

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2022/02127

In the matter between:

**UTZ OLIVER ADOLPH**

**PLAINTIFF**

and

**JOHANNES PETRUS WILLEM NAGEL**

**DEFENDANT**

**Neutral citation:** *Adolph v Nagel* (HC-MD-CIV-ACT-CON-2022/02127)  
[2024] NAHCMD 237 (17 May 2024)

**Coram:** SCHIMMING-CHASE J

**Heard:** 24 – 25 October 2024 & 7 November 2023

**Delivered:** 17 May 2024

**Flynote:** Civil procedure – Short notice – Interpretation of agreement –  
When one interprets a document, it must be presumed that each word used was  
inserted for a purpose, as superfluity or tautology of language is not presumed.

Agricultural land – Section 58 of the Agricultural (Commercial) Land Reform Act  
6 of 1995 – Foreign nationals prohibited from owning commercial land.

Pledge – A pledge is a limited real right of security in a movable asset, created by delivery of the asset to the pledgee pursuant to an agreement between himself and the owner of the asset – It is sought to secure the fulfilment of an obligation due to the pledgee by the pledgor, or some third party – A pledge does not entail ownership of a property, but merely security for the pledgee.

**Summary:** This action is premised on a loan agreement concluded between the plaintiff and the defendant. The plaintiff advanced a loan of N\$7 905 000 together with interest to the defendant. The parties, in terms of the loan agreement, would, inter alia, be jointly involved in the operations of a certain close corporation, Omaha CC Trading Enterprises CC ('Omaha CC') which owns a commercial farm. The defendant agreed to manage the business of the commercial farm.

An additional term of the agreement was that the defendant, who was a Namibian national, would own 51 per cent members' interest whilst the plaintiff, a German national who resided in Germany, would own 49 per cent members' interest in Omaha CC. In terms of the loan agreement, the defendant pledged his 51 per cent members' interest to the plaintiff, should the defendant default on the payment due to the plaintiff by at least two months. The plaintiff would then have the right to realise the defendant's pledged 51 per cent members' interest in Omaha CC.

On 10 May 2021, the plaintiff terminated the loan agreement and provided the defendant a six-month notice period for immediate and full repayment of the loan agreement with interest on or before 10 November 2021. The reason, as evinced by the plaintiff, was as a result of the defendant's mismanagement of Farm Omaha, and appropriation of funds for own use. It is common cause that the defendant never paid any moneys back to the plaintiff.

The defendant raised three special pleas. One was later abandoned. Firstly, he submitted that there was short notice given as action was only to be instituted on 10 November 2022 under clause 5.2 of the loan agreement which stipulates that the plaintiff must request the fixed annual payment of N\$660 000 by giving

the defendant six months' notice. Once the six months have lapsed, the annual payments begin to run for computation. The defendant would thus be in default only after the lapse of 12 months. The plaintiff argued that the defendant conflated the relevant provisions of the agreement and that a six-month notice was the applicable time frame.

The second special plea (also raised on the merits) was that the loan agreement, as well as the association agreement and a later call option agreement concluded between the parties are illegal contracts alternatively *contra bonis mores*. The defendant argued that the pledged 51 per cent of his members' interest to the plaintiff would amount to a contravention of s 58 of the Agricultural (Commercial) Land Reform Act 6 of 1995 ('the Act'), in that the plaintiff essentially obtained beneficial ownership of one hundred per cent members' interest in Omaha CC, which would mean that a foreign national has full ownership of commercial agricultural land which is expressly prohibited.

The plaintiff testified that he does not have any intention to contravene the provisions of the Act and that the pledge is merely security over the defendant's members' interest which is akin to a mortgage bond. In this regard, the plaintiff argued that he does not own the property but because of the call option agreement – which is not disputed – he is able to sell Farm Omaha to third parties in terms of the Act, which he intends to do.

The defendant instituted a counterclaim in the amount of N\$730 686, alleging that the plaintiff had failed to pay him his monthly market-related salary of N\$25 000 as agreed between the parties in writing. The plaintiff testified that the parties did agree that the defendant would be paid a salary by Omaha CC, though the amount was not agreed. The defendant further represented at the time of conclusion of the agreement that he would not require a salary as Farm Ohama would generate significant profits.

*Held that*, it is undisputed that the loan agreement was terminated under clause 7, which entitled the plaintiff to give notice of termination subject to a six-month notice period.

*Held that*, in terms of clause 5.2 of the loan agreement, it was clear that notice must have been given to the defendant to pay the amount of N\$660 000 and that 12 months must lapse until the defendant is in default. Therefore, the six-month period under clause 7 could be invoked. The special plea of short notice was dismissed.

*Held further that*, a pledge does not entail ownership of a property, but merely security for the pledgee. A pledge can have the same characteristics of a mortgage in that it contains contractual and hypothecary aspects. In this instance, the 51 per cent members' interest pledged by the defendant does not connote that the plaintiff is the owner of such 51 per cent members' interest.

*Held further that*, it is undisputed that the defendant failed to repay the loan amount to the plaintiff and the parties concluded a call option agreement in terms of which the plaintiff would be able to purchase the 51 per cent members' interest from defendant for N\$300 000 and that the plaintiff would then realise such members' interest by selling the same to a recognised third party, a Namibian, in compliance with provisions of the Act.

*Held further that*, given the evidence presented and the undisputed facts, the defence raised by the defendant is unsubstantiated. It seems that there is no direct violation of s 58 of the Act on the part of the plaintiff, as presented by the defendant. This is more apparent given that the plaintiff seeks a declaratory order to enable him to sell the pledged members' interest in accordance with the law, to a Namibian. The plaintiff's claim must accordingly succeed. There is no other way to obtain repayment of the loan.

*Held further that*, there is no written or oral agreement that could have existed between the plaintiff and the defendant as regards the defendant's alleged employment. It remains uncontested and unequivocal that there was an agreement between the parties that Omaha CC would pay the defendant's salary, if at all. Therefore the counterclaim fails.

