



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1372/2016

In the application between:

DEVELOPMENT BANK OF NAMIBIA

PLAINTIFF

and

NAME NOVE CONSTRUCTION CC

1ST DEFENDANT

KORNELIA MAKENA THIMENDE

2ND DEFENDANT

PAULINUS MUNIKA THIMENDE

3RD DEFENDANT

Neutral citation: *Development Bank of Namibia v Name Nove Construction CC* (I 1372/2016) [2017] NAHCMD 189 (14 July 2017)

Coram: UNENGU AJ

Heard: 14 March 2017

Delivered: 14 July 2017

Flynote: Contract – offer and acceptance – First defendant entered into an agreement for a loan with the plaintiff – Second defendant signing agreement on behalf of first defendant without attaching any condition or raising any counter-offer to plaintiff's offer – However, after participating in the implementation of and

benefiting from the agreement, first defendant denied that any valid agreement came into existence because of lack of consensus – First defendant alleged further that no agreement was concluded because plaintiff paid the money to a wrong supplier – Court found that a valid agreement was concluded between the plaintiff and the first defendant and granted plaintiff the relief sought in the particulars of claim.

Summary: The plaintiff entered into an agreement with the first defendant whereby the plaintiff lent money to the first defendant. The parties duly signed the agreement without any conditions attached on behalf of the first defendant, also without any counter – offer from the first defendant. The plaintiff has complied with its obligation in terms of the agreement by paying the supplier identified by the first defendant. However, the first defendant after participating in the implementation of the agreement and benefiting from the agreement – when sued by the plaintiff to pay the loan back, raised lack of consensus alternatively breach of contract as defences. The court held that the defences raised by the first defendant are not bona fide but fake and a pure subterfuge to evade their obligation in terms of the agreement. Court held that the offer was accepted by the first defendant unequivocally, therefore, a contract was concluded. Court further held that plaintiff proved its claim against the first defendant on the balance of probabilities and ordered the first defendant to pay the relief sought in the particulars of claim jointly and severally, one pays the others absolved.

ORDER

- (i) The first, second and third defendants are jointly and severally, the one paying the other to be absolved, ordered to pay the plaintiff N\$2 147 176.29.

- (ii) Compound interest on the said amount at the rate of 11.50 per annum calculated on a daily basis and compounded monthly as from 31st March 2015 to date of payment as agreed to between the parties.
 - (iii) Penalty interest at a rate of 2% per annum compounded monthly from the due date to date of payment to the plaintiff.
 - (iv) The counter-claim of the defendants with its alternative is dismissed.
 - (v) Cost of the suit.
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JUDGMENT

UNENGU AJ:

Introduction

[1] In this matter, the plaintiff (Development Bank of Namibia) by means of a Combined Summons, is claiming from the first, second and third defendants jointly and or severally the one paying the other to be absolved payment in the amount of N\$2 147 176.29 compound interest on the said amount at the rate of 11.50% per annum calculated on a daily basis and compounded monthly as from 31 March 2015 to date of payment as agreed to between the parties, penalties interest at a rate of 2% per annum compounded monthly from the due date to date of payment, cost of suit and further and or alternative relief.

Background

[2] The Kavango Regional Council awarded a tender no. KRC DUE (EO 106/2014/2015 to the first defendant to supply and to deliver furniture to schools. By letter dated 20 January 2015 Council informed the first defendant that at its 26th meeting of 2014/2015 financial year, held on 14 January 2015, the members of the full Economizing Committee, resolved to award the tender with a total price of N\$3 061 300.00 to the first defendant, subject to the following conditions:

- '(i) The acceptance of the offer, of a contract and agreeing to terms and conditions set out in the tender document;
- (i) The completion of the project within three months from the date of receipt of the Official Purchase Order.'

[3] The Purchase Order and Claim Form, was issued on the same day, namely 14 January 2015 and signed by the Central Administrative Officer on behalf of the Regional Council. However, it is not clear when the Council's letter was received by the defendants. What is clear, though, is that the defendants responded by seeking financial assistance from the Development Bank of Namibia when the second defendant on behalf of the first defendant applied and submitted such an application to finance the tender.

