

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

CASE NO.: I 3786/2014

In the matter between:

STANDARD BANK NAMIBIA LIMITED

PLAINTIFF

And

GERRIT STEPHANUS SWARTZ

DEFENDANT

Neutral citation: *Standard Bank Namibia Limited v Swartz* (I 3786-2014) [2015]
NAHCMD 272 (13 November 2015)

Coram: MASUKU AJ

Heard: 28 September 2015; 29 September 2015;
2 October 2015

Delivered: 13 November 2015

Flynote: LAW OF CONTRACT – Contract in terms of lending and borrowing money from a financial institution; BANKING LAW – overdraft facilities and payment of interest.

Summary: Plaintiff sued the defendant for payment of an amount owing as a result of an agreement between the parties to extend an overdraft facility to the defendant. Defendant denied the existence of the agreement between the parties. Held that the plaintiff proved the existence of the agreement in evidence and that the defendant admitted receiving the amount in his account and clearly failed to repay same. Held further that the plaintiff also admitted to have utilised the amount. Held further that it is normal banking practice for banks to levy interest on all overdrawn accounts. The plaintiff's claim was thus upheld with interest claimed and costs.

ORDER

1. That judgment is granted in favour of the plaintiff in the amount of N\$62 234.76, plus interest thereon at the rate of 15.20 per annum calculated daily and capitalized monthly from 4 August 2014 to the date of payment as agreed between the parties.
2. That the defendant pay the plaintiff's costs, such costs to include the costs of one instructed and one instructing counsel.

JUDGMENT

MASUKU AJ:

Introduction:

[1] On 2 October 2015, I granted an order in favour of the plaintiff in the following

terms:

1. That judgment is granted in favour of the plaintiff in the amount of N\$62 234.76, plus interest thereon at the rate of 15.20 per annum calculated daily and capitalized monthly from 4 August 2014 to the date of payment as agreed between the parties.
2. That the defendant pays the plaintiff's costs and such costs to include the costs of one instructed and one instructing counsel.

Following below are the reasons for the order.

[2] Plaintiff, Standard Bank Namibia Limited, instituted a claim for the repayment of the balance due, with interest, on the overdraft account of the defendant Mr. Swartz held with it. The claim is for an amount of N\$62 234. 67 it being averred that the said amount was lent and advanced to the defendant as a result of a partly oral and partly written agreement that was reached between the parties in or about October 2009. The plaintiff attached to its amended particulars of claim a copy of what it alleges to be the written portion of the loan agreement together with a certificate of balance, which evidences the written terms of the contractual relationship between the parties and the extent of the defendant's indebtedness to the plaintiff, respectively.

[3] The defendant opposed the granting of the relief sought and advanced grounds, in his defence. In a nutshell, he averred that no written agreement exists to prove the overdraft facility allegedly concluded between the parties and as a result thereof the plaintiff is precluded from claiming any amount from the defendant.

Pleadings:

[4] The plaintiff's amended particulars of claim aver that on or about 7 January 2009, at Rosh Pinah, an agreement was reached between the parties to advance monies to the defendant on an overdraft and normal cheque account. The terms of

such agreement was, *inter alia*, that the plaintiff would honour the defendant's cheques and other instructions; charge defendant with interest on amounts due to the plaintiff at the prime rate; plaintiff would debit the defendant's account with advances, bank charges, and other charges consistent with standard banking practices; plaintiff would at any time be entitled to call up the facility despite the limit of such facility being reached and that any balance owing then would become due and payable. Accordingly, the defendant would also be liable for costs involved in the recovery of the balance due and all costs incidental to any legal action instituted by the plaintiff. A certificate of balance attached to the combined summons indicates that as at 4 August 2014, the balance owing to the plaintiff was N\$62 234. 67. This is the amount presently claimed by the plaintiff.

[5] The defendant filed a plea in which he disputes the plaintiff's entitlement to the amount claimed in its particulars of claim. Two main reasons are advanced by the defendant to support this contention. The defendant, firstly, denies concluding any loan agreement with the plaintiff, whether orally or in writing. In this context, the defendant further alleges that the plaintiff, despite being called upon, has to date failed to produce the alleged written loan agreement concluded by it and the defendant. The defendant further claims that the alleged terms and conditions of the oral agreement contained under paragraph 4 of the particulars are unknown to him and as such, he could not have agreed to them.

