

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 817 (12 December 2023)

Coram: MILLER AJ
Heard: 2 October 2023
Delivered: 12 December 2023

Flynote: Contract – Interpretation of clauses 8.8 and 8.9 of the agreement – Court of the opinion that the clauses should not be interpreted narrowly and in isolation, but should be interpreted as a whole and factors such as context and purpose should be considered – The Court of the view that the parties’ intention was that the plaintiff would advance the money to the defendants on the condition that the defendants provide sufficient security to the satisfaction of the plaintiff – The plaintiff was satisfied with the letter that it constituted sufficient security and thus advanced the monies – The ninth defendant’s defence therefore fails.

Summary: The Faanbergh Winckler Development Trust concluded a written agreement with the plaintiff, whereby the plaintiff agreed to provide the Trust with a loan facility for the funding for the construction of a set of residential apartments and parking spaces, known as the Merensky Towers.

The ninth defendant bound himself as surety and co-principal debtor for the amounts payable to the plaintiff.

The plaintiff gave the defendants certain conditions for the loan to be provided, amongst others, that the defendants must present them with some form of security that the amounts advanced would be repaid, apart from the suretyship obtained from the ninth defendant.

The ninth defendant provided a letter to the plaintiff as a form of security and the plaintiff accepted it.

The plaintiff disbursed the amount of N\$94 000 000. The amount of N\$36 502 901,62 remained unpaid at the time of the institution of the proceedings.

The ninth defendant submitted that the letter provided was not the kind of security contemplated in the written agreement and that the suspensive conditions in clauses

8.8 and 8.9 had not been fulfilled and that those clauses are unambiguous and not capable of an interpretation beyond what was expressly stated and that it could not be waived, as the waiver has to be in writing. It was further argued that the plaintiff should have pursued the remedy of unjust enrichment and not breach of contract. It was also argued that the letter amounted to inadmissible hearsay evidence, however this argument had been dealt with and was dismissed in the absolution application.

Held that, the agreement cannot be interpreted only within the narrow confines of the words used in paragraphs 8.8 and 8.9 in isolation. The Court should consider the relevant factors such as context, purpose and the document as a whole.

Held that, a commercial document executed by the parties with the intention that it should have commercial operation, should not lightly be held unenforceable because the parties have not expressed themselves as clearly as they should have done.

Held that, it is apparent from reading the agreement as a whole and in context that, what the parties intended was that the plaintiff would disburse the funds required provided, the borrower could provide sufficient security to the satisfaction of the plaintiff. By presenting the letter to the plaintiff, the borrower clearly intended to provide the security that the plaintiff required and on the strength of that, to persuade the plaintiff to disburse the funds required.

Held that, whilst it may be correct to argue that the letter did not fall squarely within the ambit of what was provided for in paragraphs 8.8 and 8.9, an interpretation of the intention of the parties, considering the principles, it is quite apparent that the intention of the parties always was the provision of security to the satisfaction of the plaintiff in a form acceptable to it. To now argue that upon a strict and narrow interpretation of clauses 8.8 and 8.9 of the agreement, the conditions precedent had not been fulfilled runs counter to what the real intention of the relevant parties was at the time.

Held that, clauses 8.8 and 8.9 are not as precise as it should have been with the benefit of hindsight, however, does not detract from what I consider to have been the true intention of the parties when the agreement was concluded.

The court therefore finds in favour of the plaintiff and dismisses the ninth defendant's defence.

ORDER

1. Judgment is granted in favour of the plaintiff against the ninth defendant for payment in the sum of N\$36 502 901.62.
2. Interest of the said amount at the rate of 11.5 per cent per annum calculated from 30 September 2019 to date of payment.
3. Costs of suit on the scale as between attorney and client.
4. The matter is finalised and removed from the roll.

JUDGMENT

MILLER AJ:

[1] It is common cause in this matter that the ninth defendant is indebted to the plaintiff in the sum of N\$36 502 901.62 together with interest on that amount at the rate of 11.5 per cent per annum calculated from 30 September 2019 to the date of payment.

[2] The ninth defendant had bound himself as a surety and co-principal debtor for amounts payable to the plaintiff by an entity styled as the Faanbergh Winckler Development Trust (the Trust).

[3] The Trust concluded a written agreement with the plaintiff in terms of which, inter alia, the plaintiff agreed to provide the Trust with a loan facility up to a limit of N\$91 400 000. Having granted the facility, it was agreed that disbursements were to

be made from time to time, subject to certain conditions, which were included in the written agreement. The underlying purpose of the loan facility was to provide funding for the construction of a set of residential apartments and parking spaces, known as the Merensky Towers.

[4] The plaintiff was prepared to permit draw-downs against the facility, provided that the Trust and those representing it offered some form of security that the amounts advanced would be repaid, apart from the suretyship it had obtained from inter alia, the ninth defendant.

