

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

RULING

PRACTICE DIRECTIVE 61

Case Title: NEDBANK NAMIBIA LIMITED PLAINTIFF v ALLY SHANINGWA INEDHIMBWA ANGULA FIRST DEFENDANT MANNA BLESSING JONAH MATSWETU SECOND DEFENDANT	Case No: HC-MD-CIV-ACT-CON-2018/00589
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO	Date of hearing: 27 JANUARY 2023
	Delivered on: 9 MAY 2023
Neutral citation: <i>Nedbank Namibia Limited v Angula</i> (HC-MD-CIV-ACT-CON-2018/00589) [2023] NAHCMD 246 (9 May 2023)	
Results on merits: Merits not considered.	
The order: 1. The application for absolution from the instance is dismissed. 2. Costs of the application to be costs in the cause. 3. The matter is postponed to 17 May 2023 at 09h00 to allocate a date for the continuation of the trial.	

Reasons for orders:

Introduction

[1] This is an application for absolution from the instance at the close of the plaintiff's case.

[2] The plaintiff, Nedbank Namibia Limited, instituted proceedings against the defendants arising from a loan agreement concluded between it and the first defendant.

[3] The first defendant, Ally Angula, entered into a personal loan agreement with the plaintiff on 13 December 2014, in terms of which the plaintiff would advance a sum of N\$4 742 184.95 at a floating interest rate linked to the prime interest rate.

[4] The second defendant, Manna Matswetu, was married in community of property to the first defendant at the time, and it is the case of the plaintiff that the second defendant consented to the first defendant entering into the written loan agreement.

Background

[5] To place the agreement between the plaintiff and the first defendant into context, it is necessary to discuss briefly what gave rise to the agreement.

[6] Back in 2011, the plaintiff took legal action against Impact Distribution Namibia (Pty) Ltd (Impact Distribution) and three other defendants, with the first defendant being the second defendant in that case.¹ As security for the due and timeous payment by Impact Distribution to the plaintiff, the second to fourth defendants bound themselves as surety in solidum for and as co-principal debtors jointly and severally for Impact Distribution. Consequent to the first defendant (in the current matter) signing as surety, she accepted liability for Impact Distribution's full outstanding liability and entered into a personal loan agreement with the plaintiff, which gave rise to the current claim against the first defendant.

[7] The loan facility in the amount of N\$4 743 831.36 was applied for and approved by the plaintiff, which amount consisted of the outstanding balances on the two Impact Distribution accounts, i.e (a) N\$733 782.57, which included legal fees in the amount of N\$30 026.85 and (b) N\$4 010 048.79, which included legal fees in the amount of N\$239 530.22. The loan amount

¹ Case number I 3421/2011.

awarded to the first defendant fully settled the outstanding balance on the Impact Distribution account.

[8] It was further agreed between the parties that the plaintiff should utilise the proceeds it would receive in the execution of a judgment granted against Sonwabile Holdings (Pty) Ltd (Sonwabile Holdings) registered in South Africa. The fourth defendant in the settled matter (Impact Distribution matter) was a shareholder in Sonwabile Holdings, and he bound Sonwabile Holdings as a surety and co-principal debtor in favour of the plaintiff.

The case advanced by the plaintiff

The terms of the agreement

[9] The plaintiff's claim is based on an agreement between the parties with the material express, alternatively implied, alternatively tacit terms being the plaintiff having advanced the sum of N\$4 742 184.95 to first defendant at a floating interest rate linked to prime rate, which at the relevant time was at 9.25% per annum. Such interest was to be calculated on the daily balance of the amount of the loan plus any interest thereon outstanding from time to time.

