

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no.: HC-MD-CIV-ACT-CON-2019/03391

In the matter between:

ADFORCE NAMIBIA CC

PLAINTIFF

and

BLACKTHORN INVESTMENTS (PTY) LTD

FIRST DEFENDANT

HERMANUS SMITH

SECOND DEFENDANT

DENISE BILLY

THIRD DEFENDANT

WILLIAM PRETORIUS

FOURTH DEFENDANT

MARTHA PRETORIUS

FIFTH DEFENDANT

MAGRET GOLIATH

SIXTH DEFENDANT

Neutral citation: *Adforce Namibia CC v Blackthorn Investments (Pty) Ltd* (HC-MD-CIV-ACT-CON-2019/03391) [2023] NAHCMD 640 (11 October 2023)

Coram: CLAASEN J

Heard: 24 – 28 April 2023; 16 June 2023; 22 September 2023.

Judgment: 11 October 2023

Flynote: Contract – Acknowledgement of debt – First defendant admitted receipt of the monies but denies liability – First defendant asserted that instrument is not valid and enforceable – First defendant claimed that signatories who signed on behalf of first defendant were not authorised as two of the directors resigned – First defendant also claimed that the execution of the AOD was in violation of a clause in the shareholders agreement relating to loans by the company – Court rejected defences of first defendant. Court held where the acknowledgment of debt is coupled with an undertaking to pay, it will give rise to an obligation in terms of that undertaking – When liability is agreed upon, the debt becomes payable on demand, which performance has not been rendered by the first defendant.

Summary: The plaintiff's claim is based on an acknowledgement of debt for an amount of N\$4 854 893. The parties entered into a partnership agreement. The agreement provided that the plaintiff will pay N\$7 million for 48 percent shareholding in a new joint venture with the first defendant. A few months down the line, after having parted with N\$4 854 893, the plaintiff reached discomfort with the partnership and sought some form of guarantee from the first defendant before it disburses further money. The partners had a shareholders meeting on 29 September 2016 and in that meeting the plaintiff pitched various options to the first defendant. One such option was that the plaintiff will loan the money to the first defendant. Subsequently an AOD was executed in favour of the plaintiff, but the first defendant declined to perform in terms of the instrument.

Held that – The second and third defendant had not tendered formal written resignation letters at the time of the execution of the AOD and the evasion of liability on the strength of resignations by certain directors does not hold water.

Held further that – The clause in the shareholders agreement that deals with loans by the first defendant requires a decision by the majority of the shareholders. It does not require an 80 percent majority. Three out of five directors signed the AOD, which

constitutes a majority of the shareholders. There is thus no merit in the first defendant's argument that the signatories to the AOD had no mandate or violated clause 6 of the shareholders agreement.

Held further that – The court has to be mindful of the parole evidence rule in the interpretation of contracts and in this case there was no mention of an expectation of N\$ 2 million in the AOD.

Held further that – An AOD, is evidence of a debt which is due, but differs from a promissory note, as it does not contain an express promise to pay. Where the AOD is coupled with an undertaking to pay, it will give rise to an obligation in terms of that undertaking. When liability is agreed upon, the debt becomes payable on demand, which performance has not been rendered by the first defendant.

ORDER

1. The first defendant must pay the plaintiff the amount of N\$4 854 893.
2. The first defendant must pay interest at the rate of 20 percent per annum from 29 March 2019 until date of final payment.
3. The first defendant, must pay the plaintiff's cost, which includes the costs of one instructing and one instructed counsel.
4. The matter is regarded as finalised and it is removed from the roll.

JUDGMENT

CLAASEN J:

Introduction

[1] The plaintiff claims payment in the amount of N\$4, 854,893 plus interest at the rate of 20 percent per annum calculated from 11 October 2016 until date of final payment and cost of suit.

The parties

[2] The plaintiff is Adforce Namibia CC, a close corporation registered in terms of the laws of the Republic of Namibia with its principal place of business at 142 Jan Jonker Road, Ausspannplatz in Windhoek.

[3] The first defendant is Blackthorn Investments (Pty) Ltd, a company with limited liability incorporated in terms of the laws of Namibia with its principal place of business at c/o Dr W Kutz and Tiener Streets in Kessler Building in Windhoek. The second defendant is Hermanus Smit, an adult male residing at Erf 6567 Mose Tjitendero Street, Olympia in Windhoek. The third defendant is Denise Billy, an adult female residing at Erf 5679 Ongwediva in Namibia. The fourth defendant is William Pretorius who is described as residing at Erf 6567 Tarentaal Street in Windhoek. The fifth respondent is Martha Pretorius, the spouse of the fourth defendant, also residing at Erf 6567 Tarentaal Street in Windhoek. The sixth defendant is Ms Magret Goliath, a female residing at Erf 358 Corvus, Street Dorado Park, Namibia.

