

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case No: 19/26939

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

.....	
SIGNATURE	DATE

In the matter between:

BUSINESS PARTNERS LIMITED

Plaintiff

(Reg No. 1981/000918/06)

and

ALBERT DINTJANE MMADI

First Defendant

(I.D No. [...])

A&J PROPERTY DEVELOPMENT (PTY) LTD

Second Defendant

(Reg. No. 2013/095012/07)

REAGETSWE TRADING AND WASTE MANAGEMENT

SERVICES CC

Third Defendant

(Reg No. 2005/052400/23)

BABINO TLOU TRADING & PROJECTS CC

Fourth Defendant

(Reg. No. 2006/063521/23)

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 8 October 2020

JUDGMENT

INGRID OPPERMAN J**Introduction**

[1] This is an application for leave to appeal against summary judgment granted by this court on 10 February 2020.¹ This judgment should be read with the 10 February 2020 one (*'the judgment'*). The parties are referred to as in the main action. The applicants for leave to appeal are the defendants in the action. They seek leave to appeal against the whole of the judgment. All abbreviated descriptions used herein are defined in the judgment.

[2] I had expressed my concern about the length of time it took for this application for leave to appeal to be brought to my attention. It took some time to get to the bottom of that enquiry. It would appear that the disruptions that Covid-19 brought to the functioning of the courts might have had some role to play. It is not ideal for applications for leave to appeal to be heard after such long delays. It is a simple

¹ The Judgment erroneously records that the date of the hearing was 4 February 2019 and that judgment was handed down on 10 February 2019. Although the dates and the months are correct, it all occurred during 2020 and not 2019.

matter to contact the registrar of the Judge who heard the matter, which obligation is not only that of the party seeking leave to appeal, but also the obligation of the party who has obtained judgment and resisting the application for leave to appeal.

[3] Ms Nkosi-Thomas, representing the defendants herein and who was not the counsel who had argued the summary judgment application, very properly offered to make enquiries from her instructing attorney and to cause an affidavit to be filed dealing with these concerns. I declined this kind offer as much correspondence was exchanged in the run up to the hearing and it would appear that the use of correspondents and messages not being communicated properly or at all, further compounded matters and delayed the hearing of this application and finality must be served.

The Test

[4] In the decision of *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others*², Wallis JA observed that a court should not grant leave to appeal, and indeed is under a duty not to do so, where the threshold which warrants such leave, has not been cleared by an applicant in an application for leave to appeal. In paragraph [24] he held as follows:

“[24] For those reasons the court below was correct to dismiss the challenge to the arbitrator’s award and the appeal must fail. I should however mention that the learned acting judge did not give any reasons for granting leave to appeal. This is unfortunate as it left us in the dark as to her reasons for thinking that it enjoyed reasonable prospects of success. Clearly it did not. Although points of some interest in arbitration law have been canvassed in this judgment, they would have arisen on some other occasion and, as has been demonstrated, the appeal was bound to fail on the facts. **The need to obtain leave to appeal is a valuable tool**

² 2013 (6) SA 520 (SCA)

in ensuring that scarce judicial resources are not spent on appeals that lack merit. It should in this case have been deployed by refusing leave to appeal.” (emphasis added)

[5] It has been suggested that the legislature has deemed it appropriate to raise the bar by providing in section 17 of the Superior Courts Act 10 of 2013 (*the Superior Courts Act*) that what an applicant in an application for leave to appeal should show is that the appeal ‘*would*’ have reasonable prospects of success not ‘*might*’. It has also been suggested that the legislature did no such thing and in fact simply restated the test, which had application prior to the amendment. I will assume for purposes of this application, and in favour of the defendants³, that the lower test has application.

Full payment or partial payment?

