

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between:

Case no: HC-MD-CIV-ACT-CON-2018/01218

**STANDARD BANK NAMIBIA LIMITED**

**PLAINTIFF**

and

**MGM PROPERTIES (PTY) LIMITED**

**FIRST DEFENDANT**

**NATHAN PIETER MBUTU**

**SECOND DEFENDANT**

**MADELEINE MBUTU**

**THIRD DEFENDANT**

**Neutral citation:** *Standard Bank Namibia Limited v MGM Properties (Pty) Limited*  
(HC-MD-CIV-ACT-CON-2018/01218) [2021] NAHCMD 33 (09  
February 2021)

**Coram:** MILLER AJ

**Heard:** 02 November 2020

**Delivered:** 09 February 2021

**Flynote:** Contract – Breach – Defendants raising *pactum de non patendo* as a defence suspending the initial loan agreement entered into with Plaintiff – Onus of proof resting upon defendants in respect of alleged oral agreement – Court of the view that agreement relied upon by the defendants is invalid in terms of s (1) of the

Formalities In Terms Of The Contracts Of Sale of Land Act 71 of 1969 and therefore, the defence raised by defendants must fail.

**Summary:** The defendants raised a defence and counterclaim to the plaintiff's claim on the basis of *pactum de non patendo*, i.e. an oral agreement that replaced the initial agreement entered into with the plaintiff. During trial, it was accepted by the parties that the burden of proof rested upon the defendants to prove the alleged oral agreement.

The agreement relied on by the defendants in essence sought to vary the existing agreement, thus putting in place new or entirely different obligations, but the non-variation clause in the initial loan agreement required any variations to be in writing, ultimately resulting in the defendants to fail on that aspect, notwithstanding the fact that the oral agreement relied on is also invalid in terms of the Contracts of Sale of Land Act 71 of 1969.

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### ORDER

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1. There will be judgment in favour of the plaintiff against the defendants jointly and severally in terms of prayers 1, 2, 3 and 4 of the particulars of claim.
2. The counterclaim is dismissed with costs.

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### JUDGMENT

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MILLER AJ:

[1] The plaintiff instituted action against the defendants based upon a written agreement concluded between the plaintiff and the first defendant on 9 March 2017. In terms thereof the plaintiff advanced the sum of N\$24 000 000 to the first defendant. In a separate written agreement the second and third defendants bound

themselves as securities in *solidom* to the plaintiff as co-principal debtors for the amount advanced to the first defendant. In addition to the indebtedness of the first defendant was by registration of a continuing first mortgage bond over the properties to first defendant bought with the proceeds of the loan.

[2] It is common cause that the first defendant is in breach of the loan agreement and that he failed to repay the instalments of the loan on their due dates.

[3] Consequently the plaintiff seeks the following relief:

'1. Payment of the sum of N\$24 383 378.99;

1. Payment of interest at the rate of 11.50% per annum on the amount N\$24 383 378.99 calculated from 13<sup>th</sup> March 2018 to the date of payment;
2. An order declaring the following property executable:

CERTAIN : Erf No. 6649 (a portion of Erf No. 1448)  
Khomasdal (Extension no. 15)

SITUATE : In the Municipality of Windhoek  
Registration Division "K"  
KHOMAS REGION

MEASURING : 4201 (Four Two Nil One) Square Meters

HELD BY : Certificate of Registered Title No. T 1111/2017

And:

CERTAIN : Erf No. 6650 (a portion of Erf No. 1448)  
Khomasdal (Extension no. 15)

SITUATE : In the Municipality of Windhoek  
Registration Division "K"  
KHOMAS REGION

MEASURING : 4497 (Four Four Nine Seven) Square Meters

HELD BY : Certificate of Registered Title No. T 1114/2017

And:

CERTAIN : Erf No. 6651 (a portion of Erf No. 1448)  
Khomasdal (Extension no. 15)

SITUATE : In the Municipality of Windhoek  
Registration Division "K"  
KHOMAS REGION

