

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
LOCAL SEAT, JOHANNESBURG**

CASES NOs: 054476/2022 and 054457/2022

DATE: 17 January 2024

DELETE WHICHEVER IS NOT APPLICABLE

1. Reportable: Yes / No
2. Of Interest to Other Judges: Yes / No
3. Revised Yes

DATE: 17 January 2024 SIGNATURE:

JRG

CASE NO: 054476/2022

In the matter between:

Lancaster Group (Pty) Ltd

Plaintiff

and

Capital Creation Partners Africa (Pty) Ltd:

First Defendant

Jayson Ramsammy

Second Defendant

And

CASE NO: 054457/2022

In the matter between:

Lancaster Electricity Solutions (Pty) Ltd

Plaintiff

and

The Rock Itech (Pty) Ltd:

Defendant

JUDGMENT

Johann Gautschi AJ

1. These two applications for summary judgment are interrelated with a substantial amount of overlap. Consequently, pursuant to the request of the parties as reflected in their joint practice note, they were heard simultaneously.
2. In Case No. 054476/2022 (hereinafter also referred to as the Lancaster Group case) the plaintiff applies for summary judgment in terms of Rule 32 of the Uniform Rules of Court (the “Rules”) against the first defendant as principal debtor (herein referred to as “Capital Creation”) and as against the second defendant (Mr Ramsamy) as surety and co-principal debtor for payment of R16,975,000 in terms of three agreements, a loan agreement dated 18 February 2018, the restated loan agreement dated 3 September 2018 and the acknowledgement of debt (AOD) dated 22 August 2019.
3. In Case No. 554757/2022 (hereinafter also referred to as the Lancaster Electricity case) the plaintiff applies for summary judgment in terms of Rule 32 the Rules for payment of R1,275,000 against the defendant as principal debtor (hereinafter referred

to as “Rock Itech”) in terms of an oral loan agreement entered into during or about May and July 2018 and an acknowledgement of debt (AOD) dated 12 September 2019.

4. In both cases the defendants do not dispute having signed the transaction documents and having received the payments alleged, but rely on one defence, namely, that the multiple transaction documents and the underlying transactions on which the plaintiffs rely, were all simulated. Their defence is that the real agreement is an oral agreement which was concluded in October 2018 (hereinafter referred to as the “October 2018 agreement”) in terms of which the funds received from the plaintiffs were advanced for the purpose of disbursements which would be incurred by Capital Creation in pursuit of an “objective” for which Capital Creation would be remunerated by way of a “success fee”.
5. The October 2018 agreement defence relied upon was pleaded as follows in the Lancaster Group case and with the same wording, mutatis mutandis, in the Lancaster Electrical case:

“4.3. Without derogating from the denial, the defendants deny that the parties intended entering into the transactions as described in the documents and more particularly deny that the parties intended entering into loan transactions as between the plaintiff and the first defendant described in paragraph 5 and 7 and is purportedly subsequently acknowledged in the acknowledgement of debt described in paragraph 12 of the particulars of claim.

4.4. During or about October 2018, and in Johannesburg, the first defendant, represented by the second defendant, and the plaintiff, represented by Naidoo, alternatively Lancaster 101 (RF) (Pty) Ltd (“Lancaster 101”), represented by Naidoo, concluded an oral agreement [“the Agreement”].

4.5. The express, alternatively implied, further alternatively tacit terms of the Agreement were that:

4.5.1. Should the first defendant be able to achieve the conclusion of an agreement or transaction between the Government Employees Pension Fund “the Fund”) (as represented by the Public Investment Corporation SOC Ltd (“PIC”)) and the Lancaster group of companies (consisting of the plaintiff,

Lancaster 101 and Lancaster 102 (Pty) Ltd) so that the Fund (as represented by the PIC) recovered at least R5.6 billion in respect of its investment in the Steinhoff group of companies, and so as to generally affect [sic] an alignment of the interests of the Fund as represented by the PIC and the Lancaster group of companies [“the objective”], the first defendant would be remunerated by way of a “success fee”;

