



NOT REPORTABLE

CASE NO: SA 8/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MUNDIAL TELECOM SARL

Appellant

and

NAMIBIA TOURISM BOARD

Respondent

Coram: MAINGA, JA, SMUTS JA and FRANK AJA

Heard: 18 March 2024

Delivered: 27 March 2024

Summary: The Namibian Tourism Board (NTB) brought an action against Mundial Telecom SARL (Mundial) for the repayment of USD1,5 million or the Namibian equivalent (N\$23 506 234,01 at the time) for the cancellation of the agreement entered into between it and Mundial, for Namibia to host the Kora Awards Ceremony on 21 March 2016. NTB accepted a promotional package offered by Mundial which required the payment of a consideration of USD1,5 million. This amount was payable by 10 December 2015 soon after the agreement was signed on 4 December 2015. NTB was late in making this payment and it did so by way of three equal instalments of N\$5 million on 22 December 2015, 24 December 2015 and 7 February 2016 respectively and a fourth and final instalment of N\$8 506 234 on 17 February 2016. As the planned

date for the event approached, it became clear that the awards ceremony was not going to go ahead. In its notice cancelling the agreement, Mundial cited that NTB's late payment of the consideration of USD1,5 million amounted to a repudiation of the agreement. In its claim against Mundial, NTB relied on clause 5.3 of the agreement which provides that in the event of the awards ceremony not taking place in Namibia, Mundial 'would refund the amount (USD1,5 million) paid by NTB less reasonable expenses as determined by the parties to the agreement within 60 days of such eventuality'. At the trial, only one witness gave evidence, namely NTB's chief executive officer Mr T.D. //Naobeb. Mundial closed its case without leading any evidence.

The court *a quo* finding in favour of NTB found that although NTB's payment of the USD1,5 million was late, Mundial had elected to press for specific performance of NTB's payment obligation which Mundial then accepted. The court *a quo* further held that it was not open to Mundial to cancel the agreement and that this amounted to a mere 'face saving exercise'. The court *a quo* further found that clause 5.3 was clear in requiring a refund of the paid amount less reasonable expenses in the event of the ceremony not proceeding. The court found that the right to a refund remained even after Mundial's purported cancellation on 15 March 2016. The court referred to Mundial's failure to bring a counter-claim in respect of expenses incurred or provide any evidence of such expenses, given the failure to call any witnesses. The court *a quo* accordingly upheld NTB's claim and directed Mundial to pay NTB N\$23 506 234,01 together with interest and costs. The appeal is against this judgment and order.

On appeal, Mundial's written argument was to the effect that the court *a quo* disregarded the issues set out in the pre-trial report but counsel appearing for the appellant pointed out that there would not appear to have been such an order. Mundial further argued that the court *a quo*'s judgment was premised upon a case not pleaded by NTB; that NTB's version was improbable and that it had failed to discharge the onus upon it to establish its relief.

Held that, Mundial is precluded from relying on the pre-trial report in this Court having failed to include it in the record.

Held that, Mundial's contention that NTB's version was improbable and should have been dismissed is not borne out by the facts. The evidence of NTB's chief executive officer Mr //Naobeb was coherent and essentially undisturbed. Against that testimony which was credible, Mundial chose to close its case without leading any evidence. Thus, this ground of appeal is without merit.

Held that, the contention by Mundial that NTB relied upon a case not pleaded is without substance. NTB had squarely relied upon the contractual obligation in clause 5.3 for Mundial to refund NTB its payment, less reasonable expenses in the event of the planned award ceremony not going ahead.

Held that, it was incumbent upon Mundial to lead evidence in support of the unspecified assertion of expenses it incurred that could be deducted from the refund to avoid the obligation to refund that amount. The failure to do so rendered it liable to refund that amount in accordance with the agreement.

Held that, the attempt to cancel the contract on 15 March 2016 by reason of late payment of the amount would appear to be contrived and a stratagem devised in the face of the event not going ahead on 21 March 2016 as planned and undertaken. More importantly, it was not open to Mundial to cancel by reason of late payment of the amount, given its prior acceptance of that payment. It is well settled that a contracting party cannot approbate and reprobate. Once an election is made – in this case to enforce payment and be bound by the agreement – it was no longer open to Mundial to raise late payments as a ground for cancellation.