MEASURING : 2240 (Two Two Four Nil) Square Meters  
HELD BY : Certificate of Registered Title No. T 1113/2017

And:

CERTAIN : Erf No. 6652 (a portion of Erf No. 1448)  
Khomasdal (Extension no. 15)

SITUATE : In the Municipality of Windhoek  
Registration Division "K"  
KHOMAS REGION

MEASURING : 2700 (Two Seven Nil Nil) Square Meters  
HELD BY : Certificate of Registered Title No. T 1114/2017

And:

CERTAIN : Erf No. 6653 (a portion of Erf No. 1448)  
Khomasdal (Extension no. 15)

SITUATE : In the Municipality of Windhoek  
Registration Division "K"  
KHOMAS REGION

MEASURING : 2700 (Two Seven Nil Nil) Square Meters  
HELD BY : Certificate of Registered Title No. T 1115/2017

And:

CERTAIN : Erf No. 6654 (a portion of Erf No. 1448)  
Khomasdal (Extension no. 15)

SITUATE : In the Municipality of Windhoek  
Registration Division "K"  
KHOMAS REGION

MEASURING : 3152 (Three One Five Two) Square Meters  
HELD BY : Certificate of Registered Title No. T 1116/2017

And:

CERTAIN : Erf No. 6655 (a portion of Erf No. 1448)  
Khomasdal (Extension no. 15)

SITUATE : In the Municipality of Windhoek  
Registration Division "K"  
KHOMAS REGION

MEASURING : 3001 (Three Nil Nil One) Square Meters  
HELD BY : Certificate of Registered Title No. T 1117/2017

3. Costs of suit on a scale of attorney and own client;
4. Collection Commission
5. Further and/or alternative relief.'

[4] In the amended plea filed by the defendants, they allege that their obligation arising from the loan agreement were suspended "pursuant to a subsequent oral agreement amounting to a *pactum de non-patendo*. The terms and conditions of the oral agreement are set out in paragraph 2.1 of the amended plea and they are alleged to be the following:

'2.1 At the time of the conclusion of the aforesaid *pactum de non petendo*, at Windhoek, the Plaintiff was duly represented by a certain Nawaaz Dinath and the First

Defendant was duly represented by the Second Defendant. The material express, implied, and in the alternative tacit terms of the agreement were:

2.1.1 The first Defendant would no longer market or sell any of the properties, more fully described in paragraph 12 of the plaintiff's particulars of claim (which description is herewith repeated as if specifically pleaded), to third parties, but would make these properties (except for erven 6649 and 6650 in respect of which a Deeds of Sale had already been entered into with a certain Strauss and a certain Van Der Merwe), available for development of 192 sectional title units, comprising one bedroom and two bedroom units, for uptake by the employees of the plaintiff.

2.1.2 Plaintiff would further make financing in the amount of N\$28, 500, 000.00 available to the First Defendant for payment of the loan amount which the First Defendant had with Bank Windhoek Limited and for the release of Mortgage Bond No. B1101/2017 in favour of Bank Windhoek over the remainder of Erf 1448 and Erf 6656.

2.1.3 The aforesaid sectional title units would be developed from 2018, on Erven 6651, 6652, 6653, 6654, 6655, 6656 and the remainder of Erf 1448 (hereinafter collectively referred to as the properties), and would be sold to employees of the plaintiff at the approximate costs of N\$860 000.00 and N\$760 000.00 respectively, depending on the size of the unit, that is, whether it is a two bedroom or a one bedroom unit and such costs would be made up as follows:

(a) In respect of the two bedroom units, N\$261,718.75 towards costs of land per unit, N\$465 000,00 towards development costs and N\$125 000, 00 towards plaintiff's profit; and

(b) In respect of the single bedroom units N\$261 718.75 towards the costs of land, N\$375 000.00 towards the development costs and N\$125 000, 00 towards profit for the first defendant;

(c) The discrepancies would cancel out and the remaining balances would first go to costs of financing and any amount remaining would be refunded to the First Defendant.

