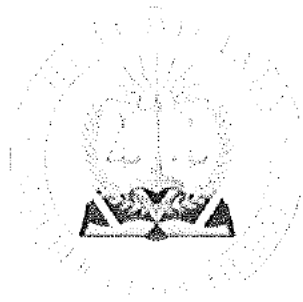




IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2022-035089

(1)	REPORTABLE: ☒ YES / NO
(2)	OF INTEREST TO OTHER JUDGES: ☒ YES / NO
(3)	REVISED.
.....20/02/2024.....	
DATE	SIGNATURE

In the matter between:

THE INDUSTRIAL CORPORATION OF SOUTH AFRICA

Plaintiff

And

MARA CORPORATION LIMITED

First Defendant

MARA PHONES LIMITED

Second Defendant

MARA PS LIMITED

Third Defendant

ASHISH JAGDISH THAKKAR

Fourth Defendant

AHUTI CHUG

Fifth Defendant

JAGDISH CHANDRA DULLABHJI THAKKAR

Sixth Defendant

SARLA JAGDISH THAKKAR

Seventh Defendant

JUDGMENT

LOXTON AJ

1. This matter concerns an exception brought by the plaintiff against the defendants' plea on the merits. The plaintiff alleges that it lent an amount of R205,973,000 to Mara Phones South Africa (Proprietary) Limited ("the Borrower") in terms of a written agreement of loan, for the acquisition of certain plant and equipment for the construction of a smart phone manufacturing facility and for working capital ("the Loan Agreement"). The plaintiff alleges further that it complied with its obligations under the loan agreement by transferring funding to the Borrower in the sum of R129 503 128,60 and a further payment of R27 799 688,91.
2. From 22 July 2019 the plaintiff and the Borrower entered into a written guarantee facility agreement in terms of which the plaintiff made available certain guarantee facilities to assist the Borrower. The terms of the guarantee facility are not germane to the issues raised by the exception which is discussed below. There were further agreements which are not germane to the issues which arise in these proceedings.
3. On 15 January 2019 the plaintiff and the defendants entered into a guarantee agreement ("the Guarantee"), the purpose of which was to guarantee performance by the Borrower under, *inter alia*, the loan agreement. The Borrower failed to perform its obligations under the loan agreement and the plaintiff obtained judgment against the Borrower for payment of outstanding amounts due under the loan agreement.
4. In consequence, the plaintiff called upon the defendants to make payment under the Guarantee of the amounts which the Borrower had failed to pay in

terms of the loan agreement. The defendants failed to honour their obligations under the Guarantee and, in consequence, the plaintiff instituted action against the defendants for payment of amounts due in terms thereof.

5. The defendants delivered a special plea, challenging the jurisdiction of the court on the basis that the loan agreement, guarantee facility and guarantee are void *ab initio*. The plea was not the subject of the plaintiff's exception and so its merits need not be interrogated at this stage. On the face of it however, the special plea appears to suffer from a fundamental contradiction. The premise of the special plea is that because the agreements are void, the choice of jurisdiction, namely this court, has no legal consequence. But in order to reach that conclusion, this court would have to pronounce the relevant agreements to be invalid. In other words, the defendants would have to invoke the jurisdiction of this court, which would, *prima facie*, amount to an acquiescence in the court's jurisdiction.

6. In order to understand the point of the plaintiff's exception, and the defendants' attempts to avoid the consequences of the exception, it is necessary to explain the fundamental allegations of fact made by the defendants in their plea. They are, in essence, the following:

- 6.1 Representatives of the Presidency and the plaintiff represented to the fourth defendant, acting on behalf of all the defendants, that the South African government would support a commercial enterprise to be pursued by the "Mara Group" (which allegedly included all the defendants) and that *"the defendants would not be called upon to pay for any losses suffered by the enterprise should such enterprise fail"*.

