IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 38869/2018

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

[redacted] 19|01|2021

SIGNATURE DATE

In the matter between:

WERNER BEGERE **APPLICANT**

And

TECMED AFRICA (PTY) LTD **RESPONDENT**

(Reg. No: 1998/021499/07)

JUDGEMENT

KOLLAPEN J

Introduction

[1] This is an opposed application in which the Applicant, a former director and shareholder of the Respondent, seeks the following relief: -

1. *Payment of the amount of R31 794 012.41;*
2. *Interest on the amount of R31 794 012.41 from 1 April 2018 to date of payment at the prime rate published by First Rand Bank Limited as being its prime overdraft rate, compounded monthly in arrear and calculated on a 365 year;*
3. *The costs of this application on an attorney and own client scale including the costs of two counsel*

[2] Following the exchange of affidavits and heads of argument, the matter was heard remotely in accordance with the Practice Directive of this division. After the conclusion of the hearing, a further set of affidavits were filed in what the Respondent termed was an interlocutory application, in which the relief sought was a referral of the dispute to evidence.

Preliminary issue – Possible dispute of fact

[3] At the commencement of argument, the stance of the Respondent was that given the likelihood that the Court would find that there was an irreconcilable dispute of fact on the papers, the Applicant was required to make an election upfront as to whether it sought a referral to evidence or to argue the matter in its entirety, mindful of the risk that if the Court concluded that there was a dispute of fact, it would be required to dismiss the application.

[4] In response thereto, counsel for the Applicant took the view that there was no risk of a dispute of fact arising as it was of the view that the Applicant was entitled to obtain the relief it sought based purely on the version the Respondent has put up. In particular, the Applicant elected to proceed to argue its case only on the basis of the alleged oral agreements of loan and not the written agreements upon which reliance was also placed in the case advanced. While reliance on the written agreements was not abandoned , for the purpose of this hearing and the relief sought, the Applicant would only rely on the terms of the oral agreements and in order to obviate any possible dispute of fact would seek the relief it seeks on the version of the Respondent in respect of those claims.

[5] The Respondent however appeared to have a change in stance when it placed on record that it would, even if the Applicant was not successful in obtaining relief based on the version of the Respondent, consent to have the matter referred to trial as opposed to seeking the dismissal of the application. Even though the Court is not bound by this stance of the Respondent, it is a factor that will be relevant if the Court reaches such a point in its determination.

The facts

[6] Given the narrow remit of the basis on which the relief sought has been advanced in argument, namely whether on the version of the Respondent the relief sought is competent in respect of the alleged oral loan agreements, it is then necessary to only focus on the common cause facts together with the version of the Respondent in adjudicating the application.

[7] The relief claimed in the Notice of Motion relates to two transactions and are referred to as the 'Lerato' transaction which relates to the transaction of Dr Motsekuoa and the 'FNB' transaction respectively.

[8] The Applicant was the founder and shareholder of the Respondent, which was founded in 1992 and whose main business involved the importation and sale of medical equipment. In March 2016, the Applicant sold his shareholding in the Respondent, which stood at 77.9% of the shares in the Respondent to AngloRand Medical (ARM) but continued to remain involved in the management of the business of the Respondent until October 2017.

[9] The business model of the Respondent involved the import and sale of expensive medical equipment. The Respondent would be required to pay its foreign suppliers for equipment purchased and would often then have to wait for payment from clients to whom the equipment was sold. This was largely on account of the fact that the financing that the clients applied for was still pending and that they were unable to pay at the time of delivery and invoicing.

[10] To make up for the gap in the payment timeline between when the Respondent was required to pay its suppliers and when it was likely to receive payment from its clients, a funding model developed. This model required trade finance in the form of short-term financing to manage the gap in the financial timeline between paying suppliers and receiving payment from clients. While the Respondent

was able to secure such financing facilities at financial institutions, these would often not be sufficient and the Applicant would then step in and advance money to the Respondent to ensure payment to suppliers was made timeously. The Respondent would then reimburse the Applicant for the loan/s.

[11] This is what the parties have referred to as the standing arrangement but there appears to be some differences with regard to the precise terms of that arrangement. As indicated, the Applicant, while not accepting the correctness of the Respondent's version, has elected to advance its case on that version.

