



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

**CASE NO: 24686/2017**

**Date of Hearing: 04 September 2018**

**Date of Judgment: 11 October 2018**

|                   |                                     |
|-------------------|-------------------------------------|
| (1)               | REPORTABLE: YES/NO                  |
| (2)               | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3)               | REVISED.                            |
| <u>11-10-2018</u> |                                     |

**In the matter between:**

**SVEN SAHLE**

**Applicant**

**And**

**CHUMA RESOURCES (PTY) LTD**

**First Respondent**

**SEAN SHIPALANA**

**Second Respondent**

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**JUDGMENT**

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**MASHILE J:**

## **INTRODUCTION**

[1] Central to this matter is an amount of EUR 82 937 that is allegedly due to the Applicant by the Respondents jointly and severally the one paying the other to be absolved. The amount arises in terms of an acknowledgment of debt ('AOD') concluded between the Applicant and the First Respondent. The Second Respondent stood surety and also signed as a co-principal debtor for all amounts due to the Applicants by the First Respondent.

## **FACTUAL BACKGROUND**

[2] It is common cause that the material terms of the AOD were that:

2.1 The Respondents acknowledged that they were truly and lawfully indebted to the Applicant in the sum of EUR 82 937 ('the Debt');

2.2 Interest would accrue on the Debt at the rate of 10% (Ten Percent) of the outstanding Debt for every month that the Debt, or any portion thereof, remained outstanding ('Interest');

2.3 The Interest on the outstanding balance of the Debt would continue each month as long as the Debt or any portion thereof remained outstanding;

2.4 The Respondents further acknowledged that they were truly and lawfully indebted to the Applicant in the sum of R10 000 for legal fees and disbursements incurred by the creditor in order to claim and recover the Debt ('Costs');

2.5 The Debt, Interest and Costs are owing to the Applicant as a result of a loan agreement ('the agreement') entered into between the Applicant and the First Respondent on or about 6 April 2016 of which the Respondents failed to make repayments as agreed;

2.6 The Respondents irrevocably undertook to make payment of the Debt, Interest and Costs as from signature date of the Agreement.

[3] The First Respondent failed to adhere to the terms of the agreement as a result of which the Applicant addressed a letter of demand to the First Respondent dated 14 February 2017 requiring it to observe the agreement. In response to the letter of demand, the First Respondent hatched a payment plan, which the Applicant accepted. In the payment plan, the First Respondent undertook to liquidate its entire indebtedness to the Applicant as follows:

3.1 EUR 10 000 on or before 9 March 2017;

3.2 EUR 5 000 on or before 20 March 2017;

3.3 EUR 5 000 on or before 3 April 2017;

3.4 EUR 5 000 on or before 17 April 2017;

3.5 EUR 10 000 on or before 1 May 2017;

3.6 EUR 5 000 on or before 15 May 2017;

- 3.7 EUR 10 000 on or before 29 May 2017;
- 3.8 EUR 10 000 on or before 12 June 2017;
- 3.9 EUR 10 000 on or before 26 June 2017; and
- 3.10 EUR 12 973 plus the Costs on or before 10 July 2017.

[4] The payment plan was incorporated and became an integral part of the AOD. The AOD has an accelerated clause in terms of which if the First Respondent failed to make payments of the amount and on the days as per the stipulated repayment plan, the Applicant would be entitled to claim immediate payment of the whole amounts due and payable notwithstanding that at the time of claiming payment some of them would not have fallen due as yet.

[5] The Applicant made an undertaking that if the First Respondent made all of the payments exactly as per the payment plan in the correct amount and on or before due date, he would waive the last three payments mentioned at paragraphs 3.7, 3.9 and 3.10 above and the Respondents would not be liable for the Costs of recovery of the Debt.

[6] The First Respondent confirmed and acknowledged that its chosen representative had read, considered and understood the AOD and that by appending his signature thereon, the Respondents unequivocally agreed, accepted and acknowledged its liability to the Applicant arising in terms of the Debt, Interest and Costs. At the time of the signing of the AOD, the First Respondent had already defaulted on payment and the amount that it owed to the Applicant was already EUR 82 937.

**[7] To resist the Applicant's claim, the Respondents have raised the following:**

**7.1 The Applicant lacks *locus standi* as the company on whose behalf he acted when he concluded both the agreement and the AOD ought to have been cited in these proceedings as the applicant;**

**7.2 The AOD does not reflect the factual circumstances and the amount reflected therein is different to the amount actually advanced in terms of the agreement;**

**7.3 The money advanced under the loan agreement was advanced in terms of an oral agreement for services rendered and accordingly the debt is extinguished;**

**7.4 The AOD was concluded for purposes of providing security for further services rendered in terms of a further oral agreement;**

**7.5 There exists material disputes of fact pertaining to the following:**

**7.5.1 who loaned and advanced the money to the First Respondent?**

**7.5.2 who concluded the agreement with the First Respondent?**

**7.5.3 what amount was loaned to the First Respondent?**

**7.5.4 does the AOD arise from the agreement for EUR 38 000? and**

**7.5.5 does the AOD correctly reflects the factual position and circumstances?**

## ISSUES

[8] Primarily, the issue concerned here is to decide whether or not the Respondents are liable in the amount claimed. Secondly, and as a side issue, is the question whether or not the Respondents liability arises in terms of the agreement or the AOD. Thirdly, it is whether or not the illegality of the agreement should play any role in determining whether or not the AOD ought to be observed.

