable doubt that their defence of "donation" cannot succeed, it is respectfully submitted that they are deriving an income from such bungalows.

56. As a result, it must be accepted that the house and bungalows improves the usefulness and economic exploitation of the property i.e. Okatare.

57. It is submitted that the Plaintiff must be compensated with the amount which he expended with regard to the building of the house and the two bungalows.

58. It is in any event submitted that the Defendants do not plead to the Plaintiffs claim to be refunded for the two hunters bungalows but only deals with the "house" as "a" "gift" and not with the two bungalows and to the Plaintiff's claim regarding and especially the one relating to unjust enrichment in respect of the house and the two bungalows must succeed.

59. It is respectfully submitted that useful expenses incurred and expended which, although not necessary for the prevention of the thing, nevertheless improves the usefulness and economic exploitation of the property.

See: Brooklyn House Furnishers (Pty) Ltd v Knoetze & Sons 1970 (3) SA 264 (A) 270H

60. As for as useful improvements are concerned, a claim based on the principles of unjust enrichment will lie.

See: Eduon Hoogtes v Charin Electronics 1973 (2) 795

61. Even on the evidence presented by the Defendants, it is clear that the house is utilized by the Defendants either for guests/hunters or as the Second Defendant had testified to, by her children when they visit the farm.

62. It is common cause and so testified to by the Defendants that they utilize such bungalows to facilitate hunters and the Plaintiff's claims and especially the one relating to unjust enrichment in respect of the house and two bungalows must therefore succeed.

63. Three remedies are in principle available to a person who has improved another's property at his own expense by erecting structures on the property or by cultivating it. He may-

53.1 Claim compensation for the expenses he has incurred.
53.2 Claim a lien over the property until he has been compensated and
53.3 In appreciate circumstances, remove the materials employed in improving the property.

64. A distinction is made between three types of expenses, namely-

(a) Necessary expenses *(impresa necessaria*) which are incurred for the preservation and conservation of the property,

(b) Useful expenses (*impensae utiles*) which although not necessary for the preservation of the thing nevertheless improve the usefulness and economic exploitation of the property according to prevailing notions; and

(c) Luxurious expenses (*impensae voluptuariae*) which are neither necessary nor useful but result simply in an adornment and possibly an increase in the market value of the property.

See: Nortje v Pool 1966 3 Sa 96 (A) 130
Brooklyn House Furnishers (Pty) Ltd v Knoetze & Sons 1970 3 SA 264 (A) 270H

65. The Plaintiff in his alternative claim claims for such useful improvements such as the house, 2 x bungalows, solar system and the animals with which the Defendants have been enriched at the expense of the Plaintiff.

66. The Plaintiff is entitled to such expenses as set out in the Summons and Particulars of Claim as the parties have agreed to the *quantum* of the amounts claimed.

67. The Second Defendant has admitted that the house is sometimes being used by her children although it is submitted that such house is also being used by hunters and/or guests.

68. It is common cause that the two bungalows are being used by hunters and that the Defendants derives an income therefrom.

69. The animals on the farm which the Plaintiff has funded, is being hunted by hunters from which the Defendants derive an income.

70. The solar system installed on the farm Okatare is being utilized by the Defendants for use by guests and/or hunters and is certainly a useful improvement to the hunting activities of the Defendant.

71. It is consequently submitted that the Defendants had been enriched at the expense of the Plaintiff and as a result, the Plaintiff is entitled to the amounts claimed.

See: Nortje en 'n Ander v Pool, No [1966] 3 AL SA 359 (A)
Rademeyer and Others v Rademeyer and Others [1967] 3 All SA 85 (C)
Eduan Hoogtes (Pty) Ltd v Chain Electronics (Pty Ltd [1973] 2 All SA 669 (T)

WHEREFORE it is submitted that the Plaintiff's claims succeed as prayed for with costs such costs to include the costs of one instructing and one instructed counsel.'

Argument for the defendants

[23] Here it should firstly be acknowledged that Mr Brandt acted for the defendants throughout the trial and that Mr Heathcote SC then crafted the respective heads of argument on behalf of the defendants.

[24] Given the fact that Mr Heathcote was not involved in the trial his heads of argument were exceptional. Although it may seem like an abdication of duty I believe that also his written submissions should be reproduced verbatim to a great extent in order to do his arguments justice.

[25] He commenced his argument by pointing out that :

> '4.1 The Plaintiff's first claim is premised on unjustified enrichment. [1] It is common cause between the parties that the Plaintiff paid the amount of €198,019-17 to the Defendants during November 2008. [2] The Plaintiff further testified that during the period of November 2008 until April 2009 additional funds to the accumulative value of N$526,322-47 were transferred to the Defendants for the construction of and expenses to have the house and bungalows erected as planned on Farm Okatare.
>
> 4.2 In paragraph 66 of the heads of argument filed on behalf of the Plaintiff it is submitted that the Plaintiff is entitled to such expenses as set out in the summons and particulars of claim "as the parties have agreed to the quantum of the amounts

[1] Paragraphs 3 – 8 of the Plaintiff's particulars of claim.
[2] Pre-Trial report at paragraph III (1).

claimed". This is incorrect. Firstly in the pre-trial report which was made an order of court the following was agreed to between the parties: [3]

Issues of fact to be resolved:

…

3) Whether the Defendants have been unduly enriched with the improvements to the property;

Ad Alternative claim:

…

9) Whether the Plaintiff suffered damages as a result of the representations in the amount of €198 019-17 and N$526,322-47;

The only relevant facts that are common cause are that:

1) Ad claim 1 and alternative claim

The Plaintiff made payment to Defendants in the amount of €198 019-17 during November 2008, which amount was used for the construction of a dwelling for the Plaintiff and two hunter's bungalows on the property.

4.3 The parties therefore agreed in the pre-trial report that payment of the amount of €198 019-17 was received by the Defendants. Later it was confirmed by the parties during the proceedings before the court that both the amounts in paragraph 14 of the Plaintiff's particulars of claim were paid by the Plaintiff to the Defendants: [4]

MR MOUTON: My Lord yes we have discussed the proposals submitted by or told, asked by Your Lordship. My Lord Mr Brandt and the Defendant they admit payment of the amounts both the amounts as it appear in paragraph 14 of the Particulars of Claim. Should one then have regard to the plea pertaining to that specific paragraph that is on page 33 of the record My Lord (intervention)

COURT: (Inaudible) 193 019.35 Euros as submitted and payment of 526 322.07.

[3] Parties Pre Trial report paragraphs 3 and 9.

[4] Record 8 June 2016 at pages 1092 (20) - 1093.

MR MOUTON: Is admitted indeed so My Lord.

COURT: (Inaudible) admitted (intervention)

MR MOUTON: Yes.

COURT: As having been paid.

MR MOUTON: As having been paid by the Plaintiff to the Defendants My Lord.

COURT: (Inaudible).

MR MOUTON: Yes My Lord.

[Emphasis provided]

4.4 Defendants' agreement that the amounts were paid by the Plaintiff was not an admission of the Plaintiff's alleged enrichment or impoverishment claim. The quantum of the Plaintiff's enrichment claim against the Defendants (and the consequent liability of the Defendants) therefore still had to be proved in accordance with the "double ceiling rule" [5] as confirmed by the Supreme Court of Namibia in the Paschke matter referred to below. This is evident from the subsequent evidence of the Defendants.

4.5 As a starting point no expert evidence was presented by the Plaintiff in respect of the value of Farm Okatare prior to the construction of the house and bungalows on the farm and the value of Farm Okatare subsequent to the construction thereof.

4.6 To prove enrichment Plaintiff must allege and prove the extent of his impoverishment and the extent of the Defendants' enrichment. The Plaintiff is entitled to recover the extent of his impoverishment or the Defendants' enrichment, whichever is the lesser, at the time of *litis contestatio*. The Supreme Court of Namibia confirmed the aforesaid general principal in the matter of **Paschke v Frans** [6] wherein O'Regan AJA held the following:

> [14] The High Court's proposition that in calculating damages the principle that a plaintiff should receive 'the fullest compensation' is not a principle that can properly be said to underpin the law of unjustified enrichment. The law of unjustified enrichment in Namibia, and in South Africa, contains a complex web of overlapping remedies. The key general principle is that a plaintiff who asserts that another's estate has been unjustifiably enriched to the detriment

[5] The South African Law of Enrichment, Professor Jacques Du Plessis, 2012, at page 380, paragraph 13.1.2 (Juta).

[6] 2015 (3) NR 668 (SC) ad paragraph 14 and the authorities referred to therein.

of the plaintiff, is entitled to recover the extent of his or her impoverishment, or the extent of the defendant's enrichment, _*whichever is the lesser amount*_. It is clear that, save in certain exceptional circumstances, a plaintiff is not entitled to recovery, even where he or she can demonstrate impoverishment, if the defendant is no longer enriched at the time of the action. Accordingly, the law of unjustified enrichment does not seek to ensure that a plaintiff receives 'the fullest compensation possible', as suggested by the High Court and its reasoning can accordingly not be sustained. [Emphasis provided]

4.7 It was further confirmed at paragraph 21 of the Paschke [7] matter that the time as which the quantum of the Plaintiff's claim is to be determined in respect of an action for enrichment is that of *litis contestatio*. The following was held by our apex court:

[21] …

Given that in an enrichment claim, the overall purpose is to determine the extent of the defendant's unjustified enrichment, and the plaintiff's consequential impoverishment, the facts pleaded by the defendant in a plea and any counterclaim will be of crucial importance in determining the extent of enrichment. It seems to make good sense, then, that the time when the quantum of enrichment is to be determined is the time when the pleadings close at *litis contestatio*.

4.8 The Plaintiff's enrichment case is premised on two separate conditions which the Plaintiff alleges the Defendants undertook to comply with, but failed to do. The conditions, it is alleged by the Plaintiff, which the Defendants undertook to comply with were the following:

4.8.1 The Defendants would procure the transfer of the land on which the dwelling was to be constructed, to the Plaintiff so that the Plaintiff would have it as his sole and exclusive property; [8]

4.8.2 The Defendants would procure for the Plaintiff and the Plaintiff's partner, Ms Nicole Grabsky, permanent residence permits to enable both the Plaintiff and his partner to reside in Namibia on a permanent basis. [9]

[7] Paschke matter at par 21.
[8] Particulars of claim paragraph 4.1 and Pre-Trial report paragraph I (1).
[9] Particulars of claim paragraph 4.2 and Pre-Trial report paragraph I (1).

4.9 The evidence led by the parties in respect of the aforesaid alleged conditions will be dealt with at paragraph 5 below.

4.10 In the present instance it is common cause between the parties that it is impossible for the Defendants to register the portion of Farm Okatare on which the house and bungalows were constructed into the name of the Plaintiff. Hence it is impossible for the Defendants to return the thing, being the portion of the land, together with the house and dwelling to the Defendant. As a result the Plaintiff's recourse would be enrichment. In accordance with the aforesaid principal as enshrined by our Supreme Court the value of enrichment must be the smaller of the Plaintiff's impoverishment or the Defendants' enrichment on the date of *litis contestatio*. The onus rests squarely on the Plaintiff to prove such value.

4.11 Therefore in order for the Plaintiff in this matter to have complied with the aforesaid principal and determine the value of the Defendants' enrichment, the Plaintiff had to prove the value of the Farm Okatare without the improvements for which the funds were transferred by the Plaintiff as well as the value of the Farm Okatare together with the improvements made thereon with the funds transferred by the Plaintiff as at *litis contestatio*. The difference between the two amounts will determine the Defendants' enrichment. In order for Plaintiff to discharge this onus he had to enlist the services of an expert in the field of the property valuation. And, the values had to be proven as at *litis contestatio*. This the Plaintiff failed to do. Without such proof, the Plaintiff did not even begin to discharge the onus.

4.12 Whatever amount the Plaintiff may have spent or paid over to the Defendants, therefore does not remotely constitute the Defendants' enrichment. Without the requisite proof, this court cannot even begin to apply the relevant test as laid down by our apex court.

4.13 In this regard, in any event, the Second Defendant testified the following when questioned by the Honourable Court: [10]

And you think that your, the property the farm has been enhanced in value by structure in, of about an access of 1.5 million. --- No Your Lordship I do not think so.

> I see, and why do you would you say something like that? --- Your Lordship, we are on the farm it is an agriculture value and an economical value and

[10] Record 13 February 2018 at pages 83 and 84.

houses does not do not fall unto economical or agriculture value Your Lordship. If I have somebody come there to evaluate they, they do not want to see the houses. They want to see the infrastructure of the farm how many water holes, how many (indistinct), how many fences, how many camps. That is what they are looking for Your Lordship, I agree with you if this building or even a bigger and more impressive building and even an Olympic pool if you want to (indistinct) has been built on our farm, still it would not (indistinct). But if I had the same building Your Lordship here in Windhoek yes, yes it will put a lot of value.

I see. --- But not on the farm.

So when one sees adverts in the newspaper that a piece of agricultural land is for sale and lists the boreholes and it lists the camps and the type of fencing and the like, it is not it becomes irrelevant whether it has a dwelling on that piece of agricultural land or not? --- Your Lordship I maybe you are misunderstood me I do not say that the dwelling is irrelevant. But what they do (intervention)

You must have many dwellings by the way? --- We have many dwellings and that does not matter to, to when I want for example to sell my farm or to have and it evaluated for some reasons maybe for the bank or for something and they come to evaluate and to have a look. They do not bother about how and how big the dwellings are Your Lordship.

You mean it is irrelevant whether you have hunting bungalows on your farm, whether you can offer your farm for sale as a hunting operation, whether you are going to offer it and says but this is a piece of agricultural land that suitable for commercial hunting activities. You mean all that is irrelevant? --- Your Lordship (intervention)

And, and any evaluator will only look at the agricultural value of the land. And everything else becomes irrelevant and does not impact on any evaluation? --- Yes Your Lordship, because I have had an evaluator there and I wanted to show him all the buildings and I do not want to see it let us go to (indistinct). They want to see if it is for hunting if I would sell it for hunting, they want to see how much grass do I have, how much water do I have. Do I have animals on that? And I do not know also so much about the advertising but I can remember I saw once an advertising where they

said there are so many kudus, there are so many whatever elephant, giraffes whatever that is important Your Lordship.

No but you know that game has commercial value the evidence before this Court has shown that? --- That is so.

Is that not so? --- Yah.

Otherwise the animals that were purchased would not have costs such a lot of euros. --- That is true they have a value the animals.

Yes. --- But not the (indistinct).

So they are obviously being taken into account as far as the evaluation is concerned or? --- If they do evaluation Your Lordship for the agricultural land and the economical value I do not even know if they would count the animals.

I see. --- They look at the infrastructure Your Lordship and it does not matter how big and your how nice and beautiful your houses are and if you have golden taps and whatever (indistinct).

So your farm must be a bargain?

4.14 The First Defendant testified that the main house is not used for hunters and is mainly used for the Defendants' children when they visit the farm. [11]

4.15 Instead the quantum of the Plaintiff's claim is premised on the principle that a successful litigant should receive the fullest possible compensation, by simply reclaiming the amounts paid as if it is an action for restitution, which it is not. As confirmed at paragraph 14 of the Paschke matter, the law of unjustified enrichment does not seek to ensure that the Plaintiff receives 'the fullest compensation possible".

