

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: HC-MD-CIV-ACT-CON-2020/02790

In the matter between:

**CHRISTIAN JOSEPHE BERNADETTE OPHOFF**

**PLAINTIFF**

And

**VAN DE VIJVER FAMILY TRUST**

**1<sup>st</sup> DEFENDANT**

**PAUL MARIE GEORGES MACHITUS VAN DE VIJVER**

**2<sup>nd</sup> DEFENDANT**

**CHRISTOPHE GASTON GEORGETTE VAN DE VIJVER**

**3<sup>rd</sup> DEFENDANT**

**OLIVIER JULIETTE VAN DE VIJVER**

**4<sup>th</sup> DEFENDANT**

**PETRUS DANIEL SWART**

**5<sup>th</sup> DEFENDANT**

**Neutral citation:** *Ophoff v Van de Vijver Family Trust* (HC-MD-CIV-ACT-CON-2020/02790 [2023] NAHCMD 280 (19 May 2023))

**Coram:** TOMMASI J

**Heard:** 16 August 2022

**Oral Submissions:** 19 August 2022

**Delivered:** 19 May 2023

**Flynote:** Acknowledgement of debt and Share Cession and Pledge agreements – Such remain unsigned – Effect thereof immaterial – Prevailing circumstances considered.

**Summary:** Both third and second defendants duly authorised as a trustee of first defendant signed Acknowledgement of Debt component and a Share Cession and Pledge. These documents were not signed by the plaintiff. Court to decide whether in circumstances the documents are valid.

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## ORDER

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The court grants judgment in favour of the plaintiff against the first, second (in his capacity as a trustee) and third defendant (in his capacity as trustee) jointly, in the following terms:

1. Payment of the amount of N\$6000 constituting the amount due for stamp duties and penalties for the acknowledgement of debt incorporating the pledge and session.
2. Interest at the rate of 20% per annum on the amount of N\$3 933 from 8 June 2020 to date of payment and interest at the same rate on the amount of N\$2 067 from 2 July 2020 N\$6000 amount.
3. Payment of the Namibian equivalent of the amount of €116 754 (N\$1 949 344.63) calculated at the spot rate of Bank Windhoek as at 15 October 2018 together with interest of 20% per annum calculated from 15 October 2018 to the date of payment.
4. Payment of the Namibian equivalent of €122 431 (N\$1 912 008.60) calculated at the spot rate of Bank Windhoek as at 30 November 2018 together with interest calculated from 30 November 2018 to date of payment.
5. Cost of suit, to include the cost of one instructing counsel and one instructed counsel.

6. The matter is finalised and removed from the roll.

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## JUDGMENT

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TOMMASI J:

[1] The plaintiff herein resides in Belgium and instituted action against the Van de Vijver Family Trust and the trustees in their nominal capacities.

[2] On 15 August 2018, the third defendant (in his capacity as a trustee of first defendant), duly authorised thereto by virtue of a resolution signed by the second defendant (in his capacity as trustee of first defendant) signed a document titled "ACKNOWLEDGEMENT OF DEBT INCORPORATING A SHARE CESSION AND PLEDGE". A copy of the said document is attached to the plaintiff's particulars of claim marked Annexure "D". Annexure "D" consists of an Acknowledgement of Debt component and a Share Cession and Pledge component. Both these documents were not signed by the plaintiff. This document forms the basis for the dispute between the parties.

[3] In terms of the Acknowledgment of Debt the first defendant is referred to therein as the debtor. The first defendant therein admits that it is liable and holds itself bound to the plaintiff (the creditor) for due and proper payment of the amount of €239 185 (the Principle Debt) in respect of monies lent and advanced plus a reimbursement value of legal expenses and interest. It requires the debtor to pay the monies into the trust account of Dr Weder, Kauta and Hoveka Inc and that the debtor would be liable for stamp duty. It further stipulates that the debtor declares itself bound to the conditions set out in the annexure attached to the acknowledgement of debt.

