

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

Case no. 1025/18

Date heard: 7/8/18

Date delivered: 14/8/18

Not reportable

In the matter between:

MARCEL MARIE DE LAUWERE

Plaintiff

and

ALAN ANSLEY BEATON

Defendant

JUDGMENT

Plasket J

[1] The plaintiff, Mr Marcel De Lauwere, (De Lauwere) issued summons against the defendant, Mr Alan Beaton, (Beaton) for the recovery of a loan advanced to Beaton in the amount of R107 000. Beaton filed a notice of opposition, De Lauwere applied for summary judgment and Beaton opposed that application.

The claim

[2] De Lauwere pleaded that, on 18 August 2017, he and Beaton entered into a written loan agreement in terms of which he lent R107 000 to Beaton. In terms of clause 3.3 of the agreement, the loan was to be repaid 'within six (6) months of the date upon which the loan is advanced to the Borrower or forthwith upon the Borrower

ceasing to be a Member of Allforms Construction Services (Pty) Limited or ceasing to be employed by that Company’.

[3] The particulars of claim allege that on 28 August 2017, the loan was advanced to Beaton by payment, on his instructions, to Mrs Barbara Strydom (Strydom) ‘in partial discharge of the Defendant’s obligations in favour of her arising from the purchase, by the Defendant, of certain shares held by her in Allforms Construction Services (Pty) Ltd’ (Allforms Construction).

[4] On 15 December 2017, Beaton ceased to be an employee of Allforms Construction. As a result, he was required to repay the loan. A demand was made of him to do so on 2 March 2018, after a six month period had elapsed since the agreement was concluded. Beaton did not comply with the demand.

Beaton’s opposition

[5] In his answering affidavit, Beaton admits the loan agreement and the advance of the money to him by way of the payment to Strydom. He avers, however, that De Lauwere’s claim for the repayment of the loan ‘has been compromised and has been fully and finally settled’.

[6] The money that he borrowed, he said, was paid ‘in partial discharge of my obligations in favour of Strydom arising [out] of the purchase, by me, of 15 shares held by her’ in Allforms Construction. On 18 December 2017, a settlement agreement was concluded between himself, Allforms Construction, De Lauwere, Strydom and Mr Gordon Blumberg which regulated his ‘complete exit, in all respects, from Allforms’.

[7] In terms of the agreement, Beaton was required, inter alia, to take the steps necessary to enable the transfer of the 15 shares back to Strydom or her nominee. He did so and now does not own those shares and ‘nor do I have the R107 000 which formed the subject matter of the agreement of loan’.

[8] He proceeded to set out his defence as follows:

'12. In terms of clause 8 of the agreement of settlement, the terms thereof are in full and final settlement of the matters dealt with therein.

13. On a proper construction of the agreement of settlement and having regard, *inter alia*, to matters which were present in the minds of those concluding the agreement of settlement, the plaintiff has compromised his claim against me because the transfer of the shares, the payment of the purchase price in respect thereof and the agreement of loan are matters dealt with either expressly or impliedly in the settlement agreement. They are issues which have therefore been fully and finally settled in terms of the agreement of settlement.'

Has a bona fide defence been established?

[9] The parties to the loan agreement were De Lauwere and Beaton, and no one else. It placed an obligation on De Lauwere to advance R107 000 to Beaton, and on Beaton to repay the loan, either within six months or 'forthwith' in the event of him ceasing to be a 'member' or employee of Allforms Construction.

[10] The settlement agreement was concluded between Allforms Construction, De Lauwere, Strydom, Blumberg and Beaton. Its purpose was to regulate Beaton's parting of ways with Allforms Construction and its directors, as both director and employee.

[11] In doing so, it placed obligations on Beaton to return cellphones to Allforms Construction; along with De Lauwere and Strydom, to cancel agreements in terms of which Beaton had purchased one share from the former and 15 shares from the latter; to sell his remaining 35 shares to De Lauwere; to execute share transfer forms to enable Allforms Construction's auditors to transfer the shares to Strydom and De Lauwere (or their nominees); and to deliver any share certificates in his possession to De Lauwere.

[12] Clause 3.2 provides that 'no amount will be paid to [Beaton] on account of his abovementioned resignations'. Clause 4.3 provides, however, that the consideration for the sale of the 35 shares to De Lauwere would be paid by Allforms Construction. That payment would take the form of transferring a vehicle, deemed to be valued at

R200 000, to Beaton, and a payment of R300 000, either plus any credit balance in his loan account or minus any debit balance in it.

[13] Clause 7 states that disciplinary proceedings against Beaton would be withdrawn and clause 8 provides that the 'terms of this agreement record a full and final settlement of the matters dealt with herein'.

[14] A compromise is defined by Christie and Bradfield in *Christie's The Law of Contract in South Africa* (6 ed) at 473 as the 'settlement, by agreement, of disputed obligations, whether contractual or otherwise'. It is, the authors say, a form of novation where 'disputed obligations are settled and replaced by a contract'. See too Du Bois (ed) *Wille's Principles of South African Law* (9 ed) at 839.

[15] I have set out the terms of both agreements in some detail in order to demonstrate that they are not linked to each other in any way and that they served entirely different and unconnected purposes. No mention is made in the settlement agreement of the loan agreement or, indeed, the loan. I cannot see any possible basis for concluding that the obligation to repay the loan was disputed, that there was a settlement of a dispute in that regard, and that it has now been replaced by the settlement agreement.

[16] The loan agreement does not record the purpose of the loan and nor does it provide for the payment of the borrowed money to Strydom: the instruction from Beaton to pay her the money as the purchase price of the 15 shares was extraneous to the loan agreement. When all is said and done, Beaton, in terms of the loan agreement, borrowed money from De Lauwere and undertook to pay him back either within six months or on ceasing to be a director or employee of Allforms Construction.

[17] Strydom was not a party to the loan agreement and De Lauwere was not a party to the sale agreement in respect of the 15 shares.

[18] The settlement agreement deals with Strydom's 15 shares in one clause. It provides for the cancellation of the sale of the shares but is silent as to the restitution

of the purchase price. If an obligation to repay the purchase price is an implied or tacit term of the agreement, and I express no view on that, the obligation to repay the purchase price would rest on Strydom, and no one else.

[19] No express term of the settlement agreement provides that the loan advanced by De Lauwere to Beaton was extinguished as a result of the cancellation of the sale agreement entered into by Strydom and Beaton. No tacit term to this effect has been identified, formulated or relied upon. The loan agreement is not even mentioned in the settlement agreement.

[20] In order to resist an application for summary judgment, a defendant is required to raise a bona fide defence that is good in law. *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) para 32; *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426C-D. The defence raised in this matter is not. As De Lauwere has made out a case for the relief sought, summary judgment will be granted in his favour. I shall also award attorney and client costs, albeit on the Magistrates' Court scale (as a result of the quantum involved) because the loan agreement makes provision for such costs when De Lauwere enforces his rights under the agreement.

[21] I make the following order

(a) Judgment is granted against the defendant for the payment to the plaintiff of R107 000, together with interest on that amount *a tempore morae* as from 28 February 2018 to date of payment.

(b) The defendant is ordered to pay the plaintiff's costs on an attorney and client scale and on the Magistrates' Court scale.

C Plasket

Judge of the High Court

APPEARANCES

For the plaintiff:

K Williams

Instructed by

BLC Attorneys, Port Elizabeth

For the defendant:

B Dyke SC

Instructed by

Brown, Braude & Vlok Inc, Port Elizabeth