4.16 During their testimonies both the Defendants disputed the amount of N$526,322-07 in view of the documents discovered by the Plaintiff, which indicated that certain of the items included in the calculation of the said amount, where personal or consumable items purchased by the Plaintiff and Ms Lauer. [12]

4.17 The First Defendant further testified that the amount of €198,019-17 included the amount of €21,252-00 transferred to the Defendants for the purchase of game, as is evident from exhibit **KK2**. The Plaintiff has therefore duplicated this amount in claims 1 and 3. The First Defendant further testified that only €140,000-00 was

[11] Record 2 February 2017 at page 2213.

[12] Record 18 May 2017 page 2773 and 26 October 2017 pages 3073 – 3168.

received from the Plaintiff in respect of the construction of the house and the bungalows. [13]

4.18 In respect of the solar electricity system the Plaintiff and Ms Grabsky (Ms Lauer) testified that the Second Defendant requested them to install the system. [14] The evidence of the Second Defendant in this regard was detailed and to the contrary when she stated the following: [15]

> What is true in this paragraph Your Lordship is that Plaintiff proposed to me an upgrading of the existing solar system. Because he wanted to run various energy intensive items simultaneously from battery storage, without starting the generator. Like an electric bread machine, electric chips maker, coffee machine, electric oven, the existing electric infrastructure on Okatare was more than sufficient to run all items on the Okatare (indistinct) but not simultaneously and Your Lordship we did not agree immediately as our existing system was a fully functioning and sufficient system. Mrs Lauer stated in her revised Witness statement BBBB2 that it was me the 2nd Defendant who proposed this to Plaintiff, and that is not true, now I am going to read paragraph 28 and right after that paragraph 29 because I want to answer them in one, is that permissible Your Lordship?
>
> Yes of course. --- So paragraph 28, the agreement regarding the expenses to be incurred for the upgrading of the solar system as proposed and accepted was to be shared on a 50/50 basis by the Plaintiff and Defendants. To which the Defendants agreed to, paragraph 29 however and when the installation of the new upgraded solar system was completed and an invoice received from (indistinct) who constructed such upgraded system the first alternatively 2nd Defendant did not pay their 50%. Which necessitated the Plaintiff to pay the full amount for such solar system. Defendants are consequently also indebted to the Plaintiff for half the costs incurred to have had an upgraded solar system, constructed and installed on the farm Okatare. The Plaintiff will testify that the invoice so received from (indistinct) dated 3 November 2009 is made out to Muller Lauer and was for an amount of four hundred and four thousand six hundred and fifty seven Namibian Dollars ninety two cents. Which the Plaintiff paid in full. There were also two subsequent invoices from (indistinct) dated 3 June 2010 to the amounts of

[13] Record 2 February 2017 page 2202.
[14] Record 3 June 2014 at page 17 and 9 June 2016 at page 1193.
[15] Record 26 October 2017 page 3089 - 3091.

ninety nine thousand five hundred thirty eight Namibian Dollars and two cents, and eighty four thousand one hundred and seventy seven Namibian Dollars and seventy cents respectively. Now I answer on paragraph 28 and 29 simultaneously. Your Lordship on that day when the solar system was discussed my husband was not on Okatare, and I cannot agree to something as big as the installation of a solar system in the absence of my husband. So after I got into contact with my husband he said it was not in our budget, and I went back to plaintiff and I told him we cannot afford it. And I was faced with a situation that somebody wants it done and somebody is against it. and I was in a conflict and I felt I was pressurised (sic) into making a decision as I wanted Plaintiff and Nicole to be happy to use the electric devices as they wanted, whenever they wanted I accepted after Plaintiff reassure me that we can pay him back 50% of the installation fees with hunters that he would send to us. And Plaintiff also said to me that he would wave this debt as soon as his residence permit was available.'

[26] In regard to the Plaintiff's alternative claim based on misrepresentation the submissions ran as follows:

'5.1 The Plaintiff's alternative claim is premised on an alleged misrepresentation by the Defendants to the Plaintiff that the portion of Farm Okatare on which the dwelling was constructed could be transferred into his name and that the Defendants would acquire permanent residence for the Plaintiff and his partner. [16]

5.2 The Plaintiff's alternative claim also fails at its root. The alleged misrepresentations concern matters of law. The Plaintiff himself says so in paragraph 12 of his particulars of claim. A representation of law does not constitute a ground for relief. The Supreme Court of Namibia, in **Denker v Ameib Rhino Sanctuary (Pty) Ltd and Others** [17] confirmed that pre-independence authorities point towards the condition that a contracting party cannot call a misrepresentation in law, in aid. The following was held by Damaseb, DCJ:

[53] As regards Viljoen's alleged misrepresentation as pleaded, it is common cause that it relates, not to fact, but to law. There is scant Namibian authority to provide guidance if a misrepresentation of the law by one party can be prayed in aid by the other contracting party. Both parties, however, proceed

[16] Paragraphs 9 – 13 of the Plaintiff's particulars of claim.
[17] 2017 (4) NR 1173 SC at paragraph 53.

from what appears in my view to be the correct premise that the innocent party's belief must be reasonable. As has famously been put in South Africa, if the party alleging a misrepresentation of the law —

'is so slack that he does not in the Court's view deserve the protection of the law, he should, as a matter of policy, not receive it'.

Transfer of a portion of land into the Plaintiff's name

5.3 The following evidence was presented by the parties in respect of the alleged agreement to transfer of the portion of the land on which the dwelling and bungalows were to be constructed:

Plaintiff

5.3.1 The Plaintiff confirmed under cross examination that during his previous visits to Namibia in 1995 and 1997 he was also interested in purchasing a farm. [18] He further confirmed that during these visits he obtained a lot of information about the requirements to purchase a farm in Namibia from a certain Vinnie. [19] According to the Plaintiff the requirements were not as strict as they were at time when he testified. [20]

5.3.2 The Plaintiff initially testified during his evidence in chief that the First Defendant approached him and requested him to build a house and two bungalows on Farm Okatare and that they were adamant in their request. [21] He further testified that the portion of land would be transferred into his name once the construction was completed. [22] Under cross-examination, however, the Plaintiff conceded that it was in fact he who approached the First Defendant and requested his permission to build a house on Farm Okatare. [23]

5.3.3 The Plaintiff testified that there is an institution in France called SAFER, which also has a pre-emptive right on property in France. He further testified that the First Defendant advised the Plaintiff after the construction of

[18] Record 12 November 2014 at page 89.
[19] Record 12 November 2014 at page 89.
[20] Record 12 November 2014 at page 89.
[21] Record 3 June 2014 at page 32 and the Plaintiff's witness statement paragraphs 5 and 6, confirmed under oath.
[22] Plaintiff's witness statement paragraph 10, confirmed under oath.
[23] Record 13 November 2014 at page 121.

the house and bungalows that the portion of Farm Okatare could not be registered in his name due to SAFER. [24]

5.3.4 The Plaintiff further confirmed that during 2007 he was in Namibia with the intention to purchase Farm Kuduberg. [25] This was prior to the Plaintiff requesting the First Defendant's permission to build a house on Farm Okatare. [26] In addition to the aforesaid the Plaintiff confirmed under cross examination that he was at the time well aware of the fact that a foreigner cannot hold a majority shareholding in a CC (or any other entity for that matter) which owns a farm. The relevant testimony by the Plaintiff is as follows:

MR BRANDT: As the Court pleases, when one looks at your evidence there, it appears that you are quite fully aware of the fact that the foreigner cannot have the majority shareholding in a cc which possesses a farm. --- Yes I did know that, I was aware of that. Phillip Muller told me that.

So you were in fact aware there were limitations for foreigners to have majority shareholding in a cc which owns a farm, is that correct? --- Yes, we only spoke about the farm, we did not speak about a company or a cc, just the farm. [27] [Emphasis provided]

and

MR BRANDT: I will just rephrase by saying, were you aware that foreigners were not allowed to own more than fifty per cent of membership interest of a company or close corporation for foreigner, were you aware of that?
INTERPRETER: Of a farm or of a close corporation?
MR BRANDT: That a foreigner who has got majority shareholding in a close corporation or company owning a farm, agricultural land is not allowed without the consent of the Minister to have the majority shareholding? --- When we talked about the possible purchase of Kudu Berg I was informed that the foreigner could not have majority shareholding. That was also the reason why I refused to buy Kudu Berg.

[24] Record 3 June 2014 at page 33.
[25] Record 13 November 2014 at page 111.
[26] Record 5 June 2014 at page 141 (20).
[27] Record 13 November 2014 at page 155 (10 & 20).

So you were aware of the limitations? --- Yes that was already the case when we talked about Kudu Berg. [28] [Emphasis provided]

5.3.5 The Plaintiff testified during his evidence in chief that a portion of land of 150 metres by 150 metres was the minimum portion of land which he wanted in his own name. [29] The Plaintiff further confirmed during his evidence in chief that he and the Defendants did not speak of the specific size of the portion of land "to be transferred" to him. [30] The Plaintiff thereafter confirmed under cross-examination that the land measurements of 150 metres by 150 metres were never mentioned before the filing of his witness statement. [31]

5.3.6 During cross-examination the Plaintiff again confirmed that the first time he mentioned the measurements was in his witness statement. Despite the obvious contradiction, the Plaintiff still testified during cross-examination that it was agreed with the Defendants that a portion of and of 150 metres by 150 metres would be transferred into his name. [32] The Plaintiff was tailoring his evidence in this regard as the trial progressed.

5.3.7 During cross-examination the Plaintiff conceded under cross-examination that the parties did not discuss the payment of any compensation for the transfer of the portion of land on which the house would be built. [33]

Nicole Grabsky (Lauer)

5.3.8 Despite the contradictory evidence by the Plaintiff, Ms Grabsky, who testified on behalf of the Plaintiff, confirmed that she the Defendants never spoke about the measurements of the "plot", knew nothing of it and that no diagram was provided to her and the Plaintiff in this regard. [34] She further confirmed under cross-examination that the Plaintiff and her priority was to be able to construct the dwelling and not to have the land. Ms Grabsky also conceded under cross-examination that prior to the filing of their witness

[28] Record 13 November 2014 at page 157and page 158.
[29] Record 3 June 2014 page 34
[30] Record 3 June 2014 page 33.
[31] Record 13 November 2014 page 125.
[32] Record 3 June 2015 at page 438.
[33] Record 13 November 2014 at page 124.
[34] Record 23 January 2017 at page 1753 and 25 January 2017 at pages 1801 – 1802

statements, nothing was mentioned about the size of the portion of land and the transfer of the land into the Plaintiff's name. [35]

5.3.9 It was also confirmed by Ms Grabsky under-cross examination that it would have been logical to discuss the price for the purchase of the land from the Defendants, but that they trusted the Defendants and therefore did not discuss same. [36]

First Defendant:

5.3.10 The First Defendant was adamant throughout his testimony that he did not promise, or undertake or enter into an agreement with the Plaintiff to transfer a portion of Farm Okatare into his name. According to the First Defendant the agreement between the Plaintiff and the Defendants were that the bungalows were a gift and the house was for the Plaintiff's exclusive use whenever he came to Farm Okatare. [37]

5.3.11 The First Defendant testified that the Plaintiff was aware before the construction commenced that the portion of land would not be transferred into his name. [38]

5.3.12 The First Defendant's position in respect of the transfer of the portion of the land to the Plaintiff was succinctly explained by the First Defendant during cross-examination when he stated the following: [39]

> COURT: Yes please. --- if we go I like to invite the Court to June 2014 record, page 33, lines 19 to 31. And I will read it to the Court. And it is a leading question by Mr Mouton to Mr Lauer. When Mr Muller the 1st Defendant made the proposal to you to build the house and bungalow because there was enough space, did you then discuss the issue of ownership of that, yes Phillip Muller had made this proposal and he has always promised me that the land for that could be bought, we did not speak about the specific size of the land, after the house and the bungalow had been built already Mr Muller

[35] Record 25 January 2017 at pages 1801 – 1802.
[36] Record 23 January 2017 at page 1753.
[37] Record 30 May 2017 at page 2644.
[38] Record 2 February 2017 at page 2187.
[39] Record 15 May 2017 at page 2638

informed me for the first time that land ownership will transfer into Mr Lauer's name was not possible because of (indistinct), because of what (indistinct). It is an institution in France with the right of pre-emption on the land title. And Your Lordship if one consider this statement to be true this will be the reason for a breakup of a friendship and not a 25% commission on a hotel booking. Never neither orally or in writing Your Lordship by email or fax was anything mentioned about transfer of land into Plaintiff's name. Your Lordship the first time is mentioned in Plaintiff's Witness statement Exhibit A and that is 2014 six years later, first time, we heard about that. In no correspondence is anything mentioned about a notary or about a transfer of plan into Plaintiff's name. Not Your Lordship not in Exhibit D4. Not in Plaintiff's email to Mr Brandt, Exhibit Y1, not in email V2 Your Lordship and if we bear in mind the email Exhibit D4 was a very important email for Plaintiff, the Exhibit D4 Plaintiff told us exactly what we Defendants owe him and what Plaintiff was waiting for. The residence permit was important to him as Plaintiff mentioned it therein, the gifts the Plaintiff confirmed the outstanding debts yet there is not a word about transfer of land into Plaintiff's name. The letter to Mr Brandt Exhibit Y1 or 2, Mr Lauer stated everything was important to Plaintiff but not a word about transfer of land. In the same Exhibit V2, and Your Lordship we have remember here Plaintiff informed us the Plaintiff have decided never to come to Okatare again. Then Plaintiff sums up all issues that were important to Plaintiff, yet again nothing is mentioned about transfer of land into Plaintiff's name. Your Lordship that does not make sense as is emphasised so was in his Witness statement Exhibit A. and Your Lordship if you still consider, would consider page 33 of June 2014 record to be true what would have motivated Plaintiff to still advance money for the animals, solar and offer me two hundred thousand euros at a (indistinct) rate Your Lordship it does not make sense to me.

Good thank you, Mr Mouton we will adjourn at this stage.

Second Defendant

5.3.13 The Second Defendant confirmed the evidence of the First Defendant in this regard.

5.3.14 The Second Defendant further testified that the fact that a portion of land could never be transferred into the Plaintiff's name was discussed with him in great detail during November 2008 prior to him making any payments for the construction of the house. [40]

5.3.15 In addition to the aforesaid the Second Defendant testified the following: [41]

> 'There was no measurement and no fencing, between 2008 and 2010 during Plaintiffs stay on Okatare there was no measurement, no fencing, and not a word about transferring land into Plaintiff's name. The first time anything is mentioned about a transfer of land into Plaintiff's name is in this Witness statement Exhibit A. He did not even mention this in his very important email C1 when he told me that bungalows and olives were a gift and solar was half a gift, he did not mention in that email that anything about transfer of land into his name. And in the letter to Mr Brandt letter that is Exhibit Y and it was a crucial letter for Plaintiff he did not mention that the property should be put into his name.'