The 'Lerato' transaction

[12] The client in question, Dr Motsekuoa, purchased medical equipment and pending the finalisation of the financing application, the Applicant in terms of the standing arrangement, advanced amounts of R8 460 000.00 on 3 July 2016 and R8 768 881.00 on 22 August 2016 to the Respondent, in order to facilitate the purchase by Dr Motsekuoa of medical equipment from the Respondent.

[13] The Respondent says the standing arrangement that would also apply to this loan was in the following terms: -

a) That the Applicant would normally be repaid when the particular customer paid in full to the Respondent.
b) In some instances, payment would only be made when the Respondent was able to afford repayment.
c) The loans would attract interest at FNB prime rate minus 0.5%.

[14] Therefore, on the version of the Respondent, the loan would become repayable when the customer paid in full, but in addition, provided that the Respondent was able to afford it. It is not clear in which instances the affordability of the repayment on the part of the Respondent would apply but it does appear from the answering affidavit that the stance of the Respondent is that this loan was also subject to that condition of affordability on the part of the Respondent.

[15] In the answering affidavit, the Respondent says the following with regard to the conditions attached to the loans: -

> 50.1. *Begere would normally be repaid when the particular customer in respect of whom the transaction for which the loan was granted had made full repayment to Tecmed, but in some instances only when Tecmed was able to afford repayment. As will appear from that which is stated below, the Lerato loans is only repayable when Tecmed was able to afford repayment; and*
>
> 50.2. *The loans would attract interest at FNB prime rate minus 0,5%;*

[16] Accordingly, on the Respondent's version, both conditions that would trigger repayment of the loan had not been fulfilled and the loan was accordingly, on its version, not repayable. I proceed to deal with these two conditions and analyse the issue from the perspective of the stance adopted by the Respondent.

Was the loan repaid in full by Dr Motsekuoa?

[17] In the answering affidavit, it says that the Lerato loan was not repaid in full. Following the conclusion of the hearing, the Respondent filed what is termed an interlocutory application, in which it sought leave to introduce the further affidavit of Mr M H Lotz, who also deposed to the main answering affidavit. In that affidavit the Respondent took issue with what it says was the impermissible conduct of the Applicant in argument in referring to the replying affidavit, when its stance had always been that it would advance its case on the strength of the answering affidavit only.

[18] It contended that on the basis of the answering affidavit, it was clear that the stance of the Respondent was that the loan had not been repaid in full and therefore on this score alone, the condition for repayment was not fulfilled and the loan was accordingly not due. The Respondent bemoans attempts by the Applicant to purport, in reply, to place reliance on the Applicant's replying affidavit and to introduce further evidence relating to the repayment of the loan.

[19] Whatever the merits of that complaint are, as well as the procedure in seeking to file a further affidavit, the Respondent went further in the affidavit in the interlocutory application by providing detail of the outstanding amount due by Dr Motsekuoa in respect of this loan and in this regard says the following: -

> 15.3. *I am able to confirm, from my own knowledge, that the Lerato loans have to this day not been repaid in full and in terms of the agreements*

which I explained in the answering affidavit Begere is not entitled to repayment by Tecmed. I have specifically checked the accounting records and confirm that R 2 854 613,07 remains unpaid on the Lerato loans until today. This Court is respectfully requested to receive this further piece of evidence in order to assuage the prejudice inherent in the impermissible manner in which counsel for Begere argued the case, in particular by his attempt to present 'evidence from the Bar';

[20] In answer thereto, the Applicant explained how the indebtedness of Dr Motsekuoa was computed and concluded that the Respondent erred in seeking to draw the conclusion that the account was not paid in full. In reply, the Respondent then accepted that the account was indeed paid in full and in para 16.4 of the replying affidavit in the interlocutory application says the following: -

> *16.4. Upon further investigation at the respondent's offices after receipt of the 31 August affidavit, it was established that, contrary to what other senior management members of the respondent and I has believed all along, a settlement had been concluded.*
>
> *16.5. The settlement is therefore conceded by the respondent and I accept that such settlement should be regarded as payment in full by Dr Lerato.*
>
> *16.6. I apologise to the Court for the misunderstanding and consequent misstatement in my previous affidavit. It was a bona fide error on my side and on the side of the other management members of the respondent. I did not at any stage intend to mislead the Court.*

[21] Thus, on the version of the Respondent as set out in the answering affidavit, read with the affidavits filed by the Respondent in the interlocutory application, there is no dispute and indeed on the version of the Respondent, the account of Dr Motsekuoa has been paid in full.