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**ORDER**

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1. The defendant is ordered to pay the plaintiff an amount of N\$7 905 000 together with interest at the rate of three per cent per annum, calculated as of 7 June 2017 to 10 November 2021, plus, interest *a tempore morae* at the rate of 20 per cent per annum as of 11 November 2021 to date of final payment.
2. An order is made declaring that the plaintiff is entitled to cause the sale of the 51 per cent members interest of the defendant in Omaha Trading Enterprises CC, registration number CC/97/1047, to a Namibian at a market related price and to convey valid title in the members' interest to the purchaser. In doing so, the plaintiff shall at all times act reasonably as provided in the Law of Pledge and the defendant shall have the right to enforce this obligation in court.
3. The defendant's counterclaim is hereby dismissed.
4. The defendant must pay the plaintiff's costs of suit consequent on the employment of one instructing and one instructed counsel.
5. The matter is regarded as finalised and removed from the roll.

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**JUDGMENT**

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SCHIMMING-CHASE J:

Introduction

[1] In this action, the plaintiff, a German national, sues the defendant, a

Namibian national, for breach of a loan agreement. At the heart of the dispute is certain agricultural land as defined in the Agricultural (Commercial) Land Reform Act 6 of 1995 ('the Act'). This land is located in the Otjozondjupa region and is a commercial farm described as the remaining extent of Farm Omaha 98, measuring 4143 Hectares ('the Farm'). The Farm land is owned by a duly registered Namibian close corporation, Omaha Trading Enterprises CC ('Omaha CC').<sup>1</sup>

[2] The plaintiff owns 49 per cent and the defendant 51 per cent members' interest in Omaha CC.

[3] The relief sought by the plaintiff against the defendant is as follows:

- (a) payment in the amount of N\$7 905 000;
- (b) interest in the amount of N\$1 106 225,63 calculated on the aforesaid amount at the rate of three per cent per annum, calculated as from 7 June 2017 to 10 November 2021;
- (c) interest on the amount of N\$7 905 000, a *tempore morae* at the rate of 20 per cent per annum from 11 November 2021 until date of payment; and
- (d) an order declaring that the plaintiff may without further notice to the defendant cause all or any of the securities to be sold presently held in pledge by public auction or private treaty or to convey valid title in the securities to any purchaser thereof in satisfaction of the aforesaid debt in the event of the defendant failing to satisfy the judgment debt.

### The pleadings

[4] The plaintiff instituted this action against the defendant on 20 May 2022. In his particulars of claim, the plaintiff alleges that he and the defendant

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<sup>1</sup> With registration number CC/97/1047.

concluded a written loan agreement ('the loan agreement')<sup>2</sup> on 7 June 2017, in Germany, alternatively in Windhoek. The terms of the loan agreement, as well as the other agreements subsequently concluded between the parties are not in dispute, and are as follows:

(a) The plaintiff advanced an interest-bearing loan in the amount of N\$7 905 000 to the defendant ('Loan').<sup>3</sup>

(b) The loan would bear interest at a rate of three per cent per annum, calculated annually.<sup>4</sup>

(c) The loan plus interest would at the latest be redeemed upon the sale of the Farm, or upon the sale of defendant's entire share portion.<sup>5</sup>

(d) The plaintiff reserved his right to, contrary to clause 5.1, request the fixed annual payments from the defendant in the amount of N\$660 000, and he would inform the defendant at least six months before commencement of the fixed monthly payments.<sup>6</sup>

(e) The defendant is entitled to repay the Loan or instalments thereof at any time before the due date without any prepayment penalty.<sup>7</sup>

(f) The plaintiff and defendant are jointly involved in Omaha CC with registration number CC/97/1047. The shares in the capital of Omaha CC are split at a ratio of 51 per cent defendant to 49 per cent to the plaintiff. The business of the corporation is the investment in immovable property and the operation of a lodge.<sup>8</sup>

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<sup>2</sup> See 'Exhibit A'.

<sup>3</sup> Clause 1.

<sup>4</sup> Clause 4.

<sup>5</sup> Clause 5.1.

<sup>6</sup> Clause 5.2.

<sup>7</sup> Clause 5.3.

<sup>8</sup> Clause 6.1 and 6.2.

(g) As security for all claims which the plaintiff has, in terms of the agreement, the defendant pledges his entire members' interest of 51 per cent of Omaha CC including any rights to profit share / to profit withdrawals and any other monetary claims in the pledged business share.<sup>9</sup>

(h) Without the prior written consent of the plaintiff and as long as any of his claims secured by the defendant's pledge of his 51 per cent members' interest in the corporation remain outstanding or may still arise, the defendant is obliged not to dispose of the securities regarding his member's interest, to create any security rights or third party rights to the securities, nor to take or refrain from any actions with the aim or intention of resulting in the security no longer being valid or in any way being placed at risk or being jeopardised.<sup>10</sup>

(i) The plaintiff is entitled to realise the defendant's pledged 51 per cent members' interest in the corporation, should the defendant be in default with regard to the due repayment or interest on payments by at least two months.<sup>11</sup>

(j) Without being required to give further notice, the plaintiff has the right to realise the defendant's members' interest at his discretion and once the aforementioned requirements in clause 6 of the agreement have been met.<sup>12</sup>

(k) The plaintiff may terminate the agreement by complying with a notice period of six months and demand its immediate and full redemption. Upon the notice of termination, the loan together with all interest becomes due in one lump sum. Partial terminations are

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<sup>9</sup> Clause 6.2. and 6.3.

<sup>10</sup> Clause 6.5.

<sup>11</sup> Clause 6.6.

<sup>12</sup> Clause 6.7.



permitted.<sup>13</sup>

(l) If the defendant falls behind with payments which he owes in terms of the agreement, he will become liable for interest on the outstanding amount at a rate of nine percent above the relevant base rate, as published by the German Federal Bank in the Government Gazette.<sup>14</sup>

(m) The agreement would be subject to the laws of the Federal Republic of Germany.

(n) The place of performance of all payments is the relevant domicile of the plaintiff, which is AuBStock Weg, 31 Oberhaching, 82041 Germany.<sup>15</sup>

(o) Subsidiary agreements and amendments of the Agreement must be made in writing.<sup>16</sup>

(p) The plaintiff complied with all of his obligations in terms of the agreement.

[5] The plaintiff alleged that some four years later, and on 10 May 2021, he terminated the loan agreement under clause 7 and provided six months' notice for the immediate and full repayment of the loan together with interest on or before 10 November 2021.

[6] The basis for the termination, according to the plaintiff, is the defendant's breach of the agreement by failing to repay the loan together with the accumulated interest.