It thus follows that the court below correctly found that clause 5.3 obligated Mundial to refund USD1,5 million (ie N\$23 506 234,01) to NTB together with costs and interest in the event of the ceremony not taking place.

The appeal is dismissed with costs.

APPEAL JUDGMENT

SMUTS JA (MAINGA JA and FRANK AJA concurring):

[1] The respondent in this appeal is the Namibia Tourism Board (NTB), a statutory body corporate established to promote tourism to Namibia. Its claim against the appellant in the High Court was based on an agreement it entered into with the appellant (Mundial), a corporate entity registered in Benin. Mundial owns the right to host the Kora Awards Ceremony which recognises the role of musicians and artists on the African continent. Mundial had agreed with the Government of Namibia that the Kora Awards for 2016 would be hosted in Namibia on 21 March 2016.

[2] Given that an awards ceremony of that nature was viewed as a useful opportunity to market Namibia as a tourist destination, NTB entered into an agreement accepting a promotional package offered by Mundial. The package mostly comprised promotional television clips to be aired prior to and during the awards ceremony. The package also included several tables and seats at the event.

[3] The consideration to be paid for this promotional package was USD1,5 million. It was payable by 10 December 2015, soon after the agreement was signed on 4 December 2015.

[4] The NTB was late in making this payment. It did so by way of four separate payments. The Namibian dollar equivalent of that sum in USD at the time was N\$23 506 234,01. Three instalments of N\$5 million each were paid on 22 December 2015, 24 December 2015 and 7 January 2016. The final instalment of N\$8 506 234 was paid on 17 February 2016.

[5] As the planned date (21 March 2016) for the event approached, it became increasingly clear that the awards ceremony was not going to go ahead.

[6] Shortly before the scheduled event and on 15 March 2016, Mundial gave notice to NTB that it (Mundial) purported to cancel the agreement on grounds of NTB's late payment of the consideration of USD1,5 million amounted to a repudiation of the agreement.

[7] NTB subsequently instituted action, claiming payment of USD1,5 million or the Namibian equivalent. The High Court found in its favour and Mundial has appealed against that judgment and order.

The pleadings

[8] NTB's claim against Mundial is based on the agreement between the parties. It relies on clause 5.3 which provides that in the event of the awards ceremony not taking place in Namibia, Mundial would 'refund the amount (USD1,5 million) paid by NTB less reasonable expenses as determined by the parties to the agreement within 60 days of such eventuality'.

[9] The breach clause in the agreement provided that should either party breach any provision and fail to remedy the breach within five days after receiving written notice of the breach, the aggrieved party would be entitled to cancel the agreement or claim specific performance with or without claiming damages.

[10] NTB claimed that Mundial breached the agreement by failing to hold the ceremony, failing to deliver the promotional package and failing to refund the USD1,5 million and by using those funds for purposes other than those sanctioned by the agreement.

[11] NTB claimed that it had called upon Mundial to remedy the breaches which Mundial failed to do.

[12] NTB proceeded to claim USD1,5 million as damages from Mundial, together with interest and costs.

[13] In its plea, Mundial admitted the agreement and that NTB had paid the consideration by way of the instalments on the dates referred to. Mundial however pleaded that all the payments were late and in breach of the agreement and as a result of these late payments, it claimed that it had cancelled the agreement on 15 March 2016.

[14] Mundial also admitted that the ceremony did not take place but that it was not obliged to refund the amount of USD1,5 million as it had incurred reasonable expenses in excess of that amount.

[15] Mundial also pleaded that it had suffered damages and was compelled to make payments to its suppliers and sub-contractors which are not specified. Mundial also pleaded that it and its sub-contractors and suppliers were no longer able to host the event due to 'the non-performance of NTB as well as the Government of Namibia'.

[16] Mundial also pleaded that it did not breach the agreement with NTB as 'such agreement had been cancelled (by it) on 15 March 2016'.