[6] The defendants accept that they defaulted in their payment obligations on 1 June 2019 and 1 July 2019 but contended that these defaults were purged on 15 July 2019 and 3 August 2019 in full. Despite valiant efforts on the part of counsel she could not change the facts. The facts are revealed in the affidavit filed by defendants. What they admit of the case against them and what they reveal in the case that they try to make out, lays the foundation for the Court’s decision. Counsel cannot do much about that. The facts reveal that once defendants defaulted the plaintiff acquired rights. The payments made subsequent to default did not change that picture. The late payments reduced the balance outstanding, they did not even amount to payment in full (contrary to what defendants averred), the payments made

³ The defendants did not contend that a lower test applied – the application was argued on the higher threshold.

after the defaults did not affect the rights of the plaintiff to seek the remedy and to be granted the relief that it obtained in this matter.

[7] The defendants accepted that the common cause facts recorded in para [1] of the judgment had been correctly stated by this Court. Thus, the monthly instalments of R393 637.27 increased to R429 585 in May 2019. The instalments due for 1 June 2019, 1 July 2019 and 1 August 2019 were R429 585 per month, totalling **R1 288 755**.

[8] The defendants paid R393 758.02 on 15 July 2019⁴ and R800 000 on 3 August 2019 totalling **R1 193 758.02**, an amount of R94 996.98 short of what they were obliged to have paid if these amounts were for the months of June, July and August 2019 as stated in the affidavit resisting summary judgment.

[9] The statement in the affidavit to the effect that the amount due for these three months had been paid in full is patently wrong and not *bona fide* as the defendants had short paid and did not explain this inaccuracy at all. This reflects on their *bona fides*.

[10] If, however, the transaction history⁵, the accuracy of which was not disputed at any stage during these proceedings, is analysed, the statement is patently false for the following reasons:

25.05.2019 instalment – R429 585

No payment in May 2019 other than a dishonoured payment.

25.06.2019 instalment – R429 585

No payment in June 2019 other than a dishonoured payment.

25.07.2019 instalment – R429 585

A dishonoured payment and the 15.07.2019 payment of R393 758.02

The 5.08.2019 payment of R 800 000

⁴ Annexure 'MM1' - Caselines – 076-14

⁵ Caselines – 026-23

[11] As at 16 August 2019 there was still R94 996.98 owing on the July 2019 instalment ((R429 585 x 3) – (R393 758.02 + R800 000) = R 94 996.98).

[12] If one attempts to reconcile the version advanced in the affidavit resisting summary judgment with the transaction history, the following should be added:

25.08 2019 instalment – R420 007.94

Payment 2.09.2019 – R400 000

May, June, July and August 2019 instalments = R1 708 762.94

Payments honoured = R1 593 758.02

Shortfall = **R115 004.92**

[13] On any construction of the facts, the version advanced by the defendants in paras 9 and 10 of the affidavit resisting summary judgment, is, at best, not *bona fide* and at worst, patently false as it is not supported by the common cause facts.

[14] The defendants' suggestion seems to be that a court is obliged to accept what a respondent says in an affidavit resisting summary judgment without question. I do not understand a court's obligation to be that but rather that a court is to interrogate the submissions against the limited admissible and common cause facts available to it at that stage of the proceedings

Legal position if partial payment had been accepted as at 16 August 2019

[15] The defendants argued that by accepting partial payment, the plaintiff '*blew hot and cold*', put differently, it approbated and reprobated. In my view, the plaintiff did no such thing. It did not elect to cancel the loan agreement. It elected to keep the loan agreement intact and to accelerate payment in terms of clause 27 of the loan agreement following upon the common cause breaches of the defendants. Acceptance of the subsequent payments did not amount to a 'change in direction', (a change of intention) the plaintiff was going in one direction only and that was the

direction of getting paid. The payments were accepted not as condonation of default but as a diminution of the outstanding balance. If there were discussions about condonation, compromise or negotiations to restore defendants to their pre-default status these would have to have been placed before the Court in documentary form. Mere acceptance of payment in the modern age of electronic banking does not demonstrate a change of intention and it is too flimsy an event to build a case of compromise on.