- 6.2 The defendants relied upon both representations, which induced them to enter into “the agreements”, which included the Guarantee.
- 6.3 In the event, the first representation was false because the South African government failed to provide adequate financial support for the enterprise of the Mara Group, which was wound up.
- 6.4 As a result of that misrepresentation, there was no consensus between the parties due to a fundamental mistake as to the terms of “the agreements”, which were accordingly void *ab initio*.
7. When pleading the representations upon which the defendants rely, the defendants do not distinguish between the Loan Agreement, the Letter of Amendment (which amended the Loan Agreement), the Guarantee Facility Letter or the Guarantee. All these agreements are lumped together and simply called “the agreements”. It is accordingly not possible to establish from the defendants’ plea how the alleged representation that the South African government would support the enterprise of the Mara Group induced the defendants to conclude the particular agreements referred to above. This failure becomes particularly important when considering the terms of the Guarantee.
8. The plaintiff excepts to the defendants’ plea to the extent that it raises the defence described above, on the basis that clause 14 of the Guarantee records that:

“No representations, promises or warranties have been made or given to the Guarantor by IDC or any other person in connection with this Agreement.”

9. In addition, the plaintiff relies on clause 22.2 of the Guarantee, which provides that:

"No Party shall be bound by any express or implied term, representation, warranty, promise or the like not recorded herein."

10. Accordingly, so the plaintiff contends, the representations and promises relied upon by the defendants are to no avail and the plea accordingly discloses no defence to the plaintiff's claim.

11. As I understand the argument advanced for by counsel for the defendants, it is this:

11.1 The plaintiff's exception concerns a matter of evidence which will be tested at trial. Facts may emerge at trial which will explain why the representation relied upon by the defendants was not included in the guarantee;

11.2 That evidence is foreshadowed in the defendants' plea being one of misrepresentation and the parties lacking consensus as to the terms of the agreements;

11.3 It is accordingly not appropriate to decide the issue on exception;

11.4 In Ocean Ecko Properties 327CC and another v Old Mutual Life Assurance Company (South Africa) Ltd¹ the Supreme Court of Appeal upheld an appeal against the decision of the court below upholding an exception that the tacit agreement to terminate the written lease in question offended the provisions of the lease, which provided that there

¹ 2018 (3) SA 405 SCA @ paras (10-16)

could be no variation or cancellation of the lease without amendment. That decision is relied upon in support of an argument that the defendants' should be permitted to proceed to trial in order to lead evidence as to the manor and effect of its representations relied upon.

11.5 The decision is also relied upon for the argument that the "*no representations*" clause will not prevent the defendants from leading evidence at the trial to show that, as a result of the misrepresentations made by the plaintiff, the defendants' reasonably laboured under a material mistake in regard to the terms of the agreement and as a result there was no consensus.

12. The next decision relied upon by counsel for the defendants – and which indeed formed the main plank of his argument – is Spenmac (Pty) Ltd v Tatrim CC².

13. As I understand the argument, it was that the Supreme Court of Appeal held in Spenmac that whenever a misrepresentation leads to a lack of consensus between the contracting parties, the party seeking to enforce the agreement in question cannot rely on any term of that agreement, and more particularly a clause which excludes reliance upon misrepresentations. It is accordingly necessary to examine the decisions in Ocean Echo and Spenmac in order to establish whether or not they apply to the facts of the present case.

14. The facts of Ocean Echo were the following:

14.1 Ocean Echo and Old Mutual had entered into an agreement of lease.

² 2015 (3) SA 46 (SCA)

14.2 The second appellant, one Giannaros, had executed a deed of suretyship in terms of which he bound himself as surety and co-principal debtor to Old Mutual for the due and proper fulfilment of all of the obligations of Ocean Echo under the lease agreement.

14.3 The defendants admitted that the first defendant had entered into the lease, but pleaded that the lease was tacitly terminated when the first defendant vacated the premises, at which time it was not in arrears in respect of rent, rates or any other charges.

14.4 Old Mutual in its turn was aware that the first defendant had vacated the premises, found a new tenant and began receiving payments from the new tenant in respect of rental, rates and other expenses. Furthermore, the plaintiff no longer sent rental statements to the second defendant and instead sent such statements to the new tenant.

14.5 In those circumstances, so the defendants argued, Old Mutual had acknowledged that there was a tacit lease between itself and the new tenant, and accordingly the lease between the Old Mutual and the defendants had come to an end.