Pleadings

[4] The claim avers that the plaintiff paid an amount of N\$4 854 893 to the first defendant and that the first defendant, alternatively the second, third and sixth defendants acknowledged receipt of the money and their indebtedness in an acknowledgment of debt (AOD) on 09 October 2016. The AOD stipulated, amongst others, that the nature, terms and conditions of repayment of this debt will be agreed

upon and finalised upon opening of the store, which at that stage had an opening date of 10 December 2016.

[5] It was further averred that the defendant(s) committed breach of contract as not only have they refused to agree on the nature, terms and conditions of repayment, they failed to set up the store by 10 December 2016, alternatively set it up on an unknown date. It was also pleaded that given the defendant(s) refusal to agree on repayment of the debt, the plaintiff is compelled to demand repayment in terms of the AOD which has become due. It was noted that the plaintiff also pleaded, in the alternative, that the plaintiff cancelled the terms of conditions of the repayment of the loan amount.

[6] It became apparent that the plaintiff had withdrawn its action against the second, third and sixth defendants on 22 June 2022 between the case management and pre-trial phase. During the trial the plaintiff withdrew its claims against the fourth and fifth defendants in their personal capacities. Furthermore although the particulars of claim contained alternative claims, those have fallen by the wayside, leaving the main claim for adjudication.

[7] The first, fourth and fifth defendants in their plea admitted the receipt of the money, but denied that it was indebted to the plaintiff on the basis that:

a) firstly, the monies paid by plaintiff was not a loan but paid pursuant to a written offer to purchase 48 percent shares in the amount of N\$7 million in a proposed joint venture to be formed 'Flip Out Africa' which monies were to be paid to the first defendant on or before 8 January 2016.

b) secondly, the second, third and sixth defendants were not mandated and did not have the authority to act on behalf of the first defendant in executing the AOD.

c) thirdly, the plaintiff ought to have been aware of the resignation of second and third defendants on 29 and 30 September 2016, and the lack of a prescribed majority as per the

terms of first defendant's shareholders agreement.

[8] In turn, the first defendant had a counterclaim for consequential damages for all the losses and damages that arose as a result of the plaintiff's breach and failure to pay the full purchase price on the due date. During the course of the trial, the first defendant withdrew its counterclaim.

[9] Consequently, the main legal issue is concerned with whether the AOD is valid and whether the plaintiff is entitled to demand performance in terms of the AOD. The issues for determination appear from the pleadings which mainly revolves around the contentions about authority to bind or lack thereof of the purported AOD, the contention that the plaintiff had an obligation in which it failed and the plaintiff's pleading, in the alternative, that the repayment was cancelled.

Summary of the evidence

[10] Mr Femi Kayode, the Managing Director of the plaintiff, testified in support of the plaintiff's claim. He described their business as a marketing services company. During 2015, his banker, one Ms Anthea Witbooi introduced him to her brother. Ms Witbooi's brother, Mr William Pretorius, and his wife, Mrs Martha Pretorius (the fourth and fifth defendants), told Mr Kayode that they are looking for investors or partners to open FlipOut franchises in Africa.

[11] On 15 December 2015, the plaintiff received a business proposal to form a partnership agreement for a new venture in FlipOut Southern Africa wherein the plaintiff will hold 48 percent shares and the first defendant will hold 52 percent shares. In pursuit of that the plaintiff paid N\$4 854 893 as share capital into the first defendant's bank account. This amount was deposited over three different occasions being N\$3 million on 26 April 2016, N\$1 204 893 on 23 May 2016, and N\$650 000 on 16 September 2016¹.

¹ Exhibit A 2.

[12] During September 2016, at a shareholder's meeting, the plaintiff voiced its concerns regarding the conflict amongst the directors of the first defendant as that did not bode well for the intended partnership. Mr Kayode testified that both parties agreed to convert the N\$4 854 893 into a loan facility payable by the defendants on completion of the FlipOut store in Centurion, South Africa. That was how the AOD saw the light. Although that store opened during April 2017 the plaintiff has been unable to get financial data from its business partner nor was the plaintiff able to get the directors of the first defendant to pay the debt, undertaken in the AOD.

[13] At some stage the plaintiff went to South Africa where they met with the fourth and fifth defendants, who were managing the Centurion store. The plaintiff presented various options regarding the situation but that did not heed any results. Standard Bank Namibia, the financier of the loan to the plaintiff, started putting pressure on the plaintiff. Consequently the plaintiff resorted to this legal action to recover the money.

[14] Extensive cross-examination followed. It commenced with a probe into the affairs that preceded the execution of the AOD. The witness reiterated that the plaintiff acquired a loan of N\$7,5 million for a partnership agreement with the first defendant. The witness laboured under the impression that the new entity was not registered at the time of the meeting on 29 September 2016. Counsel for the first defendant put it to him that indeed the new company was registered on 10 August 2016. The witness was unable to dispute that.

