

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT**

Case no: **HC-MD-CIV-ACT-CON-2020/04269**

In the matter between:

**SMALL AND MEDIUM ENTERPRISES BANK LIMITED  
(IN LIQUIDATION) HEREIN REPRESENTED BY DAVID  
JOHN BRUNI AND IAN ROBERT McLAREN OF BRUNI  
& McLAREN**

**PLAINTIFF**

**and**

**RIVERSIDE TRADING ENTERPRISES CC  
DEFENDANT  
VINCENT NOWASEB**

**1ST**

**2<sup>ND</sup> DEFENDANT**

**Neutral citation:** *Small and Medium Enterprises Bank Limited v Riverside Trading Enterprises and Another* (HC-MD-CIV-ACT-CON-2020/04269) [2022] NAHCMD 68 (21 February 2022)

**Coram:** Schimming-Chase J

**Heard:** 18 and 21 October 2021

**Delivered: 21 February 2022**

**Flynote:** Contract – onus – Plea of payment of claimed amount – Onus rests on defendant to satisfy the court that it is entitled to succeed on its defence of payment in full as alleged in its plea. Defendants, *in casu*, did not lead sufficient evidence at the trial to prove that they had settled the loan in full and accordingly failed to discharge their onus.

**Summary:** The plaintiff sued the first and second defendants for payment of an amount due and payable in terms of a loan agreement concluded between the plaintiff and first defendant. The second defendant had bound himself as surety and co-principal debtor for the due fulfilment of the first defendant's obligations to the plaintiff.

The defendants pleaded that they had settled the loan amount in full. They however elected not to lead sufficient evidence during the trial to substantiate their defence.

*Held that* the plaintiff discharged its onus proving that it made a loan to the defendants and that it is entitled to the outstanding balance of the loan together with interest.

*Held that* the defendants, having raised a special plea of payment of money, bore the onus to satisfy the court that they were entitled to succeed on their defence. Having elected not to lead sufficient evidence at trial, the defendants failed to discharge their onus to prove settlement of the loan due to the plaintiff and the plaintiff accordingly succeeds in its claim.

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### ORDER

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Judgment is granted in favour of the plaintiff against the first and second defendants, jointly and severally, the one paying the other to be absolved, in the following terms:

1. Payment of N\$246 381.39.

2. Compound interest calculated daily and capitalized monthly on the amount of N\$246 381.39 at the rate of 12.75% (prime plus 5%) per annum from 1 July 2020 to date of final payment (both dates inclusive).
3. Costs of suit on an attorney/client scale, including the costs of one instructing and one instructed counsel.

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## JUDGMENT

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SCHIMMING-CHASE J

### Introduction

**[1]** The plaintiff in this action is Small and Medium Enterprises Bank Limited, a registered commercial bank and public company with limited liability, which is currently in liquidation.

**[2]** The first defendant is Riverside Trading CC, a duly registered closed corporation. The second defendant is Vincent Nowaseb, a major male who is the sole member of the first defendant.

**[3]** These proceedings were instituted by the plaintiff against the first and second defendants during October 2020.

### The pleadings

**[4]** The plaintiff's claim against the defendants is based on a written loan agreement concluded between the plaintiff and the first defendant, represented by the second defendant, on 4 November 2016 ("the agreement"). In terms of the agreement, the plaintiff would lend an amount of N\$1.3 million to the first defendant, which amount, together with interest, was repayable to the plaintiff in one instalment by 31 August 2017.

**[5]** In its particulars of claim the plaintiff alleged that it complied with all its obligations under the agreement and advanced the loan amount to the first defendant on 7 November 2016.

**[6]** It is further alleged that the first defendant breached the agreement in that it failed to repay the loan amount together with agreed interest from 13 September 2017.

**[7]** As is the norm in loan agreements, the agreement between the parties contained an acceleration clause, which the plaintiff exercised upon the first defendant's alleged failure to comply with the payment terms of the agreement. The plaintiff thus claimed the full outstanding amount due by the defendant, which was N\$246,381.39 as at 1 July 2020, together with further interest and costs on an attorney and client scale, as agreed.

**[8]** The second defendant was drawn into the fray by virtue of a written unlimited deed of suretyship signed by the second defendant in favour of the plaintiff, in terms of which he bound himself as surety and co-principal debtor for the first defendant's debts and obligations arising from the loan agreement. Plaintiff's claim was therefore directed at both first and second defendants ("the defendants"), jointly and severally, the one paying the other to be absolved.

**[9]** In their plea, the first defendant did not deny being party to the loan agreement as pleaded, nor did the second defendant deny being liable for the first defendant's obligations to the plaintiff by virtue of the signed suretyship. The defendants' denial of the plaintiff's allegations was limited to a denial of being in breach of the loan agreement, and by extension being liable for the amount claimed. Their defence was that "that the entire debt arising from that loan was settled in full."<sup>1</sup> No further particulars were pleaded to substantiate this defence.

**[10]** The defendants lodged a counterclaim against the plaintiff for payment in the amount of N\$2 million, based on alleged set-off agreement concluded between the plaintiff and second defendant on 16 August 2017. During the trial however, counsel for the defendants advised the court that the defendants would not persist with the counterclaim. It is therefore unnecessary to traverse the contents of the counterclaim and the plaintiff's plea thereto.

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<sup>1</sup> Para 2 of the first and second defendants' plea.

[11] The plaintiff also delivered a replication, but this was unnecessary as the plaintiff merely joined issue with that contained in the defendants' plea.

Evidence at trial

[12] The plaintiff called three witnesses to testify on its behalf.

*Donald William Alcock*

[13] The plaintiff's first witness was Mr Donald William Alcock, employed with the plaintiff as Manager: Collections Risk Department. His responsibilities include assisting the plaintiff's liquidators in their recovery efforts of non-performing loans.