[4] After the approval of the application for financing by the Bank, the third defendant, on behalf of the first defendant and Martin Inkumbi in his capacity as the Chief Executive Officer of the plaintiff concluded a written agreement in terms of which the plaintiff granted a loan to the first defendant in the amount of N\$1 875 554.00. This amount was paid into First National Bank, Windhoek branch, account No. 62245149150 of which Furnitech Namibia was the account holder.

[5] The banking details of Furnitech Namibia branch was provided by the second defendant which is now an issue between the parties. The first defendant contends that the second defendant lacked authority to sign documents on behalf of the first defendant while the plaintiff is of different views that she did have such authority. More about that, later in the judgment. Not the second defendant alone had signed documents on behalf of the first defendant, Jerry (the son of the second and third defendants) also did.

[6] The upshot of the payment of the money into Furnitech Namibia account with First National Bank was that the first defendant failed to honour its obligation with the Kavango Regional Council in full and as a consequence, the Regional Council cancelled the contract with the first defendant to supply the remainder of the stock.

The effect of which is that the first defendant was not paid the tender price which it could have used to repay the loan with the plaintiff.

[7] Following the loss of the contract with the Regional Council, the first defendant was unable to repay the loan. Repayment was not possible even though an extension of time within which to pay back the money was granted to the first defendant by the plaintiff, resulting in the plaintiff issuing combined summons against the defendants.

The pleadings:

[8] In the particulars of claim attached to the summons, the plaintiff prayed for the relief set out in paragraph 1 above.

[9] On 2 August 2016 the defendants filed their plea together with a counterclaim. Paragraph 2.1 of the plea, the defendants denied that an agreement was concluded between the parties as alleged in the particulars of claim, according to them, the terms of the agreement and the terms of acceptance signed by the first defendant do not correspond. The acceptance included conditions of a standard loan while the offer did not, resulting in the parties not reaching consensus.

[10] Another issue provided for in the offer is the payment of the amount directly into the supplier's bank account with First National Bank. The supplier is Furnitech, a South African supplier located at the corner of Agro Road Hill Star Avenue, Welto, Cape Town. The plaintiff however, did not make payment to the agreed supplier but to a Namibian registered close corporation namely Namibia Furnitech cc, contrary to the agreement.

[11] In the counterclaim, which had been termed as "conditional upon the Court finding that an agreement was indeed concluded between the plaintiff and first defendant" the defendants allege that the loan agreement concluded between the plaintiff and the first defendant to which the defendants pleaded, the terms thereof were limited to the terms and conditions in the offer, but consisted of the terms and conditions set out in the offer self, the tacit agreement on whom the supplier as

contemplated in clause 4.5 of the offer would be and the terms and conditions set out in the Standard Loan Conditions of the plaintiff which the first defendant does not have a copy thereof.

[12] It is further alleged in the counter-claim that at the time when the agreement was concluded, it was within the contemplation of the parties that the loan would be specifically to enable the first defendant to comply with a tender for the supply and delivery of school furnitures to the Kavango Regional Council and that failure by the plaintiff to make payment to the agreed supplier would lead to an inability on the part of the first defendant to comply with the terms of the tender.

[13] Because of the failure of the plaintiff to make payment to the agreed supplier in terms of the agreement, the first defendant could not perform in terms of the tender. As a result, therefore, the tender contract was cancelled.

[15] Furthermore, the first defendant alleges in paragraph 10 of the counter-claim that the third defendant signed the authorization on behalf of the first defendant acting upon the representation by Mr Richard Abrahams. This is not clear which authorization signed by the third defendant on Mr Richard Abrahams' representation.

[16] The only letter signed on behalf of the first defendant where Mr Abrahams was involved, is the letter signed by the second defendant providing the plaintiff with the name of the supplier with banking details of such supplier for purpose of payment of the loan amount. It is wrong, therefore, to allege that Mr Abrahams misrepresented to the third defendant (Mr Thimende) which misrepresentation Mr Thimende acted upon causing the first defendant to suffer a loss or damage in the amount of N\$1 185 746.00 which amount the first defendant is now claiming from the plaintiff.

