

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2018/03324

In the matter between:

STANDARD BANK NAMIBIA LIMITED

PLAINTIFF

and

STEPHANUS BERGH N.O

FIRST DEFENDANT

RUDOLF WOLDEMAR WINCKLER N.O

SECOND DEFENDANT

SERVE INVESTMENTS FIFTY (PTY) LIMITED

THIRD DEFENDANT

FAANBERGH WINCKLER PROJECTS (PTY) LIMITED

FOURTH DEFENDANT

FAAN BERGH HOLDINGS (PTY) LIMITED

FIFTH DEFENDANT

STEPHANUS BERGH N.O

SIXTH DEFENDANT

PAPALLONA INVESTMENTS (PTY) LIMITED

SEVENTH DEFENDANT

SIGMA INVESTMENTS CC

EIGHTH DEFENDANT

RUDOLF WOLDEMAR WINCKLER

NINTH DEFENDANT

STEPHANUS BERGH

TENTH DEFENDANT

MANAH ENTERPRISES (PTY) LIMITED

ELEVENTH DEFENDANT

MERENSKY INVESTMENTS (PTY) LIMITED

TWELFTH DEFENDANT

Neutral citation: *Standard Bank Namibia Limited v Bergh N.O* (HC-MD-CIV-ACT-CON-2018/03324) [2023] NAHCMD 384 (7 July 2023)

Coram: MILLER AJ
Heard: 9 May 2023
Delivered: 7 July 2023

Flynote: Civil Practice – Application for absolution from the instance at close of plaintiff’s case-Test not whether the evidence led by the plaintiff establishes what would finally be required, but whether the evidence upon which a court applying its mind reasonably to such evidence could or might find for the plaintiff – Absolution from the instance refused with costs.

Summary: This is an application for absolution from the instance. The plaintiff instituted action and the matter proceeded against the ninth defendant. The plaintiff called two witnesses and closed its case. The evidence of these witnesses were not contested by the ninth defendant and defendant applied for absolution from the instance.

A written agreement was entered between the plaintiff and the Faanbergh Winckler Development Trust, whereby the plaintiff provided a commercial loan facility for the Trust.

The ninth defendant bound himself as surety and co-principal debtor for any liability incurred by the Trust.

The plaintiff advanced monies to the Trust and the Trust failed to make payments of some of the amounts advanced.

The ninth defendant argues that the agreement relied upon by the plaintiff is void as the conditions of the clauses 8.8 and 8.9 of the agreement has not been complied with. It is further argued that the plaintiff should have rather claimed for unjustified enrichment and not for breach of contract.

The plaintiff, on the other hand, argues that clauses 8.8 and 8.9 were fulfilled to its satisfaction when it was issued with an irrevocable letter of undertaking for credit of the Trust by Fischer, Quarmby and Pfeifer.

The ninth defendant argues that the letter constitutes hearsay evidence as the author of the letter was not called as a witness.

Held that, the letter would have constituted hearsay evidence if the purpose was to establish the truth or correctness of the context, however, the purpose of the evidence was to establish a different fact.

Held that, the letter was presented to the plaintiff as some form of security and it was accepted by the plaintiff as such.

Held that, the letter is not inadmissible.

Held that, the test for absolution from the instance is not whether the evidence led by the plaintiff establishes what would finally be required, but whether the evidence upon which a court applying its mind reasonably to the evidence could or might find for the plaintiff.

Held that, clauses 8.8 and 8.9 of the agreement should not be interpreted in isolation but in the context of the agreement as a whole.

Held that, at this stage of the proceedings, considering the facts presented thus far and applying the established approach to the interpretation of the agreement, the court could reasonably come to the conclusion that there was a fulfillment of what clauses 8.8 and 8.9 of the agreement had in mind.

Held that, the absolution from the instance is refused with costs.

ORDER

The application for absolution from the instance is refused with costs.

JUDGMENT

MILLER AJ:

Introduction

[1] These proceedings seek the resolution of a dispute between the plaintiff and the ninth defendant ('the defendant'). I need not concern myself with the merits or otherwise of the dispute between the plaintiff and the remaining defendants.

[2] The plaintiff proceeded by way of summons and as matters stand presently the plaintiff closed its case against the ninth defendant after two witnesses Messrs du Plessis and Grobler testified. The evidence of these witnesses was not contested in any respect.

[3] The defendant thereupon applied for absolution from the instance. This judgment deals with that application.

The Relevant facts

[4] In terms of a written agreement concluded between the plaintiff and the Faanbergh Winckler Development Trust ("The Trust"), the plaintiff provided a commercial loan facility to the Trust.

[5] The defendant bound himself as a surety and co-principal debtor for any liabilities incurred by the Trust.

[6] The plaintiff in due course permitted the Trust to affect drawdowns against the facility from time to time. The total sum so advanced totals N\$91 400 000.

[7] The Trust failed to make payment as it had agreed, however, some of the amounts advanced had been recovered.

[8] In the result, the plaintiff in terms of the amended Particulars of Claim dated 12 October 2020 seeks the following relief:

- '1. Against the Fourth, Fifth, Sixth, Ninth and Tenth Defendants Jointly and Severally, one paying the other to be absolved, payment of the sum of N\$36 502 901.62.
2. Payment of interest at the rate of 11.50% per annum on the amount N\$36 502 901.62 calculated from 30 September 2019 to the date of payment;
3. Costs of suit on a scale of attorney and own client;
4. Collection Commission.
5. Further and/or alternative relief.'