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<sup>13</sup> Clause 7.

<sup>14</sup> Clause 8.

<sup>15</sup> Clause 10.2.

<sup>16</sup> Clause 10.5.

[7] The defendant raised three special pleas (one of which was abandoned at the commencement of the trial) and instituted a counterclaim, however, the main gist of the defendant's defence as pleaded is that the loan agreement is an illegal agreement as it, in fact, entails that the plaintiff would have controlling interest in a commercial farm in contravention of the provisions of the Act.

[8] The counterclaim against the plaintiff is for failure by the plaintiff to pay the defendant's market related salary as agreed between the parties.

[9] The first special plea relates to one of short notice, namely, that the loan is not yet due and payable as yet. In this regard, the defendant pleads that clause 5.2, which gives the plaintiff the right to request the fixed annual payments of N\$660 000, prescribes that the defendant must first be given six months' notice of the plaintiff's intention to invoke the aforesaid clause and only after the expiration of the six-month period does computation of the annual payments begin to run. Thus, it is the defendant's plea that he is only in default after 18 months. The defendant further pleads that clause 7 of the loan agreement prescribes that once the six-month notice of termination is given; a further 12 months must pass for the lump sum to become due and payable.

[10] As such, the defendant's special plea is that the six-month notice period expired on 10 November 2021 and the 12-month period for payment of the annual amount would only expire on 10 November 2022. The action was instituted on 22 May 2022, being six months prematurely, according to the defendant. In any event, the defendant pleads that clause 5.2 requires rectification as there is an error on the monthly instalments that must be paid in view of the entire scheme of the loan agreement that it is for an indefinite period as per clause 2 of the agreement.<sup>17</sup>

[11] The second special plea is premised on the allegation that the loan agreement is an illegal contract. The defendant pleaded that its intended purpose constitutes an agreement that is contrary to the law, alternatively *contra bonis mores*, or further, that it is unenforceable given that it is in violation of the

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<sup>17</sup> There is no issue with rectification of clause 5.2.

law. This is premised on the clause 6, which deals with the defendant pledging his entire 51 per cent members' interest in Omaha CC (as security for the defendant's indebtedness in terms of the loan agreement). It is the defendant's case that by virtue of his pledge, he is surrendering the controlling interest in Omaha CC to the plaintiff, who is a German national and who cannot under the provisions of the Act, specifically s 58 thereof, acquire controlling interest in Omaha CC.

[12] The defendant raises the same issues on the merits as set out in his special pleas, which need no regurgitation, save to state that the defendant disputes the plaintiff's entire claim. What is not disputed, however, is that the defendant has not made any form of repayment of the loan to the plaintiff since 2017.

[13] As regards the counterclaim, it is pleaded that the parties concluded a written agreement ('the employment agreement') in terms of which the defendant would resign from his full-time employment and relocate to the Farm where he would take over the management and control of the operation of the lodge. In terms of the employment agreement, the plaintiff would pay the defendant's market related salary. The plaintiff would further provide the start-up capital to operationalise Omaha CC.

[14] The defendant alleged that he complied with the employment agreement having resigned from his full-time employment and relocated to the Farm, but that the plaintiff breached the agreement, having failed to pay the defendant a salary or a market related salary (of N\$25 000 per month). The defendant claimed a total amount of N\$730 000 as unpaid/outstanding salaries. The plaintiff allegedly also failed to provide the funds needed to operationalise the Farm.

[15] In his plea to the defendant's counterclaim, the plaintiff raised a special plea of prescription, pointing out that the defendant failed to allege when the employment agreement was concluded or when the alleged payment of salaries would commence. In this regard, the plaintiff alleged that the counterclaim was

delivered on 26 January 2023 and that any debt related to the alleged salary not paid by 25 January 2020 had become prescribed.

[16] On the merits, the plaintiff disputed an employment agreement and pleaded that the parties concluded an oral agreement in terms of which the defendant would be the managing member of Omaha CC and manage the operation of the Farm, whilst the plaintiff would provide the start-up capital. Whilst the plaintiff admitted that the defendant relocated to the Farm and that he did not pay any salaries, he disputed the employment agreement and that he was obliged to make any payments of salaries to the defendant.

### Evidence

[17] Each party testified in support of their case.

[18] The plaintiff testified that he is a German businessman with expertise in information technology and business. During August 2014, whilst on a family holiday in Namibia, he met the defendant while camping at a guest farm. They soon became friends. The defendant was employed at the guest farm that the plaintiff stayed at, at the time. During 2014, 2015 and 2016, the plaintiff and defendant became friends and he accompanied the plaintiff and his family on various tours which they had in Namibia.

[19] During these tours the defendant repeatedly expressed the wish to leave the employment of the guest farm due to the 'terrible employment conditions', and that he wanted to start his own business and be self-employed. The plaintiff, too, expressed an interest to invest in Namibia. Thereafter and at the beginning of 2017, the defendant started sharing information with the plaintiff, via WhatsApp, in respect of various farms for sale, which he wanted to purchase with the plaintiff.

[20] The plaintiff was amenable and it was discussed that the plaintiff would be the main investor, and he would provide the required capital. The defendant intended to obtain a loan from a financial institution as he did not have available

capital for such an investment.

[21] One of the farms that were for sale was the Farm, registered to Omaha CC. It was an operational guest farm which the plaintiff was interested in purchasing as it appeared to have a viable guest farm operation. It was intended and ultimately agreed that these services would be expanded by building camp sites, undertaking renovations of the farmhouse and possibly building a road or hiking routes. Thus, the parties agreed that a commercial guest farm would be run on the Farm.

[22] According to the plaintiff, he and the defendant discussed entering into a business relationship where he would purchase 49 per cent members' interest in Omaha CC, and the defendant 51 per cent members' interest. The plaintiff emphasised that it was always clear that the defendant would own the majority of the members interest.

[23] The defendant made enquiries with various financial institutions for financing his purchase of 51 per cent members' interest. The plaintiff also offered to lend the necessary funds at lower rate than the Namibian financial institutions offered at the time.

[24] The plaintiff stated that it was at all times important to him that any loan from him to the defendant would have to be repayable by him on demand, should the business venture not pan out, or should they no longer see eye to eye, or should they opt to sell the Farm. This was not only discussed with, but formed part of the salient terms of the loan agreement concluded between the parties.

