

**REPUBLIC OF NAMIBIA**



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

**JUDGMENT**

In the matter between:

Case no: **HC-MD-CIV-ACT-CON-2019/05433**

**DEVELOPMENT BANK OF NAMIBIA LIMITED**

**PLAINTIFF**

and

**LEAP MANUFACTURING NAMIBIA**

**(PROPRIETARY) LIMITED**

**FIRST DEFENDANT**

**ALLY SHANINGWA INEDHIMBWA ANGULA**

**SECOND DEFENDANT**

**MANNA BLESSING JONAH MATSWETU**

**THIRD DEFENDANT**

**Neutral citation:** *Development Bank of Namibia Limited v Leap Manufacturing Namibia (Proprietary) Limited* (HC-MD-CIV-ACT-CON-2019/05433) [2023] NAHCMD 64 (17 February 2023)

**Coram:** MILLER AJ

**Heard:** 7 October 2022

**Delivered:** 17 February 2023

**Flynote:** *Contract* – Breach – A party alleging a breach of a contract must allege and prove a breach of the contract.

*Pleadings* – Litigants are bound by the issues as defined in their pleadings – Courts also bound by what the parties have stated in their pleadings as the facts relied on by them.

**Summary:** The plaintiff instituted civil proceedings against the defendants for payment of the amount of N\$15 518 106.81 and interest on the amount above at a rate equal to the rate quoted by First National Bank on overdraft from time to time plus 3% calculated on the daily balance of the outstanding amount, compounded monthly, from 1 October 2019 to date of payment. The plaintiff further claimed that the bonded property be declared executable.

Plaintiff and first defendant entered into a written loan facility agreement on 30 June 2014 in terms of which plaintiff lent to defendant an amount of N\$4 350 000. The parties entered into a second written loan facility agreement on 14 July 2015 in terms of which plaintiff lent a further N\$4 656 000 to first defendant. The two amounts were later consolidated. The Second and Third defendant`s indebtedness is premised on suretyships signed by them in favour of the plaintiff binding them as co-principal debtors for the repayment of the loan. In addition, and as part of the security advanced in respect of the loans, a certain property described as Erf 800, Windhoek was mortgaged in terms of the Deed of Mortgage concluded between the parties.

The defendants defended the matter, and while not disputing the claims made by the plaintiff, filed a counterclaim based on both a delictual claim and a claim based upon an alleged breach of contract. At the close of the trial however, counsel for the defendants conceded that the factual and legal basis to establish a delictual claim were not proved.

Counsel for the defendant, in respect of the claim based upon an alleged breach of contract, contended that the agreement concluded between the parties contained certain implied terms. Those terms are not contained in the pleadings and the pre-trial report. Counsel for the defendant contended that implied terms to an agreement need not be pleaded.

*Held*, the pleadings define the issues between the parties.

*Held*, it is generally accepted in our courts that litigating parties remain bound to their pleadings.

*Held*, that assuming the alleged breaches of the agreement were proved, the onus remained on the defendants to establish that such breaches resulted in the damage allegedly suffered.

*Held*, neither of the alleged breaches were proved nor that any of the alleged breaches, if proved, can be said to have caused or materially contributed to the loss suffered.

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### ORDER

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1. There shall be judgment in favour of the plaintiff against the defendants jointly and severally, the one paying the other to be absolved for:

1.1 Payment of the amount of N\$15 518 106.81;

1.2 Interest on the amount above at a rate equal to the rate quoted by First National Bank on overdraft from time to time plus 3% calculated on the daily balance of the outstanding amount, compounded monthly from 1 October 2019 to date of payment.

2. The property described as:

CERTAIN: ERF NO 800

SITUATE: IN THE MUNICIPALITY OF WINDHOEK  
REGISTRATION DIVISION "K"  
KHOMAS REGION

IN EXTENT: 1211 (ONE TWO ONE ONE) SQUARE METRES

HELD BY: DEED OF TRANSFER NO T7463/2013

Is declared executable.