[22] While this evidence emerged after the conclusion of the hearing, it was triggered by the Respondent's decision to file an interlocutory application supported by an affidavit and the concession ultimately by the Respondent that the account was paid in full. That it occurred after the hearing hardly matters and it was the intervention of the Respondent that resulted in this information and the concession being made. The Court would be failing in its duty if it did not have regard to this evidence which the parties placed before the Court, which is not disputed and which disposes of a significant part of the dispute that existed between them.

[23] Accordingly, it must follow that on the version of the Respondent, the account of Dr Motsekuoa was indeed paid in full and that this would have occurred by 31 August 2018.

The affordability question

[24] The second condition for repayment raised by the Respondent is its ability to repay the loan and it says that even if payment from the client was received in full, the loan would only become repayable if the Respondent could afford to pay. In this regard it says the following at paragraph 101 of the answering affidavit: -

> *101.1. The usual terms of the loans as stated above were applicable. The cash flow of Tecmed did not allow for a repayment of the loans in addition thereto that the full purchase price in respect of the Lerato deal has to date not been paid yet. This was confirmed by Begere to Sykes on or about 3 April 2018.*
>
> *101.2. In addition, I remind the Court of Tecmed's counterclaim.*
>
> *101.3. Accordingly, the Lerato Loans are not repayable.*

[25] This statement 'that the cashflow of Tecmed did not allow for a repayment of the loans ...' is extremely vague. It is not clear which period this is a reference to. While that paragraph is a response to Para 64 of the founding affidavit which largely deals with the Section 345 letter and the response thereto which was in April 2018.

[26] The matter of the loan being repayable when the Respondent was able to afford it raises the question of whether the loan was repayable at the instance of the Respondent. Surely affordability must at least be capable of some objective verification and assessment.

[27] The answering affidavit makes reference to some discussion between the Applicant and Mr Sykes regarding affordability and the non-payment of the full account that occurred in April 2018, but there is nothing beyond that on the papers from the perspective of the Respondent that deals clearly and squarely with its inability to pay the loan based on its affordability. One would have expected a party who relies on the defence of affordability as part of its failure to repay a loan to put up some evidence for the Court to at least conclude that the Respondent says that it is unable to pay the loan. This is certainly not the case here. Even if ultimately the Court is required to determine the issue on the version of the Respondent, there is

nothing before the Court to at the very least understand and accept the cogency of the version put up.

[28] In this regard the Respondent, in response to the Section 345 letter of the Applicant, replied substantively through its attorneys on 24 April 2018. After dealing with all of the claims of the Applicant, as well as its own claims against the Applicant, the Respondent then states the following in the letter: -

> 8. *In case your client pursue its alleged claim in terms of the second loan agreement, the merits of which are still denied, our client is in the process of transferring the amount of R14,840 594,59 into our trust account, to be held in an interesting bearing account with a registered bank for the benefit of our client, as proof that such claim can be honoured should your client succeed with it. Should such claim not be instituted within 30 court days from date hereof, same will be refunded to our client.*

[29] Thus, on the version of the Respondent, no evidence whatsoever is offered of its inability to afford to repay the loan. On the contrary, its ability to pay a substantial amount into trust must at the very least question its claims impecuniosity.

[30] Therefore, if regard is had to the two conditions raised by the Respondent as triggering the repayment of the loan, I conclude that both have been met. Firstly, the account has been repaid in full and secondly, the Respondent has not advanced anything in support of its stance of its inability to afford the repayment the loan. Having raised it as a condition that would trigger repayment, the Respondent is obliged to advance facts in support of the condition having not been met but has failed to do so.

[31] I will deal later with the defence of set-off that the Respondent also relies on.