[6] The defendant further denies that the parties concluded any written agreement, whereby the defendant agreed on any outstanding balance/s, any interest rates, the interest rate thereof. Defendant also denies concluding any written agreement, in terms of which he agreed to reduce the balance on the current account and further denies that the plaintiff called up the overdraft facilities.

Issues that needs to be determined

[7] The proposed pre-trial order which was made an order of court on 29 April 2015 identifies the one question that needs to be determined as: whether or not the defendant is indebted to the plaintiff on the basis and in the amount alleged in the pleadings.

The evidence

On behalf of the plaintiff: Mr. Nolan William Christians

[8] The plaintiff called only one witness, Mr Nolan William Christians, who is employed as head of the plaintiff's Legal Department. The gist of his evidence was basically that money was advanced to the defendant as an overdraft facility which was limited to N\$ 62 000. 00 and was set to expire on 23 July 2014. As a result of non-payment by the defendant to reduce the facility, the plaintiff cancelled the overdraft facility and demanded payment, which as at 4 August 2014 amounted to N\$ 62 234.67. This is the amount depicted by the Certificate of Balance attached to the amended summons as owing by the defendant to the plaintiff.

[9] Mr. Christians testified that an application for an overdraft facility need not be in writing, as in this case and that only the application for a current account was in writing in this case. Accordingly, the overdraft facility was extended to the defendant's current account in order to transact in a debit balance on condition that the account does not exceed the agreed limit by the plaintiff. It was Mr. Christian's testimony that the defendant's financial position was evaluated and the plaintiff was comfortable with extending the overdraft facility to the defendant. It was his further evidence that non-payment of the amount left the account with a debit balance whereupon the plaintiff would decide on a monthly payment to be effected in reduction of the facility. Failure to pay these instalments resulted in the full amount becoming due, after numerous attempts were made to contact the defendant with no success.

[10] It was this witness' further testimony that letters of demand were sent to the defendant on 11 March 2014 and 13 August 2014, respectively, but these letters elicited no response from him. This resulted in the account being "locked up", meaning it was regarded as a non-performing account and that instructions were thereafter sent to the plaintiff's Attorneys to collect the total facility from the defendant. The certificate of balance handed in as an exhibit indicates that a total amount of N\$ 62 234.67 was outstanding as at 4 August 2014 as earlier stated. As regards the denial by the defendant that there was a written agreement, Mr. Christians explained that the written part of the agreement was the application form that was signed by the defendant for the creation of a current account. The overdraft facilities were orally agreed to between the parties and were debited through the current account belonging to the defendant. Under cross examination, it became apparent that the current account was approved first at the request of the defendant in 2009 and shortly thereafter, an overdraft facility was orally approved, so too were the repayment terms conveyed orally to the defendant.

[11] The defendant took issue with the particulars that were on record held by the plaintiff and used by the plaintiff's Collections Department and whether the overdraft facilities were approved orally or in writing. Significantly, no suggestion was ever put to the plaintiff's witness that the details were incorrect or that the right procedures were not followed nor that there was no money lent and advanced to the defendant by the plaintiff.

[12] The bank statements for the period from 10 October 2009 handed in as exhibits, indicated that the overdraft facility was being utilised by the defendant and the balance due is the debit balance with interest charged only on the amount actually utilised. At the end of Mr. Christian's testimony, the plaintiff closed its case.

On behalf of the defendant: Gerrit Stephanus Swartz

[13] The defendant testified in his defence and what is apparent from his evidence is that the current account application does not amount to an agreement for overdraft

facilities. This much is conceded to by the plaintiff's evidence. The defendant denied the following in this evidence:

- a) that he entered into an agreement with the plaintiff to borrow any money on an overdraft facility on the terms as relied on by the plaintiff;
- b) that specific terms as regards the calling back of the facility were ever agreed to between the parties;
- c) That no formal agreement was made where by the defendant agreed on any outstanding balances and any interest rates;

[14] No factual allegations were tendered to support the denials by the defendant. Under cross examination, the defendant could not confirm whether he received any communications from the plaintiff either by way of telephone calls or by registered post; could not confirm his account number although he confirmed that the bank statements were addressed to him. As regards the defence, the defendant testified that his defence was that he could not remember entering into an oral agreement with the plaintiff for an overdraft and that an written agreement bearing his signature would have been the best evidence to convince him of the existence of the alleged contract.

[15] Under cross-examination, the defendant admitted that he did receive overdraft money on his account in 2009 to the balance of N\$ 62 000 and acknowledged further that this money that belonged to the plaintiff bank and had to be repaid with interest. He further admitted that a cheque book and a debit card were issued to him which was used by his family, especially during the time (which was unspecified) that the defendant was out of the country.