5.4 The Plaintiff therefore admitted that he was aware that there is a law in Namibia which circumscribes the ownership of agricultural land by foreign nationals. The Plaintiff further testified that there was an institution in France, SAFER, which also had pre-emptive rights in respect of certain property in France. Therefore the Plaintiff was not oblivious to the possible legal ramifications associated with the sale and/or transfer of agricultural land in Namibia and elsewhere in the world. Seeing as the Plaintiff is a foreign national that, by itself, must have placed him on guard to seek independent legal advice, which he did not do. There is no explanation from the Plaintiff why not.

5.5 The fact that the Plaintiff was aware of the fact that their existed limitations to foreign nationals acquiring agricultural land should have rung alarm bells and made him more cautious. This is expected even more from a self-confessed astute businessman [42] dealing in a foreign country. But, instead the Plaintiff simply makes the general statement that he trusted the Defendants. Certainly it would have been

[40] Record 25 October 2017 page 3022.
[41] Record 26 October 2017 page 3057.
[42] Record 13 November 2014 at page 124, 4 June 2014 at page 114, 12 June 2015 at page 891.

expected of the Plaintiff in those circumstances to seek independent legal advice concerning the alleged registration of a portion of Farm Okatare into his name.

5.6 What seems more likely, however, is the Defendants' version that at no point in time was it discussed or agreed that a portion of Farm Okatare would be transferred into the name of the Plaintiff. This was confirmed by the First Defendant on numerous occasions during his evidence in chief and cross-examination. It was also confirmed by the Second Defendant. Nothing to the contrary appears from any of the exhibits handed in during the trial.

Permanent Residence

5.7 At the end of the hearing it was common cause between the parties that applications for temporary residence had been submitted on behalf of both the Plaintiff and Ms Grabsky and that Ms Grabsky's application was rejected. [43] The following evidence was presented by the parties in respect of the alleged undertaking by the Defendants to obtain permanent residence permits for the Plaintiff and his partner, Ms Grabsky:

The Plaintiff

5.7.1 The Plaintiff testified that the Defendants represented to him that it would not be a problem for him to obtain permanent residence in Namibia as the Defendants (according to them) knew the Minister of Finance and that such Minister would assist with such application for permanent residence and that he (the Minister of Finance) would make sure that he Plaintiff's application for permanent residence would be successful. [44]

5.7.2 The Plaintiff further testified that the First Defendant introduced him to the Minister at Farm Kuduberg and guaranteed him that he would obtain his permanent residence permanent within 3 months. [45] The Plaintiff also testified that he was made to believe that he would obtain permanent residence. [46]

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[43] See Exhibits JJ2, CCCC and PPPPP (being the proof of submission of the applications and the rejection letter in respect of Ms Grabnsky.)

[44] Plaintiff's witness statement paragraph 21, confirmed under oath.

[45] Record 4 June 2014 at page 51.

[46] Record 4 June 2014 at page 52.

5.7.3 According to the Plaintiff he offered the Defendants the two bungalows and the solar system in exchange for a permanent residence permit. [47]

5.7.4 The Plaintiff confirmed that he wanted to live in Namibia permanently. [48]

5.7.5 After Ms Emce Dodds was requested to appear in court the Plaintiff testified that he did not know Ms Dodds and that he had never before seen her. [49] He further testified that he has never been at the office of Maretha Bouwer Agencies. [50] He confirmed, however, that he was aware than an agency had been appointed to attend to the application. [51]

5.7.6 On 21 January 2009 the Plaintiff sent the Defendants a handwritten note [52] wherein he confirmed that he and Ms Grabnsky would bring their applications for temporary residence permits along and requested the Defendants to check same before filing.

Nicole Grabsky (Lauer)

5.7.7 Ms Grabsky testified that she thought that she would get a temporary residence permit first and then after two weeks the permanent residence. According to her she understood temporary residence had to be obtained first and then permanent. [53] She further confirmed that she thought it was the right process because it is like this in their country (i.e. France) first you apply for temporary residence and then for permanent residence. [54]

Second Defendant

5.7.8 The Second Defendant presented a timeline to Court in respect of the residence applications, which was marked exhibit YYYY. [55] A copy of exhibit

[47] Record 5 June 2014 at page 146.
[48] Record 13 November 2014 at page 119.
[49] Record 14 November 2014 at page 205.
[50] Record 14 November 2014 at page 215.
[51] Record 1 June 2015 at page 310.
[52] Exhibit FFFFF2.
[53] Record 7 June 2016 at page 1034.
[54] Record 6 June 2016 page 1050 – 1052.
[55] Record 26 October 2017 at page 3052.

YYYY is annexed hereto for ease of reference. This clearly sets out the timeline and events which occurred in respect of such application.

5.7.9 She testified that the Defendants were not immigration experts and that the procedure that they followed was the procedure that was advised to them by Ms Emce Dodds and Ms Marietta Bouwer. [56]

5.7.10 She further testified that the end goal was to give the Plaintiff and Ms Grabsky residence permits so that theye can come to Namibia without any problems. [57]

Emce Dodds

5.1 What is clear from Ms Dodds', an independent witness, evidence is that the Plaintiff was not truthful when alleging that he never met Ms Dodds.

5.2 Ms Dodds testified that she has been attending to immigration matters since 2005. [58] She further testified that both the Plaintiff and Ms Nicole Grabsky together with the Defendants visited her office for consultations on Monday 10th November 2008 and informed her that the Plaintiff intended building a house on Farm Okatare belonging to Mr Muller for him to use when visiting Namibia. For that purpose they needed permanent residence permits. [59]

5.3 She further testified that she informed them that they must first start with two separate applications for temporary residence permits as pensioners and once the temporary residence permits have been granted to them then only did they start qualifying for permanent residence permits after five years. They were fully appraised of the procedure for obtaining temporary residence permits. She also testified that she expressly informed them more than once at various consultations on 16th February 2009 and on 25th June 2009 that they were not allowed to work on temporary residence permits as pensioners and will only be able to work once they have obtained the permanent residence permits and adhered to the regulations of permanent residence regarding restrictions of work after receiving permanent residence. She confirmed that during all their meetings either the First or Second Defendant or both were present to explain and translate everything that was said into

[56] Record 29 January 2018 at pages 52 and 57.
[57] Record 29 January 2018 at page 51.
[58] Record 21 June 2018 at page 144.
[59] Record 21 June 2018 at page 145.

German. The Plaintiff and Ms Grabsky fully understood the state of affairs regarding the procedure relating to temporary residence permits and permanent residence permits. [60]

5.4 She testified that on Friday 6th March 2009 the Second Defendant came to her office at 15:00 to hand her all translations of the French documents translated into English that were necessary for the applications for temporary residence. [61]

5.5 After having received all supporting and requisite documentation from the Plaintiff and Nicole Grabsky she submitted the signed applications for temporary residence permits for both the Plaintiff and Ms Nicole Grabsky on 24th July 2009 at the counter of the Ministry of Home Affairs. [62] All supporting documents to the application for temporary residence were submitted together with the applications. [63]

5.6 Ms Dodds confirmed that she recognised both the Plaintiff and Ms Grabsky and that they were at her office at least three times. [64]

5.7 She further testified under-cross examination that although the Plaintiff wished to apply for permanent residence, at the time Home Affairs did not allow people to apply for permanent residence directly without having immigration status in Namibia on a normal permit before the time. You could not submit the application immediately. After they had it for five years they could apply for a permanent residence permit at that stage. [65] Despite the exact wording of the relevant Act (which she admittedly did not know by heart), the process which she described was how Home Affairs expected it to be done. [66] Nothing else would have sufficed.

5.8 In any event, the Plaintiff did not allege nor proof that his conduct was reasonable (i.e. that he could reasonably rely on the so-called misrepresentation, without making his own enquiries). In the matter of **Graceland Architects CC v Chamberlain Architects and Another** [67] the following was held by the High Court of Namibia:

[60] Record 21 June 2018 at page 146.
[61] Record 21 June 2018 at page 148.
[62] Record 21 June 2018 at pages 148 - 149.
[63] Record 21 June 2018 at pages 155 - 156.
[64] Record 21 June 2018 at page 176.
[65] Record 21 June 2018 at page 187.
[66] Record 21 June 2018 at page 189.
[67] 2018 (11) NR 34 HC ad paragraphs 17 and 18.

[17] The second exception which is aimed at the alternative claim must succeed. I was not referred to any law or judgment to the effect that the passing of legal advice between persons, particularly those who are architects, and not lawyers, if that advice is wrong, will be actionable in delict, and I have found none.

[18] Counsel for the plaintiff drew my attention to *Miller and Others v Bellville Municipality*. Although the context differs from the present case, the principle that a mistake in law is not actionable, per se was found to be one which is well established. The following is stated at 920A:

'The fact that the view of one layman, the assistant town clerk, was confirmed by the view of another, the plaintiffs' architect, did not relieve the plaintiffs from the necessity of making a proper enquiry as to the law.'

Claim 2 – Alleged Loan Agreement (Olive Orchard):

'6.1 The Plaintiff's second claim is based on an alleged loan agreement in respect of the olive orchard. The terms of the loan (as pleaded) demonstrate that it could never have been a loan. There was no arrangement or agreement between the parties for the amount to be repaid. The Plaintiff's version with regard to the alleged loan agreement varied and altered as the proceedings progressed. This will be demonstrated below.

6.2 The Plaintiff's pleaded case in respect of the alleged loan agreement was the following: [68]

"15. On the 6th of November 2008 the Plaintiff agreed to lend and advance to the Defendants at their special instance and request, the amount of €50 000 on the following conditions:

(a) That Defendants would use the amount so advanced to grow an Olive grove on 5 hectares of land on the property;

(b) That the Defendants would purchase 4000 olive trees to commence the project;

[68] Plaintiff's particulars of claim paragraphs 15 – 18.

(c) That the Defendants would commence the project within a reasonable time after Plaintiff transferred to money.

16. Plaintiff proceeded to transfer to the Defendants the sum of €50 000 on the 6th of November 2008 under the aforesaid conditions.

17. The Defendants failed to meet the aforesaid conditions, but appropriated the sum of €50 000. As such the Defendants repudiated the loan agreement which repudiation the Plaintiff has accepted alternatively hereby accepts.

18. The Defendants are accordingly liable to repay the Plaintiff the amount of €50 000."

6.3 No repayment terms and/or conditions or terms in respect of any agreement with regard to the sharing of the profit to be generated from the olive orchard were pleaded by the Plaintiff. The pleadings are important. If plaintiff pleaded a mere loan – payable on demand – the defendant would have been entitled to plead prescription. But plaintiff did not. He pleaded – not a loan – but the advance of working capital. For plaintiff to succeed, he had to prove that defendant "appropriated" the amount and never used it as working capital. If not, no "repudiation" could have been accepted. The test whether repudiation of an agreement has occurred is objective and was succinctly set out by the Supreme Court of Namibia in the matter of **Mclaren NO and Others NNO V Municipal Council of Windhoek and Others**. [69]

6.4 In terms of the pre-trial report [70] the issues to be determined by the court in respect of the Plaintiff's claim in respect of the olive orchard, where the following:

"11) Whether the amount advanced by Plaintiff constituted a loan to Defendants as pleaded pursuant to the terms and conditions pleaded at paragraph 15 of Plaintiff's particulars of claim;

12) Whether the amount so advanced was a donation out of pure liberality from the Plaintiff."

6.5 In his witness statement which was prepared on his behalf by his legal practitioners after having consulted with the Plaintiff, the Plaintiff altered his version

[69] 2018 (1) NR 250 (SC) par 42 – 52.
[70] Which was made an order of court on 1 October 2013.

for the first time and stated the following with regard to the alleged loan agreement: [71]

> "30. Mr Lauer will furthermore testify that, also during November 2008 and whilst in the farm Okatare, the Plaintiff, Nicole Grabski, a certain Mr De Villiers and both Defendants, had a friendly discussion about the cultivation and growing of olive trees on the farm Okatare.
>
> 31. The Plaintiff will testify that the Defendants convinced him that it was profitable to grow and cultivate olive trees and that he (Plaintiff) and Mr De Villiers should also assist with the buying of such olive trees in an effort to enable the Defendants to make money from the cultivation and growing of olive trees. The Plaintiffs and the Defendants were to share in the profits that were to be made from such olive trees in the future. (With respect, this is something entirely different as pleaded).
>
> 32. The Plaintiff will furthermore testify that he then (during November 2008) agreed to assist in the purchasing of olive trees and to that effect caused to be transferred to the Defendants the amount of €50 000 (Fifty Thousand Euros) on or about 6 November 2008.
>
> 33. On 29 November 2008 the First Defendant by e-mail inter alia informed the Plaintiff and Nicole Grabski that the Second Defendant had visited an olive plantation and nursery and ordered the first olive trees.
>
> 34. The Plaintiff will also testify that he would never have transferred such money i.e. €50 000 (Fifty Thousand Euros) to the Defendants had they not misrepresented to him that it was no problem to obtain permanent residence (here the Plaintiff is back at misrepresentations of law) for and Nicole Grabski in Namibia and that it was no problem to have the land registered in his name or had he known that there is legislation in place prohibiting him from owning the land upon which the house and 2 bungalows were erected. He would also not have assisted in paying for the alleged olive trees had he known about the referred to legislation. All correspondence including e-mails and documents relating to Claim Two are contained in exhibit bundle B."

[71] Plaintiff's witness statement pages 8 and 9 at paragraphs 30 – 34.

6.6 During his evidence in chief the Plaintiff, however, amended paragraph 31 of his witness statement. The last sentence of paragraph 31 was, according to the Plaintiff, incorrect and to be deleted. He confirmed that they never spoke about sharing profits. [72]

6.7 The Plaintiff further altered his version when he testified the following in this regard: [73]

> MR MOUTON: The monies that you advanced for the purchasing of the olive trees what was the arrangement with Bridget Muller for the repayment of that amount? --- Bridget Muller discussed this topic with me also in front of other people that she really wanted to install, to plant olive trees but that at that moment and time she did not have the money to do that. I said to Ms Muller it is no problem. She said that these olive trees would be profitable in five years time. I said I will transfer to you immediately the 50000 Euros. The next day, the following day after this discussion they already received the bank transfer. The profitability of 4000 olive trees is significant. I advanced the funds without fixing a date and a time line.
>
> What was the arrangement for repayment of that amount? How was that amount going to be repaid if so? --- There was no arrangement.
>
> Did you give it to Bridget Muller as a gift? --- No. [Emphasis provided]

6.8 Only after being pressed by his legal representative did the Plaintiff state the following: [74]

> So how was she to repay it to you? --- I advanced these funds to her based on a programme. It was no problem because we thought that I and Nicole would stay on the farm and that we would have a permanent residence permit and have our fine residence in Okatale.
>
> Yes we will move to that later. All I want to know was Bridget Muller supposed to repay you the monies you advanced to her for the olive trees? --- After the harvest, yes after the harvest, repayment after the harvest and that was the arrangement. Bridget Muller was a specialist in olive orchards

[72] Record 3 June 2015 page 20
[73] Record 3 June 2015 page 20 (10).
[74] Record 3 June 2014 at pages 20 - 22

and I understood that these olive trees would only be profitable after five years and this is why I did not expect any repayment before five years.

