

REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURGCASE NO 2016/A5028
A QUO 2015/13206

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

23/6/2017
DATETVJ.
SIGNATURE

In the matter between:

A MELAMED FINANCE (PTY) LTD (IN LIQUIDATION)

APPELLANT

and

HARRIS JEFFREY

RESPONDENT

JUDGMENT

Sutherland J:

Introduction

[1] The appellant (a company in liquidation and represented by its liquidators) was the applicant *a quo* in application proceedings in which it sought to recover money alleged to be owed to it by the respondent. The claim was dismissed. The Court *a quo* refused leave to appeal, and this appeal is by the leave of the Supreme Court of Appeal.

[2] Shortly before the hearing of the appeal, the respondent's attorneys of record withdrew. No heads of argument on behalf of the respondent were filed. The respondent appeared in person. He invited the court to have regard to the heads of argument drawn by Adv Subel SC and put before the Court *a quo*. We have done so.

[3] The evidential material adduced comprised the usual three affidavits from the respective parties, some correspondence and a transcript of the enquiry held into the affairs of the appellant as contemplated by section 417 of the Companies Act 61 of 1973, at which enquiry the respondent testified.

[4] The appellant claimed a loan agreement existed between the appellant and the respondent, and that the sum of R8,004,697.96 was due and repayable. To substantiate that claim the appellant relied wholly on the respondent's admissions in the section 417 enquiry.

[5] The judgment *a quo* falls into two parts.

5.1. One part deals with the admissibility of the section 417 enquiry evidence but did not conclude that the evidence was inadmissible. Indeed, no challenge to its admissibility was raised by the parties and both cited extensively from that body of evidence. No objective grounds exist upon which to question the accuracy or reliability of the transcript. That part of the judgment is a tangent which does not require further attention. The sole remaining consequence of the exploration of that issue by the court *a quo* seems to have been the notion that the 'weight' of that evidence had to be assessed carefully. It is not obvious precisely what point is sought to be made, as such an approach would apply to all evidence, regardless of source. There is no special cautionary rule about testimony garnered in a section 417 enquiry. The 'careful assessment' was also said, in the judgment, to require examination of the implications of '*lacunae*' in the transcript. It is not apparent to me that any *lacunae* exist and the judgment does not describe what supposedly was omitted. It is true that certain documents alluded to in the evidence were not also presented to the court, but the materiality thereof is not evident, given the statements made by the respondent in his testimony. But in any event, insofar as the parties willingly addressed the record of the testimony of the respondent, if any material remarks were omitted, it was for them to address it and amplify the record if needs be. They did not. The respondent was invited to address us on the failure or

need to amplify or correct the 'record' in the subsequent answering affidavit filed, but offered only the empty answer that he felt that he had not told the full story. Axiomatically, the opportunity existed in the answering affidavit to do exactly that and a failure to seize the opportunity does not assist his case.

- 5.2. The second part of the judgment deals with the merits of the appellant's money claim.

5.2.1. The judgment addresses only one of several defences raised by the respondent. The dismissal of the application was premised on the conclusion that the appellant had failed to prove the cause of action upon which the claim was based, for want of evidence to substantiate it. The judgment specifically mentions the 'limited evidential value' of the evidence, ie the section 417 enquiry record as a factor in reaching that conclusion. Why it had limited value is not explained, nor is it objectively apparent.

5.2.2. A throwaway remark is made that the other defences are not farfetched and are a source from which the credibility of the appellant can be questioned, but, so the judgment states, in the light of the dismissal of the application on the cause of action point, these

aspects of the respondent's case required no attention from that Court. Beyond this declaration, no rationale is offered.

- 5.2.3. It is plain that the approach of the court *a quo* to deciding a matter on affidavit was misconceived. The Court *a quo* seems to have thought it was appropriate to speculate on whether the allegations in the answering affidavit were more probable than those in the founding affidavit. The proper approach is set out in *Plascon -Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (AD) at 634F-635A. Also, the subsequent caution issued by Harms JA in *NDPP v Zuma* 2009 (2) SA 227 (SCA) is apposite:

'[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version.'

The relevant facts

[6] It is common cause that a relationship of long standing existed between the parties in terms of which the appellant lent money to the respondent which was repayable with interest.

