



REPORTABLE

CASE NO: SA 45/2017

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

NAME NOVE CONSTRUCTION CC

First Appellant

KORNELIA MAKENA THIMENDE

Second Appellant

PAULINUS MUNIKA THIMENDE

Third Appellant

and

DEVELOPMENT BANK OF NAMIBIA

Respondent

Coram: SMUTS JA, FRANK AJA and NKABINDE AJA

Heard: 12 June 2019

Delivered: ... June 2019

Summary: The appellants

APPEAL JUDGMENT

FRANK AJA (SMUTS JA and NKABINDE AJA concurring):

[1] During January 2015 Name Nove Construction CC (the corporation) applied to the Development Bank of Namibia (DBN) for a loan in the amount of N\$1 875 554 so as to enable the corporation to deliver desks and chairs for schools within the Kavango Region pursuant to a tender awarded to the corporation in this regard by the Kavango Regional Council. The N\$1 875 554 was needed to pay the supplier of the mentioned school furniture and who was indicated in the application as by a South African based business known as Furnitech South Africa (Furnitech).

[2] Per letter dated 5 March 2015 the DBN informed the corporation that it was prepared to lend N\$1 875 554 to it on the terms and conditions set out in the letter. One of the conditions was that the members of the corporation had to stand surety for the corporation. These members were the second and third appellants (Mr Thimende and Mrs Thimende). The letter required that it be signed on behalf of the corporation and stated that upon signature of the letter 'it will immediately become the DBN's Development Portfolio Facility Agreement entered between the DBN and the Borrower and become a legal binding agreement'. Mr Thimende signed the agreement on behalf of the corporation and immediately after his signature the following appears, namely; that he is duly authorised to sign on behalf of the corporation and that he accepts 'the DBN's Development Portfolio Facility Offer on terms and conditions as set out above and or the Standard Loan Conditions applicable to the DBN's Development Portfolio Loans' (my underlining).

[3] On the same day that Mr Themende signed the loan agreement resolution by the corporation was also signed by Mr and Mrs Themende as members of the corporation referring to the loan from the NDC and authorising Mr Themende 'to sign the Development Portfolion Facility Agreement and all other relevant documents including the Collateral Documentation required by DBN on behalf of the Close Corporation'.

[4] On 10 March 2015 Mrs Thimende per letter instructed DBN to pay the loan to Furnitech Namibia CC in an account held at First National Bank Namibia in Windhoek and supplied the number of the account. NDC duly acted on this instruction.

[5] When the loan was not repaid as stipulated in the agreement, DBN instituted action against the corporation and Mr and Mrs Thimende (the latter two based on the suretyships they had signed in favour of the corporate). The corporation and the Thimende couple raised three defences and also initiated a counterclaim against the DBN.

[6] The defences were the following: First, that no consensus was reached between the DBN and the corporation and hence no agreement came into being between them. Second, that the DBN did not pay the agreed supplier. This led to the corporation not being able to perform *vis-à-vis* the Regional Council of Kavango and to the tender to deliver the mentioned desks and chairs being cancelled causing damages to the corporation to the tune of just over N\$1,1 million. This damages claim formed the subject matter of the corporation's counterclaim. Third, that Ms Thimende was, to be knowledge of the DBN, not

authorised by the corporation to act on its behalf and could thus not authorise payment to Furnitech Namibia.

[7] The court *a quo* dismissed the defences raised and granting judgment in favour of the DBN. The counterclaim was likewise dismissed. An appeal was noted against the whole judgment court *a quo* but in the Heads of Argument the appeal against the dismissal of the counterclaim was abandoned. It is thus necessary. It is thus necessary to deal only with the appeal against the judgment in favour of the DBN.

[8] As indicated above a letter under the heading 'Contract based Finance Facility' was forwarded to the corporation on 5 March 2015 informing the corporation as to the terms and conditions on which the DBN would lend it money and that those terms and conditions would become the agreement between the parties upon signature. Mr Thimende signed this letter and accepted it 'on the terms and conditions as set out above and on the standard loans and conditions applicable to the DBN's Development Portfolio Loans' (my underlining).

[9] The submissions advanced on behalf of the corporation is that the underlined portion of the acceptance above means that there was no consensus between the parties as the said standard conditions was not part of the offer made to the corporation and there is no evidence that the DBN accepted what amounts to a counter offer to include the said standard conditions as part of the loan agreement. I do not intend any disrespect to counsel who appeared on behalf of the parties and who, in their heads of argument, dealt with the issue of consensus in detail from a legal academic perspective, but am of the view that the issue was

disposed of in the evidence. The company secretary of DBN who was cross-examined as to the request to discover the 'Standard Loan Conditions' stated that this was because the letter of 5 March 2019 constantly the offer contained the standard terms and conditions

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FRANK AJA

SMUTS JA

NKABINDE AJA

APPEARANCES

APPELLANTS:

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Instructed by Du Pisani Legal
Practitioners

RESPONDENT:

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Instructed by Kanguuehi & Kavendjii Inc