[4] It is common cause that the first defendant failed to pay as undertaken. The plaintiff is holding the defendants liable jointly and severally for payment of the following:

- (a) Payment of the amount of N\$6000 constituting the amount due for stamp duties and penalties for the acknowledgement of debt incorporating the pledge and session;
- (b) Interest at the rate of 20% per annum on the amount of N\$3 933 from 8 June 2020 to date of payment and interest at the same rate on the amount of N\$2 067 from 2 July 2020;
- (c) Payment of the Namibian equivalent of the amount of €116 754 calculated at the spot rate of Bank Windhoek as at 15 October 2018 together with interest of 20% per annum calculated from 15 October 2018 to date of payment;
- (d) Payment of the Namibian equivalent of €122 431 (N\$1 912 008.60) calculated at the spot rate of Bank Windhoek as at 30 November 2018 together with interest calculated from 30 November 2018 to date of payment;
- (e) In the event of failure to pay the plaintiff is seeking an order to realise the shares of the three companies pledged and ceded either by way of public auction or by private treaty;
- (f) Cost of suit to include the cost of one instructing counsel and one instructed counsel.

[5] The parties agreed to adopt the procedure in terms of rule 63(1) which makes provision for the parties to agree on a written statement of facts in the form of a special case for adjudication by the managing judge. The statement of fact was placed before the trial judge instead of adducing evidence. The rule 63(1) statement of fact reads as follows:

**'AGREED FACTS:**

1. The plaintiff lent and advanced to the third defendant in his personal capacity the amount of €1 000 000 pursuant to a written loan agreement concluded between the plaintiff and second defendant acting personally during or about 2011 in Belgium.
2. The unpaid balance of the said personal loan is €239 185.
3. On 15 August 2018 the third defendant, acting in his representative capacity as a trustee for the time being of the Van de Vijver Family Trust, duly authorised by the second defendant also acting as in his representative capacity as trustee for the time being of

the Van de Vijver Family Trust, signed Annexure “D” attached hereto and marked Annexure “D” (the Acknowledgement of Debt);

4. The plaintiff at no stage lent and advanced any money to the Van de Vijver Family Trust. The amount reflected in Annexure “D” constitutes the unpaid balance of the personal loan concluded between plaintiff and the second defendant in his personal capacity;
5. The plaintiff now claims the relief as set out in paragraphs 1- 8 of the Particulars of Claim as further supported by Annexures C1-C3 to the Particulars of Claim against the first, second and third defendants jointly and severally in their capacities as trustees of the first defendant, Van de Vijver Family Trust on the strength of Annexure” D”. The plaintiff abandons his claim against the fourth and fifth defendants.

#### **QUESTIONS OF LAW RAISED BY SECOND AND THIRD DEFENDANTS**

6. The first question of law raised by second and third defendant relates to whether or not the second and the third respondent in their capacities as trustees of the first defendant are jointly and severally liable to the plaintiff for the personal debt of the second defendant, on the basis of Annexure “D”.

7. The second question of law raised by second and third defendants relates to whether the document titled Pledge and Cession incorporated in the acknowledgment of debt created a valid pledge and cession in security of the first defendant’s share certificates as reflected in the shares certificate attached to Annexure “D”.

#### **SECOND AND THIRD DEFENDANT’S BRIEF SUBMISSIONS ON THE LAW TO BE APPLIED TO THE AGREED FACTS**

8. In respect of the first question the defendants contend that by virtue of paragraphs 1, 3 and 4 *supra* and on a proper interpretation of Annexure “D”, they are not liable to the plaintiff for the personal loan of the second defendant under Annexure “D” and can in any event never be severally liable to the plaintiff in their representative capacities as trustees of first defendant. Trustees can only be jointly liable in their representative capacity, not jointly and severally.