4.5.2. the first defendant was to conduct such negotiations and generally to undertake such facilitations as were necessary between the various role-players, including the Lancaster group of companies, as represented by Naidoo and its legal representatives, and the Fund as represented by the PIC and its legal representatives towards achieving the objective;

4.5.3. the first defendant would engage professional, transactional and such other advisers as may be necessary for purposes of achieving the objective and so would incur disbursements towards those advisers;

4.5.4. Although the first defendant would engage these advisers and so incur disbursements, the plaintiff, alternatively Lancaster 101 would reimburse the first defendant in respect of those disbursements;

4.5.5. to the extent necessary and during the course of the first defendant’s negotiations and facilitations towards achieving the objective, the plaintiff, alternatively Lancaster 101 (whether themselves or through their nominees) would reimburse the first defendant in respect of those disbursements by making payment to the first defendant (whether directly or through its nominees) and/or by making funds available to the first defendant (whether directly or through its nominees) to enable the first defendant to pay those disbursements.

4.6. In anticipation of the conclusion of the Agreement and then pursuant to the implementation of the Agreement,:

4.6.1 the first defendant commenced negotiations and facilitations and engaging advisers towards achieving the objective;

4.6.2 the first defendant incurred such disbursement;

4.6.3. The plaintiff and/or Lancaster 101 (and/or their nominees) make payment to the first defendant (and/or its nominees), as provided for in paragraph 4.5.5 above.

- 4.7. *The payments as described in paragraph 10 of the particulars of claim constitutes payments made by the plaintiff to the first defendant as described in paragraph 4.6.3 above.*
- 4.8. *The payments were not loans made by the plaintiff to the first defendant but rather the true nature of the payments was as described above.*
- 4.9. *The plaintiff, represented by Naidoo, sought to disguise the true nature of these payments, being as described above, by entering into a series of simulated transactions, more specifically the loan agreement, the restated loan agreement and the acknowledgement of debt as described in the particulars of claim and as reflected in the documents, and in doing so reflecting that the transactions were loans, whereas they were not."*

- 6. The plaintiff's affidavit filed in terms of Rule 32 (2) (a) in support of its application for summary judgment in the Lancaster Group case submits that the defence as pleaded does not raise any issue for trial for three reasons: (1) because the defendants' timeline discloses a factually unsustainable defence, (2) because the defendants' pleaded case is contrary to what was alleged in correspondence, thus indicating a false and contrived defence and (3) because there are no material facts or documents to support the defendants' case.
- 7. In the Lancaster Group case it is common cause, that except for the payment of R2.5 million received on 10 December 2018, all other payments received by Capital Creation were received prior to conclusion of the October 2018 agreement relied upon by the defendants.
- 8. Consequently, the plaintiff's affidavit submitted that:

"31. The defendants plead that it was only in October 2018 that it was agreed what "the objective" of the purported agreement was (paragraph 4.5.1 of the plea). The agreed objective could thus not have been existed before that date and the loan agreement could thus not have been simulated. The defendants plead that the negotiations, facilitations and engaging of advisers were required for achieving of "the objective". The defendants allege that the amounts provided by Lancaster Group were provided for the payment of disbursements and relating to the achieving of the objective. If "the objective" was only agreed in October 2018, the amounts provided prior to that

date could not possibly have been for the achievement of “the objective”, nor is there any allegation to this effect.

32. Moreover, the defendants do not plead that there was any other agreement that was entered into prior to the loan payments having been made. The defendants merely plead that payments were made “in anticipation of the conclusion of the agreement”, on the defendants’ own version there was thus no other agreement between the parties that govern the payment from February to October 2018.