## LEGAL BACKGROUND

[9] The approach on how a court ought to resolve disputes of fact was set out in *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) and has since been followed. In this regard it could be instructive to refer to *Heher JA in Wightman v Headfour (Pty) Ltd* (66/2007) [2008] ZASCA 6 (10 March 2008) at paragraphs 12 and 13:

"[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C. See also the analysis by Davis J in *Ripoll-Dausa v Middleton* NO 2005 (3) SA 141 (C) at 151A-153C with which I respectfully agree. (I do not overlook that a reference to evidence in circumstances discussed in the authorities may be appropriate.)

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. ... If that does not happen it should come as no surprise that the court takes a robust view of the matter."

[10] The non-variation clause in the AOD provides that the AOD constitutes the entire agreement between the parties and that its terms cannot be varied, consensually cancelled, waived, suspended or substituted unless such variation, consensual cancellation, waiver, suspension or substitution is reduced to writing and signed by the parties. The significance of the clause is of course that no extrinsic material or evidence can be countenanced to prove a term of the agreement to eliminate possible disputes of fact. See *Yarram Trading CC t/a Tijuana Spur v ABSA Bank (Pty) Ltd* 2007 (2) SA 570 (SCA).

[11] The NCA applies to all credit agreements, except the following types of credit agreements:-

11.1 A credit agreement in terms of which the consumer is a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons equals or exceeds the threshold determined in Section 7(1);

11.2 A large agreement, in terms of which the consumer is a juristic person whose asset value or annual turnover is below the threshold determined in Section 7(1).

[12] A credit agreement is a large agreement if '... the principal debt under that transaction or guarantee falls at or above the higher of the thresholds established in terms of section 7(1)(b).' The higher of the thresholds established in terms of section 7(1)(b) is R250 000.

[13] The Respondents have also contended that the AOD does not reflect the true intention of the parties and the correct state of affairs. The general rule is that the party alleging that a contract does not capture the common intention of the parties must allege and prove that the contract or document does not record the common intention of the parties, that there was a mistake in the drafting of the contract and what wording should have been in the contract.

[14] To the extent that the First Respondent's response to the letter of demand dated 14 February 2017 was a payment plan describing how it intended to liquidate its indebtedness to the Applicant, it constitutes a compromise. A compromise or settlement is a contract which has as its object the prevention, avoidance or

termination of litigation. It has the effect of *res iudicata* whether or not it is embodied in an order of court and is an absolute defence to any action based on the original claim.

[15] The following was stated in *Gollach & Gomperts (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd* 1978 (1) SA 914 (A):

'Voluntary acceptance by parties to a compromise of an element of risk that their bargain might not be as advantageous to them as litigation might have been is inherent in the very concept of compromise. This is a circumstance which the Court must bear in mind, when it considers a complaint by a dissatisfied party that, had he not laboured under an erroneous belief or been ignorant of certain facts, he would not have entered into the settlement agreement.'

[16] The AOD provides for the production of a certificate signed by the Applicant bearing the amount owed as prima facie proof that the amount is what the debtor owes notwithstanding that the amount so stated thereon could be illiquid. It was held in *Senekal v Trust Bank of Africa Ltd* 1978 (3) SA 375 (A) that:

'At the end of the case, when all the evidence (which includes the certificate) is in, the Court must decide whether the party upon whom the onus rests has discharged it on a proper balance of probabilities... If the prima facie evidence or proof remains unrebutted at the close of the case, it becomes 'sufficient proof' of the fact or facts (on the issues with which it is concerned) necessarily to be established by the party bearing the onus of proof.'

[17] This matter can and must be decided on the following common cause facts:

17.1 The parties entered into the agreement in terms of which the Applicant would advance a loan of EUR 38 000 to the First Respondent;

17.2 Subsequent to the conclusion of the agreement and upon the First Respondent's failure to perform in terms of the agreement, the parties entered into the AOD;

17.3 In terms of the AOD the Second Respondent bound himself as surety and co-principle debtor;

17.4 The First Respondent provided the Applicant with a payment plan in terms of which they undertook to repay the outstanding balance of EUR 82 937;

17.5 The Applicant provided the First Respondent with a proper certificate of balance.

#### THE APPLICANT'S LACK OF *LOCUS STANDI*

[18] The argument that the Applicant lacks *locus standi* because he concluded the agreements with the First Respondent as a representative of a legal entity with separate personality is, without more, naked and stands to be rejected. A party cannot make wild allegations and hope that they will, on their own, be adequate proof of what they purport. Thus lack of details such as the name of the company

with which the First Respondent contracted, among others, suggests that no such company ever existed.

