

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGEMENT

Case No: HC-MD-CIV-ACT-CON-2016/02888

In the matter between:

NAMIBIA TOURISM BOARD

PLAINTIFF

and

MUNDIAL TELECOM SARL

1ST DEFENDANT

ERNEST COOVI ADJOVI

2ND DEFENDANT

TONATA SHIIMI

3RD DEFENDANT

Neutral citation: *Namibia Tourism Board v Mundial Telecom SARL* (HC-MD-CIV-ACT-CON-2016/02888) [2022] NAHCMD 10 (20 January 2022)

Coram: Oosthuizen J

Heard: 3-6 May 2021, 31 May and 31 August 2021

Delivered: 20 January 2022

Flynote: Claim for repayment based on contract — Interpretation

Summary: Plaintiff claims repayment of consideration due to defendant's non-performance of defendant's obligations based on a written agreement. Defendant purportedly cancelled the agreement.

Held; Exhibit "A" is a stand-alone agreement between plaintiff and defendant without any reference or incorporation of the agreement which defendant concluded with the Government of Namibia on 8 October 2015. Defendant's signatory to both agreements elected not to refer to or link the governmental agreement with Exhibit "A" of 4 December 2015.

Held; Exhibit "A" recorded the purchase of a Platinum Tourism Promotion Package for the Kora Award Ceremony to be held on 20 March 2016. It recorded defendant's election to host the Kora Award on 20 March 2016.

Held; Clause 7 of Exhibit "A" provide a remedy to defendant in the event of late payment(s). Defendant had to notify the plaintiff in writing to remedy the late payment within 5 (five) days after receiving written notice. Failure to remedy entitled defendant to immediately cancel the agreement or to immediately claim specific performance.

Held; defendant's election to cancel Exhibit "A" due to late payments on 15 March 2016 was contrary to the agreement and a mere face saving exercise. Defendant's contentions derived from its unrelated agreement with the Government are rejected.

Held; plaintiff's right under Clause 5.3 of Exhibit "A" was retained in the clearest terms by Clause 7. Plaintiff claimed specific performance of Clause 5.3 (repayment) and labelled it as contractual damages.

Held; plaintiff pleaded the contractual damages arising from defendant's breaches to hold the award ceremony on 20 March 2016; defendant's failure to deliver the

Platinum Tourism Promotion Package; defendant's failure to refund the consideration and defendant's use of the funds for other purposes than delivering the platinum Promotion Package to plaintiff, despite the demand of plaintiff as in "NTB 9".

Held; in the premises the Court find that plaintiff's claim for a refund of the consideration, is sound and that plaintiff proved it on a balance of probabilities.

ORDER

IT IS ORDERED THAT:

1. Defendant shall repay the amount of **N\$23 506 234** to the plaintiff.
2. Defendant shall pay interest a *tempore morae* at the rate of **20%** per annum to the plaintiff calculated on **N\$23 506 234** from **1 July 2016** to date of final payment.
3. Defendant shall pay the costs of suit of the plaintiff which costs shall include the costs of one instructing and one instructed counsel (when used).
4. The matter is finalized and removed from the roll.

JUDGMENT

OOSTHUIZEN J:

Background

[1] Plaintiff is the Namibia Tourism Board, a juristic person incorporated under section 2 of Act No 21 of 2000.

[2] First defendant is Mundial Telecom SARL, a juristic person incorporated in terms of the Company Laws of the Republic of Benin, duly represented by Ernest Coovi Adjovi.

[3] The above descriptions are in line with Clause 1 of the agreement entered into between the parties as described therein on 4 December 2015 and in Windhoek.

[4] The above parties are the only remaining litigants in the subject case. Henceforth the first defendant will be referred to as the defendant.

[5] On 4 December 2015 the parties concluded a written agreement in Windhoek. By way of introduction it was noted in Clause 3 of the agreement (annexure "NTB 1" to the particulars of claim and Exhibit "A" in the trial) that the Kora Awards Ceremony was founded in 1996 as a platform to recognise the role of musicians, artists and leaders on the African continent; that Mundial Telecom SARL (defendant) owns the right to host the Kora Awards Ceremony; that defendant has resolved to host the Kora Awards Ceremony in Namibia on 20 March 2016; that the Namibian Government recognises that the hosting of the event in Namibia is a great opportunity for Namibia to boost its tourism market; that the statutory functions of plaintiff are to promote tourism in Namibia and that the awards ceremony in Namibia is an opportunity to promote Namibia as a tourism destination of choice.