<u>The FNB transaction</u>

[32] On 6 January 2011 and 14 October 2011, two loan agreements were entered into between FNB as lender and Tecmed Properties as borrower, for the loan amounts of R24 400 000.00 and R20 342 000.00 respectively. The Applicant says that there was an error in how the loans were recorded as in truth, the loan recorded in the agreement of 6 January 2011 between FNB and Tecmed Properties was

intended and should have been recorded as a loan to the Respondent, Tecmed Africa.

[33] In this regard, it says that while the accounting records of both Tecmed Properties and the Respondent reflected the full amount of both loans from FNB, it also recorded the liability of the Respondent to Tecmed Properties in respect of the loan that the Applicant says was intended for and utilised by the Respondent to acquire the shares of Mr Milford (a former shareholder), as well as for operational expenses of the Respondent.

[34] The Respondent's version is that Tecmed Africa was the principal debtor in respect of both loans and that the Respondent acted as surety in favour of FNB for these loans. It also says in para 104 of its answering affidavit that -

> *'In essence FNB advanced both loans to Properties and Properties in turn advanced the one loan to Tecmed'*

[35] Leaving aside the matter of how the loans were recorded on the part of FNB and Tecmed Properties, what is not in dispute and clearly emerges from para 109 of the answering affidavit (read with para 73 of the founding affidavit) is that: -

> The loan from FNB (even though recorded as a loan to Tecmed Properties) was intended for the use of the Respondent and that it was secured in order to fund: -

a) The repurchase of Mr Milford's shares in Tecmed Africa; and
b) Cash flow for the company's general operations and working capital.

[36] In this regard, the Respondent also accepts that the idea was originally to have two loans, the one in the name of Tecmed Properties and the other in the name of the Respondent but that this was not possible, as FNB was not prepared to structure them that way as they required security in the form of immovable property owned by Tecmed Properties.

[37] It is also not in dispute that the Applicant paid the sum of R29 926 178.79 to FNB on 22 April 2016, that being the outstanding balance in respect of both loans. On this basis and even accepting that the principal debtor in respect of both FNB loans was Tecmed Properties, on the version of the Respondent, the payment by the Applicant to FNB would have extinguished the loan of the Respondent to Tecmed Properties.

[38] Thus, on the Respondent's version, the payment by the Applicant to FNB was a payment made in respect of a liability of the Respondent. It is not in dispute that of the amount paid to FNB, the sum of R14 840 594.59 represented what may either be termed the loan that related to Tecmed Africa, alternatively the loan of the Respondent to Tecmed Properties. Not much turns on the difference, if any, at the end of the day.

[39] The Respondent says however, that the Applicant cannot claim the payment from it as the Applicant warranted in the Sales of Shares agreement in respect of Tecmed Properties, that the amount owing on the mortgage bond of Tecmed Properties was in the region of R16 million and therefore, the payment of some R29 million to FNB was to ensure that the warranty was honoured. It says that the difference between R29 million and R16 million, which is some R13 900 000, had to be settled by the Applicant as it exceeded the warranted liability of R16 million.

[40] Even though the Applicant was obliged to bring the mortgage amount down to R16 million, it does not detract from the admitted facts that of the payment of R29 million, some R14.8 million reflected the indebtedness of the Respondent for funds that were admittedly used for its purposes (namely, to acquire the shares of Mr Milford and to fund the operations of the Respondent). The purpose of the payment (to bring the mortgage within the limits warranted) must be distinguished from the consequences of the payment – to extinguish the liability of the Respondent to Tecmed Properties and to create a liability in favour of the Applicant on the part of the Respondent.

[41] It can hardly be open to the Respondent to on the one hand, admit a liability which it does in favour of Tecmed Properties and then when that liability is extinguished by payment made by the Applicant, to seek to simply claim the full benefit of that payment made by a third party.

[42] I am therefore of the view that on the version of the Respondent, the FNB loan created a liability on its part to Tecmed Properties and that the payment of the sum of R29 million to FNB by the Applicant was a payment that both extinguished the liability of the Respondent to Tecmed and constituted a loan in favour of the Respondent for the same amount.

