

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2016/03814

In the matter between:

DEVELOPMENT BANK OF NAMIBIA

PLAINTIFF

and

ONYIKA TRADING ENTERPRISES CC

FIRST DEFENDANT

THOMAS TANGENI HAIPETO

SECOND DEFENDANT

LEONARDT DIMBULUKENI HAUWANGA

THIRD DEFENDANT

Neutral Citation: *Development Bank of Namibia v Onyika Trading Enterprises CC and Others* (HC-MD-CIV-ACT-CON-2016/03814) [2019] NAHCMD 536 (06 December 2019)

CORAM: UNENGU AJ

Heard: 16-20 September 2019

Delivered: 06 December 2018

Flynotes: Practice – Interpretation of written contract – Suretyship and cessionary agreements – Such agreements required to secure loan – Parties agreeing to have matter adjudicated on a question of law – Court called upon to determine whether conduct of the plaintiff with regard to the Cession Agreement amounts to a prejudicial act which releases the second defendant from liability under the Suretyship – Court not satisfied that conduct of plaintiff is prejudicial to second defendant to release him from obligations under the suretyship and cessionary agreements.

Summary: The plaintiff instituted action against first, second and third defendants. The third defendant failed to deliver witness statements in support of his defense and was consequently barred and his defense was struck in terms of rules 53 to 56 and 93(5). The court granted default judgment against the third defendant on 18 September 2019. As a result, the matter proceeded against the second defendant.

The second defendant contended that the plaintiff failed to institute its claim against the creditor which assumed the risk of breach in terms of the cession agreement, and has further failed to adequately execute its obligation in terms of both the loan and suretyship agreements. It was further the second defendant's contention that such failure has the potential of prejudicing the second defendant to the extent that it is released of its liability as surety.

The plaintiff submitted that on interpretation of the cession of income agreement, the purpose thereof was simply to provide for one of the many possible ways in which plaintiff could recover the money due to it and further contended that the Deed of Cession did not intend as a consequence, to absolve from liability any surety because of its conclusion. No possible interpretation, given the clear wording of the Deed of Surety itself, could have intended the suggested consequence by the second defendant.

The plaintiff in conclusion concluded that the Deed of Surety and its enforceability is not depended on the control of the principal debtor or the composition of its members.

Held – Prejudice to a surety will only release the surety from liability if the prejudice is the result of a breach of a legal duty or obligation owed by the creditor. The primary sources of a creditor's duties and obligations are the principal agreement and the suretyship. If the prejudice complained of resulted from a conduct falling within the terms of the principal agreement or the deed of suretyship, the surety could not rely upon such prejudice in order to escape liability.

Held further – Even if the second defendant were to give notice to terminate his surety on behalf of the first defendant, the second defendant would only be released in accordance with the suretyship agreement, when the debt owed to the plaintiff is paid in full. This condition in the suretyship agreement is unconditional or not subject to any other terms in the agreement other than those highlighted.

ORDER

Judgment is hereby granted in favor of the plaintiff against the second defendant jointly and severally, with the first and third defendants, the one paying the other to be absolved, on the following terms:

- a) Payment in the amount of N\$ 1,614,024.01.
- b) Compound interest on the said amount at the rate of 10.75 % per annum calculated on a daily basis and compounded monthly as from 31st July 2012 to date of payment as agreed between the parties.
- c) Costs of Suit on an Attorney own Client Scale.

JUDGMENT

UNENGU,AJ:

[1] The Plaintiff is Development Bank of Namibia, a public company with share capital and limited liability established in accordance with section 2 of the Development Bank of Namibia Act, Act 8 of 2002. Onyika Trading Enterprises CC is the first defendant, a juristic person, the second and third defendants are Thomas Tangeni Haipeto and Leonardt Dimbulukeni Hauwanga, major male persons domiciled in Windhoek.

[2] The plaintiff instituted action against first, second and third defendants. The third defendant failed to deliver witness statements in support of his defense and was consequently barred and his defense was struck in terms of rules 53 to 56 and 93(5). The court granted default judgment against the third defendant on 18 September 2019. The present proceedings are against the second defendant. It is against that background that the court only deals with the position as between the plaintiff and the second defendant.

[3] The second defendant is cited as surety and co-principal debtor with Onyika Trading Enterprises CC and the third defendant by virtue of the deed of suretyship, incorporating cessions of loan funds, in terms of which he bound himself with the first and second defendants *in solidum* for the due payment of any amounts which may become due and payable to Development Bank of Namibia by the first defendant, Onyika Trading Enterprises CC. In terms of the suretyship, the liability of second defendant was unlimited.

[4] The court will now narrow down the issues for determination by first laying out the issues that are not in dispute.

