



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**  
**JUDGMENT**

Case no: I 2009/2015

In the matter between:

**AFRICAN DYNASTY INVESTMENT CC**

**PLAINTIFF**

and

**XAVIER GOMES**

**DEFENDANT**

**Neutral Citation:** African Dynasty Investment CC v Xavier Gomes (I 2009/2015)  
[2017] NAHCMD 280 (6 October 2017)

**Coram:** PARKER AJ

**Heard:** 29 September 2017

**Delivered:** 6 October 2017

**Flynote:** Delict – Liability – Causation – Two components of causation being factual causation and legal causation discussed – Both components discussed in relation to first claim (claim 2) for damages for loss of income and second claim (claim 3) for damages for lost or damaged goods and equipment – As to claim 2 court finding that

defendant's conduct was a *conditio sine qua non* for the loss suffered by plaintiff to occur (factual causation) but based on policy considerations it would not be fair, just and reasonable to impute liability to defendant (legal causation)– Accordingly court held plaintiff has failed to satisfy the legal causation component of causation and dismissed claim 2 – As to claim 3 court found that defendant's conduct was *conditio sine qua non* for plaintiff's loss to occur – Court found further that defendant's conduct was a substantial factor in producing the damages plaintiff suffered – Court held further that on considerations of policy it was fair, just and reasonable to impute liability to defendant as respects claim 3 - Court concluded that plaintiff has satisfied both components of causation with regard to claim 3 and granted claim 3 to the extent established by plaintiff's Auditor's Report as to the value of plaintiff's goods and equipment – Court rejected defendant's contention that plaintiff neglected to mitigate her damages – Court held that it is not enough for a defendant merely to allege in his or her pleadings that plaintiff neglected to mitigate his or her damages – Defendant must prove that plaintiff failed to do that which a reasonable man or woman would have done to mitigate his or her damages in the circumstances – One way of doing that is for defendant's counsel to put to plaintiff in cross-examination that which defendant considered to be what a reasonable man or woman would have done to mitigate his or her damages for plaintiff to answer – If court was satisfied that what defendant put to plaintiff was indeed what a reasonable man or woman would have done to mitigate his or her damages but plaintiff neglected to do so or plaintiff took different and ineffectual steps, then court would be in a position to hold that defendant has established that plaintiff neglected to mitigate his or her damages – In the absence of such evidence court is not in a position to say that plaintiff neglected to mitigate his or her damages – In the result defendant's allegation remains unproven and is therefore a mere irrelevance.

**Summary:** Delict – Liability – Causation – Two components of causation being factual causation and legal causation discussed – Both components discussed in relation to first claim (claim 2) for damages for loss of income and second claim (claim 3) for damages for lost or damaged goods and equipment – As to claim 2 court finding that defendant's conduct was a *conditio sine qua non* for the loss suffered by plaintiff to occur (factual causation) but based on policy considerations it would not be fair, just and reasonable to impute liability to defendant (legal

