

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING IN TERMS OF PRACTICE DIRECTION 61

Case Title: DEVELOPMENT BANK OF NAMIBIA LIMITED and STORM BUSINESS ENTERPRISES CC 1 st Defendant PETER BRUCE GWARADA 2 nd Defendant NAOMI BIANCA GOWASES 3 rd Defendant LUKAS G GORASEB 4 th Defendant GERALD NAHAS TEGELELA NGHAMA 5 th Defendant	Plaintiff	Case No: HC-MD-CIV-ACT-CON-2020/03497
		Division of Court: Main Division
		Heard on: 26 January 2024
Heard before: Honourable Lady Justice Rakow		Delivered on: 5 April 2024
Neutral citation: <i>Development Bank of Namibia Limited v Storm Business Enterprises CC</i> (HC-MD-CIV-ACT-CON-2020/03497) [2024] NAHCMD 153 (5 April 2024)		
Order:		
<p>Judgement is granted against the first, second, third, fourth and fifth defendants, jointly and severally, as follows:</p> <ol style="list-style-type: none">1. Payment in the amount of N\$3 696 855.49.2. Interest on the aforesaid amount calculated at the fluctuating Bank of Namibia lending rate per annum plus a default margin of 3% per annum compounded monthly as from 28 April 2021 until date of full and final payment.3. The property known as Erf no. 2009, Okuryangava, Windhoek, Namibia held by deed of transfer no. T7386/2002 is declared specially executable.		

4. Costs of suit on attorney and client scale which includes the costs of one instructing and one instructed counsel.
5. The matter is finalised and removed from the roll.

Reasons for order:

RAKOW J:

Introduction

[1] The plaintiff is the Development Bank of Namibia Limited, a company duly incorporated as such in terms of the Companies Act 61 of 1973 and a registered commercial bank duly registered in terms of the relevant banking laws of the Republic of Namibia with registration number 2003/189. The first defendant is Storm Business Enterprises CC, a closed corporation duly incorporated in accordance with the applicable laws of the Republic of Namibia with registration number CC/2012/2852.

[2] The second defendant is Peter Bruce Gwarada, an adult businessman and member of the first defendant. The third defendant is Naomi Bianca Gowases, an adult businesswoman and member of the first defendant. The fourth defendant is Lukas Goraseb, an adult businessman and member of the first defendant. The fifth defendant is Gerhard Nahas Tegelela Nghama, also an adult businessman and member of the first defendant.

[3] Initially all five of the defendants filed notices of intention to defend the claims but on 19 July 2022, the defence of the third, fourth and fifth defendants were struck with costs.

The claims

[4] It was pleaded by the plaintiff that on or about 20 July 2016 and at Windhoek, the plaintiff duly represented by Vivian Groenewald and the first defendant represented by the second defendant entered into a written Term Loan Finance Facility agreement in terms of which the plaintiff agreed to lend and advance the first defendant an amount of N\$2 016 000. This Facility agreement comprised out of two loans to wit a Term loan for N\$1 057 929 and a Suspensive Sale agreement of N\$958 071.

[5] The Term loan would be for a period of sixty months, of which the first six months constituted a grace period and that the first payment will constitute the capital and interest commencing on the last business working day of the seventh month from the first drawdown date.

[6] On 30 November 2016, the plaintiff and the first defendant represented by the second defendant entered into an Instalment Sale agreement. The plaintiff were to sell to the first defendant, who in turn shall purchase from the plaintiff a Tata Xenon Freezer Unit 2.2. The goods are to be purchased by the plaintiff from a supplier thereof at the request of the first defendant. Ownership of the goods vested in the plaintiff. The purchase price of these goods amounted to N\$331 266,01.

[7] The material terms of the Instalment Sale agreement were that the first defendant would pay interest on the loan amount at the fluctuating rate linked to the First National Bank of Namibia's prime rate plus 1 per cent. The purchase price and interest shall be repaid in fifty-three payments of N\$8 485,48 as from 31 July 2017 with the final payment to be made on 31 December 2021.

[8] The parties agreed to enter into an additional Suspensive Sale agreement for further business disbursements on behalf of the first defendant in the amount of N\$313 130,59, which were paid to various service providers on instructions of the first defendant for services rendered to the first defendant.

