REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 6374/2020

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

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DATE 5.8.2021 SIGNATUR[redacted]

In the matte between:

LIQ INVESTMENT CC **: APPLICANT**

And

PARKERS STORE LIMPOPO (PTY) LTD **: RESPONDENT**

JUDGMENT

Transmitted by email to the parties' legal representatives and posted on SAFLLI. The judgment is deemed to have been handed down at 10:00 on Wednesday the 5 August 2021.

SEMENYA DJP

[1] This is an opposed application for summary judgment brought by the plaintiff against the defendant. The applicant issued summons in which the following relief is sought:

1. Payment of the sum of R1 080 773.00;
2. Interest on the abovementioned amount at the rate of 5% per annum from 9 September 2019 to date of payment;
3. In addition to the interest of 5% per annum, a monthly interest of R100 000.00 from 01 October 2019 to date of payment;
4. Costs of the suit.

On page 6 of the particulars of claim, the prayers are stated as follows:

(a) Payment of the capital amount of R1 080 773. 00 (One Million, Eighty Thousand Seven Hundred and Seventy-Three Rand), together with interest thereon of R54 038. 00 (Fifty-Four Thousand and Thirty-Eight Rand) being 5%, a monthly interest of R100 000.00 (One Hundred Thousand Rand) for each month the loan remains unpaid and outstanding commencing October 2019 to date of payment;

(b) Payment of costs of the suit.

[2] The claim arises out of a partly oral, partly written agreement of a short term loan in the amount of R1 080 773.00, entered into between the plaintiff, represented by a Mr Maxwell Sibanda, the sole member of the plaintiff and the defendant, represented by a Mr Godknows Munetsi on the 26 August 2019. The plaintiff further relies on the

acknowledgement of debt allegedly made by the defendant' attorney on the defendant's instructions.

[3] The defendant filed a special plea and a plea to the particulars of claim. In the special plea, the defendant avers that the plaintiff's summons is premature in that the parties have agreed that repayment of the loan was dependent upon payment of certain monies, to the defendant by Anglo American, which was expected approximately 7 working days after delivery of certain goods. The defendant pleads that it has informed the plaintiff that Anglo American has to date not paid the funds. On paragraph 2 of the plea, the defendant admits that the parties did enter into a loan agreement. The defendant however denies that the it is indebted to the plaintiff in the further amount of R100 000 interest per month.

[4] In terms of rule 32 (2)(b), the plaintiff in an application for a summary judgment is required to verify the cause of action and the amount, if any, claimed, and to identify any point of law relied upon and the facts upon which the plaintiff's claim is based. The cause of action with regard to the initial short term loan is a matter of common cause. The defendant admitted in its plea that it entered into a short loan agreement with the plaintiff and that it is, as a result, indebted to the plaintiff in the amount of R1 080 733.00 plus R54 134 811 which is 5% interest on the amount owed. The indebtedness is further not denied in the defendant's affidavit filed in opposition to the granting of summary judgment. In respect of the agreement of R100 000 interest, plaintiff avers that on the 26 November 2019, a Mr Anthony Munetsi of the defendant sent him an email in which he stated that *"as long as we haven't paid the 1 Mil back to you, we will be paying a monthly interest 100k to you and when have the 1Mil then*

we will pay the 1Mil plus that month's interest. Share your view on this am open to any suggestion." Plaintiff stated that its representative replied to the letter in an email dated the 29 November 2019 wherein it accepted the offer of R100 000 monthly interest.

[5] In order to successfully resist summary judgment, the opposing affidavit must disclose fully, the nature and grounds of the defence and the material facts relied upon therefore. The defendant must also demonstrate that he has a *bona fide* defence to the action. "*The assessment of whether a defence is bona fide is made with regard to the manner in which it has been substantiated in the opposing affidavit; viz, upon a consideration of the extent to which nature and grounds of the defence and the material facts relied upon therefor, have been canvassed by the deponent.*"[1]

[6] The defendant raised a special plea that the amount owed in the short term agreement is not yet due and payable. This defence stems from the plaintiff's email in which it is stated that "*I will provide the loan of R1 080 773 at a rate of 5%, meaning the repayment (inclusive of the rate) will be R1 134 811. The repayment will be made shortly after the release of your funds from Anglo, which I understand you expect to be made approx. 7 working days after delivery of goods which should likely be by this Thursday.*" The defendant stated that it is common cause that Anglo has not paid and as a result the suspensive condition has not been realized. With regard to the interest of R100 000, the defendant raised a defence that Anthony Munetsi was not authorized to make such an offer, nor is such offer legal in that it exceeds the legal parameters for interest, and the interest would exceed the capital by the time the condition precedent for repayment of the loan is met.

