

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)**

**CASE NO: 3627/2010
DATE HEARD: 19 April 2011
DATE DELIVERED: 10 May 2011**

In the matter between

MOM CONSTRUCTION CC

Plaintiff

And

MR M BANZANA

Defendant

JUDGMENT

NEPGEN J

[1] This is an application for summary judgment. It is opposed by the defendant.

[2] The plaintiff's claim is for payment of three amounts it alleges it paid to the defendant pursuant to an agreement, in each instance, that it would lend the amount in question to the plaintiff; that it was agreed that the plaintiff would transfer the amount of the loan to the account of the defendant; that the plaintiff thereupon in fact transferred the amount into the account of the defendant; that the agreement was that the amount would be repayable on demand; and that notwithstanding demand the defendant failed to repay the said amounts to the plaintiff. The amounts in question are, firstly, an amount of R 775 912.29, which was allegedly lent to the defendant pursuant to an agreement concluded on 11 April 2008; secondly, an amount of R 1 955 256.78, which

it is alleged was lent to the defendant pursuant to an agreement concluded on 19 November 2008; and, thirdly, an amount of R 193 923.56, which was allegedly lent to the defendant pursuant to an agreement concluded on 24 March 2009.

[3] The plaintiff has annexed to its particulars of claim, allegedly as “proof of transfer by Absa Bank” a number of bank statements. These reflect that on 11 April 2008 there was a cheque payment of R 775 912.99; that on 19 November 2008 there were two separate cheque payments of R 1 481 640.27 and R 473 616.51 (a total of R 1 955 256.78); and that on 27 March 2009 there was a cheque payment of R 193 923.56. These bank statements do not indicate to whom or in whose favour these payments were made.

[4] In the defendant’s opposing affidavit he states that he is employed as the general manager of a trust described as the Mzingisi Development Trust (the trust). The defendant avers that during approximately November 2007 the trust appointed the plaintiff to erect certain residential units on its behalf. The defendant states that as a result of various problems experienced by the plaintiff in the completion of the project, the trust decided to cancel the contract with the plaintiff and institute a claim for damages. He goes on to allege that prior to the cancellation of that agreement, an agreement was concluded between the plaintiff and the trust in terms whereof the trust agreed to lend and advance to the plaintiff the sum of R 1 218 279.84. The defendant annexes a copy of an acknowledgement of debt signed by the plaintiff which reflects its indebtedness to the trust in this amount. The defendant then, in paragraph 11 of his

opposing affidavit, says the following:

“In the Plaintiff’s Particulars of Claim, it is alleged that certain sums over a certain period were loaned and advance (sic) to myself in my personal capacity. Under no circumstances did the plaintiff loan and advance any monies to myself personally. The plaintiff has also failed to attach copies of the relevant cheques/payment stubs to reflect that monies were advanced to myself.”

The defendant proceeds to deny that he entered an appearance to defend purely for purposes of delay and alleges that he has a bona fide defence to the plaintiff’s claim.

[5] When the matter was argued before me, Mr Pretorius, who appeared on behalf of the plaintiff, strenuously argued that, apart from what is set out in paragraph 11 of the defendant’s opposing affidavit, the allegations made in the opposing affidavit have nothing to do with the plaintiff’s claim and therefore do not disclose a defence. Much was sought to be made of the fact that the defendant had annexed the acknowledgement of debt to his opposing affidavit, with it being contended that he had sought to do so to establish his defence to the plaintiff’s claim and as this had nothing to do with that claim the subsequent statement, in paragraph 11 of the opposing affidavit, could not be accepted. Thus, so it was argued, the defendant had not disclosed a bona fide defence.

[6] It is indeed so that much of what has been set out in the opposing affidavit does not disclose a defence to the claims made by the plaintiff. However, it seems to me that what the defendant was trying to do was to refer to the relationship between himself, as the manager of the trust, and the plaintiff. In annexing the acknowledgement of debt to his opposing affidavit the defendant did not state that this indicated that no amounts were owing by him to the plaintiff. All that he stated was that the plaintiff signed an

acknowledgement of debt which indicated that money had been lent to it by the trust. The argument that this indicated an attempt on behalf of the defendant to avoid liability, which reflects on the bona fides of his statement that no money was lent to him personally is, in my view, without substance. The simple fact of the matter is that the defendant states that the plaintiff did not under any circumstances lend and advance money to him personally, without saying that what has been set out earlier in his opposing affidavit supports that statement.

[7] A further submission made by Mr Pretorius was that the defence disclosed by the defendant was a bare denial and that this insufficient to avoid having summary judgment granted against him. This argument is, in my view, also without merit. I agree with Mr Scott, who appeared on behalf of the defendant, that in considering the contents of the defendant's opposing affidavit one must have regard to the allegations made by the plaintiff in its particulars of claim. These are equally bald statements that money was lent to the defendant. The bank statements annexed to the particulars of claim do not support the allegations that the amounts in question were paid over to the defendant. There is also no explanation why loans would have been made in the amounts stated, which are not round amounts. In addition, in respect of the second claim, there is no explanation why, if an agreement had been reached that a specific amount would be lent to the defendant, it would have been necessary to effect payment of that amount by writing out two cheques for different amounts. In all these circumstances it seems to me that there was very little that the defendant could have done other than to deny that the money was lent to him personally.

[8] I am of the view that the defendant has disclosed a defence to the plaintiff's claims against him. In the circumstances summary judgment cannot be granted. Insofar as the costs of the application for summary judgment are concerned, these must stand over for determination by the court that hears the action.

[9] The order that I make is that summary judgment is refused and the defendant is granted leave to defend the action. The costs of the application for summary judgment are reserved for decision by the trial court.

J J NEPGEN

JUDGE OF THE HIGH COURT

Appearance:

For the plaintiff: Mr Pretorius, instructed by Greyvensteins Attorneys

For the defendant: Mr Scott, instructed by Roland Meyer & Co