15. The court of first instance upheld an exception to the defendants' plea on the basis that it was bad in law because the tacit cancellation of the lease was contrary to the terms of the written lease agreement, which contained a non-variation clause. An appeal against that decision was dismissed by the full court. An appeal to the Supreme Court of Appeal succeeded, however.

16. It is important to follow the reasoning adopted by Ponan JA in Ocean Echo. The starting point is the observation by Botha JA in Ferreira & Another v SAPDC (Trading) Ltd³:

"From Neethling's case I venture to abstract this principle: while an oral agreement varying (at least materially) the terms of a contract of the kind in question is not permissible, there is no objection to allowing proof of an oral agreement relating to the cancellation of the contract by which its terms as such are not placed in issue."

17. It is important to observe that in Neethling's case⁴ the court was not concerned with a non-variation or "no representations" clause. It was instead concerned with whether the termination of a contract which was required to be in writing by section 1(1) of the Transfer Duty Proclamation 1902 (T) could be cancelled by way of an oral agreement. Since the cancellation of the agreement did not call into question the terms of the contract, and therefore did not undermine the objects of the Transfer Duty Proclamation, an oral cancellation was permissible.

18. Botha JA, on the basis of Neethling's case, abstracted the principle that while an oral agreement varying (at least materially) the terms of a contract in question (namely a suretyship which was required to be in writing) was not permissible, there was no objection to relying on proof of an oral agreement relating to the cancellation of the contract, by which its terms are not placed in issue.⁵

³ 1983 (1) SA 235 (A) at 247

⁴ Neethling v Klopper en Andere 1967 (4) SA 459 (A)

⁵ It's important to bear in mind that the decision of Botha JA forms part of a minority judgment. The majority held that the oral agreement constituted a variation of the terms of the contract of suretyship and was therefore not permissible.

19. Returning to Oceal Echo, it is for present purposes important to observe that there the court was not dealing with the variation of the terms of an agreement, or a misrepresentation upon the basis of which the defendants sought to escape the terms of a written agreement despite the existence of a “*no representations*” clause. Ponan JA concluded⁶ that the effect of the tacit agreement pleaded by the appellant was to terminate the operation of the contract of lease *in futurum*, so as to preclude the coming into being of any further obligations, while leaving intact obligations that arose from the past operation of the contract, with all its terms.

20. It will immediately be appreciated that Ocean Echo is for that reason distinguishable from the facts of the present case. In this case the defendants have not sought to cancel any of the relevant agreements, more particularly the Guarantee. Nor have they sought to escape future obligations, as opposed to past obligations. In consequence I am of the view that the defendants’ reliance upon Ocean Echo is misplaced.

21. I turn now to consider the decision in Spenmac, upon which counsel for the defendants placed great reliance. The facts in Spenmac are correctly summarised in the headnote. Spenmac, the owner of a unit in a sectional title scheme, innocently represented to Tatrim CC that the unit was one of only two units in the scheme, and that the owner of the unit had a right to veto any subdivision of the other unit. That representation induced Tatrim to enter into an agreement to buy the unit.

22. One of the provisions of the contract was an acknowledgement by Tatrim that it had not been induced by any representation to enter into the agreement; and

⁶ At para. 15

that it waived any rights that it might have acquired as a result of such representation.

23. When the true position came to light, Tatrim applied successfully to the High Court for a declaration that the agreement was void. An appeal by Spenmac to the Supreme Court of Appeal was unsuccessful. That court held that the agreement had been void from the outset because Spenmac's misrepresentation had induced Tatrim to make a material mistake about the nature of the unit, and consequently there had never been consensus as to the subject matter of the sale. Tatrim's mistake was also reasonable. Since the agreement was void *ab initio*, Spenmac could not rely on the "*no representations*" clause.

24. It will immediately be seen from a recitation of the facts with which the court in Spenmac was confronted that that case is distinguishable from the present case. In that case, there was an error as to the subject-matter of the sale, which was induced by an innocent misrepresentation by the seller. For that reason and because the seller had been unaware of the true position, there was no consensus as to what the seller thought it was selling and the purchaser thought it was purchasing. As Mthiyane DP points out,⁷ the correct enquiry is firstly whether the error precluded the parties from reaching consensus and secondly whether it is reasonable for the resiling party to labour under such a misapprehension.