[7] The claim was for payment of R8,004,697.96. The appellant presented a case in its founding affidavit that this sum was a total of several amounts lent prior to the grant on 15 April 2014 of the provisional order of winding up of the appellant.

[8] In support of that claim, the transcript of the section 417 enquiry was annexed to the papers, in which proceedings the respondent had testified. Reliance was placed by the appellant on certain passages of the respondent's evidence in which he agreed with the examiner that he owed money to the appellant in an undisputed sum of R8,004,697.00 to substantiate its claim as set out in the notice of motion.

[9] On several occasions during the section 417 proceedings the admission by the respondent of indebtedness in that sum was made. ¹The respondent apparently needed financing for his business ASD Hosiery (Pty) Ltd. 'Avron' [Melamed] supposedly encouraged him to use his (or his Business's) cash for operational needs and then borrow, from time to time, from the appellant what additional working capital he might need. As a result, so said the respondent:

¹ No controversy exists that the testimony of a witness in section 417 proceedings can be used against that witness in subsequent proceedings: *O' Shea N. O. v Van Zyl & others N.N. O. 2012 (1) SA 90 (SCA) at [21]*

"...I borrowed in my personal capacity because we I had a relationship with them and they knew who I was and it was just on a handshake and we took the money – I took the money to pay for the containers."

[10] On the issue of repayment, by contrast to the indebtedness *per se*, the respondent's testimony was equivocal about his obligations. He alluded to various aspects of the circumstances which he believed were relevant.

10.1. First, he made mention of Avron Melamed and of Michael Wainbergass and of dealings among the three of them. When asked if the sum owed to the appellant was repayable, his answer was:

"It is repayableYes, but not the full amount because its in the wrong context of the R8m. We had a personal agreement between the three of us on how we were going to settle our debt."

He amplified this remark by claiming that that if ever he could not pay-

"....the money that Michael [Wainbergass] was holding would automatically go to pay what I owed Melfin [ie, the appellant]"

Following on this statement, he expressed the belief that he was entitled to set-off money owed to him by Wainbergass to settle at least part of what he owed to the appellant. He thereupon, when pressed for a time by which he would pay, said:

"I will pay what I am due to pay with the offset (sic) between Melamed, Michael Wainbergass."

10.2. Second, in relation to the interest due in order to discharge any indebtedness to the appellant, he alleged that:

"...we would come to an arrangement on the interest, like we have done in the past where we've made early settlements and when they needed money earlier, we would get a figure. They would reduce the interest rate and we would get a figure and pay them."

10.3. Third, he initially stated that he 'regarded' Avron Melamed and Michael Wainbergass as "one and the same...". He said that he "regarded" both "Avron" and "Mike" as his creditor; albeit that "Avron" lent the money. Moreover, he was ignorant of any legal distinction between "Avron" and "Michael". When invited to accept that there was such a distinction, he confirmed that he had invested with "Michael" because "Avron" asked him to put his money with "Michael" instead of with the appellant. This 'investment' bore a 0% interest rate.

10.4. Fourth, he asked for time over 36 months to pay the indebtedness. When asked why he had not yet paid the debt, he said that when the appellant was wound-up, despite being able to afford to pay, partly by set-off of some R2m, he:

"...was going to see how it would pan out."

[11] The answering affidavit deposed to by the respondent raised several grounds on which he relied to refuse to pay. In the answering affidavit and supplementary answering affidavit, several defences are put up. They are:

- 11.1. The application procedure was inappropriate because there are material disputes of fact.
- 11.2. The claim is unsubstantiated by any documentary proof and must fail for want of a 'valid cause of action'.
- 11.3. The apparent admissions of liability in the section 417 enquiry, properly understood in context, do not constitute any admission of liability to the appellant.
- 11.4. The true agreement between the appellant and the respondent was one in terms of which the respondent deposited and withdrew various sums of money over time and the admitted debit amount of R8004697.96 must be set off against a credit amount of R2,415,036.59.
- 11.5. The appellant was carrying on a ponzi scheme (a fact unknown to the respondent until after the winding up) and therefore the loan agreements are unlawful and unenforceable. Accordingly, a reconciliation of the account between the appellant and the respondent to recalculate the rate of interest

in terms of mora interest rate and not the agreed 42% interest rate, would reflect a credit balance in respondent's favour in the sum of R1,090,416.18.

