

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case No: HC-MD-CIV-ACT-CON-2019/00887

In the matter between:

JOHAN PIERRE LOMBARD

PLAINTIFF

and

NICO BRAND

1ST DEFENDANT

CEASAR STONE NAMIBIA CC

2ND DEFENDANT

Neutral citation: *Lombard v Brand* (HC-MD-CIV-ACT-CON-2019/00887) [2021] NAHCMD 293 (11 June 2021)

Coram: OOSTHUIZEN J

Heard: 8 December 2020 and 26 February 2021 (closing arguments)

Delivered: 11 June 2021

Flynote: Civil – Law of Contract – Sale of Member’s Interest in a Close Corporation – Contract concluded – monies transferred and member’s interest was transferred – subsequently, termination agreement entered into – member’s interest transferred back to the defendants – the purchase amount was never returned to the plaintiff – the action succeeds – the second defendant’s counterclaim is dismissed.

Summary: During September 2017 the parties entered into a sale of membership agreement in terms whereof plaintiff acquired 49% interest in second defendant for a purchase consideration of N\$7 490 000. Plaintiff paid N\$4 500 000 of the purchase consideration. First defendant transferred the 49% in second defendant having obtained a separate set of signed CC2 documents from plaintiff to retransfer the 49% membership interest back to first defendant if the need arose. Plaintiff never paid the remainder of the purchase consideration for the 49% membership interest in second defendant and on 8 February 2018 the parties entered into a termination agreement. On 9 February 2018 Ceasar Stone Namibia entered into a supply agreement with the main contractor responsible for construction of a Government Building in Namibia. Defendants found a counterclaim against plaintiff on the latter agreement. Plaintiff's claim for payment of N\$4 500 000 is founded on the termination agreement between him and the defendants with effect from 8 February 2018.

Held, that plaintiff's main claim based on the termination agreement of 8 February 2018, is granted.

Held, that defendants' counterclaim is dismissed.

ORDER

Having considered the evidence, pleadings and filings in the action, the following orders are made:

[1] The plaintiff's claim succeeds. The defendants jointly and severally, the one paying the other to be absolved, shall —

[1.1] Pay the amount of N\$4,500,000 to the plaintiff;

[1.2] Pay interest on the amount of N\$4,500,000 at the variable interest rate based on the prime lending rate publicly quoted by the Commercial Bank of

Namibia Limited from time to time, calculated from 4 October 2017 until 8 February 2018; and

[1.3] Pay interest on the amount of N\$4 500 000 at the mora rate of 20% per annum from 9 February 2018 to date of final payment;

[1.4] Pay costs of suit to the plaintiff inclusive of the costs of one instructing and one instructed counsel.

[2] The defendants' counter claim is hereby dismissed with costs on the same scale as in [1.4].

[3] The matter is finalised and removed from the roll.

JUDGMENT

Oosthuizen J:

Background and relevant facts

[1] The plaintiff is Johan Pierre Lombard, a major male businessman with full legal capacity resident at 21 Leeukop Street, Vaal Park, Gauteng, South Africa.

[2] The first defendant is Nico Brand, an adult male member of the Second Defendant and, a businessman with residential address situated at 81 Aristoteles Street, Academia, Windhoek, Namibia.

[3] The second defendant is Ceasar-Stone Namibia CC, a close corporation incorporated and registered under the Close Corporation Act, as amended, with registration number CC/2015/11460 and with its registered office situated at 136 Jan Jonker Road, Windhoek, Namibia.

[4] On or about 14 September 2017 and at Windhoek, the plaintiff, first defendant and second defendant entered into a sale of member's interest agreement. The plaintiff representing himself and the second defendant was duly represented by the first defendant.

[5] The relevant terms of the agreement were that:

5.1. The first defendant sold 49% of his member interest in the second defendant to the plaintiff, along with ceding (on an out and out basis) the right, title and interest in and to the claims of such member's interest to the Plaintiff, who purchased and accepted such cession fees, free of all liens, charges and encumbrances.

5.2. The sale of member's interest took effect from the closing date, which is defined as the fifth business day after the effective date, or such other date as the parties may agree, the effective date in turn is defined as the signature date (14 September 2017).

5.3. In consideration for the member's interest, the plaintiff was obliged to pay a purchase price of N\$ 7 490 000.00 to the first defendant on the closing date as defined.

[6] At the beginning of October 2017 only N\$4 500 000 was paid into the trust account of defendants legal practitioners.

[7] First defendant transferred the 49% members interest in second defendant to the plaintiff after obtaining signed retransfer CC2 documents from the plaintiff in order to use it to retransfer the 49% interest into first defendant's name if the need arose.

[8] Plaintiff never paid the outstanding balance of the purchase consideration for his 49% membership interest in the second defendant.

[9] The plaintiff and the first defendant personally and on behalf of the second defendant subsequent to the agreement of 14 September 2017, entered into a termination agreement on 8 February 2018.