3. The counterclaim is dismissed.
4. The defendants are ordered to pay the costs of the plaintiff on the scale as between attorney and client which will include the costs of one instructing- and one instructed counsel.
5. The matter is finalized and removed from the roll.

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## JUDGMENT

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MILLER AJ:

### Introduction

[1] The first defendant, which in the alter ego of the second defendant, came to a decision to commence a business venture. In terms thereof the business would be active in the manufacturing and retail of clothing at certain specified outlets in the Grove Mall in Windhoek in Namibia, and at a later stage in Swakopmund. The retail outlets traded under the name and style of “My Republic”.

[2] In order to secure funding for its proposed venture, it approached the plaintiff to make the required funds available to it. Its request for funding was supported by a comprehensive business plan. In terms thereof funding in the sum of N\$22 000 000 was required by way of a loan.

[3] The plaintiff received and considered the request. It concluded, however, that the request was not feasible. As an alternative to the required loan, the plaintiff proposed that the first defendant should be less ambitious and start the proposed business on a small scale confined to retail sales only. The plaintiff proposed making a loan facility of N\$4 350 000 available to the first defendant, for that purpose. The first defendant agreed to that proposal. That led to the conclusion of a written agreement of loan in that amount.

[4] The proposed business was set up and commenced its retail operation. It soon ran into troublesome financial losses. This was due mainly to certain factors such as, a substantial decrease in its Angolan based customer base, the general decline in the Namibian economy and an insufficient supply of stock. The latter was due to mainly the first defendant experiencing problems to obtain the required stock levels from a supplier based in Mauritius which had undertaken the manufacturing process of the garments. Despite some emergency measures to manufacture stock at an improved factory, matters did not improve.

[5] The plaintiff was approached once more for additional funding. The approach resulted in the granting of a further loan in the sum of N\$4 656 000. The agreement was reduced to writing.

[6] Matters did not improve and the outstanding debt owed to the plaintiff remained unpaid.

[7] A proposal was made by the first defendant to convert its debt into a preferential share issue. This was not acceptable to the plaintiff and nothing came of it.

[8] Instead a further written agreement was concluded. It essentially consolidated the previous loans and provided for an extended period of repayment. The loans remained unpaid and the plaintiff ultimately instituted action against the defendants to recover the amounts owed to it.

The pleadings:

[9] In an action instituted by way of summons the plaintiff claims the following relief:

‘WHEREFORE THE PLAINTIFF CLAIMS AGAINST THE FIRST, SECOND AND THIRD DEFENDANTS, JOINTLY AND SEVERALLY, THE ONE PAYING THE OTHER TO BE ABSOLVED FOR:

**AD CLAIM 1**

- 1) Payment in the amount of N\$15 518 106.81 (FIFTEEN MILLION FIVE HUNDRED AND EIGHTEEN THOUSAND ONE HUNDRED AND SIX NAMIBIAN DOLLAR AND EIGHTY ONE CENTS)
- 2) Interest at the base rate of 10.25 plus 1% calculated on a daily basis plus any interest thereon outstanding from time to time and compounded monthly, plus default margin of 2% interest above the applicable rate;

**AD CLAIM 2**

- 3) An order that Metropolitan Swabou Limited effect payments directly to the Plaintiff; for all or nay dividend, interest, rentals, instalments, proceeds or other sums of money which may accrue or become payable in respect of the Metropolitan Policy No. 90426930 of the third defendant deposited as securities in terms of the agreement.
- 4) An order that Old Mutual Life Assurance Company (Namibia) Limited effect payments directly to the Plaintiff; for all or any dividend, interest, rentals, instalments, proceeds or other sums of money which may accrue or become payable in respect of the Old Mutual Policy No. 80227839 of the third defendant deposited as securities in terms of the agreement.

**AD CLAIM 3**

- 5) An order declaring the following property executable:

CERTAIN:               ERF NO 800  
 SITUATE:               IN THE MUNICIPALITY OF WINDHOEK  
                               REGISTRATION DIVISION "K"  
                               KHOMAS REGION  
 IN EXTENT:            1211 (ONE TWO ONE ONE) SQUARE METRES  
 HELD BY:               DEED OF TRANSFER NO T7463/2013

**AD CLAIM 4**

- 6) An order declaring any and all movable property/ies subject to the Notarial General Covering Bond, number BN 7179/2014 executable:

**AD ALL CLAIMS**

7) Costs of suit on scale as between attorney and own client as agreed to by the parties.

