REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3364/2012

In the matter between:

PDS HOLDINGS (BVI) LIMITED **PLAINTIFF**
(formerly known as PDS Vale (BVI) Ltd)

and

DANIEL ZAIRE **DEFENDANT**

Neutral citation: *PDS Holdings (BVI) Limited v Zaire* (I 3364/2012) [2014] NAHCMD 83 (13 March 2014)

Coram: PARKER AJ
Heard: **11 November 2013; 14 February 2014**
Delivered: **13 March 2014**

Flynote: Debtor and creditor – Loan agreement – In terms of which debt became payable on demand – Court held that as a matter of law summons constitutes demand – And in that event court held further that the defendant will not be in *mora* until summons has been served – In instant case court found that defendant had been served with summons and so he was in *mora* from date of issuance of the summons – Court having found that on the evidence the defendant has no defence to the claim court granted judgment for the plaintiff with costs.

Summary: Debtor and creditor – Loan agreement – Addendum to loan agreement provides that if suspensive condition was not fulfilled by the defendant within 180 days from date of signing of the addendum to the loan agreement the debt became

payable on demand – No letter of demand was sent to defendant but summons was issued and served on defendant – Court having found that as a matter of law summons constitutes demand and also that on the evidence the defendant has no defence to the claim court granted judgment for the plaintiff with costs.

ORDER

Judgment granted in favour of the plaintiff in the amount of N$3 000 000, plus interest on that amount at the rate of 20 per cent per annum, calculated from date of summons (ie 29 October 2012) to date of full and final payment, with costs including costs of one instructing counsel and one instructed counsel.

JUDGMENT

PARKER AJ:

[1] This matter involves a civil servant Mr Daniel Zaire (the defendant), who doubles as a businessman. The defendant is a civil servant employed by the Ministry of Mines and Energy, which is responsible for the issuance of Exclusive Prospecting License for minerals and metals. The defendant has established a close corporation, Omaue Trading CC, of which he is the beneficial owner. The CC is in the business of obtaining from the Ministry of Mines and Energy EPLs and selling an EPL it obtains to real and serious prospectors. The instant case revolves around one such EPL No. 4433 which the defendant's CC obtained and sought to sell to the plaintiff. The plaintiff is represented by Mr Strydom, and the defendant by Mr Namandje.

[2] Zaire's world came crashing down when the Permanent Secretary: Ministry of Mines and Energy responded in a letter, dated 19 April 2011, to Mr Diekmann, Zaire's legal practitioner at all material times, that EPL 4433 had been granted for

base and rare metals and industrial minerals only and not for nuclear fuel minerals; and so, based on the documents before the Ministry, the Ministry 'can therefore not effect the transfer' of EPL 4433 from Omaue Trading CC to the plaintiff. The plaintiff was only interested in nuclear fuel minerals.

[3] Meanwhile, on 13 December 2010 the plaintiff and Zaire had entered into a loan agreement involving the lending of N$1 500 000 by the plaintiff to Zaire. On 18 August 2011 the plaintiff and Zaire concluded an Addendum to Loan Agreement ('addendum'). The addendum was an addition to the loan agreement. The instant case concerns the interpretation and application of Clause 3 of the addendum, particularly the grammatical clause appearing in the last two lines of Clause 3, that is, 'the initial capital amount of N$3 000 000 shall be repayable by the Borrower to the Lender on demand'. The contentions on the different sides of the suit centre on the grammatical clause 'shall be repayable by the Borrower to the Lender on demand', and particularly the interpretation and application of the phrase 'on demand'.

[4] On the evidence, I make the following factual findings and conclusions. The suspensive conditions in the addendum were not fulfilled within 180 days (or at all) from the date of the signature of the addendum. That being the case the N$3 000 000 became payable by the Borrower to the Lender on (or about) 18 February 2012. Thus by operation of law, that is, based on the addendum (a contract) Zaire became indebted to the plaintiff on (or about) 18 February 2012. This conclusion leads me to the next level of the enquiry.

[5] It is the contention of the plaintiff that despite demand by the plaintiff, alternatively summons constituting demand, Zaire has failed or refused to pay the N$3 000 000 or any part of it to the plaintiff. The contention of Zaire, in the opposite way, is that the amount has not become repayable because the plaintiff has not made a demand in terms of Clause 3 of the addendum.