[17] NTB replicated and stated that Mundial was obliged to refund the full amount claimed and pointed out that Mundial had failed to plead any amount of damages it had allegedly suffered.

The trial

[18] After the matter proceeded to judicial case management, it went to trial.

[19] Only one witness gave evidence at the trial. NTB's chief executive officer (CEO), Mr T.D. Naobeb, was the solitary witness. He testified as to the origin and finalisation of the agreement, NTB's payments and communications between himself and Mr E.C. Adjovi, the principal of Mundial, concerning their lateness. He also gave evidence concerning the failure on the part of Mundial to hold the ceremony which had started to become apparent from early March 2016. He testified that there had been no performance on the part of Mundial and that NTB claimed a refund of what it had paid (USD1,5 million) and that Mundial had not refunded it.

[20] Mundial closed its case without calling any witnesses.

Approach of the High Court

[21] The High Court found that, although NTB's payment of the USD1,5 million was late, Mundial had elected to press for specific performance of NTB's payment obligation which Mundial then accepted. The court held that it was not open to Mundial to cancel the agreement subsequently and that this amounted to a mere 'face saving exercise'.

[22] The court further found that clause 5.3 was clear in requiring a refund of the paid amount less reasonable expenses in the event of the ceremony not proceeding. The right to a refund, the court held, remained even after Mundial's purported cancellation of 15 March 2016. The court further referred to the failure of Mundial to bring a counter-claim in respect of expenses or provide any evidence of expenses, given the failure to call any witnesses.

[23] The court accordingly upheld NTB's claim and directed Mundial to pay NTB N\$23 506 234,01 together with interest and costs.

[24] Mundial appeals against that judgment and order.

Submissions by the parties

[25] Counsel who had prepared written argument, on behalf of Mundial, Mr J Diedericks, did not appear at the hearing. Mr J A N Strydom represented Mundial instead. He informed the court that Mr Diedericks declined to appear and that he (Mr Strydom) indicated that his instructions were that Mundial would stand by the written argument prepared on its behalf by Mr Diedericks. In the written argument, it was contended that the High Court erred by disregarding the issues set out in the pre-trial report. That report inexplicably did not however form part of the record filed by Mundial. Mr Strydom pointed out that it would appear that the trial proceeded without such a report. Mundial is in any event precluded from relying on it, given its absence from the record.

[26] It was also contended in the heads of argument filed on behalf of Mundial that the High Court's judgment was premised upon a case not pleaded by NTB. NTB's

pleaded case was that it suffered contractual damages equal to the consideration paid arising from Mundial's alleged failure to host the event and provide the promised promotional package. The written argument proceeded on the basis that the liability on the part of Mundial to pay the refund could only arise if NTB had timeously complied with its obligation to make that payment. It was contended that the court's finding that Mundial was effectively estopped from relying on that breach to cancel the agreement was not pleaded by NTB.

[27] It was asserted in written argument filed on behalf of Mundial that NTB's version was improbable and that it had failed to discharge the onus upon it to establish its relief. It was contended that the 'jurisdictional facts' for a refund were never pleaded and no evidence in that regard was tendered, and that NTB had not discharged the onus to prove compliance with the terms of the agreement.

[28] Counsel for NTB argued that NTB relied upon clause 5.3 of the agreement in seeking a refund and that this was confirmed in Mr //Naobeb's evidence. Counsel also referred to Mundial's failure to plead any specific expenses and lead evidence on expenses to avoid or reduce the refund and to contend that they were reasonable. Counsel argued that Mundial was precluded from relying on expenses. Counsel further argued that Mr //Naobeb's evidence demonstrated that Mundial accepted NTB's late payments and that Mundial elected to continue with the agreement. Given this election, it was contended that it was not open to Mundial to attempt to cancel the agreement on grounds of late payment subsequently.

[29] It was also pointed out on behalf of NTB that Mundial had failed to place any evidence before court to the effect that any delays by NTB to pay the amount on time had made it impossible for it to host the event.

[30] Counsel also contended that delays in NTB's payment were not material and that Mundial had accepted those delays. Counsel further argued that the High Court's judgment should be upheld.

