



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-OTH-2020/01009

In the matter between:

ANN-AUGUST SHIKONGO

PLAINTIFF

And

SILAS FILLIPUS

DEFENDANT

Neutral citation: *Shikongo v Fillipus* (HC-MD-CIV-ACT-OTH-2020/01009) [2021]
NAHCMD 340 (22 July 2021)

Coram: PARKER AJ

Heard: 10 and 11 May 2021

Delivered: 22 July 2021

Flynote: Contract – Oral agreement – Lending and borrowing of money – Defendant alleging he entered into loan agreement with plaintiff on behalf of a close corporation – Court held, since conventional representation existed defendant should place sufficient and satisfactory documentary evidence in the form of a resolution before the court tending to establish that regarding the plaintiff's and defendant's

transaction the defendant concluded the juristic act on behalf of a third person – Court held further, there are circumstances where a third party may perform on behalf of a debtor.

Summary: Contract – Oral agreement – Lending and borrowing of money – Plaintiff lent moneys to defendant upon defendant's special instance and request – Defendant alleging he entered into agreement on behalf of close corporation – The moneys lent were deposited in defendant's personal account – Court rejecting defendant's defence since no documentary evidence in the form of a resolution was placed before the court tending to establish that defendant concluded the juristic act on behalf of a close corporation – Court further rejecting defence that at one point plaintiff pursued managing member of the close corporation for payment of the loan – Court finding that did not make the close corporation the debtor – Court finding for plaintiff and granting judgment for plaintiff against defendant.

ORDER

1. Judgment for the plaintiff against the defendant in the amount of N\$180 000, plus interest on the said amount at the rate of 20 per cent per annum from 9 March 2020 to date of full and final payment.
2. Defendant shall pay plaintiff's costs of suit
3. The matter is considered finalized and is removed from the roll.

JUDGMENT

PARKER AJ:

Introduction

[1] The plaintiff instituted action against the defendant. Plaintiff's claim is based on breach of contract on the part of the defendant. Plaintiff seeks payment in the amount of N\$ 180 000 being the outstanding debt and interest at 20 per cent annum a tempore morae until date of final payment and costs of suit.

[2] The plaintiff and the defendant entered into an oral agreement in terms of which the plaintiff agreed to lend to the defendant sums of money. Pursuant to the agreement, from 13 August 2018 to 21 November 2018, the plaintiff paid into the personal bank account of the defendant N\$ 210 000. The loan attracted interest at the rate of 35 per cent per annum from the date of the giving of the moneys to defendant. The defendant paid back to the plaintiff N\$ 100 000 but failed to pay the outstanding balance of N\$ 180 000. The plaintiff demanded from the defendant payment of the outstanding balance.

[3] Upon demand, defendant alleged that he acted as an agent of one Gebhard Fillemon when he entered into the agreement with plaintiff. Gebhard Fillemon (a defence witness) describes himself as the managing member of F G Electrical Solution and Construction CC ('the CC'). The defendant alleges further that plaintiff was aware that defendant acted as an agent of Fillemon or the CC.

Plaintiff's case

[4] Plaintiff testified that she entered into an oral loan agreement with defendant and that defendant acted in his personal capacity not as an agent of a third party. She testified further that the loan was at defendant's special instance and request. Its repayment, together with interest at the rate of 35 per cent per annum, was due within 30 days from the date that the plaintiff gave him the money under the agreement. It is plaintiff's further version that she only became aware that the loan was at the request of one Fillemon after the agreement had been concluded.

Defendant's case

[5] Defendant's testimony is that when he entered into the oral loan agreement with the plaintiff, he was acting on behalf, and on the instructions, of Fillemon. Fillemon sought to corroborate defendant's evidence. Fillemon's evidence on the point is rejected because on his own version, he was not privy to the conclusion of the agreement between plaintiff and defendant. The defendant describes himself as a supervisor at the CC. The defendant admitted that the moneys lent by plaintiff, were paid into his banking account, albeit they were used to buy building materials for the CC's projects.

The Law

[6] It is worth noting from the evidence that the parties do not dispute the existence of the oral agreement. Furthermore, the fact that the moneys lent were deposited in defendant's personal account is undisputed; so also is not disputed the fact that in February 2019 defendant in partial performance of his obligation under the agreement made payment of N\$100 000 to plaintiff. Thus, the dispute between them pertains to who the parties to the oral agreement are. Therefore, the questions that arise are these: Did the plaintiff and defendant enter into the agreement in their individual personal capacity? Did the defendant act on behalf of a third party?

[7] In virtue of the facts, we need to clarify what is meant by agency, because the term has been used in a variety of senses; and at times they overlap with concepts on third party involvement in contracts, particularly mandate and representation.

[8] In a typical agency situation in contractual relationships, the principal **P** authorizes another person, the agent **A**, to represent him or her in negotiating a contract with a third person **X**. If the negotiations are successful, in the sense that there is a meeting of minds between **A** and **X**, a contract is concluded between **P** and **X**. **A** is not a party to the contract; **A** is merely a go-between. **A** will have an agency contract with **P** to regulate their agency relationship; but such contract should not concern **X**. Representation, on the other hand, is the concept in contractual relationships that occurs when one person **A** concludes a juristic act, that is, an act that creates rights and obligations, on behalf of another person **P**. Such arrangement is a conventional representation; and it stands in contradistinction to juristic representation where the power to represent is by operation of law (eg where a guardian acts for a minor). (Dale Hutchison (Ed) *The Law of Contract in South Africa* 2nd ed (2012) at 222-226)

[9] On the evidence, I find that defendant does not stand in an agency-principal relationship with any person – natural or artificial. The relationship between defendant on the one hand and the CC on the other hand 'appears to be' rather conventional representation (see para 8 above). I use 'appears to be' advisedly. It means, in my view, conventional representation could, on the evidence, exist. But,

since the CC is a close corporation, the law expects – without any allowance – defendant to place before the court sufficient and satisfactory documentary evidence in the form of a resolution tending to establish that regarding the transaction, being the loan agreement, concluded with plaintiff, the defendant concluded that juristic act on behalf of the CC.

[10] On this point, I accept Mr Tjiteere's submission. In the absence of such evidence, it does not lie in the mouth of defendant to say that he borrowed the moneys from plaintiff on behalf of a third party – the CC or Fillemon. Absence of a resolution entails no authorisation because being an artificial person, the CC could only take decisions through natural person agents. (See *Mall (Cape) Limited v Merino Ko-operasie Beperk* 1957 (2) SA 347 (C).) The fact that Fillemon told the plaintiff that he would repay the loan extended to defendant and plaintiff at one point pursued Fillemon to make good his promise is of no moment. 'There are circumstances where a third party who is not a party to the contract may perform on behalf of a debtor' (Dale Hutchison (Ed) *The Law of Contract in South Africa* at 231).

[11] Based on these reasons, I conclude that plaintiff has proved her claim; whereupon, I order as follows:

1. Judgment for the plaintiff against the defendant in the amount of N\$180 000, plus interest on the said amount at the rate of 20 per cent per annum from 9 March 2020 to date of full and final payment.
2. Defendant shall pay plaintiff's costs of suit.
3. The matter is considered finalized and is removed from the roll.

C PARKER
Acting Judge

APPEARANCES:

PLAINTIFF:

M Tjiteere

Of Dr Weder, Kauta & Hoveka Inc. Windhoek

DEFENDANT:

L Haufiku

Of Haufiku and Associates, Swakopmund