[15] The written offer, which was a letter dated 29 December 2015 with mutual obligations, was explored. The witness explained that further negotiations followed wherein the due dates for the mutual obligations were revised. The partnership agreement was signed on 2 February 2016. He confirmed that two of the payments were made when the new entity was not registered. Prior to the meeting he regarded the money paid as an investment in a joint venture. However, by the month of August 2015, the plaintiff realised that there were challenges with going into partnership with the first defendant, which is why the plaintiff called a meeting.

[16] The cross-examination ventured into the meeting held on 29 September 2016. Mr Kayode stated that there was neither an objection to the quorum nor were they informed that the outcome of the meeting would not be binding. The shareholders discussed the issues that the plaintiff presented and the meeting continued late into the night. Mr Kayode explained that, by then, the plaintiff had been in business with the first defendant for eight months. He made his position clear that the plaintiff was not going to spend more money unless the defendant gave a guarantee or some level of assurance.

[17] It was verified from him whether the approach he adopted was that the N\$2 million outstanding on the purchase price of the shares, would not be released unless there was agreement to the condition. He answered in the affirmative. Mr Kayode also confirmed that the plaintiff gave four options to the first defendant before the plaintiff departed from the meeting to enable the directors of first defendant to ponder about the state of affairs. The options can be summarised as follows:

- a) firstly, the plaintiff will loan the money to the first defendant to complete the Centurion store;
- b) secondly, restructure the entire business between them;
- c) thirdly, value the shareholding between them; or
- d) fourthly, give the plaintiff a franchise in Namibia and they will account to the first defendant as a franchisee.

[18] It further emanated from cross-examination that on 4 October 2016, the first defendant proposed certain guarantees to the plaintiff in a letter. The first bullet point in the letter was phrased along the lines that the plaintiff, upon the availability of funds, will become a preferred creditor for the amount of N\$ 2 million and that the first defendant will sign an AOD for the monies already received.

[19] Mr Kayode stated that the plaintiff understood this letter to be a document wherein the parties agreed to the repayment of the money. He was then asked whether

the plaintiff accepted the proposed guarantees in exchange for the N\$ 2 million needed. Mr Kayodi replied in the negative and elaborated that the plaintiff's decision not to pay the additional N\$2 million is indicative thereof that the plaintiff did not accept it.

[20] Subsequently, on 11 October 2016 the second defendant sent an e-mail to the plaintiff which had a scanned copy of the AOD as an attachment. It was pointed out to Mr Kayode that the AOD was signed with the expectation that the plaintiff will disburse the needed N\$2 million, but the plaintiff do not do its part. He responded that when he left the meeting that evening the five shareholders of the first defendant were in agreement but that he also had to consider his options after the objection that came forth the next day.

[21] Cross-examination ventured into the reason why the plaintiff did not advance the N\$2 million. Mr Kayode answered that it was because on 30 September 2016 the fourth and fifth defendants objected that the investment be converted into a loan. It was then put to the witness that by virtue of that, it can be accepted that the shareholders of the new company did not agree on the terms of repayment of the debt. The witness answered that in his understanding the repayment terms would be agreed upon at the opening of the store. He also accepted that the Centurion store opened without the plaintiff having advanced the additional N\$2 million.

[22] Information was also solicited about a visit to the fourth and fifth defendants during August 2017. Mr Kayode confirmed the visit saying that the plaintiff still needed the financial information for the bank as well as for the repayment of the loan to be serviced. In that regard the plaintiff made three proposals. These were not accepted by the fourth and fifth defendants, whose position was that they were not a party to the AOD and therefore they are not liable.

[23] The plaintiff's shares in the new entity also came up. It was put to the witness that the plaintiff is still a shareholder at this juncture. He disagreed with that and

motivated that it was not the case given the agreement that the money that was paid was converted into a loan.

[24] Mr Kayode was also confronted about the purported cancellation, which was pleaded in the alternative. According to Mr Kayode the possibility was explored during the time that the plaintiff went to negotiate with the fourth and fifth defendants. When questioned further as to when and how the AOD was cancelled, he said it was merely a consideration for the intended discussions but it was not cancelled at all.

[25] Mr Kayode was also questioned whether two of the directors resigned. In relation to the third defendant, he answered that she stated her intention but she could not have vacated her responsibilities as she did not formally tender it. As for the second defendant, he answered that the e-mail made it clear that an official resignation letter will still follow. In support of his stance, he mentioned that they were still 'active directors' at the time the Centurion shop opened in April 2017 and that they attended a second shareholders meeting two weeks before the opening of the Centurion store.

