

REPUBLIC OF SOUTH AFRICA



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

Case no: 33073/2019

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
3 June 2021	
DATE	SIGNATURE

In the matter between:

BUFFET INVESTMENT SERVICES (PTY) LIMITED

Applicant

And

PAULO ROBERTO MARTINS GONÇALVES

1st Respondent

THE TRUSTEES FOR THE TIME BEING OF THE

GONÇALVES FAMILY TRUST

2nd Respondent

DAVPROP 22 CC

3rd Respondent

Delivered: This judgement was prepared and authored by the Judge whose name is reflected herein and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 3 June 2021.

JUDGMENT

BEZUIDENHOUT AJ:

[1] The matter before me concerns a claim made by the applicant for payment of monies lent and advanced to Counter Act Development (Pty) Limited, the principal debtor. The three respondents are co-principal debtors and guarantors for the obligations of the principal debtor to the applicant. The respondents counterclaimed for a statement and debatement of account.

THE APPLICANT'S CLAIM

[2] On 23 and 26 March 2018, a Loan Facility Agreement incorporating a Sale of Beneficial Interest and Shares, and Repayment of Arrear Rental (the agreement) was concluded between the applicant, the principal debtor and eleven other entities, that included the three respondents.

[3] In terms of the agreement the applicant advanced an amount of R 6 million to the principal debtor, the principal debtor could draw down against the capital sum as and when it required funds.

[4] The capital advanced was repayable as and when the principal debtor had the funds to do so, subject thereto that the interest levied on the capital outstanding from time to time, had to be paid on the first day of each month beginning on 1 April 2018 and the full amount owing had to be repaid within the loan period.

[5] The Respondents, irrevocably and unconditionally, jointly and severally and as co-principal debtors and guarantors, guaranteed the due and punctual payment of all amounts due by the principal debtor and for the due and punctual performance of all the principal debtors' obligations to the applicant under the agreement.

[6] From time to time commencing March 2018 and concluding approximately during June 2019, the principal debtor drew down against the capital sum and interest was levied on the capital advanced as per the agreement; the first interest payment became due and payable on 1 April 2018.

[7] The principal debtor, in breach of the agreement, failed to pay the first interest payment on 1 April 2018, and failed to pay any of the subsequent monthly interest amounts as they fell due.

[8] On 7 December 2018, one of the principal debtor's creditors, Elematic SA (Pty) Limited obtained default judgment against the principal debtor in the amount of R 603 208-00 plus interest and the judgment remained unsatisfied.

[9] During May and June 2019, the principal debtor sent letters to its employees and creditors which made it evident that the principal debtor had ran into financial difficulties and was unable to service its financial obligations as and when they fell due.

[10] As at 30 June 2019, the principal debtor was indebted to the applicant in the capital sum of R 6.458 million and interest in the amount of R 1.383 million.

[11] On 8 July 2019, the applicant demanded payment of the full amount. The applicant, acting in terms of the agreement prepared a schedule (Schedule FA 3 attached to the founding affidavit) setting out the amounts (including both capital and interest) due by the principal debtor from time to time and this schedule accompanied the letter of demand.

[12] The applicant applied for the liquidation of the principal debtor.

[13] The loan period ended on 31 March 2020 due to efflux of time.

THE RESPONDENTS DEFENCE

[14] The respondents did not dispute the agreement or its terms, the capital amounts advanced, the computation of the interest or that the principal debtor had not paid the monthly interest or capital. The respondent did not dispute the acts mentioned in paragraphs 8 to 13 above nor did they dispute their liability as co-principal debtors and guarantors.

[15] The respondents' defences for non-payment of the capital and interest were as follows:

[15.1] the applicant did not furnish the principal debtor with any statements or any demand for the interest;

[15.2] the amounts claimed were not due and payable to the applicant;

[15.3] the applicant prevented the principal debtor from performing in that the principal debtor and the applicant agreed that the interest would be paid from the profit made on the projects however, the principal debtor received no income from Carrisbrook, the two projects located in Vanderbijlpark and Edenvale were withdrawn; and

[15.3] profits due to the principal debtor were also not paid.

DISCUSSION

[16] I will deal with the first two defences raised by the respondents as they are interlinked and then jointly with the third and fourth defences thereafter.

[17] I have been referred to the matter of *Dunn v Road Accident Fund* 2019 (1) SA 237 (KZN) where the principle has been restated that where a date for performance has been specified in the contract, a debtor must perform in accordance with the date specified in the contract and there is no obligation on the creditor to make demand, as demand is encapsulated in the date itself.

[18] The principal debtor was aware of the amounts it drawdown against the capital, clauses 3.1 and 4.1.1 provided how the interest rate should be determined and interest be calculated. It was a simple mathematical exercise for the principal debtor to calculate the interest amount it must pay over to the applicant in terms of the agreement. The date on which the first interest payment was to be made was specified in the agreement, it was 1 April 2018. There was certainty as to the obligations the principal debtor had to comply with, and no further demand was necessary.

[19] After the first interest payment the principal debtor had to effect monthly interest payments which it also failed to do. The same principle applicable to the first interest payment applies to the subsequent monthly interest payments.

[20] In terms of clause 4.2 the applicant may provide the principal debtor with a schedule from time to time, setting out the balance due but there was no obligation on the applicant to provide the principal debtor with monthly statements.

[21] The applicant had, to its letter of demand, attached a schedule setting out the capital amounts advanced and the computation of the interest; the principal debtor had not taken issue therewith. The principal debtor did not effect any payments after it received same.