2.1.4 Over a period of two years, commencing in 2018, First Defendant would develop 107 single bedroom and 85 double bedroom units on the properties.

2.1.5 In respect of each of such sectional title units so developed, an amount of N\$125 000, 00 would be paid to the first defendant as its profit on the sale of each of the respective Sectional Title Units and the remaining balance would go towards the payment of the first defendant's loans with plaintiff and cancellation of the Mortgage Bonds registered or to be registered over the properties.

2.1.6 Plaintiff would at own expense market the said sectional title units to its employees, and procure the uptake by its employees on the aforesaid terms and according to own needs and affordability of the respective sectional title units.

2.1.7 Plaintiff would, for purposes of sale to and uptake by its employees, of the respective sectional title units, provide loans to its employees, against security in the form of mortgage bonds to be registered against the respective sectional title units and in favour of the plaintiff.

2.1.8 In consideration for the first defendant making the properties referred to in paragraph 2.1.1 available for purposes of the aforesaid sectional title units, for sale to the employees of the plaintiff, plaintiff would pay to the first defendant an amount of N\$2 500 000.00, in lieu of profit on sale of land only.

2.1.7 Plaintiff would make financing available for the aforesaid sectional title development in the form of restructuring financing having the following implications:

(a) first defendant's obligation to, in terms of the Commercial Property Loan Facility agreement, repay the amount of N\$24 000 000.00 by 31 March 2018 would be suspended pending the development, sale and transfer of the said sectional title units to the respective employees of the plaintiff;

(b) the respective continuous covering mortgage bonds referred to in paragraph 12 of the plaintiff's particulars of claim would be cancelled, and in respect of each of the sectional title units sold to the respective employees of the plaintiff, mortgage bonds would be registered in favour of the plaintiff over such respective sectional title unit, covering the indebtedness of such respective employees to plaintiff;

(c) the proceeds of such restructuring financing would also be used to settle the first defendant's indebtedness to Bank Windhoek and the cancellation of the mortgage bond presently registered in favour of Bank

Windhoek, in respect of the remainder of Erf 1448 and erf 6656, both situated in Khomasdal, Extension No. 15, in the municipality of Windhoek, registration division K.

2.1.6 The First Defendant's total indebtedness to Plaintiff arising from the Commercial Property Loan Facility would be suspended pending the implementation of the aforesaid terms of the *pactum de non petendo* and in particular the sale, to the employees of the plaintiff, of 192 Sectional Title Units in terms of the terms and conditions of the oral agreement.

2.2 In compliance with its obligations flowing from the aforesaid *pactum de non petendo*, and during or about December 2017, plaintiff, at own expense and in cooperation with the first defendant, developed or caused to be developed, a brochure for purposes of marketing that said sectional title units to its employees.

2.3 The plaintiff unlawfully repudiated all the terms of the aforesaid *pactum de non petendo*, in that:

2.3.1 Plaintiff, on or about 20 February 2018 gave notice to the first defendant that the Commercial Property Loan is due for full settlement on 28 February 2018;

2.3.2 Failed to provide the aforesaid restructuring financing for purposes of development of the aforesaid sectional title units;

2.3.3 Refused or failed to market, or adequately market the aforesaid sectional title units to its employees, alternatively, failed to provide financing for such employees to purchase the said sectional title units;

2.3.4 Generally refused or failed to adhere to all the terms of the aforesaid *pactum de non petendo*.

2.4 The aforesaid repudiation by the plaintiff of the terms of the said *pactum de non petendo*, made it impossible for the first defendant to perform timeously, in terms of the Commercial Property Loan Facility agreement.

2.5 First defendant accordingly pleads that plaintiff is, in law not entitled to a benefit arising from its own breach of contract, and that plaintiff's to right enforce the terms of the Commercial Property Loan Facility agreement, including the right to cancel the Commercial



Property Loan Facility agreement and the entitlement to payment of the full balance outstanding, must remain suspended pending the determination of the first defendant's counterclaim, which is filed evenly herewith.'