[16] The authorities relied upon by the defendants all deal with the acceptance of rent or an instalment in the context of an election to cancel; there was no election to cancel here, there was only an election to enforce.

[17] I can see nothing inconsistent with the plaintiff's election to accelerate payment by accepting partial payment – this is not a situation of '*taking one road and then turn[ing] back and take[ing] another...*'⁶ This is particularly so where the parties had expressly agreed as follows:

34.2 No representation, variation, modification, consensual cancellation, **waiver** of or consent **to depart from any provision** of this Agreement shall be of any force or effect unless confirmed in writing and signed by the parties. **A written representation, variation, modification, cancellation, waiver or consent signed by the parties shall be effective only in the specific instance and for the purpose and to the extent of which it was made or given.**

35 WAIVER

35.1 The Borrower's duties and obligations in terms of this Agreement shall not be affected if Business Partners grants an extension of time or any other indulgence, or if Business Partners performs any of the Borrower's obligations on his behalf. No alleviation or concession on the part of Business Partners shall be

⁶ *Angehrn & Piel v Federal Cold Storage Co. Ltd*, 1908 TS 761 at 786

regarded as a waiver or tacit amendment of any of Business Partners' rights in terms of this Agreement.'

Compelling reason – conflicting judgments

[18] The defendants argue that in two other matters, involving the same creditor and in circumstances similar to this case, summary judgment was refused.

[19] In *Business Partners Ltd v Rajna Towers & Another*⁷, Senyatsi AJ assessed the facts serving before him. Collis J, also did so in *Business Partners Ltd v K201426876 (South Africa)(Pty)Ltd*⁸. They both found, amongst other factual conclusions, that on the agreements and affidavits before them the allegations of a compromise constituted defences, which were good in law.

[20] Although pressed for the legal principles, which allegedly were at variance with the principles applied in this case, none were forthcoming. There is no principle which has crystallised and which has been distilled and/or applied differently in those cases to the one under consideration.

[21] The conflicting judgments which section 17(1)(b) of the Superior Courts Act envisages are not, in my view, judgments where different factual conclusions were found to exist. The conflicting judgments referred to in the Superior Courts Act should, if they are to receive the attention of a Higher Court deal with matters of law, not rest on different facts. Despite being pressed to do so during argument, no differing legal principles were distilled to merit troubling a Higher Court on this ground of appeal.

⁷ [2018] ZAGPPHC 349 (1 March 2018)

⁸ [2018] ZAGPPHC

[22] Mr Toma, who argued the case at summary judgment stage without the assistance of his senior, had not argued the ‘*compromise*’ point at all. The issues argued at summary judgement phase were those identified in paragraph [4] of the judgment.

[23] The provisions of the loan agreement⁹ under consideration clearly precludes reliance on this defence. Now that the situation has become more grave the defendants have had to ‘dig deep’ for defences. Their counsel have done so valiantly but ultimately they cannot do any better than play the hand that the facts of the matter give them. Had it been argued, as it now has, I would have to have found that it does not constitute a defence in law. This is because the terms of the loan agreement prescribe certain formalities¹⁰ for a compromise to be proved. There is no written compromise agreement. There is no written waiver. There simply are no written documents before this court signed by both parties substantiating any other agreement – let alone one of compromise. This is what the parties had agreed to

⁹ quoted in para [17] hereof.

¹⁰ *Brisley v Drotsky* (432/2000) [2002] ZASCA 35 (28 March 2002) per Cameron JA (as he then was) who, on the subject of clauses in agreements limiting valid variations of the agreement only to those variations recorded in writing (non-variation clauses also referred to as ‘*Shifren* clauses’), said:

“[2]This Court nearly four decades ago upheld the validity of [non-variation] clauses. It did so after some years of academic and judicial controversy, and after full argument, which canvassed the opposing contentions. Its decision expressly considered the paradox at the core of [non variation clauses]: that they limit contractual freedom, but do so by the prior design and agreement of the parties themselves, in the exercise of their contractual freedom, and in order to enhance certainty in their future dealings and to minimise disputes between them.

