**IN THE HIGH COURT OF SOUTH AFRICA,**
**FREE STATE DIVISION, BLOEMFONTEIN**

Case number: 435/2019

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| **Reportable:** | **YES/NO** |
| **Of Interest to other Judges:** | **YES/NO** |
| **Circulate to Magistrates:** | **YES/NO** |

In the matter between:

**LEANO CONSTRUCTION SOLUTIONS (PTY) LTD** Plaintiff

and

**PGJ PROPERTIES (PTY) LTD** Defendant

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| **CORAM:** | LOUBSER, J |
| **HEARD ON:** | 16, 17 and 19 MAY 2023 |
| **JUDGEMENT BY:** | LOUBSER, J |
| **DELIVERED ON:** | The judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII on 19 JULY 2023. The date and time for hand-down is deemed to be 19 JULY 2023 at 11:00 |

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[1] In this action the plaintiff-company is claiming payment of the sum of R500 000.00 plus interest from the defendant-company. It is alleged in the summons that the plaintiff, duly represented by mr. Neo Malefane, and the defendant, duly represented by mr. Petrus Steyn, entered into an oral agreement at Bloemfontein

on 29 November 2017 in terms of which the plaintiff lent an amount of R500 000.00 to the defendant. It was a term of the said agreement that the loan would be used for working capital, and that it would be repayable to the plaintiff on demand, it is alleged.

[2] It is further alleged in the summons that the amount of R500 000.00 was subsequently paid over to the defendant on the same day, namely 29 November 2017. However, the defendant failed to repay the loan to the plaintiff on demand and is consequently indebted to the plaintiff in the amount of R500 000.00, it is alleged.

[3] In the plea filed by the defendant, the loan agreement between the parties, as alleged, is denied. It is pleaded that the defendant never concluded a loan agreement with the plaintiff, and that it is accordingly not indebted to the plaintiff in any amount claimed. It is further pleaded that the R500 000.00 received by the defendant on 29 November 2017 was a nominated payment by mr. Neo Malefane in his personal capacity.

[4] It is alleged in the plea that a week before the payment was made to the defendant, namely on 22 November 2017, a directors meeting of the companies by the name of Empire Bricks (Pty) Ltd and Mangaung Building Material and Hardware (Pty) Ltd was held. At this meeting, mr. Petrus Steyn, mr. Neo Malefane and mr. Daniel Havenga were present. It was agreed at this meeting that mr. Malefane will make an immediate cash contribution of R750 000.00 and a further cash contribution of R550 000.00 before the end of November 2017 to the two companies, Empire Bricks and Mangaung Building Material and Hardware. It was further agreed that mr. Malefane’s payment, as aforesaid, will be allocated against his personal loan account no 1 held personally by him in a close corporation by the name of Complex Webs CC, which close corporation was a shareholder of both Empire Bricks and Mangaung Building Material and Hardware.

[5] At a pre-trial conference it was agreed by the parties that the issues in dispute are as referred to in the pleadings, and more specifically the following: Firstly, whether an agreement was concluded between the plaintiff and the defendant,

and secondly, what the terms of the agreement were. During the course of the hearing, only two witnesses were called to testify, namely the abovementioned mr. Neo Malefane, who testified on behalf of the plaintiff, and mr. Petrus Steyn, who testified on behalf of the defendant.

[6] Mr. Malefane gave his testimony first. He testified that he is the sole director and a shareholder of the plaintiff. Around November 2017 he purchased the members interest in Complex Webs CC, and thereby he became a director of the defendant, of the company Bird Street Properties (Pty) Ltd, of Empire Bricks and of Mangaung Building Material and Hardware. That loan agreement was concluded around 28 November 2017, in terms of which R500 000.00 was transferred by the plaintiff to the defendant on 29 November 2017, he testified. A week before, a shareholders meeting took place. At that meeting, mr. Steyn, he himself and mr. Havenga were present. Mr. Steyn was the managing director of the defendant, of Bird Street Properties, of Empire Bricks and of Mangaung Building Material and Hardware. Mr. Steyn informed them at the meeting that the said businesses were experiencing cashflow problems. He the witness, then indicated that he will look at the financial position of his other businesses, namely the plaintiff, and he will then see what assistance he can give. He testified that he mentioned an amount of between R700 000.00 and R1 million as possible assistance. He also indicated that the loan would be made by the plaintiff, he testified.

[7] Mr. Malefane testified that he then looked at the financial position of the plaintiff, and he contacted mr. Steyn on 29 November 2017, and informed him that the plaintiff would lend an amount of R500 000.00. Mr. Steyn then said that the loan must be paid to the defendant for working capital. He further testified that they agreed that the amount was repayable on demand. He demanded the repayment early in 2018, but to date the loan was never paid back.