Was that discussed with Bridget Muller that after the harvest, after five years she would repay the advanced amount to you? --- No we mentioned it but we did not fix a time line.

The five years was that fixed? --- Ms Bridget Muller explained to me that it would take five years for the olive trees to grow and to bear fruit to be profitable and that it would take five years to have a return on this investment. Paragraph 52 does not really apply anymore. It is redundant so to say because these olive trees have never been planted so we are not talking about a reimbursement of the 50000 Euros it is rather a return of the money I gave to Ms Muller. I think it was an attempt to get money out of me.

Did he not say anything about milking? --- Milking money out of Mr Lauer.

But hypothetical I put it to you had the olive trees been planted if they were planted. --- I understand and can anticipate your question we could have come to an arrangement but I am no longer going to Okatale (sic).

But just listen to my question. Had hypothetically if the olive trees were planted according to your discussion with Bridget Muller was she obliged to repay you 50000 Euros after five year? --- After the harvest she would have been able to do that but we did not fix a time line.

EXAMINATION BY MR MOUTON: As the Court pleases My Lord. My Lord before the adjournment we were at paragraph 31 of this table. --- The last sentence is not correct.

Yes that is where we were. --- The only agreement we had that after the first harvest of the olives and that would have been five years after the planting of the olive trees we would have discussed the repayment of the advanced amount of money and the terms of that the instalments but we never spoke about sharing of profits. We did not do that. There was no clear definition of that. Bridget Muller said that the olive trees would only be productive after five years. [Emphasis provided]

6.9 It is evident from the aforesaid that the Plaintiff altered his version in respect of the terms of the alleged loan agreement on no less than 10 occasions.

6.9.1 Initially no repayment terms or profit sharing was agreed upon, but due to the Defendants allegedly appropriating the money by allegedly not planting the olive trees (the evidence presented by the Defendants confirmed the olive trees were planted and no guarantee that the olive project would be a success is involved or alleged) the Plaintiff was entitled to be reimbursed (Plaintiff's pleaded case);

6.9.2 Thereafter the Plaintiff version in his witness statement was that there would instead be profit sharing between the Plaintiff and the Defendants in respect of the profit generated from the cultivation and growing of the olive trees;

6.9.3 During his evidence in chief the Plaintiff confirmed that there was no profit sharing agreed upon and initially testified that there was no repayment arrangement;

6.9.4 The Plaintiff thereafter again altered his version that the Defendants would repay him after the first harvest, being after a period of 5 years;

6.9.5 Soon enough the Plaintiff again changed his version to say they discussed the 5 year period, but they did not fix a timeline;

6.9.6 Shortly thereafter the Plaintiff had another different version and stated that they could have come to an arrangement but he is no longer going to Farm Okatare;

6.9.7 The Plaintiff thereafter testified that the Defendants would have been able to pay after the first harvest, but that no timeline was fixed;

6.9.8 The Plaintiff went further and testified that it was discussed that that the funds transferred would either be reimbursed in two or three payments depending on the success of the harvest; [75]

6.9.9 Under cross-examination the Plaintiff further altered his version when he stated the following: [76]

[75] Record 4 June 2014 at pages 76 and 77.

[76] Record 4 June 2015 at pages 476 and 477.

There was now (sic) arrangement in writing because we agreed that the repayment would start after the first harvest and there need to be harvest for profitability without a harvest there is no income on the olives, so we would have waited for the first harvest that was our oral arrangements. And I would have waited for the first harvest and then we would have concluded a formal arrangement.

6.9.10 It was again confirmed by the Plaintiff under cross-examination that no fixed timeline was agreed to with the Defendants to repay the money transferred in respect of the olive orchard. [77]

6.9.11 Whilst being questioned by the Presiding Judge the Plaintiff confirmed that the agreement was that repayment would commence after the first harvest which was expected to be after about five years, whereafter the value of payments would be discussed and agreed. [78]

6.10 The Defendants' pleaded defence in respect of the funds transferred to them in respect of the olive orchard is the following: [79]

"6.1 The allegations herein contained are denied as if specifically traversed and the Plaintiff is put to the proof thereof. In amplification of the denial the Defendants plead that the Plaintiff donated the money to the Defendants out of pure liberality.

6.2 Without derogating from the above denial the Defendants plead that orders for the olive trees and preparation for the planting thereof were made timeously and within a reasonable period from receiving the donated monies."

6.11 Without even considering the Defendants' version, the Plaintiff never proved, on a balance of probabilities, its own pleaded case – or any of its many unpleaded versions.

6.12 Whilst testifying the First Defendant stated the following with regard to the Plaintiff's claim in respect of the alleged loan agreement:

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[77] Record 4 June 2015 at page 477.
[78] Record 12 June 2015 at page 890.
[79] Defendants' plea at paragraphs 6.1 and 6.2 at page 4.

6.12.1 My Lord this was a gift given to my wife on the 5th of November 2008 this was before I gave Plaintiff permission or consent to build the house on my property; [80]

6.12.2 My wife told me that evening what his intention was, so the next morning Mr Lauer came to me and he told me he gave my wife a gift a of €50 000 that she can start her olive project. Mr Lauer immediately instructed his secretary to transfer the money over into our bank account, which we received on the 11 November 2008; [81]

6.12.3 The olive trees came from South Africa and because they were too small and it was too cold, ninety percent of the olive trees died. [82]'

6.13 The evidence presented by the Second Defendant was much more detailed in this regard. She stated the following: [83]

Yes, my mother passed away in 2005 and her estate was finalised in 2009 and I knew that I would inherit some money so I developed an interest in agriculture and in September 2008 I started investigating in an olive project. And by coincidence Mr De Villier (sic) mentioned in the evening of the 5th November of 2008 that this country is suitable for olive production and this is when I expressed my newly found interest and that I was waiting for my mother's estate to be finalised to start the project. Only I was present during the conversation my husband was not present. <u>After dinner the Plaintiff took me to the side and he told me that he wanted to give me the money for the project and he told me that it was a gift. Your Lordship I was overwhelmed by such kindness and generosity and I could not believe it and I (indistinct) said to him that I cannot be able to accept such a gift, and he replied to me (indistinct), this is a gift</u>. (German) was an expression that Plaintiff used quite a lot. And that this money was a gift is also confirmed in Exhibit C1.

6.14 The German expression which the Plaintiff used, which is indistinct at the second last line of the above quoted portion of the record, was *paperlapap*, which loosely translated means *nonsense*.

[80] Record 2 February 2017 at page 2183.
[81] Record 2 February 2017 at page 2207.
[82] Record 2 February 2017 at page 2211.
[83] Record 30 October 2017 at page 3176.

6.15 The Second Defendant further testified that:

6.15.1 On 20 November 2008 I flew to Cape Town to visit Morgenster nursery in (indistinct) West in South Africa; [84]

6.15.2 On 25 November 2008 there was a delivery of fence and poles to prepare the orchard; [85]

6.15.3 The Defendants purchased sea bird guano for the olive orchard; [86]

6.15.4 The olive trees were ordered from Cape Vintages (Pty) Ltd on 19 December 2008 to be delivered during August 2009; [87]

6.15.5 A deposit in the amount of R26,400-00 was paid to Cape Vintages (Pty) Ltd on 31 December 2008; [88]

6.15.6 The Defendants hired bulldozers from Pretorius Plant Hire Trust whereafter on 14 April 2009 they ripped the orchard. Pretorius Plant Hire Trust was paid N$134,586-80; [89]

6.15.7 The water was analysed by an analytical laboratory in Windhoek; [90]

6.15.8 The soil was analysed in Stellenbosch; [91]

6.15.9 The orchard was fenced with wire purchased from Wire Industries (Pty) Ltd; [92] (Importantly both the Plaintiff and Ms Lauer confirmed that they indeed saw the fenced orchard when they were on Farm Okatare). [93]

6.15.10 The olive trees were delivered to the Defendants during November 2011;

[84] Record 30 October 2017 at pages 3176 – 3177.
[85] Record 30 October 2017 at page 3177.
[86] Record 30 October 2017 at page 3207.
[87] Record 30 October 2017 at page 3210.
[88] Record 30 October 2017 at page 3210 and Exhibit BBBBB2.
[89] Record 30 October 2017 at page 3213.
[90] Record 30 October 2017 at page 3214.
[91] Record 30 October 2017 at page 3191 and Exhibit AAAAA.
[92] Record 30 October 2017 at page 3192 and
[93] Record 10 June 2015 at page 812 and 13 June 2016 at page 1297.

6.15.11 The olive trees were planted during January 2012;

6.15.12 Initially almost all of the olive trees died from frost. Thereafter all of the transplanted trees also died.

6.16 The Defendants testified that the monies transferred to them by the Plaintiff was a gift. A gift is a gift. The Plaintiff confirmed this in his e-mail dated 15 July 2010. [94] The exact German wording used by the Plaintiff in the e-mail, being the following:

Oliven geschenk - Olives gift
Bungalo geschenk - Bungalwo gift
Solar halb geschenk - Solar half gift

The e-mail is unambiguous and could have confirmed nothing other than the fact that the money transferred to the Defendants in respect of the olive orchard, the bungalows and the solar panel system were gifts by the Plaintiff to the Defendants. This was confirmed by the Defendants during their respective testimonies.

6.17 The Plaintiff cannot rely on his own language barriers, which he tried to do on various occasions throughout his testimony. What is important is what he said in unequivocal terms. In this regard see **Stier and Another v Henke 2012 (1) NR 370 SC at 379 second last paragraph**.

6.18 Should the court be of the view that the monies transferred to the Defendants was in fact a loan and not a gift, which the Defendants remain of the view it was, it is clear from the evidence, in any event, that Defendants did plant the olive trees. Therefore Defendants did not "appropriate" the amount as alleged by Plaintiff and certainly, there was no repudiation, as alleged by the Plaintiff.

6.19 The Plaintiff has totally failed in proving the terms of the alleged loan agreement.'

Claim 3 – Alleged Loan Agreement (Animals):

7.1 The Plaintiff did not prove this claim either. There is no proof that Defendants generated the required income or earnings "from Defendants' hunting operations on

[94] Exhibits C1 and C2.

the property" for repayment to the Plaintiff be effected, as per the Plaintiff's pleaded case. The Plaintiff's pleaded case in this regard reads as follows: [95]

> 20. The parties agreed that the amount of €21 252-00 would be repaid from the earnings Defendants would derive from Defendants' hunting operations on the property.

7.2 Here again it is important not to permit the Plaintiff to now allege a loan with no strings attached to its repayment. It is the Plaintiff who alleged the method, mode and terms of repayment. The Plaintiff has simply not proven the Defendants made the required money to repay the Plaintiff from the "hunting operations on the property" this is so whether or not the parties envisaged the hunting operations were to be linked only to Plaintiff's clients or also to Defendants' clients. The Plaintiff cannot now ignore his own allegations and revert back conveniently to a loan repayable on demand. That would be highly prejudicial to the Defendants as the Defendants could have pleaded prescription had that been the pleaded case of the Plaintiff.

7.3 It was testified by the Defendants that it was agreed that the amount would be repaid to the Plaintiff from the funds generated from hunters sent to Farm Okatare by the Plaintiff. [96] This was so as the Plaintiff insisted on the Defendants purchasing the animals. Subsequent to the animals being purchased in 2010 the Plaintiff only sent four hunters to Farm Okatare with which the Defendants could transact normal hunting business. [97] The Plaintiff has relied on hunter's which he sent to Farm Okatare during 2007 prior to the animals being purchased, for the repayment. The First Defendant testified that the Second Defendant offered €2,700-00 received from the four hunters to the Plaintiff. However, the Plaintiff refused to accept the money. [98] The Second Defendant confirmed the aforesaid when she testified as follows in this regard: [99]

> 'In June 2014, I apologise in June 2010 four hunters came, Mr Oswald, Mr (indistinct), Mr (indistinct) and Mr (indistinct) and when we wanted to pay Plaintiff back, part of the animals and part of the solar Plaintiff said that he was awaiting his residence permit and that he then would waive all the debts

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[95] Plaintiff's particulars of claim paragraph 20.
[96] Record 9 February 2018 at page 20.
[97] Record 15 May 2017 at page 2579.
[98] Record 2 June 2016 at page 3330.
[99] Record 30 October 2017 at page 3249.

but after 2010 Plaintiff did not continue to send hunters to pay off half solar and half animals.'

7.4 The Defendants further testified that the Plaintiff has since advising the Defendants on 13 September 2010 [100] of his decision not to return to Farm Okatare, not sent any further hunters to Farm Okatare. Instead the Plaintiff intentionally cautioned and advised people against hunting at Farm Okatare.

7.5 The Defendants have therefore not been able to generate any further funds from hunters sent to Farm Okatare by the Plaintiff. The Plaintiff has failed to prove that he has sent any other hunters to Farm Okatare subsequent to the purchase of the animals, from which hunting business the Defendants would have generated funds to repay the Plaintiff.

CONCLUSION

8. In summary it is respectfully submitted that the Plaintiff's claims must be dismissed with costs, including the costs of one instructing and one instructed counsel (the latter only where employed after the death of Mr Brandt).'

Replying argument on behalf of plaintiff

[27] The counter-arguments mustered by Mr Mouton on behalf of the plaintiff ran as follows :

'AD CLAIM ONE

1. The Defendants submission that the Plaintiff cannot succeed with his claim by reason that;

1.1. a Plaintiff is entitled to recover the extent of his impoverishment or the fendant's enrichment, whichever is the lesser, at the time of *litis contestatio*.

1.2. the key general principle is that a Plaintiff who asserts that another's estate has been unjustly enriched to the detriment of the Plaintiff, is entitled to recover the extent of his or her impoverishment or to extent of the Defendant's enrichment, whichever is the lesser amount.

[100] Exhibit V2.

1.3. accordingly, the law of unjustified enrichment does not seek to ensure that a Plaintiff receives “the fullest compensation possible.”

1.4. the Plaintiff has not proved which of the amounts, i.e. impoverished and/or enriched amount is the lesser one.

is however only regarded as a general rule to which general rule there are exceptions such as when the Defendants have acted *male fide* when a Plaintiff will be entitled to be compensated for his loss and to the extent of his improvement.

See: Paschke v Frans and Others 2015(3) NR 668 (paragraph 14) VN 12

2. It is submitted that the Defendants have throughout acted *male fide* and it is submitted that the Plaintiff, by virtue of the *male fides* of the Defendants, be fully compensated for his loss.

See: J C Sonekus Unjustified Enrichment in South African Law, 2nd Edition @ 27 to 28

3. It is submitted that the Defendants acted *male fide* in that;

3.1 they misrepresented to the Plaintiff that they would obtain permanent residence permits for the Plaintiff and his wife whereas they made Application for a Study and Work Permit on behalf of the Plaintiff and his wife. Therefore, a total fraud capable of delictual liability especially since they know that the Plaintiff and his wife did not want to work and study in Namibia but wanted to stay in Namibia permanently and regardless of the fact that the Immigration Control Act … does not make provision for an Application for Temporary Residence but makes provision for an Application for Permanent Residence.

3.2 they represented that such permanent residence permit would be granted within 3 months because they knew the Minister of Finance whereas such representations were false.