8) Further and/or alternative relief.'

[10] None of the defendants dispute the claims made by the plaintiff. I may add that clams 2 and 4 are no longer relevant. The securities referred to therein no longer exists. In essence, in the final result the plaintiff persists with the prayer mentioned in claim 1 and claim 3 as well as the prayer for costs.

[11] From the facts set out in the particulars of claim, which are not in dispute, it is apparent that the second and the third defendants had bound themselves as sureties and co-principal debtors with the first defendant in respect of all monies owed by the first defendant to the plaintiff.

[12] In addition, and as part of the security advanced in respect of the loans, a certain property described as Erf 800, Windhoek was mortgaged in terms of the Deed of Mortgage concluded between the parties.

[13] The defendant, while not disputing the claims made by the plaintiff, filed a counterclaim, which if proved, would exceed the amount owed to the plaintiff. It thus became necessary that the counterclaim be determined as a first issue.

[14] The counterclaim was based on both a delictual claim and a claim based upon an alleged breach of contract. The basis for the delictual claim is encapsulated in paragraphs 1.20 to 1.21.3 of the Draft Pre-Trial Order which was subsequently adopted and made an order of the court. The relevant passage reads as follows:

'1.20 Whether the plaintiff has repeatedly negligently and or wrongfully breached its duty to take care as alleged as follows:

1.20.1 Soon after the disbursement of the loan amount of N\$4,6 million second defendant forthwith informed plaintiff that it is impossible for first defendant to meet its financial obligations in terms of the new business model. Plaintiff failed to respond and or to meaningfully react to any of the written communications addressed to them.

1.20.2 The plaintiff subsequently, through its representatives and promised to the first and/or second defendants that it would provide the first defendant with business turnaround support. This business turnaround support never came to light, despite several requests for same by the first and/or second defendants.

1.20.3 During or about May 2015, the first and/or second defendants once again informed the plaintiff that the first defendant was experiencing cash-flow constraints and requested the plaintiff to convert a part of the debt funding into preferent shares. The request was simply ignored by the plaintiff, despite the product being marketed by the plaintiff.

1.20.4 Plaintiff continuously hindered first defendant from making timeous payments to suppliers and timeous procurements due to loan disbursement made late

1.21 Whether the plaintiff as the Development Bank of Namibia has through its conduct as set out above wrongfully and or negligently breached its duties as set out in sections 5 and 6 of the Development Bank Act, 8 of 2002 by failing to:

1.21.1 contribute to the economic growth and social development of the first defendant which is a SME business as a result thereof failing to contribute to the economic growth and social development of Namibia and the sustainable promotion of the welfare of the Namibian people;

1.21.2 appraise, plan and monitor the implementation of acceptable business principles into the first defendant;

1.21.3 assist the plaintiff with the management of the funds disbursed and/or by refusing to disburse enough capital to the first defendant, thereby underfunding the first defendant with 79%.'

[15] There is no longer any need to dwell upon the issues alleged to constitute the delictual claims. Although much of the evidence adduced during the course of the trial concerned the nature and scope of the plaintiff's duties and obligations as set

out in the enabling Act, and what that entailed, counsel who represented the defendant conceded at the close of the trial, correctly so in my view, that the factual and legal basis to establish the delictual claims were not proved.

[16] All that remains for determination are the claims based on contract. The basis for this claim is to be found in paragraphs 10 and 17 of the counterclaim. They read as follows:

‘10. The plaintiff also breached of the agreement entered into between the parties (annexure “DBN1(c)” attached to plaintiff’s particulars of claim) in that the first disbursement of the loan amount was disbursed late, despite it being due on date of disbursement request.

