

**REPUBLIC OF NAMIBIA**



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

**JUDGMENT**

Case no: HC-MD-CIV-ACT-CON-2019/02591

In the matter between:

**FIRST NATIONAL BANK OF NAMIBIA**

**PLAINTIFF**

and

**CANGO CONSTRUCTION CC**

**FIRST DEFENDANT**

**MICHAEL TABAI NGHULONDO**

**SECOND DEFENDANT**

**JAKOBINA INDILENI NDAPWA NGHULONDO**

**THIRD DEFENDANT**

**FILLEMOM HAFENI**

**FOURTH DEFENDANT**

**REBEKKA KASINDA HAFENI**

**FIFTH DEFENDANT**

**LEENA TUYAKULA NGHULONDO**

**SIXTH DEFENDANT**

**Neutral citation:** *First National Bank of Namibia v Cango Construction CC* (HC-MD-CIV-ACT-CON-2019/02591) [2023] NAHCMD 25  
(2 February 2023)

**Coram:** COLEMAN J

**Heard:** 7-10 June and 11 November 2022

**Delivered:** 2 February 2023

**Flynote:** Overdraft — extended with facility letter — liability extended.

**Summary:** Plaintiff relies on an overdraft granted to first defendant and extended by way of facility letter. First defendant claims it did not receive the money referred to in the facility letter. Not a defense since it is clearly the extension of money lent and advanced previously.

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## ORDER

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1. First, second, third and sixth defendants are ordered to pay plaintiff N\$4 548 324,30, jointly and severally, the one paying the other to be absolved.
2. Interest is payable on the said amount at prime rate plus 3 percent per year calculated from 1 April 2022 to date of payment.
3. Defendants are ordered to pay plaintiff's costs on an attorney and own client scale, jointly and severally.
4. The matter is removed from the roll and regarded as finalized.

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## JUDGMENT

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COLEMAN J:

### Introduction

[1] This is a claim for payment of N\$4 548 324,30 in respect of a credit facility, or overdraft, and suretyships. The plaintiff also asks that three properties are declared executable. The plaintiff settled with fourth and fifth defendants and pursues its claims herein against the first, second, third and sixth defendants.

### Plaintiff's case

[2] In essence, the plaintiff's case is that on or about 3 February 2018 it extended an overdraft facility for the first defendant. The agreement in respect of the overdraft is contained in a facility letter dated 28 February 2018. The second defendant signed this letter on behalf of first defendant on 3 April 2018. The plaintiff alleges first defendant is in breach of the agreement since it failed to repay the outstanding balance on the overdraft.

[3] The plaintiff's case is further that over time second to sixth defendants bound themselves as sureties and co-principal debtors for first defendant's liability to plaintiff. In addition, three immovable properties were mortgaged to plaintiff as security for first defendant's debt.

### Defendants' case

[4] First, second, third and sixth defendants filed pleas. In his plea second defendant denies having entered into a written agreement for borrowing money with plaintiff. The defendants all deny they received any money or had a credit facility extended for them. Defendants further contend that plaintiff is before court with the wrong cause of action.

[5] While not denying the mortgages, defendants deny they breached it and that plaintiff can enforce it. The defendants also deny that they are liable as sureties, while not denying signing the respective deeds of suretyship. The defendants also plead that all the properties plaintiff wants to declare executable are primary homes of the second, third and sixth defendant respectively.

### The evidence

[6] The plaintiff called Mr Monjoka and Mrs Brander as witnesses. Mr Monjoka explained the plaintiff's overdraft facility system. In particular he testified that various overdraft facilities had been extended to first defendant during the period 2013 –

2018. He also put the facility letter, annexed marked 'A', to the particulars of claim in context.

[7] His testimony is that the second defendant signed the facility letter on 3 April 2018. That has the effect that the existing credit facility was renewed on the terms contained in the facility letter. This meant that the existing overdraft was extended. He testified that first defendant breached the terms of the facility by failing to repay the outstanding balance as agreed. He also spoke to the bank statements of first defendant reflecting the activities and the outstanding balance.