[22] Clause 4 of the agreement deals with the repayment of the loan facility and stipulated that: the loan shall be repayable as and when the principal debtor has funds available for these purposes provided always that: the principal debtor shall be obliged to pay interest on the balance of the capital amount outstanding from time to time monthly in arrears on the first day of each following month, the first instalment being due on 1 April 2018 and each subsequent instalment to be paid on the first day of each month thereafter.

[23] The wording “provided always” made it imperative that the monthly interest must be paid in order for the principal debtor to enjoy the benefit of the lenient repayment terms. The agreement provided that in the event of the principal debtor not paying the monthly interest that the full amounts would become due and payable.

[24] However, despite the interest not being paid the principal debtor committed further acts which under the agreement allowed the applicant to call up the facility, such as, judgement being granted against it and such remaining unsatisfied for a period of seven days or longer, the principal debtor not being able to pay its debts as and when it fell due and the principal debtor taking steps to invoke business rescue proceedings.

[25] The respondents' defences that demand was not made, statements not provided and the amounts not being due and payable cannot be sustained.

[26] The respondents raised two further defences: that the principal debtor was prevented from making payment of the interest as the applicant prevented performance in that the principal debtor received no income from Carrisbrook, the two projects located in Vanderbijlpark and Edenvale were withdrawn and profits due to the principal co-debtor were also not paid to it.

[27] The applicant objected to the respondent seeking to amend, redefine or modify the agreement by presenting extrinsic evidence and referred me to the matter of *Johnson v Leal* 1980 (3) SA 927 (A) which dealt with the integration rule. The general rule states that a party to a contract which has been integrated into a single and complete written memorial may not contradict, add, amend or modify the contract by reference to extrinsic evidence and in that way redefine the terms of the contract.

[28] The first respondent pleaded that during discussions between him and the applicant's representative leading up to the conclusion of the agreement in March 2018, they agreed that the interest owing to the applicant would be paid from the profit generated by the two projects (interest agreement).

[29] The applicant denied such an agreement and pointed to the lack of particularity and the many questions the alleged interest agreement raised which the first respondent did not address or deal with in its answering affidavit. Was the interest agreement concluded before or after the agreement, was it oral or in writing, and so forth.

[30] The applicant furthermore pointed to the clauses which recorded that the agreement was the sole memorial of the parties' agreement and that the respondents was thus precluded from placing reliance on extrinsic evidence and information to amend, modify or redefine the terms of the agreement.

[31] Under the agreement all amounts shall be paid without deduction or set off (clauses 4.3 and 18.10) and the guarantee undertaken by the respondents was an unconditional, on demand guarantee.

[32] Moreover, the interest agreement runs counter to the explicit provision in clause 4 as to when the first interest payment would be due and payable. The agreement furthermore makes no reference to the interest payment being subject to any other agreement.

[33] The respondents did not address the discrepancy being created by their version of a separate interest agreement and how this discrepancy should be aligned with the agreement.

COUNTERCLAIM

[34] The respondents in the counterclaim want this Court to order the applicant to provide them with certain supporting documentation and then for the respondents and the applicant to debate such. The respondents submitted that debatement is a right accruing to the principal debtor but as the principal debtor is not before Court the relationship between the parties are such that the Court can order the applicant to debate the accounts with the respondents.

[35] In this matter the agreement in clause 11.1 stipulated that if a net profit was made by the different projects, Buffet undertook to provide the 2nd Respondent with the financial statements of the different projects and the 2nd Respondent must then, within 7 days provide an invoice claiming its share in the profit. According to the applicant the projects did not yield a profit but despite this the applicant did provide the 2nd respondent with the financial statements pertaining to the different projects.

[36] The Respondents alleged that upon their perusal of the financial statements there was a R 1 million refund that they were aware of in which the principal debtor had to receive a percentage of and rental to the estimation of R 37 million which the principal debtor similarly had to receive a percentage of.

[37] The respondents contend that despite the principal debtor not being before Court, the Court could order the applicant to provide the documents to the respondents and to debate the accounts and / or statements with them.

[38] The respondents claimed that they have shown that the financial statements are in issue and that the respondents are entitled to a debatement to satisfy themselves of the correctness of the financial statements.

[39] The applicant contended that it is not a project owner and has no obligation to make payment of any nett profit to the second respondent.

[40] I cannot find that the provision of the supporting documents or the debatement thereof has any immediate impact on the loan facility and the repayment of the capital or the interest and the principal debtor and the respondents' liability to the applicant.

[41] I find that the applicant is entitled to the relief it claimed in its notice of motion and as the respondents agreed to pay legal costs on an attorney and own client scale in the agreement, the applicant is entitled to same.

WHEREFORE THE COURT ORDERS THAT:

1. The first, second and third Respondents, jointly and severally, the one paying the other to be absolved pay to the Applicant:
 - a. The amount of R 6 485 757-16,
 - b. The amount of R 1 382 939-20,

- c. Interest on the aforesaid two amounts at the rate of 15 percent per annum, from 18 July 2019 to date of final payment, and
- d. The costs of the application on an attorney and own client scale.

2. The Counterclaim is dismissed.



J M BEZUIDENHOUT AJ
Acting Judge of the High Court

DATE OF HEARING	:	3 March 2021
DATE OF JUDGMENT	:	3 June 2021
APPLICANT'S COUNSEL	:	Adv E Kromhout
RESPONDENT'S LEGAL REPRESENTATIVE	:	Adv SS Cohen