[8] In cross-examination the witness confirmed that all four the entities mentioned were in financial trouble, and he conceded that the R500 000.00 paid to the defendant was immediately distributed among the other entities. He also conceded that he did not find interest on the loan amount as a compelling factor. It was put to the witness that he never contacted mr. Steyn on 29 November

2017 or spoke to him. It was in fact mr. Havenga, the accountant of the entities, who had informed mr. Steyn that the plaintiff had paid R500 000.00 into the account of the defendant. It was also put to the witness that the defendant did not need any working capital, since only Empire Bricks and of Mangaung Building Material and Hardware were actually trading. They were the ones who needed working capital, and not the defendant.

[9] Mr Steyn testified that the meeting of 22 November 2017 was called to discuss the financial problems of Empire Bricks and Mangaung Building Material and Hardware, and to discuss those problems with mr. Malefane. The minutes of the meeting were prepared by mr. Havanga, who was responsible for the finances of the two companies as their accountant. Mr Steyn further testified that he never spoke to mr. Malefane on 29 November 2017, as alleged. At the meeting of 22 November 2017, he came under the impression that mr. Malefane himself would make a loan available. Havenga had made it clear to Malefane that all moneys would go through the account of the defendant. The loan would be documented against Malefane’s loan account in Complex Webs CC, he said. Mr. Steyn further testified that when the payment of the R500 000.00 happened, mr. Havenga told him that it was the plaintiff who had made the payment.

[10] In cross-examination mr. Steyn testified that he is not sure who will be liable for the repayment of the loan after the proceeds thereof were distributed among the other entities. The money was put on a loan account, and he cannot say how the money will be paid back. He is not sure how the accounting system will deal with this aspect.

[11] At the end of his testimony, the court posed a few questions to mr. Steyn, to which he responded as follows: The R500 000.00 that was paid, was a loan. This loan must be paid back. It must be paid back, “probably” to the plaintiff, although Malefane had said he himself would make the contribution. The loan must be paid back by the businesses. They must pay it back to Complex Webs CC. The businesses who must pay back to Complex Webs CC are Empire Bricks and Mangaung Building Material and Hardware, he said.

[12] During the course of the trial, the court was made privy to a number of documents, to which I will refer only as far as they are regarded to be relevant to the issues before the court. The first document is the minutes of the meeting of 22 November 2017. Although this document is not signed, it is of some significance because both parties relied on it to advance their respective cases. It is firstly clear from the minutes that those present were mr. Steyn and mr. Malefane, both representing the defendant, Bird Street Properties, Empire Bricks and Mangaung Building Material and Hardware. Secondly, it is only mentioned that mr. Steyn explained the cash flow issue and where it started from day one. Thirdly, it is documented that “Neo is positive that we can turn the cash flow situation around. Neo will look into the matter to make a cash contribution of R750 000.00 immediately and R550 000.00 towards the end of the month. This payment will be allocated against his loan account 1.” In the fourth place, it does not appear that any agreement was concluded at the meeting. And in the fifth place, the plaintiff is not mentioned at all wherever the possibility of a cash loan is discussed.

[13] The next document is an online pay alert by Standard Bank showing the payment by the plaintiff to the defendant’s account of the amount of R500 000.00 on 29 November 2017. Another document that needs mentioning, is a bank account statement of the defendant showing the payment of the R500 000.00 on 29 November 2017. It goes on to show that on the very next day, namely 30 November 2017, most of the loan amount was paid out by the defendant to other entities, which included Empire Bricks and Mangaung Building Material and Hardware. Empire Bricks received R100 000.00 and Mangaung Building Material and Hardware also received R100 000.00. Mr. Steyn himself received R50 000.00, and EMP Diesel the amount of R106 133.94. An amount of R41 122.08 went for “BSP huur November 17”, and Centlec BSP Ben Jones Elect was paid an amount of R25 624.14. Bloemsec received R385.00. An amount of R23 961.38 went to SARSEF 0046794021, and an amount of R12 501.80 for MLM-PGJ Robert Burns Street. These payments roughly amounts to a total of R460 000.00. The balance of the R500 000.00 loan apparently remained in the account of the defendant at the end of November 2017.

[14] Now on a conspectus of all the pleadings, evidence, and documents before the court, it becomes clear that the plaintiff is placing heavy reliance on the alleged communication between mr. Malefane and mr. Steyn on 29 November 2017 to prove that on that day, an oral agreement was concluded between the plaintiff and the defendant for the payment of the R500 000.000 by the plaintiff, which amount would be payable on demand. However, it is denied by mr. Steyn that such a conversation ever took place on 29 November 2017. In addition, the defendant in turn places heavy reliance on the minutes of the meeting of 22 November 2017 to show that it was actually mr. Malefane, acting in his personal capacity, who had undertaken to provide the funds as working capital for Empire Bricks and Mangaung Building Material and Hardware. The defendant contends that, on this basis, it is not liable to refund the plaintiff. The plaintiff therefore has no claim against the defendant, it is contended.