9. In respect of the second question the defendants contend that the pledge and cession in security is, for the facts stated in paragraph 3, 4 and 8 *supra* and also due to the absence of plaintiff’s signature, inchoate and contain no valid *causa debiti* and or *iusta causa traditionis*.

**PLAINTIFFS BRIEF SUBMISSIONS ON THE LAW TO BE APPLIED TO THE AGREED FACTS:**

10. In respect of the questions raised by the first, second and third defendants the plaintiff contends that:

10.1. The first and second and third defendants duly acknowledged (by way of signature) their liability to the plaintiff per Annexure “D” to the particulars of claim;

10.2. The plaintiff’s failure to sign the pledge and cession component thereof is of no consequences given the unambiguous construction thereof, it is not inchoate and the *iusta causa traditionis* do not find application.’

First question of law

[6] Mr Muhongo, counsel for plaintiff submits that Annexure “D” was signed by the third respondent and the maxim of *caveat subscriptor* applies i.e that the signatory agreed to what is recorded in the agreement regardless of whether he read and/or understood the terms and conditions. In support hereof he cites the matter of *Hugo v Council of Municipality of Grootfontein*<sup>1</sup>, where Shivute CJ sets out the applicable principle. Paragraph 16 summarises the *Caveat subscriptor* rule neatly in the following sentence:

‘It is a trite principle of the law of contract that a person who has signed a contractual document thereby signifies his assent to the contents of the document.’

He argued that this principle with equal force applies to the first second and third respondents’ assent to the acknowledgment of debt incorporating a share cession and pledge.

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<sup>1</sup> *Hugo v Council of Municipality of Grootfontein* (SA68/2012) [2014] NASC (27 October 2014).

[7] Mr Muhongo further argued that when it comes to the interpretation of contracts the matter of *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC*<sup>2</sup> is applicable.

[8] Mr Muhongo submits that it is clear that Annexure “D” is not inchoate but complete if the above approach of interpretation is applied to the contents of Annexure “D”. He submits that the obligations of the defendants are clear and the defendants unilaterally acknowledged their indebtedness to the plaintiff.

[9] He submitted that the fact that the agreement was between the plaintiff and the second defendant is of no consequence. He also argued that the prior agreements referred to in clause 12 is also of no consequence. He further makes the point that there is no prohibition for one party to take care of another person’s debt.

[10] Mr Diedericks, counsel for the defendants, came up with several arguments why the first, second and third defendants should not be held liable.

[11] Mr Diedericks submits that the plaintiff invites the court to approach the matter on a very narrow basis. He submits that the plaintiff refers to the contents of the acknowledgment of debt agreement which he submits the plaintiff is not permitted to do. He reminds the court that it should restrict itself to the issue of law and the agreed facts. He argues that according to the agreed facts, the plaintiff never advanced money to any of the defendants in their representative capacities. He submits further that the amount reflected in the acknowledgment of debt is derived from an unpaid amount of a loan between plaintiff and the second defendant. He refers to the following agreed facts: that the third defendant signed as a trustee; the plaintiff at no stage advanced monies to the trust; and the plaintiff did not sign any of the series of documents attached to Annexure “D”.

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<sup>2</sup> *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC* (SA 9-2013) [2015] NASC (30 April 2015).

[12] Mr Diedericks in oral argument submitted that it does not help to speak about the consequence of the third defendant signing the acknowledgment of debt, thereby seeking to demonstrate the liability that arises. He refers to clause 5 of the acknowledgment of debt wherein the debtor (first defendant) renounces the benefits of the exception *non causa debiti*. Of this clause he argues that this does not mean that the defendants cannot raise the fact that they did not receive any money but it merely means that the defendants bear the burden of proving that they did not receive the money. For support hereof he cites the case of *Cohen v Louis Blumberg (Pty) Ltd* 1942 (2) SA 849 (W) (the correct reference is 1949 (2) SA 849 (W)). His argument is that on the agreed facts, it is clear that no indebtedness was ever owed by the trust.

