



NOT 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: 9 October 2019

Summary: The appellants, a corporation (first appellant) represented by its two members (Mr and Mrs Thimende, the second and third appellants respectively) were awarded a tender by the Kavango Regional Council to supply desks and chairs to schools in the Kavango region. The appellants approached the Development Bank of Namibia for a loan of N\$1 875 554 to supply the desks and chairs to these schools. This amount was needed to pay the supplier of the

mentioned school furniture indicated in the application as being a South African based business known as Furnitech South Africa. One of the terms and conditions of the loan agreement was that the members of the corporation had to stand surety for the corporation. On 5 March 2015, Mr Thimende signed the agreement on behalf of the corporation and immediately after his signature, the following phrase appeared; 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 on the Standard Loan Conditions applicable to the DBN's Development Portfolio Loans'. On the same day the loan agreement was signed, a resolution by the corporation was also signed by Mr and Mrs Thimende referring to the loan from the DBN and authorising Mr Themende 'to sign the Development Portfolio Facility Agreement and all other relevant documents including the Collateral Documentation required by DBN on behalf of the Close Corporation'. On 10 March 2015, Mrs Thimende instructed DBN to pay the loan amount to Furnitech Namibia CC in an account held at First National Bank Namibia in Windhoek. DBN duly acted on this instruction. Although some furniture was delivered to the corporation and duly to the Kavango Regional Council, the bulk of the furniture was not delivered. Mr Thimende later established that Furnitech South Africa had been liquidated, which resulted in the corporation failing to honour the obligations of the tender, the Kavango Regional Council cancelling the tender without making a payment to the corporation and the DBN on the due date demanded repayment of the loan and instituted action against the appellants.

Three defences were raised by the appellants: Firstly, that no consensus was reached between the DBN and the corporation and hence no agreement came into being between them. Secondly, 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 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. Thirdly, that Mrs Thimende was, to the knowledge of the DBN, not authorised by the corporation to act on its behalf and could thus not authorise payment to Furnitech Namibia. The court *a quo* dismissed the defences raised and granted judgment in favour of the DBN. The counterclaim

was likewise dismissed. An appeal was noted against the whole judgment of the court *a quo* but in the heads of argument the appeal against the dismissal of the counterclaim was abandoned.

It is held that, the court *a quo* was correct in finding that there was consensus as to the terms and conditions of the loan agreement. On the evidence, the only terms and conditions applicable to the loan agreement were those contained in the letter which terms are the standard terms and conditions. In the circumstances the facts are clear, namely; the loan agreement was governed by the terms and conditions spelt out in the letter of 5 March 2015 and no other and it is these terms and conditions that were accepted by the corporation.

Held that, the corporation cannot raise as a defence that the money was never advanced to it because DBN paid the supplier as it was agreed to that 'the DBN to pay suppliers directly'.

It is held that, on the facts, Mrs Thimende had actual authority to authorise the payment. Even if she did not have such authority, Mr Thimende did nothing to protest the payment until the issue of lack of authority in his plea by which time the DBN and any reasonable person would have accepted Mrs Thimende's authority.

It is held that, the appeal is dismissed with costs.

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 supply desks and chairs to schools within the Kavango region pursuant to a tender awarded to the corporation in this regard by the Kavango Regional Council. N\$1 875 554 was needed to pay the

supplier of the mentioned school furniture, indicated in the application as being a South African based business known as Furnitech South Africa.

[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 are 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 on the Standard Loan Conditions applicable to the DBN's Development Portfolio Loans' (my underlining).

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

[4] At the beginning of March 2015 an official of DBN (a senior business analyst) was contacted by a Mr Scheepers to enquire whether the DBN has

received payment instructions from the corporation in respect of the loan. Mr Scheepers was known to the official of the DBN through previous business dealings as the owner of both the Namibian and South African entities known as Furnitech. According to Mr Scheepers he had discussed payment with Mr Jerry Thimende (the son of the Thimende couple) and indicated that payment has to be made to the Namibian Furnitech entity. The official of the DBN informed Mr Scheepers that he would need a letter from the corporation to instruct DBN to make such payment as Mr Jerry Thimende had no authority to do so. The record indicates that such letter was prepared between Messrs Tony Thimende and Scheepers for signature by Mr Thimende. Mrs Thimende was approached in this regard as Mrs Thimende was away for work at the time. Mrs Thimende signed this letter dated 10 March 2015 which was forwarded to the DBN.