3.3 they defrauded the Plaintiff, his wife and their friends when the Plaintiff and friends undertook their trip to Swakopmund and beyond when the Defendants overcharged them with 25% although such amounts were later on and after the Defendants had been exposed, repaid to the Plaintiff.

3.4 they were paid the full amount for the construction of the house plus two hunters bungalows by the Plaintiff yet they refused and neglected to pay the builder Ben Pretorius such full amount and kept N$306 835.39 of the contract price to themselves instead of paying it over to Ben Pretorius. They consequently defrauded both the Plaintiff and Ben Pretorius.

See: Exhibit “HHHH”

3.5 the Second Defendant lied about the fact that there was an existing solar powered battery system on the farm whereas there was only a generator powered battery system on farm Okatare prior to the installation of the solar powered battery system.

See: See Exhibits “AA1” and “AA2” as well as record of 16 February 2018 page 23 lines 12 – 32 and page 24 lines 1 - 3

3.6 they used photographs of the house in their internet prospectus and in the brochure advertising the farm Okatare as a hunting destination with superb accommodation facilities such as the house of the Plaintiff and with reference to the house of the Plaintiff yet they claim not to have used such house for business purposes.

See: Exhibits “AAA” and “BBBB”

3.7 the Defendant’s claim that they are not utilizing such house except to the extent that their children are residing in such house from time to time is consequently false.

3.8 the Defendants have obviously used such house and the prospectus and/or brochure to such farm and house to lure hunters and guests to such farm from which they have financially benefited from and from which they will benefit in future.

3.9 They admitted that the lease agreement so entered into with the Plaintiff for 20 years and which would have entitled the Plaintiff to come to Okatare was a fraud as it was a simulated lease agreement and only a pretence for the Application for Permanent Residence.

4. The aforesaid submission about the exception to the general rule when the *quantum* in unjustified enrichment is to be determined, is in line with the common law which reflects that a *male fide* possessor and a *male fide* occupier in respect of an enrichment claim will not be allowed to claim for useful improvements made to the property but will only be allowed to recover only necessary improvements so as to encourage the public to preserve properties of others from ruin. In contrast, a *bona fide* possessor or *bona fide* occupier is entitled to be compensated for both necessary and useful improvements made to the property.

5. The law of enrichment is pre-eminently part of the rules of law that guard against inequities resulting from a strict adherence to and application of certain general principles of law. In that sense the law of enrichment forms part of the self-correctional norms of the law.

See: J C Sonekus, Unjustified Enrichment in South African Law, 2nd Edition @ 18

6. The law of enrichment embodies that final element of the law of obligations whereby corrective insertions can be made in instance where that adherence to and application of the legal norms may lead to unjust results if not modified and the unjustified patrimonial transfer thus remains undisturbed in the estate of the unfoundly enriched party at the expense of the estate of the impoverished. The unfounded patrimonial transfer serves as source of obligation for the restoration of the resultant imbalance and is thus seen as a final element of the law of obligations.

See: J C Sonekus, Unjustified Enrichment in South Africa Law, 2nd Edition @ 21

7. It had been stated that:

> "The equity element that underpins the law of enrichment does not condone such contempt of the orderly process of the law and his *male fides* weigh heavily against him."
>
> *See: J C Sonekus, Unjustified Enrichment in South African law, 2nd Edition @ 134 to 135*

8. It is also held that:

> "this case clearly illustrates that no hard and fast rules can be laid down for the way in which the *quantum* of enrichment and impoverishment should be calculated in

those cases where the return of the property is impossible or would be inequitable. In many cases market value is used as the basis for calculation, which is an objective measure to ascertain the value of the enrichment (Lotz *LAWSA (9) 64*). However, in some instances fairness or reasonableness may necessitate the use of a subjective measure to calculate the enrichment or impoverishment, as happened in this instance. The true measure of the enrichment or impoverishment is the actual value of the property in the hands of the Plaintiff or the Defendant. This viewpoint is supported by the fact that in those cases where the Defendant has disposed of the property in question, he is only liable to the extent that his estate is still enriched by any counter performance received, that is the extent to which he has realized the enrichment (*De Vos Verrykingsaanspreeklikheid 335-336; [13] King v Cohen Benjamin and Co* 1953 4 SA 641 (W) 649; *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd* 1977 1 SA 298 (W) 310 D-F)"

See: Sieg Eiselen Gerit Pienaar, Unjustified Enrichment – A Casebook @ page 34
Skyword (Pvt) Ltd v Peter Scales (Pvt) Ltd 1979 1 SA 570 (R)

9. Regarding the allegation in paragraph 4.4 of the Defendants Heads of Argument that the Defendants agreement that the amounts were paid by the Plaintiff was not an admission of the Plaintiff's alleged enrichment or impoverished claim is without substance especially when regard is had to the Pre-Trail Order which does not state that the extent of the alleged enrichment needs to be proved but only "Whether the Defendants have been unduly enriched with the improvements to the property".

10. The Defendants also, in their Heads of Argument loses sight of what Mr. Brandt for and on behalf of the Defendants submitted which are as follows:

"As the court pleases My Lord the Defendants have got no objection that is claimed that the monies have been in fact paid as indicated and <u>that is not necessary for the Plaintiff to prove these claims as it has now discovered</u> but there are one issue which is quote important and that is item 33 and 34 by Alensy have been discovered and the Plaintiff have to prove that."

11. It is consequently clear that the Defendants not only admitted that the amounts as mentioned, especially the ones in paragraph 14, had not only been paid but also that the Plaintiff need not prove such claims.

12. The aforesaid admission corresponds with the Pre-Trial Order which clearly states that the Plaintiff must prove "whether the Defendants have been duly enriched with the improvements to the property" but does not state that the Plaintiff also had to prove the extent of such enrichment.'

ALTERNATIVE CLAIM

13. The submission made by the Defendant in paragraph 5.1 of their Heads of Argument that "The Plaintiff's alternative claim is premised on an alleged misrepresentation by the Defendants to the Plaintiff that the portion of Farm Okatare on which the dwelling was constructed could be transferred into his name (my emphasis) …..," is a twisted and distorted version of what the Plaintiff actually alleges in the Particulars of Claim which in fact is as follows:

> 13.1. The Plaintiff in paragraph 4.1 of the Particulars of Claim alleges that the Defendants "would (as opposed to could) procure the transfer of the land on which the dwelling was to be constructed to the Plaintiff so that the Plaintiff would have it as his sole and exclusive property" and
>
> 13.2 In paragraph 9 of his Particulars of Claim the Plaintiff alleges that
>
> > "9. The Defendants knew that the Plaintiff would act on their representations that "they would effect transfers of the land on which the dwelling was constructed", (my emphasis), to the Plaintiff once completed and further that they would acquire permanent residence for the Plaintiff and his partner Nicole."

14. It is therefore clear from the quoted portions above that the representations so relied upon by the Plaintiff relates to issues of fact i.e. that the Defendants would (not could) effect transfers of the land to the Plaintiff and that the Defendants would acquire permanent residence to the Plaintiff and his partners.

15. The argument so advanced by the Defendants in their Heads of Argument is consequently flawed and also because the Agricultural Land Reform Act 6 of 1995 does not have a blanket prohibition on a foreigner to own a portion of agricultural land but only restricts such ownership in certain circumstances. The Minister of Agriculture may in any event also grant such permission to a foreigner to own agricultural land.

16. Similarly and with regard to the Sub Division of Agricultural Land Act 70 of 1970, it is similarly submitted that such act does not have a blanket prohibition against the subdivision of agricultural land and that the Minister may *inter alia* give consent to the subdivision of Agricultural land.

17. The argument so advanced by the Defendants in their Heads of Argument is therefore untenable and especially since the case of *Denker v Ameib Rhino Sanctuary (Pty) Ltd and 4 Others (SA 15/2016) [2017] NASC 44 (22 November 2017)* upon which the Defendants rely for their argument is distinguishable and not applicable as the misrepresentations in the Denker case relate to the following:

> "The appellant (Denker) brought an Application in the High Court seeking an order declaring that the transfer of his 1% share in a Namibian-registered company owing agricultural land to a foreign nation (a trust), was unlawful and invalid. Since it was in breach of s58(1)(a) for the company, in which a Namibian did not hold a controlling interest, court, in addition to declaring the share transfer invalid, to rectify the share register of the company in terms of s 122 of the Companies Act, 2004 (Act no 28 of 2004) making him 51% shareholder and the foreign national 49% shareholder. The relief was justified on three principal grounds. The first was that the fifth Respondent had misrepresented to him that Namibian law permitted him (a foreigner) to own shares in the company (acquiring agricultural land) in equal proportion (50/50) when in truth that was not permitted by law. The second basis was that the documents evidencing the share transfer were not affixed with stamp duty as required by s23 and 2 10(6) of the Stamp Duties Act, 1993 (Act no 15 of 1993), read with s 140 of the Companies Act – rendering the transaction void and unenforceable. The third ground was that since a trust was not in law capable of holding shares, the transaction was void because it was a foreign trust which, together with Denker, held the shares in the company."

18. The issues in the Denker case clearly relates to issues of law which had to be answered by applying legal principles and interpretation of the relevant statutes.

19. The issue at hand is different from the Denker case as the misrepresentations made relates to questions of fact which are questions that must be answered by reference to facts and evidence as well as inferences arising from those facts such as;

> 19.1 the fact that the Second Defendant assisted the Plaintiff and Nicole to such an extent with their Application for Permanent Residence that it resulted in an

Application for a Work and Study Permit well knowing that the Plaintiff and Nicole wanted to reside in Namibia permanently and did not want to work and study in Namibia.

See: Exhibit "JJ" and

19.2 the fact that the Defendants made Application for a Work and Study Permit for and on behalf of the Plaintiff and Nicole whereas the Immigration Control Act 7 of 1993 makes provision for the Application for Permanent Residence and does not made provision for Temporary Residence Permits at all.

19.3 the fact that the Second Defendant, despite having testified that the Plaintiff and Nicole was from the outset advised that an Application for Temporary Residence must first be applied for, forwarded the *blanco* documents pertaining to a Work and Study permit Application to the Plaintiff and Nicole under the pretence that such Application was for Permanent Residence well knowing that the Plaintiff and Nicole could not read and understand any English.

See: Exhibit "MM"

19.4 the fact that the Second Defendant informed the Plaintiff and Nicole that the residence permit (normally) will be done by 29 September and that the Residence Permit will then be finalized.

See: Exhibit "II" and "II2"

19.5 the fact that the First Defendant has represented to the Plaintiff and Nicole that the "residence permit" will take one week once the Police Clearance had been submitted.

See: Exhibit "SS1" and "SS2"

19.6 the fact that the first Defendant has informed the Plaintiff not to forward the Police Clearance to the agent as they have found someone new that was assisting them.

See: Exhibit "SS1" and "SS2"

19.7 the fact that the Plaintiff was introduced to the Minister of Finance who would have assisted with the obtaining of the Permanent Residence Permit within 3 months.

19.8 the fact that the Plaintiff in annexure "BM2" questioned the truthfulness of the representations made to him by the First Defendant i.e. that "***Phillip at the time said to me : "That's no problem, I know the Minister" was that bluff or truth?"***

and

"**Ps Please tell me the truth regarding the Agreement for Residence. I believe less and less in it**."

Despite the fact that the defendants received such an e-mail which is dated 30 March 2010, the Defendants did not reply or answer thereto. This silence on the part of the Defendants should be taken as an admission of the contents and truth of such e-mail. The Second Defendant could also not give an answer when she was confronted with this e-mail during cross examination

Testimony of Emce Dodds

19.9 The testimony of Emce Dodds is also to be regarded with suspicion and for the following reasons;

19.9.1 She testified in her witness statement that the Plaintiff along with Nicole, Brigitte and Phillip visited her offices on 10 November 2008 as well as on 16 February 2009 and 25 June 2009 but when she was confronted with the fact that the Plaintiff was hunting on the farm Okatare on 16 February 2009 and that Nicole took the photographs on that day, she suddenly could not remember whether the Plaintiff and Nicole along with the Second Defendant visited her offices on the 16th of February 2009 and 25 June 2009. She testified that she only got such dates i.e. 16 February 2009 and 25 June 2009 from her calendar but could not remember such visits and was not sure about it when she testified as follows;

"Good so just recap of it, you now you say the very first appointment of 10th November was important, you can clearly remember what transpired there but the other two you cannot remember, --- No

So you cannot remember whether Brigitta Muller and Phillip Muller or just one of them were at your premises on the 16th February and the 25th June? …. That is correct."

You cannot remember who was there being Brigitta Muller or Phillip Muller. --- That is correct. As I said I see approximately 10 new people in a week, so appointments and detail becomes blurred."

See: Record 22 June 2018 at pages 235 lines 3 to 12 and page 237 lines 10 to 16"

Jean Pierre Nicolas also confirmed that he along with the Plaintiff and Nicole hunted on the farm Okatare on 16 February 2009 and that neither of them were in Windhoek.

19.9.2 She testified that although the Immigration Control Act of 1993 makes provision for an Application for Permanent Residence but it does not make provision for an Application for Temporary Residence and that she just followed guidelines by the Ministry of Home Affairs when she made Application for a Work and Study Permit in pursuance of a Temporary Residence Permit. Emce Dodds could however not provide the court with such guidelines.

19.9.3 Emce Dodds could also not have provided this court with her calendar from where she got the dates of 10 November 2008, 16 February 2009 and 25 June 2009 from.

19.9.4 Phillipe de Villiers testified that Brigitte Muller, the Second Defendant, did not accompany them (Plaintiff, Nicole, First Defendant and himself along with his wife) from Okatare to Windhoek but stayed behind on Okatare on 10 November 2008. It is consequently not possible and an untruth that Brigitte Muller could have visited the offices of Emce Dodds, along with the Plaintiff and Nicole on 10 November 2008.

19.10 Regarding the alleged misrepresentation that the piece of land on which the house and two bungalows were built, would be transferred into the name of the Plaintiff and whether such representation relates to an issue of law and not an issue

of fact is neither here nor there. It is sufficient that the Defendants misrepresented to the Plaintiff and Nicole that they knew the Minister of Finance and that they would procure Permanent Residence for the Plaintiff and Nicole within 3 months whereas such representation of fact is false in that Application for a Work and Study Permit instead of an Application for Permanent Residence was made on behalf of the Plaintiff and his wife.

19.11 It is however maintained that this Honourable Court should give cognisance to the fact that such representation about the title of land that would (not could) be forwarded, is also an issue of fact and also that the Plaintiff is a foreigner that cannot speak or understand any English.'

CLAIM 2 (ALLEGED LOAN AGREEMENT FOR PURCHASING OF OLIVES)

21. It is submitted that the Plaintiff has also proved this claim beyond reasonable doubt and that the version put forward by the Defendants as sketched in their Heads of Argument holds no water and for the following reasons:

21.1 The Plaintiff lend and advanced to the Defendants €50 000-00 at the special instance and request of the Defendants on condition that;

21.1.1 The Defendants would use such amount so advanced to grow an Olive grove on 5 hectares of land on the property.

21.1.2 That the Defendants would purchase 4 000 olive trees to commence the project.

21.1.3 That the Defendant would commence the project within a reasonable time after Plaintiff had transferred the money.

22. It is submitted that the Defendants did not comply with the conditions and especially not the condition that the project to "grow an Olive grove" be commenced with within a reasonable time.