[13] A further argument is that the discharge of the personal loan to third defendant by the plaintiff referred to in paragraph 12 requires the acceptance and without the signature of the plaintiff, the discharge would remain nothing more than an offer which was open for acceptance. He submits that what gives rise to the obligation, is the undertaking by the debtor and the acceptance of the creditor. In this regard, he refers to the matter of *Adams v SA Motor Industry Employers Association*.<sup>3</sup>

[14] Mr Diedericks submits that the plaintiff ought to have signified his acceptance of the discharge of the loan by signing the acknowledgment of debt. He argued that the plaintiff's consent/acceptance of the undertakings was required to release the third party of his obligations and to give rise to obligations in respect of the defendants as trustees. He goes on to say that until the plaintiff signs the acknowledgment of debt and accepts the undertakings, there can be no obligation upon the defendants and there can be no release of the third party of his obligations.

[15] In conclusion, he argues that in the main, Annexure "D" suffers from a significant shortcoming i.e that the undertakings contained therein were never accepted by plaintiff, thus no obligation arises to give effect to those undertakings to pay. He submits that the question of compromise or novation does not arise.

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<sup>3</sup> *Adams v SA Motor Industry Employers Association* 1981 (3) SA 1189 (A).



## Discussion

[16] The first question of law raised is the following: “Are the defendants liable in their capacities as trustees of the first defendant jointly and severally to the plaintiff for the personal debt of the second defendant, on the basis of Annexure “D.”

[17] The court is mindful of the fact that it must decide the question of law presented to it and has no right to travel outside the four corners of the agreed statement.<sup>4</sup>

[18] In *Rodel Financial Service (Pty) Ltd v Naidoo and Another*<sup>5</sup>, the following useful description of an acknowledgement of debt is provided:

An acknowledgment of debt, sometimes referred to as an IOU, is evidence of a debt which is due, but differs from a promissory note, as it does not contain an express promise to pay. Where, however, the acknowledgment of debt is coupled with an undertaking to pay, it will give rise to an obligation in terms of that undertaking.

[19] Mr Diedericks, if I understand his argument correctly, is not saying that it is a general requirement for an acknowledgment to be signed and accepted by the creditor. At first blush, it appeared that way. He cited the following from the *Adams* matter *supra* where the court at pages 1198B states as follow:

‘There is ample authority to the effect that an acknowledgment of debt, provided it is coupled with an express or implied undertaking to pay that debt, gives rise to an obligation in terms of that undertaking when it is accepted by the creditor.’ [his emphasis]

[20] During oral argument, it became clear that he contended that it was a requirement for this specific acknowledgment of debt to have been signed. By signing the acknowledgment of debt the plaintiff would have released the third party and this

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<sup>4</sup> *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC).

<sup>5</sup> *Rodel Financial Service (Pty) Ltd v Naidoo and Another* 2013 (3) SA 151 (KZP) page 155-156 paragraph 12.

would have given rise to the obligation by the defendants. The question therefore, is whether it is required for the plaintiff to accept and sign **this** acknowledgment of debt.

[21] It is noted that Mr Diedericks finds the rationale for making the distinction between a general acknowledgment of debt and this particular one in the contents of clause 12 of the acknowledgment of debt.

[22] Mr Muhongo's view is that all of this is of no consequence and all that is important is that the defendants acknowledged their indebtedness and gave an expressed undertaking to pay by signing the Acknowledgment of Debt.

[23] It is part of the agreed facts that the third defendant duly authorised thereto by a resolution, signed the acknowledgment of debt incorporating the share session and pledge. The question is whether paragraph 12 establishes a valid obligation in respect of the defendants in their representative capacities. Ordinarily this question would not be problematic.