[17] In any event, the plaintiff denied all the allegations in the first defendants' counter-claim and required the first defendant to prove same, except for Ad paragraph 6 which the plaintiff admits making payment to Furnitech Namibia CC, which was done at the second defendant's (Mrs Thimende) special instance and request in her capacity as a member of the first defendant.

[18] However, on 7 March 2017 when the trial started, the first defendant moved for an amendment of the entire paragraph 6 of the counter-claim by deleting it and adding the following:

'As a result of the loss of tender contract, the first defendant suffered damage in the amount of N\$ 712 945.65 calculated as follows:

12.1.	Tender amount:	3,061,300-00
12.2.	Minus costs of supply:	1,875,554-00
12.3.	Minus bank cost:	28,335-31
12.4.	Minus interest up 30 June 2015:	8,606-62
		17,291-06
		18,028-97
		<u>17,610-39</u>
		712,945-65

(2) By replacing the amount in prayers 13.1 with the amount of N\$ 712,945-65 application will be made at the hearing for the amendment.'

Evidence for the plaintiff

[19] The plaintiff called two witnesses to testify on its behalf. They were Mr Roberta Piera Bursa and Mr Richard Manfred Abrahams. Both these witnesses are officials in the employment of the plaintiff.

[20] Briefly, Ms Bursa's evidence was contained in a statement which she read into record of the proceedings after taking the oath which she, after being warned by the court, confirmed to be the information she had provided to the legal practitioner for the plaintiff who prepared the statement and that she bore personal knowledge of the information¹.

[21] Ms Bursa testified that she was the Company Secretary of the plaintiff responsible for statutory secretarial work, which included amongst others the reviewing of contracts between the plaintiff and clients; attending mediation and legal

¹ See Rule 93 of the High Court Rules.

duties with the plaintiff's external Council; summonses are some of the legal works which would come to her office for her signature.

[22] Because of the nature of her work, she was aware of the written agreement concluded between the plaintiff and the first defendant on or about 5 March 2015 at Rundu in terms of which the plaintiff would lent money to the first defendant in the amount of N\$1 875 554.00.

[23] I can mention here that it is not in dispute between the plaintiff and the first defendant that a document handed in and marked as Exhibit "A", was signed by officials of both the plaintiff and the first defendant constitutes the written agreement between them – which Mr Bursa also refers to in her evidence.

[24] Similarly, the contents of that written agreement (Exh. "A") are not in dispute.

[25] Further, Ms Bursa stated that the agreement, in clause 4.1 provides that the plaintiff would pay the supplier directly and that this was a common term in all their contracts to ensure that the funds the plaintiff gives are not utilised for other things than for purposes the funds were given to clients.

[26] However, most part of her evidence was covered in the evidence of Mr Abrahams, who dealt with the defendants personally. In addition, Ms Bursa testified about the terms and conditions of the written loan agreement, namely, interest rate, the plaintiff's based rate plus 10% calculated daily on the loan amount payable on monthly basis by the first defendant starting from the last day of the month of the first draw down. Thereafter on the last day of each and every consecutive month.

[27] It is her evidence further that in the event of the first defendant failing to pay on the due date, such overdue amounts would be an additional finance charge of 2% per annum compounded monthly from the date of payment to the plaintiff.

[28] As already indicated, the second witness called by the plaintiff to testify, is Richard Manfred Abrahams. Mr Abrahams also read his pre-prepared statement into record of proceedings forming his evidence in chief.

[29] He testified that he was employed by the plaintiff as Senior Business Analyst at the plaintiff's principal place of business situated at No. 12 Daniel Munamava Street, Windhoek. On or about 11 March 2015 he received a forwarded email correspondence from one Clinton Scheepers. He noticed from the email that there was a conversation between Mr Scheepers and Jerry Thimende, a son of second and third defendants regarding a letter authorizing the plaintiff to pay the contract amount into First National Bank account No. 6224514150, of Furnitech in Windhoek.