[1] Tumileng Trading CC v E & D Security and fire (Pty) Ltd (unreported case No. 3670/2019 (W); 30 April 2020

[7] The defendant avers that the verifying affidavit fails to conform with Rule 32 in that the plaintiff has stated different rates of interest in the summons and affidavit filed in support of the summary judgment. The plaintiff contended that interest is a legal corollary to the principle of indebtedness forming a separate and distinct indebtedness of its own[2] and that summary judgment cannot be denied on the basis of the defendant's argument.

[8] It appears from the particulars of claim and the verifying affidavit that the agreement concerning the additional interest is distinct from the initial agreement where the parties agreed to 5% interest. This is so in that the initial agreement was entered into with the defendant who was represented by Godknows Munetsi. The plaintiff alleges that the offer of R100 000.00 interest per month was made by one Anthony Munetsi, who is the financial director of the defendant. The defendant raises a defence that the defendant did not give Anthony Munetsi authority to offer the said interest at that rate. Plaintiff contended that the defendant is estopped form relying on this defence.

[9] The defendant is required to fully disclose the nature and the ground of its defence and the Court must determine whether on the facts so disclosed, the defendant appears to have, as to the whole or part of the claim, a defence which is *bona fide* and good in law[3]. I am of the view that the ground of defence that Anthony Munetsi had no authority to represent the defendant in the agreement that seemed to vary the interest agreed upon is in my view *bona fide* and good in law. The defendant should be allowed

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[2] All Purpose Space Heating Co of SA (Pty) ltd v Schweltzer 1970 (3) 560 (D) at 562-3.
[3] Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 426

to pursue it in a trial. The defendant further relies on the wording of the agreement as contained in an email dated the 26 August 2019. It is stated therein that the defendant will repay the plaintiff after it shall have received payment from Anglo American. The defendant regards this as a suspensive condition and that repayment of the loan is dependent upon its fulfilment. The defendant alleges that the summons is premature as it is willing to pay the plaintiff upon the realization of the condition. It is trite that it is not necessary for the defendant to persuade the Court of the correctness of the facts upon which the defence rests. In **Shepstone v Shepstone**[4] it was held that:

> "*The Court will not be disposed to grant summary judgment where, giving due consideration to the information before it, it is not persuaded that the plaintiff has an unanswerable case.*"

What this Court is required to do at this stage is to consider whether the facts alleged by the defendant constitute a good defence in law and whether the defence appears to be *bona fide*. I have no doubtswith regard to the *bona fides* of the defences raised by the defendant. It is not correct, as submitted by the plaintiff, that the defendant's plea consists of bare denial of the allegations in the particulars of claim. The defendant has clearly stated the facts upon which the denial is based. I conclude that the defendant should be given an opportunity to defend the summons. I cannot grant summary judgment as prayed for.

[10] The summary judgment application served before Naudé AJ on the 18 March 2021. The application was struck off the roll due to defective affidavit. The defendant asked for the dismissal of the main action and the summary judgment on the basis that the verifying affidavit is still defective. The commissioner of oath failed to write

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[4] 1974(2) SA 462 (N)

his/her full names on the commissioning. The plaintiff submitted that the Court has a discretion to condone technical mistake. It is however worth mentioning that the plaintiff is alive to the principle laid down in **Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC**[5] wherein a submission of this nature was rejected. I have no reason to differ with this dictum.

[11] This Court has a discretion on the issue of costs. The general rule in matters of costs is that the successful party should be given costs[6]. The defendant prayed for the dismissal of the summary judgment as well as the main action. I have no reason to deny the plaintiff an opportunity to prove its case against the defendant in a trial, more so in that the short term loan is not disputed. I however do not find any reason why I should deny the successfully party, being the defendant its costs.

[12] In the result, I make the following order:

i. Summary judgment is refused;

ii. The defendant is granted leave to defend the action; and

iii. The defendant is awarded costs of the application.

[redacted]

M V SEMENYA

DEPUTY JUDGE PRESIDENT

LIMPOPO DIVISION

[5] 2010 (5) SA 112 (KZP)at 122F-I

[6] Treatment Action Campaign v Minister of Health 2005 (6) SA 363 (C)

APPEARANCES:

ATTORNEYS FOR THE PLAINTIFF	**: P I UREISI ATT**
COUNSEL FOR THE APPLICANTS	**: ADV. J P MORTON**
ATTORNEYS FOR THE RESPONDENT	**: THRON I PATHER INC.**
COUNSEL FOR THE RESPONDENT	**: ADV. P A MABILO**
JUDGMENT RESERVED ON	**: 17 JUNE 2021**
JUDGMENT DELIVERED ON	**: 04 AUGUST 2021**