Disposal

[31] In the NTB's amended particulars of claim, there is express reference to and reliance upon clause 5.3 of the agreement and its terms in para 11.1, stressing the appellant's obligation to refund the amount paid by NTB within 60 days less reasonable expenses incurred as determined by the parties in the event of the ceremony not proceeding. In para 21 of the amended particulars of claim, it is alleged that the appellant breached the material terms of the agreement by failing to refund USD1,5 million which NTB had paid. It is further alleged that NTB called upon Mundial to remedy that breach and, as a result of that failure, had suffered damages in the sum of USD1,5 million or the Namibian dollar equivalent (N\$23 506 234,01).

[32] It is thus not correct for Mundial to contend that a reliance upon a breach of clause 5.3 was not pleaded and that this was not NTB's case. On the contrary, it was squarely pleaded and relied upon by NTB even though the repayment of the USD1,5 million was termed as damages.

[33] This was also made clear and repeated in evidence by NTB's CEO, Mr //Naobeb. At no stage did the erstwhile counsel for Mundial object to that evidence at

the trial. Nor could he as that was NTB's pleaded case. In fact, counsel for Mundial at the trial cross-examined Mr //Naobeb extensively on his reliance upon clause 5.3.

[34] To contend that the judgment was premised on a case not pleaded is thus entirely baseless.

[35] Although not well formulated as a claim for damages in seeking the refund, NTB relied upon a breach of the obligation to repay in the event of the ceremony not taking place and that the failure to refund resulted in damages as a result of that breach.

[36] Mundial's related written submission that a refund could only arise upon a timeous compliance with NTB's payment obligation and after the determination of reasonable expenses is not borne out by the facts.

[37] It is common cause that NTB's payments did not comply with the contractual term of 10 December 2015. The amount was paid in three equal instalments of N\$5 million on 22 and 24 December 2015 and on 7 January 2016 and a final instalment of N\$8 506 234, on 17 February 2016. The unequivocal evidence of Mr //Naobeb was that these late payments were accepted by Mundial. That is also borne out by the exchange of contemporaneous correspondence put in evidence. There was no contrary evidence provided by Mundial.

[38] The attempt to cancel the contract on 15 March 2016 by reason of late payment of the amount would appear to be contrived and a stratagem devised in the face of the event not going ahead on 21 March 2016 as planned and undertaken. More importantly, it was not open to Mundial to cancel by reason of late payment of the

amount, given its prior acceptance of that payment. It is well settled that a contracting party cannot approbate and reprobate. Once an election is made – in this case to enforce and be bound by the agreement – it was no longer open to Mundial to raise late payments as a ground for cancellation.

[39] Mundial's contention that NTB's version was improbable and should have been dismissed is not borne out by the facts. The coherent evidence on the part of Mr //Naobeb was essentially undisturbed despite an unduly discursive and lengthy cross-examination. As against that testimony which was credible, Mundial chose to close its case without leading any evidence. This ground of appeal is completely without merit.

[40] Mundial furthermore did not plead any specific expenses to be deducted from the refund. Nor was any evidence led in support of the unspecified assertion of expenses having been incurred. It was incumbent upon it to do so to avoid the obligation to refund that amount. The failure to do so rendered it liable to refund that amount in accordance with the agreement.

[41] It follows that the court below correctly found that clause 5.3 obligated Mundial to refund USD1,5 million in the event of the ceremony not taking place. In the absence of reasonable expenses being pleaded and established in evidence, the court cannot be faulted in directing that Mundial repay N\$23 506 234,01 to NTB together with costs and interest.

[42] It follows that the appeal is to be dismissed. Both sides engaged an instructing and an instructed counsel on appeal. The cost award reflects this.

[43] The following order is made:

1. The appeal is dismissed with costs;
2. The costs of appeal are to include the costs of one instructing and one instructed legal practitioner.

SMUTS JA

MAINGA JA

FRANK AJA

APPEARANCES

APPELLANT:

J A N Strydom

Instructed by Erasmus & Associates

RESPONDENT:

T C Phatela

Instructed by Kanguuehi & Kavendjii
Inc.