Issues not in dispute

[5] The court notes that the following are common cause between the parties: Plaintiff's cause of action against the first defendant ("the principal debtor") was based on a loan agreement, whilst its cause of action against the second defendant is based on a written deed of surety:

- a) The conclusion of the loan agreement and the Deed of Surety;
- b) The terms of both agreements;
- c) The conclusion of the cession agreement (in terms whereof first defendant ceded its contractual income to the plaintiff) and the terms thereof.

Questions of law in dispute

[7] It was agreed between the parties that the following questions of law are in dispute:

- a) Whether the conduct of the plaintiff with regard to the Cession Agreement amounts to a prejudicial act which releases the second defendant from liability under the Suretyship.
- b)

On behalf of the Plaintiff:

[8] On behalf of the plaintiff it was submitted that, in terms of the cession of income agreement:

- a) the principal debtor transferred and ceded to the plaintiff, all rights, title and interests in and to payments due to the principal debtor by the Opuwo Town Council in terms of a contract concluded between the principal debtor and the Opuwo Town Council;

b) the principal debtor authorised the Opuwo Town Council, to make payments on its behalf, directly to the plaintiff;

[9] The plaintiff further submitted that on interpretation of the cession of income agreement, the effect thereof is simply that the Opuwo Town Council undertook to make direct payments to the plaintiff. The purpose thereof was simply to provide for one of the many possible ways in which plaintiff could recover the money due to it.

[10] They contended that the Deed of Cession did not intend as a consequence, to absolve from liability any surety because of its conclusion. No possible interpretation, given the clear wording of the Deed of Surety itself, could have intended the suggested consequence by the second defendant.

[11] The plaintiff in conclusion concluded that the Deed of Surety and its enforceability is not dependent on the control of the principal debtor or the composition of its members. In fact, the deed of surety makes no reference thereto because it is unconditional. The plaintiff contends that it is only where non-performance by the creditor (the plaintiff, in this case) of his part of the contract, releases the principal debtor, that the surety is released.

On behalf of the second defendant:

[12] On behalf of the second defendant it was contended that the plaintiff has failed to institute its claim against the creditor which assumed the risk of breach in terms of the cession agreement, and has further failed to adequately execute its obligation in terms of both the loan and suretyship agreements. It was further the second defendant's contention that such failure has the potential of prejudicing the second defendant to the extent that it is released of its liability as surety.

[13] Moreover, it is the second defendants argument that the plaintiff failed to execute its mandate as provided for in terms of clause 6 of the suretyship agreement to the extent that it was released from its liability during December 2013 when the third

defendant indicated its absorption of such liability and thereafter taking sole liability and control of the affairs of the first defendant. The Plaintiffs has further failed to adhere to the condition precedents as contemplated in clause 5(c) and (e) of the loan agreement, the second defendant further agreed.

The law applicable

[14] The primary issue is whether the second defendant had a legal duty or obligation towards the plaintiff as surety. A related issue is whether the plaintiff's conduct has caused prejudice to the second defendant such that, in law, the second defendant should be released of his obligation as surety. The alleged prejudicial conduct complained of was that the plaintiff did not comply with clause 6 of the surety agreement, to the extent that it was released from its liability during December 2013 when the third defendant indicated its absorption of such liability and thereafter taking sole liability and control of the affairs of the first defendant.

[15] In *Caney's The Law of Suretyship*¹ the learned authors identified two major categories and several sub-categories relating to discharge of the surety. The major categories are defined by whether the defence relates to the principal obligation or whether the defence relates to the surety's own obligations under the contract of suretyship. Extinction of the principal obligation is not applicable to the facts before me. Defences derived from the surety's own contract are applicable to the matter *in casu*.

[16] Discharge of the surety by virtue of his contract is enumerated as follows:

- a) Payment of the principal debt by the surety;²
- b) Effluxion of time;³
- c) Prejudice through a material alteration in the principal debt;⁴
- d) Prejudice through an extension of time;⁵

¹ 5th Ed by C F Forsyth & J T Pretorius pages 185-214.

² Supra page 204.

³ Supra page 204.

⁴ Supra page 205.

⁵ Supra page 207.

e) Breach of contract with the surety.⁶

[17] In respect of breach of contract with surety, the surety is released because the creditor is in breach of a duty undertaken either expressly or impliedly in the suretyship, and that the duty formed a condition upon which basis the surety has undertaken his obligations.⁷

[18] In *Development Bank of Namibia v Keystone Technology Solution*,⁸ Prinsloo, J stated:

‘There is no principle in our law that states that should a creditor’s actions in respect of the principal debtor prejudice a surety, the surety can be released from its obligations under the deed of suretyship. The only instance where a surety can be released (totally or partially) is where there has been a breach of a legal duty or obligation by the creditor that was required from the creditor in terms of the principal agreement (e.g. loan agreement) and/or the deed of suretyship.’

