REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 240/2013

In the matter between:

DEVELOPMENT BANK OF NAMIBIA LIMITED	**PLAINTIFF**
and	
KUBARAF DEVELOPMENT ENTERPRISE CC	**1ST DEFENDANT**
ROBERTH COETZEE	**2ND DEFENDANT**
EMGARD COETZEE	**3RD DEFENDANT**

Neutral citation: *Development Bank of Namibia Limited v Kubaraf Development Enterprise CC* (I 240/2013) [2014] NAHCMD 67 (26 February 2014)

Coram: HOFF J
Heard: **18 February 2014**
Delivered: **26 February 2014**

Summary: Exception on the basis that particulars of claim does not disclose a cause of action – The cause of action relied upon by plaintiff must have existed at the time when the summons was issued.

The integration rule, in general, where an agreement between parties is embodied in a document no evidence may be given of its terms except the document itself, nor may the contents of such document be contradicted, altered, added to, or varied by extrinsic evidence.

Causes of action which arose after issue of summons may be joined to the existing ones in the same action.

Where an exception that pleadings disclose no cause of action is upheld, the court should set aside the pleadings and not dismiss the action.

ORDER

(a) The exceptions (grounds 1, 2 and 3) are upheld and plaintiff's summons and particulars of claim are set aside with costs, such costs to include one instructing and one instructed counsel.

(b) Plaintiff is granted leave to file an amended summons and particulars of claim within 15 days from the delivery of this judgment.

JUDGMENT

HOFF J:

[1] The plaintiff sued the defendants for the repayment of a sum of money advanced by the plaintiff to the defendants in terms of loan a agreement.

[2] In terms of the loan agreement, signed on behalf of the defendants and the plaintiff respectively on 17 February 2012 and 20 February 2012, the loan facility

was in the amount of N$3 000 000.00. The loan was signed for a period of 15 months including a 2 months grace period at an interest rate of 9.75 per annum.

[3] In a summons filed on 5 February 2013 the plaintiff alleges breach of contract by the first defendant in that it failed and/or neglected to pay the plaintiff as agreed. The particulars of claim were subsequently amended by the plaintiff twice on 6 May 2013 and on 21 August 2013. Plaintiff in its amended particulars of claim averred that the loan and interest which had to be repaid had lapsed on 11 July 2013, that the defendant had not made a single payment to the plaintiff and that the debt is now owing, due and payable.

[4] It is common cause that the second and third defendants executed identical deeds of suretyship as co-principal debtors in *solidum* for the repayment of the loan amount which surety mortgage bonds were registered on 12 April 2012.

[5] The defendants raised three exceptions to plaintiff's amended particulars of claim dated 21 August 2013 on the basis that it is bad in law on the ground that it does not disclose a cause of action.

Ground 1

[6] It was submitted by Ms de Jager who appeared on behalf of the defendants that *ex facie* paragraph 6.2 read with paragraphs 7 and 8 thereof, the said 15 months period started on 12 April 2012 and lapsed on 11 July 2013 and therefore the loan amount and interest had to be repaid on 11 July 2013.

[7] It was further submitted that in terms of paragraph 9 of plaintiff's amended particulars of claim dated 21 August 2013, it was only at 11 July 2013 that first defendant was indebted to plaintiff in the amount of N$3 148 349-49, but this notwithstanding, civil action was already instituted by the plaintiff on 5 February 2013. The institution of civil action was thus done prematurely at a stage

when there was no cause of action ie the debt concerned has not fallen due at the time when the summons was served on the defendants.

Ground 2

[8] This ground is interlinked with the first ground. It was submitted on behalf of the defendants that *ex facie* paragraph 8 of plaintiff's amended particulars of claim dated 21 August 2013 read with paragraph 3.1 of plaintiff's further particulars dated 13 June 2013, plaintiff's cause of action is that first defendant breached one of the terms of the loan agreement since the first payment became due on 30 June 2012. Ms de Jager submitted that the plaintiff's reliance on the averment that the first payment became due on 30 June 2012 is not a term of the loan agreement.