causation) – Accordingly court held plaintiff has failed to satisfy the legal causation component of causation and dismissed claim 2 – As to claim 3 court found that defendant's conduct was *conditio sine qua non* for plaintiff's loss to occur – Court found further that defendant's conduct was a substantial factor in producing the damages plaintiff suffered – Court held further that on considerations of policy it was fair, reasonable and just to impute liability to defendant as respects claim 3 - Court concluded that plaintiff has satisfied both components of causation with regard to claim 3 and granted claim 3 to the extent established by plaintiff's Auditor's Report as to the value of plaintiff's goods and equipment – Court rejected defendant's contention that plaintiff neglected to mitigate her damages – Court held that it is not enough for a defendant merely to allege in his or her pleadings that plaintiff neglected to mitigate his or her damages – Defendant must prove that plaintiff failed to do that which a reasonable man or woman would have done to mitigate his or her damages in the circumstances – One way of doing that is for defendant's counsel to put to plaintiff in cross-examination that which defendant considered to be what a reasonable man or woman would have done to mitigate his or her damages for plaintiff to answer – If court was satisfied that what defendant put to plaintiff was indeed what a reasonable man or woman would have done to mitigate his or her damages but plaintiff neglected to do so or plaintiff took different ineffectual steps then court would be in a position to hold that defendant has established that plaintiff neglected to mitigate his or her losses – In the absence of such evidence court is not in a position to say that plaintiff neglected to mitigate his or her damages – In the result defendant's allegation remains unproven and is therefore a mere irrelevance – Defendant (lessor) failed or refused to refund to plaintiff (lessee) a deposit of N\$25,000 plaintiff had paid to defendant upon due date after termination of lease of premises – Plaintiff alleging that as a result of such failure or refusal she suffered damages for loss of income which she would have derived by operating business at premises offered to her on basis of first refusal by a new landlord because she could not pay a deposit of N\$25,000 to new landlord (claim 2) – Plaintiff alleging further that as a direct result of defendant's aforementioned refusal or failure she could not after removing her goods and equipment from defendant's property on termination of the lease secure the new landlord's place to store her goods and equipment resulting in damage to or loss of the goods and equipment which were stored in an open place (claim 3) – Court having found that plaintiff did not satisfy both

components of causation as respects claim 2 court dismissed claim 2 – Court having found in respect of claim 3 that plaintiff has satisfied both components of causation court granted claim 3 but to the extent proved by plaintiff's Auditor's Report as being the value of plaintiff's goods and equipment.

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### ORDER

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- (a) Claim 2 is dismissed.
- (b) Claim 3 is granted in the amount of **N\$135 062**.
- (c) Plaintiff is awarded 60 per cent of her costs.

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### JUDGEMENT

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#### Introduction

[1] The parties entered into a lease agreement; with defendant as lessor, and plaintiff as lessee. Plaintiff paid a refundable deposit of N\$25 000 ('the amount') to defendant before taking occupation of the premises. The amount was refundable within seven days after termination of the lease on conditions stipulated in clause 26 of the lease agreement.

[2] Mr. Rukoro, counsel for the plaintiff, informed the court that plaintiff was no longer pursuing claim 1 'because plaintiff had received payment of the amount'. Plaintiff confirmed counsel's information. The burden of this court is therefore to adjudicate on claim 2 and claim 3.

[3] The provisions of the lease agreement that are relevant to the instant case are in clause 26. It was agreed that on termination of the lease the defendant (lessor) must within seven days of termination of the lease pay back to the plaintiff

the deposit of N\$25 000 which plaintiff had paid to the defendant before taking occupation of the leased premises, subject to the conditions provided in clause 26.

## CLAIM 2

### Plaintiff's allegations

[4] Plaintiff alleges as follows. Defendant failed or refused to pay back to her the amount within seven days after termination of the lease which occurred on 30 November 2014, and for such refusal or failure to pay that amount, plaintiff alleges that she could not secure premises in respect of which she had first refusal from the a Mr. Belete (plaintiff witness), resulting in her not earning an income of N\$83,776 per month for the period December 2014-December 2015. 'In the premise', so alleges the plaintiff, 'Defendant is indebted to the plaintiff in the sum of N\$1,005,321.'

### Defendant's Answer

[5] Defendant's answer to the plaintiff allegations is this. Defendant denies that the delay in paying the amount to plaintiff was the proximate cause of damages suffered by plaintiff; and if plaintiff earned an average of N\$83 776 per month as income, plaintiff did not explain why she did not 'utilize some of the income to secure the place' for which she had first refusal. Defendant contends that plaintiff's failure to do so was 'the *causa causans* of the damages and prejudices she had allegedly suffered'.