[25] On 29 May 2017, the plaintiff and defendant entered into an agreement of sale to purchase Omaha CC for the amount of N\$14 900 000 from the erstwhile owners. The sale agreement was concluded and signed on the basis that the defendant purchased 51 per cent and the plaintiff purchased 49 per cent of the members' interest.

[26] The transfer of the members' interest in Omaha CC took place on 6 June 2017 already, as the plaintiff had already advanced the funds to the defendant in terms of the loan agreement by then. The plaintiff testified that he requested the defendant to have an independent and qualified person to review the loan agreement to ensure that the defendant understood its terms prior to him signing the agreement. The plaintiff is unsure whether the defendant took such advice.

[27] Subsequent to the signature of the loan agreement and on 7 June 2017, the parties also concluded an association agreement as it relates to the management of Omaha CC. The relevant terms of the association agreement were that the defendant would manage the business and affairs of Omaha CC, and for such purposes, would receive a salary from Omaha CC. It was also a term of this agreement that the plaintiff would provide a loan to Omaha CC.

[28] The plaintiff testified that the amount of the defendant's salary was purposefully left blank by the parties as it was to be negotiated and agreed. Whether a salary would be payable and the amount thereof would depend on the specific business operations to be conducted on the Farm, as the parties agreed. The plaintiff emphasised that any salary for the defendant would be paid by Omaha CC.

[29] The plaintiff testified that he and the defendant on various occasions discussed the possibility of him receiving a salary from Omaha CC. The plaintiff was apparently not opposed to the idea, but the exact amount needed to be negotiated and agreed upon between the two as members. The plaintiff stated that before the final signature of the association agreement, the defendant advised that he was of the opinion that Omaha CC would be generating significant profits, which would be more than sufficient to sustain his livelihood. The defendant also expressed that this arrangement would lessen his tax obligations. This was also a reason why the amount was purposefully left blank.

[30] According to the plaintiff and during the period from 2017 to 2021, he repeatedly loaned money to Omaha CC for running costs, and in order to

expand the business, including for the building of camp sites, renovations of the farmhouse and for charcoal production. The plaintiff presented a schedule of additional payments made by him to Omaha CC dated 17 February 2022. According to this, the plaintiff loaned a total of N\$2 025 869,75 which I summarise as follows:

- (a) N\$120 000 initial starting costs paid on 31 August 2017;
- (b) N\$161 395,50 running costs paid on 28 November 2017;
- (c) N\$288 494,25 costs for charcoal production paid on 21 May 2018;
- (d) N\$97 990,00 funding for camp sites paid on 25 September 2018;
- (e) N\$120 000 costs for drilling new boreholes paid on 15 January 2019;
- (f) N\$35 000 running costs paid on 27 February 2019;
- (g) N\$65 000 an allowance for a new farm car paid on 18 March 2019;
- (h) N\$157 100 running costs paid on 5 April 2019;
- (i) N\$143 190 further funding for camp sites paid on 20 June 2019;
- (j) N\$49 080 running costs paid on 24 September 2019;
- (k) N\$35 000 running costs paid on 5 December 2019;
- (l) N\$32 000 running costs paid on 28 January 2020;
- (m) N\$45 000 running costs paid on 24 February 2020;

- (n) N\$79 600 running costs paid on 4 May 2020;
- (o) N\$35 000 running costs paid on 12 October 2020;
- (p) N\$70 000 running costs paid on 30 October 2020;
- (q) N\$10 000 running costs paid on 4 January 2021;
- (r) N\$15 000 running costs paid on 19 January 2021;
- (s) N\$20 000 running costs paid on 26 January 2021;
- (t) N\$97 020 running costs paid on 08 February 2021;
  
- (u) N\$15 000 funds for salaries and maintenance paid on 12 April 2021;
  
- (v) N\$59 000 funds for salaries and maintenance paid on 13 April 2021;
  
- (w) N\$60 000 funds for salaries and maintenance paid on 29 June 2021;
  
- (x) N\$110 000 running costs paid on 30 July 2021;
  
- (y) N\$20 000 running costs paid on 29 September 2021;
  
- (z) N\$30 000 running costs paid on 2 November 2021;
  
- (aa) N\$26 000 funds for salaries paid on 1 December 2021; and
  
- (bb) N\$30 000 funds for salaries paid on n 10 January 2022.

[31] According to the plaintiff, running costs included salaries for farm



workers. The plaintiff stated that according to his knowledge, the defendant misappropriated funds and used same for private purposes. He referred to an amount of N\$97 020 for running costs paid on 8 February 2021, and the amount of N\$241 180 allocated for the building of campsites as there are still no functioning campsites on the Farm.

[32] Further to that and when reconciling Omaha CC's bank account, the plaintiff found numerous transfers of funds for unknown purposes and it appeared that the defendant repeatedly used the funds of Omaha CC for private purposes.

[33] This resulted in a deterioration of the business relationship. On or about 27 March 2021, the plaintiff and his wife visited the Farm to inspect the business operations. When the defendant was confronted with the unauthorised use of Omaha CC's funds, the defendant threatened to fetch his gun and shoot to kill both the plaintiff and his wife. They immediately left the Farm and the plaintiff decided to terminate the business relationship. This was promptly and formally done on 10 May 2021 in terms of clause 7 of the loan agreement, as testified to by the plaintiff.<sup>18</sup>

[34] The plaintiff testified that an offer was made in a letter dated 10 May 2021, for the defendant to conclude a call option agreement<sup>19</sup> with the plaintiff, in terms of which the defendant's 51 per cent members' interest could be purchased by the plaintiff's nominee, and another Namibian citizen. According to the plaintiff, this offer was accepted by the defendant and the call option agreement was signed on 19 May 2023 together with a power of attorney (POA). A material term thereof was that the defendant agreed to vacate the Farm immediately, and that the plaintiff would pay him N\$300 000 for providing the option. The plaintiff duly paid this amount to the defendant.

[35] Despite initially complying with the option agreement by vacating the Farm, the defendant later repudiated the option agreement and returned to the

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<sup>18</sup> These events are disputed, but nothing turns on this.

<sup>19</sup> See 'Exhibit F'.

Farm in November 2021. He then terminated his POA on 26 January 2022, so the plaintiff testified. The plaintiff further stated that notwithstanding the defendant's repudiation of the option agreement, he also had failed to repay the N\$300 000 paid to him by the plaintiff.