[5] On 10 March 2015, Mrs Thimende per the letter referred to above instructed DBN to pay the loan amount to Furnitech Namibia CC in an account held at First National Bank Namibia (FNB) in Windhoek and supplied the number of the account. DBN duly acted on this instruction.

[6] Subsequent to the payment, some furniture was delivered to the corporation which it in turn delivered to the Kavango Regional Council. The bulk of the furniture was however not delivered and upon investigation by Mr Thimende, he established that Furnitech South Africa had been liquidated. The result of this unfortunate event was that the corporation could not make further deliveries of furniture. The Kavango Regional Council cancelled the contract without making a payment to the close corporation and the DBN, on the due date, demanded repayment of the loan.

[7] 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 corporation). The corporation and the Thimende couple raised three defences and also initiated a counterclaim against the DBN.

[8] The defences were the following: Firstly, that no consensus was reached between the DBN and the corporation and hence no agreement came into being between them. Secondly, that the DBN did not pay the agreed supplier, namely Furnitech South Africa, but instead paid Furnitech Namibia CC. This led to the corporation not being able to perform *vis-à-vis* the Regional Council of Kavango and to the tender being cancelled which cancellation allegedly caused 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. Thirdly, that Mrs Thimende was, to the knowledge of the DBN, not authorised by the corporation to act on its behalf and could thus not authorise payment to Furnitech Namibia.

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

[10] 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 Loan conditions applicable to the DBN's Development Portfolio Loans' (my underlining).

[11] Submissions advanced on behalf of the corporation were to the effect that, the underlined portion of the acceptance above means that there was no consensus between the parties as the said standard loan conditions were 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 loan conditions as part of the loan agreement.

[12] 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 I 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 failure to discover the 'Standard Loan Conditions' stated that this was because the letter of 5 March 2015 contained the standard terms and conditions. Furthermore, terms and conditions not contained in the said letter are not referred to or alleged by the corporation either in its pleadings or in the evidence. On the evidence the only terms and conditions applicable to the loan were those contained in the letter which terms are the standard terms and conditions. In the circumstances the facts are clear, namely; the loan agreement was governed by the terms and conditions spelt out in the letter of 5 March 2015 and no other and it is these terms and conditions that were accepted by the

corporation. The reference to standard loan conditions in the acceptance was mere surplusage as these were contained in the body of the offer. There was thus consensus as to terms and conditions of the loan agreement. The court *a quo* thus correctly dismissed this defence.

[13] Clause 4.5 of the agreement between the parties states 'the DBN to pay suppliers directly'. In this matter it is clear from the application form for the loan that there was only one supplier, namely Furnitech South Africa (the fact that the plural 'suppliers' is used, is a further indication that the template containing the standard terms and conditions was used). Counsel for the corporation and the Thimende couple submits that it was a tacit term of the agreement that Furnitech South Africa was the supplier. This meant that a change of supplier to Furnitech Namibia amounted to an amendment of the agreement which, in view of the standard non-variation clause, could only happen if reduced to writing and signed by DBN and the corporation. As the non-variation clause was not adhered to, the amendment was invalid and payment to Namibia Furnitech was not authorised hence such payment could not be regarded as payment of the loan amount to the corporation. Counsel for the DBN submitted that the tacit term contended for did not arise and that it was for the borrower (corporation) to identify the supplier for payment and that this is what Mrs Thimende did when she indicated where payment was to be made.

[14] If DBN indeed paid the supplier (Furnitech South Africa) then the point in this regard raised on behalf of the corporation and the Thimende couple falls away. This is so because then, even accepting for the moment the tacit term contended for, payment was made in accordance with clause 4.5 of the

agreement. The DBN had to prove that they advanced the money pursuant to the loan agreement to the corporation. As the corporation agreed in the loan agreement that the supplier would be paid the loan amount (instead of the corporation itself) the supplier (Furnitech South Africa) was the corporation's agent to accept payment on its behalf.¹ This being so, the corporation cannot raise as a defence that the money was never advanced to it because DBN paid the supplier.