[9] On or about 12 October 2017 and at Windhoek, the plaintiff and the first defendant represented by the second defendant entered into an agreement amending paragraph 10 of the loan agreement by increasing the term loan capital amount with N\$244 35,62 and conversely decreasing the Suspensive Sale agreement by the same amount. The parties again on or about 15 December 2017 and at Windhoek, entered into an agreement to amend the loan agreement by increasing the term loan capital amount with N\$69 000 and reducing the Instalment Sale agreement with the same amount.

[10] On or about 21 May 2018 and at Windhoek, the plaintiff and the first defendant represented by the second defendant entered into a written Term Loan Finance Facility agreement in terms of which the plaintiff agreed to lend and advance the first defendant an amount of N\$258 000. This loan was to be repaid over 60 months and had a 12 month grace

period.

[11] The breach of these agreements occurred when the first defendant failed to pay the full amounts due in respect of the various loans despite proper demand. On 20 January 2020, the plaintiff's manager issued a certificate of indebtedness to reflect the amount owed by the first defendant including the interest in the amount of N\$3 180 511,94.

[12] The first defendant's indebtedness is secured by registration in 2016 of a continuing covering bond in the amount of N\$500 000 by the first defendant in favour of the plaintiff in respect of a property situated at erf no 2009, Okuryangava, in the Municipality of Windhoek.

[13] The second, third, fourth and fifth defendants each executed a written Deed of Suretyship for the cession of the loan funds in terms of which they bound and obliged themselves jointly as well as severally as surety and co-principal debtors in solidum, for the repayment on demand of all or any sums of money, which the first defendant may then or from time to time thereafter, owe or be indebted to the plaintiff.

The Plea

[14] The defendants initially pleaded that certain parts of the summons and therefore the allegations regarding the claims were excipiable, which lead to the amendment of the particulars of claim to cure the said shortcomings.

[15] The defendants further denied their indebtedness regarding some of the accounts and pleaded that the payments made by them was not reflected in the particulars of claim. They further denied that the plaintiff disbursed any funds to them.

[16] In their amended plea the first and second defendants pleaded that they deny the allegation that the plaintiff lend and advanced the total amount of N\$2 016 000 to the first defendant. They further denied that any payment as set out in the certificate of indebtedness is due and payable. They also pointed out that all attempts to resolve the matter amicably were not accommodated.

Evidence

Claim 1

[17] The conclusion of the agreement, together with the terms thereof, (which includes all the addendums to the first agreement) are all common cause facts. Mr Groenewald testified that N\$1 371 280,62 (as a portion of the N\$2 016 000) under the first agreement was working capital. He further testified that the remaining balance of N\$644 719,30 was disbursed on request of the first defendant when the latter needed to acquire capital assets for its business, such as freezers or trucks. Mr Groenewald went on to testify that for each such request (to acquire capital assets), the plaintiff and the first defendant would conclude a separate new Instalment Sale agreement in respect of the specific capital asset the first defendant wished to acquire.

[18] Mr Groenewald further testified that the plaintiff therefore only claims N\$1 371 280,62 together with capital and cost under the first agreement and that the remaining balance is claimed under separate instalment sale agreements under claims 3 and 4. Mr Groenewald testified that the plaintiff complied with its obligations under the first agreement, (specifically with relation to the provisions relating to the term loan), in that it lent and advanced the amount of N\$1 371 280,62 to or on behalf of the first defendant. He furthermore testified that the first defendant breached the first agreement in that it failed to pay any instalment since it became due on 30 June 2017 under the first agreement.

[19] Ms Nengola testified and confirmed that the plaintiff disbursed a total amount of N\$1 371 280,62 to the first defendant under the first agreement with reference to exhibit "Q". She furthermore testified that the total amount outstanding as on 21 March 2021 was in terms of the first agreement, N\$2 389 699,51 (which includes interest).