[36] Ultimately, it is the plaintiff's testimony that Omaha CC has failed to generate any profit and the defendant has failed to repay the loan and interest under the loan agreement.

[37] None of the agreements or their terms are disputed. The material terms of the loan agreement are common cause between the parties. It is not disputed that in addition to the loan to the defendant, the plaintiff disbursed over N\$2 million into the business. More importantly, it is not in dispute that to date, no income was generated at the Farm, as a lodge.

[38] Under cross-examination, it was put to the plaintiff that the pledge by the defendant in the loan agreement and the association agreement effectively makes the plaintiff beneficial owner of the 51 per cent members' interest of the defendant. The plaintiff denied this and stated that the pledge served as security for the loan in terms of clause 2 of the loan agreement. He made it clear that he would receive no ownership of the pledged members' interest. The intention was to help the defendant to build a profitable business together with the plaintiff, but to still secure his investment. The defendant would earn the income through the day-to-day management and control of the business of the lodge at the Farm, which the defendant told the plaintiff he was willing and able to do. The plaintiff made it clear that he was not a farmer and relied on the defendant's expertise in this regard. This is in any event a question for the court to determine as a matter of law, as I set out below.

[39] When questioned about how he knew that he could only own up to 49 per cent of the members' interest in Omaha CC, the plaintiff testified that he became aware of the provisions of the Act during negotiations with the defendant. He was clear that a foreigner was not permitted to own a controlling interest in a corporation that owns agricultural land. The plaintiff testified that

there was never an intention to flout the law.

[40] The plaintiff did not dispute in cross-examination that the defendant was entitled to a salary, but he stated that the salary would in any event come from Omaha CC and not from him. He reiterated that when they held discussions about salary, the defendant came up with the idea that the new enterprise would be profitable for him to live from profits instead of a salary. In any event, according to the plaintiff, the defendant lived well from the money that the plaintiff invested for running costs. The plaintiff mentioned that there was never a proper account rendered by the defendant as to how the money was spent, apart from the farm workers' salaries. No financial information was provided by the defendant, who was to manage the business while the plaintiff remained in Germany.

[41] Cross-examination veered into areas that were either not pleaded, alternatively not relevant to the defendant's claim. By way of example, it was put to the plaintiff that the loan agreement was a simulated transaction. Not only is this not pleaded, but it does not appear in the pre-trial order. The plea was that the agreement was illegal and in contravention of the provisions of the Act, and thus, unenforceable.

[42] The defendant's case is this. He met the plaintiff sometime during 2015 and the following year, the plaintiff approached him and expressed an interest in purchasing the Farm. The defendant informed the plaintiff that he did not have the financial means to venture into this, but the plaintiff was insistent that they purchase the Farm, together. He advised the plaintiff on numerous occasions that the profitability of the lodge would be difficult to obtain given the competition but the plaintiff said that profitability need not concern the defendant.

[43] The plaintiff then began negotiating with the Farm's erstwhile owners without the defendant's input and was informed by the plaintiff that he would own 51 per cent of the members' interest, while the plaintiff would own 49 per cent in Omaha CC.

[44] During May 2017, the parties commenced with negotiations. The plaintiff informed the defendant that he would lend him the money to acquire the 51 per cent members' interest and that the defendant would have to repay the loan out of his income from Omaha CC. According to the defendant, during these negotiations, the plaintiff indicated to him that they would set up a salary for the defendant as managing member of Omaha CC, but that this was never done.

[45] He testified that on 7 June 2017, he signed the association agreement and in August 2017, he moved to the Farm where he has been residing since. He testified that upon receipt of his pension from his previous employer, in the amount of N\$1,5 million, he invested the same into the daily operations of Farm.<sup>20</sup> On 17 May 2018, the plaintiff undertook to make the Farm profitable and started providing funds for this purpose.

[46] The defendant testified further that in the beginning of 2017, his relationship with the plaintiff began deteriorating because he was struggling to make ends meet given that he was not receiving a salary. The defendant testified that he received an email from the plaintiff on 23 April 2021 and was informed of the call option agreement and that the plaintiff would pay him a once-off payment of N\$300 000 upon his signing of the agreement. Subsequently, he received the termination letter on 10 May 2021. He agreed to the terms of the call option agreement on 12 May 2021 (and signed on 19 May 2021), which are as follows:

(a) The plaintiff would immediately pay to the defendant N\$300 000 upon conclusion of the agreement (and the annexures thereto).

(b) The plaintiff would have the right to call on the purchase of the defendant's 51 per cent members' interest either in a single or in various transactions and at the price of the loan together with interest.

(c) Any funds paid for the defendant's 51 per cent members' interest shall be first set off against the loan and interest.

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<sup>20</sup> No documentation was provided to this effect.

(d) Should the plaintiff offer to purchase the defendant's 51 per cent members' interest at an amount higher than the amount owed by the defendant for the loan and accumulated interest or should the plaintiff cede his rights to a third party in exchange for a higher purchase consideration to be paid then the excess amount would be paid to the defendant when the sale agreement is concluded.

[47] There was no cross-examination of the defendant.

[48] Before I consider the parties' arguments, it is apposite that I reiterate that there is no dispute that the parties concluded the loan agreement with its salient terms.<sup>21</sup> I am also alive to the fact that the parties do not dispute the rectification of 'monthly' payments in clause 5.2 to 'annual' payments.<sup>22</sup> In fact, there is no dispute regarding the signature by the parties of all agreements, as well as the termination of the call option agreement by the defendant.

[49] As regards the special pleas, the defendant raised a special plea that the plaintiff's claim is premature under clause 5.2 of the loan agreement<sup>23</sup> in that the clause requires that the plaintiff must first give notice for the annual payments to be made and after six months lapse, the annual payments would be due. It is only after 12 months have lapsed, according to the defendant that he would be in default.

[50] Mr Rukoro, appearing for the defendant, argued that if notice to pay the annual payments was made on 10 May 2021, the six-month notice period would only lapse on 10 November 2021, at which point the annual payment starts running. If by 10 November 2022, no payment was made, the defendant would

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<sup>21</sup> See paras 1.2 and 1.6 of the pre-trial order of 10 July 2023.

<sup>22</sup> See para 15 of the pre-trial order of 10 July 2023.