[8] Mrs Brander was called to address the certificate of indebtedness and the amount owing by first defendant. This was done since the parties agreed that a certificate of indebtedness constitutes prima facie proof of indebtedness.

[9] Second defendant, the managing member of first defendant, testified on behalf of the defendants. He denies that plaintiff complied with all its obligations under the loan agreement with first defendant. Amongst others, he contends that plaintiff did not advance the money allegedly lend to first defendant. He generally denies that the defendants are indebted to the plaintiff. He also denies that the existing facility was extended.

[10] Second defendant also contests the enforceability of the mortgages plaintiff relies on. He essentially contends that the debt in terms of which the immovable properties plaintiff wants to sell in execution was already settled by first defendant prior to 2018. He testified that the property Erf 2433, Ondangwa, is his primary home where he resides with sixth defendant. He also testified that Erf 2761, Otjimuiise, is the primary home of third defendant. According to him Erf 2840, Ondangwa, is also the primary home of sixth defendant. Consequently he contends that these properties cannot be declared executable.

### Conclusion

[11] After considering the evidence and the submissions on behalf of the parties it is clear to me that plaintiff's claim is based on the conventional overdraft facility. The

assertions on behalf of first defendant does not hold water. It is clear – especially from the bank statements introduced as exhibits – that the overdraft facility was used and extended. Therefore, it is not a defence for first defendant to contend that it did not receive the money represented in the facility letter. It clearly includes an amount outstanding on the overdraft before its extension. Therefore, I am satisfied that plaintiff proved its claim against first defendant.

[12] Plaintiff relies on deeds of suretyship signed by second, third and sixth defendants for its claim against them. While these defendants deny in their pleas that they are liable as sureties for first defendant's debt no evidence was produced to support that. Third and sixth defendants did not testify. Second defendant, who testified, did not address the surety issue directly. He focused on first defendant's liability and the mortgages in his testimony. Therefore, I am satisfied that plaintiff established second, third and sixth defendants' liability in terms of the deeds of suretyship they signed.

[13] Furthermore, plaintiff, relying on three mortgages, asks that the following immovable properties be declared executable: Erf 2433, Ondangwa, Erf 2761, Otjomuise, and Erf 2849, Ondangwa. According to the defendants all these properties are primary homes. Erf 2433, Ondangwa, is the property of first defendant and according to second defendant his primary home where he lives with sixth defendant, his sister. Erf 2761, Otjomuise, is the property of second and third defendants jointly and according to second defendant it is the primary home of third defendant. Erf 2840, Ondangwa, is owned by sixth defendant and according to second defendant her primary home as well.

[14] In my view, the parties did not address the requirements under rule 108 properly. For example, the possibility of less drastic measures was not addressed at all. Furthermore, two of the properties are owned by parties who are liable for first defendant's debt by virtue of a deed suretyship each signed. I am not satisfied that a case had been made by plaintiff to declare the properties executable and would fail in my oversight duty should I accede to plaintiff's request. As a consequence, I am not making any ruling on it and leave it to plaintiff – if it so wish – to later pursue an application under rule 108 in respect of these properties.

[14] I make the following order:

1. First, second, third and sixth defendants are ordered to pay plaintiff N\$4 548 324,30, jointly and severally, the one paying the other to be absolved.
2. Interest is payable on the said amount at prime rate plus 3 percent per year calculated from 1 April 2022 to date of payment.
3. Defendants are ordered to pay plaintiff's costs on an attorney and own client scale, jointly and severally.
4. The matter is removed from the roll and regarded as finalized.

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G Coleman  
Judge

## APPEARANCE

## PLAINTIFF:

Y Campbell

Instructed by Fisher, Quarmby and Pfeifer

Windhoek

## DEFENDANTS:

K Amoomo

of Kadhila, Amoomo Legal Practitioners.

Windhoek