[9] The indebtedness of the Trust and the defendant is not disputed. The argument advanced by the defendant is that the plaintiff misconceived the remedy available to it. The argument, so it went, is that the agreement relied upon by the plaintiff is void for non-fulfilment of clauses 8.8 and 8.9 of the written agreement. It is argued that the plaintiff's claim can consequently not reside in the agreement but rather in the law of unjust enrichment, more specifically the *condictio indebitii* and the *condictio sine causa*.

[10] Clauses 8.8 and 8.9 of the agreement are sub-paragraphs of clause 8 as such which is titled "Conditions Precedent". In context the agreement provides as follows:

'8. The Bank will make the Loan available to the Borrower subject to the fulfilment of the following conditions precedent to the satisfaction of the Bank.

...

8.8 Provide the Bank with confirmed presales with a value of 100% (one hundred percent) of the loan amount prior to any draw-down or progress payment. The presale target to be achieved within 3 (three) months from date of this letter, failing which the facility will be revoked;

8.9 For consideration as a presale, the Bank must be furnished with a signed sales agreement in an acceptable format, stating that all sales proceeds will be paid into the collections account and one of the following to be supplied:

8.9.1 an irrevocable payment guarantee or letter of undertaking from a reputable financial institution;

8.9.2 in the case of cash sale, the full purchase price to be deposited into the appropriate collection account or attorney trust account acceptable to the Bank.'

[11] The plaintiff submits that clauses 8.8 and 8.9 were complied with. In a replication dated 11 October 2022, plaintiff states the following:

'3.1 The plaintiff pleads that the conditions contained in clauses 8.8 and 8.9 were fulfilled to its satisfaction when it was issued with an irrevocable letter of undertaking for credit of the Trust by Fisher, Quarmby & Pfeifer, to the effect that Fisher, Quarmby & Pfeifer holds at plaintiff's disposal the amount of N\$94 000 000.00, on 30 May 2016.'

[12] The letter reads that:

'At the request of Mr F Bergh; we advise that we hold at your disposal the amount of N\$94 000 000 (Ninety Four Million Namibia Dollars) upon written advice from Fisher, Quarmby & Pfeifer that the following transactions have been registered namely:

1. Opening of the Sectional Title Register of Merensky Tower, which is being constructed on the remaining extent of Portion B of Erf 364, Windhoek has been opened.
2. Transfer of 91 units with 131 parking bays above registered into the names of the poretaser. We reserve the right to withdraw from this undertaking should any unforeseen circumstances arise to prevent or unduly delay the registration of the abovementioned matters and whereupon the sum will no longer be held at your disposal, subject to the condition that we give you written notice, prior to the registration of our intention to withdraw from this undertaking ...'

[13] The witness, Mr Grobler testified that the aforesaid letter was presented to the plaintiff on 30 May 2016.

The Argument Based on the Hearsay Rule

[14] Counsel for the defendant submitted, during the course of his argument, that the letter from Fisher, Quarmby & Pfeifer is not admissible in evidence. According to counsel for the defendant it was necessary to call the author of the letter as a witness. The failure to do so has as its consequence that the letter constitutes hearsay evidence. I do not agree. The aforesaid letter will constitute hearsay evidence if the purpose was to establish the truth or correctness of the content thereof. In *casu*, the purpose of the evidence was to establish a different fact. *Ex facie* the document was presented to the plaintiff as some form of security and it was accepted by the plaintiff as such. I accordingly hold that the letter is not inadmissible.

The Application for Absolution

[15] The well-established test for absolution is:

‘When absolution from the instance is sought at the end of the plaintiff’s case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required, but whether the evidence upon which a court applying its mind reasonably to such evidence could or might (not should or ought to) find for the plaintiff.’¹

[16] This approach has been consistently adopted and applied by Namibian courts.²

[17] The central issue in the current matter concerns the interpretation of particularly clauses 8.8 and 8.9 of the agreement relied upon by the plaintiff. The relevant clauses should be interpreted, not in isolation but in the context of the agreement as a whole. It is useful to refer to the dictum of the Namibian Supreme Court in *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC*.³ In paragraph 18 is said that:

¹ *Stier and Another v Henke* 2012 (1) NR 370 (SC) para 4 quoting from *Gordon Lloyd Page and Associates v Rivera and Another* 2001 (1) SA 88 (A) and *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A).

² *Huang v Nevonga* (SA 60/2019) [2021] NASC 27 (15 July 2021).

³ *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors* (SA 9/2013) [2015] NASC 10 (30 April 2015).

'South African courts too have recently reformulated their approach to the construction of text, including contracts. In the recent decision of *Natal Joint Municipal Pension Fund v Endumeni Municipality* Wallis JA usefully summarised the approach to interpretation as follows:

"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production..."

[18] The submissions made by counsel for the defendant is confined to a strict application of the grammatical meaning of the words used, and do not take account of the further factors to be used as aids in interpretation as confirmed in *Total Namibia supra*.

[19] To all this I must add that I am not in the same position as the ultimate trier of the issues. The question to be resolved at this stage of the proceedings is a different one, being whether a court acting reasonably may or could find in favour of the plaintiff.

[20] In applying that approach I hold the view that a court upon a consideration of the facts presented thus far and applying the established approach to the interpretation of agreement could reasonably come to the conclusion that there was a fulfilment of what clauses 8.8 and 8.9 of the agreement had in mind.

[21] Whether or not that will ultimately turn out to be the case is not relevant at this stage of the proceedings and is left for consideration at a later stage.

[22] I therefore make the following order:

The application for absolution from the instance is refused with costs.

P J MILLER
Acting Judge

APPEARANCES

PLAINTIFF: P Kauta
Of Dr Weder, Kauta & Hoveka Inc., Windhoek

9TH DEFENDANT: P C I BARNARD
Instructed by Lubbe & Saaiman Incorporated,
Windhoek