IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, MTHATHA

CASE NUMBER: 5024/2020

In the matter between:

BUSINESS PARTNERS LIMITED **Applicant**
(REGISTRATION NUMBER: 1981/000918/06)

And

BIJAL LEGACY (PTY) LTD **First Respondent**
(REGISTRATION NUMBER 2017/447387/07)
ISHMAEL OSSMANE BICA BIJAL **Second Respondent**

JUDGEMENT

MATEBESE AJ

Introduction:

[1] The applicant, described in the papers as a Company with limited liability registered in terms of the laws of the Republic of South Africa and carrying on business at 23 Jan Hofmeyr Road, Westville, Durban, instituted proceedings against the respondent in which it seeks the following relief:

1.1 As against the respondents, jointly and severally, the one paying the other to be absolved payment of a sums of R9,547, 860.00, R 291, 426.94 and R 5, 364, 864.51 plus interest on all such amounts at the rate of prime as charged by the Standard Bank of South Africa Limited plus 1% per annum from 25 December 2019 to date of payment, both days included, compounded monthly;

1.2 Costs on an attorney and client scale.

1.3 As against the second respondent an order declaring the immovable property of the second respondent described as Erf 2716 Mthatha, Mthatha Township Extension No.12, King Sabata Dalindyebo Municipality, District of Mthatha in extent 7954 square metres and held by Deed of Transfer number T308/1997 specially executable.

[2] The application was opposed by both respondents. In opposition of the application the respondents relied on the following defences:

2.1 The loan agreements sought to be enforced by the applicants are a paragon of deceipt and/or fraud and as such the court should not assist the applicant in enforcing same.

2.2 That it was a tacit term of the agreement that the monthly instalments due would be repaid from the monthly net turnover or monthly rent of the development once completed and in business. In essence pleading that since the building is not complete the instalments are, in terms of the tacit term, not yet due and payable.

2.3 That the applicant, through its representative, represented to the respondents that the debt shall be payable from the rental income to be generated from the building in line with the alleged tacit term of the agreement and the applicant therefore, so the argument went, is estopped from acting contrary to such representation.

[3] During argument counsel for the respondent abandoned or at least indicated that he no longer pursues the first ground of opposition. In any event, the respondent had not pointed out in the papers, and counsel was accordingly also unable to point the court to, any evidence of fraud or deceipt as sought to be contended. The point was as a result unsustainable in any event.

[4] Before I deal with the respondent's contentions, above, it is important that I give the brief common cause background facts which I set hereunder.

Factual background

[5] On 31 October 2017 the applicant and the first respondent concluded a written loan agreement ("the first loan agreement") in terms of which the applicant loaned to the respondent a sum of R9.3 million.

[6] On 31 October 2017 the applicant and the first respondent concluded a written Royalty agreement ("the royalty agreement") in terms of which the respondent agreed to pay to the applicant royalty in the amount of 9.82% on the higher of the actual monthly turn over or of the projected monthly turnover of respondent's business with effect from 1 June 2018.

[7] Clause 34 of the Standard Conditions of the loan agreement provides:

"34. WHOLE AGREEMENT

34.1 This agreement constitutes the whole agreement between the parties. No agreements, representations or warranties between the parties which are not set out in this Agreement are binding on the parties.

34.2 No representations variations, modification, consensual cancellation., waiver of or consent to depart from any of the provisions of the Agreement shall be of any force or effect unless confirmed in writing and signed by the parties. A written representation, variation, modification, cancellation, waiver or consent by the parties shall be effective only in the specific instance and for the purpose and to the extent for which it was made or given."

[8] On 8 February 2018 the applicant and the first respondent signed an addendum to the first loan agreement in terms of which they agreed as follows:

8.1 that the requirement in the loan agreement for a decree of divorce as per clause 8.4.3 be waived.

8.2 That the requirement for approved building plans in clause 8.4.5 of the loan agreement for the property situate at 16 Errol Spring Avenue, Vulindlela Heights, Mthatha, Eastern Cape be waived.

8.3 That the requirement of a short term insurance as per clause 8.3.2 be relaxed for advance of R1000 000.

8.4 That the addendum agreement shall not be regarded as a novation of the loan agreement and that all terms and conditions contained in the loan agreement shall remain of full force and continue to be binding on the parties unless specifically amended.

