



CASE NO: I 183/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

HANS HAMUKOTO

PLAINTIFF

and

KASIKU SITEKETA

DEFENDANT

CORAM:

SCHIMMING-CHASE, AJ

Heard on: 24 May 2011

Delivered on: 24 May 2011

JUDGMENT

SCHIMMING-CHASE, AJ:

1. This is an opposed application for summary judgment. The plaintiff's claim against the defendant is that the plaintiff in

terms of an agreement loaned the defendant an amount of N\$83,000.00 during May and June 2008. It is also alleged that this loan agreement was concluded between the parties personally.

2. The defendant raises three points *in limine*, the first point is that the plaintiff failed to comply with Rule 18(6) of the Rules of Court in that the particulars of claim do not state whether the loan agreement was oral or written and if written, that no such copy of the agreement was annexed to the particulars of claim. It is also not stated where the agreement was concluded. It is submitted on behalf of the defendant that due to this non-compliance summary judgment should be refused.
3. The second point *in limine* is that the plaintiff should have joined one Daniel Kamunoko, as he has a direct and substantial interest in the matter. This argument is raised in the opposing affidavit, in which it was stated by the defendant on the merits that the agreement was concluded by her in her capacity as agent of and on Mr Kamunoko's behalf. I deal with this aspect in more detail below.
4. Thirdly the defendant argues *in limine* that the plaintiff's claim is not liquidated and that accordingly summary judgment should not have been applied for.

- 5.
6. As regards the first point *in limine* it is clear that there is non-compliance with Rule 18(6) of the Rules of Court. The plaintiff failed to allege in his particulars of claim whether the agreement concluded was written or oral. The plaintiff further failed to indicate the place where the agreement was concluded. However the opposing affidavit makes it clear that the agreement was orally concluded between the plaintiff and the defendant in Windhoek. What is placed in issue by the defendant relates to the capacity in which, and on whose behalf the agreement was concluded. On this basis, I see no real prejudice in the failure to properly plead the particulars of the agreement in terms of Rule 18(6). This point therefore does not succeed.
7. As regards the point of non-joinder, I shall deal with this issue as part of the merits, especially in view of the argument made by counsel for the defendant that should leave to defend be granted, the point of non-joinder will be raised.
8. The point *in limine* relating to the plaintiff's claim not being liquidated is also dismissed, because there is no doubt that the amount claimed in the particulars of claim is capable of easy calculation. After all this claim is based on a specified amount of money that was allegedly loaned to the defendant.

9.

10. I now proceed to deal with the merits. The defendant, in her opposing affidavit, denies that she entered into a loan agreement with the plaintiff as alleged, either in her personal capacity or for her own personal consumption. The defendant states that she concluded this agreement in her capacity as an agent of Mr Kamunoko and that her mandate with him was terminated since his return from Hong Kong in October 2009. The defendant further states that this aspect is well within the knowledge of the plaintiff.

11. I am in respectful agreement with the authorities cited by both counsel relating to the principles to be applied in determining summary judgment applications, in particular that summary judgment is a robust and drastic remedy which should only be granted when the defendant's claim is unanswerable.

See: Kelnic Construction (Pty) Ltd v Cadilu Fishing (Pty) Ltd
1998 NR 198 (HC) at 201C-D
Mauno Haindongo t/a Onawa Wholesales v African Experience (Pty) Ltd 2006 (1) NR 56 (HC) at 59C-D

12.

13. Having considered the opposing affidavit, I am not convinced that the defendant's case is unanswerable. Firstly she states in her affidavit that the plaintiff was aware that she concluded the

loan agreement as an agent on behalf of another person. This aspect must be clarified at the trial, and the question of joinder must also be considered at that stage.

14. Secondly, although the power of attorney annexed to the affidavit does not make a clear reference to the defendant's powers to conclude a loan agreement on behalf of Mr Kamunoko, the power of attorney does allow her "in general to do and suffer all acts and execute all deeds whatsoever in or about my property and my affairs and affairs and concur with persons jointly interested with myself therein doing and suffering all acts and executing all deeds herein particularly or generally described as amply and effectually to all intent and purposes, as I could do in my own person if this deed had not been made".

15. In light of the foregoing, I decline to award summary judgment in favour of the plaintiff.

16. In a result, I make the following order:

(a) The application for summary judgment is dismissed.

(b) The costs of this application are to stand over to be

determined at the close of the trial between the parties.

SCHIMMING-CHASE, AJ

ON BEHALF OF THE PLAINTIFF

Instructed by:

Mr Kamanya

Sisa Namandje & Co

ON BEHALF OF THE DEFENDANT

Instructed by:

Mr Akweenda

Hengari, Kanguuehi &

Kavendjii Incorporated