[19] The issue relating to the release of a surety as a result of prejudice caused to him or her by the actions of the creditor was set out as follows by Olivier, JA in *Absa Bank Ltd v Davidson*:⁹

‘As a general proposition prejudice caused to the surety can only release the surety (whether totally or partially) if the prejudice is the result of a breach of some or other legal duty or obligation. The prime sources of a creditor’s rights, duties and obligations are the principal agreement and the deed of suretyship.¹⁰ If . . . the alleged prejudice was caused by conduct falling within the terms of the principal agreement or the deed of suretyship, the prejudice suffered was one which the surety undertook to suffer. . .’¹¹

⁶ Supra page 209.

⁷ Supra page 209.

⁸ (I 3678-2013) [2018] NAHCMD 295 (19 September 2018) at para 19.

⁹ [1999] ZASCA 94; 2000 (1) SA 1117 (SCA) para 19.

¹⁰ [1993] Cited with approval in *M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz Mega Built v Kurz* 2008 (2) NR 775 (SC) at 788.

¹¹ See also *Bock & Others v Duburoro Investments (Pty) Ltd* [2003] ZASCA 94; 2004 (2) SA 242 (SCA) paras 18 to 21.

[20] Prejudice to a surety will only release the surety from liability if the prejudice is the result of a breach of a legal duty or obligation owed by the creditor. The primary sources of a creditor's duties and obligations are the principal agreement and the suretyship. If the prejudice complained of resulted from a conduct falling within the terms of the principal agreement or the deed of suretyship, the surety could not rely upon such prejudice in order to escape liability.¹²

Application of the law to the facts

[21] I should note that the surety agreement and the loan agreement used in this matter and the matter of *Development Bank of Namibia v Keystone Technology Solution* are almost identical and this court will follow the sentiments expressed by Prinsloo, J as the correct position of law dealing with these types of matters and will apply the principles adopted therein.

[22] Furthermore, I cannot agree with the submissions by counsel for the second defendant for the following reasons. Firstly, looking at the agreement of cession, clause 4 of the cession agreement holds that:

'The Cessionary undertakes in favour of the Creditor not to hold the Creditor liable for any payment due in terms of this Cession in the event of the Cedent not performing their obligations in terms of the Contract resulting therein that no payments become due to them in terms of the Contract.

[23] In the cession agreement, the Opuwo Town Council was therein referred to as the creditor, the plaintiff as the cessionary and the first defendant as the cedent, therefore, in other words, in the cession agreement, the plaintiff was not to hold the creditor liable in the event where the first defendant failed to make good the monthly payments to the plaintiff. In effect, Opuwo Town Council as the creditor in the primary loan agreement was excluded from being liable for the monthly payments due to the

¹² *Development Bank of Namibia v Keystone Technology Solution* (I 3678-2013) [2018] NAHCMD 295 (19 September 2018) at para 20.

plaintiff by the first defendant. Therefore, the submissions by counsel for the second defendant that the plaintiff ought to have held the Opuwo Town Council liable for the monthly payments does not hold water, therefore meritless.

[24] Furthermore, looking at the provisions of the suretyship agreement, specifically clause 6 detailing with the conditions wherein a surety will be released from the obligations as depicted in that agreement, it provides that a surety would only be released once the amount outstanding on the loan agreement is paid in full, notwithstanding any notice of termination given by any surety to be released from the suretyship agreement. Therefore, in other words, a surety would only be released from the suretyship agreement once the full amount as owed to the creditor by the debtor, in this case being the debt owed to the plaintiff. Even if the second defendant were to give notice to terminate his surety on behalf of the first defendant, the second defendant would only be released in accordance with the suretyship agreement, when the debt owed to the plaintiff is paid in full. This condition in the suretyship agreement is unconditional and not subject to any other terms in the agreement other than those highlighted.

[25] Consequently and with reference to the above, the second defendant's defence against the plaintiff's claim must fail. In the result, I make the following order:

Judgment is hereby granted in favor of the plaintiff against the second defendant jointly and severally, with the first and third defendants the one paying the other to be absolved, on the following terms:

- a) Payment in the amount of N\$ 1,614,024.01.
- b) Compound interest on the said amount at the rate of 10.75 % per annum calculated on a daily basis and compounded monthly as from 31st July 2012 to date of payment as agreed between the parties.
- c) Costs of Suit on an Attorney own Client Scale.

E P Unengu
Acting Judge

APPEARANCE

For the plaintiff:

Y Campbell
Instructed by Kangueehi & Kavendjii Inc.

For the second defendant:

H Ndilula
of Kadhila Amoomo Legal Practitioners, Windhoek