[26] In re-examination counsel for the plaintiff enquired whether the witness had seen any cancellation document. The witness answered that he has not seen it but harboured an impression that it was around the time he was seeking advice from its legal team. He was also asked if he had seen share certificates and he said no.

[27] The court followed up on the share certificate issue. Mr Kayode answered that he has no proof that he is a shareholder and therefore he does not regard the plaintiff to be a shareholder in the new entity.

[28] The first defendant presented evidence of two witnesses. Mr William Pretorius made a lengthy witness statement, but I will focus on the salient parts. He described himself as a shareholder and Managing Director of the first defendant as well as the Managing Director of a subsidiary of the first defendant, 'K 2015316558 trading as Flip Out Centurion'. He stated that he and his wife were South African based whereas the

second, third and sixth defendants were the Namibian based directors of the first defendant.

[29] He attested that the first defendant had been granted a master franchisor area developer license for FlipOut International Trampoline Arena Franchise in respect of the SADC area. That was obtained on 22 June 2015 for USD 200 million and the licence would run for ten years. The first defendant paid 50 percent of the price and the remaining 50 percent was still due. During September 2015, he applied for a loan of N\$ 3 million, which was pending a local signatory.

[30] He stated that Ms Witbooi, at the bank, enquired if he would be interested in meeting the two astute businessmen. After that a Skype meeting was held on 16 December 2015, between the directors of the first defendant and Messrs Abius Akwake and Femi Ogunboye Kayodi, representing the plaintiff.

[31] The plaintiff opted to buy shares in the first defendant's interest in the FlipOut franchise area developer licence for the SADC area. The first defendant offered 48 percent shares for a price of N\$7 million, which was due by 8 January 2016. A partnership agreement to that effect was signed on 2 February 2016.

[32] He further attested that Mr Akwake joined in meetings and was kept in the loop of the business of the first defendant and the projected opening of the flagship store in Centurion South Africa was 1 March 2016. He mentioned a strategic session which was held on 29 March 2016 with the partners and that the plaintiff did not raise any concerns.

[33] Mr Pretorius asserted that N\$3 million was used to pay outstanding balances on equipment and shipment costs. He stated that the second payment by the plaintiff was used to pay accumulated storage fees to FlipOut International and operational costs.

[34] He had another source for funding, which he declined because the other

shareholders were not in favour of that fund. According to him that left the first defendant at the mercy of the plaintiff who delayed the payments for the shares and held the first defendant ransom by releasing the payment for the shares in bits and pieces. That resulted in strain on the business and the relationship, and more so because the Area Developer Master licence ended up being withdrawn by FlipOut International on 30 September 2016.

[35] On 9 September 2016 Mr Pretorius wrote a stern email to all shareholders about the accumulated cost and the delay in payment. The plaintiff, through Mr Akwake, responded that their money would not be used for demurrage cost. A day later, Mr Kayode contacted him telephonically and 'refused to release more funding until a meeting is held.' That is how the shareholders meeting of 29 September 2016 came about.

[36] Mr Pretorius stated that the meeting was consumed by a presentation done by the plaintiff. It culminated in a lengthy discussion and the fourth and fifth defendants did not agree to the option that the monies disbursed by the plaintiff be converted into a loan. According to him they recorded an objection in an e-mail² the next day, but the second, third and sixth defendants continued to sign the AOD, which he contends was in violation of clause 6 of the first defendant's shareholders agreement.

[37] He also elaborated on further developments, inter alia that that during November 2016 he and his wife negotiated with the third defendant, who was desirous of purchasing their shares. That did not materialise. He further declared that he learnt that during March 2017 the third defendant requested FlipOut International to reinstate the license to the second, third and sixth defendants' names, but the company said it would do so provided that the Pretorius couple give their consent. It appears that a breakdown of the sales agreement ensued and he decided to step back.

[38] Additionally he referred to resignation letters for the other shareholders. These

² Exhibit A 10.

indicated that the second defendant resigned on 13 April 2017, the third defendant resigned on 09 April 2017 and the sixth defendant resigned on 19 October 2018. Mr Pretorius stated that the first defendant is under no obligation to perform the requests by the plaintiff as the plaintiff breached the agreement and that resulted in the first defendant not being able to meet its obligations.

[39] During cross examination it was put to Mr Pretorius that as a director of a company he has a separate legal personality from the company and he agreed to that. The plaintiff's view was put to Mr Pretorius that at the date of April 2017 the directors against whom the claim has been withdrawn, were still directors and shareholders. He answered that the third defendant resigned in the meeting of 29 September 2016 and the second defendant resigned on the day after that. He was then referred to his witness statement which spoke about resignation letters by the second, third and sixth defendants. He reiterated that the letters were just to state what happened afterwards.

