

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA



CASENO: 77515/19

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO ☒
(2)	OF INTEREST TO OTHER JUDGES: YES/NO ☒
(3)	REVISED
DATE:	18 June 2021
SIGNATURE:	

In the matter between:

THOMAS LAWRENSON

FIRST PLAINTIFF

DRILLMECH (PTY) LTD

SECOND PLAINTIFF

and

FREDERICK JACOBUS FOUCHE

DEFENDANT

These reasons for judgment are issued by the Judge whose name is reflected herein and are submitted electronically to the Parties/their legal representatives by email. The reasons for judgment are further uploaded to the electronic file of this matter on CaseLines by the Judge or his/her Secretary on 18 June 2021.

REASONS FOR THE JUDGMENT

LUKHAIMANE AJ:

[1] This matter came before the court as an Unopposed application (summary judgement) on 10 December 2020. The Defendant however appeared on the day. The parties argued the indebtedness of the Defendant to the Second Plaintiff and the court granted the following order:

- 1.1 Declaring that the Defendant is liable to the Second Plaintiff in terms of Section 424 (1) of the Companies Act, Act 61 of 1973 for the debts incurred by the Defendant to the Plaintiff for an amount of R1 838 429.00 (one million eight hundred and thirty-eight thousand four hundred and twenty-nine rand); and/or
- 1.2 Declaring that the Defendant is liable to the Second Plaintiff in terms of a Dissolution Agreement dated 22 February 2017, for the debts incurred by the Defendant to the Plaintiff for an amount of R1 838 429.00 (one million eight hundred and thirty-eight thousand four hundred and twenty-nine rand); and/or
- 1.3 Interest on the amount of R1 838 429.00 at a rate of prime plus 1 from 22 February 2017 to date of payment, alternatively *mora interest* at a rate of 10.5% *a tempore morae* until date of final payment;

1.4 Delivery by the Defendant of the share certificates in respect of shares transferred, duly completed and signed together with share transfer forms duly completed and signed by the Defendant in a form to enable the Second Plaintiff to attend to the transfer of the shares to the Second Plaintiff in accordance with the provisions of the dissolution agreement.

1.5 Costs of suit calculated on the scale as between attorney and client;

[2] On 17 May 2021, I received a request to furnish the parties with reasons for the judgement. It would seem that such a request had been forwarded earlier but not brought to my attention, hence the inordinate delay. I undertook to provide the reasons by the end of the current term. Herewith the reasons for the judgement.

[3] On or about 22 February 2017, at Krugersdorp, the Second Plaintiff, duly represented and the Defendant acting personally, entered into a written contract, hereinafter referred to as the 'dissolution agreement', the Defendant as the debtor, acknowledges that the Second Plaintiff as creditor has a claim against him in the amount of R1 838 429.00. The dissolution agreement further states that on the effective date of the agreement, the Defendant shall deliver to the Second Plaintiff the share certificates in respect of the shares hereby transferred duly completed and signed together with the share transfer

forms duly completed and signed by the date in a form to enable the Second Plaintiff to attend to the transfer of the shares to the Plaintiff in accordance with the provisions of the dissolution agreement.

- [4] Before delving into the merits of the matter, the Defendant raises a *point in limine* regarding the Plaintiffs reliance on Rule 32(2)(b). The Defendant avers that owing to the Plaintiff's non-compliance with Rule 32, they are not entitled to summary judgement
- [5] The Defendant pleads that the issues raised are better served by a trial. The Defendant refers to the fact that the failure to comply with the dissolution agreement should have been dealt with through arbitration and that the dissolution agreement itself falls foul of the Constitution of the Republic of South Africa as it is *contra bonos mores*.
- [6] In his plea, the Defendant admits that he facilitated the overdraft facility with the Second Plaintiff's bankers for the Second Plaintiff. The Defendant also advances the fact that the dissolution agreement should have been subjected to arbitration, however does not disclose the specific aspects of the law and the aspects of the dissolution agreement that must be subjected to such arbitration. Both in the papers and during argument, the Defendant submitted that he signed the dissolution agreement under circumstances of undue influence and duress. In the plea, the opposing affidavit and after several prompts during the hearing, the Defendant failed to set out any such grounds

of imminent danger nor actions by the Plaintiffs that could be denoted as *contra bonos mores*. Therefore, the Defendant failed to set out a defence that is good in law. The Defendant could not even support his allegation that the dissolution agreement was concluded under duress or as a result of undue influence – not one ground nor allegation.

[7] Similarly, the Defendant sets out that the dissolution agreement fails to line up to the Constitution, but does not indicate which aspects of the Constitution it falls foul of. The Defendant had three opportunities to take the court into his confidence by disclosing his defences; in his plea or his opposing affidavit or during the hearing. Instead, the Defendant has pleaded a bare denial and failed to set out any aspect that required arbitration or indicate non-compliance to the Constitution.

