

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between: Case no: HC-MD-CIV-ACT-MAT-2021/03719

VENACIO SANDJONDJO HOMBA

PLAINTIFF

and

MEDIA KACHANA KAMWI HOMBA (BORN KAMWI)

DEFENDANT

Neutral citation: *Homba v Homba* (HC-MD-CIV-ACT-MAT-2021/03719) [2023]
NAHCMD 562 (12 September 2023)

Coram: MILLER AJ

Heard: 9 - 10 May 2023; 12 May 2023; 12 June 2023; 10 July 2023 & 8 August 2023.

Delivered: 12 September 2023

Flynote: Civil practice – Burden of proof on a balance of probabilities – The burden of proof rested on the defendant. The defendant failed to discharge that onus to the required degree. The probabilities of the case favour the plaintiff, the Court therefore dismisses the defendant's counterclaim with costs.

Summary: In this matter, the plaintiff and defendant were married out of community of property. The plaintiff was the sole member of Nacio Construction CC. Nacio Construction CC was then granted a loan by Development Bank of Namibia in the

amount of N\$1 500 000 and the defendant bound herself as surety and co-principal debtor as security for the loan.

The defendant claimed that the parties agreed that the plaintiff will personally pay if Nacio Construction CC default.

The defendant also advanced an amount of N\$800 000 to Nacio Construction CC. The defendant states that the loan was for the plaintiff personally and on his request the money was paid into the bank account of Nacio Construction CC.

The amount of N\$800 000 was partially repaid leaving a balance of N\$600 600.

The plaintiff then instituted divorce proceedings and the defendant filed a plea and counterclaim. In the counterclaim, the defendant also sought an order of divorce, payment of N\$1 500 000 and payment of N\$600 600 with interests and costs.

The plaintiff states that the claims lie against Nacio Construction CC and not against him personally and denies that he would personally repay the amount of N\$1 500 000 should Nacio Construction CC default.

Held that, the probabilities of the case favour the plaintiff. The parties were at the time a married couple. The defendant knew that the plaintiff owned Nacio Construction CC, which provided his source of income. In those circumstances it is not improbable that she, as a wife, would assist her husband in his endeavors to conduct a successful business. This is borne out to some extent, by the fact that she readily agreed to bind herself as a surety for the loan advanced by the Development Bank of Namibia. The same applies in respect of the loan of N\$800 000.

Held that, the burden of proof rested on the defendant. The defendant did not discharge that onus to the required degree. The Court dismisses the defendant's counterclaim with costs.

ORDER

1. Claims 2 and 3 of the counterclaim are dismissed with costs.
 2. The matter is finalised and removed from the roll.
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JUDGMENT

MILLER AJ:

[1] What remains for adjudication are essentially prayers 2 and 3 of the counterclaim filed by the defendant in the main action, in which the following relief is claimed:

Ad Claim 2

Payment in the amount of N\$1 500 000.

Ad Claim 3

Payment in the amount of N\$600 600.

[2] The prayers cited above are accompanied by additional prayers relating to interest on the amounts claimed and a prayer for costs.

[3] The matter arose in the following way:

3.1 The plaintiff and the defendant were married to one another out of community of property.

3.2 The plaintiff was the sole member of a close corporation trading under the name and style of Nacio Construction CC.

3.3 While the marriage was still in existence, Nacio Construction CC applied for and was granted a loan by the Development Bank of Namibia in the sum of N\$1 500 000.

3.4 The defendant bound herself as surety and co-principal debtor as security for the loan, as is apparent from a Deed of Surety executed at the relevant time. The defendant claimed that the parties agreed that the plaintiff will personally pay the sum of N\$1 500 000 should Nacio Construction CC default.

3.5 The defendant in addition advanced an amount of N\$800 000 to Nacio Construction CC. This payment was made on 20 October 2018. I pause to point out that the evidence of the defendant is to the effect that although the payment was made to the bank account of Nacio Construction CC, the loan was in fact a loan to the plaintiff personally. The fact that the deposit was made into the bank account of Nacio Construction CC, was due to the plaintiff's specific request to that effect.

3.6 The amount of N\$800 000 was partially repaid leaving a balance of N\$600 600.

3.7 The marriage concluded between the parties deteriorated to the extent that the plaintiff instituted proceedings seeking essentially an order of divorce.

3.8 The defendant filed a plea and a counterclaim. In claim 1 of the counterclaim, she likewise sought an order of divorce in claim 1, as well as claims 2 and 3 to which I referred above.

3.9 On 3 November 2022, this court granted an order dissolving the bonds of marriage between the parties, leaving claims 2 and 3 of the counterclaim for adjudication at a later stage.

[4] The stance adopted by the plaintiff in response to the allegations made in respect of claims 2 and 3 was to the effect that the claims lie against Nacio Construction CC and not against him in his personal capacity. He denies the existence of any agreement that he would personally repay the sum of N\$1 500 000

should Nacio Construction CC default in repaying the sum borrowed from the Development Bank of Namibia. The further loan of N\$800 000 was made to Nacio Construction CC according to the plaintiff and not to him personally.

[5] During the course of the trial the defendant and the plaintiff respectively were the only witnesses called to testify. There remains in essence a direct and material conflict in their respective versions as to what the terms of the alleged agreements were. The agreements were verbal agreements concluded between parties who were, at least at that stage when the alleged agreements were concluded, happily married.

[6] There are no internal or external contradictions in any of the versions. Nor can I adversely criticize any of the witnesses in regard to their demeanor and candour.

[7] The probabilities of the case in my view favour the plaintiff. The parties were at the time a married couple. The defendant knew that the plaintiff owned, so to speak, Nacio Construction CC, which provided his source of income. In those circumstances it is not improbable that she, as a wife, would assist her husband in his endeavors to conduct a successful business. This is borne out to some extent, by the fact that she readily agreed to bind herself as a surety for the loan advanced by the Development Bank of Namibia. The same applies in respect of the loan of N\$800 000. To that extent it is noteworthy that the payment was reflected as a "loan to Nacio Construction".

[8] I am mindful to adopt the approach in the oft cited case of *SFW Group Ltd and Another v Marcell Cie and Others*.¹

[9] Ultimately I take into account that the burden of proof rested on the defendant. For the reasons I indicated, the defendant did not discharge that onus to the required degree.

[10] Counsel for the plaintiff raised as an issue that there was no resolution passed by Nacio Construction CC which entitled the plaintiff to act on its behalf. That argument was not persisted with in argument and in my view correctly so.

¹ *SFW Group Ltd and Another v Marcell Cie and Others* 2003 (1) (SCA) at 147-151.

[11] In the result I make the following order:

1. Claims 2 and 3 of the counterclaim are dismissed with costs.
2. The matter is finalised and removed from the roll.

P J MILLER
Acting Judge

APPEARANCES

PLAINTIFF: A Shimakeleni
Of Appolos Shimakeleni Lawyers, Windhoek

DEFENDANT: A Feris
Of Sisa Namandje & Co. Inc., Windhoek