### The Evidence

[6] The evidence is clear and of common cause that defendant did not pay the amount to plaintiff within seven days after termination of the lease but did so some 16 months after the termination. It is also not disputed that defendant had no reason in terms of clause 26 of the lease agreement not to pay the full amount of N\$25 000 within seven days after termination of the lease on 30 November 2014. No part of the deposit was lawfully retainable in terms of clause 26 of the lease agreement.

## The Law

[7] In such delictual matters plaintiff must establish that defendant's conduct caused the plaintiff's alleged harm or loss. In the absence of a causal connection between the harm or loss and the defendant's conduct, there is no delict. (*mCubed International (Pty) Ltd and another v Singer and another NNO* 2009 (4) SA 471 (SCA))

[8] Two separate problems are involved in causation in delict. The first problem involves primarily a question of fact. It relates to the sequence of events which stretches from defendant's breach of duty to plaintiff to the harm or loss allegedly suffered by plaintiff. In the instant case, it stretches from defendant's failure or refusal to pay back to plaintiff the amount within seven days after termination of the lease to the occurrence of the alleged loss or harm, which is that plaintiff was unable to pay a deposit to secure another property from where she could carry out her business, resulting in her losing an income to the tune set out in Claim 2. This is a factual problem; it is factual causation.

[9] It has been stated that the main tool for determining factual causation is the 'but-for' test or the theory of *conditio sine qua non*. (*Minister of Police v Skosana* 1977 (1) SA 31 (A)) In the course of time the 'but-for' test has been criticized as not being perfect. But in *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) the Supreme Court of Appeal was of the view that any hurdles in the way of the application of the 'but-for' test should not be exaggerated unduly because a plaintiff does not have to establish factual causation with absolute certainty. The plaintiff only has to prove that the conduct complained of probably caused the harm or loss and that this entails a 'sensible retrospective analysis of what would probably have occurred based upon the evidence and what can be expected to occur in the ordinary course of human affairs' (*Van Duivenboden* (SCA), para 25).

[10] Nevertheless, the factual link between a defendant's conduct and the harm or loss is not enough to establish liability. This concerns the second problem mentioned in paragraph 8 above, i.e. legal causation. A person may be held liable

for only the consequences that are closely linked to his or her conduct – either directly or sufficiently closely. Where the consequences are not linked closely to the defendant's conduct or where the link is not strong enough, then there is no legal causation, that is, the consequences alleged by the plaintiff are too remote, as the defendant in the instant case contends. (See Max Loubser (ed.), *The Law of Delict in South Africa*, Cape Town, OUP, 2nd edn (2012), para 5.2.)

[11] The solution to the second problem (i.e. legal causation) is based on policy and it entails considerations of reasonableness, fairness and justice. (Max Loubser (Ed), para 6.6). It involves a delicate question of law: how far should the law go in requiring the defendant to pay damages for a loss or harm which his or her conduct has in fact been a substantial factor in producing; that is, is it fair, reasonable and just for the court to require the defendant to pay damages for consequences of his or her conduct, regardless of remoteness of the consequences.

#### Application of the law to the facts (claim 2)

[12] On the facts I find that the defendant's failure or refusal to refund the amount to plaintiff within the time limit set by the lease agreement is wrongful as it violates his obligation under the lease agreement. I also find that the defendant's conduct was a *conditio sine qua non* for the loss suffered by the plaintiff to occur, taking into account the rule of law that plaintiff need not establish factual causation with absolute certainty. (*Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA)) However, I find that on policy considerations it will be unjust, unfair and unreasonable to impute liability to defendant. To hold otherwise will assume crucial facts which were not established by the evidence. For instance, the fact that plaintiff made a net profit of N\$422,019 in the period ended 31 December 2014, according to her Auditor's Report, does not follow without any evidence that she would have made – without more – that amount, if she had secured the premises offered to her by Mr. Belete (who would have been her new landlord). It will be unreasonable, unjust and unfair for the court to make such assumption in the absence of evidence. Besides, any such contention by the plaintiff flies in the teeth of human experience in the ordinary course of human affairs regarding the provision of services for gain in

the economy whose fortunes are amenable to fluctuations; that is, downturn and upturn.