Claim 2

[20] Ms Bezuidenhout verified the common cause facts, as per the pre-trial report, under claim 2. These were the conclusions of the relevant written Instalment Sale agreement together with its addendum; the terms of the written instalment sale agreement as it appears therein; that the plaintiff complied with its obligations under the second agreement in that it paid the first defendant's disbursements in the total amount of N\$313 130,59; that the first defendant failed to pay the instalment payments as it became due and since 31 March 2019; and that the outstanding amount with interest, under the second agreement stood at N\$533 583,76 on 28 April 2021.

Claim 3

[21] Ms Bezuidenhout also verified the common cause facts, as per the pre-trial report, under claim 3. These were the conclusion of the relevant written Instalment Sale agreement together with its addendum; the terms of the written Instalment Sale agreement as it appears therein; that the plaintiff complied with its obligation under the third agreement and purchased the Tata vehicle from the supplier on 30 November 2016 for the purchase amount of N\$331 266,01; that the first defendant failed to pay the instalment payments as it became due and since 31 March 2019; and that the outstanding amount with interest, under the third agreement stood at N\$431 721,45 on 28 April 2021.

Claim 4

[22] The common cause facts, as per the pre-trial report, as per the claim are the following: the conclusion of the fourth agreement as well as the terms of the fourth agreement as reflected therein; that the plaintiff complied with its obligations in terms of the fourth agreement in that it lent the amount of N\$258 000 to the first defendant; that the first defendant failed to pay the instalment payments under the fourth agreement as it became due and payable on 31 December 2018 and that the outstanding amount under the fourth agreement, together with interest are N\$341 850,77, as on 28 April 2021.

The evidence of the defendant

[23] The second defendant testified on behalf of himself, and the first defendant and called Mr Lawrence also to testify. The defence of the first and second defendants are based on the issue of the alleged supervening impossibility which prevented the first defendant from repaying the various loans. The essence of Mr Gwarada's testimony on the issue of supervening impossibility can be summarised as follows:

- (a) The suppliers failed to deliver the capital goods timeously;
- (b) The delivery, installation and commissioning of the equipment was delayed;
- (c) The orientation, training and appointment of the production workers were delayed;

- (d) As a result of the aforementioned delays, the production targets, schedules and cash flow projections could not be realised;
- (e) The first defendant had electrical issues at its premises (the extent and cause thereof remains unknown);
- (f) The first defendant failed to get equity partners to commit and invest in its business;
- (g) The availability of cash flow.

Legal considerations

[24] In *Transnet Limited T/A National Ports Authority v Owner of MV Snow Crystal*,¹ Scott JA, discussed the defence of supervening impossibility as follows:

‘As a general rule impossibility of performance brought about by a *vis major* or *casus fortuitus* will excuse performance of a contract. But it will not always do so. In each case it is necessary to look at the nature of the contract, the relationship of the parties, the circumstance of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied. The rule will not avail a defendant if the impossibility is self-created; nor will it avail the defendant if the impossibility is due to his or her fault. Save possibly in circumstances where a plaintiff seek specific performance, the onus of proving impossibility will lay upon the defendant.’

[25] In *Standard Bank Namibia v A to Z Investment Holdings (Pty) Ltd and Another*,² it was held that the impossibility relied upon by a defendant would only void the contract if the impossibility were absolute (objective). Therefore it must not be possible for anyone to make the specific performance. If the impossibility is peculiar to a particular contracting party because of his personal situation, that is if the impossibility is merely relative or subjective, the contract is valid and the party who finds it impossible to render performance will be held liable for breach of contract.

[26] In *Unibank Savings and Loans Limited (formerly Community Bank)*³ Flemming DJP held as follows:

¹ *Transnet Limited T/A National Ports Authority v Owner of MV Snow Crystal*, 2008 (4) SA 111 (SCA) para [28].

² *Standard Bank Namibia v A to Z Investment Holdings (Pty) Ltd and Another*, 2022 (1) NR 197 (HC) at para [17].

³ *Unibank Savings and Loans Limited (formerly Community Bank) v ABSA Bank Limited*, 2000 (4) SA 191 (W) para [9.3.1].

'Impossibility is furthermore not implicit in a change of financial strength or in commercial circumstances which cause compliance with the contractual obligations to be difficult, expensive or unaffordable.'

