

DELETE WHICHEVER IS NOT APPLICABLE

1. REPORTABLE: YES/NO. ☒ YES

2. INTEREST TO OTHER JUDGES: YES/NO. ☒ YES

3. REVISED. ☐

30/7/2010

SIGNATURE

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 11900/2010

In the matter between:

30/7/2010

TURF-AG (PTY) LTD

Plaintiff

And

LEVIN, KEVI ALEXANDER

Defendant

JUDGMENT

LEDWABA, J

[1] This is an opposed application for summary judgment. Plaintiff is applying for summary judgment against the defendant for payment of the amount of R2 891 133.44 plus interest and costs on the main claim in the particulars of claim.

[2] The plaintiff has four alternative claims in the particulars of claim. The main claim being the claim on which the application for summary judgment is based reads as follows:
"3. MAIN CLAIM

- 3.1 *On or about 27 July 2007 and at Centurion, Pretoria, the plaintiff, represented by Andries Willem Stefanus Du Toit and the defendant acting in person, entered into a partly oral and partly written agreement.*
- 3.2 *To the extent that the agreement was recorded in writing, a copy of the written part is annexure "A" hereto.*
- 3.3 *The material and relevant terms of the agreement were as follows:*
- (a) The defendant acknowledged and admitted that he was indebted to the plaintiff in an amount of R2 891 133,44 (Two Million Eight Hundred and Ninety One Thousand One Hundred and Thirty Three Rand and Forty Four Cents).*
 - (b) The defendant undertook to repay the total amount of R2 891 133,44 (Two Million Eight Hundred and Ninety One Thousand One Hundred and Thirty Three Rand and forty Four Cents) to the plaintiff within a reasonable time.*
 - (c) A reasonable time for repayment of the said amount would be no longer than the time reasonably required by the defendant to sell a farm which he undertook to sell.*

3.4 The defendant has sold the said farm but in breach of the agreement he failed to pay the amount of R2 891 133,44 (Two Million Eight Hundred and Ninety One Thousand One hundred and Thirty Three Rand and Forty Four Cents) or any part thereof to the plaintiff.

Alternatively:

A period of more than 2 years and 6 months have lapsed since 27 July 2007 and accordingly a reasonable time allowed for payment of the said amount has expired.

3.5 By virtue of the aforesaid facts:

(a) The whole of the amount of R2 891 133,44 (Two Million Eight Hundred and Ninety One Thousand One Hundred and Thirty Three Rand and Forty Four Cents) is due and payable.

(b) Plaintiff is entitled to immediate payment of the aforesaid amount which is hereby claims."

[3] The defendant in paragraphs 4 and 5 of the opposing affidavit, when he deals with his bona fide defence, said the following:

"

4.

I respectfully refer the above Honourable Court to annexure "A" to the plaintiff's particulars of claim, which is acknowledgment of debt signed by myself on the 26th July 2007 that evidence an amount of R2 891 133,44 that I allegedly owed to the plaintiff.

5.

The aforesaid amount was indeed incurred by me when I was trading as Fairways Irrigation. Fairways Irrigation made numerous purchases with the plaintiff.” (own underlining).

- [4] To substantiate his *bona fide* defence further, the defendant alleged that in about May/June 2006 in Cape Town he entered into a oral contract of employment with the plaintiff. He further annexed his bank statements to show that in March 2008 plaintiff paid him a salary of R37 685, 04. He alleged that he resigned from the employment in about August 2009.

- [5] He also alleged that the express, alternative implied, further terms of the aforesaid employment contract were as follows (see page 55 of the indexed papers):

“10.1 the contract that Fairways Irrigation concluded with the King David Golf Club, would be ceded to the plaintiff and the profits thereof would be offset against the debt that Fairways Irrigation incurred with the plaintiff;

10.2 the operational costs and purchase of material of current projects that Fairways Irrigation had, would be for the account of plaintiff;

10.3 a commission structure was contemplated between the parties, which would be offset against the debt incurred by Fairways Irrigation;

10.4 the parties also contemplated that I would require some sort of shareholding in the near future;

*10.5 I would require the position as National Sales Manager of the plaintiff; which entailed, **inter alia**, the following:*

10.5.1 to acquire key accounts for the plaintiff;

10.5.2 to acquire projects for the benefit of the plaintiff."