11.6. The appellant is in violation of Section 11 of the Banks Act 94 of 1990 by taking deposits from the public. (Presumably, although it is not actually alleged, the inference to draw is that no claim for repayment of money lent is enforceable).

11.7. Prior to winding up, post - dated cheques, totalling R5,849,602.93 from the ASD hosiery (Pty) Ltd were provided to the appellant as security which appellant was "entitled"(sic) to apply towards my indebtedness" which cheques have been misappropriated by Destination Capital (Pty) Ltd, who demand the respondent pay money to it, the validity of which demand the appellant has challenged. Accordingly, so it is argued, it is said, any claim by the appellant should be deferred until the dispute between the appellant and Destination Capital (Pty) Ltd is resolved. Moreover, the appellant cannot sue the respondent for want of *locus standi*, it is argued that because, prior to *litis contestatio*, it had ceded the indebtedness of the respondent to the appellant to Destination Capital (Pty) Ltd by way of giving it possession of these very cheques.

Evaluation of the contentions

The Challenge to the establishment of the appellant's cause of action

[12] The pleaded claim is that a determined sum was lent to the respondent and it now due and payable. The evidence tendered for that allegation is the testimony of the respondent who said exactly that in the section 417 enquiry.

[13] Notwithstanding those admissions, the argument, advanced on the respondent's behalf, criticises the formulation of the claim as (1) vague, (2) bereft of details of the underlying transactions that gave rise to the alleged indebtedness or (3) details of how the sum is made up, (4) is unclear as to the identity of the creditor. Therefore, it is argued, no valid cause of action is made out.

[14] These contentions purport to re-describe the facts alleged and are incorrect. There is no sound reason not to rely on oral acknowledgement of a debt. Moreover, the respondent supplied a schedule attached to his answering affidavit listing the transactions between the appellant and him, totalling a sum owed to the appellant by him which is exactly the sum claimed. The absence of other corroborating documentation, assuming it existed, does not dent the effect of the acknowledgement. Moreover, the respondent's answering affidavit alludes to an oral agreement about the lending of money to him by the appellant.

[15] The identity of the creditor is, without doubt, the appellant. It is so that the respondent suggested, faintly, that the appellant and Wainbergass were one and the

same, but he belies any sincere belief in that notion when in he further alleged that Avron Melamed told him not to deposit money with the appellant any longer but deposit it with Wainbergass. To fortify the distinct legal personality between the appellant and Wainbergass, the documents attached to the answering affidavit include an affidavit by Avron Melamed (in the winding up application) to say other than he there were no other employees of the appellant bar himself and also a corroborating affidavit by Wainbergass to say this is true. Also, and more importantly, a schedule of the respondent's transactions with MG Wainbergass Financial Services is attached to the answering affidavit totalling a sum owed to appellant which is the sum which he wants to be set-off. It must be noted that these are not items of evidence that the appellant relies on nor needs to rely on to formulate its claim; what these items do show however, is that the argument advanced on behalf of the respondent are unsupported and indeed, contradicted by the documents the respondent has introduced into evidence. Lastly, the very nature of the appellant's business as a financier is stated in Melamed's affidavit.

[16] Accordingly, the appellant did make out a valid cause of action, unrebutted by the respondent. Insofar as the judgment *a quo* held otherwise, it was in error.

A material dispute of Fact?

[17] The preliminary argument is made that the deponent to the founding affidavit is a liquidator who has no personal knowledge of the underlying transactions. Obviously, she could not have such knowledge, and nor does she purport to say so. What the deponent

has done is marshal the facts assembled in the liquidation process, which are facts with which she is required acquaint herself and which include the admissions, under oath, by the respondent as already described above. The contention is, under such circumstances, misdirected.

[18] Naturally, any relevant dispute of fact needs to be material to the claim by the appellant against the respondent and to a valid defence. No facts are adduced which contradict the appellant's admissions in the section 417 enquiry; indeed, the answering affidavit fortifies the admissions.