33. It is factually impossible on the defendants’ version for any payments made prior to October 2018 to have been dealt with under the purported agreement when they were made prior to the agreement. Indeed, as there is no prior agreement that is pleaded, there is nothing to support a version that for the period February to October 2018 the payments were made for any other reason other than under the relevant loan agreement. If the defendants were in fact using the amounts advance from February to October 2018 for disbursements, they were doing so unilaterally and without any agreement in place permitting them to do so.”

9. The defendants’ plea specifically refers to the future engagements of advisers and future incurring of disbursements to them by pleading in each instance as follows as to what “*would*” be done, i.e. in future:

4.5.3. the first defendant would engage professional, transactional and such other advisers as may be necessary for purposes of achieving the objective and so would incur disbursements towards those advisers;

4.5.4. Although the first defendant would engage these advisers and so incur disbursements, the plaintiff, alternatively Lancaster 101 would reimburse the first defendant in respect of those disbursements;

(underlining added).

10. In response the defendants emphasised the contents of paragraph 4.6 of their plea. However, paragraph 4.6 as quoted above merely refers to what was done “*in anticipation of the conclusion of the Agreement*” and does not profess to amend or add to the terms of the Agreement.
11. Even during oral argument when I specifically invited counsel for the defendants to address me on the use of the word “*would*”, counsel could do no more than emphasise

paragraph 4.6 of the plea and submit that I should not place too much store on the use of a single word in considering whether to refuse summary judgment.

12. However, upon a careful consideration of paragraphs 4.6 and 4.7 of the defendants' plea, it does seem to me that there are indications in the plea that the October 2018 agreement was intended to cover also the historic engagement of advisers and historic incurring of disbursements to them. But, that does not solve the defendants' problem as the use of the word "*would*" in paragraphs 4.5.3 and 4.5.4 of the plea nevertheless results in the plea remaining ambiguous.
13. Paragraph 4.6 of the plea alleges that "*in anticipation of the conclusion of the Agreement*", i.e. prior to February 2018, the first defendant "*commenced negotiations and facilitations and engaging advisers towards achieving the objective*" and "*incurred disbursements*" and, most importantly, alleges that it "*made payments as provided in paragraph 4.5.5 of the plea*", i.e. payments which would be reimbursed in terms of the October 2018 agreement.
14. Furthermore, paragraph 4.7 of the plea alleges that the "*payments as described in paragraph 10 of the particulars of claim*", i.e. all the payments including those made prior to October 2018, "*constitute payments made by the plaintiff to the first defendant as described in paragraph 4.6.3 above*".
15. Those paragraphs read together do therefore seem to me to provide an indication that the October 2018 agreement intended to include reimbursements of previously made disbursements when considered in the light of paragraph 4.5.5 which alleges that in terms of the October 2018 agreement reimbursement would be made "*in respect of those disbursements*", referring to disbursements made "*during the course of the first defendant's negotiations and facilitations towards achieving the objective*", which would include negotiations and facilitations alleged in paragraph 4.6.3 to have commenced in anticipation of the October 2018 agreement.
16. However, in the light of the use of the word "*would*" in paragraphs 4.5.3 and 4.5.4, the plea remains ambiguous at best. That ambiguity is perpetuated by the explanation provided by the defendants' affidavit resisting summary judgment because Ramsammy, whilst providing the following explanation for payments made prior to

conclusion of the October 2018 agreement, also reaffirmed the contents of the plea, i.e. including the word “*would*” in paragraphs 4.5.3 and 4.5.4:

“31. These invoices for payment were several months before any demand emanated from the plaintiff (or any other Lancaster group company) seeking payment from the defendants or The Rock ltech.

32. The well-publicised Steinhoff share collapse happened in December 2017.

33. Both Naidoo and I immediately knew that they would be fallout from the collapse and that it would become necessary in some manner or other to achieve an alignment of interests of the Fund as represented by the PIC and the Lancaster group of companies. We had then already begun working towards what would become the PIC Unwind as it was inevitable that something would need to be done about the exit of PIC from the collapsed Steinhoff, particularly as the PIC would look to the plaintiff or recovery of the loans that it had made pursuant to its investment in Steinhoff of some R9.35 billion and R50 million in August and September 2016.