[30] He testified that on the same day, he received the said letter from Jerry Thimende, signed by the second defendant who is also a member of the first defendant. He said that the letter authorized the plaintiff to pay the funds into the Bank account of Namibia Furnitech CC. Mr Abrahams denied coercing second defendant into signing the letter.

[31] On a question from his counsel to tell the court who Clinton Scheepers was, Mr Abrahams replied that Mr Scheepers was the owner of both Namibian Furnitech CC and the South African Furnitech CC. On a follow-up question from Mr Kanguuehi how he knew Mr Scheepers, Mr Abrahams told the court that he and Mr Scheepers communicated constantly and dealt with him for the past five years. He said further that he assisted a client and two others through the company of Mr Scheepers.

[32] It also emerged through Mr Abrahams' testimony that Mr Scheepers and Jerry Thimende exchanged correspondence about which Bank account of which company the plaintiff should deposit the loan money.

[33] In cross-examination, Mr Barnard wanted to know from the witness why the plaintiff accepted the letter signed by Mrs Thimende authorizing it to deposit the funds into an account of a different supplier contrary to a resolution which authorized Mr Thimende as the sole person to sign documents on behalf of the first defendant. He replied that the letter was one of documents any member of the CC could sign because it did not need to be signed in the presence of a commissioner of oath or bank official.

[34] Mr Abrahams generally was straightforward in answering questions put to him by both counsels in evidence in-chief and during cross-examination. On a statement about Mr Paulinus Thimende's version with regard what the agreement between the plaintiff and the first respondent consisted of, namely, the document self, which was handed in as an exh. "A", indicating that the supplier would be Furnitech South Africa and the standard loan conditions, his comment was that the plaintiff was authorised to deposit the funds into the Namibia Furnitech account by a letter signed by the second defendant which was supplied to them by Jerry Thimende.

[35] Despite a lengthy and vicious cross-examination from Mr Barnard, Mr Abrahams was never shaken. He was time and again referred to versions of the Thimende family, but stood by what he said in evidence in-chief.

Evidence for the defendants

[36] The first witness called to testified was Jerry Thimende the son of the second and third defendants. His evidence is very short. In fact he was called to come and tell the court that he arranged for the letter authorizing the payment of the loan amount, which was signed by his mother instead of his father on the instruction of Mr Scheepers. He said that Mr Abrahams called him enquiring whether Mr Scheepers had called him which he denied. Thereafter, Mr Scheepers called him and instructed him to write the letter and provided him with the details he would include in the letter. In cross-examination Mr Thimende stated that he was aware of the Namibian Furnitech a franchise of the Cape Town Furnitech, because they got a quotation from Namibia Furnitech first before approaching the South African Furnitech. The next witness called to testify was Mr Paulinus Thimende the third defendant. Mr Paulinus Thimende testified that he is the managing member of the first defendant and has signed the agreement between the first defendant and the plaintiff on 5 Mach 2015. He further testified that when signing the agreement, he did not realize that he was accepting terms of the agreement different from those in the offer. He said that the agreement entered into with the plaintiff was for funds to satisfy the tender awarded to the first defendant by the Kavango Regional Council to supply it with school chairs and desks.

[37] He said that Furnitech South Africa was the supplier per the agreement between the parties as indicated in the proforma invoice of 13 February 2015. He stated further that he and his wife as members of the first defendant, passed a resolution giving him the power to sign documents on behalf of the first defendant required by the plaintiff.

[38] It is further Mr Thimende's evidence that shortly after forwarding the invoice to the plaintiff, he and his wife, (2nd defendant) met Mr Abrahams in Windhoek to discuss how the money would be paid to the supplier. This version was put to Mr Abrahams in cross-examination by Mr Barnard, counsel for the defendants which Mr Abrahams denied, Mr Abrahams denied ever meeting the witness and the wife in Windhoek.

[39] Mr Thimende further testified that on his arrival home on 11 March 2015 from his work at Nkurenkuru, his wife handed him a copy of a letter signed by her authorizing the plaintiff to deposit the loan amount into the Namibian Furnitech account. He said that he was angry but would do nothing to stop what was arranged in the letter. He did not authorize her to sign the letter on his behalf, he stated.