[24] It is not unusual for a person(s) to acknowledge indebtedness on behalf of another. In *MB De Klerk & Associates v Eggerschweiler and Another*,<sup>6</sup> the defendants, directors and sole shareholders of a company, executed an acknowledgement of debt in plaintiff's favour, accepting personal liability even though there did not exist any present or future personal liability for legal costs towards the plaintiff. Damaseb JP in that matter concludes that the acknowledgement of debt had the effect of making the defendants assume personal liability for the obligations of the agency. In *Total South Africa (Pty) Ltd v Bekker NO*,<sup>7</sup> the court discusses several ways in which a person, without being compelled to do so by law, may intervene in a contract between two parties. A third party may also by way of delegation be introduced as debtor in substitution for the original debtor.<sup>8</sup>

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<sup>6</sup> *MB De Klerk & Associates v Eggerschweiler and Another* 2014 (3) NR 609 (HC).

<sup>7</sup> *Total South Africa (Pty) Ltd v Bekker NO* 1992 (1) SA 617 (A), at page p 627.

<sup>8</sup> See Christie's Law of Contract in South Africa, 6<sup>th</sup> edition.

[25] I do not deem it expedient or even necessary to dwell into the reasons for the trustees to assume liability for the debt of one of the trustees as this would be straying outside the issues which the court has to consider. The court however, in examining the nature of the obligation the defendants consented to as contained in clause 12, must determine whether it was required for the plaintiff to consent and sign the acknowledgment of debt.

[26] Clause 12 of the acknowledgment of debt reads as follows:

‘On the date of signature of this Acknowledgment of Debt the previous Acknowledgment of Debt incorporating a Pledge and Cession executed on 28 July 2016 shall immediately be replaced hereby and the loan agreement concluded by Paul Marie Georges Machitus Van De Vijver and the creditor shall remain **as previously agreed** of no force and effect.[my emphasis].

[27] *Ex facie* the acknowledgment of debt, the defendants acknowledged that there has been an agreement in place to release the third party of his indebtedness.

[28] As regards the argument that no money was paid to the trust or owed by the trust, the defendants accept that the onus lies with them to prove that no debt was owed to the plaintiff. In *Cohen v Louis Blumberg (Pty), Ltd and Another*,<sup>9</sup> the court held that the defendant was entitled to raise a defence that money was never received despite having renounced the *exception*, but the effect thereof is that the onus when an *exceptio* is renounced, rests upon the defendant.

[29] The acknowledgement of debt does not specify that monies has been advanced to the trust but the context of document makes it clear that the debt of the second defendant in his personal capacity has been discharged by agreement between the parties, giving rise to the obligation by the defendants herein to pay the plaintiff. It thus, appears that all the parties, including the plaintiff agreed that the debt between the plaintiff and the second defendant is of no force and effect. The admitted fact that no

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<sup>9</sup> See footnote 3 above.

money was lent and advanced to the trust is therefore of no assistance to the defendants.

[30] In *Jenkins v De Jager*<sup>10</sup> the court held that: 'it was well settled that for the purposes of provisional sentence the document concerned need not reflect the *causa debiti* at all (indeed, liquid documents such as cheques and even acknowledgements of debt seldom reflected the *causa debiti*) and that, if it was not necessary to record the *causa debiti*, then there was no reason why it should have any relevance in those instances where it was recorded, whether correctly or not.' The acknowledgment of debt constitutes a cause of action separate from the original obligation.<sup>11</sup>

[31] It is my considered view that the trustees of the first defendant accepted liability for the obligation as per the acknowledgment of debt in their representative capacities and that it was not a requirement for the plaintiff to consent or sign the acknowledgment of debt. I further conclude that for purposes of the acknowledgment of debt, it was not necessary for the defendants to stipulate the *causa debiti* in detail or at all for the court to hold them to their undertaking to pay the debt. The defendants are therefore bound to pay as undertaken.