[40] Counsel for the plaintiff also challenged Mr Pretorius' contention that he and the fourth defendant made a 'u-turn' on the conversion decision made in the meeting on 29 September 2016. He reiterated that the fourth and fifth defendants did not agree with the proposal even in the meeting. Counsel then headed to the third defendant's e-mail that tells the shareholders that the withdrawal by the fourth and fifth defendants was that of a minority of the shareholders. He confirmed it to be the case. Mr Pretorius was directed to the AOD wherein it was stated that the terms of repayment will be discussed after the opening of the store and that the store indeed opened. He confirmed that indeed the AOD states that and also confirmed that the store opened.

[41] During re-examination he was directed to the last phrase in clause 15.1 of the shareholder's agreement. He confirmed that it states that such a shareholder shall be deemed to have resigned on the first day of the calendar month in which he or she has given notice.

[42] The court enquired from this witness whether the plaintiff currently holds shares in the new entity. His answer indicated that there were talks about shares certificates, but he has not seen it and that in any event Mr Akwake and the second defendant were given the task of registering the entity. Further questions emanated about the status of the purported entity wherein the plaintiff acquired shares. Upon considering the documents obtained from the Business and Intellectual Property Authority (BIPA) it became apparent that indeed an entity was registered under no 2016/0682 on 20 June 2016, which underwent a name change to Flip Out Entertainment (Africa)(Pty) Ltd on 16 September 2016.

[43] The second witness for the first defendant was Mrs Salome Guriras, who testified that she is employed at L and B Secretarial Services CC (hereinafter L & B). She attested that Mr Abias Akwake is an existing client of them. He approached L & B through an e-mail during August 2016 to acquire a shelf company. She explained that a shelf company is a company that is already registered at BIPA, which they could buy from L & B. In response to Mr Akwake's request L & B explained the procedure and send registration documents for completion. He returned the documents.

[44] Subsequently, L & B prepared further documents for signature by the directors. She elaborated that these included resolution(s) for noting of the resignation of the previous director of the shelf company, noting the new directors, changing from the existing shareholder to new shareholders, share transfer forms, new share certificates and acceptance of an accounting officer for the new company. According to her, Mr Akwake acknowledged receipt of the documents, but thereafter she did not receive the documents back.

[45] In this case she stated that the shelf company was Aloe Investment 145 (Pty) Ltd and the correspondence about the name change. She testified that the shareholders were Mr William Andrew Pretorius, Ms Martha Pretorius, Mr Abias Akwake, Mr Tuluwa Femi Kayodi Okumboya, Ms Jennifer Billy, Mr Herman Smith and Ms Margret Goliath. Finally, she reiterated that the information as per the shareholding in the register is that

the plaintiff is a 48 percent shareholder and the first defendant is a 52 percent shareholder.

Summary of Submissions

[46] Counsel for the plaintiff argued that the AOD is enforceable as it was duly executed on behalf of the first defendant. Although the fourth and fifth defendants objected, that it does not mean anything as the decision of the majority of directors was to proceed with the AOD, which decision they confirmed by affixing their signatures on behalf of the first defendant. Besides, he argued, the AOD was reinforced by the minutes taken for the meeting held on 29 September 2016, which does not show any objections to the convening of the meeting, or the quorum.

[47] He regarded the opening of the Centurion store in April 2017 as constituting the trigger for the repayment of the loan. Even though the plaintiff approached the first defendant with proposals regarding the terms and conditions of repayment of the AOD, nothing came to fruition. There was no evidence tendered by either the plaintiff or the defendant that the AOD was ever cancelled. In the premises he argued that the plaintiff is entitled to the main claim.

[48] As for the claim that the document does not bind the first defendant because two of its directors had resigned, counsel for the plaintiff regarded that as mere intentions to resign. He also argued that the minutes show no trace of the fourth and fifth directors' objection to the AOD, which means it is just a smokescreen.

[49] Counsel for the first defendant contended that the AOD does not bind the first defendant. He accentuated that the money was initially for shareholding in the new entity and that the meeting of 29 September 2016 sanctioned an AOD of the monies that are paid to date, but it was on the condition and expectation of N\$2 000 000 to be advanced by the plaintiff in order to complete the Centurion store. The plaintiff never paid the N\$2 million as per that undertaking and the store was opened without that

money. He also argued that the so-called conversion is a simulated transaction.

[50] He also submitted that the repayment was not triggered by that store in any way. What was triggered, when the store opened, was an obligation to discuss and agree on the nature, terms and conditions of the debt. He also reminded the court of the evidence given by the fourth defendant that it was in fact the plaintiff who frustrated the issuance of share certificates in the new entity.

