

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

CASE NO.: 4150/2015

In the matter between:

JR QUALITY PROJECTS (PTY) LIMITED **Plaintiff**

And

**TUTELAGE REAL ECONOMIC EMPOWERMENT
(PTY) LIMITED** **Defendant**

AMENDED JUDGMENT

BESHE, J:

[1] The plaintiff in this matter instituted action against the defendant wherein it seeks an order directing the defendant to deliver share certificates issued in TDC Yellow-Wood (Pty) Ltd to the plaintiff. Initially plaintiff's claim was for 50% of the issued shares in TDC Yellow-Wood. However this has since been amended to 25%.

[2] The genesis of plaintiff's claim is a loan agreement concluded between the plaintiff and the defendant. In terms of this agreement, plaintiff was to advance a sum of R1 463 048.00 (as a lender) to the defendant (the borrower). The said loan was secured by a pledge and cession of 50% of issued shares in TDC Yellow-Wood (Pty) Ltd so as to enable the plaintiff to be registered as a 50% shareholder in the said company. *Clause 6* of the loan agreement reads thus:

“SECURITY

Clause 6

6.1 “**The Borrower**” hereby pledges and cedes unto and in favour of “**the Lender**” Fifth Percent (50%) of the authorised and issued shares held by “**the Borrower**” in the “**NEWCO**” TDC Yellow-Wood (Proprietary) Limited in terms of the pledge Agreement attached hereto and marked Annexure “A”.”

Annexure “A” relates to “Pledge and Cession of Shares and Loan Accounts”.

[3] It is common cause that the plaintiff complied with its obligations in terms of the loan agreement by making payments in the amount agreed upon in favour of the defendant.

[4] The plaintiff alleges that the defendant breached its obligations in terms of the loan agreement, the pledge and cession agreement by:

failing to pay the capital amount together with accrued interest to the plaintiff;

failing to deliver a percentage of the authorised issued shares in TDC Yellow-Wood (Pty) Ltd as per agreement.

This culminated in plaintiff obtaining a judgment by default against the defendant for payment of R1 463 048.00 and interest therein on the 9 September 2014.

[5] The plaintiff alleges that the defendant remains in default by failing to pay any amount/s in settlement of the judgment and fails in its obligation to transfer 50% of the shares in question to the plaintiff. As a result the plaintiff issued summons against the defendant claiming delivery of the relevant shares in October 2015. This was met by an entrance by the defendant of its intention to defend the action. This in turn was met by the plaintiff’s application for summary judgment based on the belief held by

the plaintiff that the defendant does not have a *bona fide* defence to the claim, and that the appearance to defend was entered solely for purposes of delay.

[6] In order to successfully oppose a summary judgment application, it is trite that the defendant is required to fully disclose the nature and grounds of the defence relied upon and the material facts on which it is based. Facts, which, if accepted as the truth or proved at the trial, with admissible evidence, would disclose a defence to the plaintiff's action.

[7] **Mr Jacques Lamprecht** is the sole director and shareholder of plaintiff.

[8] In his affidavit in opposition of the summary judgment application, **Mr Hein Swanepoel (Swanepoel)**, a director in the defendant, outlines what he describes as complicated arrangements between himself and **Mr Abraham Jacob Lamprecht**. A relationship that existed and “took various forms and various entities” which were used by both of them. **Swanepoel** proceeds to outline same transactions and dealings between him and a certain **Lamprecht**. It transpired that the **Lamprecht** referred to is not **Jacques Lamprecht** but one **Abraham**. He attests to a number of loan agreements concluded by entities who are not parties in this matter. He refers to a matter that served before a court involving Hi-Line Investments (Pty) Ltd (not one of the parties in this matter). He states that in respect thereto, discussions were held between him and **Lamprecht**, who, for the first time at paragraph 24 of **Swanepoel's** affidavit is said to have been representing the plaintiff. These discussions culminated in the said **Lamprecht** agreeing that it would not be fair in **Swanepoel's** words, “unconscionable” for plaintiff to claim the amount listed on “POC1”

“(The amount of R1 463 048.00) for certain reasons. He further states that to this end an oral agreement was concluded between him and **Lamprecht**. The terms of the oral agreement being that plaintiff’s claim be extinguished and regarded as being paid.

[9] As *Mr Van Rooyen* for the plaintiff rightly pointed out, no detail is provided as to when this oral agreement was concluded, whether it was before or after the entering of default judgment against the defendant. It is not clear why defendant’s relation with **Abraham Lamprecht** through “various forms and entities” have a bearing in this matter.