[6] I accept Zaire's contention to a point. A careful distinction should be drawn between indebtedness of one to another person and one's duty to pay that which

one owes that other person. The distinction becomes even more relevant and critical on the facts of the instant case. In the instant case, as I have found previously, Zaire became indebted to the plaintiff on (or about) 18 February 2012. But that which Zaire owed to the plaintiff would be repayable 'on demand' by the plaintiff. Now, the question is this: has the plaintiff made a demand on Zaire to repay the amount Zaire owes to the plaintiff. The plaintiff says it has; Zaire says the plaintiff has not. Evidence was led by the plaintiff and the defendant to establish their individual contentions.

[7] In weighing the evidence adduced on the issue of 'on demand', particularly the evidence of Mr Diekmann (for the plaintiff) and Zaire (for the defendant) I find that the version of Diekmann and of Zaire are mutually destructive. That being the case,

> 'I must follow the approach that has been beaten by the authorities in dealing with such eventuality; that is to say, the proper approach is for the Court to apply its mind not only to the merits and demerits of the two mutually destructive versions but also their probabilities and it is only after so applying its mind that the Court would be justified in reaching the conclusion as to which opinion to accept and which to reject. (See *Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR 555 at 559D.) Additionally, from the authorities it also emerges that where the onus rests on the plaintiff and there are two mutually destructive versions, as aforesaid, the plaintiff can only succeed if the plaintiff satisfied the Court on a preponderance of probabilities that the plaintiff's version is true and accurate and therefore acceptable, and that the version on the opposite side is false or mistaken and should, therefore, be rejected.'

(*Absolute Logistics (Pty) Ltd v Elite Security Services CC* I 1497/2008 (Unreported), para 6)

[8] Having applied my mind not only to the merits and demerits of the two mutually destructive versions but also to their probabilities I make the following factual findings and attendant conclusions. Diekmann testified that he met Zaire in the Ministry of Lands and Resettlement one fine day. Diekmann's mission for going to the Ministry of Lands and Resettlement was not to look for Zaire and make a

demand on Zaire for the repayment of the N$3 000 000. Zaire owes no such money to Diekmann. Diekmann met Zaire in the Ministry of Lands and Resettlement but theirs was a chance meeting. Diekmann testified that he asked Zaire 'to pay'. It flies in the teeth of common sense and human experience that that is all Diekmann told Zaire. I accept as probable Diekmann's other version of what transpired when he met Zaire in the Ministry of Lands and Resettlement, and it is that he informed Zaire that the plaintiff had told Diekmann to sue Zaire for the N$3 000 000 but Diekmann had told the plaintiff that he could not do that because Zaire was his client.

[9] Only the plaintiff or an agent of the plaintiff could make the demand. Diekmann could not have been the agent of the plaintiff and so as a matter of law and ethics Diekmann could not have made a demand on Zaire for the repayment of the N$3 000 000. It follows that it matters tupence whether Diekmann told Zaire 'you must pay' or he informed Zaire that he had been told by the plaintiff to sue him for N$3 000 000 but that he had declined to do so. I conclude therefore that as respects the chance meeting between Diekmann and Zaire no demand was made by the plaintiff for Zaire to pay the N$3 000 000. For the view I have taken of anything Diekmann might have said to Zaire in the Ministry of Lands and Resettlement, I do not think *Amalgamated Society of Woodworkers of SA and Another v Die 1963 Ambagsaalvereniging* 1968 (1) SA (T) is of any real assistance on the point under consideration. Diekmann, as I have said previously, could not have pressed a claim for repayment of the N$3 000 000 and could not have indicated a clear threat to recover the money, as a matter of law and ethics.

[10] The matter does not rest there. As mentioned previously, the plaintiff contends that alternatively, summons constitutes demand', that is, the plaintiff contends that it made a demand within the meaning of Clause 3 of the addendum when the plaintiff caused summons to be issued from the registrar's office on 29 October 2012. In this regard Mr Strydom, counsel for the plaintiff, argued that the summons that was issued in this matter constitutes demand, and counsel cited several authorities in support of his argument. And what is the argument of Mr Namandje, counsel for the defendant? It is this. According to Mr Namandje, Mr Strydom's reliance on the authorities is misplaced – though not in so many words – because of art 80(2) of the

Namibian Constitution which the court should take into account in considering those authorities. The material part of art 80(2) provides: 'The High Court shall have original jurisdiction to hear and adjudicate upon all civil disputes.…'

[11] Mr Namandje argued thus: when summons was issued no dispute existed between the plaintiff and the defendant because the N$3 000 000 could only become repayable on demand in terms of Clause 3 of the addendum. There has been no demand. Therefore, there is no dispute which the court could be called upon to adjudicate. In short, as far as Mr Namandje is concerned, there can only be a demand if the defendant was put on notice of the dispute and the defendant was 'placed on terms that pay tomorrow or pay the 3rd'.