[9] On 25 May 2018 the applicant and the first respondent signed another addendum to the first loan and the royalty agreement ("the second addendum to the loan and the first addendum to the royalty agreements") in terms of which they agreed to amend the date of the first instalments on both agreement to 1 March 2019.

[10] On 27 March 2019 the applicant and the first respondent again concluded another written addendum ("the third addendum to loan and second addendum to royalty agreements") to both the loan and the royalty agreement in terms of which they amended the date of first instalment in both the loan and royalty agreements, as amended by the second addendum to loan and first addendum to royalty agreements, to 1 June 2019.

[11] On 18 February 2019 the applicant and the first respondent concluded a second written loan agreement ("the second loan agreement") in terms of which an amount of R 270 000.00 was loaned to the first respondent by the applicant. The amount was, in terms of the agreement payable in monthly instalments of R 6 856.23 with effect from 1 March 2019.

[12] On 31 October 2017 the second respondent and the applicant concluded a suretyship agreement for the capital sum of R11.8 million plus and additional sum of R2, 360, 000.00 in terms of which the second respondent stood surety for the above amounts owed by the first respondent to the applicant. A surety bond B9/2018 was registered by the second respondent for the above amounts over Erf 2716 Umtata, Umtata Township Extension Number 12, King Sabata Dalindyebo Municipality, Province of Eastern Cape, In extent 7945 square metres ("the Property").

[13] The respondents failed to make payments as and when they fell due in terms of the agreements. This resulted in the institution of these proceedings in which the applicant seeks the relief in paragraph 1 above.

[14] It is important to state that none of the terms of the written agreements, including the addenda thereto, were placed in dispute by the respondents. Neither did the respondent contend for a different interpretation of any of the terms of the written agreements.

[15] Instead, the respondents argued that there exists a tacit term to the effect that the monthly instalments due would be repaid from the monthly net turnover or monthly rent of the development once completed and in business.

[16] I deal with the respondents' points in turn hereunder starting with the alleged existence of a tacit term.

The tacit term

[17] The respondents relying on an email dated 19 June 2017 from one Patrick Swartz of the applicant contended that there exists a tacit term of the agreements in terms of which the monthly instalments due would be repaid from the monthly net turnover or monthly rent of the development once completed and in business.

[18] The email reads:

"Hi Lilo

Herewith QS costing.

Based on 2 students per room, the gross income is R272 000pm (less 20% expenses) therefore the net income is R217 600.

A loan of R21m over 10 years will cost R260 515.

We therefore need to reduce the cost of the project.

Please advise

Kind regard"

[19] On a reading of the email nothing supports the respondent's contention therein. In my view the email only contains advice to the respondents to reduce the cost of the project based on "QS costing".

[20] I therefore find the respondent's contention to be without merit.

[21} Furthermore, a tacit term is an unexpressed provision of a contract inferred by a court from the express terms of the contract and the surrounding circumstances.[1]

[22] The present state of our law is that the usual test for the existence of a tacit term is that of an interfering bystander who asks what is to happen in the particular situation and receives the answer: 'Of course X will be the position. It is too obvious to us to say so.'[2]

[23] In the present case, were the parties to be confronted with the above question in relation to the due date of the first instalment, they would obviously refer the 'bystander' to the provisions of the contract and the addenda.

[1] Alfred Mc Alpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A); South African Maritime Safety Authority v McKenzie 2010 (3) SA 601 (SCA) para.11
[2] McKenzie supra para.12

[24] It follows therefore that there is no room for the tacit term contended for by the respondents. The parties have expressed themselves in writing on the issue and no tacit or implied terms can be invoked to contradict what they have expressly agreed upon.

[25] Accordingly the respondents' contention in this regard falls to be rejected.

Estoppel

[26] The respondents contend that the applicant represented to them that the monthly repayment of the capital amount and any other amount that may be owing and payable pursuant to the various agreements shall be made from the monthly net rent or net turnover of the development once the development is complete and occupied by rent payers and that any date set for the commencement of repayment of instalments shall be subject to the completion of the development and resultant occupation by rent payers.