[32] The question of whether the first, second and third defendants are liable jointly and severally has not been argued strenuously by any of the parties but it is evident that the defendants can only be held liable jointly and not severally. The second and third defendants as trustees of the first defendant are jointly liable.

### Second question of law

[33] In respect of the second question raised, Mr Muhongo referred the court to the only case he could find which deals with *iusta causa traditionis* namely *Kaap Agri Bedryf Limited v Hardap Co-Operative Limited*,<sup>12</sup> where an exception was raised in which the

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<sup>10</sup> *Jenkins v De Jager* 1993 (4) SA 534 (N).

<sup>11</sup> See *Adams v SA Motor Industry Employers Association* 1981 (3) SA 1189 (A).

<sup>12</sup> *Kaap Agri Bedryf Limited v Hardap Co-Operative Limited*, Case No. I 827/2008 (4 October 2010).

defendant in that case, *inter alia*, attacks the validity of the cession upon which the plaintiff based its claim against the defendant. He however submits that there is a valid cause for the right to transfer as stipulated in clause 1.1 of the Session and Pledge component of Annexure “D”.

[34] The defendants contend that the Pledge and Cession in security is based on the agreed facts and also due to the absence of plaintiff’s signature, inchoate and contain no valid *causa debiti* and/or *iusta causa traditionis*.

[35] Mr Diedericks argues that the related Pledge and Cession contained in Annexure “D” is invalid as there is no valid cause for the transfer of rights evidenced by the cession and pledge. He refers in this regard to *Johnson v Incorporated General Insurance Limited*<sup>13</sup> 1983 (1) SA 318 at 319 and the matter of *Kaap Agri*.<sup>14</sup>

### Discussion

[36] The second question of law raised by second and third defendants relates to whether the document titled Share Pledge and Cession incorporated in the Acknowledgment of Debt created a valid Pledge and Cession in security of the first defendant’s share certificates as reflected in the shares certificate attached to Annexure “D”.

### The share cession and pledge Component of Annexure “D”

[37] Clause 1 of the Cession and Pledge portion of annexure “D” provides that,

‘With effect from the signature date of the acknowledgement of debt to which this Annexure is attached (***the Effective date***) and as security for the proper and timeous payment by the Debtor of its obligations under the Acknowledgement of Debt (***secured obligation***), the debtor (***Pledgor***) hereby pledges to the creditor (***Pledgee***) all of the pledgor’s shares being:...

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<sup>13</sup> *Johnson v Incorporated General Insurance Limited* 1983 (1) SA 318 at 319.

<sup>14</sup> See footnote 13 above.

[38] All the shares consists of one hundred ordinary shares amounting to 100% of the issue share capital in respect of all the concerns described therein) of the first defendant in the 3 different private companies. The first defendant also cedes *in securitatem debiti* all the rights and interest in and to the credit loan claims of the first defendant against the companies of the Acknowledgment of Debt on the terms and conditions set out therein.

[39] The defendants raised the question whether a valid agreement Share Cession and Pledge came to existence given the fact that it was not signed by the plaintiff. Unlike the Acknowledgement of Debt, the Share Cession and Pledge component is a contract between the parties and acceptance thereof is required. On the stated facts, there is no indication *ex facie* the document that the plaintiff accepted the offer by the defendants. The admitted fact is that the document was not signed by the plaintiff. Under these circumstances, the plaintiff failed to establish that a valid Cession and Pledge agreement came into existence and any relief sought in terms thereof ought not to be granted.

#### Lack of compliance with the Exchange control Regulations, 1961

[40] Mr Diedericks in a final attack on the validity of Annexure "D", drew the court's attention to the provisions of section 10(1)(c)<sup>15</sup> and points out that as a matter of law the Acknowledgement of Debt would be illegal. He submits that there is no evidence that the original loan agreement (2011) was registered with the Bank of Namibia, as required by law and that the taint of illegality of the original agreement extends to the Acknowledgement of Debt and renders it invalid. He submits that the indebtedness of a foreign loan be registered before entering into the agreement. In answer to the question by the court why it should deal with it when raised only in argument, he submitted that the court may have regard to it and make an adverse order with regards to costs.