[12] It seems to me superficially attractive, as Mr Namandje's forceful argument may be in regard to the question of 'demand'. The evidence is overwhelming and unchallenged that the defendant does not deny that as at 18 February 2012 (or thereabouts) he was indebted to the plaintiff in the amount of N$3 000 000 by operation of law in terms of Clause 3. Furthermore, Clause 3 does not prescribe the form in which the demand should take. For these reasons it is to the common law and case law that the court should seek assistance in the interpretation and application of Clause 3 of the addendum, respecting in particular the phrase 'on demand'. By 'demand' is meant some actual request or demand indicating to the debtor that the creditor wishes to receive his money. (See *Dougan v Estment* 1910 TPD 998 at 1001.) And Watermeyer JA stated succinctly in *Ridley v Marais* 1939 AD 5 at 8 thus:

> 'Now the decision of this Court in the case of *Western Rand Estates Ltd v New Zealand Insurance Co* (1926 AD 173) makes it clear that a summons is equivalent to a demand and places a debtor in *mora* from the time of service of the summons.'

[13] The principle of law that summons constitutes demand was followed in the very recent case of *SA Taxi Securitisation v Mbatha* 2011 (1) SA 310 (GSJ), para 21 where Levenberg AJ stated, 'As a matter of law, to the extent that demand is required, summons constitutes demand'. I accept the dicta in *Ridley* and *Mbatha* as correct statements of law, and so I adopt them. The only qualification to the principle

is that the defendant will not be in *mora* until summons has been served. (Herbstein and Van Winsen , *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, 5th ed (2009): p 249) In the instant case, summons has been served. But then Mr Namandje argues that the authorities should be read against the backdrop of art 80(2) of the Namibian Constitution. I have done that. All that the relevant part of art 80(2) does is to confirm the court's inherent power to adjudicate civil disputes (among other disputes). I do not find that art 80(2) renders inoperative the principle that 'as a matter of law, to the extent that demand is required, summons constitutes demand'. Why do I say that? It is for these reasons. One must not lose sight of the fact that a defendant, upon service on him or her of the summons is thereby informed and requested to pay that which the plaintiff claims. If the defendant tenders payment that is the end of the matter, there is no dispute requiring adjudication by the court. On the other hand, a defendant who disputes liability may file a notice of intention to defend the claim. In that event a dispute comes into existence which the court is entitled to adjudicate. In the instant case, Zaire did not admit liability and Zaire did not tender payment of the N$3 000 000. Zaire filed a notice of intention to defend. In that event, a dispute came into existence which the court was entitled to adjudicate. For these reasons and having read the authorities intertextually with art 80(2) of the Namibian Constitution, I do not, *pace* Mr Namandje, find that art 80(2) does render inoperative the principle of law that summons constitutes demand.

[14] Based on all these reasoning and conclusions, I hold that there has been a demand on Zaire to pay the N$3 000 000, which as I have found, became payable when summons was issued and served, and Zaire has refused or failed to pay the N$3 000 000.

[15] It remains to consider Mr Namandje's submission about the issue of 60 per cent of membership interest of Omaue Trading CC that has been transferred by Zaire to the nominees of the plaintiff. I accept Mr Strydom's argument that there is no connection between the debt of N$3 000 000 and the transfer of 60 per cent membership interests of Omaue Trading CC. Besides, this issue was not pleaded.

Accordingly, the court is not entitled to adjudicate it: it is not a dispute raised in the pleadings.

[16] For all these reasons, I grant judgment for the plaintiff in the amount of N$3 000 000, plus interest on that amount at the rate of 20 per cent per annum, calculated from date of summons (ie 29 October 2012) to date of full and final payment, with costs including costs of one instructing counsel and one instructed counsel.

C Parker

Acting Judge

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APPEARANCES

PLAINTIFF :	J A N Strydom
	Instructed by Diekmann Associates, Windhoek
DEFENDANT:	S Namandje
	Of Sisa Namandje & Co. Inc., Windhoek