[40] Mr Thimende testified that no developments were forthcoming from Furnitech South Africa a few weeks after disbursement and it became apparent to him that the supplier was unable to deliver the goods. In view of that, he started making enquiries about why delivery was not taking place when he was informed by a certain Mr DF Malan, the attorney of Furnitech South Africa why delivery would not be made.

[41] Mr Thimende is not entirely correct that no delivery was made to the first defendant after the disbursement. Indeed, the first consignment consisting of chairs and desks were delivered which the first defendant delivered to the Regional Council. Mr Thimende is untruthful in that respect. The inability to deliver arose after the first delivery. It is also clear from the evidence of both the son and father Thimende that Mr Clinton Scheepers was not a stranger to them as they want the

court to believe. They dealt with him on behalf of the South Africa Furnitech because he provided them with a quotation for the furnitures, exhibit "V".

[42] He further, testified about the price of the furnitures if supplied by Furnitech South Africa and that which Furnitech Namibia had asked resulting in a loss of some hundred thousand Namibia dollars.

[43] Meanwhile, in cross-examination, Mr Thimende (senior) proved to be not only poor but also an unreliable witness. He failed in his evidence in-chief to tell the court about the 186 desks and 250 chairs delivered to them. This was done purposely to justify the claim of plaintiff paying wrong supplier. It is inconceivable that Mr Thimende while well aware that part of the delivery was made, deliberately withheld this information from the court and testified that no development was forthcoming from the suppliers after disbursement by the plaintiff.

[44] In any event, apart from deliberately lying under oath, Mr Thimende did not impress me during his testimony. His counsel struggled to get information out of him which, in my view, is an indication that the defense that the parties did not reach consensus is an afterthought if not a fabrication hatched after it became known that their supplier has been declared insolvent therefore could not deliver the remaining batch.

[45] Further in cross-examination, Mr Thimende conceded that it was part of Mrs Thimende's administrative function to sign letters, paying of debts, etcetera, on behalf of the first defendant because he worked in Nkurenkuru far from home in Rundu. It also came out that in fact 537 desks and 500 chairs were delivered to the first defendant by the supplier before it stopped.

[46] Mr Thimende again conceded in cross-examination that the plaintiff complied with its obligation in terms of the agreement by paying the supplier and that the complaint for non-payment of money was received from Furnitech South Africa. Mr Thimende vigorously defended the issue of the letter of authority signed by his wife on whose authority the plaintiff paid the money into Namibian Furnitech bank account in Windhoek.

[47] In his answer to a further question by Mr Kangueehi why he did not do something to have the payment to Furnitech Namibia stopped, Mr Thimende simply answered that he did nothing. He also failed to tell the court why he did not do something to correct the wrong done by his wife. He kept quiet just to come later and tell the court that his wife was wrong to authorise the plaintiff to pay. But, after failing to do anything to correct the alleged mistake made by his wife, he failed again to instruct their first legal practitioner Messrs Sibeya and Partners to correct the mistake or to confront the plaintiff why it had accepted a letter signed by a member of the CC who did not have the authority to sign it. In its place, Mr Thimende instructed the legal practitioners to request for more time within which to pay. Why not at that time already complained that plaintiff had breached the contract?

[48] The last witness called to testified on behalf of the defendants is the second defendant, Mrs Kornelia Makena Thimende, the wife of the previous witness, Mr Thimende. Her evidence was very short and did not dwell on unnecessary stories. Mrs Thimende testified that she signed and sent the letter to the plaintiff giving it (the plaintiff) permission to pay the money. She further testified that she was responsible for the administration of the first defendant by doing the paperwork, bookkeeping, drafting and the sending out of letters on behalf of the first defendant. Her evidence was partly corroborated by the evidence of her husband. Mrs Thimende was adamant that she had the authority to sign the letter handed to the plaintiff as it was part of her administrative work.