[5] The security provided was a letter dated 30 May 2016. The letter was penned by one CJ Gouws on the letterhead of a firm of legal practitioners, Fisher, Quarmby & Pfeifer and was addressed to the Manager Commercial Properties Finance, Standard Bank Namibia Limited and marked for the attention of Mr Manus Grobler. The letter reads as follows:

'Dear Sir,

IRREVOCABLE LETTER OF UNDERTAKING; FOR CREDIT FAANBERGHWINCKLER DEVELOPMENT TRUST, REGISTRATION NUMBER T371/2010

At the request of Mr. F. Bergh, we advise that we hold at your disposal the amount of N\$94,000,000.00 (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 354, Windhoek, has been opened;
2. Transfer of 91 units with 131 parking bays have been registered into the names of the purchasers.

We reserve the right to withdraw from this undertaking should any unforeseen circumstances arise to prevent or unduly delay in 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. This letter is neither negotiable nor transferable and must be returned to us against payment of the above sum/s.'

[6] It is common cause that this letter was presented to the plaintiff as a form of security and accepted by it as such.

[7] The plaintiff thereafter disbursed the amount of N\$94 000 000 provided for in the facility.

[8] As I had indicated, an amount of N\$36 502 901.62 remained unpaid at the time these proceedings were instituted.

[9] The ninth defendant, having admitted his liability in that amount raised a number of defences. In the main, it was contested that the letter I referred to was not of the kind of security contemplated in the written agreement. Hence, so it was argued, the plaintiff could not rely on the written agreement since the suspensive conditions had not been fulfilled. Instead, so it was argued, the plaintiff's remedy was to pursue an action based upon unjust enrichment, rather than a breach of the agreement. It was contended further, that the letter I quoted amounted to inadmissible hearsay evidence. In a separate judgment following an application for absolution, I dismissed the latter submission for the reasons I indicated in that judgment. I continue to hold the views I expressed then and have nothing further to add thereto.

[10] As to the third defence raised on the papers, I need only state that nothing more was said about it during the course of the trial, no relevant evidence was tendered and nothing was said in argument. I will accordingly not deal with it.

[11] What remains for consideration is whether on the facts, the plaintiff was correct in instituting this action as one based on contract. Of particular relevance in this context is clause 8 of the agreement headed "Conditions Precedent". The relevant portions read as follows:

'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, falling 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.'

[12] During the course of the trial, counsel for the ninth defendant submitted that as the matter of interpretation, the letter I referred to earlier, did not satisfy any of the agreed conditions precedent in clauses 8.8 and 8.9 above. It was submitted that those clauses are unambiguous and not capable of an interpretation beyond what was expressly stated. Nor could those conditions be waived, it was submitted, since any waiver has to be in writing.

[13] In considering my approach to this interpretation of the agreement, the principles to be taken into account involve more than just the grammar and syntax as expressed in the written document: While the words used in the document always remains relevant to ascertaining the intention of the parties, it is not the only consideration.

[14] The Supreme Court of Namibia in the matter of *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors*¹ formulated the approach as follows:

'South African courts too have recently reformulated their approach to the construction of text, including contracts. In the recent decision of *Natal Joint Municipal*

¹ *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors* (SA 9 of 2013) [2015] NASC 10 (30 April 2015).

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. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.”

[15] The approach formulated in *Total Namibia (Pty) Ltd* supra requires of me to consider the correct interpretation not only within narrow confines of the words used in paragraphs 8.8 and 8.9 in isolation. It requires of me to take into account the relevant factors such as context, purpose and the document as a whole. As was held in the matter of *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund*,² a commercial document executed by the parties with the intention that it should have commercial operation should not lightly be held unenforceable because the parties have not expressed themselves as clearly as they should have done.

[16] It is apparent from reading the agreement as a whole and in context that what the parties intended was that, the plaintiff would disburse the funds required provided that the borrower could provide sufficient security to the satisfaction of the plaintiff. By presenting the abovementioned letter to the plaintiff, the borrower clearly intended to provide the security that the plaintiff required and on the strength of that to persuade the plaintiff to disburse the funds required.

[17] Whilst it may be correct to argue that the letter did not fall squarely within the ambit of what was provided for in paragraphs 8.8 and 8.9, an interpretation of the intention of the parties, considered in the light of the aforementioned principles, it is quite apparent that the intention of the parties always was the provision of security to

² *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* [2009] ZASCA 154; 2010 (2) SA 498.

the satisfaction of the plaintiff in a form acceptable to it. To now argue that upon a strict and narrow interpretation of clauses 8.8 and 8.9 of the agreement, the conditions precedent had not been fulfilled, runs counter to what the real intention of the relevant parties was at the time.

[18] It may well be that clauses 8.8 and 8.9 are not as precise as it should have been with the benefit of hindsight. That, however, does not detract from what I consider to have been the true intention of the parties when the agreement was concluded.

[19] I therefore conclude that the defence raised must fail. Therefore I make the following orders:

1. Judgment is granted in favour of the plaintiff against the ninth defendant for payment in the sum of N\$36 502 901.62.
2. Interest of the said amount at the rate of 11.5 per cent per annum calculated from 30 September 2019 to date of payment.
3. Costs of suit on the scale as between attorney and client.
4. The matter is finalised and removed from the roll.

K MILLER
Acting Judge

APPEARANCES

PLAINTIFF: P Kauta (with him M Kuzeeko)
Dr Weder, Kauta & Hoveka Inc., Windhoek

9TH DEFENDANT: P C I Barnard (with him D Lubbe)
Instructed by Lubbe & Saaiman Incorporated,
Windhoek