- [6] The alleged contract between King David Club Projects and Fairways Irrigation which is unsigned has been attached to the papers as annexure: L2". Defendant attached another unsigned contract between King David Club Projects and the plaintiff as annexure "L3".

- [7] I interpose to state that the defendant did not allege anywhere in the opposing affidavit that annexures "L2" and "L3" were later signed by the parties mention therein.

- [8] Furthermore, no documentation was attached to confirm the alleged cession.

- [9] Regarding the commission structures and the shareholding that the defendant alleged as a term of the contract of employment, the defendant in the opposing affidavit alleged that they were never formally discussed.

- [10] Defendant further alleged that the acknowledgment of debt, annexure "A", was signed because of Mr. du Toit insistence

so that he, Mr. du Toit, should have some sort of clarity to the amount, which is owed by Fairways Irrigation to enable him to offset the profits that would be derived from the King David Golf Club Project and all the other projects that Fairways Irrigation obtained. The alleged offset was to be made pursuant to the employment agreement.

- [11] In law, a set off comes into operation when two parties are mutually indebted to each other and both debts are fully due. The defendant must plead and prove a set off. Only a liquidated debt can be set off. A defendant wishing to rely on an unliquidated debt must file a claim in reconvention pending judgment on the claim in reconvention. See '*Amler's Precedents of Pleadings*', seventh edition, by LTC Harms, on pages 351-352.
- [12] In *casu*, the defendant mentioned unsigned agreements involving other third parties viz, King David Golf Club and Jaysem 27 (Pty) Ltd t/a Fairways Irrigation. Of importance is further that the defendant does not mention that it intends to join the said parties to this action to prove the alleged cession, commission and shareholding.
- [13] Significantly, the alleged shareholding and cession were never formally discussed, according to the defendant in his opposing affidavit.
- [14] The acknowledgment of debt upon which the plaintiff claims the amount of R2 891 133, 44 is made up of a total amount

of loan and outstanding Accounts and a total of amounts paid into or on behalf of Fairways/Jaysem to Fairways Irrigation/creditors.

- [15] Even though annexure 'A' reflects the amount claimed as "TOTAL AMOUNT PAID TO K LEVI/FAIRWAYS" the defendant admitted to have signed the document and he further said the amount was incurred by him. The defendant never alleged that he was acting on behalf of Fairways Irrigation.
- [16] The defendant acknowledged that he signed the acknowledgment of debt on 26 July 2007 and that the amount was incurred by him not Fairways Irrigation when he, personally, was trading as Fairways Irrigation. The last sentence in annexure 'A': *"Please note that Durban still has to sort out some credits due to Jaysem"* does not, in my view, affect the liquidity of the plaintiff's claim.
- [17] In my view, there is no merit in the defendant's allegation that annexure "B" was signed in April 2004 but the plaintiff issued summons after six years and that the court should draw a negative inference from the plaintiff's failure to mention the employment agreement. Defendant has not raised prescription as a defence to the plaintiff's claim. There is nothing untoward, in my view, in the plaintiff not issuing summons immediately after annexure "A" was signed.

- [18] The plaintiff's claim is based on an acknowledgment of debt signed on 27 July 2007 which the defendant acknowledged that he did sign. I fail to understand the relevance of mentioning a plaintiff's competitor as a factor to be taken into account as mentioned in the defendant in the opposing affidavit.
- [19] Defendant did not allege that he was unduly influenced or unlawfully forced to sign annexure 'A'.
- [20] The defendant made allegations which are not properly substantiated and some of which are irrelevant, in my view, to qualify as a *bona fide* defence.
- [21] The defence of set-off cannot in law succeed because the alleged debts mentioned by the plaintiff are not liquidated.
- [22] Defendant has therefore failed to raise a *bona fide* defence.
- [23] **I therefore, grant summary judgment and make the following order:**
- (i) **Defendant is liable to pay the plaintiff an amount of R2 891 133. 44.**
 - (ii) **Defendant is liable to pay interest on the said amount at the rate of 15% from 24 February 2010 to date of payment.**
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- (iii) Defendant is to pay the plaintiff's costs on party and party scale.

A handwritten signature in dark ink, consisting of a stylized, cursive 'A' followed by a series of loops and a final flourish.

A. P. LEDWABA
JUDGE OF THE HIGH COURT