[10] The first defendant had to repay the loan as follows:

- (a) The loan would be repayable over a period of 56 months.
- (b) A lump sum of N\$650,000 was payable on 21 December 2012.
- (c) The first defendant would make an annual payment of N\$650 000 on or before 30 November of each successive year until the debt was settled.
- (d) Interest was payable on the personal loan subject to variation depending on the existing market conditions. Interest would be charged at prime rate resulting in an instalment of N\$45 000 per month.
- (e) At the end of each calendar month, the first defendant had to pay the plaintiff a commitment fee/penalty equal to one-twelfth of one per cent per annum, calculated on the amount by which amounts owing to the Plaintiff as at the month-end in terms of the agreement are less than 95% of the cumulative amounts which, in terms of the First Schedule referred to in the agreement, should then have been owing to the plaintiff.

[11] In the event of a breach by the first defendant of any of the terms and conditions of the

agreement, and should she fail to remedy the breach within seven days of written notice, the plaintiff may convert the first defendant's loan to one repayable on demand and/or revise any of the terms and conditions and/or increase the interest rate charged.

[12] The first defendant undertook to be liable for all costs on the scale as between attorney and client incurred by the plaintiff in the recovery of any amount due.

[13] The plaintiff claims that the first defendant breached the conditions of the agreement as her account fell in arrears in the sum of N\$1 250 249.34, and the first defendant is, as a result, indebted to the plaintiff in the aggregate as confirmed in the certificate of indebtedness attached to the particulars of claim.

[14] In the alternative, the plaintiff contends that if the court should find that:

- (a) the loan agreement is a nullity or that the second defendant is not lawfully bound with the first defendant for the repayment of the claim -
 - (i) That plaintiff performed in terms of the agreement by advancing the said amount to the first defendant;
 - (ii) The first defendant performed in terms of the agreement;
 - (iii) Neither party has been aware of the nullity of the agreement. The defendants were accordingly enriched with the claimed amount plus interest at the prescribed rate of 20% per annum from the enrichment date to the payment date.

The evidence adduced

[15] In support of the plaintiff's case, two witnesses were called, i.e Ms Trula Zoganas and Mr Sven Hanschen.

[16] The loan agreement is common cause between the parties and need not be discussed further.

[17] I do not intend to repeat the evidence of the witnesses but will briefly summarise the evidence.

[18] Ms Zoganas testified as follows:

- (a) Ms Zoganas confirmed the terms of the agreement as set out above.
- (b) In terms of the personal loan agreement, the first defendant authorised the plaintiff to debit her current account monthly for the instalments due. The debit orders are generated automatically by the system by debiting the first defendant's current account and crediting the personal loan account.
- (c) The second defendant signed the Spousal Consent form on 3 January 2013. On the same date, the first defendant signed the cession of her insurance policy no 209400468 with Momentum Insurance Life and disability cover limited to N\$4 000 000.
- (d) The first defendant, on various occasions, requested indulgences to pay the lump sum on a date other than the agreed date. The first request from the first defendant was made in September 2013. However, the first defendant failed to make the lump sum payment for 2013 on the extended date of 31 May 2014 and only made the payment in July 2014.
- (e) On 1 September 2014, the first defendant requested a restructuring of the existing loan terms by extending the repayment period for a further three years and reducing the monthly payment to N\$25 000 instead of the original N\$45 000. The first defendant also requested a postponement of the next capital payment of N\$650 000 due by the end of November 2014 to July 2015.
- (f) On 28 July 2015, an amount of N\$1 750 000 was received from Sonwabile Holdings, and the payment was applied for the benefit of the first defendant. A further dividend payment of N\$392 787.54 was received in the liquidation of Sonwabile Holdings in March 2016. It was similarly applied for the benefit of the first defendant, which settled the outstanding arrears of N\$96 420.19, leaving a remaining balance of N\$1 033 182.39.
- (g) No further payment was received from the first defendant. As a result, the witness prepared a report for consideration by the credit committee to transfer the personal loan account of the first defendant to the legal department for further legal action.

[19] The second witness, Mr Sven Hanschen's evidence can be summarised as follows:

- (a) He was employed as the Senior Manager: Credit Risk Department of the plaintiff at the time that the parties had concluded the agreement.
- (b) Mr Hanschen confirmed the evidence of Ms Zoganas and further in an attempt to

explain how the current agreement between the parties came into being referred back to the agreement between the plaintiff and Impact Distribution and the subsequent litigation that flowed from it. I intend to avoid repeating what was set out above already.