Legal principles and their application

[51] In simple terms, an AOD signifies an admission of liability and a written undertaking to repay the amount that is owing. In *Ophoff v Van de Vijer Family Trust*³ Tommasi J referred to an instructive description of an AOD as elucidated in *Rodel Financial Service (Pty) Ltd v Naidoo and Another*:⁴

‘An acknowledgment of debt, sometimes referred to as an IOU, is evidence of a debt which is due, but differs from a promissory note, as it does not contain an express promise to pay. Where, however, the acknowledgment of debt is coupled with an undertaking to pay, it will give rise to an obligation in terms of that undertaking.’

[52] Given that the matter deals with a purported AOD I find the criteria stated in *Basil Read (Pty) Ltd v Beta Hotels (Pty) Limited*⁵, relevant herein though his Lordship Justice Moosa referred to provisional sentence:

‘If the document in question upon a proper construction thereof evidences by its terms, and without resort to evidence extrinsic thereto, an unconditional acknowledgement of indebtedness in an ascertained amount of money, the payment of which is due to the creditor, it is one upon which provisional sentence may properly be granted (*Rich and Others v Lagerwey* 1974 (4) SA 748 (A) at 754H).’

³ *Ophoff v Van de Vijer Family Trust* (HC-MD-CIV-ACT-CON-2020/02790 [2023] NAHCMD 280 (19 May 2023 para 18.

⁴ *Rodel Financial Service (Pty) Ltd v Naidoo and Another* 2013 (3) SA 151 (KZP) at 155-156 para 12.

⁵ *Basil Read (Pty) Ltd v Beta Hotels (Pty) Limited* [2000] 1 All SA 1 (C) para 13.

[53] In respect to whether a valid contract came into being both parties cited *Conradie v Rossouw*⁶ wherein the Appellate Division held that:

'According to our law if two or more persons, of sound mind and capable of contracting, enter into a lawful agreement, a valid agreement arises between them enforceable by action. The agreement may be for the benefit of the one of them or of both (Grotius 3.6.2). The promise must have been made with the intention that it should be accepted (Grotius 3.1.48); according to Voet the agreement must have been entered into *serio ac deliberato animo*. And this is what is meant by saying that the only element that our law requires for a valid contract is *consensus*, naturally within proper limits – it should be *in* or *de re licita ac honesta*.'

[54] I proceed to the AOD⁷, which was signed by a majority of the first defendant's shareholders. The material part thereof reads as follows:

'Acknowledgement of debt

Blackthorn Investment Holdings (Pty) Ltd has to date received N\$ 4,854,893 (four million eight hundred fifty four thousand eight hundred and ninety three Namibia Dollars) from Adforce for the setting up of the Centurion store.

These funds were initially meant to be share capital but as per mutual agreement on a meeting of shareholders of FlipOut Entertainment Africa (Pty) Ltd held on 29 September 2016, it will become a debt to BHI instead.

The nature, terms and conditions of repayment of this debt will be agreed upon and finalised upon the opening of the store, which is set out to be on the 10th of December 2016.'

[55] With that in mind, I proceed to evaluate the evidence and will start with a shortened version of what was common cause.

a) The plaintiff disbursed N\$4 854 893 to the first defendant as a result of a written offer, which was accepted by the plaintiff on 29 December 2015. The agreed terms were that

⁶ *Conradie v Rossouw* 1919 AD 279.

⁷ Exhibit A 15.

plaintiff undertook to pay N\$7 million before 8 January 2016 for 48 percent shareholding in a new company to be formed namely 'Flip Out Africa'.

b) A meeting took place on 29 September 2016 between the shareholders of the new entity. During that meeting the plaintiff, expressed concerns about the growing expenditure and the business relationship. The plaintiff wanted some form of guarantee before it dispenses further money and presented four options to the first defendant

c) On 30 September 2016 the fourth and fifth defendant communicated in an email that they are withdrawing from the decision to convert the shareholding into a loan. In response to that, the third defendant, addressed an e-mail to the effect that it is an objection by two shareholders and it does not constitute the formal decision of the first defendant.

d) On 4 October 2016 the first defendant send a letter with proposed guarantees, one of which was that the plaintiff will become the preferred creditor for the amount of N\$ 2 million and that the first defendant will sign an acknowledgment of debt for the monies already received, the conditions for such debt to be determined later.

e) On 11 October 2016 the second defendant sent an e-mail that contained the AOD, signed by the second, third and sixth defendant, on behalf of the first defendant.

e) The first defendant has until date not performed in terms of the AOD.

[56] It is clear that the first defendant does not deny receipt of the funds, nor does it deny the existence of the AOD. The first defendant absolves itself claiming that the signatories could not have signed as some directors had resigned, furthermore that the signatories did not have authority and that the AOD was executed in anticipation of the plaintiff paying a further N\$2 million which he did not do. I proceed to deal with that.

[57] Clause 15.1 of the first defendant's shareholders agreement⁸ provides that:

⁸ Exhibit B 8.