Discussion

[27] When one has regard to the relevant agreements in this matter, they reveal no provisions which deal with the occurrence of force majeure. As a result, the defendants must meet the stringent requirements of the common law doctrine of supervening impossibility. None of the agreements relied upon by the plaintiff contained a condition that the first defendant's repayment obligations were subject to the first defendant's business generating an income or that the equipment needed to commence business, had to first be delivered although some of these agreements had a grace period of either six or twelve months which would allow for the first defendant to start operating the business before the first instalment on the loan will be due. The plaintiff therefore was sensitive to the fact that the first defendant would not be generating enough of an income to immediately start repaying all the loans.

[28] From the evidence tendered by the defendants, it seems that the circumstances relied upon to support their defence of a supervening impossibility are mainly self-created and or as a result of their own negligence and/or poor business management or skills. It was clear from the evidence of the second defendant on behalf of the first defendant that the first defendant failed to service the loans as a result of financial difficulties caused by a number of factors, but none of these are meeting the criteria to create a supervening impossibility.

Rule 108 Relief

[29] A bond was registered over the immovable property of the second defendant in favour of the plaintiff and therefore, the plaintiff is entitled to execute against the immovable property without first having to execute against the movables of the defendants. The second defendant confirmed that the property in question is his primary home and the court proceeded to enquire whether less drastic measures can be utilized to settle the debt. The second defendant admitted that he has no assets to satisfy the judgment debt.

[30] As pointed out in *Niklaas v First National Bank of Namibia Limited*,⁴ the second defendant bears the onus to persuade the court why the immovable property should not be declared executable, make the court aware of the status of the property for example whether the property

⁴ *Niklaas v First National Bank of Namibia Limited* 2021 JDR 1951 (NmS) at para 18.

constitutes residential property or the primary home of either of the judgment debtor or a third party, and to prove that less drastic measures exist to satisfy the judgment debt than the sale of his immovable property.⁵

[31] Regarding less drastic measures, the North Gauteng High Court in *FirstRand Bank Ltd v Folscher and Another, and Similar Matters*⁶ gives significant instructive guidance on this topic. The court stated –

[39] Absent any extraordinary circumstances, the judgment creditor will normally be entitled to enforce his judgment by executing against the immovable property that is bonded as security. Bond finance is an important socioeconomic tool, enabling individuals to acquire their own home, to make the most important investment of their lives, to build up a nest egg, and to eventually enjoy the fruits of capital growth, quite apart from acquiring an asset that may provide security for further access to capital. The special hypothec registered in favour of the creditor, as security for the moneys advanced for the purchase of the home and capital loans, is entered into between borrower and lender consciously, deliberately and for mutual benefit. If the lender were no longer to enjoy the assurance of bond security, access to housing for persons not qualifying for a state subsidy would become expensive and beyond the reach of the man in the street, with grave negative consequences for society and its social and commercial stability. The trust in bond finance, based upon the assurance that its repayment will be upheld by our courts, should therefore not be undermined.’

[32] In the result, I make the following order:

Judgement is granted against the first, second, third, fourth and fifth defendants, jointly and severally, as follows:

1. Payment of N\$3 696 855,49.
2. Interest on the aforesaid amount calculated at the fluctuating Bank of Namibia lending rate per annum plus a default margin of 3% per annum compounded monthly as from 28 April 2021 until date of full and final payment.
3. The property known as Erf no. 2009, Okuryangava, Windhoek, Namibia held by deed of transfer no. T7386/2002 is declared specially executable.
4. Costs of suit on attorney and client scale which includes the costs of one instructing and one instructed counsel.

⁵ *Futeni Collection (Pty) Ltd v De Duine (Pty) Ltd* 2015 (3) NR 829 (HC) at 838G-H.

⁶ *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 (4) SA 314 (GNP) – approved by the Supreme Court in *Standard Bank Namibia Ltd v Shipila and Others* 2018 (3) NR 849 (SC).

5. The matter is finalised and removed from the roll.	
Judge's signature	Note to the parties:
E RAKOW Judge	Not applicable
Counsel:	
Plaintiff:	1st and 2nd Defendant:
L Lochner Instructed by Engling, Stritter & Partners, Windhoek.	P Gwarada 2 nd Defendant, in person Windhoek.