[9] Mr Muluti who appeared on behalf of the plaintiff disagreed that the particulars of claim disclosed no cause of action. He submitted that in order to establish a cause of action in respect of a claim based on a loan, a plaintiff must allege and prove (a) the loan agreement; (b) that the money was advanced in terms of the agreement; and (c) that the loan is repayable. He submitted that where no specific date is mentioned when the money advanced is due and payable, then the loan is repayable on demand.

[10] It was further submitted that the purpose of the amended particulars was to show that on 11 July 2013 the debt of the first defendant including interest stood at N$3 148 349.49, that the loan had to be repaid by the first defendant within 15 months from 12 April 2012 to 11 July 2013, that the first instalment was due on 30 June 2012 and the last instalment on 11 July 2013. Mr Muluti submitted that the first instalment became due after the two month grace period on 30 June 2012 hence when summons was issued during February 2013, the first defendant had breached the agreement by failing to make the first payment. He submitted that the contention by the defendants that the debt only became due and payable after 11 July 2013 is misplaced and self-serving.

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[11] The plaintiff in its combined summons relied on the provisions of a written loan agreement (Annexure A) which provides *inter alia* as follows:

'1.1 Terms of SDF Term Loan Facility

Total Bridging Facility	N$3,000,000.00
Period	15 months including 2 months grace period
Interest rate	Prime Rate (currently 9.75% per annum.'

[12] There is ample authority that a cause of action relied upon by a plaintiff must have existed at the time when the summons was issued.

[13] *In Philotex (Pty) Ltd and Others v Snyman and Others* 1994 (1) SA 710 TPD at 715 D-G Van Dijkhorst J stated the following in this regard:

'The general approach in this Division has for many decades been that a cause of action should exist at the time of institution of action. This has also been the approach in other Divisions and in the Appellate Division (see *Ritch v Bhyat* 1913 TPD 589 at 592; *Druckman v Seligson* 1922 TPD 254 at 257; *Lebedina v Schechter & Haskell* 1931 WLD 247 at 256-7; *Mahomed v Nagdee* 1952 (1) SA 410 (A) at 148G; *Van Wyk and Another v Louw and Another* 1958 (2) SA 164 (C) at 169F; *Dinath v Breedt* 1966 (3) SA 712 (T) at 715F-H; *Nel v Silicon Smelters (Edms) Bpk en 'n Ander* 1981 (4) SA 792 (A) at 800B; . . . and *Western Bank Ltd v Wood* 1969 (4) SA 131 (D) at 136).'

[14] There is a definite rule of law that where an agreement between parties is been embodied in a document (in writing) such a document contains the exclusive memorial of the transaction and in a dispute between the parties no evidence is allowed, as a general rule, to prove the terms of such agreement. This rule referred to as the integration rule was explained as follows by Corbett JA in *Johnston v Leal* 1980 (3) SA AD 927 at 943B:

'Dealing first with the integration rule, it is clear to me that the aim and effect of this rule is to prevent a party to a contract which has been integrated into a single and complete

written memorial from seeking to contradict, add to, or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract.'

[15] In *Lowrey v Steedman* 1914 AD 532 at 543 the Appellate Division stated the following in respect of this rule:

'The rule is that when a contract has once been reduced to writing no evidence may be given of its terms except the document itself, nor may the contents of such document be contradicted, altered, added to, or varied by oral evidence.'

(See also *Marguad & Co.v Biccard* 1921 AD 366 at 373; *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at 47; *Venter v Birchholtz* 1972 (1) SA 276 (A) at 282).