'Any Shareholder ("the Retiring Shareholder") may at any time retire from the service of the company with a least three calendar months (applicable to the second financial year) prior written notice to the other Shareholders (the "Remaining Shareholders") of the company, in which event the Retiring Shareholder shall be deemed to have offered his shares in ad loan accounts against the company for sale to the Remaining Shareholders and shall be deemed to have resigned as a director of the company in accordance with this clause 15 with effect from the first calendar day of the calendar month following the calendar month in which he or she has given notice in terms of this clause 15.1'

[58] The contention is that the third defendant resigned in that meeting. In considering the minutes of the meeting, clearly it does not qualify as a definite resignation. The third defendant merely orally conveyed her intention to resign, whilst the shareholder's agreement requires written resignation. That impression is supported by her continued involvement in proceeding to communicate and her signature on behalf of the first defendant. No formal written resignation surfaced at the time.

[59] Likewise the alleged resignation by the third defendant. The first defendant places reliance on an e-mail dated 30 September 2016⁹, authored by the second defendant and addressed to the plaintiff's members and the third to fifth defendants. It states that:

' . . . Please find the purpose of this email to be my notification that I resigning from BHI as a shareholder. Official resignation letter to follow.'

[60] The text speaks for itself insofar as it says that the official resignation letter will still come forth. There is no evidence of a written resignation letter to the first defendant or to BIPA. Thus, I agree with the stance of the plaintiff that these two directors were still part and parcel of the decision making-machinery at the time that the AOD was discussed and executed. That stance is supported by oral evidence from the plaintiff and the first defendant's side. The plaintiff attested that these directors were at a second shareholders meeting two weeks before the opening of the Centurion store and Mr Pretorius' witness statement referred to resignation letters that had effective dates of

⁹ Exhibit A 9.

2017. His explanation, when questioned about these letters, that he was merely stating what happened afterwards is simply not convincing on that point. Therefore, the evasion of liability on the strength of resignations does not hold water.

[61] Clause 6 in the first defendant's shareholders agreement deals with loans and funding. The relevant part that deals with loans reads as follows:

'Any decision of the Shareholders to finance the capital requirements of the Company by means of loans by the Shareholders to the company or by means of loans procured from financial institution or other third parties shall be subject to a majority decision of all Shareholders approving such loans at such terms and conditions as the Shareholders may unanimously approve. Any decision of the Shareholders to finance the capital requirements of the company by means of loans procured from financial institutions or other third parties which are to be secured by suretyships of guarantees to be given by all the shareholders for the benefit of such financial institution or other third party, shall be subject to a majority decision of the Shareholders approving and requiring such suretyships.'

[62] The gist of the clause is that 'a majority decision' by the shareholders is required for the company to incur indebtedness. It does not say 80 percent majority is required, but merely that a majority of shareholders is required. Three out of five directors signed the AOD. That constitutes a majority of the shareholders who signed the AOD. There is thus no merit in this point that it violated clause 6 of the shareholders agreement.

[63] Counsel for the first defendant also attacked on the basis that there was no resolution that preceded the signing of the AOD. Counsel for the plaintiff had an answer for this too. He submitted that there was agreement amongst the first defendant's directors about the conversion of the share capital to a loan, which was reached during the meeting of 29 September 2016 when everyone was around the table.

[64] Ironically, I find support for the view that such a decision was indeed reached in the e-mail sent by the fifth defendant the day after that meeting. The first defendant

states the he and his wife 'withdraws from the decision' to review Adforce's shareholding of 48 percent for N\$ 7 million to become a loan and therefore will not be in a position to sign an acknowledgment of debt. Had there been no consensus about the conversion and subsequent AOD, there would have been no need to communicate that these directors 'withdraw from that decision'.

[65] Moreover, notwithstanding the withdrawal, on 1 October 2016, the chairperson of the first defendant, sent an e-mail response to all shareholders indicative thereof that based on the majority of the shareholders, the decision of 29 September 2016 remains intact. That e-mail states that the withdrawal from the decision is not a formal decision of the first defendant and such withdrawal is the stance of two shareholders. The first defendant had five shareholders at the time. The said e-mail¹⁰ reads as follows:

'Please be informed that this is not a formal decision of BIH, but that of two shareholders of the entity.

We will communicate as planned and resume our agreed meeting on Sunday evening.'

[66] Counsel for the first defendant made a point of venturing into the context that preceded the AOD, in particular the expectation of N\$2 million to be paid by the plaintiff before the AOD will be signed. However, none of that surfaced in the written memorial of the parties, the AOD, and this court has to be mindful of the parole evidence in the interpretation of contracts. In this regard counsel for the plaintiff cited *Damaraland Builders CC v Ugab Terrace Lodge CC*¹¹ at para 11:

'The rule is that when a contract has once be 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. (Lowrey v Steedman 1914 AD 532 at 543.'