[3] The appellant’s attack invites us to reconsider that decision. We are obliged to do so in the light of the Constitution and of our general obligation, which is not purely discretionary, to develop the common law in the light of fundamental constitutional values. For the reasons the joint judgment gives, I do not consider that the attack can or should succeed. The *Shifren* decision represented a doctrinal and policy choice which, on balance, was sound. Apart from the fact of precedent and weighty considerations of commercial reliance and social certainty, that choice in itself remains sound four decades later. Constitutional considerations of equality do not detract from it. On the contrary, they seem to me to enhance it. As the joint judgment observes (para 7), it is fallacious to suggest that insistence on only written alterations to a contractual regimen necessarily protects the strong at the expense of the weak. In many situations the reverse is likely to be true.” (footnotes excluded)

and there is nothing else that can change that conclusion before this court. There exists thus no triable issue on this front.

[24] There is however, another reason why this defence of ‘compromise’ should be rejected, and that is that it is on another basis lacking in *bona fides*: what the defendants argued initially and what they had said under oath, was not that reliance on the acceleration clause was compromised, but rather that clause 27 of the loan agreement did not constitute an acceleration clause **at all**, as, on a proper construction of such clause, all the acceleration clause entitled the plaintiff to do, argued defendants, was to charge an increased interest rate. This argument was not pursued in the application for leave to appeal. So, although this court was criticized in the heads of argument for interpreting clause 27 of the loan agreement at summary judgment stage, it was not argued that such interpretation was wrong. In fact, the contrary occurred: the point was effectively abandoned. The court’s construction of the clause was accepted as correct. The application for leave to appeal was argued on the basis that clause 27 entitled the plaintiff to accelerate payment provided there was compliance with the law. Acceleration was justified by the late payments, no subsequent conduct nor any interpretation changed that conclusion.

Discretion

[25] Reliance was placed on the *Mowschenson*¹¹ case for the proposition that summary judgment is an extraordinary remedy. In *Joob Joob Investments (Pty) Ltd*¹² the Supreme Court of Appeal held that the ‘*rationale for summary judgment*

¹¹ *Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd*, 1959 (3) SA 362 (W)

¹² *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*, 2009 (5) SA 1 (SCA)

proceedings is impeccable' and that '(a)fter almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary.'

[26] Having found that there were no *bona fide* defences, which were good in law the defendants nonetheless argued that this court ought to have exercised its discretion in favour of the defendants and refused summary judgment. In my view, the material facts in the defendants' affidavit together with the transaction history militates against the exercise of such discretion. The transaction history reveals that almost without fail, every month from inception of the loan agreement, the defendants made payments, which were dishonoured. It is difficult to conceive what defences might emerge at a future trial. When prompted to identify facts, which ought to have influenced this discretion, the amount involved was mentioned. In my view, that consideration is irrelevant. The legal principles in relation to the exercise of a discretion in summary judgment proceedings are the same irrespective of the amount involved.

Conclusion and Order

[27] I accordingly find that there are no reasonable prospects of success. The plaintiff has sought punitive costs, which follow from the provisions of clause 18 of the deeds of suretyship. This is a contractually agreed term.

[28] I accordingly grant the following order:

The application for leave to appeal is refused with costs as between attorney and client payable by the first to fourth applicants (defendants in the action), jointly and severally, the one paying the other to be absolved.

I OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

Counsel for the applicants/defendants: Adv L Nkosi-Thomas SC and Adv K. Toma

Instructed by: Van Deventer Campher Inc

Counsel for the respondent/plaintiff: Adv CL Markram-Jooste

Instructed by: Strydom Britz Mohulatsi Inc

Date of hearing: 27 August 2020

Further heads of argument: 11 and 15 September 2020

Date of Judgment: 8 October 2020