<sup>23</sup> The clause reads as follows: 'The Lender (plaintiff) reserves his right to, contrary to clause 5(1), request fixed annual payments from the Borrower (defendant) to the amount of N\$ 600'000.00. He shall inform the Borrower of this intention at least six months before commencement of the fixed monthly payments. In this case payments are also firstly set off against the accumulated interest and lastly against the principal loan'.

be in default. Given that the action was instituted on 10 May 2022, the defendant is of the view that there is non-compliance with clause 5.2 read with clause 7<sup>24</sup> of the loan agreement, which prescribes an additional six-month notice period for termination.

[51] Mr Barnard, appearing for the plaintiff, argued that the defendant conflates the provisions of clause 5.2 and 7, and misinterprets the aforesaid provisions. Counsel argued that clause 5.2 is irrelevant in this instance as clause 7 was invoked by the plaintiff to terminate the agreement. In this regard, it was argued by counsel that clause 5.2 merely entitles the plaintiff to seek annual payments, whereas clause 7, on the other hand, entitles the plaintiff to terminate the loan agreement and demand repayment in a lump sum. Mr Barnard argued that the aforementioned clauses do not find application within one another and should the defendant's interpretation be accepted, the provisions would become 'superfluous'. In this regard, it was argued that when one interprets a document, it must be presumed that each word used was inserted for a purpose, as superfluity or tautology of language is not presumed.<sup>25</sup>

[52] No relevant authority has been presented to the court by the defendant in substantiating his argument. I am inclined to agree with Mr Barnard that there is conflation of the two clauses by the defendants. Moreover, it is undisputed that the loan agreement was terminated under clause 7, which entitled the plaintiff to give notice of termination subject to a six-month notice period. I cannot find, on the evidence presented, that clause 5.2 was invoked by the plaintiff in this instance, and therefore, I cannot find that notice must have been given to the defendant to pay the amount of N\$660 000 and that 12 months must lapse until the defendant is in default, and that, thereafter the six-month period under clause 7 may be invoked. It must also be considered, as argued by Mr Barnard,

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<sup>24</sup> This clause reads as follows: 'The Lender (plaintiff) may terminate the loan by complying with a notice period of 6 months and demand its immediate and full redemption. Upon notice of termination, the loan and interest becomes due in one lump sum. Partial terminations are permitted'.

<sup>25</sup> *Wellworths Bazaars Ltd v Chandler's Ltd and Another* 1947 (2) SA 37 (A) at 43 cited with approval in *Egerer and Others NO v Executrust (Pty) Ltd and Others* 2018 (1) NR 230 SC at 242 para 39.

that on the facts adduced, the defendant accepted the termination without raising the issue of the two clauses. I accordingly dismiss the first special plea.

[53] I turn to the next special plea, also dealt with in the plea on the merits, that the loan agreement is an illegal agreement. This defence was set out in the pre-trial order of 10 July 2023 as follows:

‘3.10 Whether the only object of the loan agreement was to enable the defendant to acquire 51% in the corporation which has 100% membership interest in and to Farm Omaha CC, only to pledge same over to the plaintiff.

3.11 Whether the loan agreement and the pledges made by the defendant therein resulted in the plaintiff acquiring controlling interest in Farm Omaha CC no. 98 contrary to and in violation of section 58 of the Agricultural Land Reform Act no. 6 of 1995.’

[54] Before I consider the issue, I must deliberate on the provisions of the loan agreement. At clause 6.2 of the loan agreement,<sup>26</sup> the defendant pledged his 51 per cent members’ interest in Omaha CC as security for the plaintiff’s claim under the agreement. The defendant is obliged not to dispose of any securities in the members’ interest, or to create any security or third party rights to the securities, alternatively risk the securities.<sup>27</sup> Clause 6.6 reads as follows:

‘The Lender (plaintiff) is entitled to realize the pledged shares, should the Borrower (defendant) be in default with regard to the due repayments or interest payments by at least 2 months. The applicability of § 1277 BGB is excluded, which implies that no enforceable title is necessary for the realisation of the pledged securities. The realization is only admissible once the Lender (plaintiff) has given an ultimatum of one month with regard to the realization of the corporate rights, and once this notice period has expired. The notice and deadline is however not valid if the Borrower (defendant) has become commercially insolvent or an insolvency

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<sup>26</sup> This clause reads as follows: ‘As security for all claims which the Lender (plaintiff) has in terms of the Loan Agreement, the Borrower (defendant) herewith pledges his entire share of 51% in the capital in OMAHA TRADING ENTERPRISES CLOSE CORPORATION (Reg. No CC/97/1047. Namibia)’.

<sup>27</sup> See clause 6.5 of the loan agreement.

procedure has been initiated with regard to his estate; the same applies if the Borrower (defendant) has filed for insolvency or insolvency proceedings have been initiated by a third party. The Lender (plaintiff) is neither obliged to first institute legal action against the Borrower (defendant) nor to have to provide him with further securities. The Borrower (defendant) waives his rights in terms of § 1224 and §§ 1211, 770 BGB.' (Emphasis supplied.)

[55] There is no gainsaying that the plaintiff is entitled to realise the members' interest at his discretion once the relevant prerequisites have been met, without any further notice being required, under clause 6.7 of the loan agreement. It may be recalled that the parties are *ad idem* that the defendant pledged his entire 51 per cent members' interest in Omaha CC to the plaintiff. There is also no dispute that the call option agreement and sale of members' interest agreements were concluded between the parties on 19 May 2021.<sup>28</sup>

[56] Mr Rukoro argued that, at the time of pledging his members' interest in Omaha CC wholly to the plaintiff, the defendant pledged any right to profit share in Omaha CC. In this regard, counsel argued that given the pledge, the defendant was left financially destitute and could not service the loan between the parties, thus, allowing the plaintiff 'to gain control over the corporation and by extension' the Farm. It is counsel's contention, as I have it, that by the mere fact that the plaintiff has not sold his members' interest, he *de facto* owns one hundred per cent members' interest in Omaha CC, which offends s 58 of the Act.

[57] Mr Barnard argued that the defendant incorrectly understands the import and effect of the pledge as set out in the loan agreement as well as the provisions of s 58 of the Act. I will consider the issue of the pledge.