Submissions and discussions

[49] Both Mr Kangueehi and Mr Barnard, counsel for the plaintiff and the defendants respectively prepared and filed written heads of argument which they expanded on during oral submissions.

[50] Mr Kangueehi argued that the parties entered into an agreement whereby the plaintiff lent money to the first defendant in terms of which the plaintiff had complied by disbursing the said amount to the supplier of the first defendant. He argued

further that the first defendant, however, had failed to repay the money in accordance with the terms of the agreement therefore breached the agreement.

[51] With regard to the defence of lack of consensus raised by the first defendant, which, according to the first defendant, rendered no loan agreement being concluded between the parties, Mr Kanguuehi referred the court to a definition of a contract in the book of Gibson paragraph 9 which reads as follows:

'A contract is a lawful agreement, made by two or more persons within the limits of their contractual capacity, with the serious intention of creating a legal obligation communicating such intention without vagueness, each to the other and being of the same mind as to the subject matter to perform positive or negative acts which are possible of performance'.

[52] It is further Mr Kanguuehi's argument that if regard is had to the execution clause which is not in dispute, it is clear that Mr Paulinus Thimende, the third defendant, having been authorised to do so, had signed the development portfolio facility offer on the terms and conditions set out therein and on the Standard Loan Conditions applicable to the Development Bank of Namibia's Development Portfolio Loans. Therefore, Mr Kanguuehi submits, confirmed the coming into existence of the agreement between the parties when he signed and dated the copies of the Development Portfolio Facility Offer.

[53] On his part, Mr Barnard for the defendants, stated that the defence of the defendants in paragraph 2 of his written heads of argument are twofold, namely that there is no contract to be enforced as consensus was not reached and that if the court should find that there was in fact consensus and an agreement reached; that the plaintiff did not comply with clause 4.5 of the contract in that payment was not made to the supplier. Accordingly, and as the plaintiff did not pay the loan amount to the first defendant or on behalf of the first defendant, the plaintiff could not reclaim the loan.

[54] Further, Mr Barnard contended that the offer accepted by the first defendant was not on the same terms as those of the offer, therefore, consensus was not

reached. In support of his contention he referred the court to Wessels Law of Contract in South Africa, second edition Vol. 1 paragraph 165 (et seq.) where it is stated that the trite rule relevant in this regard is that the acceptance must be absolute, unconditional and identical with the offer, failing this there is no consensus and therefore no contract. He also referred, amongst others, to the matter of *Namibia Broadcasting Corporation v Kruger and others*², where Chomba, AJA who wrote the judgment for the court stated the following:

‘Proper reading of the learned author Christie’s exposition of the term acceptance in his work **The Law of Contract in South Africa** op cit acceptance must be clear and unequivocal or unambiguous. Nay, he goes further and states at 62 under the rubric “acceptance must correspond with offer”, the following

‘ One aspect of the rule that acceptance must be clear and unequivocal or unambiguous is that the acceptance must exactly correspond with the offer.’³

[55] In paragraph 36 of the judgment Chomba, AJA further stated:

‘36 further in *JRM Furniture Holdings v Cowlin* supra Nestadt J said at 544 A-B:

‘The trite rule relevant in this regard is that the acceptance must be absolute, unconditional with the offer failing this there is no consensus and therefore no contract. (Wessels Law of Contract in South Africa 2nd Vol. 1 paragraph 165 et seq.) Wille’s Principle of South Africa Law 7th edition at 310 states the principle thus’.

‘The person to whom the offer is made can only convert it into a contract by accepting, as they stand, the terms offered, he cannot vary them by omitting or altering any of the terms or by adding proposal of his own. It follows that if the acceptance is not conditional but coupled with some variation or modification of the terms offered, no consensus is constituted’.

[56] I agree with and approve of the legal principles in the case law referred to in the *Namibia Broadcasting Corporation v Kruger and Others* matter above. However, the facts in the matter differ from those in the present matter. No counter-offer was

² 2009 (1) Nr 196 (SC) at pg 35 and 36.