[14] Mr Alcock recapitulated the relevant terms of the loan agreement as pleaded in the plaintiff's particulars of claim.

[15] The witness testified that the first defendant had not settled the loan amount in full and that the last payment made towards settlement of the loan was on 13 September 2017. Reminder letters and a letter of demand were sent to the first defendant on 12 July 2018, 13 October 2018 and 21 November 2018, respectively. According to Mr Alcock, prior to the letters being sent to the first defendant, numerous discussions were held between the first defendant and two employees of the plaintiff at the time, namely Jacqueline Stumpfe and Fillemon Nditya (the plaintiff's second and third witnesses). These discussions and correspondences centered around the first defendant's outstanding debt and the alleged set-off agreement.

[16] Mr Alcock testified that the second defendant had addressed a letter dated 25 March 2019 to the plaintiff's liquidators, maintaining that the debt owed had been settled in full. In the letter, the second defendant explained that an amount invested by the first defendant with the plaintiff was applied to outstanding loan amount, which investment amount had been paid towards settlement of the outstanding loan.

[17] Mr Alcock testified that in terms of the insolvency laws of Namibia, the plaintiff was prohibited from setting-off the first defendant's investment against the outstanding loan amount.

**[18]** Under cross-examination, Mr Alcock confirmed that the last payment received by the plaintiff was on 13 September 2017 in the amount of N\$162,719.86. This amount was received from Namibia Institute of Pathology, a client of the first defendant who had made the payment directly to the plaintiff on instructions of the first defendant. This payment had been accounted for when the outstanding balance as pleaded in the particulars of claim was calculated.

*Jacqueline Stumpfe*

**[19]** The plaintiff's second witness was Ms Jacqueline Stumpfe, employed at the time as an account relationship manager. She testified that the first defendant's account had been handed to her for recovery of the loan after the previous account manager, Aina Ntinda, had left the plaintiff's employ during November 2017.

**[20]** The second defendant had at an unspecified time contacted Ms Stumpfe telephonically and advised her that he was under the impression that the loan had been settled in full. The second defendant had made reference to email correspondences with Ms Ntinda confirming that his investment with the plaintiff had been applied to the loan amount to offset the remaining balance on the account. Ms Stumpfe testified that she had informed the second defendant that such a transaction was not allowed as the plaintiff was under provisional liquidation.

**[21]** She further testified that during the period July 2018 to June 2020, she and the third witness, Mr Fillemon Nditya, had engaged in numerous discussions and correspondences with the second defendant regarding the outstanding balance on the loan account and the purported set-off agreement. During these discussions, the second defendant was advised to propose a repayment plan to settle the loan. The second defendant, however, maintained that the loan had been settled in full and refused to pay the outstanding amount at the time.

**[22]** Ms Stumpfe sent a letter to the defendants dated 21 November 2018, demanding payment of the arrears and threatening legal action should the amount

remain unpaid. It was to this letter of demand that the second defendant responded by way of the letter dated 25 March 2019, which was discussed in para 15 above.

*Fillemon Kanana Nditya*

**[23]** The third and final witness who testified on behalf of the plaintiff was Mr Fillemon Nditya. At the time of giving his testimony, he was no longer in the employ of the plaintiff. At the relevant time, he was plaintiff's Head: Business Lending.

**[24]** Mr Nditya corroborated Ms Stumpfe's evidence that they had both engaged the second defendant regarding the outstanding loan and the unlawfulness of setting-off the investment against the loan account.

**[25]** At the close of the plaintiff's case, counsel for the defendants advised the court that the defendants would not lead any evidence and closed their case. As previously mentioned, the court was informed that counterclaim would not be persisted with.

#### Applicable law

**[26]** In a claim based on a loan, the plaintiff must allege and prove: (a) the loan agreement; (b) that the money was advanced in terms of the agreement; and (c) that the loan is repayable.<sup>2</sup>

**[27]** The plaintiff pleaded what was required by law and led evidence to support its claim.

**[28]** The defendants, having raised a special plea of payment of money, bore the onus to satisfy the court that they were entitled to succeed on their defence. The defendants had a duty to discharge the onus to prove their defence.<sup>3</sup>

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<sup>2</sup> L T C Harms *Amler's Precedents of Pleadings* 8 ed (2015) at 244.

<sup>3</sup> *Pillay v Krishna* 1946 AD 946 as quoted in *Taapopi v Ndafediva* 2012 (2) NR 599 (HC).

**[29]** The defendants elected not to lead any evidence in support of their defence. As a result, the court was left with only the plaintiff's version. I am satisfied, based on the plaintiff's evidence, that it discharged its onus proving that it made a loan to the defendants and that it is entitled to the outstanding balance of the loan together with interest.

**[30]** Contrarily, the defendants failed to discharge their onus to prove settlement of the loan due to the plaintiff, and accordingly the relief sought by the plaintiff stands to be granted.

**[31]** Judgment is accordingly granted in favour of the plaintiff against the first and second defendants, jointly and severally, the one paying the other to be absolved, in the following terms:

1. Payment of N\$246 381.39.
2. Compound interest calculated daily and capitalized monthly on the amount of N\$246 381.39 at the rate of 12.75% (prime plus 5%) per annum from 1 June 2020 to date of final payment (both dates inclusive).
3. Costs of suit on an attorney/client scale, including the costs of one instructing and one instructed counsel.

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EM SCHIMMING-CHASE

Judge



## APPEARANCES

### PLAINTIFF

Ms L Ambundo-Nashilundo

Instructed by Katjaerua Legal Practitioners

### DEFENDANTS

Mr T Muhongo

Instructed by Ntelamo-Matswetu & Associates