

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE:

- | | |
|---------------------------------|--------------------|
| (1) REPORTABLE: | YES /NO |
| (2) OF INTEREST TO OTHER JUDGES | YES /NO |
| (3) REVISED: | YES/NO |

24 January 2024
DATE:


SIGNATURE:

Case Number: 035251/2022

In the matter between:

ABSA BANK LIMITED

Plaintiff

and

OBJECTIVE PHOTO (PTY) LTD

First Defendant

JACOBUS DANIEL WIEDEMEN

Second Defendant

JUDGMENT

MALATSI-TEFFO AJ

INTRODUCTION

This is an application for default judgment against the first and second respondents for the payment of R391 539.55. The plaintiff further seeks an order for costs.

BACKGROUND

- [1] The issued summons which was served by the Sheriff of the High Court on the first and second defendants, indicated on the return of service that the Sheriff served the summons in terms of Rule "41A", "*by affixing at the chosen domicilium citandi et executandi by affixing on the principal door at the registered addresses.*" The *dies induciae* had expired and the first and second defendants failed to enter an appearance to defend.
- [2] In the main application and application for default judgment, the plaintiff/applicant sought an order against the first respondent/defendant and second respondent/defendant for the payment of R391,539.55, the parties being jointly and severally liable, the one to pay the other to be absolved. However, during court proceedings, counsel submitted that judgment should be granted against the first defendant and should exclude the second defendant.

THE FACTS

- [3] On 21 August 2020, the plaintiff and the defendants entered into a loan agreement subject to the COVID-19 term. The conditions of the loan agreement provided that the plaintiff would lend and advance to the first defendant, a bridge loan in the amount of R338,144.00. The capital loan amount was to be repaid by way of 60(sixty) monthly installments, each for R7 975.52 per month commencing 1st March 2021.
- [4] These were the amounts pleaded in the particulars of the claim. During the proceedings before the Court, I raised an issue concerning the completeness of

the contract which I shall address in detail later. It suffices for the present purposes to say that the agreement upon which the plaintiff relies in this suit is not the correct version and/or is an incomplete agreement concluded between the parties.

- [5] In terms of the loan agreement, all the outstanding amounts that were due and payable by the defendants to the plaintiff had to be paid by no later than the relevant due dates provided for. Should the first defendant fail to make payment of any such amounts to the plaintiff, the plaintiff would be entitled to recover all the amounts owing under the agreement.
- [6] A certificate signed by any manager whose authority need not be proved, as to the indebtedness by the plaintiff to the defendants would be the *prima facie* proof of the correctness thereof.
- [7] The loan facility was granted for financing working capital.
- [8] The defendants breached the terms of the loan agreement, in that it failed to make payment of the monthly interest due and the necessary capital repayments in terms of the agreement.
- [9] The plaintiff accordingly sent out a notice and terminated the COVID-19 term loan agreement as it was entitled to do so. As a result of the termination, the full balance became due and payable. The plaintiff issued summons, which was followed by a default judgment application, as the defendants failed to file a notice of intention to defend.

The cause of action

- [10] The cause of action is based on two documents that were annexed to the particulars of claim namely, the COVID-19 term loan agreement concluded in terms of the National Credit Act 34 of 2005 marked as annexure "A" ('the loan agreement'), and the Suretyship agreement marked as annexure "D".

[11] The loan agreement was signed in 2020 by the second defendant on behalf of the first defendant as the borrower, however, the signature of the lender does not appear on the agreement; the plaintiff in this case.

[12] The suretyship agreement referred to was signed in 2013 by the second defendant and it has not been shown how it was connected to the loan agreement. I raised these issues with Counsel, and I afforded her the customary opportunity to remedy them. Counsel requested the matter be stood down to afford her the opportunity to look at the papers. Upon resumption of the proceedings, she insistently submitted that the loan agreement was signed and that a proper case against the first defendant had been made, therefore an order should be granted against the first defendant only. She then handed in the amended draft order wherein the words, "*second defendant, jointly and severally liable the one paying the other to be absolved*" were deleted. Upon scrutinization of the documents, it came out that there is no signed agreement; thus it seems to me that Counsel has forgotten that as an officer of the court, she has the duty to assist the court with the correct information to avoid creating mishaps and for the court to make proper and informed decisions. The prudent thing would have been for the counsel to remove the matter from the roll to sort out their papers.