[13] Based on these reasons, I conclude that the connection between the conduct of the defendant and the loss allegedly suffered by the plaintiff was not close enough for liability to arise. I therefore hold that while there is factual causation, the loss cannot be imputed to the defendant because plaintiff has failed to satisfy the legal component of causation. It follows that claim 2 should be reject; and it is rejected.

[14] Ms. Shifotoka, counsel for the defendant, submitted that upon the authority of *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Limited* 1915 AD 1 damages for loss of profits can only be awarded when such loss is the direct, natural or contemplated result of non-performance. I do not find *Victoria Falls & Transvaal Power Co Ltd* to be of assistance on the point under consideration. *Shatz Investment Pty Ltd v Kalovymas* 1946 (2) SA 545 (A), also referred to me by Ms. Shifotoka, stands in the same boat.

[15] I have mentioned those cases to reject them as of no assistance on the point under consideration. Plaintiff's claim 2 is not for profit but loss of income. Income and profit are not the one and the same thing. Be that as it may, I have accepted Ms. Shifotoka's submission that the loss of income allegedly suffered by the plaintiff due to defendant's conduct is too remote to hold defendant liable. It follows that plaintiff has failed to satisfy the legal component of causation. Claim 2 is rejected. I now proceed to consider claim 3.

### CLAIM 3

#### Introduction

[16] The introductory remarks in paras 1-3 regarding claim 2 apply equally to claim 3; and so, I need not rehearse them here.



### Plaintiff's allegations

[17] Plaintiff makes the same allegations regarding defendant's failure or refusal to pay to her in terms of clause 26 of the lease agreement the amount. And for such refusal or failure, plaintiff alleges that she was unable to secure the premises in respect of which Mr. Belete had given her first refusal. Her evidence was that the goods and equipment were left in open spaces and were at the mercy of the elements, resulting in her losing the goods and the equipment because, most of the said items were damaged and/or lost in transportation and storage of those items. In her pleadings the plaintiff has listed the goods and equipment as TV sets, beds, mattresses, blankets and cutlery. For the harm, plaintiff claims from defendant N\$500000 'being the fair and reasonable replacement value of the said items'.

### Defendant's defence

[18] Defendant repeats the same defence he had put forth with regard to claim 2 (see para 5 above); and adds that plaintiff ought to have taken reasonable steps to mitigate her losses, and that she could have avoided the losses 'had she taken steps reasonable in the circumstances of this matter', and adds further: 'In respect of the furniture and equipment, the plaintiff having knowledge of the value of its (her) good (goods) choose to store it (them) in open air and as a result it was (they were) damaged.

### The Evidence

[19] On the facts, I do not find that plaintiff did not do anything to find a suitable place to store her goods. She looked for places to store her goods; and she could only get an open space to store her goods. Some would say she caused her own loss, as Ms. Shifotoka submitted, but such submission overlooks plaintiff's testimony. She testified that because defendant failed to pay the amount in terms of the lease agreement, she could not secure Mr. Belete's premises. She explained – and I am satisfied with her explanation – that she had to use the money she had to pay workers and rates. In my opinion, payment of wages of employees when it falls due

is extremely important in the employer-and-employee relationship and good practice in industry and commerce.

### The Law

[20] The proposition of law in paras 7-11 above on factual causation and legal causation apply with equal force to claim 3.

### Application of the law to the facts (claim 3)

[21] On the totality of the evidence, I find that defendant's conduct (i.e. his breach of clause 26 of the lease agreement) was wrongful. The conduct was a *conditio sine qua non* for the loss that plaintiff suffered to occur.