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<sup>15</sup> Exchange Control Regulations of 1961.

[41] Mr Muhongo indicated that the agreement makes no mention of repatriation of monies to Belgium and the acknowledgment of debt specify that the monies should be paid into the trust account of the plaintiff's legal practitioner.

[42] Section 10(1)(c) provides as follow:

'No person shall, except with permission granted by the Treasury and in accordance with such conditions as the Treasury may impose –

(a) – (b) ....

(c) enter into any transaction whereby capital or any right to capital is directly or indirectly exported from the Republic.'

[43] The loan agreement which the defendants are referring to has in terms of clause 12 of the acknowledgment of debt been declared to be of no force and effect. It is further trite that a party wishing to rely on illegality must plead it.<sup>16</sup> In this case, the issue has not been pleaded and no evidence was adduced as the parties brought a stated case before the court for adjudication. There is therefore, no merit in this issue raised by the defendants.

### Costs

[44] With regard to costs Mr Muhongo cited the case of *Namibia Breweries Limited v Serrao*<sup>17</sup> where the court indicated that it will only award cost on attorney and client scale where the litigant had wilfully applied for summary judgment knowing that the defendant has bona fine defence. He submits that this is a case where the court may use its discretion to award costs on a punitive scale.

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<sup>16</sup> *PRATT v FIRST RAND BANK LTD* 2009 (2) SA 119 (SCA) where the court held that that proof that permission (in terms of the Exchange Control Regulations) was necessary and had not been granted were essential elements of the appellant's case, that the illegality on which the appellant relied was not such as appeared ex facie the transaction, and that she therefore had to not only plead but also adduce evidence of all relevant facts to support her contentions in this regard. In other words, the plaintiff had to prove a negative.

<sup>17</sup> *Namibia Breweries Limited v Serrao* 2007 (1) NR 49 (HC).

[45] Mr Diedericks submitted that the plaintiff had the opportunity to apply for Summary Judgment but failed to do so. I understood him to mean that the plaintiff knew that the defendants had a bona fide defence.

[46] I disagree that this is a case where the court ought to consider a punitive costs order given the fact that the defendants raised triable defences and partially succeeded in their defence. The main claim of the plaintiff succeeds and he is therefore entitled to a costs order in his favour. Both parties instructed counsel and as such the costs order should include the cost of one instructing and one instructed counsel.

[47] The court grants judgment in favour of the plaintiff against the first, second (in his capacity as a trustee) and third defendant (in his capacity as trustee) jointly, in the following terms:

1. Payment of the amount of N\$6000 constituting the amount due for stamp duties and penalties for the acknowledgement of debt incorporating the pledge and session.
2. Interest at the rate of 20% per annum on the amount of N\$3 933 from 8 June 2020 to date of payment and interest at the same rate on the amount of N\$2 067 from 2 July 2020.
3. Payment of the Namibian equivalent of the amount of €116 754 (N\$1 949 344.63 ) calculated at the spot rate of Bank Windhoek as at 15 October 2018 together with interest of 20% per annum calculated from 15 October 2018 to the date of payment.
4. Payment of the Namibian equivalent of €122 431 (N\$1 912 008.60) calculated at the spot rate of Bank Windhoek as at 30 November 2018 together with interest calculated from 30 November 2018 to date of payment.
5. Cost of suit to include the cost of one instructing counsel and one instructed counsel.
6. The matter is finalised and removed from the roll.



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M A TOMMASI

Judge

## APPEARANCES

PLAINTIFF: Advocate Muhongo  
Instructed by Fisher, Quarmby & Pfeifer, Windhoek

DEFENDANT: Advocate Diedericks  
Instructed by Joos Agenbach Attorney & Notary, Windhoek.