[58] Joubert and Faris<sup>29</sup> define a pledge as 'a limited real right of security in a movable asset, created by delivery of the asset to the pledgee pursuant to an agreement between himself and the owner of the asset, by which it is sought to

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<sup>28</sup> See paras 1.15 and 1.17 of the pre-trial order of 10 July 2023.

<sup>29</sup> Joubert, WA. Faris JA. *The Law of South Africa* 2 ed (2008) at 365 paras 405-506.



secure the fulfilment of an obligation due to the pledgee by the pledgor, or some third party'. In other words and in this instance, the plaintiff does not acquire ownership of the defendant's members' interest, but merely holds the same as means of security. To put it simply, a pledge can have the same characteristics of a mortgage in that it contains contractual and hypothecary aspects.<sup>30</sup> Joubert and Faris further opine that:

'It is of an accessory nature, and does not, in principle, afford the pledgee the use and enjoyment of the pledged asset, the right serving merely to ensure the satisfaction of the pledgee's claim under the principal obligation by earmarking the asset and its proceeds for this purpose. To this end the pledgee enjoys a preference to the proceeds of the pledged asset upon the insolvency of the pledgor.' (Emphasis supplied.)

[59] Dealing with the rights and duties of the parties regarding pledges, Silberberg and Schoeman<sup>31</sup> opine as follows:

'With the delivery of the object, a limited real right is vested in the pledgee. This limited real right does not enable the pledgee to become owner through prescription, nor does the pledged object fall within the pledgee's insolvent estate in the case of his or her insolvency. The pledgee is in possession of the pledged object for security reasons ... The pledgee is not permitted to use it for his or her own purposes without authority from the pledgor ...'

[60] It is, thus, clear that a pledge does not entail ownership of a property, but merely security for the pledgee. In this instance, the 51 per cent members' interest pledged by the defendant does not connote that the plaintiff is the owner of such 51 per cent members' interest.

[61] Turning to the interpretation of s 58 of the Act; s 58(1) prescribes explicitly that no foreign national – as in the case of the plaintiff – shall have the right to, inter alia, acquire agricultural land through the registration and transfer of ownership without the Minister's prior written consent. Section 58(2) provides

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<sup>30</sup> Ibid.

<sup>31</sup> Badenhorst, PJ. Pienaar JM, Mostert H. *The Law of Property* 5 ed at 393.

further that 'if the controlling interest in any ... close corporation which is the owner of agricultural land passes to any foreign national, it shall be deemed, for the purposes of subsection (1)(a), that such ... close corporation acquired the agricultural land in question on the date on which the controlling interest so passed'. Under s 1(b) of the Act, the term 'controlling interest' is defined as being more than 50 per cent of interest in the close corporation. (emphasis added)

[62] It is correctly pointed out by Mr Barnard that the plaintiff would be in contravention of the Act should he have acquired more than 50 per cent members' interest in Omaha CC as s 58 prohibits the plaintiff from acquiring the controlling interest in a close corporation. The plaintiff was also clear that he understood the restrictions within which he could own agricultural land in Namibia, at the outset.

[63] Counsel, however, argued that a mere transfer of the members' interest in a close corporation does not amount to the registration of the amended founding statement and that for transfer of the members' interest to take place, the same must be 'passed'. In this regard, counsel's submission is that no transfer or cession of ownership of the defendant's members' interest has taken place. I agree with this assessment by counsel.

[64] Mr Barnard also argued that the plaintiff made it clear that he has no intention to contravene the provisions of the Act and that he would not be able to purchase the 51 per cent members' interest, unless he obtains ministerial consent. It is argued by counsel that, in fact, the plaintiff has made it clear that he intends to dispose of his 49 per cent members' interest in Omaha CC and that he has identified a prospective purchaser.

[65] In dealing with the enforcement of the pledge, Mr Barnard argued that clause 6 of the loan agreement provides that the defendant would pledge his 51 per cent members' interest to the plaintiff. Under clause 6.6,<sup>32</sup> there was no

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<sup>32</sup> Clause 6.6 reads that 'the Lender (plaintiff) is entitled to realize the pledged shares, should the Borrower (defendant) be in default with regard to the due repayments or interest payments by at

need for litigation by the plaintiff to realise the members' interest and the plaintiff is entitled to realise the members' interest to his discretion.<sup>33</sup>

[66] Under clause 3.1 of the call option agreement, it was agreed between the parties that at the date of the signature, the defendant would grant to the plaintiff (and/or his successors-in-title) the option to purchase the members' interest in full or part thereof following the occurrence of a call option event<sup>34</sup> and/or on written notice by the plaintiff to the defendant.

[67] Mr Barnard argued that the passing of 50 per cent members' interest in a

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least 2 months. The applicability of § 1277 BGB is excluded, which implies that no enforceable title is necessary for the realisation of the pledged securities. The realization is only admissible once the Lender (plaintiff) has given an ultimatum of one month with regard to the realization of the corporate rights, and once this notice period has expired. The notice and deadline is however not valid if the Borrower (defendant) has become commercially insolvent or an insolvency procedure has been initiated with regard to his estate; the same applies if the Borrower (defendant) has filed for insolvency or insolvency proceedings have been initiated by a third party. The Lender (plaintiff) is neither obliged to first institute legal action against the Borrower (defendant) nor to have to provide him with further securities. The Borrower (defendant) waives his rights in terms of § 1224 and §§ 1211, 770 BGB'.

<sup>33</sup> Clause 6.7 of the loan agreement.

<sup>34</sup> Clause 1.2.4 defines a 'call option event' as the occurrence of any of the following events: (1) if issuer (defendant) dies; (2) if action is instituted against the issuer (defendant) in any court of law; (3) if the issuer (defendant) commits an act akin to an act of insolvency under s 8 of the Insolvency Act 24 of 1936; (4) if sequestration proceedings are launched against the issuer (defendant) and/or issuer (defendant) is sequestered; (5) issuer (defendant) is insolvent or is provisionally or finally sequestered; (6) issuer (defendant) fails to pay on the due date (or any extension of such date) any material debt owing to any creditor, and the issuer (defendant) is unable to provide reasonable proof, within three days of being requested in writing by any party to do so, of good cause for such non-payment; (7) any asset/s of the issuer (defendant) is/are attached under a writ of execution issued out of any court, and the issuer (defendant) fails, within 30 days of the date upon which such attachment came to the notice of the issuer (defendant), to take the necessary steps to have such attachment set aside or thereafter fails to pursue such steps expeditiously and diligently; (8) the issuer (defendant) enters into or attempts to enter into any compromise, composition or arrangement with her creditors generally; (9) regardless of the occurrence of any other event listed above, the subscriber (plaintiff) in its sole and unfettered discretions issuing a call notice to the issuer (defendant) in writing informing the issuer (defendant) that the subscriber (plaintiff) is desirous of exercising the call option.

close corporation to a foreign national amounts to violation of the Act, but the conclusion of the call option agreement, as in this instance, does not result in contravening s 58, though possibly having the effect that it may be unlawful in its implementation. In this regard, counsel relied on the decision of *Bahlsen v Nederlof and Another*<sup>35</sup> which facts are similar to that of the present instance.