34. That this would materialise as demonstrated by the subsequent institution of legal proceedings by the PIC against inter alia the Lancaster group of companies. I annex as “SJ nine” a copy of the notice of motion, without annexes, demonstrating the exposure of Lancaster Group to the PIC and the need for an alignment of interests and the resolution of the dispute through the PIC Unwind.

35. Although a formal oral agreement, in the form of the agreement as described in paragraph 4.4 and 4.5 of the plea, may only have been concluded in October 2018 between Lancaster Group and/or Lancaster 101, on the one hand, a Capital Creation, on the other hand, the general aim of the PIC Unwind had already formed and steps had already been taken towards achieving that objective long before that. This included the engagement by Capital Creation of consultants and advisers, as described above.

36. Accordingly, the plaintiff had already commenced making payments to Capital Creation for purposes of providing cash flow for the payments to the advisers for the PIC Unwind before October 2018, and would continue to do so afterwards.

37. This explains why some of the claimants which form the subject matter of the plaintiff's action, as appears from paragraph 10 of the particulars of claim, preceded the conclusion of the formal Agreement in October 2018, and that there is nothing incongruent about these payments being made before the conclusion of the Agreement. Paragraph 4.6 of the plea expressly states that the payments were made not only

pursuant to the implementation of the Agreement, but also in anticipation of the conclusion of the Agreement.

38. *It is in these circumstances that the amounts claimed by the plaintiff in this action against the defendants do not arise from loans made to Capital Creation by the plaintiff as described in the particulars of claim, notwithstanding what is described in the written documents described in the particulars of claim (i.e. "the loan agreement", "restated loan agreement" and "the AOD"), but rather were monies received by or on behalf of Capital Creation for the reimbursement or funding of the disbursements as described above in anticipation of and implementation of the Agreement.*

39. *Action proceedings on a similar basis have been instituted by Lancaster Electricity Solutions against The Rock Itech, in which Lancaster Electricity Solutions as the plaintiff similarly relies upon written loan agreements and an acknowledgement of debt to recover the sum of R1,275,000. That action was instituted by Lancaster Electricity Solutions under case number 2022/054457. The same defence as raised by the defendants in this matter is raised by the Rock Itech in that matter."*

17. Thus, because in the same resisting affidavit the contents of the plea are confirmed, the ambiguity in the plea is perpetuated. It follows in my view that the plea and the statements of fact in the resisting affidavit are at best ambiguous and therefore do not comply with Rule 32 (3) (b) having regard to the following dictum in the judgment of Corbett J (as he then was) writing the judgment of the Full Bench in Arend and another v Astra Furnishers (Pty) Ltd 1974 (1) SA 298 (C) at page 303H to 304A:

"In the first place, it is clear that all that a defendant need do in order to defeat a claim for summary judgment is to satisfy the Court that he has a bona fide defence to the action. He would normally do so by deposing to facts which, if true, would establish such a defence. At this stage he is not required to persuade the Court of the correctness of the facts stated by him or, where facts are disputed, that there is a preponderance of probability in his favour. The Court, in its turn, does not endeavour to weigh or decide disputed factual issues: it merely considers whether the facts alleged by the defendant constitute a good defence in law and whether that defence appears to be bona fide. In order to do so the Court must be apprised of the facts upon which defendant relies with such completeness as to be able to hold that if these statements of fact are found at the trial to be correct, judgment should be for the defendant; and that the defence appears to be a bona fide one. It is clearly for this reason that the Rule prescribes that the nature and grounds of the defence and the material facts relied upon therefor must

be fully disclosed in the affidavit. Accordingly, if, for instance, the statements of fact are equivocal or ambiguous or contradictory or fail to canvass matters essential to the defence raised, then the affidavit does not comply with the Rule."