³ *Christian v Ries* (1898) 13; *Treadwell v Roberts* 1913 WLD 5,59-60 *Joubert v Enslin* 1910 AD 6, 29, *Davis and Lewis v Chadwick and Co* 1911 WLD 12, 16, *Whittle v Henley* 1924 AD 138, 148, *Holdigs v Cowlin* 1983 (4) SA 54, SA 541 (W) 544 A-C’.

made by the offers in this matter while in the *Namibia Broadcasting Corporation v Kruger and Others*, a counter-offer was made. In other words Mr Kruger and Others to whom the offer was made did not accept the offer as it stood but added some proposals of their own and wanted to modify some of the terms in the offer. That being the case, the acceptance was not absolute and unconditional therefore, no consensus was reached.

[57] In the matter at hand though, there is no counter- offer made by the first defendant or by the other defendants. The agreement was signed by the third defendant, accepted the terms and conditions of the offer as they appeared in the agreement without attaching any condition to the acceptance.

[58] The Development Bank of Namibia's Development Portfolio Facility Agreement (exhibit "A") which was signed by Mr Paulinus Munika Thimende contains all the information necessary to inform him about what he was signing for.

[59] For example, in clause 1 of the agreement, the terms of the loan like the amount of the loan, the term within which to repay the loan together with interest and cost involved; the frequency of payment which is a once off instalment; interest at the base rate plus 1%; the facility fees; further interest, penalty interest and repayment are contained there. These are the terms referred to by Ms Bursa in her evidence as the General Loan Conditions of the plaintiff applicable to Development Portfolio Loans.

[60] Similarly, mention is made in clause 4 about standard conditions which refer to the signing and acceptance of the Development Bank of Namibia's Development Portfolio Facility Agreement which the first defendant duly signed and accepted.

[61] Mr Paulinus Munika Thimende, the third defendant who was authorised to sign the agreement on behalf of the first defendant signed the execution clause with full knowledge of its content: It reads as follows:

'I/we Paulinus Munika Thimende, duly authorised to sign this Development Portfolio Facility Agreement, do hereby confirm that on behalf of the Borrower, I accept the Development Bank of Namibia's Development Portfolio Facility offer on terms and conditions

as set out above and on the Standard Loans Condition applicable to the Development Bank of Namibia's Development Portfolio Loans.

I/we further confirm upon duly signing and dating copies of this Development Bank of Namibia's Development Portfolio Finance Facility offer and that it will be the agreement between the Development Bank of Namibia and the Borrower in respect of the Development Portfolio Agreement being offered to Borrower by the Development Bank of Namibia'.
(Emphasis added)

[62] The offer by the plaintiff was thus accepted immediately after the execution clause was signed by Mr Thimende and the contract was concluded when that acceptance was communicated to the plaintiff.

[63] In any event, it is trite law that the basis of a contract is either the true agreement (consensus) between the contractants, known as the intention theory or the reasonable reliance (belief) by one contractant that there is in fact agreement (the reliance theory). According to the latter theory there is a contract if a party's true intention is in agreement with the reasonable impression that he, she or it has regarding the other party's intention. In this matter, the reasonable impression the plaintiff has regarding the defendants' intention is that a valid contract was concluded between it and the first defendant.

[64] The reasonable impression the plaintiff in this matter has regarding the defendants' intention was created by the external manifestations of the defendants.

[65] The author R.H. Christie⁴ states the following:

'In the result it is correct to say that in order to decide whether a contract exists one looks first for the true agreement of two or more parties, and because such agreement can only be revealed by external manifestation one must of necessity be generally objective. This generally objective approach is now known as the doctrine of quasi-mutual assent.
(Emphasis added).

⁴ Law of Contract in South Africa 5th Edition page 24.

[66] Professor Christie goes further and states:⁵

'This doctrine embodied in *Smith v Hughes* (1871) LR 60 page 597 607 and *Pieters & Co v Salomon* 1911 AD 121 137 has been explained at pages 10-12 above where the comment was made that without it our law would be in a sorry state. The reason for this was well expressed by Davis, J in *Irvin & Johnson (SA) Ltd v Kaplan* 1940 CPD 647 651'. After quoting from *Smith v Hughes* and *SAR & H. v National Bank of SA Ltd* he said: 'If this were not so, it is difficult to see how commerce could proceed at all. All kinds of mental reservations, of careless unilateral mistakes, of unexpressed conditions and the like, would become relevant and no party to any contract would be safe, the door would be opened wide to uncertainty and even to fraud'. Because of its reliance in resolving disputes, Christie stresses that the importance of the doctrine is such that no dispute on the existence of the agreement can properly be resolved without calling in aid'.