[68] In dealing with whether the court may grant an order transferring the opposing respondent's members' interest to a third party, Damaseb JP held the following:

'The applicant seeks a further order that the 50% membership interest in the second respondent held by the first respondent be transferred to Cooper for the sum of N\$50 in terms of the "option". Paragraph (c) of ss (2) of s 36 empowers the Court ordering cessation of membership "as it deems fit", to make an order in regard to any "any other matter regarding the cessation of membership which the Court deems fit." This is a very wide discretion given to the Court. I think the discretion given in para (c) is wide enough to pass transfer to a person who is not a member of the second respondent. Even if I am wrong in this, my exercise of the discretion in this way *in casu* is made possible by the fact that the parties themselves had agreed that the applicant could cede the 50% membership of the first respondent to a non-member.'<sup>36</sup>

[69] As I have it, the plaintiff's case is that he loaned N\$7 905 000 to the defendant which is undisputed. The plaintiff and defendant would purchase the members' interest in Omaha CC (49 per cent to the plaintiff and 51 per cent to the defendant). It remains common cause that in terms of the loan agreement, the defendant would pledge his 51 per cent to the plaintiff and in default of repayment by the defendant, the plaintiff would be entitled to realise the defendant's pledged members' interest. It is undisputed that the defendant failed to repay the loan amount to the plaintiff and the parties concluded a call option agreement in terms of which the plaintiff would be able to purchase the 51 per cent members' interest from defendant for N\$300 000 and that the plaintiff would then realise such members' interest by selling the same to a recognised

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<sup>35</sup> *Bahlsen v Nederlof and Another* 2006 (2) NR 416 (HC).

<sup>36</sup> *Ibid* at 428H-429A para 47.

third party in compliance with provisions of the Act.

[70] It is my view that given the evidence and the undisputed facts, the defence raised by the defendant is unsubstantiated. It seems to me that there is no direct violation of s 58 of the Act on the part of the plaintiff, as presented by the defendant. This is more apparent given the fact that the plaintiff seeks a declaratory order to enable him to sell the pledged members' interest to a Namibian. The defendant does not dispute that he has not repaid a cent. To my mind, the plaintiff's claim must succeed. There is no other way to obtain repayment of the loan.

[71] I now turn to the issue of the counterclaim. As I have expressed above, the defendant seeks payment of N\$730 686 for outstanding salaries owed to him by the plaintiff. He premises this claim on an alleged written employment agreement concluded between the parties. No documentary or other evidence was presented on this issue. I hasten to add that the plaintiff raised the issue of prescription in that the defendant failed to plead when the salaries, if any, were due and that any payment, if any, prior to 25 January 2020 have become prescribed. I do not see the need to consider this special plea given the order I intend to make as regards the defendant's counterclaim.

[72] The plaintiff did not dispute that there was an agreement that the defendant would be paid a monthly salary. What is in dispute, though, is whether the plaintiff or Omaha CC was to pay the monthly salary, and further, how much the salary was. Mr Rukoro also submitted that the parties are *ad idem* that the defendant would be remunerated for 'managing the affairs of the corporation'.

[73] Mr Barnard argued that the defendant failed to evince to the court that there was ever a written agreement concluded between the parties and merely attaches email correspondences to evince same. He, however, submitted, rightfully so, that the plaintiff testified that the defendant, as managing member, would receive a salary from Omaha CC as agreed between the parties. This testimony was left uncontested by the defendant during cross-examination, or

so Mr Barnard argued.

[74] I have considered the evidence and arguments as it relates to the defendant's counterclaim and I find that no written or oral agreement could have existed between the plaintiff and the defendant as regards his alleged employment. It remains uncontested and unequivocal that there was an agreement between the parties that Omaha CC would pay the defendant's salary. Although, the defendant raises that argument that the moneys paid to Omaha CC did not include moneys to pay his salaries, it remains, in my view, that Omaha CC would pay his salary and not the plaintiff. One must not forget that the plaintiff, in this instance, enjoys the privileges of the 'corporate veil'.

[75] The counterclaim is also dismissed in light of the foregoing.

### Conclusion

[76] I have found for the reasons advanced that the plaintiff must succeed in his claim, and that the counterclaim must be dismissed. I believe the declaratory relief is a bit wide, as submitted by Mr Barnard, and, thus, I make the following order:

1. The defendant is ordered to pay the plaintiff an amount of N\$7 905 000 together with interest at the rate of three per cent per annum, calculated as of 7 June 2017 to 10 November 2021, plus, interest a tempore morae at the rate of 20 per cent per annum as of 11 November 2021 to date of final payment.
2. An order is made declaring that the plaintiff is entitled to cause the sale of the 51 per cent members interest of the defendant in Omaha Trading Enterprises CC, registration number CC/97/1047, to a Namibian at a market related price and to convey valid title in the members' interest to the purchaser. In doing so, the plaintiff shall at all times act reasonably as provided in the Law of Pledge and the defendant shall have the right to enforce this obligation in court.

3. The defendant's counterclaim is hereby dismissed.
4. The defendant must pay the plaintiff's costs of suit consequent on the employment of one instructing and one instructed counsel.
5. The matter is regarded as finalised and removed from the roll.

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E M SCHIMMING-CHASE  
Judge

APPEARANCES

PLAINTIFF:

P C I Barnard

Instructed by Cronjé Inc, Windhoek

DEFENDANT:

S M Rukoro

Instructed by Jerhome Tjizo & Co Inc.,  
Windhoek