18. In the circumstances it must, in my view, follow that the defendants have not in their plea and affidavit resisting summary judgment unambiguously set out facts which, if proved at a trial, would constitute a defence which is legally or factually sustainable and therefore the defendants have not complied with the requirements of Rule 32 (3) (b).
19. In the Lancaster Electricity case it is common cause that all payments were made prior to conclusion of the September 2019 AOD. Consequently, for this reason alone Rock Itech's identical defence in that case also does not comply with Rule 32 (3) (b).
20. It now remains for me to consider whether, having regard to contents of the plea and the affidavits filed, I should exercise my discretion nevertheless to refuse summary judgment and grant leave to defend.
21. The plaintiff has put forward cogent reasons to cast doubt on the credibility of the version put forward by Mr Ramsamy on behalf of the defendants. For example, the contradictory versions in the defendants' attorney's letter dated 27 October 2022 letter which, in responding to the plaintiff's letter of demand dated 20 October 2022, alleges that the AOD was cancelled on 30 January 2022. Also, the defendants' attorney's letter dated 1 December 2022 which did not put forward details of the defence raised in the defendants' resisting affidavit, but instead referred to money "*required from the Lancaster group for the payment of professionals*" at a different time ("*During the period December 2022 February 2022*") and based on a different previous project (Project Sierra). Whilst those contradictions and the explanations proffered by Mr Ramsammy in his resisting affidavit will be relevant to the probabilities to be tested in cross-examination at trial, the probabilities are not to be assessed at this stage for summary judgment.
22. On the other hand there is much in the detailed resisting affidavits which lends support to the defendants' version, for example, the long-standing and close of business and personal relationship between Mr Naidoo and Mr Ramsammy; the role played by Mr

Ramsammy previously in Sierra 1, “*the transaction in terms of which Lancaster will, through a Lancaster Entity, subscribe for shares in Steinhoff and the GEPPF will provide the funding to Lancaster to enable Lancaster to do so*” which led to Capital Creation receiving payment of a R100 million success fee pursuant to the December 2015 Referral Agreement;¹ the fact that the plaintiff made no demand on Capital Creation to remedy its failure to pay the outstanding amount which was due on 31 December 2019 in terms of the AOD until 20 October 2022, i.e. almost 3 years later and only after Capital Creation’s May and June 2022 invoices for payment of the R175 million success fee relating to “PIC unwind” and its attorney’s letter of demand dated 16 August 2022.

23. In the light thereof and having regard to Ramsammy’s detailed explanation quoted in paragraph 17 above and the aforementioned indications in the plea that the October 2018 agreement was intended to cover also the historic engagement of advisers and historic incurring of disbursements as result of which the existing ambiguity can be rectified by means of relatively simple amendments to paragraphs 3.5.4 and 3.5.5 of the pleas in both actions, I am of the view that there is, in the words of Colman J in Breitenbach v Fiat 1976 (2) SA 228 (T) at 229H, “*a reasonable possibility that injustice may be done if summary judgment is granted*”. Refusal of summary judgment will also have the desirable advantage of enabling these two actions to be heard together with the Capital Creation action for the R175 million success fee.

24. In the result am of the view that it is appropriate that I should exercise my discretion to refuse summary judgment and grant leave to defend in both actions and that in such circumstances the usual order as to costs should follow, namely, that the costs of the summary judgment application should be costs in the cause.

25. Accordingly, I make the following orders.

¹ defendants' affidavit resisting summary judgment in the Capital Creation case, paragraph 57.6

ORDER in the Lancaster Group case (case number 054476/2022):

1. Summary judgment is refused and the defendants are granted leave to defend.
2. The costs of the application for summary judgment will be costs in the cause.

ORDER in the Lancaster Electricity case (case number 054457/2022):

1. Summary judgment is refused and the defendant is granted leave to defend.
2. The costs of the application for summary judgment will be costs in the cause.

Johann Gautschi AJ

17 January 2024

Date of judgment: 17 January 2024

Date of hearing: 24 October 2023

Counsel for Plaintiffs: Attorney V Moshovich

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