- (c) The witness further testified regarding the payment received from Sonwabile Holdings (Pty) Ltd, which was utilised as a capital reduction of the first defendant's loan.
- (d) During cross-examination, the witness confirmed that the first defendant entered into a stand-alone agreement with the plaintiff, which does not involve the sureties of Impact Distributors. The witness further confirmed that the default judgment obtained against the remaining sureties did not satisfy the claim amount for which these parties were co-principle debtors.
- (e) The witness confirmed that the first defendant signed surety for Impact Distribution and not on behalf of the other sureties. The action in respect of Impact Distributors was not pursued any further.
- (f) The witness was extensively questioned on the issue of legal fees charged and why the two accounts of Impact Distribution reflected two distinct amounts charged for legal fees. The witness was further questioned on the issue of compounded interest which was charged on the legal fees allocated to the Impact accounts and the journal entries processed on the two accounts in excess of the amounts reflected as outstanding on the two Impact Accounts and transferred as a liability for second defendant's account.
- (g) In this regard, the witness testified that liability only arose with respect to the second defendant's personal loan account once drawdowns were made and that these were done not on the instructions of the first defendant but by means of journal entry passed internally.

Arguments advanced on behalf of the parties

On behalf of the first defendant

[20] Ms Delpont argues that it is clear that the first defendant made payment in the total amount of N\$4 794 482.84 towards the settlement of the loan to the plaintiff, and the interest calculated only with respect to the total legal fees charged computing to N\$539 114.14 amounts to N\$427 263.93 totalling an amount of N\$966,378.07, which essentially has to be deducted from

the initial drawdown.

[21] Ms Delport submits that the facility advanced to the first defendant was based on manual calculations made by the plaintiff to calculate the liability of Impact Distribution. Ms Delport further submits that it was conceded on behalf of the plaintiff that an implied term of the loan agreement was that any recovery on the collection on the Impact Distribution account, which the bank agreed to pursue actively, was to reduce the first defendant's liability in terms of the stand-alone agreement concluded with her.

[22] The calculation by the plaintiff when calculating the actual indebtedness of Impact Distribution included capitalised interest on the outstanding balance as well as legal costs incurred in actions pursued against the two remaining sureties for which a specific amount of costs was awarded. The first defendant and, by operation of law, the second defendant, were held liable for these inflated amounts.

[23] Ms Delport acknowledges that the terms of the agreement are not in dispute, but what remains in contention is the calculation of the drawdown passed internally by the plaintiff without any written instruction issued by the first defendant or her having agreed to the computation.

[24] Ms Delport submits that the plaintiff is guilty of a violation of a number of sections of the Banking Institutions Act 2 of 1998, for example, charging capitalised interest on an account where it is clear that the debtor is unable to service the debt by creating manual statements in order to bypass the prohibition on capitalised interest being charged.

[25] Counsel submits that not only did the capitalised interest component accrue to the first defendant as a drawdown on the facility, the amount further included legal costs, which resulted in the plaintiff having earned further interest on these amounts, despite it being a service rendered by a third party. The drawdown passed internally by the plaintiff is incorrect, which greatly impacts on the daily interest charged which was capitalised monthly, which in turn impacted on the capital reductions made by the once-off payments and the capital reductions on each instalment made.

[26] Ms Delport contends that the plaintiff failed to prove the computation of its claim and the court cannot be tasked to calculate the actual balance due therefore, absolution from the instance must be granted.

On behalf of the plaintiff

[27] Ms Kuzeeko argued that the plaintiff made out a prima facie case to which the first defendant must answer. Ms Kuzeeko argued that the agreement relied upon is a written agreement and the trite principles of the caveat subscriptor rule and parol evidence rule find application and that there is evidence upon which this court, applying these principles to such facts, could or might find for the plaintiff.