[10] It is noteworthy that in its plea, (attached to opposing affidavit) significantly, defendant pleads:

“5.5 During or about April 2014 and at Port Elizabeth the Plaintiff and the Defendant (the Plaintiff represented by Lamprecht and the Defendant represented by Hein Swanepoel) concluded an oral agreement, the express, alternatively tacit alternatively implied material terms whereof being the following:

5.5.1. The Defendant and Hein Swanepoel, would abandon any claim they possessed as against Evening Flame Trading 449 (Pty) Ltd (in liquidation). Such abandonment by agreement was in favour of Hi-Line Investments (Pty) Ltd.

5.5.2. On so abandoning its claim in favour of Hi-Line Investments (Pty) Ltd the Plaintiff undertook to abandon any claim it had against the Defendant.

5.6 Accordingly, and by the agreement to abandon and waive any claim, any claim that previously existed has in law been extinguished.”

[11] This does not accord with what is suggested in the opposing affidavit, namely, it was agreed that this particular debt as recorded in “POC1” (loan agreement) be and is extinguished. (See paragraph 26 of opposing affidavit). According to the plea, plaintiff is alleged to have

abandoned any claims against the defendant generally. The matter in respect of which discussions allegedly took place between **Swanepoel** and **Abraham Lamprecht** appears to be in connection with a matter between Hi-Line Investment (Pty) Ltd and three defendants being; **Abraham Jacob Lamprecht, Marinda Lamprecht** and **Swanepoel**. The settlement agreement reached in respect of this matter was placed at my disposal by the defendant. It is clear from the said agreement that it was between the parties to that matter. The plaintiff was not one of the parties in that matter – namely the Hi-Line Investments matter. It would seem, it is **Swanepoel** (third defendant in that matter) who “undertakes not to prove any further claim against the principal debtor (which appears to be Evening Flames Trading 449 (Pty) Ltd) and also waives and abandons any such further claim which it may have. It is also not clear why, if there was such an agreement as claimed by the defendant, plaintiff would apply for default judgment in September of the same year after the claim was settled between the parties according to **Swanepoel** as it emerges from the settlement agreement in the Hi-Line Investment matter. This does not make any sense.

[12] I am not persuaded that the defendant has succeeded in showing that it has a *bona fide* defence against plaintiff’s claim. The defence alleged by the defendant is also countered on the basis that it falls foul of the non-variation clause of the agreement. Defendant alleges that an oral agreement was concluded between him and **Mr Abraham Jacob Lamprecht**. *Clause 12 of the Loan Agreement* reads thus:

“No agreement varying, editing to, deleting from or cancelling this agreement, no waiver whether specifically, implicitly or by conduct of any rights to enforce any term of this agreement, shall be effective unless reduced to writing and signed by or on behalf of the parties.”

Counsel for the defendant **Mr Williams** submitted that the non-variation clause does not cover a release from obligations in terms of the agreement. Put differently, the release from obligations under the loan agreement is not provided for in the non-variation clause. It was submitted that the agreement stayed intact and was not varied by the oral agreement. I do not agree, in my view the purported abandonment of claim or release of the defendant from the obligations flowing from the loan agreement amounts to a waiver of plaintiff's right to enforce the terms of the agreement. The "release" is therefore covered by the non-variation clause. To be valid it required to be reduced to writing and signed by or on behalf of both parties.

[13] In his plea (to which my attention was drawn by the defendant) defendant states that according to the agreement he was required to deliver to the plaintiff 50% of defendant's 50% issued shares which amounts to 25%. This as opposed to 50% of the Yellow-Wood's shares. But 50% of shares held by the defendant in the said company.

[14] Plaintiff concedes that the defendant is entitled to leave to defend in respect of 25% of the issued share capital in TDC Yellow-Wood and sought an amendment of paragraph 1 of the Notice of Application for Summary Judgment to read '25% in the place of 50%'.

[15] Accordingly summary judgment is entered in favour of the plaintiff:

(a) Directing the defendant to deliver within seven (7) days of the granting of this order the necessary signed transfer documents of 25% of the issued shares in TDC Yellow-Wood (Pty) Ltd;

(b) In the event of the defendant failing to comply with (a) above of this paragraph, the sheriff is authorised to do whatever is necessary to ensure that plaintiff receives transfer of 25% of issued shares in TDC Yellow-Wood (Pty) Ltd;

(c) Defendant is granted leave to defend in respect of the 25% of the issued share capital of TDC Yellow-Wood (Pty) Ltd.

(d) Defendant is ordered to pay costs of suit.

N G BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

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Date Reserved : 23 February 2016
Date Delivered : 25 February 2016