[16] It is quite apparent from the loan agreement between the parties that this document is silent as to when the first instalment became due and payable contrary to the plaintiff's contention that the first instalment became due and payable on 30 June 2012. Nowhere in the agreement is this date stipulated. The plaintiff at no stage in its amended particulars of claim dated 21 August 2013 made an averment that the first instalment became due and payable on 30 June 2012. This was mentioned though in plaintiff's reply to defendant's request for further particulars. This was also the contention by Mr Muluti who appeared on behalf of the plaintiff. The averment by the plaintiff that the first instalment became due and payable on 30 June 2012 would in effect be adding a term of the loan agreement which, in terms of the integrated rule plaintiff is not permitted to do ie plaintiff may not adduce extrinsic evidence in order to prove a term of the loan agreement and in this way endeavour to establish a cause of action.

[17] The plaintiff in its amended particulars of claim stated that the 15 month period in terms of which the loan and interest had to be paid lapsed on 11 July 2013.

[18] I must for the purpose of this exception take the facts as alleged in the pleadings as correct.

(See *Hangula v Motor Vehicle Accident Fund* 2013 (2) NR 358 at 363).

[19] It follows, in my view, in the absence of any agreement between the parties when instalments, if any, became due and payable, that the loan amount and interest became due and payable at the expiration of the period of 15 months ie on 11 July 2013.

[20] The submission by Ms de Jager that the summons was issued prematurely ie at a stage when the debt was not due and payable, is in my view, well-founded. It must be mentioned that the exceptions raised do not require an interpretation of the contract (loan agreement) by this court but are founded on the fact that the terms on which the plaintiff relied on, are non-existent ie they do not appear *ex facie* the loan agreement. It follows that there existed no cause of action at the stage when summons was issued. Consequently the exceptions raised in grounds 1 and 2 should be upheld.

[21] The third ground of exception is that *ex facie* prayer 2 of plaintiff's amended particulars of claim interest is claimed against the defendants as from 1 July 2013. However in paragraph 8 of plaintiff's amended particulars of claim it is stated that the 15 month period in terms of which the loan and interest has to be repaid lapsed on 11 July 2013. Therefore no basis is set out in plaintiff's amended particulars of claim to substantiate its claim of interest as from *1 July 2013*. This exception, in my view, is also well-founded. It follows that no cause of action is set out for interest to be claimed from *1 July 2013*.

[22] This however does not mean that the plaintiff is prevented from pursuing its action against the defendants.

[23] In *Philotex* (supra) at 716G Van Dijkhorst stated the following:

'On the other hand, practical considerations have in the past dictated that causes of action which arose after issue of summons be joined to the existing ones in the same action . . . This is not the *ex post facto* introduction of a fresh cause of action to an action between the parties who are properly before court, because there is no objection to the

locus standi of some plaintiffs. The effect of this amendment is that it seeks to introduce parties to an existing action with causes of action which arose after the issue of summons.'

[24] In *Total Namibia (Pty) Ltd v Van der Merwe t/a Ampies Motors* 1998 NR 176 at 180B-D Strydom JP said the following:

'In recent decision by the South African Appeal Court the principles was laid down that in exceptions on the basis that the pleadings do not disclose a cause of action the court should set aside the pleadings and not dismiss the action. See *Group Five Building Ltd v Government of the RSA* 1993 (2) SA 593 (A); *Trope and Others v South African Reserve Bank* 1993 (3) SA 264 (A) *and Rowe v Rowe* 1997 (4) SA 160 (A). I intend to follow these decisions.'

[25] In the result the following orders are made:

(a) The exceptions (grounds 1, 2 and 3) are upheld and plaintiff's summons and particulars of claim are set aside with costs, such costs to include one instructing and one instructed counsel.

(b) Plaintiff is granted leave to file an amended summons and particulars of claim within 15 days from the delivery of this judgment.

E P B HOFF

Judge

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APPEARANCES

PLAINTIFF :	P Muluti of Muluti & Partners, Windhoek
1ST TO 3RD DEFENDANTS:	B de Jager Instructed by Du Toit Associates, Windhoek

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