[15] Just as the corporation could agree that payment of the loan amount to the supplier would constitute payment to it, so could Furnitech South Africa agree that payment to Furnitech Namibia would constitute payment to it. This is, in my view, what happened on the facts. Mr Scheepers who was the owner of both Furnitech South Africa and Furnitech Namibia indicated that the payment had to be made to the Furnitech Namibia account. The senior business analyst at DBN, who authorised the payment, testified to this effect. The evidence indicates that both business entities were in fact close corporations, but the probabilities are that Mr Scheepers was a member of both entities. He dealt with said business analyst in these capacities for about 5 years. It is also clear from the emails handed in with the exhibits that payment to Furnitech Namibia was made at the request of Mr Scheepers, the owner or member of Furnitech South Africa. Mr Scheepers requested the son of the Thimendes to get a letter of authorisation for payment to Furnitech Namibia. This letter was only presented to Mrs Thimende subsequent to Mr Scheepers being satisfied with its contents. There is no doubt that this payment would be in respect of the furniture ordered for the schools as per the document provided by Furnitech South Africa that was presented to DBN in its application for the loan. The subsequent events fortify this evidence. Some desks and chairs

¹ *Matador Buildings (Pty) Ltd v Harman* 1971 (2) SA 21 (C); *Baker v Probart* 1985 (3) SA 429 (A) at 439 C-E and *Bird v Summerville* 1961 (3) SA 194 (A).

were delivered and there was no demand by Furnitech South Africa for payment. Simply put, just as the corporation agreed that payment to the supplier by DBN, would be payment to it for the purposes of the loan, so did the supplier agree that the payment by the corporation (via DBN) to Furnitech Namibia would be payment to it. On the facts, payment was thus made to the supplier (clause 4.5 of the agreement between the corporation and DBN), namely Furnitech South Africa (per the tacit term averred by the respondents). It follows that payment was made in accordance with the agreement and this defence cannot be sustained.

[16] The final defence raised is that Mrs Thimende had no authority to authorise payment. According to the submission the DBN knew she has no authority because Mr Thimende was authorised in terms of the resolution of 5 March 2015 mentioned above to sign the loan agreement 'and all other relevant documents including collateral documentation required by the DBN on behalf of the close corporation'. In terms of s 54 of the Close Corporation Act² every member of the corporation acts as an agent for the corporation when it comes to dealing with third parties and it is only where the third party has knowledge or ought to have knowledge that such member does not have the power to act on behalf of the corporation that a corporation would not be bound by the acts of a member. Of course, if a member has actual authority the belief of the third party as to such member's authority or lack thereof is irrelevant, and the corporation will be bound by the acts of such members. I should also mention in passing that unauthorised action by a member may subsequently be ratified by the corporation.³ Assuming for the moment that the resolution granting Mr Thimende authority in relation to the loan agreement implicitly curtailed Mrs Thimende's authority to act on behalf of the

² Act 26 of 1988.

³ Section 54(2)(a) of Act 26 of 1980.

corporation the evidence is such that it establishes actual authority in this regard in respect of Mrs Thimende and at the least a ratification of her instruction to DBN.

[17] According to the evidence, Mr Thimende was often away for work and would only return home for weekends. In general, it was Mrs Thimende who saw to the administrative tasks relative to the corporation. When Mr Thimende was not available Mrs Thimende could attend to any matter arising and concerning the corporation. The identification of the bank account into which the supplier had to be paid was regarded by Mr and Mrs Thimende as an administrative task. She was thus implicitly authorised to see to the day to day administration of the corporation and to sign documents relevant to the execution of these tasks.⁴ Mr Thimende, although stating that he was upset when he heard that Mrs Thimende had authorised the payment, did nothing to raise the issue with the DBN so as to stop payment or complain about the payment. In fact, after payment was demanded, the lawyers representing the close corporation and the Thimende couple did not raise authority but asked for time to allow the borrower and the sureties to see whether they could come up with the money. In the light of the behaviour of the appellants, it is unlikely that Mr Thimende was upset about the payment instruction as testified by him and this is more likely to have been an afterthought to tie in with the defences raised after the engagement of a new lawyer. The facts indicate that Mrs Thimende probably had actual authority. This is also why her son, who assisted in preparing the tender, after finalising the wording of the payment instruction in consultation with Mr Scheepers, asked her to sign it in the absence of his father. Even if she did not have actual authority her action was ratified when Mr Thimende did nothing to protest the payment until he raised

⁴ *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) para [48].

the lack of authority point long after the event in his plea by which time DBN and any reasonable person would have accepted Mrs Thimende's authority. It follows that this third defence raised on behalf of the corporation and the Thimende couple also stands to be dismissed.

[18] In the result the appeal is dismissed with costs.

FRANK AJA

SMUTS JA

NKABINDE AJA

APPEARANCES

APPELLANTS:

P C I Barnard

Instructed by Du Pisani Legal
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RESPONDENT:

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