[8] In *Maharaj v Barclays National Bank Ltd* 1976(1) SA 416 (A) at 423 A – H, the court states as follows:

“Concerntrating more particularly on requirement (a) above, I would point out that it contemplates the affidavit being made by the plaintiff himself or some other person ‘who can swear positively to the facts. In the latter event, such other person’s ability to swear positively to the facts is essential to the effectiveness of the affidavit as a basis of summary judgement; and the Court entertaining the application therefor must be satisfied, *prima facie*, that the deponent is such a person. Generally speaking, before a person can swear

positively to facts in legal proceedings they must be within his personal knowledge. For this reason, the practice has been adopted, both in regard to the present Rule 32 and in regard to some of its provincial predecessors (and the similar rule in the magistrates' courts), of requiring that a deponent to an affidavit in support of summary judgement, other than the plaintiff himself, should state, at least, that the facts are within his personal knowledge (or make some averment to that effect), unless such direct knowledge appears from other facts stated (see e.g. *Joel's Bargain Store v Shorkend Bros. (Pty) Ltd*, 1959 (4) SA 263 (C); *Misid Investments (Pty) Ltd v Leslie*, 1960 (4) SA 473 (W); *Sand and Co. Ltd v Kollias*, supra at pp. 165 – 7; *Fischereigesellschaft v African Frozen Products*, supra at pp. 109 – 110; *Flamingo Knitting Mills (Pty) Ltd v Clemans*, supra at pp. 515 – 6). The mere assertion by a deponent that he 'can swear positively to the facts' (an assertion which merely reproduces the wording of the Rule) is not regarded as being sufficient, unless there are good grounds for believing that the deponent fully appreciated the meaning of these words (see *African Frozen Products case*, supra at p110; *Love's case*, supra at p515). In my view, this is salutary practice. While undue formalism in procedural matters is always to be eschewed, it is important in summary judgement applications under Rule 32 that, in substance, the plaintiff should do what is required of him by the Rule. The extraordinary and drastic nature of the remedy of summary judgement in its present form has often been judicially emphasised (see e.g., *Mowschenson and Mowschenson v*

Mercantile Acceptance Corporation of SA Ltd, 1959 (3) SA 362 (W) at p 366; *Arend and Another v Astra Furnishers (Pty) Ltd*, 1974 (1) SA 298 (C) at pp. 304 – 5; *Shepstone v Shepstone*, 1974 (2) SA 462 (N) at p467). The grant of the remedy is based upon the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus or bad in law. One of the aids to ensuring that this is the position is the affidavit filed in support of the application; and to achieve this end it is important that the affidavit should be deposed to either by the plaintiff himself or by someone who has personal knowledge of the facts.

Where the affidavit fails to measure up to these requirements, the defect may, nevertheless, be cured by reference to other documents relating to the proceedings which are properly before Court (see *Sand and Co Ltd v Kollias*, supra at p165). The principle is that, in deciding whether or not to grant summary judgement, the Court looks at the matter 'at the end of the day' on all the documents that are properly before it (*ibid.* at p165).

- [9] The Defendant is expected to engage with the Plaintiffs averments in his pleaded defence, i.e disclose fully the nature and grounds of the defence and the material facts relied upon therefor. The Plaintiffs in this matter have indicated that the point of law that they rely on is the law of contract in that they are suing for the cancellation of the dissolution agreement and immediate payment of the amount therein owing to the Defendants failure to

comply with the provisions of the said dissolution agreement. Further, the Plaintiffs clearly indicated in the form of the dissolution agreement, the facts relied upon and the supporting documentation thereto. The Defendant on the other hand has failed to adduce any facts that would require a trial. The Defendant's allegations regarding breach of the Constitution and there having been duress in getting him to sign the dissolution agreements are not supported by any facts at all – they are just mere allegations. This claim was in the alternative. The court did not deal with section 424 (1) of the Companies Act 61 of 1973 as this was not the argument being advanced by the Plaintiffs.

- [10] The Defendant further submitted that the National Credit Act 34 of 2005, finds application to the dissolution agreement as the repayments were deferred thereby rendering the dissolution agreement to be a credit agreement in terms of the National Credit Act. It is not necessary to go into detail as to why the National Credit Act does not find application in this matter, save to say that the parties to the dissolution agreement are excluded in terms of section 4 of the National Credit Act as the dissolution agreement is not being concluded between parties that are acting with each other at arm's length and also does not meet the requirements of the definition of credit agreement in terms of this Act.

[11] As far as the merits are concerned, the parties entered into a dissolution agreement on or about 22 February 2017, in terms of which the Defendant is indebted to the Plaintiffs in the amount of R1 838 429.00. The Defendant had also agreed to deliver share certificates to the Plaintiffs.

[12] As at the date of commencing action and during the hearing, the Defendant had failed to deliver the share certificates; the Defendant had also failed to repay the said sum of R1 838 429.00 together with the attendant interest. Except to advance a bare denial, the Defendant failed to advance any cogent reasons as to why Rule 32(2)(b) had not been complied with.

[13] Therefore, this Court ruled in favour of the Plaintiffs.

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M A LUKHAIMANE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

APPEARANCES

Counsel for the Plaintiffs:

Advocate A Botha

Instructed by:

Van Heerden & Krugel Attorneys

Counsel for the Defendant:

Advocate E Mann

Instructed by:

Cilliers & Reynders Inc Attorneys