[19] In particular, it may be mentioned that the respondent, in the answering affidavit, alludes to an agreement of October 2010 among Melamed, Wainbergass and him. In terms of this oral agreement, he made deposits and made withdrawals as the needs of his business required. He repeats the vain assertion that he thought Wainbergass was an employee of the appellant notwithstanding the documentation which he attaches contradicts that being a fact, and moreover his account of being told not to deposit money with the appellant but with Wainbergass belies such a bona fide belief.

The Plethora of other defences

[20] The further allegations are arguments, rather than allegations of fact, about why he is not liable, but do not contradict or challenge the indebtedness *per se* or his admission that it was overdue. Some of the 'defences' can be dismissed out of hand for

want of substantiation, ie those that either depend on arguments bad in law or fail for want of the necessary factual allegations needed to sustain them.

The Set- Off defence

[21] The critical point is that the set off cannot apply to the indebtedness of Wainbergass to the respondent as regards an indebtedness of the respondent to the appellant. At best, for the respondent, if Wainbergass promised to pay part of the respondent's debt to appellant, then the appellant shall have to enforce that obligation against Wainbergass. He could have joined Wainbergass as a third party. He did not. He is not relieved of his obligations to the Appellant.

The Cession and post-dated cheques defence

[22] The answering affidavit describes a dispute between the appellant and Destination Capital (Pty) Ltd over the ownership of post-dated cheques from ASD Hosiery (Pty) Ltd, and which of the two is entitled to effective payment. The appellant claims the cheques were unlawfully misappropriated. This dispute is plainly irrelevant to the subject matter of this application. The cheques were apparently made out in blank by ASD Hosiery (Pty) Ltd, ie the respondent's business, not the respondent personally, in favour of the appellant for the purposes of furnishing a form of security for the loan. No nexus exists between that quarrel and the dispute between the appellant and the respondent that could warrant the contention that that the present matter be must deferred until that matter is resolved; moreover, it provides no defence to the indebtedness of the respondent to the appellant.

The further allegation that the appellant ceded the cheques and thus its security to Destination Capital (Pty) Ltd is another naked averment. The facts adduced about the cheques do not afford a platform upon which to build such a contention, still less that such a cession absolves the respondent of his indebtedness to the appellant.

The section 11 of the Banks Act 94 of 1990 Defence

[23] The contention is that a creditor who violates section 11 by accepting or soliciting deposits without being a registered financial institution cannot enforce a debt. This is incorrect. The very argument was rejected in *Gazit Properties v Botha & Others NNO* 2012 (2) SA 306 (SCA) at [10] – [11].

The Ponzi Scheme defence and the cession defence

[24] Whether the appellant was engaged in a Ponzi scheme is the subject matter of a bald allegation unaccompanied by any factual substantiation. Moreover, even if that were so, whether the respondent was an investor or in any other way implicated in such a scheme is not spelt out. Furthermore, the link between such an averment, even if substantiated, and the 'illegality' of a loan agreement is neither articulated nor, objectively, likely.

Conclusions and Costs

[25] In the result, the appeal must succeed and the order dismissing the application must be set aside.

[26] The appellant seeks punitive costs against the respondent on the basis that there was never a bona fide dispute about the indebtedness which he had admitted in the section 417 enquiry and at which time he had sought terms to pay. This is an appropriate submission in the circumstances. The answering affidavit was a constellation of meritless skittles tossed up to obscure the simple reality of an admitted obligation to pay. Its aim could only have been to gamble on securing a unjustified delay. In my view attorney and client costs are indeed called for.

The Order

- (1) The appeal is upheld.
- (2) The order of the court a quo is set aside and is substituted with an order that the respondent pay to the appellant the sum of R8,004,697.96 together with interest thereon calculated at 42% per annum from 15 April 2014 to date of payment.

- (3) The respondent shall bear the costs of the application and of the appeal on attorney and client scale.



Sutherland J (with whom Molahlehi and Twala JJ concur)
Judge of the High Court,
Gauteng Local Division, Johannesburg



Molahlehi J
Judge of the High Court,
Gauteng Local Division, Johannesburg



Twala J
Judge of the High Court,
Gauteng Local Division, Johannesburg

Hearing: 7 June 2017
Judgment: 26 June 2017

Appearances:

For the Appellant:

Adv G. D. Wickins,
Instructed by Brooks and Brand.

The respondent in person;

(Heads of argument prepared by Adv A. Subel SC)