23. Regard to the fact that the olive trees were ordered on or about 19 December 2008 yet the trees were only planted during January 2012 i.e. more than 3 years since the monies were advanced to the Defendants by the Plaintiff. This cannot be regarded as having commenced "the project to grow an olive grove" within a reasonable time let alone, "growing

an Olive grove" which never materialized as one of the conditions. The aforesaid especially since the Second Defendant deceitfully informed the Plaintiff, that such olive trees were going to arrive in August 2009 already, yet it only arrived during January 2012 and no evidence exist that such trees were ever plated.

See: Exhibits "GG1" and "GG2"

24. It consequently and on the evidence of the Defendants appear as if all the olive trees have died which by necessary implication means that the Defendants have not fulfilled the 1st condition. As pointed out, the Defendants also did not comply with the 3rd condition and it appears, only complied with the second condition.

25. The evidence of the First Defendant supports the version of the Plaintiff insofar as it relates to whether such "loan" was to be regarded as a joint venture (incorrectly) as opposed to a loan. The First Defendant referred to the Olive project as the project of the Second Defendant and not to it as a joint venture.

See: Record 2 February 2017 at page 2207

26. In addition to what is being submitted above, it is submitted that the Plaintiff has throughout maintained that it was agreed to between him and the Defendants that the €50 000 so advanced to the Defendants was a loan which had to be repaid after 5 years when the olives were to produce the first harvest.

See: Record 3 June 2014 at pages 20 – 22

…

28. It is also significant to repeat that the defence by the Defendants that such €50 000 so advanced by the Plaintiff was given as a gift/donation cannot hold any water because;

> 28.1 Donation is not a unilateral act and must be treated in the same way as an offer and acceptance.
>
> 28.2 Even if it were to be accepted that the Plaintiff donated or gave such €50 000 as a gift to the Second Defendant then there is no evidence that either the Second and/or First Defendant accepted such donation and/or gift.

28.3 To the contrary, the Second Defendant on her own evidence rejected and/or refused to accept such gift and/or donation when she said the following;

"Your Lordship I was overwhelmed by such kindness and generosity and I could not believe it <u>and I said to him that I cannot be able to accept such a gift</u>, and he replied to me, this is a gift."

See: Record 30 October 2017 page 3176

<u>AD CLAIM THREE</u>

29. The Defendants are opportunistic in their submissions as stated in their Heads of Argument especially since the Defendants throughout maintain that their business is the income received from hunters irrespective as to whether such hunters were send or brought by the Plaintiff or not.

30. The submissions by the Defendants are opportunistic especially if one has regard to exhibits "AA1" and "AA2" which clearly states that the animals, the purchasing of which the Plaintiff funded, was "fully repayable" upon agreement.

31. Nothing was mentioned in exhibit "AA1" and "AA2" about the allegations contained in the Plea that such loan would have been repaid from monies earned from hunters sent to Okatare by the Plaintiff and as a result, this Honourable Court should regard the Plea and the allegations therein contained as well as the evidence of the Defendants in this regard as an afterthought and untruthful.

32. Even if the evidence of the Defendants is to be believed (which it is submitted that it should not) then the following is drawn to the attention of this Honourable Court:

32.1 The money for the purchasing of animals was advanced to the Defendants on 20 April 2009.

32.2 According to the Defendants, such animals were purchased and off-loaded on or during May 2009 (see exhibits "XXX1" and "XXX2")

32.3 During June 2010, the Plaintiff brought four additional hunters i.e. Oswald, Grangi, Karst and Weber to the farm of the Defendants where they stayed and hunt.

See: Exhibits "YY1" to "YY9"

32.4 The total income deprived by the Defendants from such four hunters as per Exhibits "YY1", "YY3", "YY5" and "YY8", amounts to the sum of €19840.

32.5 In addition to the aforesaid amount, the Plaintiff has paid, on behalf of the aforementioned hunters, the accommodation of such four hunters to the sum of €3 750.

See: Exhibit "YY7"

32.6 It is consequently clear from the evidence presented that the Defendants could have and should have repaid the amount of €21 252 so received from the Plaintiff for the purchasing of wild animals to the Plaintiff as the Plaintiff (quite apart from the other hunters who visited and hunted on the farm during the period 2009 to date hereof) had brought hunters to the farm Okatare from which hunters so brought by the Plaintiff, the Defendants derived an income to the extent of at least €23590 which is in excess of the €21 252 so lent and advanced to the Defendants for the purchasing of animals.

32.7 This Honourable Court with respect, cannot and should not have regard to the submissions made in paragraph 7.3 of the Defendants Heads of Argument i.e.

"The First Defendant testified that the Second Defendant offered €2 700 received from the four hunters to the Plaintiff. However, the Plaintiff refused to accept the money. The Second Defendant confirmed the aforesaid when she testified as follows in this regard:

In June 2014, I apologise in June 2010 four hunters came, Mr. Oswald, Mr. (indistinct), Mr. (indistinct) and Mr. (indistinct) and when we wanted to pay Plaintiff back, part of the animals and part of the solar Plaintiff said that he was awaiting his residence permit and that he then would waive all the debts but after 2010 Plaintiff did not continue to send hunters to pay off half solar and half animals."

because such versions were never put to the Plaintiff and/or Nicole Lauer when they were cross-examined by Mr. Brandt.

32.8 It is consequently submitted that the aforesaid testimony of the First and Second Defendants is false.

Solar

33. It is admitted by the First Defendant that the amount of N$526 322-47 (as claimed under Claim One of the Particulars of Claim) was paid by the Plaintiff in respect of the installation of the solar system on the farm Okatare.

See: Record 2 February 2017 page 2202 lines 12 to 22

34. The First Defendant also admitted that the Plaintiff paid for the solar

See: Record 2 February 2017 page 2202 lines 28 to 30

35. The Second Defendant, despite having testified that the farm Okatare already had a solar powered battery system prior to the installation of the solar system by Alency and that such existing generator (solar) powered battery system was sufficient, stated in exhibit "I1" and I2" that the "new" solar system so installed by Alency and paid for by the Plaintiff "*functions very well and it is really a good thing*."

36. The Second Defendant admitted that the Defendants and the Plaintiff at the time agreed that the Defendants would pay half of the costs of the solar system so installed by Alency and paid for in full by the Plaintiff.

37. The Defendants subsequently have the exclusive use of such solar system and as a consequence, is obliged to repay the Plaintiff therefor on the same grounds as mentioned under Claim One hereinbefore and the Alternative Claim thereto. It however needs to be mentioned that the full amount so paid by the Plaintiff in respect of the solar plus the amounts reflected on exhibit "EE1" and "EE2" constitutes the amount of N$526 322,47 as claimed under Claim One and the Alternative thereto.'

Resolution Claim 1

[28] This claim is essentially based on unjustified enrichment. It was admitted that the plaintiff had transferred € 198 019.17 and N$ 526 322.47 to the defendants. These are also the amounts the plaintiff is attempting to recover through this claim.

[29] It however immediately became clear - with reference to *Paschke v Frans* 2015 (3) NR 668 (SC) - that counsel for the defendants - being alive to the general

requirements imposed by the said Supreme Court judgment, on a plaintiff, that wishes to recover, what he alleges has been the extent to which he has been impoverished and the defendants having been enriched – seemingly exposed that the plaintiff had failed to:

a) prove – through admissible expert evidence - the value of the farm Okatare without the improvements for which the plaintiff had transferred € 198 019.17 and N$ 526 322.47;

b) prove – through admissible expert evidence – the value of the farm Okatare together with the improvements for which the plaintiff had transferred € 198 019.17 and N$ 526 322.47;

c) prove these values at the relevant time, namely at the time of *litis contestatio*;

d) prove the difference between these values in order to determine the extent of the defendants' enrichment;

e) discharge his burden of proof, his onus, in this regard.

[30] It is also clear that the plaintiff's claim for enrichment was founded on the non-fulfillment of two conditions, namely:

a) that the Defendants would procure the transfer of the land on which the dwelling was to be constructed, to the Plaintiff so that the Plaintiff would have it as his sole and exclusive property; [101] and

b) that the Defendants would procure for the Plaintiff and the Plaintiff's partner, Ms Nicole Grabsky, permanent residence permits to enable both the Plaintiff and his partner to reside in Namibia on a permanent basis. [102]

[31] In this regard it was further common cause that it is impossible for the defendants to transfer the land on which the house and two bungalows where

[101] Particulars of claim paragraph 4.1 and Pre-Trial report paragraph I (1).
[102] Particulars of claim paragraph 4.2 and Pre-Trial report paragraph I (1).

constructed into the name of the plaintiff – that it is consequentially impossible for the defendants to return the house and the two bungalows, and also the land on which these structures where built to the plaintiff. The plaintiff's recourse, in such circumstances, admittedly, being a claim for unjust enrichment.

[32] That there was veracity in the fundamental flaws exposed in the plaintiff's case, subject to certain exceptions, was proved by the plaintiff's attempt to cure such defects, in the first instance, through the sought amendments. This avenue of escape is no longer available to the plaintiff due to the court's decision to dismiss the application for leave to amend.

[33] But this was not the only argument mustered by counsel for the plaintiff in response.

[34] Mr Mouton had picked up that Mr Heathcote's argument made in answer to his submission that the quantum of the plaintiff's claim was no longer in issue was also premised on the submission that *' … the defendants' agreement that the amounts, (€ 198 019.17 and N$ 526 322.47), that were paid was not an admission of the plaintiff's alleged enrichment or impoverishment claim and that the quantum of the plaintiff's enrichment claim still had to be proved in accordance with the 'double ceiling rule …',* which he countered with reference to the pre-trial order which did not require the plaintiff to prove the extent of the alleged enrichment but only *' … whether the defendants have been unduly enriched with the improvements to the property'*.

[35] His argument rested further on the manner in which Mr Brandt, at the time, had formulated the admission recorded on behalf of the defendants, to the effect that *' … it is not necessary for the plaintiff to prove these claims …'* , which signified that the defendants did not only admit the claimed amount but also that the plaintiff need not prove such claims, that is the quantum of the claims to which such amounts relate. This, so the argument ran further was also in line with the related issue formulated in the said pre-trial order on which the parties were directed to trial and which required the parties to address only *'whether the defendants have been unduly enriched with the improvements to the property'* but not the extent of such enrichment.

[36] I agree with Mr Mouton. The pre-trial order - and the issues which had been formulated for purposes of trial in such pre-trial order - on the basis of the parties' pre-trial proposals - did not require the plaintiff to prove the quantum, ie. the extent of the defendants' enrichment.

[37] It should already have appeared further from what has been set out above that the plaintiff essentially succeeded in proving issue 1 on which the parties were sent to trial, as formulated in paragraph 1 of the pre-trail order of 1 October 2013 – and - that, as far as issue 2 is concerned, that the conditions, referred to in paragraphs 4.1 and 4.2 of the parties' pre-trial proposal, were not fulfilled.[103]

[38] I believe further that there was never any dispute between the parties that the house that was built with the transferred funds was always intended for the exclusive use and enjoyment of the plaintiff, and that the two bungalows, were always intended for the use by hunters, if and when they would come to Okatare, for hunting. Issue 4, on which the parties were sent to trial is thus to be resolved accordingly.[104]

[39] This leaves the issues formulated in paragraphs 3 and 5 of the pre-trial order.

Issue 3 - Have the defendants' been unduly enriched with the improvements to the property?

[40] The property in question is the farm Okatare. It is registered in the first defendant's name. It is common cause that a luxurious house and also two attractive bungalows where constructed on the first respondent's farm, nestled around a lush lawn, a beautiful garden and a sparkling pool. All this is depicted in the brochures, Exhibits 'Z' and 'ZZ' and the foto's posted on the website, Exhibit 'VVVV'.

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[103]Compare Pre-trial order Issues:

1) Whether the parties entered into an oral agreement in terms of which they agreed that Plaintiff would pay for the construction and fitting of a dwelling for Plaintiff and his partner and the construction of two hunters bungalows on the property so as to expand Defendants hunting operations on the property under the conditions pleaded at 4.1 to 4.2 of the Plaintiff's particulars of claim;

2) Whether the conditions had been fulfilled;

[104] Compare Pre-trial Issue :

4) Whether the construction of the dwelling and the two bungalows was purely for the use and enjoyment of the Plaintiff, whenever he visited Namibia;

[41] These improvements where constructed with the received funds, at the expense of the plaintiff, through which the plaintiff was clearly 'impoverished'.

[42] Also, whether or not there was an existing solar system, for the generation of electricity on the farm, at the time, or whether the farm's electricity supply was generated by a generator only, is neither here nor there. Fact of the matter is that the second defendant agreed, somewhat reluctantly, to the supply and installation of an upgraded solar system to the tune of N$ 526 322.47, as offered by the plaintiff, which so became a reality and became available for use and was to the benefit of all on Okatare. Again at the admitted expense and 'impoverishment' of the plaintiff.

[43] So, has all this, in principle, enriched the defendants? I believe that the answer to this must surely be in the affirmative.

[44] But a belief is obviously not enough. Guidance to the factual enquiry, which is to be conducted in this regard is provided by the South African Appellate Division decision of *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A) where the Court stated :

' … That brings me to the factual enquiry whether here was an enrichment or not. The test in this regard is stated as follows by De Vos in Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg at 183,

> "Die verweerder se aanspreeklikheid strek nie verder as die mate waartoe hy inderdaad deur ontvangs van die geld ten koste van die eiser verryk bly nie. Die eiser kan aanspraak maak op die maksimum bedrag wat die verryking bereik het, maar die verweerder is geregtig om 'n vermindering of wegval van die verryking te pleit mits hy nie deur die reëls ivm mora ens getref word nie. Ontvangs van geld, net soos van enige andere goedere, skep 'n vermoede van verryking. Die las om 'n wegval of vermindering van verryking te bewys, rus op die verweerder. As die verweerder met inagneming van al die omstandighede, tog nie beter daaraan toe is as wat hy sou gewees het indien die ontvangs van die geld nie plaasgevind het nie, kan hy nie as verryk beskou word nie en is hy nie meer aanspreeklik nie. As hy slegs gedeeltelik beter daaraan toe is, is sy aanspreeklikheid dienooreenkomstig verminder."

See also the article by J C van der Walt in THR-HR referred to above ((1966) vol 29 at 221).[105]

[45] The receipt of the money, *(€ 198 019.17 and N$ 526 322.47),* is admitted and is common cause in this instance and to which the plaintiff, thus, in principle, can lay claim to. Generally, the liability of the defendants is thus confined to the extent that they continue to remain enriched through the amounts actually - in this instance – admittedly - received.

[46] In accordance with *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd,* the admitted receipt of the amounts of *€ 198 019.17 and N$ 526 322.47* created a presumption of enrichment, which thus kicks in also in this case.

[47] This presumption was also referred to subsequently, with approval, in *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA) ([2003] 3 All SA 1) :

> '[21] A presumption of enrichment arises when money is paid or goods are delivered. A defendant then bears the onus to prove that he has not been enriched: De Vos (supra 2nd ed at 183), quoted with approval in *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A) at 713G - H.'