11. The plaintiff was further in breach of the agreement entered into between the parties as it has disbursed a further drawdown from the loan to the first defendant in breach of the stipulation of the agreement that no further drawdowns shall be allowed in the event that the first defendant was in default of payment of the said loan agreement.’

[17] The same alleged breaches of the agreement are repeated in paragraphs 3.6 and 3.7 of the draft pre-trial order prepared by the parties.

[18] During the course of the submissions made by counsel for the defendants at the conclusion of the proceedings, counsel contended that the agreement concluded between the parties contain certain implied terms. Those terms are not contained in the pleadings and the pre-trial report. Counsel contended that implied terms to an agreement need not be pleaded. I do not agree. The pleadings define the issues between the parties. Where the claim is one based on contract, the express and implied terms must be pleaded. Although the rules of the court determine that it is not necessary to plead the circumstances leading to an implied term, it does not follow that the implied terms, if there are any, should not be pleaded.

[19] It is generally accepted in our courts that litigating parties remain bound to the pleadings<sup>1</sup>. Reference may also be had to the dictum in *Makono v Nguvauva* and more particularly what is set out on page 140 of the judgment<sup>2</sup>

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<sup>1</sup> *Uchab Terrace Lodge CC v Damaraland Builders CC* 2014 JDR 1499 (Nms).

<sup>2</sup> *Makono v Nguvauva* 2003 NR 138 at p. 140 A-D.

[20] It follows that the matter is to be decided on the pleadings as they stand, absent any application to amend particulars of the counterclaim.

[21] Moreover, and assuming that the alleged breaches of the agreement as pleaded were proved, the onus remained on the defendants to establish that such breaches resulted in the damage allegedly suffered. As it was stated by Corbett JA in the matter of *Minister of Police v Skosana*<sup>3</sup>:

‘... the court starts with the question whether the ... act or omission in question caused or materially contributed to the harm giving rise to the claim. If not, then no liability can arise.’

[22] I agree with counsel for the plaintiff who submitted that neither of the alleged breaches were proved. Nor am I persuaded, as I had indicated, that any of the alleged breaches, ever if proved, can be said to have caused or materially contributed to the loss suffered.

[23] In sum, on the evidence as a whole, the first defendant embarked upon the risky business of setting up a start-up business. That the venture was ultimately unsuccessful beyond dispute. The evidence establishes that a myriad of adverse factors contributed to a greater or lesser degree to the ultimate failure of the business, none of which can be attributed to any breach of the plaintiff’s contractual obligation.

[24] It follows that the counterclaim stands to be dismissed.

[25] Concerning the prayer to declare the immovable property, which was mortgaged executable, I will follow, as I am obliged to the dictum of the Supreme Court in *Standard Bank Namibia v Shipila*.<sup>4</sup> In applying those principles to the facts and circumstances of the present case, I am satisfied that the plaintiff is entitled to an order declaring the property executable.

[26] I make the following orders:

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<sup>3</sup> *Minister of Police v Skosana* 1977 (1) SA 31 (A) at p. 34.

<sup>4</sup> *Standard Bank Namibia v Shipila* 2018 (3) NR 849 (SC).

1. There shall be judgment in favour of the plaintiff against the defendants jointly and severally, the one paying the other to be absolved for:

1.1 Payment of the amount of N\$15,518,106.81;

1.2 Interest on the amount above at a rate equal to the rate quoted by First National Bank on overdraft from time to time plus 3% calculated on the daily balance of the outstanding amount, compounded monthly from 1 October 2019 to date of payment.

2. The property described as:

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Is declared executable.

3. The counterclaim is dismissed.

4. The defendants are ordered to pay the costs of the plaintiff on the scale as between attorney and client which will include the costs of one instructing- and one instructed counsel.

5. The matter is finalized and removed from the roll.

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K MILLER  
Acting Judge

## APPEARANCES

PLAINTIFF:

P C I BARNARD

Instructed by Köpplinger Boltman Legal  
Practitioners, Windhoek

1<sup>ST</sup> and 2<sup>ND</sup> DEFENDANTS:

A DELPORT

Delport Legal Practitioners, Windhoek