Parties' submissions

[16] Counsel for the plaintiff submitted that the defendant failed to dispute the version as put forth by the plaintiff, that an oral agreement was entered into in terms of which money was advanced and was to be repaid with interest according to plaintiff's implied

terms of practice. No rebutting evidence was received from the defendant to the effect that he never received the letters nor that he never received any money. In point of fact, the defendant admitted that money was lent and advanced to him and that he utilised same since 10 October 2009. He stated that according to his understanding, this was an overdraft from the plaintiff which had to be repaid with interest.

[17] The defendant reiterated the averrals in his plea and submitted that there is no evidence to support the existence of the alleged loan agreement in that no written agreement for the request of the overdraft facility is before court and that no written instructions or warnings were forwarded to him.

Analysis of the evidence

[18] Mr. Christians' evidence during the trial remained unshaken. In his evidence in-chief he testified that the loan agreement, which constitutes the basis of the defendant's alleged indebtedness to the plaintiff was concluded on or about January 2009. He further testified that an application for an overdraft facility need not be in writing, as in this case and that only the application for a current account was in writing. He reinforced this view by stating that customers indeed are entitled to request for an overdraft facility over a telephonic call with an employee of the bank. He could not be controverted on this.

[19] The defendant, for his part, in his testimony, particularly under cross-examination was to say the least evasive. In his evidence he said that he could no longer remember many of the details regarding the transactions. In fact, on a number of occasions while being cross-examined, he deflected the more probing questions and many of his answers were vague. As an example, in cross examination, the following exchange in the battle of wits between the defendant and counsel for the plaintiff took place:

“Q: Is it correct that you deny going into an agreement with the Bank in respect whereof overdraft facilities were granted because the Bank could not provide you with written prove of that agreement, is that your defence?

“A: I cannot remember that I went into the Bank and consult with anyone for an overdraft facility. So what I would like to say in that, to say it was just an oral agreement or what type of agreement I would that they have it in written and my signature as you asked that will refresh and remind me that happened now just to say there was an oral agreement in 2009 I cannot remember that I was in 2009 on the 7th October in the Bank to consult with anyone about an overdraft facility it is difficult for me to say yes I was there because I was very little in the Bank at all.

“Q: Okay let us just for a moment forget about whether it was an oral or a written agreement, did you at any stage after 2009 up and until today received overdraft facilities from Standard Bank?

“A: Yes according to the bank statement, one can see here in this page 14 yes there is an overdraft facility, yes.

“Q: So you are acknowledging that there was pay facility (intervention) --- A debit balance of sixty two thousand?

“A: Yes.

“Q: Okay and you would agree with me that if a bank statement shows a debit balance that that is in fact monies that you owe to the Bank not the Bank to you?

“A: Yes that is money of the Bank yes I agree with that.

[20] As already stated, the defendant conceded under cross-examination that, he did receive overdraft facility in his account in 2009 to the balance of N\$ 62 000 and acknowledged that this is money that belonged to the plaintiff bank and had to be repaid with interest. He also conceded that a cheque book and a debit card were issued to him by the plaintiff. It was his evidence that the latter was used by his family, especially during his absence from the country.

[21] It is must be mentioned that a court is entitled to take judicial notice of the fact retail banks charge interest on overdrawn accounts¹. In this regard, and coming closer

¹ Harmse, Amler's Precedents of Pleadings, 7th ed, page 64

home, plaintiff's counsel referred to the decision of *Commercial Bank of Namibia v Preuss t/a Equiptech*², where this court held that it was common banking practice in general, and the practice of banks in particular, for interest to be debited to overdrawn accounts, as being money due and payable to the bank.

[22] For the foregoing reasons I find no good or sound basis as to why the plaintiff should be deprived of the amount claimed together with interest charged as set out in the particulars of claim.

[23] I have considered the parties' evidence and submissions on the matter, in particular that the defendant has in evidence conceded receiving the overdraft facility in his account. In my respectful view, the defence, as raised by the defendant, lacks merits and it was for the foregoing reasons that I found in favour of the plaintiff as reflected in paragraph 1 of this judgment.

TS Masuku
Acting Judge

² 1999 NR 174 (HC).

APPEARANCES:

PLAINTIFF:

Y. Campbell
Instructed by Engling, Stritter &
Partners,

DEFENDANT:

G S Swartz
In person