[22] I therefore, find that plaintiff has satisfied the factual causation component. I now pass to consider whether the factual connection between the defendant's conduct and the loss was sufficiently close for the court to attribute liability to defendant; that is the legal causation component. In other words, was the defendant's conduct a substantial factor in producing plaintiff's loss to the extent that it will be fair, reasonable and just to impute liability to defendant on the basis that defendant's conduct was not remote?

[23] On the facts, I find that the non-payment of the amount, as aforesaid, was a substantial factor in producing the loss which plaintiff suffered. On considerations of policy, I hold that it is fair, reasonable and just for the court to attribute liability to defendant.

[24] But then Ms. Shifotoka submits that plaintiff did not take steps to mitigate her losses. I fail to see what more plaintiff could have done to prevent loss of her goods and equipment. She had to transport them from defendant's property and she had to store them. But transportation and storing cost money; money which, thanks to defendant, plaintiff did not have, as I have found previously. In any case, Mr. Rukoro submitted in his response to this submission of Ms. Shifotoka's that onus rests on the defendant to allege and prove that plaintiff neglected to do what a reasonable

man or woman would have done in order to mitigate his or her damages (LTC Harms, *Amler's Precedents of Pleadings*, 4<sup>th</sup> edn (1993), p 102; and the case there cited). As I understand it, it is not enough for defendant merely to allege in his or her pleadings that plaintiff neglected to mitigate her damages. Defendant must prove that plaintiff failed to do that which a reasonable man or woman would have done to mitigate his or her damages in the circumstances. The defendant must prove the allegations.

[25] In my opinion, one way of doing that, is for defendant's counsel to put to plaintiff in cross-examination that which defendant considered to be what a reasonable man or woman would have done to mitigate his or her damages for plaintiff to answer. And if the court was satisfied that what defendant put to plaintiff was, indeed, what a reasonable man or woman would have done to mitigate his or her damages, but plaintiff neglected to do so or plaintiff took different ineffectual steps, then court would be in a position to hold that defendant has established that plaintiff neglected to mitigate his or her losses, and the court would be in a position to hold that plaintiff neglected to mitigate his or her losses.

[26] In the instant case, Ms. Shifotoka did not lead any such evidence. In the absence of such evidence, the court is not in a position to say that plaintiff neglected to mitigate her damages. Defendant's allegation remains unproven; it is a mere irrelevance.

[27] Based on these reasons I conclude that as respects claim 3, plaintiff has satisfied both components of causation. But that is not the end of the matter. Plaintiff claims N\$500000, 'being the fair and reasonable replacement value of the said items'.

[28] In response, Ms Shifotoka referred the court to the plaintiff's Auditor's Report for the material period ended 31 December 2014 which was filed of record as part of the discovered documents. That report indicates that the closing net book value of plaintiff's office equipment, computer equipment, furniture and fitting (apart from a motor vehicle which Mr. Rukoro conceded could not have been left in the open to deteriorate) is N\$135,062. No evidence was led by plaintiff to establish the value of

the goods and equipment as being N\$500,000. Accordingly, I accept Ms Shifotoka's submission that the court should find that the value of the goods and equipment is that which plaintiff's own Auditor has stipulated in the Auditor's Report.

[29] What remains to determine is the matter of costs. The plaintiff came to court to seek judgment for two claims (claim 1 was abandoned before commencement of the trial, as I have mentioned above). Claim 2 has been rejected upon defendant's successful defence. Claim 3 has succeeded. In that event; it will be unfair and unsatisfactory to grant plaintiff all her costs. I think she should be awarded 60 per cent only of her costs.

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

- (a) Claim 2 is dismissed.
- (b) Claim 3 is granted in the amount of **N\$135 062**.
- (c) Plaintiff is awarded 60 per cent only of her costs.

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C Parker  
**Acting Judge**

## APPEARANCES

PLAINTIFF:

S. Rukoro

Instructed by Dr. Weder, Kauta &amp; Hoveka Inc.

DEFENDANT:

E. Shifotoka

of Conradie and Damaseb, Windhoek