



CASE NO.: I 2780/2011

**IN THE HIGH COURT OF NAMIBIA**

**MAIN DIVISION, HELD AT WINDHOEK**

In the matter between:

**NEDBANK NAMIBIA LTD**

**PLAINTIFF**

and

**DESIRE FRANCES LOUW**

**DEFENDANT**

**CORAM: SMUTS, J**

Heard on: 1 August 2012

Delivered on: 8 August 2012

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**JUDGMENT**

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**SMUTS, J.:** [1] The plaintiff excepted to the defendant's plea on the grounds that the plea did not sustain a defence in law and that the defence stood to be struck with costs.

[2] On 11 July 2012, the hearing of the exception was postponed to 1 August 2012 at the request of the defendant who appeared in person. On 1 August 2012 the defendant was not present after her name had been called. The defendant was originally cited as the first defendant in an action which the plaintiff settled with the second defendant. Shortly before the hearing of this exception, the defendant filed a notice dated 28 July 2012 on 30 July 2012 which purported to attach a letter to request postponement. The only attachment to the notice was an incomplete memorandum addressed to the defendant by a firm of legal practitioners, AngulaColeman. In this memorandum, the view is expressed that the defendant's defence is excipiable and the defendant was advised against arguing the exception. The view was also expressed, with reference to authority<sup>1</sup> that it was not competent for the plaintiff to seek the dismissal of the defence but rather an order upholding the exception and seeking an order affording the defendant the opportunity to amend her plea. There was no reference in the memorandum filed with court – although its second page was missing – to any postponement or even a request for one. There was furthermore no such application filed and the defendant was not present to move one or even raise it as possibility.

[3] I accordingly proceeded to hear argument by plaintiff's counsel, Mr Mouton, in respect of the exception. He submitted that the plea did not disclose a defence because it failed to take into account the terms of the respective loan agreements. One such term was that the full amount of the loan would be repayable if one month's instalment was in arrears. He referred me to the relevant terms of the particulars of claim and the

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<sup>1</sup>Group 5 Building Ltd v Government of the Republic of South Africa 1993(2) SA 593 (A)

agreements to that effect. In her plea, the defendant acknowledged that the loan financing had been provided by the plaintiff in respect of all three claims but denied that in the event of a default of any monthly payment and in the absence of demanding it, the full amounts of the loans together with interest and all other sums due under the conditions of the agreements would become immediately due and recoverable.

[4] In view of the terms of the agreements, which are not put in dispute, it is clear to me that the defendant's plea does not disclose a defence to the plaintiff's claims as was corrected acknowledged to by the legal practitioners she had consulted and which advice the defendant had disclosed.

[5] The loans were each secured by a special mortgage bond. A term of each of the bonds was that the failure on the part of the defendant to make loan repayments would entitle the plaintiff to claim full amount of the defendant's indebtedness and to proceed for the recovery of those amounts together with interest and such further monies due under the agreements against the defendant without notice to the defendant. In the plea, the defendant did not deny that the loan funding had been received or that she was default of making payments of any instalments. It was however pleaded that instalments had not been demanded. But this is not required by the agreements in respect of the claims. The plea thus does not constitute a defence to the claims.

[6] The plaintiff excepted to the plea on the grounds that it did not contain a defence in law and stood to be dismissed with costs. Mr Mouton argued that the purpose of an

exception was dispose of a matter where a defence or a claim had not been set out. He referred to the fact that the defendant made no allegation that she had punctually paid any or all the instalments due but instead denied that the full amount was outstanding on the basis that instalment amounts had not been demanded from her.

[7] The plea being thus excipiable, Mr Mouton argued that the plea should be struck with costs and that the defendant should not afforded the opportunity to amend, given the fact that the plea did not disclose any defence. He referred to the authorities collected in Erasmus Superior Court Practice<sup>2</sup> and submitted that the *Group Five* - matter referred to in memorandum placed before me by the defendant was distinguishable given the fact that it related to particulars of claim which were excipiable, with the summons remaining intact.

[8] But the reasoning of the court in the *Group Five* – matter, with which I respectfully agree, would in my view suggest a contrary approach<sup>3</sup>. Whilst that matter did relate to an excipiable particulars of claim, the approach of the court would in my view find application to successful exceptions taken against a plea, given the drastic consequence of a defence being struc0k.

[9] It follows that the order I make is:

- (a) the first defendant's plea is set aside with costs, including the costs of one instructed and one instructing counsel, including the appearance on 11

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<sup>2</sup>At B1-151

<sup>3</sup>Act 603 B-H

July 2012, and the first defendant is given leave, if so advised, to file an amended plea within 1 month from the date of the delivery of this judgment.

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**SMUTS, J**

**ON BEHALF OF THE PLAINTIFF:**

**MR MOUTON**

**Instructed by:**

**KOEP & PARTNERS**