

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
PRACTICE DIRECTIVE 61
ORDER AND REASONS

Case No: HC-MD-CIV-ACT-CON-2022/03902

In the matter between:

DEVELOPMENT BANK OF NAMIBIA LIMITED

APPLICANT

and

PLATFORM TRADING (PTY) LTD

1ST RESPONDENT

TUTALENI PETER LEINHORD SHIIMI

2ND RESPONDENT

MARY NDESHIHAGELA SHIIMI

3RD RESPONDENT

**SPECIAL VEHICLE RESOURCE CLOSE
CORPORATION**

4TH RESPONDENT

Neutral Citation: *Development Bank of Namibia Limited v Platform Trading (Pty) Ltd* (HC-MD-CIV-ACT-CON-2022/03902) [2023] NAHCMD 334 (16 June 2023)

Coram: OOSTHUIZEN J

Date of hearing: 8 May 2023

Delivered on: 16 June 2023

Result on merits: Summary judgment application granted in respect of claims 1,2 and 3 and declined in respect of claims 4 and 5.

Having heard Mr. Barnard for the plaintiff/applicant and Mr Rukambe for the first to the fourth respondents/defendants and having attended to the pleadings and arguments filed of record:

IT IS ORDERED THAT:

The Plaintiff's claims 1, 2 and 3 against the first, second, third and fourth defendants, jointly and severally, the one paying the other to be absolved, succeeds for:

CLAIM 1

1. Payment in the amount of **N\$1,004,076.27**;
2. Interest thereon to be calculated at varying rate linked to the prime interest rate applicable to First National Bank (currently 9.25%) plus 1% calculated on a daily basis plus any interest thereon outstanding from time to time and compounded monthly, plus default margin of 2% interest above the applicable rate from 31 July 2022 to date of full and final payment.

CLAIM 2

3. Cancellation of the Loan Agreement;
4. Payment in the amount of **N\$9,596,163.68**;
5. Interest thereon to be calculated at varying rate linked to the prime interest rate applicable to First National Bank (currently 9.25% plus 1% calculated on a daily basis plus any interest thereon outstanding from time to time and compounded monthly, plus default margin of 2% interest above the applicable rate from 31 July 2022 to date of full and final payment.

CLAIM 3

6. Cancellation of the Loan Agreement;
7. Payment in the amount of **N\$3,141,105.26**;
8. Interest thereon to be calculated at varying rate linked to the prime interest rate applicable to First National Bank (currently 9.25%) plus 1% calculated on a daily basis plus any interest thereon outstanding from time to time and compounded monthly, plus default margin of 2% interest above the applicable rate from 31 July 2022 to date of full and final payment;
9. Claims 4 and 5 are declined and to be pursued by the execution procedure prescribed in Rule 108.
10. Costs of suit on a scale as between attorney and own client as agreed between the parties. The costs shall include the costs of the plaintiff for employing one instructing and one instructed counsel.
11. The matter is finalized and removed from the roll.

Reasons for orders:

[1] Claim 1 of the applicant/plaintiff is for the payment of an agreed quarterly commission fee on a performance guarantee in the amount of N\$4,571,234.74 which the plaintiff has rendered to the Ministry of Works and Transport as an irrevocable guarantor for the due performance by first respondent/defendant of all its obligations in terms of Tender No. F1/10/1-5-2014. A copy of the performance guarantee was attached to the particulars of claim and marked as annexure "DBN 2".

[2] A copy of the account statement of the plaintiff in respect of the quarterly guarantee fee, VAT and interest was attached to the particulars of claim and marked annexure "DBN 3"

[3] The first defendant/respondent have raised no bona fide defence in respect of the performance guarantee, the quarterly commission agreed and payable thereunder as well as the interest payable on the outstanding quarterly commission fees.

[4] The defendants failed to grasp that first respondent was not entitled to payments under the performance guarantee. A fixed amount was guaranteed to the employer of the first defendant, the Ministry of Works and Transport, by the plaintiff as guarantor for the due performance of the first defendant of its obligations towards the said Ministry on terms of the Tender (with the Ministry). The performance guarantee by plaintiff to the Ministry is not linked to instalments percentage linked to progress payments made by the Ministry to first defendant. First defendant agreed to pay a fixed quarterly commission to plaintiff for plaintiff's performance guarantee towards the Ministry. The fixed quarterly commission was payable quarterly in advance to the plaintiff.

[5] The purported defence to claim 1 was not bona fide and only in an attempt to delay payment thereof. It also is devoid of substance and rationality.

[6] Defendants had an opportunity to satisfy the court by way of their answering/opposing affidavit that they have a bona fide defence to the action. Their opposing affidavit should have disclosed with clarity the nature and grounds of their defences to the respective claims and the material facts relied on.¹

[7] Defendants did not deal with their defences concerning claims 2 and 3 as they were required to do.

[8] Defendants did not even refer the court to annexures "DBN 4" and "DBN 6" annexed to the particulars of claim underlying claims 2 and 3.

[9] Defendants have dismally failed to satisfy the requirements of a bona fide defence on claims 1 to 3 in that the nature and grounds of their respective defences,

¹ *DI Savino v Nedbank Namibia Ltd* 2012 (2) NR 507 (SC) and Rule 60 (2) and (5).

particularly on claims 2 and 3, and the material facts relied upon for each defence, are still a mystery.

[10] Concerning claims 4 and 5, the defendants, to the satisfaction of the court, have indicated in broad what their objections are against the execution orders sought concerning the two immovable properties. Due to the Notice of motion procedure provided for in the Rules of Court, i.e. Rule 108, this court is not seized with the execution.

.....
G H OOSTHUIZEN
JUDGE

APPEARANCES

APPLICANT:

P Barnard
Köpplinger Boltman, Windhoek.

FIRST TO FOURTH RESPONDENTS:

U Rukambe
Fisher, Quarmby & Pfeifer, Windhoek