#### EXISTENCE OF DISPUTES OF FACT

[19] It is notable that the First Respondent has made no effort, either by furnishing more details or supplying documentary proof to support its claim that it entered into an oral agreement that the money advanced under the agreement was for services rendered. The allegation that the AOD was also concluded in respect of an oral agreement to supply security services to the Applicant must suffer the same fate.

[20] Like in the case of paragraph 18 *supra*, the rule that a party who alleges must prove remains relevant and finds application here. The conclusion of oral agreements in the terms described by the Respondents has been denied. In the light of the allegation of the oral agreements being sketchy and unreliable, the court rejects it as unworthy of merit.

[21] In any event, the allegation of the conclusion of oral agreements is offensive to the 'non-variation clause' contained in the AOD, which the First Respondent has signed. That clause specifically provides that the AOD will not be altered unless such change is recorded in writing and signed by both parties. The significance and applicability of the Shifren principle was underscored in the *Yarram Trading CC* case *supra*. Once I have rejected the oral agreements, it follows that there cannot be a claim that disputes of fact exist.

## **RECTIFICATION**

**[22] The Respondents assert that the AOD is incorrect in that it does not describe the correct state of affairs. In essence, therefore, the contention must be that it requires rectification. For an application for rectification to succeed the following must be alleged and proved:**

**22.1 An agreement has been concluded between the parties and reduced to writing;**

**22.2 The written document does not reflect the true intention of the parties. This requires that the common continuing intention of the parties, as it existed at the time when the agreement was reduced to writing, be established;**

**22.3 A mistake in drafting the document, which mistake could have been the result of an intentional act of the other party or a *bona fide* common error; and**

**22.4 The actual wording of the true agreement.**

**See *Propfokus 49 (Pty) Ltd v Wenhandel 4 (Pty) Ltd* 2007 3 All SA 18 (SCA).**

**[23] The allegation pertaining to the incorrectness of the AOD without demonstration of the above requirements that must be alleged and established is too bare. In the absence of application for rectification, the AOD must stand as a true reflection of what the parties had intended to achieve.**

## COMPROMISE

[24] The payment plan which the First Respondent presented to the Applicant and subsequently incorporated into the AOD is a compromise. It was proposed and presented with the objective of settling the dispute that had arisen between the parties. Accordingly and in line with what was held in the *Gollach & Gomperts* case *supra*, the Respondents' are accordingly barred from relying on the original cause of action, being the loan agreement or any alleged oral agreement for services rendered.

## CERTIFICATE OF BALANCE

[25] The AOD provides that a certificate of balance signed by the creditor constitutes *prima facie* proof of the amount of indebtedness of the debtor to the creditor. It was held in the *Senekal* case *supra* that *prima facie* evidence of a certificate of balance would, unless challenged, be sufficient proof of what it purports to be. The First Respondent's silence on the face of that *prima facie* proof of indebtedness to the Applicant means that the latter has demonstrated that he is entitled to payment in the amount claimed.

[26] The Second Respondent's assertion that the certificate of balance is only valid as against the First Respondent is untenable especially in view of the suretyship that he has signed in favour of the Applicant. If the certificate issued against the First Respondent is sufficient proof of the amount due to the Applicant by the First Respondent then it is preposterous for the Second Respondent to expect it not to apply to him. The certificate is sufficient for the purpose for which it was designed to accomplish.

## CONCLUSION

[27] The Respondents are jointly and severally liable to the Applicant, the one paying the other to be absolved, in the amount of EUR 82 937. The indebtedness of the First Respondent arises in terms of the AOD while that of the Second Respondent is in terms of the suretyship agreement that he signed. In view of what a compromise is, the validity or invalidity of the agreement in terms of which the amount of EUR 38 000 was advanced is immaterial to the outcome hereof.

## ORDER

[28] The application succeeds and I make the following order:

28.1 The Respondents are ordered to pay to the Applicant the sum of EUR 82 937 (Eighty two thousand nine hundred and thirty seven Euros), jointly and severally, the one paying the other to be absolved;

28.2 The Respondents are further liable for payment of interest on the abovementioned amount at the prescribed legal rate *a tempore morae* until date of final payment;

28.3 The Respondents are ordered to pay the costs of the application.



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**B A MASHILE**  
Judge of the High Court of South Africa  
Gauteng Local Division, Johannesburg

**APPEARANCES:**

For the Applicant: Adv. Laughland  
Instructed by: Schindlers Attorneys

For the Respondent: L Pillay  
Instructed by: Amiraj Bauchoo Attorneys