[15] The crucial question is then whether this court can find in the circumstances of this case and on the evidence that mr. Malefane and mr. Steyn had actually agreed in a conversation on 29 November 2017 that the plaintiff would provide a loan of R500 000.00, that the loan would be paid to the defendant and that the loan would be repayable on demand. Here we have the word of one witness against the other. In such circumstances, the probabilities of the matter must be considered, as well as the evidence of the respective witnesses when they advanced their contradictory versions.

[16] The probabilities in my view favour the version of the plaintiff. The minutes of the meeting of 22 November 2017 leaves the firm impression that it would be mr. Malefane who will provide the loan in his personal capacity. Something must have happened to change this intention to one where the plaintiff was the entity that eventually provided the loan. That something could probably be the conversation on 29 November 2017. The evidence of mr. Steyn that the R500 000.00 must be paid back to "probably" the plaintiff, in my view brings an end to the enquiry. His further evidence that the loan must be paid back by Empire Bricks and Mangaung Building Material and Hardware, makes no sense, because we have seen that the R500 000.00 became distributed to several entities, and not only to the two companies in question. In the premises, I find that an oral agreement was concluded between the plaintiff and the defendant on

the terms alleged by the plaintiff. If the loan was made for the benefit of Empire Bricks and Mangaung Building Material and Hardware, it makes no difference to the position of the defendant, since the agreement stipulated that the loan would be made to the defendant.

[17] Even if this court is wrong in finding that there was in fact an oral agreement between the parties on 29 November 2017, I have no doubt that, at the very least, a tacit contract came into being between the parties on that day. This is so because of the following: Firstly, the R500 000.00 was paid into the bank account of the defendant on 29 November 2017 by the plaintiff, notwithstanding any agreement that might have preceded such payment. Secondly, mr. Steyn was well aware at the time that it was the plaintiff who had paid the said amount, and he was well aware that the payment represented a loan. It was mr. Havenga who informed him as such. Thirdly, mr. Steyn did not reject the payment into the defendant's account, nor did he do anything to object to the payment by the plaintiff. On the contrary, he was quite happy and content to make use of the money the very next day by allowing the defendant to distribute the funds to other entities. If the payment by the plaintiff was not in accordance with any prior agreement with mr. Malefane, mr. Steyn had full opportunity to pay back the full amount to the plaintiff without making use of it.

[18] The now Supreme Court of Appeal has found that if a party fails to respond in circumstances that call for a response, it will be an important factor in the final determination of the dispute.[1] This is such a case, where the conduct of mr. Steyn, or for that matter, mr. Havenga, established on a balance of probabilities that a tacit loan agreement came into being between the plaintiff and the defendant on 29 November 2017. After all, in deciding whether a tacit contract was concluded, the law considers the conduct of both parties objectively and the circumstances of the case generally.[2] The conduct of the parties in the present case, viewed against the background of all the circumstances that emerged during the trial, justify only one reasonable inference, and that is that both parties tacitly agreed on 29 November 2017 that the plaintiff would provide a loan to the defendant, which he had to pay back on demand. If I am wrong with the payment

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**[1] McWilliams v First Consolidated Holdings (Pty) Ltd 1982 (2) SA 1 (AD) at page 10**
**[2] Mühlmann v Mühlmann 1984 (3) SA 102 (AD) at 124 A-B, and Standard Bank of SA Ltd v Ocean Commodities Inc. 1983 (1) SA 276 (A) at 292B**

on demand, I am in any event satisfied that a reasonable period for the payment of the loan has already lapsed. Having regard to the evidence of mr. Malefane, I cannot find that payment of interest by the defendant was a term of the tacit agreement.

[19] In the summons, the plaintiff referred to the terms of the agreement between the parties as the relevant express, alternatively implied, alternatively tacit terms and conditions of the agreement. I find, in the premises, that the tacit terms of the agreement have been proved by the plaintiff. Consequently, I make the following orders:

1. The defendant is ordered to pay the sum of R500 000.00 to the plaintiff.

2. The defendant is ordered to pay the plaintiff's costs of suit.

**P. J. LOUBSER, J**

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| For the plaintiff: | Adv. J.H. Els |
| Instructed by: | Phatshoane Henney Inc. |
| | Bloemfontein |
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| For the defendant: | Adv. P.J.J. Zietsman SC |
| Instructed by: | Honey Attorneys |
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