¹⁰ Exhibit A 11.

¹¹ *Damaraland Builders CC v Ugab Terrace Lodge CC* (2803 of 2007) [2011] NAHC 142 (27 May 2011).

[67] The principle was also explained in *National Board (Pretoria) (Pty) Ltd and Another v Estate Swanepoel*¹² at 26B-C that:

‘When a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act.’

[68] The parole evidence rule does not apply if the contracting party, against whom it is sought to be applied, relies on misrepresentation, fraud, duress, undue influence, illegality, failure to comply with the terms of a statute, and mistake.¹³ The onus rests on the party who seeks to rely on any of those defences.¹⁴ The first defendant did not rely on any of these defences.

[69] It was argued by both parties that the AOD is self evident, although each counsel contemplated a different outcome. Counsel for the first defendant called the AOD a one pager from which liability cannot arise as the repayment of the loan does not arise. According to him it is only discussions about repayment terms and conditions that are referred to in that last sentence in the AOD.

[70] I briefly pause at the issue pertaining to the cancellation of the AOD, which was pleaded, in the alternative. This issue was carried forth in the pre-trial order, not amongst the admitted facts, which means it was for determination on the evidence. Nor was this a stated case. Having considered the evidence on that it became clear that actual cancellation did not take place, and the first defendant’s evidence was not able to refute that. Thus nothing concrete can turn on that.

[71] In considering the purported instrument, it is printed on the letterhead of the first defendant and it is entitled AOD. The first sentence states that the first defendant received the amount in question. The second sentence deals with the conversion and that it had been agreed that it will become a loan. In considering that sentence and

¹² *National Board (Pretoria) (Pty) Ltd and Another v Estate Swanepoel* 1975(3) SA 16(A).

¹³ See authorities collected under each of these defences by Professor Christie in ‘*The Law of Contract in South Africa*’, 5th ed at p. 194.

¹⁴ *Malherby v Ackermann* (2) 1944 OPD 91.

bearing in mind that it emanated from a properly constituted meeting of the shareholders, there is no inkling of a simulated transaction, which argument also surfaced in the closing submissions by the first defendant. The third sentence says that 'the nature, terms and conditions of repayment will be agreed upon and finalised upon the opening of the store...' It is common cause that the store indeed opened.

[72] This begged the question as to whether the first defendant's liability is evident in the instrument. In particular, the discerning feature is whether the purported AOD can be construed as a liquid document in that it is the time of payment, and not liability that is dependent on a future date.

[73] In my view, the last sentence refers to the time when the repayment terms and conditions will be discussed and agreed upon, rather than whether it will be paid or not. It is thus not liability (whether to pay or not to pay) that is dependent on a future event, but the time of payment that depends on a future event, namely the opening of the store.

[74] The drafters, on behalf of the first defendant, used the word 'repayment' in the instrument in relation to when it will be done, which is indicative thereof that the first defendant genuinely intended repayment. The dictionary¹⁵ describes 'repay' as a verb that means 'to pay back money that you owe...' or to 'repay a debt/loan.'

[75] That accords with the criteria in the *Rodel* case wherein it was stated that where an AOD is coupled with an undertaking to pay, it will give rise to an obligation in terms of that undertaking. It is thus synonymous with an undertaking to pay, and thus gave rise to an obligation to perform in terms of that undertaking. When liability is agreed upon, the debt becomes payable on demand, which performance has not been rendered by the first defendant.

[76] In these premises, I come to the conclusion that the plaintiff has discharged the

¹⁵ *Oxford Wordpower Dictionary* Oxford University press 4th ed. p 613.

onus on it and grants judgment in favour of the plaintiff on the main claim.

[77] The court having noted a discrepancy in the date on which interest arose, in the particulars of claim and that prayed for in the heads of argument, invited parties to file brief supplementary heads on that. The first defendant used the opportunity to argue, consistent with its stance, that liability does not arise nor does the issue of interest. The court having arrived at a different conclusion is satisfied that the plaintiff demanded payment and will thus grant interest from the date of the letter of demand.

[78] Accordingly, I make the following order:

1. The first defendant must pay the plaintiff the amount of N\$4 854 893.
2. The first defendant must pay interest at the rate of 20 percent per annum from 23 March 2019 until date of final payment.
3. The first defendant must pay the plaintiff's cost, which includes the costs of one instructing and one instructed counsel.
4. The matter is regarded as finalised and it is removed from the roll.

C Claasen
Judge

APPEARANCES

PLAINTIFF

T Muhongo(with him D Doeseb)

Instructed by AngulaCo Inc.

FIRST, FOURTH AND

FIFTH DEFENDANT:

J Diedericks (with him R Strauss)

Instructed by Dr Weder, Kauta & Hoveka Inc, Windhoek.