ISSUES TO BE DETERMINED

[13] The issues before the Court are the following:

- a. whether a proper case has been made by the plaintiff; and if so,
- b. should an order for default judgment be granted, are the parties jointly and severally liable, with the one to pay the other to be absolved? Alternatively, can an order only be granted against the first defendant despite relief being initially sought against both parties?

LEGAL PRINCIPLES AND REASONS

[14] Rule 18(6) of the Uniform Rules of Court provides as follows:

"A party who in his pleadings relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading".

[15.2] It was held by Jacobs AJ¹ that pleadings in civil litigation do not only serve to inform an adversary of the case he or she has to meet. He referred to the importance of pleadings as

shown by W.J. Odgers many years ago as "*The system of pleading introduced by the Judicator Acts in theory the best and wisest, and indeed the only sensible system of pleading in civil actions.*" Each party in turn is required to state the facts on which he relies;

[15.3] Jacobs AJ further indicated that, If pleadings are not formulated in conformity with the well-established practice the trial will be conducted by counsel at cross purposes before a mystified judge, and when the fog is lifted by a court of appeal the defendants would find themselves landed with the costs of an appeal and the plaintiff with the costs of the trial and both parties would go away feeling that litigation is an expensive and unsatisfactory business. All this can be avoided if the plaintiff's particulars of claim is formulated with the required measure of particularity.

[15] An agreement does not constitute an enforceable contract until signed by both parties². Once the parties decide that they will reduce their contract to writing and that they will be bound by their written contract then the contract comes into existence only when it has been signed by both parties.³

¹ VAN ZYL'S INCORPORATED v ANDRE DANIEL BRAND N.O. and others 11460/22 par 5/6 GD PTA

² Minister of Justice and Constitutional Development v C J C Myburgh and Others JA46/15 LAC

³ Richmond v Crofton (1898) 15 SC 183 189; Hadingham v Carruthers 1911 SR 33 38; Goldblatt v Fremantle 1920 AD 123 129; Patrikios v The African Commercial Co Ltd 1940 SR 45 56–7

[16] The plaintiff, in the current case, has failed to sustain a valid cause of action on the basis that an unsigned version of the loan agreement was attached to the particulars of claim.

[17] It is my view that the loan agreement annexed to the particulars of claim does not support the averments therein, as it is incomplete. Particular attention must be paid to the clause after the amortization profile clause which reads as follows:

"By signing this agreement each party acknowledges that it has read and understood its terms and accepts and agrees to those terms and confirm the correctness thereof..."

[18] The loan agreement attached to the particulars of claim does not bear the signatures of both parties and contains only one signature, being that of the second defendant on the signature page.

[19] The plaintiff's particulars of claim do not comply with the Rules of Court and are therefore vague and embarrassing. Accordingly, the attachments to the particulars of claim do not support the averments.

CONCLUSION

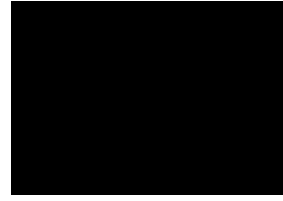
[21] In my view the claim by the plaintiff/applicant against the first and the second defendants is baseless, as a result, no proper case has been made by the plaintiff/applicant.

[22] In light of the above findings, I find there are insufficient reasons for me to deal with the second issue.

ORDER

Having regard to the above, the following order is made:

1. The application is struck off.
2. No order as to costs.



MALATSI-TEFFO AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Counsel for the Applicant: Adv JDB Themane

Instructed by: VZLR INC

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Date of Hearing: 20 December 2023

Date of Judgment: 24 January 2024