[6] Clauses 4 and 5 of the agreement ("NTB 1" and Exhibit "A") recorded that defendant offered and plaintiff bought one Platinum Tourism Promotion Package with guaranteed features for 1,5 million US dollars payable on or before 10 December 2015. The guaranteed promotional features were:

6.1 26 (twenty six) promotional television clips, to be shown on each participating African television station, each being 60 (sixty) seconds in duration to be shown for 2 (two) months prior to the Awards Ceremony.

6.2 Each promotional television clip will showcase the NTB with 5 (five) seconds visuals on the Awards Ceremony's promotional television clips.

6.3 Mundial will make available the promotional television clips to at least 30 participating African territories/countries.

6.4 Mundial is to provide a post Award report, 60 days after the event on the coverage of the Kora All Africa Awards. The report will include the number of countries/territories in which the Kora All Africa Awards was broadcasted.

6.5 5 (six) promotional clips, each being 30 (thirty) seconds in duration to be aired during the live broadcast of the Award Ceremony. The NTB to produce and provide the promotional clips.

6.6 A prominent presence of NTB on the Awards Ceremony website with links to the NTB's website.

6.7 4 (five) verbal mentions by the hosts during the live broadcast of the Awards Ceremony.

6.8 Space allocation in the Kora magazine consisting of 2 (two) full pages within the body of the magazine.

[7] Clause 5.3 of the agreement states that in the event of the Kora awards ceremony not taking place in Namibia, defendant shall refund the consideration of 1,5 million US dollars less reasonable expenses incurred as determined by the parties within 60 days of the award ceremony not taking place.

[8] Clause 7 of the agreement states that if any party breach any provision of the agreement and fail to remedy such breach within 5 (five) days after receiving written notice from the aggrieved party, the aggrieved party shall be entitled to immediately cancel the agreement or immediately claim specific performance, without prejudice to its other rights under the agreement and/or in law, including any right to claim damages.

[9] Clause 10.1 of the agreement provides that the agreement constitutes the sole record of the agreement between the parties and that no party shall be bound

by any express, tacit or implied term, representation, warranty, promise or the like not recorded in the agreement.

[10] Clause 10.2 of the agreement provides that no addition to, variation, amendment, consent to cancellation of the agreement including 10.1 and no extension of time, waiver or realization of or suspension of any provisions or terms of the agreement including 10.1 shall be of any force or effect unless in writing and signed by all or on behalf of all the parties.

[11] Plaintiff paid the equivalent of 1,5 million US dollars to the defendant but paid it late and in instalments as follows:

[11.1] US\$ 327 868.85 (N\$5 000 000) on 22 December 2015;

[11.2] US\$326 541.27 (N\$5 000 000) on 23 December 2015;

[11.3] US\$310 269.93 (N\$5 000 000) on 7 January 2016;

[11.4] US\$ 535 319.95 (N\$8 506 234) on 17 January 2016.

[12] The Kora awards ceremony did not take place in Namibia on 20 March 2016 or thereafter.

[13] On 15 March 2016 defendant notified the plaintiff that it terminates the agreement with plaintiff as a result of plaintiff's continued breach of the agreement. According to defendant's letter of 15 March 2016 the breaches constitute a repudiation which defendant accepted and consequently elected to cancel the agreement.

[14] The content of the previous paragraphs (save the reason of defendant's cancellation) are common cause between the parties.

Pleadings

[15] On 7 September 2016 the plaintiff issued summons against the defendant.

[16] On 8 May 2017 the plaintiff filed amended particulars of claim against defendant for repayment of US\$1 500 000 (N\$23 506 234); interest at the rate of 20% *a tempora morae* and costs of suit.

[17] According to plaintiff it had complied with the material terms of the agreement in that it paid the US\$1 500 000 to the defendant (paragraph 20 of the amended particulars of claim).

[18] Defendant breached the material terms of the agreement in that it failed to hold the ceremony in Namibia on 20 March 2016; failed to deliver the Platinum Tourism Promotion Package; failed to refund the US\$1 500 000 (N\$23 506 234) and used the funds paid by plaintiff for purposes other than those intended and agreed between the parties.

[19] Plaintiff pleaded that it suffered contractual damages which arise directly from the terms pleaded as in [18].