⁷ At para 27

25. Importantly for present purposes, both Spenmac and Allen v Sixteen Sterling Investments (Pty) Ltd⁸ - which was approved in Brink v Humphries & Jewell (Pty) Limited⁹ concerned an error regarding the subject matter of a sale.

26. In Brink v Humphries¹⁰ the error concerned the existence of a personal suretyship obligation in a credit application form. The appellant maintained that when he signed the credit application form on behalf of the debtor, he had not known that it embodied a personal suretyship obligation, and it was common cause that no one had informed the appellant that such an obligation was embodied in the form. Cloete JA, who spoke for the majority of the court, held that the credit application form was a trap for the unwary and that the appellant was justifiably misled by it.¹¹ The learned judge of appeal held that it was unreasonable for a party who had induced the justifiable mistake in the signatory as to the contents of a document to assert that the signatory would not have been misled had he read the document carefully and that such party could accordingly not rely on the doctrine of *quasi-mutual* assent.

27. In the present case there is no allegation that the defendants were misled as to the terms of the Loan Agreement or the Guarantee, or that they could not reasonably have expected, when signing those agreements, that they contained the obligations which they did. The allegation by the defendants that the representations identified by them in paragraphs 30.4-30.7 of the plea do

⁸ 1974 (4) SA 164 (D), and (CLD)

⁹ 2005 (2) SA 419 (SCA)

¹⁰ Supra

¹¹ At para 11

not justify a conclusion – even on the most benevolent interpretation of the plea - that they induced a *justus* error on the part of the defendants as to the contents of the Guarantee. The furthest that the defendant go is that the representations in question induced them to conclude “*the agreements*”. But that is insufficient to bring the defendants within the scope of Spenmac, or the other authorities relied upon by counsel for the defendants.

28. The allegation in paragraph 31 of the plea that as a result of the representation, there was no consensus between the parties “*in concluding the agreements and that there was a fundamental mistake as to the binding nature of the agreements and their terms*” suffers from two defects.

28.1 Firstly, paragraph 31 appears to be an inference which the defendants have drawn from the facts pleaded in the previous paragraphs and not an allegation of fact.

28.2 Secondly, paragraph 31 does not contain an allegation as to what the defendants believed that the terms of the Guarantee were, or even that they believed that the Guarantee did not impose obligations upon them.

29. In the absence of any allegation on the part of the defendants that they had been led to believe by the plaintiff the Guarantee did not impose obligations upon the defendants to make payment to the plaintiff in the event of the breach of the Loan Agreement, or that its terms were other than what appeared in the Guarantee, is in my view fatal to the defendants’ attempt to escape the “*no representation*” clause in the Guarantee. On the face of it, the Guarantee quite obviously imposes obligations of the financial nature upon the defendants. In addition, it is clear that the obligations imposed by the Guarantee are wholly independent of the success or failure of their venture.

30. In short, the defendants have pleaded that there was a mistake which led to a lack of consensus without ever pleading what, in relation to the Guarantee, the mistake was.

31. Finally, although it is correct that an excipient must take the pleadings as he finds them, there are limits to that principle. Where, as here, the allegations are so improbable that they border on the ridiculous, a court may reasonably conclude that the pleadings have been framed with the object of escaping the contract upon which the plaintiff's claim is based, instead of setting out a genuine defence. Fortunately, it is not necessary in this matter to reach a conclusion on that question.

32. In the circumstances I find that the plaintiff's exception was well taken. Accordingly, I grant the following order:

32.1 The exception is upheld and the defendant's plea on the merits is dismissed.

32.2 The defendants are given leave to amend their plea, if so desired, within a period of 30 days from the date of this order.

32.3 The defendants are to pay the costs of the exception, such costs to include the costs of two counsel.

C.D.A. LOXTON SC
ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 14 March 2024

Date of judgment: 19 March 2024

Appearances

For the plaintiff: Adv Pillay SC

Adv Broster

Adv Mchunu

Instructed by: Pather & Pather Inc

For the first defendant: Adv Patrick

Instructed by: De Klerk & Ven Gend Inc