[48] Such onus was however never discharged by the defendants. This was never even attempted as the focus of their defence was aimed, throughout, at proving that the house and bungalows, and thus the receipt of the funds, constituted a gift or donation. The defendants also never pleaded any reduction or the complete loss of the enrichment.

[49] Fact of the matter is that the defendants, at the end of the day, remain in possession of a beautiful house, 2 hunter's bungalows and a state- of- the art solar system. The defendants have vehemently denied that they benefit in any way from the use of the house, save, for the occasional use by it, through their children. One only needs to pause here to reflect that the probabilities, of this being true, are absolutely remote. The plaintiff has not set foot on Okatare since 2010. There is

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[105] *African Diamond Exporters (Pty) Ltd v Barclays Bank International* at p713 F –H.

absolutely nothing, except for an alleged self- imposed restraint, that prevents the defendants from using and appropriating these improvements at their whim and at any time over many years. The house and bungalows feature prominently in the mentioned brochure and on the website through which the Defendants' *'Okatare Hunting Safaris'* are advertised and through which it is held out to the public and the world that such facilities are available for use and enjoyment. Exhibits 'Z', 'ZZ' and 'VVVV' underscore all this. Also the state- of- the- art solar system has ever since been available for the exclusive use of the defendants, their children and their guests, through which – and I quote -. the *'… ensuite bathrooms and all rooms have hot water and daily cleaning and laundry services…'.*

[50] These uncontroverted facts thus strengthen the presumption of enrichment and militate towards the conclusion that the defendants have been enriched and thus – for the moment at least - that such enrichment is unjustified. This is particularly so in circumstances where the defendants refuse to reimburse the plaintiff for these assets in any manner whatsoever, but in respect of which it must also be taken into account, that this refusal would be legitimate if it were to be found that the receipts of the funds through which the said improvements were effected amounted to a gift or donation.

[51] It follows that issue 3 must, in principle, be answered in favour of the plaintiff, subject to the resolution of issue 5.

<u>Issue 5 - was the construction of the dwelling and the two bungalows a gift or donation?</u>

[52] Here it should firstly be mentioned that this issue was inaccurately formulated. 'Issue 5', obviously, also entailed the question as to whether or not the solar system, installed on Okatare, and paid for by the plaintiff, to the tune of *N$ 526 322.47,* also constituted a gift or donation.

[53] In regard to 'Issue 5' the evidence on behalf of the defendants was essentially that the moneys were transferred to them as a gift and that this was borne out by Exhibit 'D'- the original e-mail dated 15 July 2010 which emanated from the plaintiff, having been marked 'C'.

[54] It was submitted in this regard that the e-mail was unambiguous and that it confirmed nothing other than that the moneys were transferred as gifts, as confirmed by the defendants during their testimonies.

[55] The first point to be made in this regard is that the relied upon e-mail, on face value, does not even mention the ‘dwelling’ at all, and thus, at best, can only serve as confirmation that the moneys for the bungalows and for the olive project constituted a gift and that the payment for the solar system constituted a ‘half gift’.

[56] Secondly, the e-mail is not as unambiguous, as counsel and the defendants would have it. The e-mail, in the first instance, caused a dispute as to its correct translation, until such time that the parties agreed that Mrs Rumpff’s translation, made during the trial, on 3 June 2014, would be the accepted one. This was Exhibit ‘D5’. Importantly it is to be taken into account in this regard that the second defendant responded to this e-mail by superimposing her answers in red colour, as is borne out by the colour- copy, marked as Exhibit ‘D4’. In the second instance it appears further, on a comparison, from these exhibits, that Exhibit ‘D5’ is also inaccurate in that it does not reflect the use of the symbol ‘ > ’ as reflected on Exhibit ‘D4’, apparently utilized as text- breaks.

[57] The picture that emerges from Exhibit ‘D5” is :

‘I recall :
- olives present *Know about it*
- bungalow present *Know about it*
Solar half gift *Know about it*
We have to talk about it. *No problem*. It is not urgent. *Oh I see?* But you have to think about it. I will also write to Alensy regarding the quotation for the solar system at the house. *Yes that’s good*’ *(emphasis added through Italics to reflect the text superimposed by second defendant in red}*

[58] As indicated above the original text however reflected the symbol ‘>’ throughout, which creates the following picture :

‘ > …

> ….

> …

> I recall :

> olives present *Know about it*

> bungalow present *Know about it*

> Solar half gift *Know about it*

> We have to talk about it. *No problem*. It is not urgent. *Oh I see?* But you have to think about it. I will also write to Alensy regarding the quotation for the solar system at the house. *Yes that's good*'

> …

> …

> …'.

[59] I believe that the use of the symbol '>' was really intended to indicate- and separate the various issues that the author wanted to have addressed and so to identify all the seperate issues that the plaintiff intended to talk about. The entire text should really be seen and be read as a whole and cannot be cut off after the word 'gift', so as to be read- and be interpreted selectively, as constituting proof of the fact that the 'olives' bungalows'. where a 'gift' – or - that the solar system was a 'half-gift'. This interpretation is also supported by the general introductory sentence[106] *' … I want to talk to you about: … '* which introduction is then followed by all the listed items, identified and separated through the symbol '>', which the plaintiff obviously still felt required discussion. Why otherwise, would there have been a need to 'talk' about anything, if it was already a done deal. This is also borne out by the further question raised in regard to the solar system, which reads: *'What about the repayment of the solar system half/half?'* and where the response was : *'we will talk about it',* as opposed to *:'Know about it',* where the first response, at least, signals the preparedness to talk about it and the second one seemingly does not.

[60] It follows then that the relied upon e-mail does not support the contention, nor the defendants' reliance thereon that *' … it is unambiguous and that it confirms nothing more that the money for the olives, bungalows and solar system were a gift …'* and – where on the other hand the evidence on behalf of the plaintiff, to contrary, was really corroborated by these exhibits.

[106] Which follows immediately after : ' What about the flat? Is Amantha doing what we said to her? *Yes*.'

[61] Also here the defendants attracted a further onus. This appears from this court's decision in *Taapopi v Ndafediva* 2012 (2) NR 599 (HC), (not referred to by counsel), and where the court adopted with approval- and endorsed the Full Bench decision of the Eastern Cape Division in *Barkhuizen v Forbes* 1998 (1) SA 140 (E) [107]. I believe that it is apposite to again have regard to the relevant principles governing cases of this nature as cited in *Taapopi* :

'[49] As indicated above the court was also referred to the very helpful judgment handed down by the full bench of the Eastern Cape Division in *Barkhuizen v Forbes*[108] where the court conveniently analysed the case law and set out the resultant applicable legal principles — which I endorse respectfully as follows:

'From the authorities it seems to be clear that a donation is never presumed but must be proved by the person alleging it. See *Timoney and King v King* 1920 AD 133 at 139; *Meyer and Others v Rudolph's Executors* 1918 AD 70 at 76; *Twigger v Starweave (Pty) Ltd* 1969 (4) SA 369 (N) at 375; *Kay v Kay* 1961 (4) SA 257 (A).

This approach is, in terms of the authorities, based on the strong probability against the gratuitous giving away of property out of pure liberality and because no one is presumed to throw away or squander his property. See *Twigger v Starweave (Pty) Ltd* (supra); *Smith's Trustee v Smith* 1927 AD 482 at 486.H As regards the matter of onus it was held in *Avis v Verseput* 1943 AD 331 at 345 per Watermeyer ACJ that the onus rests upon the person who alleges a donation to prove it even if it is raised as a defence when sued. For this proposition he relied on a passage from Voet (Krause's translation) 39.5.5 in which the following is stated:

"In case of doubt a donation is not presumed as long as any other conjecture or interpretation is possible. And therefore he who alleges a gift — even if it be by way of an exception (when sued) — ought to prove it.

'In the present matter, however, plaintiff alleges that she paid moneys to and on behalf of the respondent under circumstances which constitute loans, whereas the respondent seems to allege in some of the cases that the payments were made as donations to him. Does this mean, in view of the above authorities, that the case is to be decided only upon the basis of whether defendant is able to prove that the payments were

[107] as endorsed by Van Zyl J in *Mogudi v Fezi* op cit at 32 – 33. See also the judgment by Berman J in *Jordaan and Others NNO v De Villiers* 1991 (4) SA 396 (C) at 400F – G.

[108] 1998 (1) SA 140 (E) and not p 400 as indicated in the *Taapopi* judgment.

donations without any necessity for plaintiff to prove anything save that the moneys were paid? The answer in my view appears from the decisions in *Timoney* and *King v King* (supra) and *Pillay v Krishna and Another* 1946 AD 946. In *Timoney's* case Innes CJ stated as follows at 139:

"Some argument was addressed to us on the question of onus. Now clearly the onus rested originally upon the plaintiffs; it was for them to establish their claim. But when they put in a statement of account sent to the defendant, and therefore evidence against him, which showed what purported to be advances by the firm, then the onus was shifted. It was shifted by virtue of the general principle that a donation is not presumed and must be proved by him who relies upon it (Voet 39.5 sec 5; Grotius 3.2.4, etc). There are a few cases in which the law will presume a donation but this is not one of them. So that the plaintiffs, having given prima facie evidence of advances, sufficient with interest to make up the amount of their claim, the onus was transferred to the defendant to make good his contention that the transactions were donations, which he was under no obligation to repay. And the issue of this controversy turns upon whether the onus has been discharged.

'In Pillay's case Davis AJA set out three principles derived from the Roman law, and approved by the Appellate Division in *Kunz v Swart and Others* 1924 AD 618 at 662 – 3, which govern the incidence of the onus of proof. They are:

(i) If one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it. (At 951.)

(ii) When a person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded quoad that defence, as being a claimant: for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it. (At 951 – 2.)

(iii) He who asserts, proves and not he who denies . . . or (t)he onus is on the person who alleges something and not on his opponent who merely denies it. (At 952.) At 952 – 3 Davis AJA proceeds to state as follows: I

"But I must make three further observations. The first is that, in my opinion, the only correct use of the word 'onus' is that which I believe to be its true and original sense (cf D 31.22), namely, the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim, or defence, as the case may be, and not in the sense merely of his duty to adduce evidence to combat a prima facie case made by his opponent. The second is that, where there are several and distinct issues, for instance a claim and a special defence, then there are several and distinct burdens of

proof, which have nothing to do with each other, save of course that the second will not arise until the first has been discharged. The third point is that the onus, in the sense in which I use the word, can never shift from the party upon whom it originally rested. It may have been completely discharged once and for all, not by any evidence which he has led, but by some admission made by his opponent on the pleadings (or even during the course of the case), so that he can never be asked to do anything more in regard thereto; but the onus which then rests upon his opponent is not one which has been transferred to him: it is an entirely different onus, namely the onus of establishing any special defence which he may have.

'When comparing the above-quoted dicta of Davis AJA with the dictum of Innes CJ in *Timoney's* case quoted above, there appears to be an inconsistency between them due to the use of the expression by Innes CJ that the onus was shifted. It is clear from the judgment of Davis AJA that in a case where there is an onus on a defendant to prove a special defence there is no shifting of the onus but that, once the plaintiff has discharged the onus upon him, then there is a duty upon the defendant to discharge the onus upon him to prove his defence. It is therefore not a question of a shifting of the onus from the one to the other but it is in fact a duty on the defendant to discharge an entirely different onus which rested on him all along. A consideration of the above dictum by Innes CJ, however, shows that, despite the use of the expression that the onus was shifted, there is no real difference in the practical effect of the two judgments.

When the aforegoing is applied to the present situation the position is therefore that in respect of the claims by appellant for payment of amounts which respondent in his plea in effect alleges to be donations there rested, in terms of the pleadings, an onus on respondent to prove that they were donations…'.

[62] Returning now to the facts of this matter it is common cause, because this was admitted, that the amounts of *€ 198 019.17 and N$ 526 322.47* where paid by plaintiff to defendants. The plaintiff has throughout denied categorically that these amounts were ever donated by him or constituted a gift to the defendants. It is to be taken into account in this regard that Exhibits 'C' and 'D' do not even mention the house. The plaintiff's evidence, as borne out by the said exhibits, also confirms, beyond doubt, that he wanted to talk about this, ie. whether or not the olives, the hunter's bungalows and half-solar constituted a gift or not. The plaintiff clearly felt that there was a need to discuss these issues, ie. the olives, bungalows and solar, and he accordingly requested that : *" … we have to talk about it …"*, and although this was not urgent, that the defendants should, in the meantime, *' … think about it*

… ‘. Again the plaintiff’s version is corroborated in this regard by the referred to exhibits. All this is a far cry from the alleged donation or gift. It should possibly be mentioned also that Mrs Nicole Lauer’s evidence was also to the effect that the house and the two bungalows were never donated to the defendants. She also confirmed that the defendants would have to repay half the amount expended on the solar system and thus, by implication, that the other half would be borne by the plaintiff and so could be regarded as a ‘half-gift’. It so appears that the Plaintiff has discharged his onus in this regard substantially.

[63] In such circumstances it became incumbent on the defendants to prove, on a balance of probabilities that the amounts received for the construction of the dwelling, the two bungalows and the financing of the solar system constituted a gift or donation? Their evidence will also have to be weighed and tested against the general probabilities.

[64] The case of the defendants was straightforward in this regard. Their evidence was to the effect that, after a certain Mr Balhadere could not proceed with the intended construction of a bungalow on Okatare, the plaintiff approached the first defendant regarding the possibility of taking over the Balhadere project and that the discussion in this regard was had at the lapa on Okatare. As per the discussion the plaintiff sought to have the dwelling and two smaller bungalows constructed at his cost. The dwelling was intended for his exclusive use, whenever he visited Namibia, whereas the bungalows constituted a gift. This was confirmed, by the e-mail, later to become Exhibits ‘C’ and ‘D’. It was contended further that the plaintiff, throughout, made it clear that the dwelling and the bungalows were a gift and that he did not seek any reimbursement for the expenditure incurred in the construction of same.

[65] In this regard it was in Exhibit ‘AA’ explained, (in a letter from defendants, re-typed by Mr Brandt’s office), that a donation in regard to the bungalows was never requested and that this was a spontaneous decision on the plaintiff’s part, which was accepted with thanks. The house that was built, was built, so that the plaintiff could ‘hear the grass grow’ in Namibia. The reason for the permission to build, admittedly a difficult one, was merely to allow the plaintiff happiness and harmony.

[66] As far as the solar system was concerned the plaintiff's consumption apparently necessitated an 'extension' of the existing power system. As the defendants did not have the necessary cash flow the plaintiff would initially fund the entire bill and the defendants would repay half of the cost incurred in this regard with the aid of hunters, which the plaintiff would find. Importantly the plaintiff repeatedly indicated that he would cancel the entire 'debts' of the defendants once he would receive permanent residence.

[67] Interestingly enough it was added that temporary residence became irrelevant as the plaintiff had stated that he would never return to Okatare. In any event it was unlikely that the plaintiff would send hunters as negative propaganda was being exercised in France against Okatare. The solar system could therefore not be repaid.