[27] The respondents argue that applicant is estopped from denying the truthfulness of its representations prior to the conclusion of the agreements and post the conclusion of the agreement.

[28] When asked to point to the representations, respondents' counsel could only direct the court to the email dated 19 June 2017, quoted above, and to no other representations, written or otherwise.

[29] I have stated herein above that what is alleged by the respondents is not borne out by the email. On any interpretation, the email does not support the respondents' contention.

[30] In essence what the respondents seek to do is to rely on alleged representations which are inconsistent with the express terms of the agreement, and which are not written and signed by both parties.

[31] This is contrary to clause 34 of the agreement quoted above, which requires that for such representations to be binding they must be in writing and signed by both parties.

[32] When parties impose restrictions on their own power to vary a contract, as they did through clause 34, they do so to achieve certainty and avoid later disputes. The obligation to reduce any representations to writing and have them signed was aimed at preventing disputes regarding such representations and the terms thereof. Our courts have confirmed the efficacy of clauses like clause 34 of the agreement in casu.[3]

[33] For the reason that the respondents have failed to prove any representations as envisaged in clause 34 of the agreement, i.e. representations that are in writing and signed by both parties, the respondents' contention that the applicant made representations as alleged falls to be rejected.

[34] It follows that the respondents' estoppel point must accordingly fail.

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[3] Spring Forest Trading CC v Wilberry (Pty) Ltd t/a Ecowash and Another 2015 (2) SA 118 (SCA) para.13 and the authority referred to therein.

[35] It is not in dispute that the first respondent failed to pay the instalments due in terms of the agreement when they fell due. In fact, the first respondent conceded that it never made any payments to the applicant in terms of the loan agreements.

[36] Clause 27 of the loan agreements provides that in the event of failure to pay any instalment due to balance on the loan agreements or any other instrument of debt concluded by the parties becomes due and payable.

[37] It follows therefore that as soon as the first respondent defaulted on its instalments the whole debt under the loan and the royalty agreements became due and payable as provided for in the agreements.

[38] In terms of the suretyship agreement the second respondent is jointly and severally liable with the first respondent for the amounts due in terms of the loan and the royalty agreements.

[39] The applicant has, in terms of clause 25 of the agreements, submitted a certificate of balance by its manager as prima facie proof of the amount due and payable under the agreements. The respondents sought to challenge the certificate of balance on the basis that it is not evidence of neither money lent and borrowed nor money due to the applicant by the respondents.

[40] This argument was not pursued by the respondents. In any event, same had no merit especially regard being had to the fact that the respondents did not dispute that the agreements were concluded, that monies were advanced by the applicant to the first respondent and that the first respondent failed to pay the monthly instalments when they fell due. There was also no challenge to the amounts reflected in the statement or certificate.

[41] In the circumstances I find that the applicant has made out a case for the relief sought in the Notice of Motion.

[42] It was common cause or at least undisputed that the property, which is the subject matter of these proceedings is a commercial property and that the provisions of rule 46A do not find application.

Costs

[43] Both parties argued, in the event they are successful, that costs be awarded on an attorney and client scale as provided for in the agreement. I find no reason to conclude differently.

[44] In the result I make the following order:

1. The respondents are ordered and directed to pay the applicant the total sum of R15, 204 151.45 (Fifteen Million Two Hundred and Four Thousand One Hundred and

Fifty One Rand Forty-Five Cents) jointly and severally the one paying the other to be absolved.

2. The respondents shall pay interest on the said amount at the rate of prime as charged by the Standard Bank of South Africa plus 1% from 25 December 2019 to date of payment, both days included, such interest to be compounded monthly.

3. The immovable property described as Erf 2716 Mthatha, Mthatha Township extension Number 12, King Sabata Dalindyebo Municipality, District of Mthatha, in extent 7954 square metres and held by Deed of Transfer Number T308/1997 is declared specially executable.

4. The respondents shall pay the costs of this application on an attorney and client scale.

Z.Z. MATEBESE
ACTING JUDGE OF THE HIGH COURT

APPARANCES:

For the applicant: Adv De la Harpe SC
For the respondents: Adv Koroma

Date Heard: 22 July 2021
Delivered: 03 August 2021