[5] The amended plea continues to allege that the plaintiff breached the oral agreement, which in turn forms the basis of the first defendant's counterclaim which reads as follows:

'WHEREFORE the first defendant claims:

1. An order confirming the termination of the *pactum de non petendo*;
2. Payment of the amount of N\$2 500 000.00;
3. Payment of the amount of N\$24, 000, 000.00;
4. Interests on the aforesaid amounts at the rate of 20% per annum from 20 February 2018 to the date of final payment;
5. An amount found to be due in respect of the penalty interest charges arising from the outstanding balance of N\$24 383 378.99 in respect of the Commercial Property Loan Facility agreement at the rate of 3.5% per annum over the plaintiff's prime rate from time to time from 20 February 2018.
6. An amount found to be due in respect of the interest charges at the rate of 12.25% per annum in respect of the loan agreement between first defendant and Bank Windhoek Limited from 20 February 2018 to the date of final payment.
7. Costs of suit.
8. Further and or alternative relief.'

[6] During the course of hearing I heard the evidence of Mr Mbutu (second defendant) and Mr Dinath who represented the plaintiff.

[7] It was accepted by the parties that the burden of proof rested upon the defendants in respect of the alleged oral agreement. The stance adopted by the

defendants is one of confession and avoidance and the principles in *Pillay v Krishna and Another* 1946 AD 946 and *Mabaso v Felix* 1981(3) SA 865 (A), apply.

[8] With that in mind I proceed to consider the evidence tendered at the hearing.

[9] There is no dispute of the fact that once, it became apparent that the first defendant was unable to comply with the terms of the loan agreement, there were discussions from time to time between the second defendant and Mr Dinath. These took the form of meetings between the parties and the exchange of e-mails and text messages

[10] The evidence of the second defendant is that following the discussion he submitted a proposal to the plaintiff, which the plaintiff accepted. A cornerstone of the proposal was that the plaintiff would purchase the land in question for the sum of N\$50 250 000.00. The second defendant was adamant that what was contemplated in the proposal and accepted by the plaintiff centered around the sale of the land to the plaintiff. The evidence in this regard contradicts the allegation made in the amended plea that it was proposed to the first defendant will make the land in question "available" for the development of units to be acquired by employees of the plaintiff. There can be no argument that the sale of the land in question to the plaintiff, being an oral agreement is invalid because of the provision of section (G) of the formalities in respect of Contracts of Sale of land Act, Act 71 of 1969.

[11] On that basis the defense and the counterclaim must fail.

[12] It is probably not necessary to decide whether the agreement alleged by the defendant is a *pactum de non petendo*, or whether it amounts to an impermissible variation of the loan agreement, which prohibits oral variation of its terms and condition.

[13] The true nature of a *pactum de non petendo* in an agreement in terms whereof the parties to the agreement agree not to enforce the obligations of the respective parties until the happening of some specified due or occurrence. The existing rights and obligations of the parties remain as they are. All that the *pactum* prevents is, the enforcement of the obligations one of the parties owe the other. It is

thus a shield and not a sword. The agreement relied upon by the defendant as is evident from the proposal by Mr Mbutu in essence seeks to vary the existing agreement and to put in the place new or entirely different obligations in which the parties acquire previously non-existing rights and assume different obligations. It is on the strength of the new agreement that the defendant alleges that the plaintiff assumed obligations not contained in the loan agreement and which the first defendant now relies upon as a basis for his counterclaim. The non-variation clause in the loan agreement requires any variation to be in writing. As such the defendant's case must fail on that basis as well.

[14] I consequently make the following orders:

3. There will be judgment in favour of the plaintiff against the defendants jointly and severally in terms of prayers 1, 2, 3 and 4 of the particulars of claim.
4. The counterclaim is dismissed with costs.

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PJ MILLER  
Acting Judge

APPEARANCES

PLAINTIFF:

P Kauta

Dr Weder, Kauta & Hoveka Inc., Windhoek

DEFENDANTS:

F Bangamwabo

FB Law Chambers, Windhoek