[68] As far as credibility is concerned it is clear that it plays an important role in the determination of whether or not a party will be able to show, on a balance of probabilities, that its version is true and that the version of the other side cannot reasonably possibly be true. In this regard the following should immediately be stated, namely that the court observed, throughout, and particularly during the initial stages of the trial; that there was great animosity between the parties. The open manifestations of animosity and displays of emotion, made it necessary for the court to call on the parties to restrain themselves, on numerous occasions. Although this behaviour subsided somewhat during the course of the protracted trial, this aspect never quite went away and it obviously clouded the accuracy of the evidence that was tendered. In addition, and what played a major role, and what impacted also on the accuracy of the evidence given by all the witnesses, as mentioned above, was their inablility, to recall, accurately, the events, which had occurred many years before. This was not surprising from a human perspective. I take all this into account when I consider the veracity of all the evidence tendered.

[69] What impacted however, in a most negative way, on the evidence of the defendants, was the manner, in which the second defendant blatantly attempted to unduly influence- and coach – the evidence given by the first defendant. This interference necessitated the bringing of an application to the effect that the second defendant be excluded from the court proceedings until such time that the first defendant had concluded his testimony. The court reluctantly granted the

unprecedented application brought in this regard, for the reasons, given in a short ex-tempore judgment.

[70] A further aspect, which negatively impacted on the second defendant's credibility was her attempt to read from prepared notes, until found out, and which indicated that she did not really have an independent recollection in regard to many of the events which she testified about.

[71] While it is clear – and while I take into account that also the evidence given by the plaintiff was not always beyond reproach - and that his evidence is thus also to be approached with caution and thus required corroboration – I believe that the abovementioned factors weakened the veracity of the evidence tendered on behalf of the defendants, on this aspect of their defence, materially.

[72] If one then turns to the probabilities, I believe that it firstly - and incontrovertibly - became clear throughout the trial that the plaintiff – indeed - was most generous and I accept that he thus most certainly held a genuine intention to waive all 'debts' should the defendants have procured permanent residence for him and his wife in Namibia. Because of this he – for obvious reasons - did not immediately insist on any re-imbursements. But one only needs to stop here - to reflect - that the version of the defendants – at the same time mirrors that there were indeed debts – as opposed to gifts or donations – as only debts could be waived - once permanent residence for the plaintiff and his wife would have been obtained. This, I believe is the eventual conclusion that is to be drawn from all the evidence. Such conclusion is also in line with the so-called presumption against donations, in terms of which donations are never presumed, but must be proved by the person alleging it. There was always a strong probability against the plaintiff gratuitously giving away the house and bungalows out of pure liberality. His motive clearly was to retire in peace in Namibia and for this purpose he requested the permission to build on Okatare. I believe that the moneys in question were not simply transferred out of pure liberality but that the transfer was essentially motivated by the plaintiff's genuine desire to retire in Namibia. I take into account in this regard also that Exhibits 'C' and 'D' do not support the defendants' version, as they contend, for the reasons given above. On the contrary, no one is presumed to throw away or squander his property. This applies squarely to the plaintiff - a director of companies and the owner of

factories. He had the financial means - and – as I have stated before – I accept that he would have waived all debts eventually – beyond a shadow of doubt and without a whimper – as he could afford this - if his dream – of permanent residence – would have been achieved. It was not.

[73] The downside of all this is – and as permanent residence was simply not attained - that the debts were simply never waived. It must thus be concluded - on all the evidence tendered – and on the probabilities - that the transferred funds, through which the construction of the residence and bungalows were financed - never constituted a gift or donation. This also holds true for the expenditure incurred in regard to the solar system

[74] At the same time it did emerge in this regard that it was actually common cause that the solar system only constituted a 'half-gift', as it was put. This means that the plaintiff's half-share was to be regarded as a gift, whereas the defendants' half-share was always repayable, unless waived, which it was not. This automatically means that the plaintiff's claim in regard to the claimed amount of N$ 526 322.47 is to be reduced by half.

[75] Ultimately and even if I were wrong in having come to the conclusion that the probabilities on this facet of the case favour the plaintiff's version, it can, in any event not be said in this regard that the plaintiff's evidence was false and that of the defendants true. The defendants thus fail to discharge the onus, which they have attracted in this regard.

[76] It follows that 'Issue 5', as formulated for resolution, in the pre-trial order, must be answered in the negative.

[77] It will by now have appeared that also all the other issues, to be resolved in accordance with the governing pre-trail order, in regard to claim 1, where answered in favour of the plaintiff.

[78] Generally it can thus be said that the plaintiff has thus succeeded in establishing the general requirements for his enrichment claim.

[79] In order to then tie up all the loose ends it is useful to, again, call to mind, the general requirements, for liability for enrichment, as conveniently summed up, by Fourie J in *Watson NO v Shaw NO* 2008 (1) SA 350 (C). He held that what has to be establsished is that :

'….

(a) the defendant must be enriched;

(b) the plaintiff must be impoverished;

(c) the defendant's enrichment must be at the expense of plaintiff; and

(d) the enrichment must be unjustified (*sine causa*).' [109]

[80] It appears that all these requirements were met, and, as the plaintiff was not required to prove the extent of his impoverishment and the extent of the defendants' enrichment, whichever was the lesser, at the time of *litis contestatio*, I believe that plainitff's claim 1 must succeed. This finding then also obviates the need to determine the alternative claim.

Resolution Claim 2

[81] The issues for determination formulated in the pre-trial report where as follows:

'Ad claim two

11) Whether the amount advanced by Plaintiff constituted a loan to defendants as pleaded pursuant to the terms and conditions pleaded at paragraph 15 of Plaintiff's particulars of claim.

12) Whether the amount so advanced was a donation out of pure liberality from the Plaintiff;'

[82] I believe that this claim can easily be disposed of. Although Mr Mouton strenuously argued that this claim was proved *'beyond reasonable doubt'*, ie.in accordance with the criminal standard, it was exposed by counsel for the defendants that the plaintiff's case did not even get out of the starting blocks. This can not only

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[109] *Watson NO v Shaw NO op cit* at [11]

be ascertained through the manner in which his case commenced and where the plaintiff almost from the outset changed and corrected his initial version, as contained in his original witness statement. Here I take into account, in the plaintiff's favour, that this is permissible, in terms of the Judge President's Directives, pertaining to the introduction into evidence of witness statements. What however immediately detracted from the veracity of the plaintiff's evidence was that he then altered his version again during his evidence in chief.[110] It appears from the record that plaintiff's counsel clearly- and despite numerous valiant attempts - was not able to elicit the desired evidence on this claim from the plaintiff.[111]

[83] I agree with Mr Heathcote that the plaintiff changed his version in respect of the terms of the alleged loan agreement on no less than 10 occasions.[112]

[84] It does not take much to fathom that in such circumstances, counsel's consequential submission - to the effect that the plaintiff never proved his own pleaded case in this regard - 'on a balance of probabilities'[113] - without the necessity to even consider the defendants' case - has merit - and is to be upheld.

[85] I believe nothing more is to be said on this score, save to state that, the first issue, as formulated in paragraph 11 of the pre-trial report, as read with para 15 of the plaintiff's particulars of claim, for the determination of the court must be determined in favour of the defendants. Issue 12 – consequentially - falls away and does not require determination. The second claim of the plaintiff thus fails.

Resolution Claim 3

[86] This is the claim relating to the amount of €21 252.00 advanced for the purchase of game.

[87] The pre-trial order formulated the following issues for the court's determination:

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[110] Compare the extract from the record as quoted above in the main Heads of Argument filed on behalf of the defendants' at para 6.7.

[111] Compare the above quoted extract from the record in para 6.8 of Defendant's heads.

[112] Compare the above quoted para 6.9 of counsel's heads.

[113] In accordance with the applicable civil standard, as was required.

‘Ad claim three

13) What the terms and conditions were of the oral agreement concluded between the parties, relating to the purchase of game;

14) Whether the Plaintiff waived his rights to claim the amount of €21252-00 as alleged by Defendants;’

[88] According to the plaintiff the referred to terms and conditions where to the effect that this amount would be repaid from the earnings defendants would derive from defendants’ hunting operations on the property. The defendants’ version on this was that the existence of an oral agreement in this regard was admitted but that the loan would be repaid from hunters sent to Okatare by plaintiff.

[89] In regard to the issue of waiver – Issue 14 of the pre-tral order - it became clear that also this issue raised in respect of claim 3 was permeated by the plaintiff’s stance that also this debt would be waived once permanent residence would be awarded to him and his wife. The evidence shows that there was thus a conditional waiver in respect of which a ‘condition precedent’ was set before the plaintiff would waive his right to reclaim the €21 252.00. This condition was never met as the contemplated event did not occur. On the contrary permanent residence was refused.

[90] It was in such circumstances that issue 13 came to the fore again.

[91] Defendants’ counsel argued his clients’ case on the basis that also this claim was simply not proved as the plaintiff failed to establish that the defendants made the required money to repay the plaintiff from ‘hunting operations’. This was also the evidence of the defendants, who again relied on the plaintiff’s 2010 decision, never to return to Okatare and thus on the consequential fact that they were thus not able to generate the required funds from hunters sent to Okatare by plaintiff.

[92] In the first instance it immediately becomes clear from this defence that, inherent in it, is the, in principle, acceptance of the fact that these moneys did never constitute a gift or donation, and that the advanced €21 252 constituted a loan which was thus repayable from hunters sent by the plaintiff, unless waived.

[93] This inference is underscored, in a material way, by the offer, made, under cover of Exhibit 'AA', to pay off this debt by way of instalments in which the defendants stated, and I quote:

> '7) Animals (black wildebeest): - these animals are fully repayable upon agreement. According to the agreement these animals were also to be repaid by means of hunting guests and then these debts were also to be waived as soon as Mr Lauer received the temporary residence. Since Mr Lauer will probably no longer procure any hunters and the temporary residence is still undecided, Mr Mueller is prepared to repay these animals to Mr Lauer. Under the above circumstances Mr Mueller will undertake to repay these animals without interest at N$ 2000 per month as from January 2011 into Mr Lauers existing Bank Windhoek account. Should there be more income in different months, Mr Mueller would pay more in such months. Otherwise N$ 2000 per month.' *(emphasis added)*

[94] Exhibit 'AA' is also telling in another important respect as it contains another version of the defendants alleged conditions for repayment as there is absolutely no mention of the now relied on condition that the required funds were to be generated 'from hunters sent to Okatare by plaintiff' but rather it was expressly stated that 'the animals would be repaid by means of hunting guests'. This exhibit thus corroborates the plaintiff's version.

[95] Although this contradiction materially weakens the defendants' version it does ultimately not matter as Mr Mouton's detailed submissions on this score exposed that the defendants were actually - and even on their own version of the applicable re-payment condition – actually placed in the position to repay this debt with funds generated in excess of the loan amount from hunters – mainly through Messrs Oswald, Grangi, Karst and Weber - brought by the plaintiff - to Okatare - during June 2010 - and also through others brought during 2009 - subsequent to the transfer of the funds which had occurred on 20 April 2009.[114]

[96] Mr Mouton also took issue with the defendants' reliance on the assertion that the second defendant offered to repay €2700 from the funds the defendants had generated through Messrs Oswald, Grangi, Karst and Weber, which offer the plaintiff

[114] Compare the quoted submissions as made in para's 32.2 to 32.6 of his supplementary heads of argument in reply to the defendants heads.

refused to accept, as he was awaiting his residence permit and that he would then waive this debt as this aspect was never put to the plaintiff's witnesses during cross-examination. Also this aspect is ultimately neither here nor there as it became clear later that the permit was refused and the debt thus remained repayable, an aspect acknowledged throughout by the defendants.

[97] The conclusion that is to be drawn from all this is that it is more probable than not that the repayment condition alleged by the plaintiff was the one that was intended to regulate the repayment of the funds advanced for the purchase of game and that the term alleged by the defendants that such loan would be repayable through funds generated through hunters brought by the plaintiff was not agreed upon. It was obviously a convenient afterthought. Issue 13 is thus determined accordingly in favour of the plaintiff and claim 3 consequentially as well.

Part of claims in foreign currency

[98] It will have appeared that the plaintiff claims repayment of €198 019-17 and €21 252-00, which are claims sounding in foreign currency. The impact on this was not addressed by counsel at any stage.

[99] It would appear however that the South African- and Zimbabwean courts have held in a string of cases, dealing with various types of claims, that, in principle, there is no absolute bar to an order for payment in a stipulated foreign currency and that, generally, the conversion from Namibian Dollars to the foreign currency in question is to be made on the date when payment is actually made.[115]

Conclusion

[100] At the end of a lengthy trial, and after all that was said and done, the court will have to determine the issue of costs. It is clear that both parties are deeply out of pocket. In this regard it was said to them on numerous occasions that it lay in their

[115] See for instance : *Murata Machinery Ltd v Capelon Yarns (Pty) Ltd* 1986 (4) SA 671 (C) at 673 to 674, *Makwindi Oil Procurement (Pvt) Ltd v National Oil Co of Zimbabwe (Pvt) Ltd* 1988 (2) SA 690 (ZH) at 696A, *Elgin Brown & Hamer (Pty) Ltd v Dampskbisselskabet Torm Ltd* 1988 (4) SA 671 (N) at 673, *Makwindi Oil Procurement (Pvt) Ltd v National Oil Co of Zimbabwe (Pvt) Ltd* 1989 (3) SA 191 (ZS) (1977 (2) ZLR 482 (SC)) at 197 to 198, *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at p774 to 777 and others.

hands to limit and thus control this aspect and the risks attendant with this and even further costs in the event of an appeal. The court – throughout – encouraged the parties to come to an amicable settlement and the opportunity to achieve this was afforded to them on a number of occasions, as the record will reflect. This window of opportunity was unfortunately not utilized. I take into account however that the parties were never under an obligation to settle. Accordingly the issue of costs also requires determination.

[101] In this regard counsel for both parties have asked the court to issue a costs order in their client's favour. This was obviously done on the assumption that the court would rule accordingly. As the outcome however reflects that each party has achieved a measure of success I believe that it is accordingly appropriate to decline these requests by counsel and to rule, in the exercise of the court's discretion, that each party is to pay its own costs.

[102] In the final equation the following orders are thus made:

1. The application for leave to amend, dated 27 January 2020, is dismissed with costs, such costs to include the costs of one instructed- and one instructing counsel.

<u>Claim 1</u>

2. The first and second defendants are to pay the amounts of €198 019-17 and N$ 263 161-23, plus interest on the aforesaid amounts, at the rate of 20% per *annum a tempore morae* to date of payment, jointly and severally, the one paying the other to be absolved;

<u>Claim 2</u>

3. This claim is dismissed.

<u>Claim 3</u>

4. The first and second defendants are to pay the amount of €21 252-00, plus interest on the aforesaid amount at the rate of 20% per *annum* from 20 April 2009 to date of payment, jointly and severally, the one paying, the other to be absolved;

5. Each party is to pay its own costs.

H GEIER

Judge

APPEARANCES

PLAINTIFF:	Adv CJ Mouton Instructed by Koep & Partners, Windhoek
DEFENDANTS:	Initially Mr CF Brandt Chris Brandt Attorneys, Windhoek Subsequently: Adv Heathcote SC (argument only) Instructed by Francois Erasmus & Partners,

Windhoek