

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1111/2006

In the matter between:

OFFSHORE DEVELOPMENT COMPANY (PTY) LIMITED

PLAINTIFF

and

DELOITTE & TOUCHE

DEFENDANT

Neutral citation: *Offshore Development Company v Deloitte & Touche* (I 1111/2006) [2018] NAHCMD 299 (25 September 2018)

Coram: PARKER AJ

Heard: 4, 5, 6, 7, 8 and 11 June 2018 – 20 August 2018

Delivered: 25 September 2018

Flynote: Practice: Trial – Special case in terms of rule 63 of the rules of court – Separated issues in special case determined after plaintiff's evidence – Determination of separated issues resulting in conclusion of litigation – Court finding that moneys lost in investment made through defendant belonged to third entities – Court found therefore that the loss was not plaintiff's – Plaintiff's patrimony was not diminished – Court held

that no person can lose what he or she himself had not possessed – Principle of *nemo potest perdere quod ipse non possederat* applies – Plaintiff could not claim what it itself had not lost – Consequently, separated issues determined in favour of defendant – Accordingly , plaintiff’s claim dismissed with costs.

Summary: Practice – Trial – Special case in terms of rule 63 of the rules of court – Counsel for plaintiff and counsel for defendant by agreement submitted to the court a special case in terms of rule 63 for adjudication on in terms of that rule – Agreed separated issues determined after plaintiff’s evidence – Separated issues concerned whether plaintiff lost N\$65m in an investment adventure for which its auditors being the defendant could be held liable on the basis of defendant having breached its contractual obligations in relation to its audit of defendant’s financial statements for the year ending February 2003 – Court found that on the facts third entities used defendant as a conduit through which they moved their moneys to what turned out to be bogus and fraudulent investees – Court concluded that the moneys belonged to those third entities and it was their investment – The investment was not defendant’s – Defendant could not lose what it had not itself possessed and therefore could not claim what it itself had not lost – Consequently, separated issues determined in favour of defendant – Whereupon plaintiff’s claim dismissed with costs.

ORDER

Plaintiff’s claim is dismissed with costs, including costs of one instructing counsel and two instructed counsel.

JUDGMENT

PARKER AJ:

[1] Plaintiff is a State-Owned Enterprise ('SOE'), which means, in common parlance, that plaintiff belongs to the State. At all material times plaintiff's received funding from these three sources only:

- (a) initially from the European Union as a grant in the amount of N\$ 32 million;
- (b) from the central Government; and
- (c) from interest-bearing investments.

[2] These facts came out in the evidence of Mr Burmeister (plaintiff witness) who must know because Burmeister was the chairperson of plaintiff at the relevant time. There is no evidence tending to establish anything contrary as respects these facts.

[3] Other important aspects of the case that emerge from the evidence concern the relationship between plaintiff and another SOE, namely, the National Development Corporation ('NDC').

They are these:

- (a) NDC was the parent company to plaintiff, as a subsidiary company;
- (b) Mr Burmeister (a plaintiff witness) was at the relevant time the chairperson of the Board of Directors of plaintiff.
- (c) There was Mr A.P. Ndishishi, from the Ministry of Trade and Industry ('MTI'), as a Board Member of plaintiff, with Mr D. Nuuyoma, also from MTI, as an alternate member of plaintiff's Board.
- (d) Burmeister and Ndishishi were present most of the time at plaintiff's Board Meetings; and what is more, Burmeister and Ndishishi were most active in the Board management of plaintiff.

(e) Mr A.S. Aboobakar was the Chief Executive Officer ('CEO') of both plaintiff and NDC, as well as a member of the Board of Plaintiff. In the result, Aboobakar was also part of the executive management of plaintiff, on top of being a member of plaintiff's Board of Directors.

[4] Plaintiff claims against defendant for N\$65m, representing a loss allegedly suffered by plaintiff and caused by defendant and arising from defendant's breaching its contractual obligations respecting defendant's audit of plaintiff's financial statements for the year ending February 2003.

[5] In the course of the proceedings when what remained in respect of plaintiff's case was the adducing of expert-witness-evidence, both counsel, that is, Mr Subel SC (assisted by Ms Schimming-Chase SC) for plaintiff, and Mr Van der Nest SC (assisted by Mr Heathcote SC) for defendant, raised a special case for adjudication on in terms of rule 63 of the rules of court. Both counsel submitted comprehensive written submissions, apart from oral submissions. I am grateful for their commendable industry.