[20] Defendant eventually filed a plea on 9 November 2018 wherein it pleaded another agreement between it and the Government of Namibia, inextricably linked to the agreement between it and plaintiff.

[21] Defendant pleaded that plaintiff made none of the payments timeously.

[22] Defendant pleaded that the late payments constituted a breach and it therefore cancelled the agreement with reference to its letter of 15 March 2016 (*vide para* [13] above)

[23] Defendant pleaded that in addition the Government of Namibia breached its agreement with defendant.

[24] Defendant admits that the awards ceremony did not take place and that it did not refund the US\$1 500 000 to plaintiff. It pleaded that it was not obliged to refund as it incurred reasonable expenses in excess of the amount paid by plaintiff.

[25] It pleaded that it suffered damages and was compelled to make payments to its suppliers and sub-contractors in terms of its contracts with such suppliers and sub-contractors to host the Kora Awards Ceremony.

[26] It pleaded further that its suppliers and sub-contractors were not able to comply with their obligations as the event could no longer be hosted in the available time due to the non-performance of plaintiff and the Government of Namibia.

[27] Defendant pleaded that the breaches of plaintiff and the Government of Namibia made it impossible to comply with its obligations resulting in it being liable for damages.

[28] Defendant pleaded that it did not breach the agreement with plaintiff as such agreement had been cancelled on 15 March 2016.

[29] Defendant did not counterclaim against plaintiff despite its declared intention to do so.¹

[30] Plaintiff replicated on 22 November 2018 and denied that the agreement between defendant and the Government of Namibia was linked to the agreement between it and defendant. It pleaded that the alleged agreement defendant had with the Government of Namibia is irrelevant and has no bearing on the determination of its claim against defendant. Plaintiff pleaded that the Government of the Republic of Namibia is not a party to the proceedings. Plaintiff further pleaded that it is entitled to the amount claimed as defendant failed to comply with its (defendant's) obligations. Plaintiff pleaded that defendant is not entitled to rely on a defence which arose after its failure to perform its obligations.

Evidence

¹ Defendant's Status Report dated 10 October 2018.

[31] Only one witness testified.

[32] The Chief Executive Officer of plaintiff verified the case of the plaintiff.

[33] Defendant did not call any witnesses.

[34] Counsel for defendant from the bar requested video linked evidence on the basis of one witness being infected with Covid-19 and the other being absent due to travel restrictions. Plaintiff objected.

[35] The Court refused on the basis that there was no agreement between the parties to the effect, which was confirmed by the counsel for plaintiff.² Also that defendant indicated on 12 April 2021 that its witnesses would be available. Defendant's counsel also on 30 April 2021 indicated to the Court during Roll Call that it is ready to proceed. There was no proper application for video linked evidence, nor for postponement.

[36] I need to mention that Mr Adjovi previously under oath conveyed his unwillingness to testify under oath in Namibia as he believed he would be arrested for fraud and corruption when entering Namibia.³

[37] Defendant did not apply for a postponement in order to call his witnesses when available.

[38] Defendants election to proceed without witnesses was made clear to the court.

[39] Counsel's liberal cross examination of Mr Digu//Naobeb (Chief Executive Officer of plaintiff) was founded largely on the plea of defendant without consideration that defendant did not institute a counterclaim; did not prove reasonable expenses; counsel's interpretation of annexure "NTB 1" and Exhibit "A";

² Transcribed Record page 68 to 73.

³ Interlocutory Index page 46. Repeated in August 2018.

and the alleged interlinked agreement defendant had with the Government of Namibia.

Findings

[40] Exhibit "A" is a stand-alone agreement between plaintiff and defendant without any reference or incorporation of the agreement which defendant concluded with the Government of Namibia on 8 October 2015. Defendant's signatory to both agreements elected not to refer to or link the governmental agreement with Exhibit "A" of 4 December 2015.

[41] Exhibit "A" recorded the purchase of a Platinum Tourism Promotion Package for the Kora Award Ceremony to be held on 20 March 2016. It recorded defendant's election to host the Kora Award on 20 March 2016.

[42] Clause 7 of Exhibit "A" provide a remedy to defendant in the event of late payment(s). Defendant had to notify the plaintiff in writing to remedy the late payment within 5 (five) days after receiving written notice. Failure to remedy entitled defendant to immediately cancel the agreement or to immediately claim specific performance.