[67] If one applies the facts of the present matter to the legal principles enunciated above, it will be apparent that the third defendant, even though, had more than enough time to stop the payment of the loan money to Namibia Funitech by instructing the plaintiff to do so, he did nothing.

[68] Secondly, Mr Thimende could have cancelled the agreement with the plaintiff for the alleged breach of accepting the letter signed by the second defendant. Again they decided to go ahead and implemented the agreement. They even benefited from the agreement.

[69] The excuse given why he did not stop the payment of the loan into the account of Namibia Furnitech, is a lame excuse because he did nothing, absolutely nothing, not even an attempt to complain to the plaintiff that it breached the agreement for accepting the letter signed by the second defendant as authority.

[70] The agreement only provided for the payment of the loan money directly to the supplier, but who the supplier would be, was left to the defendants to choose and to identify. There is, however, a dispute between the parties on the identity of the supplier. Mr Abrahams denied meeting with Mr and Mrs Thimende in his office in Windhoek. The version of Mr Abrahams is more probable and plausible because it

⁵ At page 24.

is absurd for him to request the defendants, even Mr Scheepers for that matter, to identify the supplier while having in his possession all the information of the supplier.

[71] Surely, when regard is had to how the defendants conducted themselves after the agreement was signed, about what they did and not do and the fact that they allowed themselves to participate in the implementation of the agreement by accepting delivery of the first consignment of chairs and desks, they cannot come now and say that no agreement was concluded because there was no consensus or that the plaintiff breached the agreement for paying a wrong supplier. The question arises as why did the defendants not exercise their right to cancel and rescind from the agreement, when they became aware of the error and the breach in the contract. Why benefiting from an agreement which they regarded as non-existence for lack of consensus?

Conclusion

[72] Following the authorities and legal principles referred to by both counsel and the evidence of the matter as a whole, I came to the conclusion that the defences of the defendants against the claim of the plaintiff, namely “no contract was concluded because there was no consensus reached between the parties as the terms of the offer and those of the acceptance are not the same”, and that the plaintiff breached the agreement because a wrong supplier was paid, are not bona fide. They are fake defences. Certainly, the defences are nothing else but a pure subterfuge hatched by the defendants to evade their obligation in terms of the agreement after the combined summons for the repayment of the loan was served on them by the deputy sheriff.

[73] Therefore, and for reasons and conclusion set out above, I do not consider it necessary to deal with the alternative claim for unjust enrichment raised by the plaintiff safe to reiterate what I said already that I am satisfied that the plaintiff has managed, on a balance of probabilities to prove its main claim for payment of the amount of N\$2 147 176.29 plus compound interest as agreed between the parties at rate of 11.% per annum calculated on a daily basis and compounded monthly from 31st March 2015 to date of payment and costs of the suit.

[74] Consequently, the following order is made:

- (i) The first, second and third defendants are jointly and severally, the one paying the other to be absolved, ordered to pay the plaintiff N\$2 147 176.29.
- (ii) Compound interest on the said amount at the rate of 11.50 per annum calculated on a daily basis and compounded monthly as from 31st March 2015 to date of payment as agreed to between the parties.
- (vi) Penalty interest at a rate of 2% per annum compounded monthly from the due date to date of payment to the plaintiff.
- (vii) The counter-claim of the defendants with its alternative is dismissed.
- (viii) Cost of the suit.

E P UNENGU
Acting Judge

APPEARANCES

PLAINTIFF: KNG Kangueehi
of Kangueehi & Kavendjii – Inc., Windhoek

DEFENDANTS: P Barnard
of Du Pisani Legal Practitioners, Windhoek