[43] What the Respondent however raises, as it were, separate to the loan and the recording thereof, is that the existence of the loan was not disclosed during the negotiations for the sale of shares in Tecmed and that the non–disclosure constituted a material breach of the warranties in the Tecmed Properties sale agreement. It says that to the extent that this loan was not disclosed, the Applicant was responsible for settling it and therefore cannot seek to claim its repayment from the Respondent.

[44] To this end, it therefore takes the position that ARM has a claim against the Applicant in respect of this breach, as well as a claim for repayments made in terms of this loan in the amount of some R5 498 689.00, which it says were made in the *bona fide* but mistaken belief that the same was due and payable. It says that ARM has ceded this claim to the Respondent.

The defence of set-off

[45] Beyond disputing whether the amounts advanced to it constituted loans and whether they had become repayable, the Respondent has also raised the defence of set-off in the event of the Court finding that the claims of the Applicant were valid and enforceable.

[46] The reliance on set-off is set out in the Respondent's response to the Section 345 letter and is premised on what the Respondent refers to as the fraudulent non-disclosure on the part of the Applicant of various liabilities in Tecmed Properties and Tecmed Africa at the time that the sale of shares agreement was concluded with AngloRand Medical (ARM) in respect of the Applicant's shareholding in Tecmed. It goes on to detail those liabilities as being: -

> *4.10.1. a claim by SARS for R1 235 282,94 against Tecmed Properties (Pty) Ltd;*
> *4.10.2. a claim of R945 981,81 in respect of legal fees and expenses incurred in the Stephen Cilliers matter by Tecmed Africa (Pty) Ltd; and*
> *4.10.3. an amount of R13 679 470,00 relating to unpaid profit share payments in Tecmed Africa.*

[47] In addition, the Respondent says that the amount in respect of legal fees in the Cilliers matter has since increased by a further R800 000.00.

[48] It says that ARM ceded, transferred and made over its right title and interest in those claims to the Respondent on 19 April 2018 and that it is entitled to apply set-off in respect of any obligation found to exist in favour of the Applicant. While the Applicant disputes both the entitlement of the Respondent to raise the principle of set-off, as well as the validity of the amounts raised as being non-disclosed liabilities, on the version of the Respondent it cannot be said that they are so unsustainable that they fall to be rejected or indeed that a genuine dispute of fact has not been raised.

[49] They, at the very least, create a dispute of fact and in the light of the dicta in ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)***, that final relief can only be granted on motion '*if those facts averred in the applicant's founding affidavits which have been admitted by the respondent together with the facts alleged by the respondent, justify such an order*', this Court should be wary of granting the final relief sought.

[50] Thus, the raising of the defence of set-off must at the very least stand as an obstacle to the granting of the relief sought. These proceedings cannot make a definitive finding on those claims that form the basis of the set-off defence given their disputed nature.

[51] In the circumstances and in summary, what the Respondent has raised as defences that must stand in the way of the granting of the relief sought are that: -

a) It is the cessionary in respect of claims against the Applicant based on fraudulent non-disclosure in the total amount of about of some R16 million.
b) It is the cessionary in respect of a claims against the Applicant based on a mistaken repayment of the Milford Loan and has raised a defence that it is not liable to repay this loan on the basis of the failure by the Applicant to disclose this loan to ARM during the negotiations and the conclusion of the sale of shares agreements.

[52] Under those circumstances and when I have regard to the version of the Respondent, the proper order would be to refer the matter to trial in the light of the disputes of fact that arise in respect of the defences raised.

[53] I make the following order: -

1. The application is referred to trial and will remain in the Commercial Court;
2. The notice of motion will stand as the simple summons;
3. The answering affidavit will stand as the notice of intention to defend;
4. The applicant will file its declaration within 20 days of the handing down of this order, thereafter the rules of the Commercial Court will apply to further pleadings and the conduct of this matter;
5. The costs of the application to date, and the costs of the trial, will be reserved for the trail court to determine, on the basis that the costs of two counsel are included.

[redacted]

N KOLLAPEN

JUDGE OF THE HIGH COURT,

PRETORIA

Appearances:

For the Applicant:	Adv S Symon SC
	Adv A Armstrong
Instructed by:	Werksmans Attorneys
For the Defendant:	Adv CH Badenhorst SC
	Adv JW Steyn
Instructed by:	Rossouws, Lesie Inc.