[6] The separated issues raised at that stage of the proceedings are whether plaintiff proved that it suffered a loss, and, if it suffered a loss, whether plaintiff has proved its loss and the quantum of the loss. Plaintiff pleads that if defendant had complied with its audit obligations, plaintiff would not have invested some N\$65m with Great Triangle Investments (Pty) Ltd ('GTI') between April 2003 and January 2004, and that it would not have lost the N\$65million which turned out to be an investment in a fraudulent investment scheme. For defendant, N\$55 million of the N\$65 million loss claimed by the plaintiff does not represent loss suffered by plaintiff. The reason is that, if loss was suffered, N\$55 million was suffered by a separate thirty party, who has not claimed this from defendant, namely NDC. Furthermore, N\$7 million of the N\$65 million loss claimed by the plaintiff does not represent loss suffered by the plaintiff; for, if loss was suffered, N\$7 million was suffered by another separate third party, who has not claimed this from defendant, namely Silnam Information Technologies (Pty) Limited. In any

case, plaintiff has recovered amounts of no less than N\$34 Million, alternatively N\$15 million, from various parties, including the insolvent estate of Philip Andre Fourie, which has the effect of extinguishing the remainder of the plaintiff's claim against the defendant.

[7] It follows that the separated issues are not concerned with the question of whether defendant breached its contractual obligations towards plaintiff, or whether it was plaintiff's conduct that caused it to suffer the loss claimed. The separated issues concern this short and narrow question: Has ODC proved a loss in either the amount of N\$65 million or a lesser amount? This, in my view, is, therefore, the macro question that the court should answer: Who suffered the loss and in what amount?

[8] I have set out para 1 above the three closed sources of funding of plaintiff at all material times. There is no evidence establishing the existence of additional sources of funding on top of those three sources. For instance, the evidence does not establish that NDC was a fourth source of funding of plaintiff. This point is crucial as will become apparent shortly. It follows inevitably that N\$55 million of the N\$65 million investment that was moved from NDC into plaintiff's account and was lost would belong to, and become an asset of, plaintiff, would be a loss to plaintiff, if – and only if – one of the following critical postulated situations was proved to exist; that is to say, if –

- (1) NDC donated the N\$55m to plaintiff (Postulate 1).
- (2) NDC and plaintiff concluded a valid and enforceable agreement whereby NDC lent that amount to plaintiff (Postulate 2).
- (3) NDC did not govern the investment adventure by plaintiff and NDC did not decide what must be done and what capital should be embarked on it (Postulate 3).

[9] Mr Van der Nest proposed the first two postulated situations in his submission and I adopt them. The three postulated situations represent the micro issues that the

court ought to consider in order to determine the macro question mentioned in para 8 above. I now proceed to consider these critical postulated situations crafted as questions.

(a) Did NDC donate the N\$55m to plaintiff?

[10] The evidence does not prove a donation by NDC to plaintiff. And in that regard, it is important to emphasize the point that the evidence establishes that NDC was not one of the sources of the funding of plaintiff.

(b) Did NDC and plaintiff conclude a loan agreement respecting the N\$55m?

[11] The evidence does not prove the existence of a loan agreement concluded between NDC and plaintiff whereby NDC lent N\$55 million to plaintiff. In the absence of such loan agreement it makes no sense in law or logic to say, as Mr De Wet (plaintiff witness) testified, that the moneys advanced by NDC to plaintiff are independent of the transaction between plaintiff and any 'investees'. I find that the evidence is overwhelming that there is no valid and enforceable loan agreement concluded between plaintiff and NDC whereby the latter lent the amount to the former.

(c) Did NDC govern the investment adventure by plaintiff and decide what should be done and what capital to embark upon it?

[12] There is no evidence proving that plaintiff requested NDC to move its N\$55m into plaintiff's account for plaintiff to use in any way plaintiff wished and on any operations that met plaintiff's eyes. Mr Subel asked rhetorically in his submission: Why didn't NDC transfer the funds directly to GTI. Why indeed? We will never know. But from the evidence we know this. NDC was not one of the sources of funding of plaintiff. Nevertheless, N\$55m were moved into plaintiff's account. I have found previously that those funds were not moved into plaintiff's account pursuant to the implementation of any valid and enforceable loan agreement concluded between NDC and plaintiff

whereby NDC lent plaintiff the amount. Additionally, the ex post facto 'Investment Management Agreement' purportedly entered into between NDC and plaintiff is clearly invalid. Furthermore, Burmeister confirmed that plaintiff did not approve the guarantee to assume liability for NDC's loss that was given to GTI with regard to NDC's investment.

[13] Thus, Mr Subel's submission that 'NDC has simply made available funding to ODC which had, as principal made the investments in issue in its own right' flies in the teeth of common business practices and law. We are not talking about two simple traders running Cuca Shops somewhere in one of the Regions of Namibia. NDC is an SOE, so is ODC. In the absence of a loan agreement, upon what legal basis and common sense had one SOE 'simply made available funding' to another SOE. It matters tuppence about the principal/subsidiary relationship between NDC and ODC. It is more probable than not that NDC intended to use plaintiff as a conduit through which to move its funds to designated investee of its choosing. Whether NDC knew or did not know they were dealing with a bogus and fraudulent investee is, therefore, immaterial. NDC did invest its moneys and it lost its moneys.