[10] In the pleadings the termination agreement was pleaded by plaintiff in the following fashion:

'8. On or around 8 February 2018 a partly written and partly oral agreement was concluded between the Plaintiff, the First Defendant and the Second Defendant (**"the termination agreement"**). In concluding the termination agreement, the Plaintiff and the First Defendant acted personally and the Second Defendant was represented by the First Defendant. The termination agreement was concluded at Windhoek. The material, alternatively implied, alternatively tacit terms of the termination agreement are as follows:

8.1 The Plaintiff would immediately transfer the member's interest to the First Defendant so that the First Defendant would once more be the only member of the Second Defendant. If the Plaintiff refused to do so the First Defendant would be entitled to cause transfer of the member's interest to himself.

8.2 The First Defendant agreed to pay to the Plaintiff the amount of N\$ 4,500,000.00 with interest agreed at the *normal bank rate* applicable at the time, alternatively the variable interest rate based on the prime lending rate publicly quoted by the Commercial Bank of Namibia Limited from time to time, calculated from 4 October 2017 until date of payment, alternatively until 8 February 2018.

8.3 The amount of N\$4,500,000.00 would be paid by the First Defendant to the Plaintiff within a reasonable time. A reasonable time within the circumstances of the matter is no more than thirty (30) calendar days calculated from 8 February 2018.

8.4 The agreement (i.e the sale of members interest agreement) would be terminated with immediate effect.

9. A copy of a letter authored by the First Defendant, in terms of which the written portion of the termination agreement is recorded, is attached hereto and marked annexure "C". The Plaintiff confirms the terms of this letter (annexure C) insofar as the terms are consistent with what is pleaded in paragraph 8 above.'

Defendants pleaded as follows in paragraphs 6 and 7 of their Plea:

'AD PARAGRAPH 8 TO 8.4 THEREOF:

The First Defendant specifically denies that the amount of N\$ 4,500,000.00 would be repaid to the Plaintiff within thirty (30) calendar days from 8 February 2018. The remainder of the paragraph is however noted and the content thereof is admitted.

AD PARAGRAPH 9 THEREOF:

The content of this paragraph and the Plaintiffs admission is admitted.'

[11] The defendants instituted a counterclaim against the plaintiff for penalties and profits allegedly lost in a subcontract agreement concluded by Ceasar Stone Namibia on 9 February 2018, for the supply of granite cladding of the Home Affairs building.

[12] It is common cause that plaintiff was not a party, nor a signatory to the supply of the granite cladding agreement concluded on 9 February 2018.

Applicable Law and Conclusion

[13] "Once an agreement to discharge a contract is concluded the contract is discharged and ceases to exist."¹

[14] It is settled law that language, purpose and context informs the interpretation of the terms of an agreement.²

[15] The termination agreement as pleaded in paragraph [10] hereof is clear and determinative of the issues before this court.

[16] The termination agreement of 8 February 2018 has the effect of discharging the agreement of 14 September 2017 and the latter ceased to exist on 8 February

¹ See: Christie's Law of Contract in South Africa, 7 ed, at p 517, fifth paragraph.

² See: Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors 2015(3) NR 733 SC at 739 and 740, paragraphs [18] and [19].

2018. The termination agreement was a compromise between parties, which settled the disputes they had under the discharged agreement of 14 September 2017.³

[17] The supply of the granite cladding agreement between Ceasar Stone Namibia and the main contractor, China Civil Engineering Construction (Namibia) (Pty) Ltd, concluded on 9 February 2018 whereto the plaintiff was neither a party, nor a signatory, has no bearing and application on the plaintiff and cannot be used as a basis to found a counterclaim against the plaintiff.

[18] Defendants are in mora from 9 February 2018.

[19] Costs should follow the result and it is so ordered.

[20] The following orders are made:

[20.1] The plaintiff's claim succeeds. The defendants jointly and severally, the one paying the other to be absolved, shall —

[20.1.1] Pay the amount of N\$4,500,000 to the plaintiff;

[20.1.2] Pay interest on the amount of N\$4,500,000 at the variable interest rate based on the prime lending rate publicly quoted by the Commercial Bank of Namibia Limited from time to time, calculated from 4 October 2017 until 8 February 2018; and

[20.1.3] Pay interest on the amount of N\$4 500 000 at the mora rate of 20% per annum from 9 February 2018 to date of final payment;

[20.1.4] Pay costs of suit to the plaintiff inclusive of the costs of one instructing and one instructed counsel.

[20.2] The defendants' counter claim is hereby dismissed with costs on the same scale as in [20.1.4].

³ See: Wille's Principles of South African Law, 9th edition, at pp 839 to 840.

[20.3] The matter is finalised and removed from the roll.

GH Oosthuizen
Judge

APPEARANCE

For the plaintiff:

Adv J Jacobs
Instructed by Koep & Partners, Windhoek

For the 1st and 2nd defendant(s):

Mr P. Theron
Of PD Theron & Associates, Windhoek