[43] Defendant elected not to cancel the agreement immediately (during December 2015). It seems that defendant elected to demand payment (specific performance) and when payment was made by plaintiff as in para [11] herein before, defendant accepted same.

[44] Defendant's election to cancel Exhibit "A" due to late payments on 15 March 2016 was contrary to the agreement and a mere face saving exercise. Defendant's contentions derived from its unrelated agreement with the Government are rejected.

[45] Defendant's purported cancellation of 15 March 2016 however had the effect of informing plaintiff in writing that defendant resiles from its obligation to host the award ceremony on 20 March 2016.

[46] By that time the plaintiff had completed the payment of N\$23 506 234 already on 17 February 2016.

[47] Clause 5.3 of Exhibit "A" is clear in its terms and entitled plaintiff to demand repayment of the consideration, less reasonable expenses determined by the parties within sixty days of the ceremony not taking place.

[48] It is common cause that defendant elected not to institute a counterclaim for its alleged but unproven reasonable expenses. It is also common cause that defendant did not render the guaranteed features of the Platinum Tourism Promotion Package.

[49] Defendant's unsupported argument/contention that plaintiff had failed to give written notice of a breach in terms of Clause 7 of Exhibit "A" and therefor was not entitled to rely on the breaches as pleaded, was not pleaded or supported by evidence of the defendant. Moreover it was anchored on a wrong interpretation of Clause 7.

[50] Defendant notified plaintiff in writing on 15 March 2016 that it will not host the award ceremony as agreed.

[51] Plaintiff's right under Clause 5.3 of Exhibit "A" was retained in the clearest terms by Clause 7. Plaintiff claimed specific performance of Clause 5.3 (repayment) and labelled it as contractual damages.

[52] Clause 7 expressly provides for "without prejudice to its other rights under this Agreement".

[53] Plaintiff pleaded the contractual damages arising from defendant's breaches to hold the award ceremony on 20 March 2016; defendant's failure to deliver the Platinum Tourism Promotion Package; defendant's failure to refund the consideration and defendant's use of the funds for other purposes than delivering the platinum Promotion Package to plaintiff, despite the demand of plaintiff as in "NTB 9".

[54] Plaintiff did not cancel the agreement. Plaintiff's paragraph 23 in its particulars of claim read with "NTB 9" (Exhibit "K" dated 17 March 2016) are clear in their terms. Defendant pleaded a denial and amplified that "it did not breach the agreement with plaintiff as such agreement had been cancelled on 15 March 2016"

[55] Plaintiff claimed a refund of the consideration as it is entitled to per Clause 5.3 of Exhibit "A". I repeat that defendant had to counterclaim its alleged reasonable expenses which it failed to do. I concur with plaintiff that the reasonable expenses had to be related to the rendering by defendant of the Platinum Tourism Promotion Package bought by plaintiff.

[56] Defendant's attempt in cross examination of plaintiff's witness to introduce a quantification of its reasonable expenses failed due to the fact that it did not institute a counterclaim; did not tender evidence; and did not plea properly to plaintiff's claim as in paragraphs [53] to [55] above.⁴

[57] It is trite law that a Court, not the parties, shall interpret contracts⁵ as it did. *Vide* paragraphs [40], [42], [44], [47], [49], [51], [52] and [55].

[58] In the premises the Court find that plaintiff's claim for a refund of the consideration, is sound and that plaintiff proved it on a balance of probabilities.

[59] Costs will follow the result.

[60] The following orders are made:

[60.1] Defendant shall repay the amount of **N\$23 506 234** to the plaintiff.

[60.2] Defendant shall pay interest a *tempore morae* at the rate of **20%** per annum to the plaintiff calculated on **N\$23 506 234** from **1 July 2016** to date of final payment.

⁴ See also page 172 to 176 of the transcribed record where plaintiff's witness under cross examination testified about plaintiff's attempts to elicit proof from Mr Adjovi concerning his alleged reasonable expenses.

⁵ See *Total Namibia v OBM Engineering and Petroleum Distributors* 2015(3) NR 733 SC at 741, paragraph [23].

[60.3] Defendant shall pay the costs of suit of the plaintiff which costs shall include the costs of one instructing and one instructed counsel (when used).

[60.4] The matter is finalized and removed from the roll.

G H Oosthuizen
Judge