[14] Burmeister was clear and unequivocal in his testimony that plaintiff's Board's position has always been that plaintiff could not take responsibility for what happened to NDC's investments, and so, plaintiff was not liable to NDC. Indeed, Burmeister's testimony does not establish that plaintiff's investigations and legal action that plaintiff embarked on were unambiguously aimed at funds invested by plaintiff. He said they were aimed at funds invested rather by and /or through plaintiff, including the funds belonging to NDC and Silnam.

[15] Moreover, Burmeister agreed in his cross-examination-evidence, having regard to affidavit statements made by Mr Ortmann and Ndishishi of plaintiff that he (Burmeister) and Aboobakar drew a distinction between plaintiff's funds and NDC's funds.

[16] In my judgment, the amount of N\$55 million of the N\$65 million invested, as aforesaid, in GTI ('the GTI Investment') was NDC's moneys and was considered persistently as such by plaintiff and was invested by NDC in GTI. NDC made a bad investment.

[17] The consideration of the evidence in the foregoing paragraphs concerning NDC funds and the conclusions I have reached there apply with equal force by the context to the Silnam funds as a part of the N\$65 million. To recap with reference to Silnam: there is no evidence that (a) Silnam donated any funds to plaintiff; (b) Silnam was at the relevant time one of the sources of funding of plaintiff (see para 1 above); (c) plaintiff and Silnam entered into a loan agreement whereby Silnam lent money's to plaintiff; (d) plaintiff and Silnam entered into any investment management services agreement whereby plaintiff invested Silnam's funds and managed such investment pursuant to such agreement.

[18] Burmeister's testimony is unequivocal and unambiguous in these terms: Plaintiff's Board was unaware of placement of funds by other institutions (e.g. NDC and Silnam for onward investment with Great Triangle (GTI). Furthermore, the investigations and legal action that were launched by plaintiff were aimed at recovering all the funds invested by and/or through plaintiff, including the funds belonging to NDC and Silnam. In addition, if all the invested funds were recovered, NDC and Silnam would receive their recovered portions. There is also the evidence that Silnam took action against plaintiff and recovered N\$7 million. These pieces of evidence cannot on any pan of scale debunk my holding that Silnam's part of the N\$65 million was Silnam's funds and belonged to it. Like the NDC part of the N\$65 million, Silnam's part was moved using plaintiff as a drain, for the funds to reach GTI. The evidence shows that it has always been the unwavering position of plaintiff, as I have mentioned previously, that plaintiff could not take responsibility for what happened to Silnam's investment because plaintiff is not legally responsible to Silnam for its loss in the investment adventure. Like NDC, Silnam also made a bad investment. It is, therefore, inexplicable as to why in the face of plaintiff's steadfast position, as I have set it out above, Silnam

succeeded in taking action against plaintiff, resulting in Silnam recovering N\$7 million from plaintiff. It only shows the fibre of those who managed this SOE. In virtue of the reasoning and conclusions made above regarding Silnam's funds, that action, in my judgment, is irrelevant in these proceedings.

[19] In *DM v SM* 2014(4) NR 1074, para 26, I cited with approval the following principle enunciated by the Supreme Court in *M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz Megabuild v Kurz* 2008 (2) NR 775 (SC) at 790B-E:

'Now it is trite law that, in general, in finding facts and making inferences in a civil case, the Court may go upon a mere preponderance of probability, even although it's so doing does not exclude every reasonable doubt ... for, in finding facts or making inferences in a civil case, it seems to me that one may ... by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one.'

[20] I have considered plaintiff's evidence. I have applied *M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz Megabuild v Kurtz*. I have gone on a preponderance of probability. Having done all that, I conclude that plaintiff has failed to prove that its patrimony was diminished by N\$65 million for which it could claim from defendant. Plaintiff has failed to prove that it has suffered a loss to the tune of N\$65 million or at all respecting the GTI 'investment'. The principle of *Nemo potest perdere quod ipse non possederat* should apply. It follows that plaintiff could not claim what it itself had not lost.

[20] Based on all these reasons, the separated issues are determined in favour of defendant; whereupon, I order as follows:

Plaintiff's claim is dismissed with costs, including costs of one instructing counsel and two instructed counsel.

C Parker
Acting Judge

APPEARANCES:

FOR PLAINTIFF: A Subel (with him E Schimming-chase)
 instructed by Theunissen, Louw & Partners, Windhoek

FOR DEFENDANT: Van der Nest (with him R Heathcote)
 instructed by Engling, Stritter & Partners, Windhoek