[28] Ms Kuzeeko argues that the caveat subscriptor rule provides that a person who signs a contractual document thereby signifies his assent to the contents of the document and if the contents subsequently turn out not to be to his or her liking, as is in the present case, he or she has no one to blame but him/herself. In this regard, the defendants have not raised any of the qualifications to the caveat subscriptor rule. Consequently, the caveat subscriptor rule must apply to these proceedings and the first defendant should be taken to have, amongst other things, assented to the express terms in the agreement.

[29] Ms Kuzeeko submits that the evidence of the plaintiff's witnesses establishes that the first defendant breached the agreement between the parties and that consequent upon that breach, the plaintiff was entitled to charge penalty interest in addition to the interest rate applicable to the loan as from the date of that breach. Ms Kuzeeko furthermore, urged the court to apply the caveat subscriptor rule and dismiss the defendants' attack on the calculation of the capital amount (the loan amount) of N\$4 742 184.95 and that the court should disregard the impact, if any, of the amortization schedule dispatched by the first defendant.

The relevant applicable legal principles

[30] The law in respect of absolution applications is settled and it is unnecessary to deal with the principles in much detail. To the extent necessary, our Apex Court stated as follows in *Stier v Henke*:²

'At 92F-G Harms JA in *Gordon Lloyd Page & Associates v Rivera and Another* 2001(1) SA 88 referred to the formulation of the test to be applied by a trial court when absolution is applied for at the end of an appellant's case as appears in *Claude Neon Lights (SA) v Daniel* 1976 (4) SA 403(A) at 409G-H:

"When absolution from the instance is sought at the close of the plaintiff's case, the test to

² *Stier v Henke* 2012 (1) NR 370 (SC) at para 4.

be applied is not whether the evidence led by the plaintiff establishes what would finally be established, but whether there is any evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.” ’

Discussion

[31] In *Rosherville Vehicle Services (Edms) Bpk v Bloemfonteinse Plaaslike Oorgangsradaad*³ it was held that:

‘When absolution from the instance is sought at the close of the plaintiff’s case, the test to be applied is not whether the evidence led by the plaintiff established what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. Where the plaintiff’s case rests on the interpretation of a document, the interpretation of which is in dispute, the interpretation on which the defendant relies has to be beyond question before its application for absolution will succeed. Where the defendant bears the onus in a dispute, absolution should not be granted.’

[32] The plaintiff’s claim is founded on breach of contract and the plaintiff had an onus to make out a prima facie case for the breach of contract and the elements of the claim.

[33] In the current instance, the terms and conditions of the agreement between the parties are common cause. It is further common cause that there was a performance by the plaintiff and that the first defendant failed to perform in terms of the agreement.

[34] In the alternative, the plaintiff claims unjust enrichment and had to make out a prima facie case that the first defendant received a benefit at the expense of the plaintiff and that it would be under the circumstances unjust for the first defendant to retain the benefit without the corresponding compensation.

[35] I am satisfied that the plaintiff successfully crossed the threshold set at the close of the plaintiff’s case in order for the case to advance further. The first defendant relies on calculations and an amortization schedule in defence to the claim of the plaintiff. I am of the view that for reasons advanced on behalf of the plaintiff set out above that there is indeed an onus of rebuttal on the first defendant. At this stage, there is no evidence before this court in support of the cross-examination directed to the plaintiff’s witnesses.

³ *Rosherville Vehicle Services (Edms) Bpk v Bloemfonteinse Plaaslike Oorgangsradaad* 1998 (2) SA 289 (O) at 293 B-C and 293 G-H and 296 G.

[36] For these reasons, I find that the plaintiff indeed tendered evidence upon which a court, properly directed and applying its mind reasonably to such evidence, could or might find for the plaintiff. Accordingly, the application for absolution is dismissed.

[37] As a result, I make the order as set out above.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff	First Defendant
M KUZEEKO <i>of</i> Dr Weder, Kauta & Hoveka Inc., Windhoek	A DELPORT <i>of</i> Delpport Legal Practitioners, Windhoek
	Second Defendant
	D HANS-KAUMBI <i>of</i> Ueitele & Hans Inc., Windhoek